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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 755

FINAL OFFER RATE REVIEW

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

EXPANDING ACCESS TO RATE RELIEF

Decided: November 12, 2021

AGENCY: Surface Transportation Board.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: In response to comments received on the notice of proposed rulemaking (NPRM) in these dockets and to ensure parallel consideration of the proposal in Docket No. EP 755 with the proposal in Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes (Arb. NPRM), Docket No. EP 765, the Surface Transportation Board (STB or Board) invites parties, through this supplemental notice of proposed rulemaking (SNPRM), to comment on certain modifications to the rate reasonableness procedure proposed in the NPRM, as well as other issues contained in the discussion below.

DATES: Comments are due by January 14, 2022. Reply comments are due by March 15, 2022.

ADDRESSES: Comments and replies may be filed with the Board via e-filing on the Board's website at www.stb.gov and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: 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

[1] These proceedings are not consolidated. A single decision is being issued for administrative convenience.

2018, the RRTF issued a report on April 25, 2019 (RRTF Report).[2] Among other recommendations, the RRTF included a proposal for a final offer procedure, which it described as "an administrative approach that would take advantage of procedural limitations, rather than substantive limitations, to constrain the cost and complexity of a rate reasonableness case." RRTF Rep. 12. Versions of a final offer process for rate review have also been recommended by the U.S. Department of Agriculture (USDA) and a committee of the Transportation Research Board (TRB).

In a notice of proposed rulemaking issued on September 12, 2019, the Board proposed to build on the RRTF recommendation and establish a new rate case procedure for smaller cases, the Final Offer Rate Review (FORR) procedure. Final Offer Rate Rev. (NPRM), EP 755 et al. (STB served Sept. 12, 2019).[3]

The Board received numerous comments on the NPRM. By decision served on May 15, 2020, to permit informal discussions with stakeholders, the Board waived the general prohibition on ex parte communications between June 1, 2020, and July 15, 2020. Meetings took place during the specified period; parties filed memoranda pursuant to 49 C.F.R. § 1102.2(g)(4); the memoranda were posted on the Board's website; and parties were permitted to submit written comments in response to the memoranda.[4]

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[2] The RRTF Report was posted on the Board's website on April 29, 2019, and can be accessed at https://www.stb.gov/stb/rail/Rate_Reform_Task_Force_Report.pdf.

[3] The proposed rule was published in the Federal Register, 84 Fed. Reg. 48,872 (Sept. 17, 2019).

[4] The following parties submitted comments, participated in meetings, or submitted comments in response to memoranda: the American Chemistry Council (ACC), 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 Company (CN); Canadian Pacific (CP); 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); Growth Energy; Indorama Ventures (Indorama); Industrial Minerals Association – North America (IMA-NA); The Kansas City Southern Railway Company (KCSR); MillerCoors; National Grain and Feed Association (NGFA); National Taxpayers Union (NTU); Norfolk Southern Railway Company (NSR); Olin Corporation (Olin); Private Railcar Food and Beverage Association (PRFBA); Samuel J. Nasca; Solvay America, Inc.; Steel Manufacturers Association (SMA); Union Pacific Railroad Company (UP); USDA; U.S. Wheat Transportation Working Group (USW); 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, the late 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 Regul. (2015), http://nap.edu/21759.

In light of the filed comments and information received in meetings with stakeholders, the Board is issuing this SNPRM to invite comment on certain modifications to the rate reasonableness procedure proposed in the NPRM, as well as other issues contained in the discussion below. Today's issuance of this SNPRM also will ensure parallel consideration of the modified FORR proposal with the proposal being made today in Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes (Arb. NPRM), EP 765 (STB served Nov. 15, 2021).

In addition to seeking comments, the Board will again waive the general prohibition on ex parte communications regarding matters related to this proceeding,[5] to allow discussions of FORR issues in conjunction with ex parte discussions of the arbitration proposal. See 49 C.F.R. § 1102.2(g); Final Offer Rate Rev., EP 755 (STB served May 15, 2020). The duration of the ex parte waiver will match the ex parte meeting period in Docket No. EP 765, i.e., between November 15, 2021, and February 23, 2022.

BACKGROUND

In the ICC Termination Act of 1995 (ICCTA), Congress directed the Board to "establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost [(SAC)] presentation is too costly, given the value of the case." Pub. L. No. 104-88, 109 Stat. 803, 810. In the Surface Transportation Board Reauthorization Act of 2015 (STB Reauthorization Act), Pub. L. No. 114-110, 129 Stat. 2228, Congress revised the text of this requirement so that it currently reads: "[t]he Board shall maintain *1 or more* simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full [SAC] presentation is too costly, given the value of the case." 49 U.S.C. § 10701(d)(3) (emphasis added). In addition, section 11 of the STB Reauthorization Act modified 49 U.S.C. § 10704(d) to require that the Board "maintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates."[6] More generally, the rail transportation policy (RTP) at 49 U.S.C. § 10101 states that, in regulating the railroad industry, it is the policy of the United States Government to, among other things, "provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part." 49 U.S.C. § 10101(15).

In 1996, the Board adopted a simplified methodology, known as Three-Benchmark, which determines the reasonableness of a challenged rate using three benchmark figures. Rate Guidelines—Non-Coal Proc., 1 S.T.B. 1004 (1996), pet. to reopen denied, 2 S.T.B. 619 (1997), appeal dismissed sub nom. Ass'n of Am. R.Rs. v. STB, 146 F.3d 942 (D.C. Cir. 1998). A

[5] The Board previously waived the prohibition on ex parte communications in Docket No. EP 665 (Sub-No. 2). See Expanding Access to Rate Relief, EP 665 (Sub-No. 2) (STB served Mar. 28, 2018) (stating that "[t]he waiver will remain in effect until further order of the Board.").

[6] Prior to the enactment of the STB Reauthorization Act, § 10704(d) began with a sentence stating that, "[w]ithin 9 months after January 1, 1996, the Board shall establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates." See, e.g., 49 U.S.C. § 10704(d) (2014).

decade passed without any complainant bringing a case under that methodology. In 2007, the Board modified the Three-Benchmark methodology and also created another simplified methodology, known as Simplified-SAC, which determines whether a captive shipper is being forced to cross-subsidize other parts of the railroad's network. See Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1) (STB served Sept. 5, 2007), aff'd sub nom. CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir. 2009), vacated in part on reh'g, 584 F.3d 1076 (D.C. Cir. 2009). In 2013, the Board increased the relief available under the Three-Benchmark methodology and removed the relief limit on the Simplified-SAC methodology, among other things. See Rate Regul. 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). Notwithstanding the Board's efforts to improve its rate review methodologies and make them more accessible, only a few Three-Benchmark cases have ever been brought to the Board, and no complaint has been litigated to completion under the Simplified-SAC methodology.

The Board has recognized that, for smaller disputes, the litigation costs required to bring a case under the Board's existing rate reasonableness methodologies can quickly exceed the value of the case. Expanding Access to Rate Relief, EP 665 (Sub-No. 2), slip op. at 10 (STB served Aug. 31, 2016). As the Board stated in Simplified Standards, "[f]or some shippers who have smaller disputes with a carrier, even [Simplified-SAC] would be too expensive, given the smaller value of their cases. These shippers must also have an avenue to pursue relief." Simplified Standards, EP 646 (Sub-No. 1), slip op. at 16. Along similar lines, as the Board has previously stated, simplified procedures "enable the affected shippers to avail themselves of their statutory right to challenge rates charged on captive rail traffic regardless of the size of the complaint." Non-Coal Proc., 1 S.T.B. at 1057.[7]

In public comments, shippers and other interested parties have repeatedly stated that the Board's current options for challenging the reasonableness of rates do not meet their need for expeditious resolution at a reasonable cost.[8] Moreover, because a contract rate may not be

[7] See also Calculation of Variable Costs in Rate Compl. Proc. Involving Non-Class I R.Rs., 6 S.T.B. 798, 803 & n.19 (2003) ("[W]e have adopted simplified evidentiary procedures for adjudicating rate reasonableness in those cases where more sophisticated procedures are too costly or burdensome, 'to ensure that no shipper is foreclosed from exercising its statutory right to challenge the reasonableness of rates charged on its captive traffic.'") (quoting Non-Coal Proc., 1 S.T.B. at 1008); Mkt. Dominance Determinations—Prod. & Geographic Competition, 3 S.T.B. 937, 949 (1998) (excluding product and geographic competition from consideration in market dominance determinations so as to "remove a substantial obstacle to the shippers' ability to exercise their statutory rights.").

[8] See, e.g., Alliance for Rail Competition Opening Comment 22, June 26, 2014, Rail Transp. of Grain, Rate Regul. Rev., EP 665 (Sub-No. 1) (stating that the Three-Benchmark methodology is too costly and complex for grain shippers and producers in its current form); WCTL Opening Comment 74-76, Oct. 23, 2012, Rate Regulation Reforms, EP 715 (the cost and complexity of the Simplified-SAC methodology discourage its use); Oversight of the STB Reauthorization Act of 2015 Before the Subcomm. on R.Rs., Pipelines, & Hazardous Materials of the H. Comm. on Transp. & Infrastructure, 115th Cong. (2018) (letter from Chris Jahn, then-

challenged before the Board, 49 U.S.C. § 10709(c)(1), some complainants[9] shift from contract rates to tariff rates before bringing a rate case, and tariff rates may be higher than prior contract rates.[10] That factor gives complainants a strong interest in having a rate case decided quickly, from start to finish.

Accordingly, the Board has continued to explore ideas to improve the accessibility of rate relief. For example, in Expanding Access to Rate Relief, Docket No. EP 665 (Sub-No. 2), the Board sought comment on procedures relying on comparison groups that could comprise a new rate reasonableness methodology for use in very small disputes. The initial comments on that proposal were universally negative. But among the comments submitted in Docket No. EP 665 (Sub-No. 2), the Board received a suggestion from USDA that the Board consider procedural limitations to streamline and expedite its rate reasonableness review as an alternative to substantive limitations. See USDA Reply Comment 5-6, Dec. 19, 2016, Expanding Access to Rate Relief, EP 665 (Sub-No. 2). USDA specifically recommended a short procedural timeline as a means to make rate reasonableness review accessible for smaller disputes. See id. To implement this recommendation, USDA suggested that the Board adopt a final offer procedure whereby parties would submit market dominance and rate reasonableness evidence in a single package offer. See id. at 6-7.

The Board already uses a final offer procedure as part of the Three-Benchmark methodology, although it is only one part of the rate reasonableness approach as opposed to providing the overall framework, as the Board is proposing here.[11] One of the benchmarks compares the markup paid by the challenged traffic to the average markup assessed on similar

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President of The Fertilizer Institute, submitted for the record) (due to the time and expense needed to pursue a rate case, it "does not work" for most complainants).

[9] Paying a transportation rate is not the only way to establish standing to bring a rate case, and the Board has previously provided guidance in a policy statement for "complainants that allege indirect harm in rate complaints." See Rail Transp. of Grain, Rate Regul. Rev., EP 665 (Sub-No. 1) et al., slip op. at 7-8 (STB served Dec. 29, 2016).

[10] As an example, the most recent rate proceeding involved a complainant that had been served pursuant to contracts for many years and then filed its complaint as soon as its contract expired. See Consumers Energy Co. Compl. 4-5, Jan. 13, 2015, Consumers Energy Co. v. CSX Transp., Inc., NOR 42142; see also Occidental Chem. Corp. Comments 2-4, Oct. 23, 2012, Rate Regul. Reforms, EP 715 (paying the tariff rate for extended periods of time while a rate case is litigated—which can add millions of dollars in costs beyond the direct costs of litigation—undermines the utility of a rate challenge, especially if the carrier requires that all rates bundled with the challenged rate also shift to tariff during the pendency of the case); PPG Indus., Inc. Comments 3-4, Oct. 23, 2012, Rate Regul. Reforms, EP 715 (noting the effect of bundling and stating that tariff premium could reach $20 million per year of rate litigation). The latter two filings are cited here simply to illustrate the need for expedited rate reasonableness procedures, not to indicate that the Board takes any position in this proceeding—one way or another—on the appropriateness of rate bundling.

[11] The Three-Benchmark methodology also includes more procedural steps and a longer timeline than the FORR procedure proposed here. See 49 C.F.R. § 1111.10(a)(2).

traffic. See, e.g., Rate Regul. Reforms, EP 715, slip op. at 11. To improve the efficiency of this part of the Three-Benchmark methodology and "enable a prompt, expedited resolution of the comparison group selection," the Board requires each party to submit its final offer comparison group simultaneously, and the Board chooses one of those groups without modification. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 18.

Although the Board may not require arbitration of rate disputes under current law,[12] and is not doing so here, the benefits of *final offer* procedures used in other settings offer support and background for the Board's rule proposed here. For example, final offer procedures are used in commercial settings, including the resolution of wage disputes in Major League Baseball, and final offer arbitration is therefore sometimes referred to as "baseball arbitration." See, e.g., Josh Chetwynd, Play Ball? An Analysis of Final-Offer Arb., Its Use in Major League Baseball, & Its Potential Applicability to Eur. Football Wage & Transfer Disps., 20 Marq. Sports L. Rev. 109 (2009) (noting the final offer procedure "can lead to a win-win situation as it spurs negotiated settlement at a very high rate"); see also Michael Carrell & Richard Bales, Considering Final Offer Arb. to Resolve Pub. Sector Impasses in Times of Concession Bargaining, 28 Ohio St. J. on Disp. Resol. 1, 3, 16, 23-24 (2012) (noting that 14 states had codified some form of final offer arbitration for certain labor disputes involving public sector employees and noting that the procedure "encourages the parties to negotiate toward middle ground rather than staking out polar positions" and "encourages the parties to settle before arbitration").

Similarly, AAR's Circular No. OT-10, "Code of Car Service Rules/Code of Car Hire Rules," sets forth a final offer procedure for car hire arbitration, which is included in Rule 25 (the Arbitration Rule). See Circular No. OT-10, Rule 25, https://www.railinc.com/rportal/documents/18/260773/OT-10.pdf. The Board has described the Arbitration Rule as an "integral part" of its deregulation of car hire rates. See Joint Pet. for Rulemaking on R.R. Car Hire Comp., EP 334 (Sub-No. 8) et al., slip op. at 1 (STB served Apr. 22, 1997). And as noted by the Board's predecessor agency, the Interstate Commerce Commission (ICC), the Arbitration Rule "provides for negotiation and, when that is not successful, 'baseball style' arbitration, by which the arbitrator will select between the best final offers of the parties." Joint Pet. for Rulemaking on R.R. Car Hire Comp., 9 I.C.C.2d 80, 88 (1992).

[12] See Arb.—Various Matters, EP 586, slip op. at 3 n.7 (STB served Sept. 20, 2001); see also 49 U.S.C. § 10704(a)(1); 49 U.S.C. § 11704(c)(2). The Board has had a *voluntary* arbitration process in place for more than 20 years, and section 13 of the STB Reauthorization Act required adjustments to this process (including the addition of rate disputes to the types of matters eligible for arbitration), but to date parties have not agreed to arbitration of any dispute brought before the Board. See Arb. of Certain Disps., 2 S.T.B. 564 (1997) (adopting voluntary arbitration procedures at 49 C.F.R. part 1108); Revisions to Arb. Proc., EP 730 (STB served Sept. 30, 2016) (making adjustments required by STB Reauthorization Act). In addition to its recommendation for a final offer procedure that would culminate in a decision by the Board, the RRTF recommended legislation that would permit mandatory arbitration of smaller rate cases. See RRTF Rep. 14-15.

Finally in this regard, in the TRB Report released in 2015, the Committee for a Study of Freight Rail Transportation and Regulation of the TRB (TRB Committee)[13] described the benefits of adopting "an independent arbitration process similar to the one long used for resolving rate disputes in Canada."[14] In particular, the TRB Committee recommended "a final-offer rule," set on a "strict time limit," whereby "each side offers its evidence, arguments, and possibly a changed rate or other remedy in a complete and unmodifiable form after a brief hearing." TRB Rep. 211-12. According to the TRB Report, adoption of such a procedure could enhance complainants' access to rate reasonableness protections, while expediting dispute resolution and encouraging settlements. Id. at 212.

The RRTF agreed that a final offer process—with the decision being made by the Board rather than an arbitrator—could be an effective way to implement procedural limitations, which would improve access to rate relief. RRTF Rep. 16. Taking into account these recommendations, the Board's NPRM proposed to adopt a FORR process with the following primary features. As proposed, FORR would allow limited discovery, with no litigation over discovery disputes; FORR could only be used if the complainant elected to use the streamlined market dominance approach proposed (and since adopted) in Docket No. EP 756, Market Dominance Streamlined Approach;[15] and the procedural schedule would be brief, with a Board decision issued 135 days after the complaint is filed. See NPRM, EP 755 et al., slip op. at 8-10, 13-14.

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[13] In 2005, legislation was enacted directing the Secretary of Transportation to enter into an agreement with TRB "to conduct a comprehensive study of the Nation's railroad transportation system." See Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 9007, 119 Stat. 1144, 1925 (2005). The study was funded in 2011, H.R. Rep. No. 112-284, at 287 (2011), and the TRB Committee was formed, see TRB Rep. 12-13.

[14] In a well-known process used by Canadian regulators, final offer procedures are administered by an outside arbitrator or panel of arbitrators. In Canada, a complainant may submit its rate dispute to the Canadian Transportation Agency, which refers the matter to an arbitrator or a panel of arbitrators. Canada Transp. Act, S.C. 1996, c. 10, as amended, §§ 161(1), 162(1) (Can.). The Canadian statute establishes a two-tiered structure: if the matter involves freight charges of more than $2 million CAD (subject to an inflation adjustment), a 60-day procedure applies, and if the matter involves freight charges of $2 million CAD or less (subject to an inflation adjustment), a 30-day procedure applies. Id. §§ 164.1, 165(2)(b). Among other things, the 60-day procedure allows the parties to direct interrogatories to one another, and the arbitrator may request written filings beyond the final offers and information initially submitted in support of final offers. See id. §§ 163(4), 164(1). In the 30-day procedure, there is no discovery, and the arbitrator may request oral presentations from the parties but may not request written submissions beyond the final offers and replies. See id. § 164.1. The arbitrator's decision is issued within 60 days after the matter was submitted for arbitration, or 30 days if the further expedited procedure applies. Id. § 165(2)(b). Any resulting rate prescription is limited to two years, unless the parties agree to a different period. See id. § 165(2)(c).

[15] Mkt. Dominance Streamlined Approach, EP 756 (STB served Aug. 3, 2020) (adopting final rule).

Parties would simultaneously submit their market dominance presentations, final offers, analyses addressing the reasonableness of the challenged rate and support for the rate in the party's offer, and explanations of the methodology used and how it complies with the decisional criteria set forth in the NPRM. NPRM, EP 755 et al., slip op. at 12. Parties would next submit simultaneous replies. Id.

The complainant would bear the burden of proof to demonstrate that (i) the defendant carrier has market dominance over the transportation to which the rate applies, and (ii) the challenged rate is unreasonable. NPRM, EP 755 et al., slip op. at 12-13; see also 49 U.S.C. §§ 10701(d)(1), 10704(a)(1), 11704(b); Union Pac. R.R.—Pet. for Declaratory Ord., FD 35504, slip op. at 2 (STB served Oct. 10, 2014). If the Board were to find that the complainant's market dominance presentation and rate reasonableness analysis demonstrate that the defendant carrier has market dominance over the transportation to which the rate applies and that the challenged rate is unreasonable, the Board would then choose between the parties' final offers. In making the rate reasonableness finding and choosing between the offers, the Board would take into account the criteria specified in the NPRM: the RTP, the Long-Cannon factors in 49 U.S.C. § 10701(d)(2), and appropriate economic principles. See NPRM, EP 755 et al., slip op. at 10-13.

