

STB EX PARTE NO. 627<sup>1</sup>MARKET DOMINANCE DETERMINATIONS —  
PRODUCT AND GEOGRAPHIC COMPETITION

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*Decided July 1, 1999*

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The Board denied (1) the petitions for reconsideration of the Association of American Railroads (AAR) and Union Pacific Railroad Company (UP); (2) the request of UP to consider product and geographic competition in the FMC proceeding; and (3) ordered that the new market dominance procedures are applicable to all pending and future cases.

## BY THE BOARD:

In the Spring of 1998, at the request of the leadership of our Senate oversight committee, we conducted hearings to examine issues of access and competition in today's railroad industry and the statutory remedies and agency procedures that relate to those matters.<sup>2</sup> In those hearings the shipper community expressed, *inter alia*, a widely shared concern that consideration of product and geographic competition in the market dominance analysis has placed unnecessary and exceedingly high obstacles in the path of the administrative rate complaint process, rendering that process virtually inaccessible as a practical matter. Accordingly, we instituted this rulemaking proceeding to determine whether our administrative process needed revision in this regard. After considering all the comments submitted and reviewing the experience gained in handling rate complaint cases that included issues of product and geographic competition, we concluded that a streamlining of the market dominance analysis was indeed needed. Thus, in *Market Dominance Determinations*, 3 S.T.B. 937 (1998) (*1998 Decision*), we decided that we would no longer consider evidence of product and/or geographic competition in determining whether a rail carrier has market dominance over the traffic involved in a rail rate complaint.

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<sup>1</sup> This case embraces No. 42022, *FMC Wyoming Corporation and FMC v. Union Pacific Railroad Company*.

<sup>2</sup> *Review of Rail Access & Competition Issues*, 3 S.T.B. 92 (1998), and *modified* May 4, 1998 (STB Served May 4, 1998).

On January 11, 1999, the AAR and its member railroads<sup>3</sup> filed a petition for reconsideration of the *1998 Decision*. UP also filed a separate petition for clarification or reconsideration of that decision. Numerous shipper parties<sup>4</sup> oppose the AAR and UP petitions.<sup>5</sup> Upon consideration of the railroads' arguments and the shippers' responses, we deny the requests for reconsideration and clarification.

In this decision, we also address the issue of the application of our *1998 Decision* to pending cases. In *FMC Corp. and FMC Wyoming Corp. v. Union Pac. R.R.*, Docket No. 42022 (STB served March 11, 1999) (*FMC*), we declined to rule on a pending motion to strike tendered evidence relating to product and geographic competition until we could consider the broader policy issue raised in the AAR and UP petitions for reconsideration of the *1998 Decision*.<sup>6</sup> Upon deciding here not to modify the *1998 Decision*, we clarify that the revised market dominance procedures are applicable to the pending *FMC* case and that we therefore will not consider the product and geographic competition evidence tendered by UP in that case. We find it unnecessary, however, to require UP to resubmit its opening evidence, as *FMC* suggests.

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<sup>3</sup> The Burlington Northern and Santa Fe Railway Company; Canadian National Railway Company; Canadian Pacific Railway Company; CSX Transportation, Inc.; Illinois Central Railroad Company; Kansas City Southern Railway Company; Norfolk Southern Railway Company; and Union Pacific Railroad Company.

<sup>4</sup> Ag Processing, Inc. (AGP); Edison Electric Institute, The Fertilizer Institute, The Society of the Plastics Industry, Inc., and Chemical Manufacturers Association, jointly; FMC Corporation; Idaho Power Company; National Grain and Feed Association (NGFA); The National Industrial Transportation League (NITL); North Dakota Public Service Commission, North Dakota Wheat Commission, and North Dakota Grain Dealers Association, jointly; PP&L, Inc. (PPL); and Western Coal Traffic League, National Mining Association, Texas Municipal Power Agency, City Utilities of Springfield, Missouri Salt River Project Improvement and Power District, and Northern States Power Company, jointly (WCTL).

<sup>5</sup> The following abbreviations are used to refer to pleadings filed in the rulemaking proceeding:

petitions for reconsideration - "Pet."  
reply to petitions for reconsideration - "Pet. Reply"  
opening comments - "Open."  
reply comments - "Reply"  
verified statement - "V.S."

<sup>6</sup> STB Ex Parte No. 627 and STB Docket No. 42022 have not been consolidated. Rather, for administrative convenience we resolve here both the broad challenges to our policy change and the more limited question of whether that policy change applies to pending cases, in particular the pending *FMC* case.

