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SERVICE DATE – LATE RELEASE MARCH 9, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 732

REVISED PROCEDURAL SCHEDULE IN STAND-ALONE COST CASES

Decided: March 7, 2016

AGENCY: Surface Transportation Board.

ACTION: Final Rules.

SUMMARY: The Surface Transportation Board (Board or STB) is revising its regulations by adjusting the procedural schedule in stand-alone cost (SAC) cases to conform with Section 11(b) of the Surface Transportation Board Reauthorization Act of 2015, P.L. 114-110 (2015) (STB Reauthorization Act). Because these administrative final rules amend agency practice and procedure, this action is exempt from the usual requirement for notice and an opportunity for public comment under 5 U.S.C. § 553(b)(A) of the Administrative Procedure Act (APA). These rules are not applicable to SAC cases filed before the STB Reauthorization Act's enactment date of December 18, 2015.

DATES: These rules are effective on April 8, 2016.

ADDRESSES: Information or questions regarding these final rules should reference Docket No. EP 732 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Nathaniel Bawcombe at (202) 245-0376. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: The Board is revising its regulations at 49 C.F.R. § 1111.8 so that the procedural schedule in SAC cases conforms with Section 11(b) of the STB Reauthorization Act.<sup>1</sup> The Board intends to address implementation of other parts of Section 11 separately—including initiating a proceeding to assess procedures that are available to parties in litigation before courts to expedite litigation and the potential application of any such procedures to rate cases. The Board will also determine whether additional changes to the SAC case process are necessary in order for the Board to meet the expedited timeline for a final decision established under the STB Reauthorization Act.

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<sup>1</sup> The Board is also revising the authority listed under Part 1111 to reflect the STB Reauthorization Act's redesignation of § 721 of Title 49 of the United States Code as § 1321.

49 C.F.R. 1111.8, Procedural schedule in SAC cases.

Section (a) will be revised to adjust the schedule in SAC cases to conform to the STB Reauthorization Act. Furthermore, to reconcile the SAC case schedule with determinations made in a prior rulemaking proceeding, the Board will amend its regulations to no longer require that the parties file evidence on the existence of product and geographic competition.<sup>2</sup> Also, in line with the practice before the Board in recent SAC cases, only the complainant will file opening and rebuttal evidence, and only the defendant will file reply evidence. Both parties will continue to file final briefs.

The Board considers the day the complaint is filed to be Day 0. The deadlines for the conference of the parties (Day 7 or before) and the defendant's answer (Day 20) will remain the same as under the current rules. The deadline for discovery will move from Day 75 to Day 150. The complainant will have an additional 15 days (for a total of 60 days) from the close of discovery to submit its opening evidence.

The defendant will continue to have 60 days from the deadline for opening evidence to file its reply evidence. The complainant will have an additional 5 days (for a total of 35 days) from the deadline for reply evidence to file its rebuttal evidence.

The Board is adding two additional deadlines to § 1111.8 in accordance with the STB Reauthorization Act. The first is that final briefs will be due 30 days after the deadline for rebuttal evidence.<sup>3</sup> The second is that the Board will issue its decision no later than 180 days after the close of the evidentiary record.

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<sup>2</sup> In 1998, the Board instituted a rulemaking proceeding to reconsider whether product and geographic competition should be eliminated as factors in determining market dominance in rail rate cases. The Board concluded that evidence of product and geographic competition should be excluded because such evidence was not required by 49 U.S.C. § 10707(a) and because of the substantial burden its inclusion imposed on the parties and the Board. Mkt. Dominance Determinations—Prod. & Geographic Competition, 3 S.T.B. 937 (1998). Accordingly, evidence regarding product and geographic competition has not been considered by the Board in market dominance determinations since that time.

<sup>3</sup> In order to expedite the adjudication of SAC cases, the STB Reauthorization Act provides that the Board must establish a schedule where final briefs are due “not later than 60 days” after the close of the evidentiary record. The purpose of the 30-day deadline for final

(continued . . . )

Because these changes relate solely to the rules of agency practice, procedure, and organization, they will be issued as final rules without requesting public comment. See 5 U.S.C. § 553(b)(A).

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-612, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Because the Board has determined that notice and comment are not required under the APA for this rulemaking, the requirements of the RFA do not apply.

#### List of Subjects

49 C.F.R. Part 1111

Administrative Practice and Procedure

Investigations

It is ordered:

1. The final rules set forth in the Appendix to this decision are adopted. Notice of the rules adopted here will be published in the Federal Register.
2. This decision is effective on the date of service. The rules are effective April 8, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

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( . . . continued)

briefs is to ensure that the Board has a full record of the parties' submissions as soon as practicable, thus facilitating a final decision.

## Appendix

### Code of Federal Regulations

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

#### **PART 1111 – COMPLAINT AND INVESTIGATION PROCEDURES**

1. Revise the authority citation for part 1111 to read as follows:

Authority: 49 U.S.C. §§ 10704, 11701, and 1321.

2. Revise § 1111.8(a) to read as follows:

#### **§ 1111.8 Procedural schedule in stand-alone cost cases.**

(a) *Procedural Schedule.* Absent a specific order by the Board, the following general procedural schedule will apply in stand-alone cost cases:

Day 0—Complaint filed, discovery period begins.

Day 7 or before—Conference of the parties convened pursuant to § 1111.10(b).

Day 20—Defendant’s answer to complaint due.

Day 150—Discovery completed.

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

Day 270—Defendant files reply evidence to complainant’s opening evidence.

Day 305—Complainant files rebuttal evidence to defendant’s reply evidence.

Day 335—Complainant and defendant file final briefs.

Day 485 or before—The Board issues its decision.