The Board proposed a relief cap of $4 million, indexed annually using the Producer Price Index, consistent with the potential relief afforded under the Three-Benchmark methodology. See NPRM, EP 755 et al., slip op. at 16.

The Board also sought additional comments on Docket No. EP 665 (Sub-No. 2), including whether to close that docket. NPRM, EP 755 et al., slip op. at 17.

Also, on November 25, 2020, the Board instituted a rulemaking proceeding to consider a proposal by CN, CSXT, KCSR, NSR, and UP to establish a new, voluntary arbitration program for small rate disputes. Joint Pet. for Rulemaking to Establish a Voluntary Arb. Program for Small Rate Disps., EP 765 (STB served Nov. 25, 2020).[16] In a decision served concurrently with this SNPRM, the Board is proposing to adopt a form of such an arbitration program. Arb. NPRM, EP 765.

As discussed in more detail in the Arbitration NPRM, the Board is deferring final action on FORR and issuing this SNPRM concurrently with the Arbitration NPRM so that both proposals may be considered simultaneously, including the pros and cons of adopting—either with or without modification—the voluntary arbitration rule, FORR, both proposals, or taking other action.

[16] CP subsequently submitted a letter stating that it "supports the effort to find a workable, reasonable, accessible arbitration program for small rate cases, and would participate in such a pilot program." CP Letter, Jan. 25, 2021, Joint Pet. for Rulemaking to Establish a Voluntary Arb. Program for Small Rate Disps., EP 765.

DISCUSSION AND REQUEST FOR COMMENTS

Based on the filed comments and information received in meetings with stakeholders, the Board invites comment on certain modifications to the rule proposed in the NPRM and other issues contained in the discussion below. In **Part I**, the Board addresses comments on the purpose of the rule. In **Part II**, the Board addresses comments regarding its statutory authority to adopt FORR. In **Part III**, the Board addresses comments regarding the appropriateness of a final offer procedure. In **Part IV**, the Board addresses the review criteria for FORR cases. In **Part V**, the Board addresses discovery and procedural schedule issues, including the Board's proposal to remove the use of adverse inferences and instead adopt a process for motions to compel discovery. The Board also proposes to include mandatory mediation in FORR cases and to extend the proposed procedural schedule to accommodate motions to compel and mandatory mediation. In **Part VI**, the Board addresses market dominance issues, including the Board's proposal to require only the complainant to submit market dominance evidence on opening. The Board also proposes to allow complainants to choose between streamlined and non-streamlined market dominance approaches and extends the proposed procedural schedule in cases where the complainant selects non-streamlined market dominance. In **Part VII**, the Board addresses the relief cap. Finally, in **Part VIII**, the Board addresses other miscellaneous issues. The attached Appendix contains the text of the proposed rule as modified.

Although the modifications to the proposed rule described in this decision are not the type that would necessitate additional notice and comment under the Administrative Procedure Act,[17] the Board seeks further comment in this instance in order to determine if the outlined refinements would improve its proposed rule, and so that the modified FORR proposal may be considered in parallel with the proposal in Docket No. EP 765 to establish an arbitration program that could include an exemption from FORR for carriers that participate in the program. See Arb. NPRM, EP 765, slip op. at 14. In seeking additional comment, the Board does not limit its authority to adopt modifications that are a logical outgrowth of the NPRM or this SNPRM in any final rule without further comment.

PART I – PURPOSE OF THE RULE

The purpose of this proposed rule is to satisfy the statutory requirement that, if the Board determines that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable. See 49 U.S.C. § 10701(d)(1).[18] A shipper's ability to challenge a rate subject to market dominance,

[17] 5 U.S.C. § 551. See, e.g., Covad Commc'ns Co. v. FCC, 450 F.3d 528, 548 (D.C. Cir. 2006) (recognizing that "[a]n agency's final rule need only be a 'logical outgrowth' of its notice").

[18] See also 49 U.S.C. § 10701(d)(3) (requiring the Board to "maintain 1 or more simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case"); 49 U.S.C. § 10704(d)(1) (requiring the Board to "maintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates," including "appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings.").

and vindicate its statutory right to a Board decision on rate reasonableness, is frustrated where the litigation costs of the Board's available processes exceed the value of potential relief. Non-Coal Proc., 1 S.T.B. at 1049. Furthermore, in addition to litigation costs, a shipper must also take into account the risk associated with the uncertainty of receiving relief and the time it may take to obtain a decision. As described in the NPRM and as noted above, the Board has sufficient grounds to conclude that shippers lack meaningful access to the Board's existing rate reasonableness processes with respect to small disputes, due to the complexity, cost, and duration of those processes. NPRM, EP 755 et al., slip op. at 3. The Board expects that FORR's procedural limitations should lower the cost of litigating rate disputes, providing complainants who otherwise might be deterred from bringing smaller rate cases under one of the Board's existing processes a more accessible avenue for rate reasonableness review by the Board. Id. at 7. Reduced litigation costs should also make it more feasible for complainants to prove meritorious cases, while a final offer selection process would discourage extreme positions and may facilitate settlement. Id.

Some rail interests question the need for a new procedure to resolve small rate disputes. (See, e.g., AAR Comment 24; BNSF Comment 3.)[19] Shipper interests uniformly indicate that there is a need for such a procedure. (AFPM Comment 3; Coalition Ass'ns Comment 4; Farmers Union Comment 5-6; Growth Energy Comment 2; IMA-NA Comment 11-12; Indorama Comment 11-12; MillerCoors Comment 13-14; NGFA Comment 6; Olin Comment 1-9; PRFBA Comment 2; SMA Comment 11-12; WCTL Comment 1-2.) The Board will now address those comments.

AAR claims that the Board's only evidence of the problem to be solved—the lack of a meaningful avenue to address rate reasonableness in small disputes—is the "purported scarcity of rate complaints." (AAR Comment 24.) According to AAR, the absence of complaints could be subject to other explanations, for example, that "many rates are governed by contract, and those that are based on tariffs are generally reasonable." (Id.)

As indicated in the NPRM, however, that is not the only evidence of the problem. As the Board explained, the problem is illustrated by the lack of small rate cases *combined* with repeated shipper statements that they need rate relief but find the Board's existing processes too complex and expensive. NPRM, EP 755 et al., slip op. at 2-3; see also id. at 3 n.5. Comments from shipper interests in this proceeding bear out that problem. (See, e.g., Farmers Union Comment 5-9 (explaining the challenges faced by customers with small rate disputes, as well as citations to evidence of steadily rising rail transportation rates for agricultural commodities in recent decades);[20] NGFA Comment 5-6; USDA Comment 2-3.)

[19] Unless otherwise specified, citations to the record are to the record in Docket No. EP 755.

[20] Notwithstanding these widespread rate increases, no rate case addressing rail transportation of agricultural commodities has been filed with the Board or the ICC since McCarty Farms, which commenced in 1981. See McCarty Farms, Inc. v. Burlington N., Inc., 2 S.T.B. 460, 462-63 (1997) (denying rate relief after reopening and remand).

AAR's reasoning is circular: it suggests that, in order to justify adoption of a new process to determine *whether* specific rates are reasonable, the Board must already have evidence that rates in general *are* unreasonable. Committing to inaction based on such flawed logic would risk leaving shippers without a meaningful avenue to challenge unreasonable rates, in spite of substantial evidence of the need for such relief.

BNSF contends that the Board should not "sidestep the innate complexity and sophistication of the core task before the agency." (BNSF Comment 3.) BNSF's implication seems to be that the subject matter is so complex that it may not be feasible to simplify it sufficiently for use in small disputes (i.e., to address these difficult issues expeditiously and inexpensively enough that a case can be worth pursuing even with a relatively small amount of money at stake). The Board recognizes the concern raised by BNSF—the agency's decades-long efforts to create accessible small rate case processes attests to the difficulty of reconciling the economic complexity of railroad rate review with cost-effective dispute resolution.[21] But the statute's requirement that rates subject to market dominance be reasonable applies to large and small cases alike, and BNSF's concern cannot preclude further reform given Congress's mandate that simplified and expedited methods exist to challenge rate reasonableness in smaller cases. See 49 U.S.C. §§ 10701(d)(3), 10704(d)(1).

BNSF also argues that the Board should limit any reforms to "the discrete population of small sized shippers moving modest sized shipments that are inordinately impacted by the cost and complexity of the STB's current methodologies." (BNSF Comment 3-4.) BNSF does not explain how it would be fair or reasonable to limit a remedy to small *shippers* rather than small *disputes* (as the Board has done with other processes with relief caps), or why a potential complainant with a dispute smaller than the cost of using the Board's existing processes should be denied access to a new process merely because of the size of the entity. BNSF suggests that eligibility to participate in a new process should turn on whether the complainant has the "ability to undertake the expense and burden" present in a more expensive proceeding. (Id. at 3.) But even a large shipper with the means to proceed under one of the Board's existing rate reasonableness processes could not rationally be expected to do so where the time, risk, and cost of using that process would exceed the value of the case. Limiting FORR to small shippers would leave large shippers without recourse to challenge unreasonable rates in smaller cases, and therefore frustrate the statute's reasonableness requirement for rates subject to market dominance. See 49 U.S.C. § 10701(d)(1).

UP argues that, instead of adopting FORR, the Board could accelerate Three-Benchmark cases by eliminating rebuttal, starting discovery when the complaint is filed, and committing to

[21] To this end, in the NPRM, the Board stated that parties may file comments as to whether and how the Board might provide assistance to parties—particularly smaller entities—regarding how best to utilize the proposed FORR procedure. NPRM, EP 755 et al., slip op. at 17. In response, AFPM states that "support and assistance should be limited to guidance documents and similar materials. AFPM believes STB should focus efforts on implementing the program effectively before pursuing major efforts to supply hands-on assistance." (AFPM Comment 10.) The Board remains open to ways in which it might provide assistance to participants.

issue a decision in 60 days. (UP Comment 20-21.) It is far from clear that the length of Three-Benchmark cases presents the only deterrent for potential complainants. For example, the complexity due to defendants' expansive use of "other relevant factors" is also likely an issue. See RRTF Rep. 51-52. Eliminating the complainant's rebuttal and starting discovery upon the filing of the complaint, even in the name of faster record development, therefore seems unlikely to increase the utility of Three-Benchmark for complainants with small disputes.

For these reasons, based on the record to date, the Board finds that FORR would further the RTP goal of maintaining reasonable rates where there is an absence of effective competition, see § 10101(6), by providing increased access to rate reasonableness determinations in small disputes. By facilitating the determination of rate reasonableness in situations where it may not, in practice, have been feasible previously, FORR would also foster sound economic conditions in transportation. See § 10101(5). And FORR's short timelines would promote expeditious regulatory decisions and provide for the expeditious handling and resolution of proceedings. See § 10101(2), (15).

PART II – STATUTORY AUTHORITY TO ADOPT FORR

Railroad interests argue that the Board lacks statutory authority to adopt FORR. The Board disagrees for the reasons stated in the NPRM and below.

AAR asserts that Congress has not authorized the Board "to determine the maximum reasonable rate through a baseball-style final offer process." (AAR Comment 8.) According to AAR, "[n]othing in the governing statutes, or in the Administrative Procedure Act, authorizes the Board to adopt an adjudicatory method that so drastically departs from the way agency adjudications and rate-setting proceedings have historically been conducted." (Id. at 9.) AAR is incorrect. Section 10701(d)(3) authorizes (and in fact, requires) the Board to maintain one or more "simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full [SAC] presentation is too costly, given the value of the case."[22] This provision does not expressly identify the specific methods that the Board can use for simplified and expedited rate cases, and courts have affirmed the Board's significant discretion to pursue various "possible regulatory approaches" in this area. See Burlington N. R.R. v. ICC (McCarty Farms Appeal), 985 F.2d 589, 597 (D.C. Cir. 1993). AAR does not identify anything in § 10701(d)(3) to support its contention that the Board is limited in rate review proceedings to "the way agency adjudications and rate-setting proceedings have historically been conducted." (AAR Comment 9.) See also 49 U.S.C. § 10704(d)(1) (requiring the Board to "maintain

[22] AAR argues that § 11(c) of the STB Reauthorization Act does not authorize FORR because it refers to "procedures that are available to parties in litigation before courts." (AAR Comment 10-11.) The plain language of § 11(c), on which the NPRM did not rely, does not limit the Board to such procedures, but merely requires the Board to "assess" those procedures for their "potential" use in rate cases, which the Board did in a different proceeding. See Expediting Rate Cases, EP 733 (STB served Nov. 30, 2017); STB Reauthorization Act § 11(c) (directing the Board to "initiate a proceeding to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases.").

procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates," including "appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings.").[23]

Certain railroad interests also emphasize that "[f]inal-offer decisionmaking is an *arbitration* technique," and contend that because the Board lacks authority from Congress to impose mandatory arbitration, it lacks authority to adopt FORR. (AAR Comment 8-9; see also CN Comment 6; CSXT Comment 2.) But the fact that this decision-making structure is often used in arbitration does not mean that FORR *is* arbitration. See NPRM, EP 755 et al., slip op. at 4-6 (noting that, in addition to arbitration, the final offer structure is a key part of adjudications by the Board under its existing Three-Benchmark test). Indeed, the NPRM made clear that FORR was not an arbitration proposal and that "*the Board* would make the determination of rate reasonableness as it does under the Board's current options for challenging the reasonableness of rates." See id. at 4 (footnote omitted).[24] And while it is true that Congress did not authorize mandatory arbitration, it did authorize the development of new methods and procedures for use by *the Board* in evaluating rate reasonableness. 49 U.S.C. §§ 10701(d)(3), 10704(d)(1). The absence of statutory authority for third-party arbitrators to conduct mandatory arbitration does not prohibit the Board from adopting decisional procedures also used by arbitrators.[25] That is particularly true here, where the statutory authorization is open-ended regarding the decisional procedures that the Board may adopt.

AAR cites a decision of a federal district court, in which, according to AAR, "[t]he court rejected an agency's attempt to use final-offer decisionmaking . . . concluding that the agency lacked statutory authorization to adopt the procedure." (AAR Comment 13 (citing Stone v. U.S. Forest Serv., No. Civ. 03–586–JE, 2004 WL 1631321 (D. Or. July 16, 2004)).) Stone is readily distinguishable. At issue there was a statute allowing owners of private property in a national

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[23] AAR also argues that "the Board fails to identify any other agency that uses Final Offer Rate Review outside the arbitral context." (AAR Comment 9.) But under the statute, whether another agency might use a final offer process has no bearing on whether the Board may adopt such a procedure. And, as noted in the NPRM, the final offer structure is already a central part of adjudications under the Board's Three-Benchmark test. NPRM, EP 755 et al., slip op. at 4.

[24] As courts have recognized, an arbitration is the resolution of a dispute by a private arbitrator. See, e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010) ("[A]n arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution."); IDS Life Ins. Co. v. SunAmerica, Inc., 103 F.3d 524, 528 (7th Cir. 1996) (arbitration is "private ordering").

[25] See, e.g., Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 (1956) ("The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial . . . .").

scenic area an opportunity to avoid certain land use restrictions by selling their land to USDA for fair market value. See Stone, 2004 WL 1631321 at *1-2. USDA, acting through the Forest Service, established a procedure for establishing fair market value whereby it compared its own fair market appraisal with the landowner's appraisal and selected the one with the strongest support for value. Id. at *3. There was no provision for price negotiation, and no additional appraisals would be considered after an appraisal was selected. Id.

In assessing this procedure, the district court noted that "in all probability the Forest Service would simply ignore" the landowner's appraisal and "rely exclusively upon the report of its own appraiser." Id. at *3. From there, it questioned whether "Congress ever has or could give a federal agency the power to unilaterally determine the ultimate price it must pay to acquire private property for public purposes, over the objections of an unwilling seller." Id. at *5. The court concluded that by "arbitrarily clos[ing] its eyes to additional appraisals submitted by the owner, or categorically prohibit[ing] negotiation regarding the purchase price," the Forest Service's procedure would frustrate, rather than further, the statute's goal of affording landowners an opportunity to dispose of burdened property. Id. at *7.

Here, the Board would not be using a final offer process to set the price of a transaction to which the government itself is a party, a fact that weighed heavily on the outcome in Stone. Accordingly, FORR does not raise the same concerns raised in Stone: there is no suggestion that the Board would not fairly consider both parties' final offers, and their respective replies, or the question of whether the shipper has demonstrated both market dominance and that the challenged rate is unreasonable under governing statutory principles, both prerequisites to rate relief. And by expanding accessibility to rate relief, FORR would further implement the statute's directive to create methods and procedures to determine what is reasonable. 49 U.S.C. §§ 10701(d)(3), 10704(d)(1). In this proposed rule, the Board has done so, while specifically accounting for the overarching principles that Congress provided. See NPRM, EP 755 et al., slip op. at 10-12. Accordingly, Stone is inapposite.

CN argues that because § 10701(d)(3) authorizes development of a simplified "method," and FORR does not provide for an economic methodology that the Board will use to determine the reasonableness of the challenged rate, the statute does not authorize FORR. (See CN Comment 6-8.) CN mischaracterizes the statutory language. The definition of "method" encompasses "a procedure or process for attaining an object."[26] CN acknowledges that FORR is a procedure, (see CN Comment 7), and FORR plainly satisfies the express terms of § 10701(d)(3).[27]

[26] See *Method*, Merriam-Webster, http://merriam-webster.com/dictionary/method (last visited Oct. 13, 2021). Similarly, Black's Law Dictionary defines "method" as "a mode of organizing, operating, or performing something, esp. to achieve a goal." *Method*, Black's Law Dictionary (11th ed. 2019).

[27] Even if Congress had used the word "methodology" rather than "method," the dictionary definition is very similar and would also include FORR: "a body of methods, rules, and postulates employed by a discipline: a particular procedure or set of procedures." See *Methodology*, Merriam-Webster, http://merriam-webster.com/dictionary/methodology (last visited Oct. 13, 2021).

UP claims, without support, that "[b]y adopting FORR . . . the Board would be unlawfully constraining the exercise of its congressionally delegated authority" by "mak[ing] itself a prisoner of the parties' submissions." (UP Comment 3.) The simple fact is that the Board's exercise of discretion to offer FORR would not constrain its authority to prescribe a maximum rate under § 10704(a)(1). FORR would instead facilitate the exercise of that authority, and in doing so further Congress's intent that rate review be available at the Board, through the enhancement of shippers' opportunities to challenge rates subject to market dominance under the relevant criteria by providing an additional option available to potential complainants. And even if the Board could be said to be using something less than its congressionally delegated authority (which it is not), the agency may choose to act within a narrower range than Congress authorized. See, e.g., Midtec Paper Corp. v. Chi. & N.W. Transp. Co., 3 I.C.C.2d 171, 181 (1986), aff'd sub nom. Midtec Paper Corp. v. United States, 857 F.2d 1487, 1500 (D.C. Cir. 1988).

Accordingly, the Board would act within its statutory authority in adopting FORR.

PART III – APPROPRIATENESS OF A FINAL OFFER PROCEDURE

Railroad interests advance a variety of arguments assailing the appropriateness of a final offer procedure for rate reasonableness determinations by the Board. The Board addresses these arguments below.