### A. Legal Requirements

AAR first argues that, as a matter of law, we are required by controlling precedent to consider product and geographic competition in the market dominance analysis. As we explained at some length in our *1998 Decision*,<sup>7</sup> we read the statute and relevant precedent as leaving for the agency to decide whether consideration of competitive pressures that are not specifically identified by the statute would be consistent with the long-standing Congressional directive to establish practical market dominance procedures, and with the more recent statutory directive to process rate cases more expeditiously. AAR's argument that we lack any discretion does not give weight or effect to Congress' express directive that the agency's market dominance procedures be "designed to provide for a practical determination without administrative delay."<sup>8</sup> Congress expected the market dominance procedures to be relatively uncomplicated, and specifically cautioned that the examination of whether effective competition exists should not involve "lengthy antitrust-type litigation."<sup>9</sup> Accordingly, courts that have examined the market dominance procedures have consistently recognized that the process must be administratively manageable.<sup>10</sup> Furthermore, the courts have appreciated that the design of administratively practical procedures was left to the agency<sup>11</sup> and that periodic reevaluation of the feasibility of such procedures "is an important feature of the administrative process."<sup>12</sup>

Concerns regarding practicality led our predecessor, the Interstate Commerce Commission (ICC), initially to limit the market dominance inquiry to an examination of intra- and intermodal competition, and that approach was

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<sup>7</sup> *1998 Decision*, at 938-42, 945-46.

<sup>8</sup> See former 49 U.S.C. 1(5) (1976).

<sup>9</sup> S. Rep. No. 499, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 47 (1976), reprinted in 1976 U.S.C.C.A.N. 61.

<sup>10</sup> *Atchison T.&S.F. Ry. v. ICC*, 580 F.2d 623, 633 (D.C. Cir. 1978) (*ATSF*); *Western Coal Traffic League v. United States*, 719 F.2d 772, 779 (5<sup>th</sup> Cir. 1983) (*en banc*) (*Western Coal*).

<sup>11</sup> *ATSF*, 580 F.2d at 639; *Western Coal*, 719 F.2d at 778; *Aluminum Co. of Amer. v. ICC*, 761 F.2d 746, 750 (D.C. Cir. 1985).

<sup>12</sup> *ATSF*, 580 F.2d at 640; see also, *American Trucking Ass'n v. Atchison, T&S.F. Ry.*, 387 U.S. 397, 416 (1967) ("Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."); *Western Coal*, 719 F.2d at 778 ("none can doubt the [agency's] authority to change its mind in light of experience").

judicially upheld.<sup>13</sup> The ICC later allowed the introduction of product and geographic competition evidence in the belief that such evidence could be handled practicably,<sup>14</sup> and that policy change was also judicially upheld.<sup>15</sup> Contrary to AAR's assertion,<sup>16</sup> however, the reviewing court in the latter case did not rule that any attempt to preclude consideration of product and geographic competition would violate the statute. Rather, the court did "not read the statute either to require or to forbid the consideration of geographic competition."<sup>17</sup> In other words, the reviewing court recognized the agency's broad discretion to design the market dominance procedures, affirmed the agency's discretion to change course, and then upheld the agency's decision to consider indirect competition.<sup>18</sup>

If Congress had meant to require the agency to consider indirect competition, as AAR suggests, Congress could easily have so specified. But it did not do so, either when the market dominance requirement was first enacted in 1976<sup>19</sup> or in any subsequent legislation. To the contrary, Congress has expressly reaffirmed the agency's "broad discretion" with respect to the

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<sup>13</sup> *ATSF*, 580 F.2d at 634. AAR incorrectly states that "the ICC never precluded *entirely* consideration of product and geographic competition." AAR Pet. at 3 (emphasis in original). In fact, the ICC's initial position was "that evidence of geographic and product competition be always and automatically excluded from every proceeding." *Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118, 130 (1981); *ATSF*, 580 F.2d at 634; *Western Coal*, 719 F.2d at 779.

<sup>14</sup> *Special Proc. for Finding Market Dominance*, 359 I.C.C. 735 (1979).

<sup>15</sup> *Western Coal*, 719 F.2d 772.

<sup>16</sup> AAR Pet. at 4.