A. Use of a Final Offer Procedure in Adjudication

In addition to its statutory authority arguments discussed above, AAR also argues that, in using FORR, the Board would be "abandon[ing] its statutory duty to apply the law in determining, based on its own best judgment, the maximum reasonable rate." (AAR Comment 10.) Final offer decisionmaking, according to AAR, amounts to the adjudicator deciding which party's proposal "comes closest to the correct outcome" rather than determining the correct outcome.

AAR's argument ignores the fact that adjudicators routinely rely on or adopt the parties' submissions or decisional framework. AAR implies that, to reach a "legally correct outcome," the Board must perform a rate analysis distinct from any party's pleadings within each case; otherwise, it somehow violates that provision within § 10704 authorizing it to establish the "maximum rate." But here the Board has established a process and a set of analytical criteria in which to exercise its judgment in individual cases. That approach is not novel. For example, apart from evidence regarding "other relevant factors," which is optional, the Board's Three-Benchmark test comprises a final offer process and a formula—an approach in which the Board exercises its discretion in deciding between the parties' comparison groups under a final offer structure. See Union Pac. R.R. v. STB, 628 F.3d 597, 601 (D.C. Cir. 2010) ("Since the revenue need adjustment factor is derived from static figures published annually by the Board, the Three Benchmark framework's reasonableness determination generally turns on the Board's selection of a comparison group.") Likewise, in FORR, the Board would exercise its best judgment at multiple stages, including its determination of whether the challenged rate has been shown to be

unreasonable under the governing criteria and, if necessary, its selection of an offer. See NPRM, EP 755 et al., slip op. at 10-11.

AAR similarly asserts that in some cases the maximum reasonable rate may be above or below the parties' final offers, whereas in others it may fall between the final offers. (AAR Comment 12.) It claims that, through FORR, the Board would abdicate its independent judgment to determine a maximum reasonable rate, and quotes McCarty Farms Appeal for the proposition that "[o]f course no adjudicator would expect to be able to rely entirely on one side's analysis." (Id. (citing McCarty Farms Appeal, 985 F.2d at 599).)

This argument incorporates the same mistaken assumptions as the argument previously addressed. In particular, AAR assumes that "what in the Board's view is the actual maximum" depends solely on the Board's analysis within an individual case. But the Board also "exercise[s] its independent judgment" in creating a decisionmaking process with less discretion within the individual case, as in Three-Benchmark. The fact that the Board is applying a process or even a formula created outside of an individual adjudication does not mean it is not an exercise of judgment. AAR's definition of the maximum reasonable rate is telling: "the rate that *best* achieves the many objectives the Board is statutorily required to consider." (AAR Comment 12 (emphasis added).) This argument—which boils down to an appeal that the Board determine the reasonableness of rail rates "in the abstract"—was rejected in CSX Transportation, 568 F.3d at 242. There, the court indicated that in order to give shippers a "meaningfully effective way to seek some degree of redress for unreasonable rail rates," § 10701(d)(3) authorized the Board to adopt procedures even if they do not yield the level of precision seemingly demanded by AAR here. Id. Regardless, and as explained at length in the NPRM and in this decision, FORR is a process that achieves the Board's various statutory objectives. See, e.g., 49 U.S.C. §§ 10101(1)-(3), (6), (15), 10701(d)(2), (3), 10704(d)(1).[28] Indeed, in establishing the maximum lawful rate using a FORR process, the Board would continue to balance economic considerations together with administrative feasibility in defining a process ahead of time. See BNSF Ry. v. STB, 453 F.3d 473, 482 (D.C. Cir. 2006) ("The pursuit of

[28] UP argues in the same vein that "the Board might choose the shipper's final offer, even though the rate is below the 'maximum rate' that would otherwise be objectively reasonable, id. § 10704(a)(1), or it might decide the challenged rate is better than the alternative, even though it believes the rate exceeds an objectively 'reasonable' rate, 49 U.S.C. § 10701(d)(1)." (UP Comment 5.) According to UP, "under FORR, the Board would not determine whether a challenged rate is reasonable by measuring it against the maximum reasonable rate calculated using the statutory criteria." (UP Comment 9-10.) Like AAR, UP insists that there must be an "objectively reasonable" rate outside of any process used to determine the maximum reasonable rate. UP's theory seems to be that the "statutory criteria" themselves provide a calculation, and in individual cases, the Board measures the challenged rate against the "maximum reasonable rate" resulting from the statute. But in fact, the statute supplies no calculations. Instead, the ICC and the Board have developed processes that are applied in individual cases to produce a maximum reasonable rate—as in FORR. If a party's FORR submission fails to adhere to the statutory criteria, it would be unlikely to prevail on rate reasonableness, and if necessary, selection of an offer.

precision in rate proceedings, as in most things in life, must at some point give way to the constraints of time and expense, and it is the agency's responsibility to mark that point.").[29]

Contrary to AAR's suggestion, nothing in McCarty Farms stands for the proposition that the Board may not accept one party's proffered rate where it finds it superior to the rate offered by the other party. In noting that "no adjudicator would be expected to rely entirely on one side's analysis," the court appears to have been merely emphasizing that all submissions in litigation tend to be self-serving to some extent. See McCarty Farms Appeal, 985 F.2d at 598-99. In any event, under FORR, each party would have an opportunity to submit analysis with its reply pointing out deficiencies in the other side's analysis, which the Board would consider in assessing the reasonableness of the challenged rate and the merits of the parties' respective offers. See NPRM, EP 755 et al., slip op. at 12. Moreover, a final offer process would give parties an incentive to moderate their positions, which is demonstrably absent from SAC (where parties may expect the Board to seek the middle ground).[30] In that regard, parties are reminded that FORR would not reward extreme positions; parties likely would have greater success by presenting more moderate proposals.

UP makes a similar argument, claiming that, unless the Board engages in an issue-by-issue weighing of alternatives within each individual case (as opposed to exercising some of its discretion in advance), it fails to protect the public interest. (See UP Comment 3-4.) UP is incorrect for the same reasons stated above. UP cites a Board decision that observes that "the ICC was not the prisoner of the parties' submissions, but rather had the duty to 'weigh alternatives and make its choice according to its judgment of how best to achieve and advance the goals of the [RTP].'" Pub. Serv. Co. of Colo. v. Burlington N. & Santa Fe Ry., NOR 42057, slip op. at 4 (STB served Jan. 19, 2005) (quoting Balt. & Ohio R.R. v. United States, 386 U.S. 372, 430 (1967) (Brennan, J., concurring)). Again, that is exactly what the Board proposes to do in this rulemaking: exercise its judgment to develop a procedure for smaller rate cases that will best "achieve and advance the goals of the [RTP]." That the Board has affirmed its authority in

[29] In its comment in response to the ex parte meeting memoranda, AAR restates these objections, arguing that the Board must engage in a three-step process to rule on rate reasonableness: (1) determine market dominance; (2) determine whether the challenged rate is unreasonable; and (3) determine the reasonable rate, taking into account the Long-Cannon factors and railroad revenue adequacy. (AAR Comment in Response to Mem. 2-3, Aug. 12, 2020.) Contrary to AAR's argument, the FORR process accounts for each of these three steps. See NPRM, EP 755 et al., slip op. at 10-14. As discussed below, the Board confirms in this SNPRM that the determination in the third step would be the determination of the maximum reasonable rate.

[30] According to AAR, "even if final-offer procedures were an acceptable method of retrospective dispute resolution, there is no basis for using them with regard to the Board's 'legislative function' of setting rates prospectively. See Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry., 284 U.S. 370 (1932) (unlike backward-looking awards of reparations, prescribing a maximum rate is legislative and forward-looking)." (AAR Comment 13.) But AAR fails to explain this position, and seems to overlook the fact that the provisions authorizing the Board to develop methods for the resolution of disputes apply specifically to prospective rate-setting. See §§ 10701(d)(3), 10704(d)(1).

other cases to exercise its judgment notwithstanding the parties' submissions does not mean it cannot also adopt a final offer procedure where the Board chooses to exercise less discretion. Indeed, UP's issue-by-issue weighing approach would preclude not only FORR, but also the Three-Benchmark test, which has been judicially affirmed. See supra at 3; see also Union Pac. R.R., 628 F.3d at 601 (explaining that the Three-Benchmark test generally turns on the Board's selection of a comparison group—a final offer process in which "the Board's selection is an 'either/or' choice between the parties' final offers, with no modifications allowed").

UP contends that Three-Benchmark is distinguishable from FORR because parties can claim "other relevant factors," which acts as a "safety valve." (UP Comment 6.) However, "other relevant factors" are optional, and in three of the four proceedings decided under Three-Benchmark, the Board rejected all proposed "other relevant factors."[31] Moreover, because litigation over proposed "other relevant factors" has substantially expanded the scope of Three-Benchmark cases, it appears that "other relevant factors" are a reason—perhaps a primary reason—why complainants have not pursued many Three-Benchmark cases. See RRTF Rep. 51-52.[32]

In an analogous argument, UP describes the Federal Communications Commission's (FCC) adoption of final offer arbitration for interconnection rates, which are required to be just and reasonable. (UP Comment 7.) The FCC's procedure requires the arbitrator to ensure that the offers comply with the statutory standards, and if they do not, the arbitrator can take steps designed to result in an outcome that satisfies those standards, including requiring the parties to submit new final offers or adopting a result not submitted by any party. (See id.) Such an approach, while certainly permissible, would eliminate the "either/or" nature of a final offer selection that the NPRM cited as a benefit. NPRM, EP 755, slip op. at 13; see also Simplified Standards, EP 646 (Sub-No. 1), slip op. at 18 & n.25 ("This ["either/or" final offer] approach will work as intended only if the parties know that the agency will not attempt to find a compromise position somewhere in the middle. . . . [W]e cannot preserve the incentives created by a final-offer selection process and retain the discretion to formulate our own comparison group. Accordingly, we will not adopt [a proposal for the Board to retain the discretion to modify the parties' final offers], which would defeat the purpose of a final-offer selection process."). Moreover, as explained in the NRPM, the Board's criteria for determining rate reasonableness and choosing between offers would be based, in part, upon consideration of the RTP and the Long-Cannon factors, ensuring that the Board would consider the relevant statutory standards. NPRM, EP 755 et al., slip op. at 10-11.[33]

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[31] See E.I. DuPont de Nemours & Co. v. CSX Transp., Inc., NOR 42099, slip op. at 14-15, 17-19 (STB served June 30, 2008); E.I. DuPont de Nemours & Co. v. CSX Transp., Inc., NOR 42100, slip op. at 11-13, 15-18 (STB served June 30, 2008); E.I. DuPont de Nemours & Co. v. CSX Transp., Inc., NOR 42101, slip op. at 10-12, 14-16 (STB served June 30, 2008).

[32] With respect to UP's focus on the public interest, as the Coalition Associations point out, UP loses sight of the fact that the Board is proposing to act here because shippers with small rate cases lack reasonable access to the Board's existing rate remedies—a situation which itself impinges on the public interest. (See Coalition Associations Reply Comment 11-12.)

[33] According to AAR, a procedure is not actually a final offer procedure unless there is a series of offers back and forth, narrowing the dispute before final offers are submitted to the

CN argues that, under FORR, the Board would not make a finding that the winning offer is the maximum reasonable rate. (CN Comment 9-10.) While CN is correct that the NPRM did not state expressly that the selected offer would be found to be the maximum reasonable rate, it is apparent from other language in the NPRM that it would be. See NPRM, EP 755 et al., slip op. at 10 ("Each party's final offer should reflect what it considers to be the maximum reasonable rate."). The Board now clarifies that if a FORR case reaches the final offer selection stage (i.e., the Board has found market dominance and that the challenged rate is unreasonable), the offer selected would be found to be the maximum reasonable rate.[34] Also, the Board clarifies that each party's final offer *must* reflect what it considers to be a maximum reasonable rate. (See UP Comment 16 n.8 (questioning the NPRM's use of "should" with respect to this issue).[35])

B. "Full Hearing" Requirement

AAR argues that FORR would not satisfy the "full hearing" requirement of 49 U.S.C. § 10704(a)(1), because, according to AAR, the Board "has tied [its] hands by artificially limiting [its] decisional range to two possibilities" and has not "retained [its] full decisionmaking powers." (AAR Comment 15-16.) AAR cites Morgan v. United States, 304 U.S. 1, 12 (1938), for the proposition that "Congress, in requiring a 'full hearing,' had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." (AAR Comment 15.) AAR contends that, just as a judge cannot reject "fundamental elements of a trial," the Board cannot "announce in advance that it will confine its decisional outcome to the parties' two proposals." (Id. at 15-16; see also CN Comment 10; AAR Comment in Response to Mem. 4, Aug. 12, 2020.)

In a 1984 decision, the ICC rejected an argument that a "full hearing" means a formal "trial-type" hearing under sections 556 and 557 of the Administrative Procedure Act (APA), noting that the phrase "full hearing" is not the same as the "on the record" language that is a significant factor in deciding whether formal hearing procedures are required. State Intrastate Rail Rate Auth.—Tex., 1 I.C.C.2d 26, 34-35 (1984). As the ICC observed, where a hearing on

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decision-maker. (See AAR Comment 22.) AAR provides no support for this statement. Canadian final offer arbitration, for example, does not require the model suggested by AAR. See Canada Transp. Act, S.C. 1996, c. 10, as amended, §§ 161(2), 161.1(1) (Can.). Accordingly, this feature is not universal and is not a defining feature of a final offer process.

[34] CN also implies that, under FORR, the Board would choose between final offers without first making a finding that the challenged rate is unreasonable. (CN Comment 9-10.) But the NPRM states exactly the opposite. NPRM, EP 755 et al., slip op. at 13.

[35] UP further argues that requiring a defendant's final offer to reflect what it considers to be the maximum reasonable rate "would in many cases require railroads to defend higher rates than they actually want to charge." (UP Comment 16 n.9.) The basis for UP's concern is unclear, given that defendant railroads routinely submit rate case analyses that produce R/VC ratios higher than the challenged rate, sometimes much higher. See, e.g., UP Opening Evid. 31, 61 & n.62 (citing workpaper with calculations), US Magnesium, L.L.C. v. Union Pac. R.R., NOR 42114. Railroads have not hesitated to defend those rates.

the record is not required, an agency has "considerable discretion to establish appropriate procedures." Id. (citing Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, 435 U.S. 519, 524 (1978) ("generally speaking," the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.")).

In denying a petition for review of the ICC's decision, the court of appeals rejected the appellant's contention that by requiring a "full hearing," the relevant statutory provision requires a formal hearing, affirming that such formality will "obtain only on the requirement of a 'hearing on the record.'" R.R. Comm'n of Tex. v. United States, 765 F.2d 221, 227 (D.C. Cir. 1985). Notably, the court held that where the formal hearing requirements of the APA are not triggered, the agency has "substantial flexibility to structure the hearings it must provide." Id. at 228 (quoting Sea-Land Serv., Inc. v. United States, 683 F.2d 491, 495 (D.C. Cir. 1982)). This required the ICC to "conduct whatever proceedings are necessary to ensure that it has sufficient information so that its final decision reflects a consideration of the relevant factors." Id. (quoting Sea-Land Serv., 683 F.2d at 496).

The Supreme Court has confirmed that agencies have such discretion. In Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990), the Court upheld a Pension Benefit Guaranty Corporation (PBGC) decision after a lower court had, among other things, found the decision arbitrary and capricious because the "PBGC's decisionmaking process of informal adjudication lacked adequate procedural safeguards." Id. at 644. The Supreme Court reversed, explaining that, per Vermont Yankee, "courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA" and that the court of appeals "did not point to any provision in [PBGC's governing statute] or the APA which gives [respondent] the procedural rights the court identified." Id. at 654-55. It concluded that PBGC's determination "was lawfully made by informal adjudication, the minimal requirements for which are set forth in the APA, 5 U.S.C. § 555, and do not include such [further] elements." Id. Here, AAR and other railroad commenters do not point to any language in §§ 10701(d)(3), 10704(a)(1), or otherwise, that restricts the Board's discretion to set a rate by selecting the best of two offers after it finds the challenged rate unreasonable and considers appropriate statutory principles.

AAR's reliance on Morgan, a decision that predates enactment of the APA, is also misplaced. Contrary to AAR's suggestion, the "full hearing" requirement, as interpreted in Morgan, speaks not to how an agency renders its decision, but rather to the parties' rights in agency adjudications to be "heard." FORR provides sufficient opportunity for parties to be heard and to critique opposing arguments, similar to parties' opportunities under other rate reasonableness procedures such as Three-Benchmark.

Morgan involved an order by the Secretary of Agriculture setting maximum rates to be charged at Kansas City stockyards. Morgan, 304 U.S. at 13. There, USDA opened an inquiry into the rates charged at the stockyards and collected a voluminous amount of evidence. Id. at 15-16. The Secretary of Agriculture held an oral argument to consider the evidence, but USDA's Bureau of Animal Industry (which was seeking to set the rates) submitted no briefing, and other than what it said at argument, "formulated no issues and furnished [the stockyard entities] no statement or summary of its contentions and no proposed findings." Id. at 16. The

Secretary denied a request by the stockyard entities for a tentative report, "to be submitted as a basis for exceptions and argument," and instead adopted findings prepared by the Bureau of Animal Industry, leaving the stockyard entities no "opportunity . . . for the examination of" those findings until after the Secretary had served his order. Id. at 17. In reversing a lower court that had affirmed the Secretary's order, the Supreme Court held that a "full hearing" includes "a reasonable opportunity to know the claims of the opposing party and to meet them." Id. at 18. It further held that "[t]hose who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." Id. at 18-19.

The concerns underlying the Supreme Court's decision in Morgan are not present with respect to FORR, under which both parties would have ample opportunity to be heard, with two rounds of briefing. Moreover, because the Board would confine its choice to one of two proposals (only after finding the challenged rate unreasonable), the defendant would know the complainant's claim and the rate that it might face should the Board select the complainant's offer, and would have an opportunity to respond to that offer. Even assuming Morgan survived enactment of the APA, which is not clear, FORR clearly satisfies its interpretation of a "full hearing."

C. Burden of Proof

AAR suggests that FORR would relieve the complainant of its burden of proof, because the Board would simply consider the burden carried if it selected the complainant's offer. (See AAR Comment 16.) However, this is not what the NPRM proposed. As described in the following section, the complainant must still meet its burden by establishing that the challenged rate is unreasonable. NPRM, EP 755 et al., slip op. at 13. And as made clear above, each party's final offer *must* reflect what it considers to be a maximum reasonable rate. The fact that a party's analysis of the reasonableness of the challenged rate would almost certainly be the same analysis supporting its offer does not mean the Board would simply pass by the rate reasonableness step. On the contrary, even if the complainant's offer is superior to the defendant's offer, the complainant would not prevail if it failed to prove that the challenged rate is unreasonable. See NPRM, EP 755 et al., slip op. at 12-13.

AFPM states that it does not "share STB's assertion that the burden of proof must always be on the complainant (e.g., rail shipper) and encourage[s] STB to consider scenarios where the burden of proof is on the rail carrier." (AFPM Comment 8.) However, the Board has long held that complainants bear the burden of proof in rate reasonableness proceedings. See, e.g., Union Pac. R.R., FD 35504, slip op. at 2; Duke Energy Corp. v. Norfolk S. Ry. (Duke/NS), 7 S.T.B. 89, 100 (2003).

WCTL states that the parties' presentations "may be akin to ships passing in the night, and the Board might find each method has merit." (WCTL Comment 10.) To address this issue, WCTL proposes that the Board follow the approach used in larger rate cases, in which shippers may select one of several "constraints" to prove entitlement to rate relief. (See id. at 10-11 (citing Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 534 n.35 (1985).) It asks that the

Board in FORR cases similarly allow the complainant shipper to select the governing methodology, so long as the Board finds the methodology, and final offer developed using that methodology, to be reasonable. (Id.) WCTL also notes that because complainants bear the burden of proof in rate reasonableness cases, "[i]t is only fair that the party with the burden of proof can select the maximum rate standard it chooses to utilize to prove its case, and that the Board accept this choice if it is reasonable and supported." (Id. at 11.)

WCTL apparently intends its proposal to apply in both the evaluation of the reasonableness of the challenged rate, and, if the challenged rate is found unreasonable, the selection of offers. But applying it in the selection of offers would eliminate the final offer element of FORR—rather than selecting between two offers, the Board would simply stop at the complainant's offer if it were "reasonable and supported." (See id. at 11.) The beneficial incentives and dynamics produced by a final offer process, discussed above and in the NPRM, would be unavailable. See NPRM, EP 755 et al., slip op. at 4-7. Nor would it be appropriate to apply WCTL's proposal to the evaluation of the challenged rate. Simply because a shipper may select one of several of the Board's established constraints to challenge a rate in a larger case, it does not follow that a shipper should be entitled to dictate the methodology used in an expedited FORR proceeding (potentially including a methodology of the shipper's own creation introduced for the first time in a particular case). A fundamental aspect of FORR is that the Board would provide more flexibility in methodologies and would consider both sides' proposed methodologies for evaluating the reasonableness of the challenged rate. WCTL's argument to the contrary, it would not be fair to the defendant to establish a principle dictating in advance the selection of the complainant's methodology in a FORR case even where there is persuasive evidence that the defendant's methodology yields a result that better satisfies the statutory standards.

D. Specific Scenarios Under FORR

Some railroad interests posit scenarios intended to show that FORR suffers from conceptual flaws that would prevent it from functioning properly.

In a purely hypothetical argument, AAR poses a scenario in which the complainant's offer is below the jurisdictional threshold, see 49 U.S.C. § 10707(d)(1)(A), and hence "impermissibly low," and yet the complainant otherwise proves that the defendant's offer—be it the challenged rate or otherwise—is unreasonable and hence "impermissibly high." (See AAR Comment 16-17.) As the NPRM pointed out, however, the Board may not set the maximum reasonable rate below the level at which the carrier would recover 180% of its variable costs of providing the service. NPRM, EP 755 et al., slip op. at 10 n.21. Given the either/or nature of a final offer process, a complainant would have to submit a final offer at or above the jurisdictional threshold to be entitled to relief, regardless of whether its methodology supports a lower rate.

UP claims that, in a FORR case, the Board could never select a railroad's final offer. (See UP Comment 11-14.) This claim starts from the incorrect premise that, in every case, "the railroad's final offer will be equal to or exceed the challenged rate." (See id. at 11-12, 21-22 (mistakenly assuming that discovery would be unfair to defendants because the railroad's final

offer and the challenged rate "will inevitably be the same").)[36] In the abstract, UP may not want to "conced[e] that the challenged rate is unreasonable," but in specific cases it could be an effective strategic decision for the railroad to offer a rate that is lower than the challenged rate but higher than the complainant's offer.[37]

UP also describes a hypothetical situation in which a complainant submits very compelling evidence that the challenged rate is unreasonable and no evidence whatsoever in support of its offer. (See UP Comment 15-16.) In that situation, UP argues, the Board would have to accept that unsupported (and unreasonably low) offer, because it cannot prescribe the challenged rate after finding it unreasonable. (See id.) UP again assumes, incorrectly, that a railroad's final offer must be identical to the challenged rate. Such a scenario is also extremely unlikely because it is implausible that a complainant's analysis producing an unsupported and unreasonably low rate could satisfy FORR's proposed decisional criteria to show that the challenged rate is unreasonable.

E. FORR's Encouragement of Settlements

The NPRM observed that a final offer procedure may help to encourage the private settlement of disputes. NPRM, EP 755 et al., slip op. at 7. AAR contends that, if FORR does encourage settlements, it will not create precedent that will guide parties in future disputes. (AAR Comment 20.) While AAR's observation may be true, at least in part, it fails to demonstrate a problem with FORR. Increasing the frequency of settlements, and therefore avoiding the cost and time of litigation, would be a better outcome for parties and the Board. See, e.g., U.S. Dep't of Energy v. Balt. & Ohio R.R., NOR 38302S et al., slip op. at 5 (STB served June 28, 2017) ("Wherever possible, the Board's longstanding policy is to encourage the private resolution of disputes through voluntary negotiations among all interested parties."). By contrast, if most disputes are litigated, that would be a less favorable development, even though precedent would develop more quickly.[38]

AAR also argues that it is unreasonable for a railroad to face the "coercive pressure" inherent in a final offer procedure, which is what encourages settlements. (See AAR Comment 21-22.) AAR asserts that the risks faced by shippers and railroads are not reciprocal,

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[36] UP also argues that a railroad concerned about its ability to defend the challenged rate would settle instead. (Id. at 13.) Settlement is possible, of course, but UP provides no support for the idea that it would *necessarily* happen—for example, the parties' positions could still diverge too much to allow for a negotiated resolution.

[37] This strategic decisionmaking is analogous to what happens in other types of litigation. In a SAC case, for example, a party can deliberately take a less aggressive position on an element of the analysis if it is concerned about its likelihood of success—a decision that changes what the party ultimately submits as the SAC rate.

[38] Without citing support, AAR claims that uncertainty would deter negotiated outcomes. (See AAR Comment 18; see also CN Comment 19; BNSF Comment 4-5, 8.) But the NPRM cited multiple sources supporting the opposite proposition. NPRM, EP 755 et al., slip op. at 5-7.

because the Board would never prescribe a rate higher than the challenged rate. (See id.; see also UP Comment 14-16, 18.)

This lack of reciprocity is a result of the Board's statutory mandate to regulate railroad conduct, rather than shipper conduct. See, e.g., 49 U.S.C. § 10704(a)(1) (authorizing the Board to prescribe a rate or practice for a carrier). It may be true that that statutory limitation could produce different incentives than parties have in other final offer procedures. But in proposing FORR, the Board has weighed the competing considerations and determined that FORR would provide sufficient benefits (see, e.g., NPRM, EP 755 et al., slip op. at 4-7) even if it were found not to afford the full settlement incentives present in certain other contexts.[39] Additionally, while the Board would not prescribe a rate higher than the challenged rate in a FORR case, as indicated in the NPRM,[40] there is still considerable risk to a complainant that brings an unsuccessful FORR case that the carrier may conclude based on the Board's evaluation of the economic analyses that it has more latitude to set a higher rate. And should the Board find the challenged rate has not been shown to be unreasonable in a given case, the Board's findings could have a preclusive effect on that complainant in subsequent litigation. See, e.g., Martin v. Garman Const. Co., 945 F.2d 1000, 1004 (7th Cir. 1991) ("Agency adjudications are afforded collateral estoppel effect, provided appropriate safeguards are met.") (citing United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 & n.18 (1966)). Finally, any lack of reciprocity is balanced by the defendant carrier's possession of market dominance—a prerequisite in any rate case before the Board, including FORR. See 49 U.S.C. § 10707.[41] The very existence of a rate case that satisfies the market dominance threshold indicates an inherent imbalance in bargaining power that favors carriers, while the statutory requirements that rates subject to market dominance be reasonable, and that the Board maintain simplified procedures for smaller cases, reflect Congressional intent to level this playing field. See 49 U.S.C. §§ 10701(d)(1), (3).

[39] In a related argument, AAR contends that FORR would have a detrimental effect on railroad revenue adequacy, outside the context of an individual dispute, because it would "creat[e] a coercive downward force on rates." (AAR Comment 25.) AAR provides no support for this claim. Although FORR is intended to encourage settlements, it would not require them, and any railroad may choose to defend its rate as reasonable. If a market dominant railroad does not believe its rate is reasonable, as required by 49 U.S.C. § 10701(d), then it should be incentivized to negotiate a lower rate. In other words, to the extent FORR would put downward pressure on high rates, it would function as a legitimate mechanism for indirectly enforcing the statutory requirement that rates subject to market dominance be reasonable.

[40] See NPRM, EP 755 et al., slip op. at 14.

[41] A complainant challenging a rate that is subject to market dominance (i.e., any complainant whose case under FORR reaches the rate reasonableness phase) would not have the options that UP assumes would be available to complainants. (See UP Comment 14-16 (assuming, for example, that if a complainant loses, it could simply choose not to move traffic under the rate that was at issue in the case, or that, "in many situations," the challenged rate is constrained by market forces).)

AAR also asserts—similar to its prior claims in opposing other efforts at reforming the Board's rate review processes[42]—that rates adopted through FORR settlements would become the basis for comparison groups in Three-Benchmark cases, "further driving railroad pricing down." (See AAR Comment 22-23.) That could be true, but the argument would apply whenever *any* shipper obtained a lower rate, either through a Board decision (using any rate reasonableness process) or a settlement. Indeed, any decision favorable to a shipper in a Three-Benchmark case, a process that AAR supports, would set the stage for similar decisions in other cases and similar arguments about so-called ratcheting. So, in essence, AAR is asserting that any rate reasonableness process—whether FORR or some other approach—that results in meaningful opportunities for shippers to show that rates are unreasonably high must be rejected because it could result in reduced revenues for the railroads. The Board will, of course, remain vigilant about the adequacy of railroad revenues,[43] but accepting an argument that it should not adopt any process that could provide meaningful rate relief would undermine the very law that the Board is bound to administer and enforce.

F. Comparisons to Canadian Final Offer Arbitration

CN argues that concerns regarding final offer arbitration are mitigated in Canada because the process and results are confidential and decisions are non-precedential, but that FORR lacks these features. (CN Comment 24; see also CSXT Comment 2.) While a certain degree of confidentiality and lack of precedent could enhance the benefits of a final offer process,[44] rate reasonableness decisions by the Board are precedential and made available to the public (with exceptions for certain confidential material). See 5 U.S.C. § 552(a)(2) (requiring that agencies make "available for public inspection" final opinions and orders made in the adjudication of cases); Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (noting that agency adjudications "constitute binding precedents"). In proposing FORR, the Board has weighed these considerations and, based on the record to date, concludes that FORR would provide sufficient benefit even without being confidential and non-precedential.

CN also states that Canadian final offer arbitration does not provide for reparations. (CN Comment 25.) In fact, Canadian final offer arbitration does provide monetary relief covering the pendency of the litigation, although, unlike reparations awarded by the Board, it cannot reach back two years prior to the complaint. See Canada Transp. Act, S.C. 1996, c. 10, as amended, § 165(6) (Can.). This difference is less significant than it might appear, because complainants in rate cases before the Board often wait to switch from a contract to a tariff rate until shortly before they file their complaints, to minimize the time they pay the tariff rate. See, e.g., Consumers

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[42] See AAR Suppl. Comment 10-11, Feb. 26, 2007, Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1) (predicting incorrectly that the Three-Benchmark approach would "inevitably result in an overall ratcheting down of rates towards an average").

[43] The Board is cognizant of the concern raised by the court in McCarty Farms Appeal that frequent and regular use of a comparison group approach could reduce rates to the lowest revenue to variable cost ratio used in the comparison group. See McCarty Farms Appeal, 985 F.2d at 597.

[44] (See TRB Professors Comment 5 & n.17.)

Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 1, 284 (STB served Jan. 11, 2018) (complaint filed in 2015; reparations calculation started from 2015). The reasonableness of those contract rates is not subject to challenge before the Board (see 49 U.S.C. § 10709(c)), meaning that, in practice, the reparations period often begins around the time the complaint is filed, rather than two years earlier.

CP states that Canadian final offer arbitration proceedings are complex and expensive for both parties, and that, because CP does not know what arguments shippers will make, it "must be overly expansive in its briefing, addressing all possible arguments that the complainant might raise." (CP Comment 5-8 (predicting that briefing in FORR cases will be overbroad, with parties submitting "a vast amount of materials").) Canadian final offer arbitration may be complex, but the more relevant issue here is how FORR compares to the Board's existing rate reasonableness processes. If it is sufficiently less costly than Three-Benchmark, for example, then it could still help to expand access to rate relief. Moreover, several shipper interests with member companies that have participated in Canadian final offer arbitration tout its success. (See, e.g., NGFA Comment 7 ("Some of NGFA's member companies have had successful experiences with the Canadian final offer arbitration procedures . . . ."); Farmers Union Reply Comment 2 ("In your practitioner's experience in working with Canadian researchers, we found that [final offer] procedures between shippers and carriers rarely went to fruition but were settled many times . . . .").) And none of the shipper interests have expressed concerns similar to those raised by CP, despite the fact that it is the shipper interests that support FORR based on its expected reduced cost and complexity.

PART IV – REVIEW CRITERIA

As noted above, the Board stated that, in reviewing offers, it would take into account the RTP, the Long-Cannon factors in 49 U.S.C. § 10701(d)(2), and appropriate economic principles. See NPRM, EP 755 et al., slip op. at 10-13.

Some shipper interests request additional information regarding the review criteria proposed in the NPRM, while railroad interests strongly oppose the proposal to rely on criteria as opposed to a defined economic methodology. The Board continues to propose a non-prescriptive, multi-factor test, which would apply in the rate reasonableness determination regarding the challenged rate and, if necessary, in selecting between the offers. See NPRM, EP 755 et al., slip op. at 10-12. But, to aid commenters on this SNPRM, the Board will provide some additional information about what it would expect to consider.

A. Additional Information Regarding Review Criteria

USDA asks the Board to be more explicit about the types of actions that would not satisfy the criteria. (USDA Comment 4.) Similarly, AFPM asks the Board to define "appropriate economic principles," and NGFA suggests that the Board provide a "more detailed discussion of the potential criteria and statutory standards." (AFPM Comment 7; NGFA Comment 10.) And while the Coalition Associations support the Board's proposal, they state that the absence of a specific economic methodology requires complainants to take a "leap of faith." (Coalition Ass'ns Comment 2.)

To mitigate this uncertainty, the Board will provide additional information here. First, parties seeking to satisfy the criteria might submit, for example, robust comparison group approaches, cross-subsidy analyses, analyses that incorporate market-based factors (see, e.g., BNSF Mem. 1-2 (Mtg. with Board Member Begeman); NGFA Reply 12, Aug. 20, 2020, Joint Pet. for Rulemaking to Establish a Voluntary Arb. Program for Small Rate Disps., EP 765), or new analyses relying on constrained market pricing (CMP) principles, which are discussed further below. The Board declines to propose to determine in advance whether specific methodologies (including those identified above) would satisfy the review criteria; rather, that determination would take place in individual cases, and submitting a methodology in one of these categories would not guarantee a party's success.[45] And this list is certainly not exhaustive; parties could also seek to satisfy the review criteria with methodologies that are not listed here. But parties who are uncertain about how to choose a methodology might consider one of these examples as a starting point.

Second, the Board clarifies that parties would not be expected to address every RTP factor, all of the Long-Cannon factors (see further discussion below), or every type of appropriate economic principle. In other proceedings, the Board and parties rely on the RTP factors that are relevant to the individual case, and the same would be true in FORR cases.

In particular, the Board would rely primarily on the RTP factors that have previously been relied on in the rate reasonableness context: the policy to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail, 49 U.S.C. § 10101(1); to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board, § 10101(3); and to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital, § 10101(6). See, e.g., Simplified Standards, EP 646 (Sub-No. 1), slip op. at 34 (relying on RTP factors (3) and (6)); W. Coal Traffic League—Pet. for Declaratory Ord., FD 35506, slip op. at 16-17 (STB served July 25, 2013) (relying on RTP factor (1) in distinguishing the Board's rate regulation from public utility regulation). To the extent parties seek to rely on RTP factors that have not been relied on in the rate reasonableness context, they must take care to demonstrate how those factors relate to the economic analysis of the reasonableness of the rate.

AAR argues that the Board does not provide enough detail on how it would protect revenue adequacy in a FORR case. (AAR Comment 24-25; see also CN Comment 13-14.) In a FORR case, if a party submits an analysis that fails to explain how it accounts for revenue adequacy—with regard to the reasonableness of the challenged rate as well as support for the offer—the party would be less likely to prevail. And if a party's analysis does not adequately

[45] The Coalition Associations describe a rate benchmarking methodology and argue that it would be appropriate to use in a FORR case. (See Coalition Ass'ns Comment 19-25.) The Board agrees with AAR, however, that this issue is beyond the scope of the proceeding, where the Board did not seek comment on particular methodologies. (See AAR Reply Comment 5-6.) The appropriateness of methodologies would be decided on a case-by-case basis under the proposed approach.

account for revenue adequacy, the opposing party could draw attention to this problem in its reply.

With respect to the Long-Cannon factors, the NPRM indicated that, in deciding between offers, the Board would give due consideration to (i) the carrier's efforts to minimize traffic transported at revenues that do not contribute to going concern value, (ii) the carrier's efforts to maximize revenues from traffic that contributes only marginally to fixed costs, and (iii) whether one commodity is paying an unreasonable share of the carrier's overall revenues, while recognizing the policy that rail carriers earn adequate revenues. NPRM, EP 755 et al., slip op. at 11. CN points to the Board's statement in a prior decision that there is "no feasible way to incorporate such an analysis into a method for resolving small rate disputes without raising litigation expenses and rendering the 'simplified' method too expensive," and implies that this discussion applied to the Long-Cannon factors in general. (See CN Comment 19-20 (citing Simplified Standards for Rail Rate Cases (Simplified Standards NPRM), EP 646 (Sub-No. 1), slip op. at 22 (STB served July 28, 2006)).) But in fact, in that decision the Board was referring specifically to the first factor, observing that rail capacity had become tight (as opposed to the excess capacity that existed when Staggers was enacted) and so "a railroad is not likely to carry any traffic that does not contribute to going concern value." See Simplified Standards NPRM, EP 646 (Sub-No. 1), slip op. at 22. Parties could choose to rely upon this conclusion in FORR cases, making the first Long-Cannon factor unlikely to be a significant aspect of the analysis, though parties could still address how it is accounted for in their proposed methodology.

Because the Board must give due consideration to the Long-Cannon factors when assessing the reasonableness of rates, parties should generally address how their methodologies would allow the Board to take the issues raised by these factors into account. As discussed above, parties may use Board precedent to make arguments about the degree and manner in which a particular factor should be considered by the Board in relation to a proposed methodology.[46]

Finally, appropriate economic principles would encompass Board and ICC precedent (also discussed further below), court precedent reviewing Board and ICC decisions, generally accepted economic theory (e.g., presented in experts' verified statements or citations to academic literature), and analogous economic regulatory materials from other tribunals, such as federal courts and agencies. Reliance on these sources would hardly be an innovation; parties and the Board already can and do cite Board precedent, for example, as well as academic literature and analogous materials from other tribunals. See, e.g., Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc., NOR 42121, slip op. at 220 (STB served Sept. 14, 2016) (relying on Board precedent); Consumers Energy Co., NOR 42142, slip op. at 19 n.20 (citing academic literature); AEP Tex. N. Co. v. BNSF Ry., NOR 41191 (Sub-No. 1), slip op. at 7-8 (STB served May 15,

[46] For example, the ICC described the Long-Cannon factors as "certain checks on obviously inefficient management." Coal Rate Guidelines, Nationwide, EP 347 (Sub-No. 1), slip op. at 10, 13-14 (ICC served Feb. 24, 1983); see also Coal Rate Guidelines, Nationwide (Coal Rate Guidelines), 1 I.C.C.2d 520, 540-41 (1985) (discussing the Long-Cannon factors in establishing the management efficiency constraint). Not every case would be likely to involve "obviously inefficient management," and parties may seek to explain why that is the case.