<sup>17</sup> *Western Coal*, 719 F.2d at 783 (Rubin & Reavley, JJ., dissenting) (summarizing holding of majority opinion). AAR asserts that the court "went much further and found that any attempt to preclude consideration of product and geographic competition would violate the statute." AAR Pet. at 4-5. To the contrary, the court merely overturned the panel's holding "that the ICC lacked statutory authority to consider evidence of product and geographic competition" (719 F.2d at 777) and then deferred to the ICC's conclusion that consideration of product and geographic competition would be feasible. The court's decision is replete with references to that deference. See, e.g., *id.* at 779:

Refusing to set forth a rigid standard for determining when effective competition exists, Congress authorized the ICC to establish appropriate standards and procedures for determining when market forces suffice to regulate rail rates. The ICC is in the best position to determine whether product and geographic competition play a role in the day-to-day fluctuations in rail rates and whether consideration of such evidence is feasible within the requirements of the 4R Act.

<sup>18</sup> *Western Coal*, 719 F.2d at 780.

<sup>19</sup> Section 202, Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 35 (1976).

consideration of economic alternatives and our discretion to revise the market dominance standards as appropriate.<sup>20</sup> Accordingly, we reject AAR's arguments that the statute compels consideration of product and geographic competition in the market dominance determination.

#### B. Policy Considerations

Alternatively, AAR argues that, even though "[t]he Board has considerable discretion to manage the cases brought before it,"<sup>21</sup> we abused that discretion in the *1998 Decision*. AAR contends that the record in this proceeding and in prior cases<sup>22</sup> does not support our findings that consideration of product and geographic competition imposes substantial burdens on the rate complaint process, unduly complicating and impeding the processing of rate cases, and deters captive shippers from filing rate complaints. AAR also objects to our conclusion that the burdens on shippers and the agency from considering product and geographic competition far outweigh the burden on railroads from eliminating consideration of such competitive pressures. AAR contends that such a balancing of interests is impermissible under the statute and, in any event, that we did not properly assess the relative burdens.<sup>23</sup>

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<sup>20</sup> H.R. Conf. Rep. No. 422, 104 Cong., 1<sup>st</sup> Sess. 173 (1995), *reprinted in* 1995 U.S.C.C.A.N. 858.

<sup>21</sup> AAR Pet. at 17.

<sup>22</sup> In support of its petition, AAR appended summaries of various prior rate cases that is more than a simple recitation of the history of those proceedings; it is a 35-page extension of AAR's petition and, as such, exceeds the 20-page limit. *See*, 49 CFR 1115.3(d). We waive the page limitation and consider the AAR appendix to the extent that it addresses the case experience referred to in the *1998 Decision*. We also consider the verified statements of several shipper witnesses appended to their replies to the AAR's petition.

<sup>23</sup> AAR complains that the *1998 Decision* does not separately analyze the burden associated with considering each form of competition. However, as recent cases have shown, product and geographic competition are often blended, so that evidence of a hybrid form of competition is presented. *See, e.g., West Texas Utilities Company v. Burlington Northern RR Co.*, 1 S.T.B. 638 (1996) (*West Texas*); *Arizona Public Service Co. v. Atchison, T. & SF. Ry. Co.*, 2 S.T.B. 367 (1997) (*Arizona*); *FMC*. Indeed, it would be rare for a substitutable product to be available from exactly the same geographic source. *See, e.g., NITL Pet. Reply* at 15. Thus, issues of product substitution are generally interspersed with issues of geographic competition, and it is appropriate to discuss them together.

AAR's claim that the burdens associated with consideration of product and geographic competition have not been excessive<sup>24</sup> stands in sharp contrast to our own experience as well as the overwhelming evidence and argument submitted by the shipping community. AAR attempts to downplay the documented burdens by focusing on the time it took to complete discovery,<sup>25</sup> to compile the evidentiary record, or to issue decisions in individual cases,<sup>26</sup> and by counting the number of pages in particular decisions<sup>27</sup> that address product and geographic

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<sup>24</sup> AAR Pet., Appendix at 34-35. AAR concedes that in Docket No. 41670, *Shell Chemical Co. v. Boston & Maine Corp.*, the discovery associated with product and geographic competition evidence was quite protracted and contentious. See also, NITL Pet. Reply, V.S. of Felker (detailing burden associated with three years of discovery). AAR argues that the *Shell* case is the exception, however, not the rule.

<sup>25</sup> AAR suggests that, because the discovery and evidentiary phases of two recent cases — STB No. 41295, *Pennsylvania Power & Light Co. v. Consolidated Rail Corp.*, and STB No. 41989, *Potomac Elec. Power Co. v. CSX Transportation, Inc.* — were completed within the general time frames adopted in *Expedited Procedures for Processing Rail Rate*, 1 S.T.B. 857 (1996) and 1 S.T.B. 859 (1996) (*Expedited Procedures*), consideration of product and geographic competition was not unduly burdensome. But the evidence in this rulemaking demonstrates that meeting those deadlines in those cases imposed a significant resource burden on the shippers. The evidence details how taxing it was on shipper resources to respond to the railroad's product and geographic discovery requests and evidentiary submissions. PP&L Open. at 13-15; WCTL Pet. Reply, V.S. of Graves.

<sup>26</sup> AAR disputes our statement in the *1998 Decision* that it took years to make the market dominance determination in *Consolidated Papers, Inc. v. Chicago & N.W. Transp.*, ICC No. 37626 (*Consolidated Papers*). AAR Pet., Appendix at 11. But AAR's own summary of the case notes that after oral argument and the submission of written evidence, it took the ICC more than three years to issue a written decision resolving the market dominance issue. *Id.* at 14.

AAR also suggests that consideration of geographic competition in *Coal Trading Corp. v. Baltimore & O.R.R.*, ICC No. 38301S and in *Westmoreland Coal Sales Co. v. Denver & R.G.W.R.R.*, ICC No. 38301S (Sub-No. 1), "had little if anything to do with the complexity and duration of [those] cases." AAR Pet., Appendix at 5. But, as AAR acknowledges, the rate complaints remained pending while "lengthy consideration" was given to the issue of geographic competition in Ex Parte No. 346 (Sub-No. 7), *Railroad Exemption — Export Coal*. AAR Pet., Appendix at 6. Thus, the analysis of the competitive pressures on the export coal movements and the litigation that followed in *Export Coal* was directly responsible for the protraction of the *Westmoreland* and *Coal Trading* cases.

<sup>27</sup> AAR suggests that because the evidentiary presentations on product and geographic competition in the *West Texas* and *Arizona* cases were addressed in only two pages of our decisions, consideration of those issues was neither time consuming nor complicated. But the record in this proceeding and our experience in processing those cases are to the contrary. As we explained in the *1998 Decision*, in both cases the railroads argued that the coal-burning electric generation facilities could avoid using the rail carrier serving the facility by generating power at other plants and by purchasing power from the electric grid. This required us to delve extensively into the operations of the electric generation industry before reaching a conclusion on market dominance. The fact that we could ultimately explain the basis for our conclusion in only a few pages says nothing of the

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competition. These numbers alone do not, however, reflect the magnitude of the effort and resources — on the part of the Board and of the complaining shippers — that go into each stage of the process.

The initial, but by no means only, burden on the process has come from the inordinate amount of discovery that has been sought (and allowed) on the basis of the potentially far-ranging nature of the product and geographic competition inquiry.<sup>28</sup> From the shippers' perspective, substantial time and resources have been devoted to responding to such requests, whether by producing the requested materials or by objecting to the requests and seeking to impose reasonable limits on the scope of discovery.<sup>29</sup> Moreover, the prospect of confronting massive discovery requests and engaging in substantial discovery disputes clearly could dissuade (and we believe has dissuaded) some potential complainants.<sup>30</sup> In addition, resolution of these discovery disputes burdens this agency's resources. Administrative Law Judges (ALJs) must often be employed to oversee discovery<sup>31</sup> and appeals from their rulings must be addressed by the Board. In the pending *FMC* proceeding, for example, the procedural schedule was delayed substantially by the large number of discovery disputes pertaining to product and geographic competition issues, many of which required Board intervention to resolve appeals from an ALJ's discovery rulings and to curb further discovery.<sup>32</sup>

The very heavy burden on shippers from contending with product and geographic competition issues extends well beyond discovery. Contrary to AAR's contention, the record is replete with testimony from shippers that the burden of preparing evidentiary presentations in response to allegations of

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<sup>27</sup>(...continued)

effort that was required to sift through and analyze the evidence and competing arguments and to reach those conclusions. We note that in *Arizona*, we were also required to address the product and geographic competition arguments a second time in connection with the rail carrier's petition for reconsideration. *Arizona*, 3 S.T.B. 70 (1998).

<sup>28</sup> See, *1998 Decision*, at 945-47.

<sup>29</sup> AAR suggests that a large number of discovery questions is not a burden because such questions are "merely the starting point for discussions that allow the parties to hone in on information that is truly relevant." AAR Reply at 18. AAR does not acknowledge the effort and resources that must be expended to respond to, object to, and/or negotiate to weed out the less relevant inquiries.