2009) (citing analogous federal court precedent). Expressly referencing these sources among the review criteria ensures that parties and the Board can continue to cite them in the same ways and with the same frequency that they do in other types of proceedings.

B. Vagueness Arguments

Citing FCC v. Fox Television Stations, Inc., 567 U.S. 239 (2012), AAR contends that FORR is unconstitutionally vague because railroads do not know in advance what the Board might find unreasonable, inasmuch as the methodology is chosen within the case—railroads will not know in advance how to conform their conduct to the demands of the law. (See AAR Comment 17-19; see also CN Comment 18-19; BNSF Comment 4-5, 7-8.) AAR also states that predictable application is necessary to prevent the adjudicator from acting in an arbitrary or discriminatory way. (AAR Comment 19.)

Although any agency standard must be sufficiently clear to pass constitutional muster,[47] Fox Television has little resemblance to the circumstances here. Unlike the FCC in that case, the Board here is not changing course mid-proceeding and purporting to regulate railroad conduct without providing notice of what that regulation requires. See 567 U.S. at 254. To the contrary, the Board is proposing procedural rules for the adjudication of railroad rates under the precise criteria established by statute. Following the Board's adoption of FORR, railroads would continue to be entitled under § 10701 to "establish any rate for transportation" over which they do not have market dominance. Where there is market dominance, railroads would also continue to be entitled to charge a rate so long as it is reasonable. The Board would also consider the reasonableness of rates challenged under FORR using the same statutory criteria and economic principles applied in past rate cases using other processes. The NPRM made clear that a railroad in a FORR proceeding may use "existing rate review methodologies" to defend the challenged rate or its final offer, as well as other methodologies that follow the applicable criteria. NPRM, EP 755 et al., slip op. at 12.

AAR's argument overstates the predictability of other types of litigation before the Board and understates the predictability of a FORR case. In almost every recent SAC case litigated to a merits decision, both shippers and railroads have raised novel issues, some of which reach the core of the SAC concept. See, e.g., Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113, slip op. at 140-42 (STB served Nov. 22, 2011) (accepting a new calculation proposed by the defendant railroad for use in the discounted cash flow analysis); Consumers Energy Co., NOR 42142, slip op. at 25-27 (addressing a new proposed method for traffic group selection); E.I. DuPont de Nemours & Co. v. Norfolk S. Ry., NOR 42125, slip op. at 282-84 (STB served Mar. 24, 2014)

[47] In Freeman United Coal Mining Co. v. Federal Mine Safety & Health Review Commission, 108 F.3d 358, 362 (D.C. Cir. 1997), a case cited by CN, the court noted that regulations need not achieve "mathematical certainty" or "meticulous specificity," and may instead embody "flexibility and reasonable breadth." Id. (quoting Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).) Applying these principles, the court found that the regulation at issue, which broadly required that mine structures "be maintained in good repair to prevent accidents and injuries to employees" was "sufficiently specific to provide notice . . . of the conduct that it required or prohibited." Id.

(accepting a new adjustment proposed by the complainant shipper to the terminal value calculation). Not all of these issues are purely matters of economic policy; many also require adjudication as to how a hypothetical railroad might operate differently than the defendant, an inherently non-quantitative weighing of evidence and argument. See, e.g., E.I. DuPont de Nemours & Co., NOR 42125, slip op. at 39-40 (requiring, for the first time, that a SARR carrying predominantly carload traffic account for car classification and blocking). Notwithstanding parties' posturing in negotiations before a rate case, (see BNSF Comment 8), they cannot predict the resolution of these novel, potentially case-dispositive issues in advance—nor can the Board, before the development of an administrative record. SAC, however, is not unconstitutionally vague and has been upheld on judicial review. See, e.g., Consol. Rail Corp v. United States, 812 F.2d 1444, 1456-57 (3d Cir. 1987); Potomac Elec. Power Co. v. ICC, 744 F.2d 185, 192-95 (D.C. Cir. 1984).

Adjudication of claims under 49 U.S.C. §§ 10702 and 11101, addressing the reasonableness of practices and the common carrier obligation, respectively, bears even greater resemblance to the approach proposed here. Each involves a case-specific, multi-factor analysis. See, e.g., CF Indus., Inc.—Pet. for Declaratory Ord., FD 35517, slip op. at 4-5 (STB served Nov. 28, 2012) (describing legal standard in unreasonable practice cases); Union Pac. R.R.—Pet. for Declaratory Ord., FD 35219, slip op. at 3-4 (STB served June 11, 2009) (describing legal standard in common carrier obligation cases).[48] The ICC and the Board have followed this approach for more than a century, with judicial approval, despite parties' inability to "know in advance what the Board might deem unreasonable" with the specificity that AAR would apparently require, (AAR Comment 17-18). See, e.g., Lake-and-Rail Butter & Egg Rates, 29 I.C.C. 45, 46-47, 49-51 (1914) (enforcing the common carrier obligation); Bodine & Clark Livestock Comm'n v. Great N. Ry., 63 F.2d 472, 477-78 (9th Cir. 1933) (affirming the ICC's determination regarding the reasonableness of a practice); Granite State Concrete Co. v. STB, 417 F.3d 85, 92-93 (1st Cir. 2005) (specifically affirming the STB's application of the legal standard).[49]

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[48] The factors in such cases can be quintessential examples of the "incommensurate interests" that CN found so problematic in its comment: for example, weighing safety considerations against the economic interests of a railroad or its customer. See CN Comment 20; see also, e.g., N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42119 (STB served Mar. 12, 2015); Bar Ale, Inc. v. Cal. N. R.R., FD 32821 (STB served July 20, 2001). The ICC and the Board have performed these analyses lawfully and with judicial approval, see, e.g., Granite State Concrete, 417 F.3d at 95-96, and without an advance explanation as to how they would balance potentially competing interests. Therefore, contrary to CN's argument regarding the Long-Cannon factors, (see CN Comment 20-21), regulating railroad practices or rates using a non-prescriptive, multi-factor test is not "void for vagueness" even if some of the factors are incommensurate interests. Cf. Gentile v. State Bar of Nev., 501 U.S. 1030, 1048-51 (1991). CN also does not support its attempt to analogize FORR to the situation in Gentile, a First Amendment decision that specifically addresses "[t]he prohibition against vague regulations of speech." See id.

[49] Even in a cost-of-service rate case before another agency, which bears greater resemblance to traditional utility ratemaking—a mode of regulation that has been established far

AAR characterizes FORR as distinct from these other agency processes in terms of predictability, implying that the Board has given no hint as to how it would reach a decision. (See AAR Comment 17-19; AAR Comment in Response to Mem. 5, Aug. 12, 2020.) That is not so; the NPRM stated the criteria that would apply in determining rate reasonableness,[50] and if necessary, choosing an offer.[51] These criteria would signal to parties what rates might be found unreasonable. For instance, if a defendant railroad is charging vastly more for the challenged traffic than it does for comparable traffic, if it is aware of costly inefficiencies that a new railroad would not adopt, or if its revenue from the challenged rate is out of proportion to its properly attributable capital requirements and other costs of service, (see BNSF Mem. 2 (Mtg. with Board Member Begeman)), then it could reasonably predict a lower likelihood of success in a FORR case.[52] In other words, there is a continuum of predictability with respect to litigation—rather than the binary distinction AAR proposes—and FORR is closer on the continuum to other types of litigation than AAR acknowledges. (See Olin Comment 11 (citing Board of Trade v. United States, 314 U.S. 534, 546 (1942) (ratemaking "is fluid and changing—the resultant of factors that must be valued as well as weighed")).) FORR's level of predictability, which is in line with unreasonable practice cases and other adjudications requiring the tribunal to weigh multiple factors, does not render it unconstitutionally vague.

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longer and with greater continuity than any of the Board's rate processes—the regulator or a reviewing court may change a significant component of the analysis within an individual litigation. See, e.g., United Airlines, Inc. v. FERC, 827 F.3d 122, 134-36 (D.C. Cir. 2016) (overturning agency's allowance of income taxes in cost of service for carriers structured as partnerships).

[50] AAR disagrees with similar reasoning proffered by Olin; AAR states that Olin "misses the point" because, "[i]n the rate context, the elastic term 'reasonable' has specific meaning." (AAR Comment in Response to Mem. 5, Aug. 12, 2020.) In this attempt to distinguish rate reasonableness from unreasonable practice cases and rulings on the common carrier obligation, AAR does not cite any statutes or case law. See id. AAR relies instead on an article, which does not even support the point for which AAR cites it, much less provide statutory or precedential support. See id. AAR further notes that, with respect to rate reasonableness, Congress has required the Board to account for railroad revenue adequacy and the Long-Cannon factors. See id. But the FORR process does account for these considerations. See NPRM, EP 755 et al., slip op. at 10-12.

[51] CSXT asserts that the NPRM "fails to set forth any substantive standard that it would use to choose between the 'final offers.'" (CSXT Comment 1.) No other commenter makes such a claim, for good reason: the NPRM directly stated the non-prescriptive criteria that would provide the substantive standard in FORR cases. NPRM, EP 755 et al., slip op. at 10-12.

[52] AAR does not address whether the discussion it cites from Paralyzed Veterans of America v. D.C. Arena, L.P., 117 F.3d 579, 584 (D.C. Cir. 1997) survives Perez v. Mortgage Bankers Association, 575 U.S. 92 (2015). (See AAR Comment 19.) It does not matter here, however, for the reasons stated above. Far from "promulgat[ing] mush," see Paralyzed Veterans, 117 F.3d at 584, the Board has proposed a test that requires the balancing of multiple factors stated in advance, as in other types of adjudication.

AAR states that, "it remains unclear whether the Board will even disclose *when deciding the case* the methodology it used to choose the winner." (AAR Comment 19.) To clarify, when deciding a case under FORR, the Board would explain the basis for its decision, as it does in every case. AAR's concern apparently stems from a comment made by the TRB Professors, who suggest that the Board can "fully . . . discharge its obligations without going into detail on the reasons it chose one offer rather than the other." (TRB Professors Comment 5.) However, in a FORR case, as in all other cases, the Board would have to provide enough detail to supply a reasoned basis for its decision. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Consequently, AAR's concern that the Board would issue FORR decisions without explaining its reasons for selecting one offer rather than the other, or on the reasonableness determination as to the challenged rate, is unfounded.[53]

AAR argues that, because FORR would rely on general criteria rather than a pre-determined methodology, FORR decisions would not provide useful guidance in future cases even if the Board did explain its reasoning. (AAR Comment 20.) It is a significant overstatement to claim, as AAR does, that FORR decisions would provide "little if any guidance" to future litigants. As parties observe which methodologies can be successfully employed within the constraints of FORR, they could adopt—and perhaps even improve upon—those methodologies in future cases. AAR appears to assume that each FORR case would involve a completely different methodology than any prior case. Such a development is possible, but parties have strong incentives to be guided by precedent, because it is more efficient to build on economic and legal work that has already been performed in prior cases. Also, parties to other proceedings involving case-specific, multi-factor tests can and do cite precedent on a regular basis. See, e.g., Ark. Elec. Coop. Opening Evid. & Arg. 4-5, Mar. 16, 2010, Ark. Elec. Coop.—Pet. for Declaratory Ord., FD 35305 (unreasonable practice case); UP Reply 31-38, May 5, 2015, Sherwin Alumina Co. v. Union Pac. R.R., NOR 42143 (common carrier obligation case).

C. Board Precedent

AAR asserts that any rate reasonableness process adopted by the Board must be "tethered to" CMP,[54] arguing that FORR deviates from "historic agency practice." (See AAR

[53] AAR claims that FORR would not require the parties' offers or supporting methodologies to incorporate the stated review criteria. (AAR Comment in Response to Mem. 3, Aug. 12, 2020.) However, as the NPRM explained, a party that disregards these criteria would likely lose, because the criteria will guide the Board's determinations. See NPRM, EP 755 et al., slip op. at 11. AAR fails to distinguish this situation from any other litigation, where a party can choose to submit pleadings that disregard the substantive principles governing the proceeding, but in doing so scuttle its own case.

[54] CMP, which the ICC adopted in Coal Rate Guidelines, contains three main constraints on the extent to which a railroad may charge differentially higher rates on captive traffic. The revenue adequacy constraint is intended to ensure that a captive shipper will "not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting its

Comment 14; see also CN Comment 11-14.) However, AAR overstates the degree to which the Board has adhered to CMP in developing previous rate reasonableness processes. In adopting the Three-Benchmark test, the Board stated:

> whether using an SAC analysis or CMP's alternative top-down approach (both of which are highly data-intensive), a CMP presentation can be quite expensive and thus not feasible where the amount of money at issue is not great enough to justify the expense. Accordingly, the ICC instituted this rulemaking in 1986 to search for simpler, less expensive procedures for assessing rate reasonableness in small cases.

Non-Coal Proc., 1 S.T.B. at 1008 (footnote omitted). The Board also explained the development of Three-Benchmark as follows: "the ICC decided that it must find some means other than CMP to meet the dual objectives of enabling a railroad to differentially price its traffic and protecting a complaining captive shipper from bearing an undue share of a carrier's revenue requirements." Id. at 1012-13. The Board concluded that "other procedures can, and indeed must, be made available for those cases in which CMP simply cannot be used—because the traffic is so infrequent or widely dispersed that it is not susceptible to a SAC presentation or because the case is so small in value that the substantial expense of a CMP presentation (whether through the top-down approach or SAC's bottom-up approach) cannot be justified." Id. at 1021 (footnote omitted).

Similarly, when the ICC began the inquiry that led to the Three-Benchmark test, it explained that its Coal Rate Guidelines decision, the source of CMP, might not be a good fit outside the circumstances for which it was developed: "[Coal Rate Guidelines] arose out of a request to set rate standards for high-volume shipments from newly-developed reserves in the Western United States. We acknowledge that the specifics of the guidelines finally adopted are particularly well suited to high-volume, long-term movements, where the cost and complexity of rate regulation are not disproportionate to the public and private interest in developing economically efficient rates." Rate Guidelines—Non-Coal Proc., EP 347 (Sub-No. 2), slip op. at 1-2 (ICC served May 21, 1986).[55]

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current and future service needs." Coal Rate Guidelines, 1 I.C.C.2d at 535-36. The management efficiency constraint is intended to protect captive shippers from paying for avoidable inefficiencies (whether short-run or long-run) that are shown to increase a railroad's revenue need to a point where the shipper's rate is affected. Id. at 537-42. The SAC constraint is intended to protect a captive shipper from bearing costs of inefficiencies or from cross-subsidizing other traffic by paying more than the revenue needed to replicate rail service to a select subset of the carrier's traffic base. Id. at 542-46.

[55] In the Simplified Standards NPRM, the Board stated that, "while this Three-Benchmark approach would not replicate directly the results of a SAC analysis, it would import that constraint indirectly by comparing the challenged rate against rates for other potentially captive movements that are constrained by some form of the SAC test." Simplified Standards NPRM, EP 646 (Sub-No. 1), slip op. at 28. That characterization, however, relied directly on the eligibility criteria that the Board had initially proposed (because the criteria would ensure that most rates were not eligible for Three-Benchmark, meaning that most rates in a comparison

To be sure, Three-Benchmark's revenue-to-variable cost (R/VC) benchmark tests are meant to account for "all of the relevant statutory and economic principles," while meeting the Board's "dual objective" of both permitting differential pricing and protecting captive shippers from bearing an undue share of a railroad's revenue requirements. Non-Coal Proc., 1 S.T.B. at 1012-13, 1041.[56] These are the same objectives that support CMP. Id. at 1012-13. AAR argues that, unlike SAC or Three-Benchmark, FORR does not account for "market-driven outcomes and principles." (AAR Comment 14; see also BNSF Comment 7.) The FORR review criteria, however, expressly account for these factors. See NPRM, EP 755 et al., slip op. at 10-11. If a complainant's FORR presentation does not adequately account for the necessity of demand-based differential pricing, for example, it likely would be unable to prove that the challenged rate is unreasonable.

According to AAR, the Board's existing processes have been fine-tuned through notice and comment and judicial review, and the Board has not provided a reasoned explanation for its departure from those established methods. (AAR Comment 14-15; see also BNSF Comment 5-6; CN Comment 14.)[57] However, the FORR proposal arose in the context of the agency's long and difficult search for a solution for smaller rate disputes, and the NPRM explained in detail the reason for its proposal. See NPRM, EP 755 et al., slip op. at 3-4, 6-7, 17. Again, the Board and the ICC have already recognized the need for non-CMP methods, and FORR expressly accounts for "the basic economic principles that have long guided the Board in judging the reasonableness of rates," (AAR Comment 15). BNSF argues in addition that, under FORR, a party could "select only the favorable elements of an existing methodology while discarding less favorable elements (including essential procedural protections)." (BNSF Comment 5-6.) However, if a party relies on a modified version of an existing methodology that deviates from the principles identified in the NPRM as review criteria, the party is less likely to succeed on rate reasonableness, and if necessary, selection of an offer. And if a party's

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group would be constrained by SAC, see id.)—and the Board chose not to adopt those criteria in the final rule. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 89-94.

[56] BNSF argues that approaches relying on R/VC ratios, including the 180 R/VC threshold, are inaccurate. (See BNSF Comment 4.) This resembles a position adopted by the TRB Professors in their report, but as the TRB Report acknowledges, reliance on R/VC ratios (at least for market dominance) is built into the statute and would require the enactment of legislation to remove. See TRB Rep. 134-35. Also, even if BNSF were correct, its argument would support the Board's adoption of FORR: the Board's existing rate processes all rely on R/VC ratios, and although some FORR cases might also use R/VCs (depending on the methodology selected), it is likely that not all FORR cases would do so.

[57] CN cites McCarty Farms Appeal to argue that "the unexplained jettisoning of CMP cannot pass for reasoned decision-making." (CN Comment 14.) But in McCarty Farms Appeal, the court concluded that the ICC had not sufficiently explained its adoption of a particular comparison-group methodology only after finding that the methodology had "no evident connection" to the statutory goals undergirding CMP, including railroad revenue adequacy. Id. at 595-99. By contrast, in resolving a dispute under FORR the Board would account for the relevant statutory criteria, including (as explained further below) revenue adequacy.

submission is deficient, as BNSF appears to contemplate, the opposing party can explain this deficiency in its reply.

Finally, AFPM argues that "appropriate economic principles" should not include agency precedent because the industry has changed dramatically due to consolidations. (AFPM Comment 7.) The Board disagrees. Board and ICC precedent would have value in the FORR small dispute context—it constitutes a significant part of the agency's implementation of Staggers and ICCTA, establishes important concepts, and has been tested on judicial review[58]—and that is true even if the specific methodologies developed and implemented in prior cases do not turn out to be the ones used in a given FORR case.[59]

PART V – DISCOVERY AND PROCEDURAL SCHEDULE

Railroad interests raised concerns with the NPRM's proposed approaches to discovery and the FORR procedural schedule. Shipper interests proposed several changes to these approaches. Below, the Board addresses the comments and changes proposed in this SNPRM in response to comments.

A. Discovery

In the NPRM, the Board proposed to disallow litigation over discovery disputes in FORR cases. NPRM, EP 755 et al., slip op. at 8. Instead, the Board proposed to take any unreasonable withholding of relevant information into account in choosing between the offers—for example, by giving less weight to an argument that could be undercut by the information that was withheld or by making other adverse inferences. Id. Railroad interests strongly oppose the proposal to rely on adverse inferences rather than motions to compel. (See AAR Comment 3, 18-19; BNSF Comment 6-7; UP Comment 23.) The Coalition Associations also oppose this proposal and recommend instead that the Board adopt an expedited process for motions to compel. (Coalition Ass'ns Comment 10-11; see also UP Comment 23 ("if the Board were to move forward with FORR, it would have to develop actual procedures for resolving discovery disputes.").) Other shipper interests, while not directly opposing the proposal, question how it would apply. (See AFPM Comment 5-6; NGFA Comment 7-8, 10.)