<sup>30</sup> See, e.g., NGFA Pet. Reply at 8, 12; PPL Pet. reply at 7; NITL Pet. Reply at 10-11; WCTL Pet. Reply at 13-14; and AGP Pet. Reply 2-3.

<sup>31</sup> Because of staffing limitations, the Board has no ALJs in-house but rather must contract with other agencies to procure for a fee the services of an ALJ as needed.

<sup>32</sup> See, *FMC*, 3 S.T.B. 88 (1998) and served May 5, 1998.

effective product and geographic competition is quite substantial.<sup>33</sup> Product and geographic competition issues often involve non-transportation aspects of a shipper's business and, because the agency lacks extensive expertise in non-transportation industries, the burden on a shipper to fully educate the Board on its industry and its operations can be very great. Moreover, it can be relatively easy for a carrier to claim that a shipper can alter its business practices to avoid reliance on the service of a particular railroad, but much more burdensome for a shipper to demonstrate the impossibility or impracticality of such options.

The consideration of product and geographic competition also places a heavy burden on this agency. AAR concedes that consideration of indirect competition evidence can be "esoteric" and does not dispute that such evidence requires us to delve deeply into industrial operations that are far removed from the transportation industries that we oversee. It argues, however, that we are quite capable of resolving disputes over such issues as the feasibility of a shipper altering its current business practices in order to lower or contain its transportation costs,<sup>34</sup> and that consideration of such complex issues has not been problematic for the agency.<sup>35</sup> We are not afraid to tackle complex and difficult issues, and we recognize that, with enough time and resources, we can educate ourselves on the nuances surrounding a particular shipper's business, but such analyses are seldom simple (as the recently tendered evidence in the *FMC* case

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<sup>33</sup> AAR points to *Sierra Pacific Power Co. v. Union Pac. R.R.*, No. 42012, for the proposition "that claims of product and geographic competition have not been unduly burdensome to litigate." AAR Pet., Appendix at 32-34. But as AAR notes, the market dominance inquiry in that case was "addressed primarily to issues of intramodal and intermodal competition." As many of the cases have focused more heavily on product and geographic competition, that case does not provide support for AAR's position.

<sup>34</sup> AAR argues that the ICC's analysis of the non-transportation operations of the shippers' businesses in three cases mentioned in the 1998 Decision — *Aluminum Assoc. v. Akron, Canton & Youngstown R.R.*, ICC No. 37466, *Aluminum Co. of Amer. v. Burlington Northern, Inc.*, ICC No. 37715S, and *Consolidated Papers* — shows that these issues are manageable. As those cases demonstrate, however, complex non-transportation issues were involved, such as whether it was feasible to substitute glass or plastic containers for aluminum cans or whether different types of wood are substitutable in the paper production process. The inclusion of such matters, as to which the agency has no particular expertise, necessarily increases the difficulty of the analysis that must be performed and places significant demands on agency resources. In the 1980s (when the two *Aluminum* cases were decided) and in the early 1990s (when *Consolidated Paper* was decided), the ICC's staff was several times larger than the current Board staffing levels.

<sup>35</sup> See, AAR Pet. at 16; Appendix at 3.



demonstrates once again<sup>36</sup>) and they severely tax our limited resources. Thus, consideration of product and geographic competition makes it difficult for us to comply with the statutory directive to expedite rate cases.

Ultimately, the most troubling aspect of including an examination of product and geographic competition involves the widespread claims that captive shippers with legitimate concerns about the level of their rates are deterred from availing themselves of their statutory right to challenge those rates. While those claims cannot be documented, we do not doubt them, given the complexity and cost that consideration of these factors introduces into a proceeding. A railroad need not be able to prevail on its product and geographic competition arguments for the costs of litigating those issues — in terms of time, money, and other resources — to act as a barrier to rate complaints. We also note, while the evidence and arguments in this rulemaking have focused primarily on litigation in larger cases, the chilling effect is even greater for smaller cases. Where substantial traffic and large sums of money are not involved, it is readily apparent that the prospect of engaging in antitrust-type litigation<sup>37</sup> would impose an insurmountable barrier to the pursuit of a regulatory remedy.<sup>38</sup>

Notwithstanding the obvious substantial burdens on shippers and the agency of considering product and geographic competition in the market dominance determination, and the chilling effect on captive-shipper rate complaints, AAR contends that such factors are not entitled to any weight. AAR would have us accord paramount importance to the statutory policy favoring reliance on market-set rates where there is effective competition.<sup>39</sup> But “this [policy] must be read