The Board acknowledges the concerns raised over the use of adverse inferences and recognizes that a motion to compel procedure would present a more exacting means of resolving

[58] See, e.g., Consol. Rail Corp v. United States, 812 F.2d 1444 (3d Cir. 1987); BNSF Ry. v. STB, 526 F.3d 770 (D.C. Cir. 2008); BNSF Ry. v. STB, 748 F.3d 1295 (D.C. Cir. 2014).

[59] Also, contrary to AFPM's suggestion, much of the cited precedent was developed after industry consolidation. See, e.g., Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 1 S.T.B. 233 (1996) (merger); CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., 3 S.T.B. 196 (1998) (acquisition and division of assets); Rep. on Rate Case Rev. Metrics, 3d Quarter 2021, available at https://www.stb.gov/wp-content/uploads/Report-on-Rate-Case-Review-Metrics-Third-Quarter-October-1-2021.pdf (listing 19 rate case dockets that reached merits decisions after 1998); Simplified Standards, EP 646 (Sub-No. 1) (one of several rate reasonableness rulemakings completed after 1998).

discovery disputes. Therefore, although it detracts from the Board's goal of a highly expedited procedural schedule, the Board proposes to remove the use of adverse inferences and instead adopt a process for motions to compel similar to the Coalition Associations' proposal.

Under the proposed process, each party would be permitted to file a single motion to compel that aggregates all of the discovery disputes with the other party. (Coalition Ass'ns Comment 10.) A motion to compel would need to explain how the requested material is relevant either to a methodology that the party may present in its opening submission or to market dominance. Each party's motion to compel, if any, would have to be filed on the 10th day before the close of discovery (or, if not a business day, the last business day immediately before the 10th day). The procedural schedule would be tolled while motions to compel are pending. (Id.) Each party would be permitted seven days to reply to the other party's motion to compel, but in the interest of expediting the schedule (and contrary to the Coalition Associations' proposal), replies to replies would not be permitted. (See id.) The Board would issue a decision in 10 business days. Upon issuance of a decision on motions to compel, the procedural clock would resume, and any party ordered to respond to discovery would have to do so within the remaining 10 days in the discovery period. (See id.) The Board also proposes to grant the Coalition Associations' request to extend the discovery period from 21 days to 35 days; otherwise, with motions to compel now permitted, parties would have to file such motions after only 11 days of discovery. (See Coalition Ass'ns Comment 9-10; AAR Comment 23 (expressing concern that FORR would provide too little time for record development).) Because parties would be able to use motions to compel for discovery enforcement, the Board would not adopt the NPRM's alternative procedure involving adverse inferences.[60] Despite this addition, parties should seek to resolve discovery disputes among themselves rather than filing motions to compel. See 49 C.F.R. § 1114.31(a)(2)(i) (motions to compel in stand-alone cost and simplified standards rate cases—which would now include FORR—must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to answer discovery to obtain it without Board intervention).

Both NGFA and AFPM ask the Board to provide more guidance as to what parties should produce in discovery in FORR cases. (See NGFA Comment 7-8, 10; AFPM Comment 5-6.) The Board understands NGFA's and AFPM's interest in reducing uncertainty with respect to discovery. But the material a party seeks in discovery depends to a significant extent on the methodology it plans to present. Above, the Board describes examples of methodologies that a party might present in a FORR case; information in support of one of these methodologies would be a type of material that parties could seek in discovery, provided that it is appropriately limited in scope and production burden given the brief discovery period. See NPRM, EP 755 et al., slip op. at 8 ("narrowly tailored, targeted discovery requests based on the information that the other side could reasonably be expected to provide in a short period of time, focusing on the key information needed to prove or defend a rate case"). The Board confirms, as suggested by NGFA, that a complainant may notify the defendant of the data and information it intends to

[60] Though the Board no longer proposes to adopt the adverse inferences discussed in the NPRM, the Board notes that, in the event a party does not comply with a Board order on a motion to compel, the provisions of 49 C.F.R. § 1114.31(b) would apply in a FORR proceeding.

seek in discovery at the same time it provides notice of its intent to file a complaint. (NGFA Comment 9-10.)

The Coalition Associations argue that, because rate reasonableness methodologies could involve revenue adequacy, the Board should make more years of waybill data available—enough to cover a business cycle. (See Coalition Ass'ns Comment 11-13.) The Coalition Associations are correct that, depending on the methodology a party chooses, more than four years of waybill data could be relevant. That would not be the case in every FORR proceeding, however, and the Board is mindful of the need to disclose no more confidential waybill data than necessary. See Proc. on Release of Data from the ICC Waybill Sample, 4 I.C.C.2d 194, 197-212 (1987). Therefore, four years of waybill data would be the default in FORR cases, but a party could request more years if special circumstances support such a request in an individual case. Also, as requested by the Coalition Associations, the Board confirms that, as in Three-Benchmark cases, waybill access (subject to appropriate protective orders) would include the full sample, including unmasked revenue. (See Coalition Ass'ns Comment 13.)

B. Procedural Schedule

AAR argues that the burden of FORR's short timelines falls disproportionately on the defendant, because the complainant can take as much time as it wants to prepare its case before initiating litigation. (See AAR Comment 23; see also BNSF Comment 7 (contending without explanation or citation of authority that the impact of these deadlines is contrary to complainants' burden of proof).) To a certain degree, AAR's arguments simply reflect the nature of litigation. A plaintiff in a civil action in court controls the timing of case initiation and therefore has essentially unlimited time to prepare its case (subject to the statute of limitations), because it decides when to file a complaint. The defendant in such a case has to prepare its response with limited time. And the Board notes that this situation exists in the Board's other rate reasonableness processes as well.

It is true that this imbalance may be more pronounced under FORR because the deadlines are shorter and the methodology more flexible. But this imbalance would be mitigated by the Board's proposal to extend the discovery deadlines and adopt a motion to compel process, as discussed above, and to require a mandatory mediation period, as discussed below. Moreover, the Coalition Associations point out that, unlike defendants, complainants must make their cases largely based on information in the possession of the opposing party. (See Coalition Ass'ns Comment 9.) In this regard, shorter discovery deadlines favor the defendants and further balance out the burden that railroad interests describe. In any event, even assuming that the procedural schedule in FORR might, in some cases, place a proportionately greater burden upon defendants than in other rate review processes, such a burden must be weighed against the likelihood that rate relief may be functionally unavailable in a small dispute.

In addition to proposing to lengthen several deadlines in the record development portion of a FORR proceeding, the Coalition Associations propose to reduce the Board's decision time from 90 days to 60 days. (Coalition Ass'ns Comment 8.) The Coalition Associations state as support the fact that Canadian final offer arbitration provides for decisions in as little as 30 days and no more than 60 days. (Id.) The Board declines to adopt this proposal. Canadian final offer

arbitration decisions are informal, confidential, non-precedential, and may be formulated by a single individual. See Canada Transp. Act, S.C. 1996, c. 10, as amended, § 161(1) (Can.) (arbitration is conducted by a single arbitrator unless the parties agree to have a panel of three arbitrators). FORR decisions, by contrast, would be public precedential decisions that must be supported by a majority of the Board, which can have as many as five decision-makers. Moreover, FORR decisions are subject to the requirements of the APA, including the requirement that the agency "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (internal quotation marks omitted).

In the NPRM, the Board proposed to omit mandatory mediation because it would add time and possibly expense but stated that the Board would be prepared to facilitate mediation if requested by the parties. NPRM, EP 755 et al., slip op. at 14. CN argues that this explanation does not account for an interest in mediation "to promote positive and mutually agreeable outcomes for the parties." (CN Comment 17-18.) NGFA, by contrast, argues that mandatory mediation is unnecessary in FORR cases. (NGFA Reply Comment 16.) NGFA asserts that, if a shipper reaches the point of filing a complaint, it has already reached an impasse in commercial negotiations with the railroad. (Id.) But the Board's mediation program has led to post-complaint settlements, to the benefit of the parties and the Board. See, e.g., Twin City Metals, Inc. v. KET, LLC, NOR 42168 (STB served Sept. 23, 2020). After reviewing the comments, the Board agrees with CN that mediation can produce substantial benefits, and is persuaded, based on the current record, that the possibility of achieving settlement through mediation would outweigh a modest lengthening of FORR's procedural timeline. See, e.g., Assessment of Mediation & Arb. Proc., EP 699, slip op. at 2, 4 (STB served May 13, 2013) ("The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, wherever possible. . . . If a dispute is amicably resolved, it is likely that the parties would incur considerably less time and expense than if they used the Board's formal adjudicatory process.") Therefore, the Board now proposes to include mandatory mediation in FORR cases, ensuring that FORR's mediation approach remains consistent with other rate reasonableness procedures.

To accommodate a 20-day mediation period, the Board will extend the pre-complaint notification period by 20 days beyond the time period proposed in the NPRM, to a total of 25 days. This timing is analogous to SAC, where mediation takes place between the pre-complaint notification and the filing of the complaint. See 49 C.F.R. § 1109.4. Also analogous to SAC, the mediation period in FORR cases would begin on the date of appointment of the mediator(s).[61] See § 1109.4(f). Both of these features—beginning mediation before the filing of the complaint, and having the mediation period run from the date of appointment of the mediator(s)—are intended to preserve as much as possible the expedited nature of the FORR procedures themselves.

[61] The Board would appoint a mediator or mediators as soon as possible after the filing of the notice of intent to initiate a case. Also, as in the Board's other rate case processes, parties would be required to meet or otherwise discuss discovery and procedural matters. In FORR cases, this discussion would be required to take place within three days after the complaint is filed.

The following procedural schedule is the result of the changes described:

Day -25	Complainant files and serves notice of intent to initiate case; mediation begins on date of appointment of mediator(s)
Day 0	Complainant files complaint; discovery begins
Day 35	Discovery ends
Day 49	Simultaneous filing of rate reasonableness analyses, final offers, and complainant's market dominance presentation
Day 59	Simultaneous filing of replies; defendant's market dominance reply
Day 66	Complainant's letter informing the Board whether it elects an evidentiary hearing on market dominance
Day 73	Optional telephonic evidentiary hearing before administrative law judge (market dominance)
Day 149	Board decision

The filing of a motion to compel by either party would toll this schedule as discussed above.

As stated in the NPRM, this timeline balances the need for due process—for example, allowing parties to reply to each other's submissions—and the Board's underlying goal of constraining the cost and complexity of rate litigation by limiting the overall duration of the proceeding. NPRM, EP 755, slip op. at 14.

To preserve the effects of the procedural limitations described above, requests for extensions of time would be strongly disfavored, even if both parties consent to the request. Therefore, parties are encouraged not to spend the scarce time available under this procedure on preparing extension requests. Joint requests to allow time to negotiate a settlement, including joint requests for additional mediation, are an exception and would be considered by the Board. A party would be permitted to accept the other party's final offer at any time.

Additional procedural schedule issues regarding market dominance are addressed below.

PART VI – MARKET DOMINANCE

A. Procedural Issues

The Board indicated in the NPRM that both complainant and defendant would be required to submit market dominance analyses as part of their simultaneous opening submissions. See NPRM, EP 755, slip op. at 12 ("On reply *parties* would not be able to modify

their market dominance presentations . . . ."), 14 ("Simultaneous filing of market dominance *presentations*") (emphasis added). The Board is concerned, however, that doing so would require the defendant to anticipate in this opening submission what the complainant might present regarding market dominance, without even knowing (as discussed below) whether the complainant has selected streamlined or non-streamlined market dominance. Accordingly, the Board proposes to revise the procedure so that only the complainant—as the party with the burden—is required to submit market dominance evidence on opening. Only the defendant would be required to address market dominance on reply. This approach is aligned with the pleadings in Three-Benchmark. See 49 C.F.R. § 1110.10(a)(2)(i)(F), (H).

The procedural schedule proposed above reflects two differences from the market dominance timeline established in Market Dominance Streamlined Approach, Docket No. EP 756. See 49 C.F.R. § 1111.12. The complainant's letter informing the Board whether it elects an evidentiary hearing would be due seven days after the filing of replies, rather than 10 days, in recognition of FORR's expedited schedule. Cf. § 1111.12(d)(2). And the hearing itself would be held 14 days after replies, unless the parties agree on an earlier date, rather than the date when the complainant's rebuttal evidence would be due, because FORR does not include written rebuttal evidence. Cf. id.

B. Option to Use Non-Streamlined Market Dominance

In the NPRM, the Board proposed that FORR could only be used if the complainant also elected to use the streamlined market dominance approach, which at that time was proposed in Market Dominance Streamlined Approach, Docket No. EP 756. NPRM, EP 755 et al., slip op. at 9. The streamlined market dominance approach has since been adopted. The Board stated that the streamlined market dominance approach "would complement and enhance the streamlined rate reasonableness procedure proposed here" and that "the expedited timelines proposed here may make it too difficult for parties to litigate a non-streamlined market dominance presentation." NPRM, EP 755 et al., slip op. at 9. However, the Board also recognized that "there may be merit to giving complainants the option of choosing between streamlined and non-streamlined market dominance in FORR cases," and expressly sought comment on whether complainants should have this choice. Id. at 9-10.

Some shipper interests advocate giving complainants such a choice, while others support the restriction of FORR to streamlined market dominance.[62] (See AFPM Comment 6 (supporting restriction); NGFA Comment 9 (same); Olin Comment 18 (FORR should not be restricted to streamlined market dominance; if non-streamlined market dominance proves to be an issue, the Board can address it later, e.g., by imposing page limits); Coalition Ass'ns Comment 13-15 (opposing restriction and proposing bifurcated pleadings when complainant chooses non-streamlined market dominance); NGFA Reply Comment 4 (NGFA does not object to the Coalition Associations' proposal); see also TRB Professors Comment 4 ("We see no rationale for this restriction. If complainants can make a showing of dominance in other ways without violating the FORR time limits, they should be permitted to do so.").)

[62] Railroad interests did not address this issue.

The Board is persuaded by Olin, the Coalition Associations, and the TRB Professors that complainants should have the option of choosing between streamlined and non-streamlined market dominance in FORR cases. Accordingly, the Board now proposes not to limit FORR complainants to streamlined market dominance. Limiting FORR in this way could effectively deny access to FORR for many potential complainants—those who are unable to satisfy one or more of the streamlined factors—which is contrary to FORR's goal of improving access to rate reasonableness determinations. Instead, complainants in this situation would be permitted to try to carry their market dominance burden using a non-streamlined presentation if they believe they can do so in the time available. See Mkt. Dominance Streamlined Approach, EP 756, slip op. at 1 ("It is established Board precedent that the burden is on the complainant to demonstrate market dominance."). The fact that complainants would have less time to do so in a FORR case does not diminish this burden; complainants choosing non-streamlined market dominance would still have to demonstrate "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).

Providing this choice is intended to ensure that FORR can proceed where market dominance can be established with relatively straightforward evidence (commensurate with the small disputes that FORR addresses with respect to rate reasonableness), even if the complainant is unable to use the streamlined approach. Whether market dominance is actually straightforward enough to allow a complainant to meet its burden in a very short time must be evaluated by the complainant; by choosing non-streamlined market dominance in a FORR case, the complainant would assume the risks presented by the short FORR timeline. Requests for extension of time would be strongly disfavored, as discussed above, even if the complainant chooses non-streamlined market dominance. Therefore, complainants should not choose non-streamlined market dominance with the expectation that the Board will grant extensions sufficient to allow them to assemble a market dominance presentation as voluminous as the ones in other rate reasonableness procedures.

The Board recognizes that defendants are likely to face a more difficult analysis in a case using non-streamlined market dominance, and unlike complainants, they may not have time to prepare in advance of litigation. Therefore, in cases where the complainant chooses non-streamlined market dominance, the deadline for replies would be extended by 20 days. The resulting 30-day interval between opening and reply aligns with Three-Benchmark cases, where complainants may also elect to use non-streamlined market dominance. See 49 C.F.R. § 1111.10(a)(2)(i)(H).[63]

[63] The Board rejects the Coalition Associations' proposal to add a separate round of pleadings for market dominance. (See Coalition Ass'ns Comment 14.) The Coalition Associations make this proposal in response to the Board's concern that that "the expedited timelines proposed here may make it too difficult for parties to litigate a non-streamlined market dominance presentation." NPRM, EP 755, slip op. at 9. But for reasons explained above, the Board has proposed a different approach to address this concern. Moreover, the Coalition Associations' proposal, which would add three more rounds of pleadings (market dominance opening, market dominance reply, and market dominance rebuttal), (see Coalition Ass'ns Comment 14), is disproportionate to FORR, which is intended to be simplified and expedited.

Complainants must state their choice of streamlined or non-streamlined market dominance in their opening market dominance submission. See Mkt. Dominance Streamlined Approach, EP 756, slip op. at 37 ("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.").[64]

The following procedural schedule would apply in cases where the complainant elects non-streamlined market dominance:

Day -25	Complainant files and serves notice of intent to initiate case; mediation begins on date of appointment of mediator(s)
Day 0	Complainant files complaint; discovery begins
Day 35	Discovery ends
Day 49	Simultaneous filing of rate reasonableness analyses, final offers, and complainant's market dominance presentation
Day 79	Simultaneous filing of replies; defendant's market dominance reply
Day 169	Board decision

The filing of a motion to compel by either party would toll this schedule as discussed above.

PART VII – RELIEF CAP

In the NPRM, the Board proposed to establish a relief cap of $4 million, indexed annually using the Producer Price Index, which would apply to an award of reparations,[65] a rate prescription or any combination of the two. NPRM, EP 755 et al., slip op. at 16. This is consistent with the potential relief afforded under the Three-Benchmark methodology.[66] Id. The

[64] Because complainants would not state their choice between streamlined and non-streamlined market dominance until their opening submissions, see Mkt. Dominance Streamlined Approach, EP 756, slip op. at 37, it would be impractical to extend the deadline for opening submissions in cases using non-streamlined market dominance as the Board has done for replies. Such an increase would be inappropriate in any event, because expedited timelines are part of the core concept of FORR, and because it is the complainant's choice to use non-streamlined market dominance.

[65] The standard reparations period reaches back two years prior to the date of the complaint. 49 U.S.C. § 11705(c) (requiring that complaint to recover damages under 49 U.S.C. § 11704(b) be filed with the Board within two years after the claim accrues).

[66] As proposed, the relief cap would incorporate indexing that has previously been applied to the Three-Benchmark cap, so that the cap for FORR is the same as the cap for Three-Benchmark.

Board further proposed that any rate prescription be limited to no more than two years unless the parties agree to a different limit on relief. NPRM, EP 755, slip op. at 14. Such a limit would be one-fifth of the 10-year limit applied in SAC cases and less than half of the five-year limit applied in Simplified-SAC and Three-Benchmark cases, see Expanding Access to Rate Relief, EP 665 (Sub-No. 2), slip op. at 6, thereby accounting for the expedited deadlines of the FORR procedure. The Board also requested comment on the advisability of a two-tiered relief procedure in which the top tier has a longer procedural schedule and no limit on the size of the relief. NPRM, EP 755 et al., slip op. at 16.

Railroad interests object to the proposed relief cap, arguing that it is too high. AAR argues that the $4 million relief cap is arbitrary because, in this context, it is not based on the cost of litigating the next-more-complicated method, on which the Board relied in setting relief caps for other rate reasonableness procedures. (AAR Comment 23; see also CN Comment 14-16; UP Comment 23-24.) The NPRM, however, explained why it would not make sense to rely on the next-more-complicated method here: "because FORR does not prescribe a particular methodology—nor a methodology necessarily less precise than any pre-existing procedure—the Board's prior rationale for capping relief based on the cost of the next more complicated procedure does not necessarily or neatly apply here." NPRM, EP 755 et al., slip op. at 15. And the NPRM also explained the Board's rationale for applying a $4 million relief cap: "[a]pplying a relief cap based on the estimated cost to bring a Simplified-SAC case would further the Board's intention that Three-Benchmark and FORR be used in the smallest cases, and applying the same $4 million relief cap, as indexed, would provide consistency in terms of defining that category of case." Id. at 16.

According to UP, putting FORR and Three-Benchmark into the same "small case" category does not make sense because the Board "justifies the adoption of the FORR procedure on the basis that it would be more affordable to litigate than the Three Benchmark test." (UP Comment 24.) Instead, UP argues, the FORR relief cap "should be designed to funnel into the Three Benchmark test," which UP suggests is the next-more-complicated procedure. (See UP Comment 24; see also CN Comment 15-16.)[67] UP assumes without support that the cost of a procedure is a perfect proxy for its accuracy, so that if FORR is less costly to litigate than Three-Benchmark, it must be less accurate. (See UP Comment 24 ("If the FORR procedure were just as expensive and accurate as the Three Benchmark test, there would be no need for the Board to adopt the proposed rule. . . . [T]he proposal's significant discovery limitations and abbreviated timeline . . . would inevitably sacrifice precision.").)[68] The Board disagrees. By applying fast

[67] CN states that the estimated cost of bringing a Three-Benchmark case is $250,000. (CN Comment 16 (citing Simplified Standards, EP 646, Sub-No. 1, slip op. at 32).) But the most recently reported estimate of the cost to litigate a Three-Benchmark case is actually $500,000, based on a case completed in 2010. See US Magnesium, L.L.C. Comment, V.S. Howard Kaplan 4, Oct. 23, 2012, Rate Regul. Reforms, EP 715.

[68] As part of an argument that a final offer procedure will increase the cost and complexity of rate cases, UP claims that "the 90 days the Board now proposes to grant itself to decide each case, see NPRM, EP 755 et al., slip op. at 14—the same amount of time as for a Three Benchmark case, see Simplified Standards, [EP 646 (Sub-No. 1),] slip op. at 23—appears

timelines and a simplified procedure, the Board intends that FORR would be less costly to litigate, but that does not inevitably mean the analysis is less accurate. Parties' ability to choose their methodology would allow the use of analyses that are equally accurate or more accurate, if the party presenting it can prepare the analysis quickly enough to present it in the time available.[69] This is to say that UP's argument unnecessarily forecloses the possibility that FORR will strike a better "balance" than Three-Benchmark between providing a "reasonably accurate methodology" while avoiding the expense associated with SAC. See BNSF Ry., 453 F.3d at 482.

CN argues that the $4 million relief cap is actually higher than the $4 million cap on Three-Benchmark because a complainant can use FORR every two years rather than every five years. (CN Comment 15-16.) CN is correct that FORR, as proposed, could be used more frequently than Three-Benchmark, but that difference is offset by the fact that a FORR complainant could only receive a rate prescription for two years rather than five years under Three-Benchmark. A FORR complainant may not be able to receive the full $4 million because its rate prescription expires at the two-year mark; a Three-Benchmark complainant, by contrast, would have three more years to receive the benefits of a prescription.

AAR also contends that the $4 million relief cap would not limit FORR to small cases because there is no limit on disaggregation of cases. (See AAR Comment 23-24 ("a large chemical company could file 100 simultaneous FORR complaints for the same rate for the transportation of the same commodity for 100 different origin and destination pairs and potentially win $4 million for each complaint.").) If disaggregation actually proved to be a problem, the Board could address it as it has committed to do in Three-Benchmark cases.[70] But as discussed below, the Board has not held that the mere filing of simultaneous Three-

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to be a recognition that deciding cases under the FORR proposal would require the evaluation of complex, competing evidentiary submissions." (UP Comment 19-20.) UP's expectation that FORR cases would present "complex analyses"—analogizing to Three-Benchmark, (id.)—undermines its argument in the context of the relief cap that FORR's procedural streamlining renders it less accurate than Three-Benchmark, (id. at 24).

[69] UP claims that "the Board also relies on the fact that Canada caps the relief available under its final offer framework," and yet the Board does not explain why FORR would have a higher relief cap than Canadian final offer arbitration. (UP Comment 24.) UP mischaracterizes the NPRM. The NPRM clearly referenced the Canadian relief cap in seeking comment on the two-tier idea; it did not "rel[y] on the fact that Canada caps relief" as support for the $4 million relief cap. NPRM, EP 755 et al., slip op. at 16. In any event, as discussed above, Canadian final offer arbitration is an informal, non-precedential process.

[70] See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 32-33 ("The limits on relief that we establish here do not include a mechanical mechanism to police against attempts to divide a large dispute into multiple smaller disputes. It is not clear that such a mechanism is necessary at this time. The Board has ample discretion to protect the integrity of its processes from abuse, and we should be able to readily detect and remedy improper attempts by a shipper to disaggregate a large claim into a number of smaller claims, as the shipper must bring these numerous smaller cases to the Board.").

Benchmark cases by the same complainant automatically constitutes "abuse" or "improper" disaggregation. See E.I. DuPont de Nemours & Co. v. CSX Transp., Inc., NOR 42099 et al., slip op. at 3-4 (STB served Jan. 22, 2008).

Shipper interests, by contrast, object to the proposed relief cap because they believe it is too low or that there should be no cap at all. (See Coalition Ass'ns Comment 15-17; AFPM Comment 9; Farmers Union Reply Comment 5; Olin Comment 15-16; USDA Comment 5-7; USW Comment in Response to Mem. 5; WCTL Comment 8-9; see also TRB Professors Comment 5 (arguing against a cap).)

The Coalition Associations argue that reparations should not apply towards the $4 million relief cap, suggesting that the Board could adopt a separate cap for reparations, or, if the cap applies to both reparations and rate prescriptions, it should be $8 million. (See Coalition Ass'ns Comment 15.) The combined cap that the Coalition Associations find confusing, (id.), is identical to the one adopted for Three-Benchmark in 2007:

> The limit on relief will apply to the difference between the challenged rate and the maximum lawful rate, whether in the form of reparations, a rate prescription, or a combination of the two. Any rate prescription will automatically terminate once the complainant has exhausted the relief available. Thus, the actual length of the prescription may be less than 5 years if the shipper ships a large enough volume of traffic so that the relief is used up in a shorter time.

Simplified Standards, EP 646 (Sub-No. 1), slip op. at 28. The Coalition Associations "agree that the FORR relief caps should be *no less than* the caps previously adopted for Three-Benchmark cases," although they argue that the cap in Three-Benchmark cases should be higher. (Coalition Ass'ns Comment 16 (citing the effects of rate bundling).) However, both changes to the relief cap for Three-Benchmark and determinations regarding rate bundling are outside the scope of this rulemaking. See NPRM, EP 755 et al., slip op. at 4 n.7.

The Coalition Associations assume that FORR cases would be lane-specific, with the relief cap applying to a single origin-destination pair. (Coalition Ass'ns Comment 16.) They argue that it would be unreasonable to require complainants to aggregate multiple origin-destination pairs into a single case under a single relief cap. (Id. at 16-17.) The Board intends to address this issue in a manner similar to its treatment in Three-Benchmark cases. There, the Board established that a complainant is not categorically precluded from filing multiple complaints at the same time, with the relief cap applying separately to each complaint. See E.I. DuPont de Nemours & Co., NOR 42099 et al., slip op. at 3 ("If DuPont wished to seek relief of up to $1 million on each individual rate for each origin/destination pair, it needed to file separate complaints for each."). However, the Board retained its discretion to prevent the use of Three-Benchmark as "a vehicle for adjudicating multiple parts of a larger dispute." Id. at 3-4; Simplified Standards, EP 646 (Sub-No. 1), slip op. at 32-33. The Board would anticipate doing the same with respect to FORR upon adoption.

The Coalition Associations further propose that, if a party presents a sufficiently rigorous rate methodology, it should be able to ask the Board to waive any FORR relief cap on a case-by-

case basis. (Coalition Ass'ns Comment 17; see also USDA Comment 6 (relief should be uncapped if the complainant can "demonstrate very convincingly the rate is exceptionally unreasonable.").) But the Board's purpose in proposing FORR is to fill a gap in the availability of rate reasonableness determinations for small disputes. As discussed below in reference to the two-tier idea, experiences litigating FORR cases may provide further insight into whether FORR could also work in the resolution of larger disputes. Therefore, although the Board will not propose the Coalition Associations' approach here, this concept or similar ones may be considered at a later time.

Several commenters express concern that defendants could "game" the relief cap by setting high initial rates such that any relief cap will be quickly exhausted, which would in turn free the railroad to charge the inflated rate for any remainder of the prescription period. (See Olin Comment 17; WCTL Comment 8-9; AFPM Comment 9.) The Board would anticipate addressing this conduct in individual cases should it happen, and the Board would retain the ability to revise its processes to counteract any abuses that may arise. WCTL cites Major Issues, in which the Board adopted a relief calculation—the Maximum Markup Methodology (MMM)—to foreclose the potential for abuse. (WCTL Comment 9 (citing Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 9-15 (STB served Oct. 30, 2006)).) But WCTL does not propose the adoption of MMM here, and its proposed solution—removing the relief cap—would disconnect FORR from its purpose as a small dispute resolution mechanism before there is case experience to support such a change. As WCTL notes, moreover, the Board adopted a case-by-case approach to this issue for its current small rate case procedures in Simplified Standards, which was decided almost a year after Major Issues. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 33. Olin proposes a different solution: using the expired contract or previously used tariff rates as the starting point for applying the cap on reparations and rate prescription. (Olin Comment 17.) Olin offers no explanation as to how this solution would work in practice. In any event, this may be an appropriate remedy in cases where abuses are shown to have occurred, but, consistent with Simplified Standards, the Board will not adopt Olin's proposal for all cases in advance.

USDA states that the Board's practice of using relief caps to "channel" disputes to the appropriate procedure, based on the cost of the next-more-complicated procedure, fails to account for potential complainants' uncertainty as to their likelihood of success in a rate case. (USDA Comment 5-6.) According to USDA, "it is not clear FORR logically fits into the same channeling structure as" the Board's existing rate reasonableness procedures. (USDA Comment 6.) USDA's second point directly supports the NPRM, which concluded that, "because FORR does not prescribe a particular methodology—nor a methodology necessarily less precise than any pre-existing procedure—the Board's prior rationale for capping relief based on the cost of the next more complicated procedure does not necessarily or neatly apply here." NPRM, EP 755 et al., slip op. at 15. For that reason, the Board has not based its proposed approach on its prior "channeling" practice here, instead relying on the rationale discussed above. Id. at 16 (rather than setting a cap based on the next-more-complicated procedure, the NPRM proposed a cap based on a general analogy to Three-Benchmark, given that Three-Benchmark and FORR are both intended for use in small rate disputes).

Finally, some commenters expressed support for the idea of a two-tiered relief procedure in which the top tier has a longer procedural schedule and no limit on the size of the relief. (See, e.g., AFPM Comment 10-11; Olin Comment 16; SMA Comment 11-12; TRB Professors Comment 5.) However, it would be premature to propose expanding FORR beyond its initial purpose, which is permitting access to rate reasonableness determinations for small disputes. In the future, the Board could assess whether FORR may be appropriate for larger disputes. Should that be the case, the Board could consider adopting a two-tiered process like the one referenced in the NPRM—or other ways of expanding FORR's application.[71]

Accordingly, the Board continues to propose the relief cap proposed in the NPRM.

PART VIII – MISCELLANEOUS ISSUES

A. InterVISTAS Report

AAR states that InterVISTAS Consulting Inc. (InterVISTAS), a consultant that prepared a report for the Board in 2016,[72] rejected Canadian final offer arbitration as providing no guidance for rate case alternatives, due to the confidentiality of that process. (AAR Comment 19-20.) AAR implies that InterVISTAS's conclusion supports AAR's position regarding FORR. (See id.) While the NPRM mentioned the Canadian system as an example of final offer procedures, it relied primarily on recommendations from USDA and the TRB Report. NPRM, EP 755 et al., slip op. at 2, 4, 6-7. Both USDA and the TRB Professors discussed the benefits of using a short procedural timeline, combined with a final offer process, in general terms, and did not limit themselves to describing the Canadian system. See USDA Reply Comment 5-7, Dec. 19, 2016, Expanding Access to Rate Relief, EP 665 (Sub-No. 2); TRB Rep. 138, 211-12; Tr. 24-25, Pub. Roundtable, Oct. 25, 2016.[73] The Board found both of these analyses persuasive, NPRM, EP 755 et al., slip op. at 4, 6-7, and InterVISTAS's reluctance to draw conclusions specifically from the Canadian process, because of its confidentiality, does not provide a reason to disregard them.

BNSF argues that InterVISTAS warned against simplification of Three-Benchmark or Simplified-SAC because it "risks moving the approaches further away from the bedrock CMP principles, undermine[s] the reliability of the tests, and would not necessarily incentivize shippers to use those tests." (InterVISTAS Rep. xvii; BNSF Comment 3 n.1; see also NSR Comment 1-4.) In the body of its comment, however, BNSF itself supports "further simplifications of existing STB mechanisms" notwithstanding this conclusion from InterVISTAS. (BNSF Comment 3, 9 ("Among the concepts that BNSF has supported is a

[71] This approach bears some resemblance to USDA's suggestion of a FORR "pilot phase." (See USDA Comment 5.)

[72] An Examination of the STB's Approach to Freight Rail Rate Regul. & Options for Simplification (InterVISTAS Report), InterVISTAS Consulting Inc., Sept. 14, 2016, available at https://www.stb.gov/wp-content/uploads/STB-Rate-Regulation-Final-Report.pdf.

[73] A transcript of this public roundtable is available on the Board's website at https://www.stb.gov/wp-content/uploads/TRANSC-Intervistas-Roundtable-Oct.-25-2016.pdf.

streamlined comparison group approach built on existing Three Benchmark methodology but using prescribed factors to minimize complexity of presentation and disputes.") In any event, the Board is not bound to follow the recommendations of particular studies.

B. Application to Class II and III Railroads

In the NPRM, the Board proposed that FORR would not be available to challenge purely local movements of a Class II or Class III rail carrier.[74] NPRM, EP 755 et al., slip op. at 16-17. However, FORR would be available in challenges where the movement involves the participation of a Class I railroad as well as a Class II or Class III railroad. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 101-02 (stating that excluding combined movements would shut out a significant portion of domestic rail traffic and could create perverse routing incentives).

Some shipper interests argue that, contrary to the Board's proposal, FORR should be available to challenge purely local movements of a Class II or Class III rail carrier. (See Coalition Ass'ns Comment 18; NGFA Comment 10; Farmers Union Comment 10.) AFPM states that it does not oppose expanding FORR to smaller carriers, but if that would delay implementation, the rule should be implemented in phases. (AFPM Comment 10.)

As the Board gains experience with the FORR procedure, the arguments made by these commenters could provide a reason to expand FORR to purely local movements of a Class II or Class III rail carrier. Based on the record to date, however, the Board is reluctant to allow the potential for smaller railroads to be the defendants in any initial cases under FORR. See, e.g., Am. Short Line & Reg'l R.R. Ass'n Comment 4-5, Feb. 26, 2007, Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1) (describing the impacts new rate reasonableness procedures would have on small railroads in particular). Accordingly, the Board proposes to retain the exclusion from FORR of purely local movements of a Class II or Class III rail carrier at this time.

C. Regulatory Impact Analysis

In his comment, the late Dr. Ellig proposed that the Board conduct a "regulatory impact analysis" (RIA), which is a form of a cost-benefit analysis, in these proceedings and in Market Dominance Streamlined Approach, Docket No. EP 756. (Ellig Comment 3-4; see also AAR

[74] Currently, Class III carriers have annual operating revenues of $40.4 million or less in 2019 dollars. Class II rail carriers have annual operating revenues of less than $900 million but in excess of $40.4 million in 2019 dollars. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds in decisions and on its website. 49 C.F.R. § 1201.1-1; Indexing the Annual Operating Revenues of R.Rs., EP 748 (STB served July 12, 2021) (the annual deflator factor for 2020 is 1.0000, meaning that the 2020 thresholds are the same as the thresholds stated in 2019 dollars). The Board recently modified the thresholds for classifying rail carriers by raising the Class I revenue threshold. See Mont. Rail Link, Inc.—Pet. for Rulemaking—Classification of Carriers, EP 763 (STB served Apr. 5, 2021).

Comment 25.)[75] Other parties did not comment on this proposal. While the Board need not conduct a formal RIA,[76] the Board is, as described throughout this decision, carefully weighing the benefits and burdens associated with particular aspects of the proposed FORR approach. See, e.g., supra at 8-11, 21-25, 34-38, 40, 42-43, 47.

D. Issues Outside the Scope of These Proceedings

Commenters raise several issues that are outside the scope of these proceedings. (See Coalition Ass'ns Comment 25-27 (asking the Board to move forward with reciprocal switching and bottleneck changes); AFPM Comment 10 (following the TRB Professors' recommendation, stating that the Board could order reciprocal switching as a rate case remedy); Olin Comment 13-15 (asking the Board to prohibit rate bundling); USDA Comment 4 (requesting a definition of revenue adequacy for purposes of rate reasonableness determinations).) Also, Farmers Union states that, "[i]n its August 31, 2016 decision in this proceeding [Expanding Access to Rate Relief, EP 665 (Sub-No. 2)], the Board said (at n.3) that it would address issues like standing and agricultural rate transparency in a subsequent decision." (Farmers Union Comment 9-10.) The Board notes that it has already issued a decision addressing standing and publication of rates for agricultural products. See Rail Transp. of Grain, Rate Regul. Rev., EP 665 (Sub-No. 1) et al., slip op. at 7-8 (STB served Dec. 29, 2016), recons. denied (STB served June 30, 2017).

DOCKET NO. EP 665 (SUB-NO. 2)

Unlike the universally negative reactions to the Board's comparison group proposal in the initial comments in Docket No. EP 665 (Sub-No. 2),[77] commenters more recently expressed

[75] AAR similarly argues that the Board failed to conduct a cost/benefit analysis of this rule, citing Executive Order 12866's requirement that executive agencies make a "reasoned determination that the benefits of the intended regulation justify its costs" and the Policies and Procedures for Rulemakings of the U.S. Department of Transportation (DOT). (AAR Comment 25.) The cited provision of Executive Order 12866 does not apply to "independent regulatory agencies," including the Board. See 49 U.S.C. § 1301(a); see also Vt. Yankee, 435 U.S. at 524-25, 543-48 ("Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."). In any event, and as noted above, the Board has carefully considered the need for regulatory reform, FORR's anticipated benefits and burdens, and alternative approaches, including the comparison group approach proposed in Docket No. EP 665 (Sub-No. 2).

[76] See Vill. 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 [APA] requires the Board to conduct formal cost-benefit analysis").

[77] See, e.g., AAR Comment 2, Nov. 14, 2016, Expanding Access to Rate Relief, EP 665 (Sub-No. 2) ("the Board should not proceed to propose new rules and should discontinue this proceeding."); NGFA Comment 7, Nov. 14, 2016, Expanding Access to Rate Relief, EP 665 (Sub-No. 2); ACC Comment 7-9, Nov. 14, 2016, Expanding Access to Rate Relief, EP 665 (Sub-No. 2).

some interest in that approach. (See, e.g., NGFA Comment 11; AAR Reply Comment 2, Jan. 10, 2020, Expanding Access to Rate Relief, EP 665 (Sub-No. 2).) However, the EP 665 (Sub-No. 2) comparison group proposal, FORR, and the arbitration program proposed in Docket No. EP 765 all seek to address the same issue: access to rate reasonableness determinations in small disputes. As long as the Board is moving forward with the arbitration program and/or FORR, it would not be an efficient use of administrative resources to pursue the comparison group proposal simultaneously—particularly in light of the possibility that some or all of its objectives might be better accomplished through modifications to the Three-Benchmark test rather than creating an additional comparison group approach. See ACC Comment 7-9, Nov. 14, 2016, Expanding Access to Rate Relief, EP 665 (Sub-No. 2). The Board therefore proposes to close Docket No. EP 665 (Sub-No. 2) but may revisit some of the ideas presented there depending on future developments and whether additional steps in the small rate dispute context appear necessary.

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. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, § 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities," § 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.[78] The Board explained that its proposed changes to its regulations would not mandate or circumscribe the conduct of small entities. The rule requires no additional recordkeeping by small railroads or any reporting of additional information. Nor do these 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, the latter of which the Board expects will be reduced through the use of this procedure.

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

[78] 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 C.F.R. part 1201, General Instructions § 1-1. See Small Entity Size Standards Under the Regul. Flexibility Act, EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting).

Regulatory Flexibility Act. NPRM, EP 755 et al., slip op. at 18 (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.

This SNPRM revises the rules proposed in the NPRM; however, the same basis for the Board's certification in the NPRM applies to the SNPRM. Therefore, the Board certifies under 5 U.S.C. § 605(b) that the SNPRM 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 proposes to modify 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 C.F.R. § 1320.8(d)(3) regarding: (1) whether the collection of information, as modified in the proposed rule in the Appendix, 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 questioned the factual basis for the Board's estimate that the adoption of FORR would result in four additional complaints per year. (Ellig Comment 12.) 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 FORR procedure would be new, the Board previously has adopted other rate reasonableness procedures. Based on its substantial experience with the complexities of prior rate reasonableness litigation, and how such complexities impacted the number of complaints filed each year, the Board estimated that it would receive approximately four additional complaints each year due to the FORR procedure. As no party submitted any specific information that would lead to a more precise estimate, the Board continues to find that the FORR procedure would likely lead to approximately four additional cases per year.

Dr. Ellig also commented 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 four additional complaints expected to be filed due to the FORR procedure. (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—and, with respect to FORR, downward adjustments based on FORR's procedural streamlining. See STB, Supporting Statement for Modification & OMB Approval Under the Paperwork Reduction Act & 5 C.F.R. 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.

If FORR is adopted, this modification and extension request of an existing, approved collection would be submitted to OMB for review as required under the PRA, 44 U.S.C. § 3507(d), and 5 C.F.R. § 1320.11.

List of Subjects
49 C.F.R. Part 1002
Administrative practice and procedure, Common Carriers, Freedom of information.

49 C.F.R. Part 1111
Administrative practice and procedure, Investigations.

49 C.F.R. Part 1114
Administrative practice and procedure.

49 C.F.R. Part 1115
Administrative practice and procedure.

It is ordered:

1. The Board requests comments on revisions to its proposed rule as set forth in this decision. Notice of this request for comment will be published in the Federal Register.

2. The procedural schedule is established as follows: comments on this decision are due by January 14, 2022; replies are due by March 15, 2022.

3. The general prohibition on ex parte communications is waived regarding matters related to this proceeding, between November 15, 2021, and February 23, 2022.

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

5. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz. Board Member Begeman dissented in part with a separate expression. Board Members Primus and Schultz concurred with separate expressions.

BOARD MEMBER BEGEMAN, dissenting in part:

During my tenure, I became convinced that not all shippers have a viable rate review process available to them at the Board, which was a driving factor in why I established the Rate Reform Task Force in 2018 while serving as the Acting Chairman. I know many stakeholders share in my frustration that, here we are, nearly four years since the Task Force went to work, and the Board has still not adopted a rate review process to enable shippers with smaller disputes to bring a rate case here. To continue, indefinitely, with the status quo is not acceptable. That is why I strongly dissent on today's decision to the extent it further delays adoption of a final rule to reform the Board's rate review regulations.

As interested parties may have gleaned through the Board's quarterly reports on Pending Regulatory Proceedings, the Board has had ample opportunity to adopt a final rule to provide a viable rate review process for smaller rate disputes, after proposing and receiving public comment on the FORR proposal in 2019 and 2020 and then developing a final rule for action in October 2020. But it takes the support of a Board *majority* for that much-needed final action. Until then, shippers, and particularly smaller shippers, are the ones who may be literally paying the price for the Board's inaction on a final rule. I am not okay with that.

Today's decision recognizes that, prior to the Task Force's creation, years of work had already been expended in trying to determine how the Board could best improve the accessibility of rate relief. Yet it was not until the Board proposed FORR that many stakeholders coalesced around a new rate review option. And while I support exploring the feasibility of a new voluntary arbitration program specific to small rate disputes and the effort to provide another alternative to litigation, that effort should not come at the expense of shippers' ability to pursue formal rate relief while consideration of an arbitration proposal plays out.

But rather than amending the Board's regulations today and finally ensuring that *all* shippers have access to Board rate review, the Board is instead issuing a supplemental notice of proposed rulemaking, even though a well-reasoned final rule was prepared by staff and ready for final Board action over a year ago. The only substantive change in today's decision from last year's draft final rule is permitting additional ex parte communications. It is my hope those meetings will finally convince a Board majority to vote in support of a final rule.

My time at the Board has almost run out, and I know some shippers may be thinking that theirs has too. I thank the Task Force, the great team of staff who prepared the FORR notice of proposed rulemaking and draft final rule, and the many stakeholders for their contributions to helping bring needed reform to the agency's rate review processes. Please don't give up.

BOARD MEMBER PRIMUS, concurring:

As I wrote in the EP 765 decision, the Board should implement FORR along with small rate case arbitration and should do so expeditiously. While I do not believe FORR to be the magic bullet that will solve all the network's rate challenges, it does represent a new and unique attempt to address an old and festering issue. For those who will nitpick or outright oppose this effort, I respond by saying no methodology is perfect and the Board should be given the flexibility and latitude to bring forth thoughtful solutions that may ultimately enhance the viability of our national rail network.

I would also like to acknowledge and applaud the work of our fellow Board member and past Chairman, Ann Begeman. In 2018, under her leadership, the Board established the Rate Reform Task Force, which ultimately laid the groundwork that resulted in the creation of FORR the following year. Ann's efforts then, and the efforts of the current Board under the leadership of Marty Oberman, are a testament to the Board's continued desire to work collaboratively to address some of the network's most pressing issues. As one of the Board's newest members, I am honored to be a part of this vitally important endeavor.

BOARD MEMBER SCHULTZ, concurring:

The Board is issuing two rulemaking proposals to provide a new option to resolve small rate disputes between railroads and shippers. Although I have concurred with issuing the supplemental notice of proposed rulemaking (NPRM) in this docket and voted for the arbitration program proposal in Docket No. EP 765, I am not in favor of the Board adopting both rules. I concurred with issuing this supplemental NPRM for two reasons. First, this proceeding began in 2019, well before I joined the Board in January of this year, and I have not had the opportunity to meet with stakeholders about the proposed rule. Issuing the supplemental NPRM and waiving the prohibition on ex parte communications will allow me to discuss the rule with stakeholders. Second, the Board is concurrently seeking public comment on a proposed rule in Docket No. EP 765, Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes, and I believe it is important for stakeholders to be able to review, and comment on, the text of both proposed rules at the same time.

I am of the firm belief that the arbitration program proposal in Docket No. EP 765 represents the better path forward for shippers and railroads alike. However, I welcome the opportunity to speak with stakeholders about the proposed final offer rate review program in this docket.

Appendix A

Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1002, 1111, 1114, and 1115 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1002—FEES

1. The authority citation for part 1002 continues to read as follows:

5 U.S.C. 552(a)(4)(A), (a)(6)(B), and 553; 31 U.S.C. 9701; and 49 U.S.C. 1321. Section 1002.1(f)(11) is also issued under 5 U.S.C. 5514 and 31 U.S.C. 3717.

2. Amend § 1002.2 by redesignating paragraphs (f)(56)(iv) through (f)(56)(vi) as (f)(56)(v) through (f)(56)(vii) and adding paragraph (f)(56)(iv) to read as follows:

§ 1002.2 Filing fees.

* * * * *

(f) * * *

Type of Proceeding	Fee
* * * * * * *	
PART V: Formal Proceedings:	
(56) A formal complaint alleging unlawful rates or practices of carriers:	
(i) A formal complaint filed under the coal rate guidelines (Stand-Alone Cost Methodology) alleging unlawful rates and/or practices of rail carriers under 49 U.S.C. 10704(c)(1)	$350.
(ii) A formal complaint involving rail maximum rates filed under the Simplified-SAC methodology	$350.
(iii) A formal complaint involving rail maximum rates filed under the Three Benchmark methodology	$150.
(iv) A formal complaint involving rail maximum rates filed under the Final Offer Rate Review procedure	$150.
(v) All other formal complaints (except competitive access complaints)	$350.
(vi) Competitive access complaints	$150.
(vii) A request for an order compelling a rail carrier to establish a common carrier rate	$350.

* * * * *

PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

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

49 U.S.C. 10701, 10704, 11701, and 1321

4. Amend § 1111.3 by revising paragraph (c) to read as follows:

§ 1111.3 Amended and supplemental complaints.

* * * * *

(c) *Simplified Standards*. A complaint filed under Simplified-SAC or Three-Benchmark may be amended once before the filing of opening evidence to opt for a different rate reasonableness methodology, among Three-Benchmark, Simplified-SAC, or stand-alone cost. If so amended, the procedural schedule begins again under the new methodology as set forth at §§ 1111.9 and 1111.10. However, only one mediation period per complaint shall be required. A complaint filed under Final Offer Rate Review may not be amended to opt for Three-Benchmark, Simplified-SAC, or stand-alone cost, and a complaint filed under Three-Benchmark, Simplified-SAC, or stand-alone cost may not be amended to opt for Final Offer Rate Review.

5. Amend § 1111.5 by revising paragraphs (a), (b), (c), and (e) to read as follows:

§ 1111.5 Answers and cross complaints.

(a) *Generally*. Other than in cases under Final Offer Rate Review, which does not require the filing of an answer, an answer shall be filed within the time provided in paragraph (c) of this section. An answer should be responsive to the complaint and should fully advise the Board and the parties of the nature of the defense. In answering a complaint challenging the reasonableness of a rail rate, the defendant should indicate whether it will contend that the Board is deprived of jurisdiction to hear the complaint because the revenue-variable cost percentage generated by the traffic is less than 180 percent, or the traffic is subject to effective product or geographic competition. In response to a complaint filed under Simplified-SAC or Three-Benchmark, the answer must include the defendant's preliminary estimate of the variable cost of each challenged movement calculated using the unadjusted figures produced by the URCS Phase III program.

(b) *Disclosure with Simplified-SAC or Three-Benchmark answer.* The defendant must provide to the complainant all documents that it relied upon to determine the inputs used in the URCS Phase III program.

(c) *Time for filing; copies; service*. Other than in cases under Final Offer Rate Review, which does not require the filing of an answer, an answer must be filed with the Board within 20 days after the service of the complaint or within such additional time as the Board may provide. The defendant must serve copies of the answer upon the complainant and any other defendants.

* * * * *

(e) *Failure to answer complaint*. Other than in cases under Final Offer Rate Review, which does not require the filing of an answer, averments in a complaint are admitted when not denied in an answer to the complaint.
* * * * *

6. Amend § 1111.10 by adding paragraph (a)(3) 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:
* * * * *

(3)(i) In cases relying upon the Final Offer Rate Review procedure where the complainant elects streamlined market dominance:

(A) Day -25—Complainant files notice of intent to initiate case and serves notice on defendant.

(B) Day 0—Complaint filed; discovery begins.

(C) Day 35—Discovery closes.

(D) Day 49—Complainant's opening (rate reasonableness analysis, final offer, and opening evidence on market dominance). Defendant's opening (rate reasonableness analysis and final offer).

(E) Day 59—Parties' replies. Defendant's reply evidence on market dominance.

(F) Day 66—Complainant's letter informing the Board whether it elects an evidentiary hearing on market dominance.

(G) Day 73—Telephonic evidentiary hearing before an administrative law judge, as described in §1111.12(d) of this chapter, at the discretion of the complainant (market dominance).

(H) Day 149—Board decision.

(ii) In cases relying upon the Final Offer Rate Review procedure where the complainant elects non-streamlined market dominance:

(A) Day -25—Complainant files notice of intent to initiate case and serves notice on defendant.

(B) Day 0—Complaint filed; discovery begins.

(C) Day 35—Discovery closes.

(D) Day 49—Complainant's opening (rate reasonableness analysis, final offer, and opening evidence on market dominance). Defendant's opening (rate reasonableness analysis and final offer).

(E) Day 79—Parties' replies. Defendant's reply evidence on market dominance.

(I) Day 169—Board decision.

(iii) In addition, the Board will appoint a liaison within five business days after the Board receives the pre-filing notification.

(iv) The mediation period in Final Offer Rate Review cases is 20 days beginning on the date of appointment of the mediator(s). The Board will appoint a mediator or mediators as soon as possible after the filing of the notice of intent to initiate a case.

(v) With its final offer, each party must submit an explanation of the methodology it used.

* * * * *

7. Amend § 1111.11 by revising paragraph (b) to read as follows:

§ 1111.11 Meeting to discuss procedural matters.

* * * * *

(b) *Stand-alone cost or simplified standards complaints*. In complaints challenging the reasonableness of a rail rate based on stand-alone cost or the simplified standards, the parties shall meet or otherwise discuss discovery and procedural matters within 7 days after the complaint is filed in stand-alone cost cases, 3 days after the complaint is filed in Final Offer Rate Review cases, and 7 days after the mediation period ends in Simplified-SAC or Three-Benchmark cases. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes.

8. Amend § 1111.12 by revising paragraphs (c) and (d) to read as follows:

§ 1111.12 Streamlined market dominance.

* * * * *

(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 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.
* * * * *

PART 1114—EVIDENCE; DISCOVERY

9. The authority citation for part 1114 continues to read as follows:

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

10. Amend § 1114.21 by adding paragraph (a)(4) to read as follows:

§ 1114.21 Applicability; general provisions.

(a) * * *

(4) Except as stated in § 1114.31(a)(2)(iii), time periods specified in this subpart do not apply in cases under Final Offer Rate Review. Instead, parties in cases under Final Offer Rate Review should serve requests, answers to requests, objections, and other discovery-related communications within a reasonable time given the length of the discovery period.

* * * * *

11. Amend § 1114.24 by revising paragraph (h) to read as follows:

§ 1114.24 Depositions; procedures.

* * * * *

(h) *Return*. The officer shall either submit the deposition and all exhibits by e-filing (provided the filing complies with § 1104.1(e) of this chapter) or securely seal the deposition and all exhibits in an envelope endorsed with sufficient information to identify the proceeding and marked "Deposition of (here insert name of witness)" and personally deliver or promptly send it by registered mail to the Office of Proceedings. A deposition to be offered in evidence must reach the Board not later than 5 days before the date it is to be so offered.

* * * * *

12. Amend § 1114.31 by revising paragraphs (a) and (d) to read as follows:

§ 1114.31 Failure to respond to discovery.

(a) *Failure to answer*. If a deponent fails to answer or gives an evasive answer or incomplete answer to a question propounded under § 1114.24(a), or a party fails to answer or gives evasive or incomplete answers to written interrogatories served pursuant to § 1114.26(a), the party seeking discovery may apply for an order compelling an answer by motion filed with the Board and served on all parties and deponents. Such motion to compel an answer must be filed with the Board and served on all parties and deponents. Except as set forth in paragraph (a)(2)(iii) of this section, such motion to compel an answer must be filed with the Board within 10 days after the failure to obtain a responsive answer upon deposition, or within 10 days after expiration of the period allowed for submission of answers to interrogatories. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(1) *Reply to motion to compel generally*. Except in rate cases to be considered under the stand-alone cost methodology or simplified standards, the time for filing a reply to a motion to compel is governed by 49 CFR 1104.13.

(2) *Motions to compel in stand-alone cost and simplified standards rate cases*.
(i) Motions to compel in stand-alone cost and simplified standards rate cases must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to answer discovery to obtain it without Board intervention.

(ii) In a rate case to be considered under the stand-alone cost, Simplified-SAC, or Three-Benchmark methodologies, a reply to a motion to compel must be filed with the Board within 10 days of when the motion to compel is filed.

(iii) In a rate case under Final Offer Rate Review, each party may file one motion to compel that aggregates all discovery disputes with the other party. Each party's motion to compel, if any, shall be filed on the 10th day before the close of discovery (or, if not a business day, the last business day immediately before the 10th day). The procedural schedule will be tolled while motions to compel are pending. Replies to motions to compel in Final Offer Rate Review cases must be filed with the Board within 7 days of when the motion to compel is filed. Upon issuance of a decision on motions to compel, the procedural schedule resumes, and any party ordered to respond to discovery must do so within the remaining 10 days in the discovery period.

(3) *Conference with parties on motion to compel*. Within 5 business days after the filing of a reply to a motion to compel in a rate case to be considered under the stand-alone cost methodology, Simplified-SAC, or Three-Benchmark, Board staff may convene a conference with the parties to discuss the dispute, attempt to narrow the issues, and gather any further information needed to render a ruling.

(4) *Ruling on motion to compel in stand-alone cost, Simplified-SAC, and Three-Benchmark rate cases*. Within 5 business days after a conference with the parties convened pursuant to paragraph (a)(3) of this section, the Director of the Office of Proceedings will issue a summary ruling on the motion to compel discovery. If no conference is convened, the Director of the Office of Proceedings will issue this summary ruling within 10 days after the filing of the

reply to the motion to compel. Appeals of a Director's ruling will proceed under 49 CFR 1115.9, and the Board will attempt to rule on such appeals within 20 days after the filing of the reply to the appeal.

* * * * *

(d) *Failure of party to attend or serve answers*. If a party or a person or an officer, director, managing agent, or employee of a party or person willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under § 1114.26, after proper service of such interrogatories, the Board on motion and notice may strike out all or any part of any pleading of that party or person, or dismiss the proceeding or any part thereof. Such a motion may not be filed in a case under Final Offer Rate Review. In lieu of any such order or in addition thereto, the Board shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Board finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

* * * * *

PART 1115—APPELLATE PROCEDURES

13. The authority citation for part 1115 continues to read as follows:

5 U.S.C. 559; 49 U.S.C. 1321; 49 U.S.C. 11708.

14. Amend § 1115.3 by revising paragraph (e) to read as follows:

§ 1115.3 Board actions other than initial decisions.

* * * * *

(e) Petitions must be filed within 20 days after the service of the action or within any further period (not to exceed 20 days) as the Board may authorize. However, in cases under Final Offer Rate Review, petitions must be filed within 5 days after the service of the action, and replies to petitions must be filed within 10 days after the service of the action.

* * * * *