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<sup>36</sup> In the *FMC* case, the carrier has tendered reams of non-transportation related market dominance evidence on such matters as: the substitutability of synthetic soda ash, caustic soda and recycled glass for natural soda ash in the production of glass; the impact of foreign competition on the transportation of domestic soda ash; the substitutability of metal and plastic containers for glass containers; the impact of soda ash “dumping” charges on the price that can be assessed for domestic rail transportation; the substitutability of natural sodium bicarbonate for sodium sesquicarbonate; the relative cost of producing phosphoric acid by the “purified wet acid” process or the “thermal” process; the impact of limitations on the use of phosphates in detergents and competition from zeolites (non-phosphorous containing chemicals) on the demand for phosphorous derivatives; and the impact of imported phosphorous derivatives on domestic rail rates. See, *FMC* case, UP opening evidence, vol. 1 (pages 20-35), vol. 2, 4, 5, 6, 9 and 10, filed January 15, 1999.

<sup>37</sup> It has long been recognized that consideration of product and geographic competition can transform the market dominance determination into a complex, antitrust-type proceeding. *ATSF*, 580 F.2d at 634 (product and geographic competition are highly complex issues); AAR Open. at 11-12 (acknowledging that product and geographic competition are basic antitrust tenets).

<sup>38</sup> See, AGP Pet. Reply at 2-3; AAR Pet. at 14.

<sup>39</sup> 49 U.S.C. 10101(1).

in conformity with the other provisions and policies of the Act.<sup>40</sup> Congress has also called for the market dominance determination to be a practical test,<sup>41</sup> for rate cases to be handled and resolved expeditiously,<sup>42</sup> and for shippers without competitive alternatives to have reasonable access to the rate complaint process.<sup>43</sup> Because these other policies can be frustrated by, and thus conflict with, a boundless market dominance inquiry, we must weigh and balance the competing policy objectives.

We are confident that we struck an appropriate balance in the *1998 Decision*. We do not believe that the relatively modest burden placed on the carriers by our revised policy — the burden of litigating a potentially frivolous case — outweighs the substantial burdens on the administrative process of continued consideration of product and geographic competition. Specifically, we are not persuaded that our revised policy will result in railroads having to defend rates where competition is effective and the resulting rate is reasonable.<sup>44</sup> Disaffected shippers are not likely to pursue a rate complaint when faster, less costly and more effective self-help is available in the marketplace. To the contrary, we have observed that, in the years since the regulatory reform of the late 1970s and early 1980s, shippers have adjusted to a primarily unregulated transportation marketplace and have become quite adept at using competitive leverage to obtain the best transportation rates and services.<sup>45</sup>

Thus, we believe that our revised policy should lead to additional rate complaints only where captive shippers have been deterred from challenging rates on market dominant traffic by the prospect of burdensome and protracted antitrust-style litigation. Given the statutory directive “to maintain reasonable rates where there is an absence of effective competition,”<sup>46</sup> defending against regulatory challenges to rates charged on captive traffic is not a new burden but rather one that already has been placed upon the railroads by the statute. Indeed,

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<sup>40</sup> *Coal Exporters Ass'n of the United States v. United States*, 745 F.2d 76, 98 (D.C. Cir. 1984).

<sup>41</sup> 49 U.S.C. 1(5) (1976).

<sup>42</sup> 49 U.S.C. 10101(15), 10704(d), provisions affirmatively added by Congress in the ICC Termination Act of 1995.

<sup>43</sup> 49 U.S.C. 10101(6).

<sup>44</sup> In any event, a “frivolous” case could in theory be brought regardless of whether we consider product and geographic competition in the market dominance analysis, and under our current rules, the carrier will need to file its entire case up front.

<sup>45</sup> See, e.g., AAR Open. at 19-22 (where competition is effective, railroads must offer reasonable rates or lose business).

<sup>46</sup> 49 U.S.C. 10101(6).

when existing rules create uneven and unfair burdens on the parties that come before us, we have the responsibility to amend the rules to level the playing field.

*C. Alternative Measures Suggested by the Railroads*

AAR argues that it is inappropriate to exclude consideration of product and geographic competition altogether because there are alternative means of reducing the burdens associated with them. AAR suggests that we could — presumably after another rulemaking — adopt presumptions as to the type of cases in which product and geographic competition would impose an undue burden and, in those cases only, restrict discovery and evidentiary presentations. In a similar vein, AAR suggests that we conduct a threshold screening test to determine at the outset of a case whether product and geographic competition are likely to be probative factors. (AAR does not identify the factors that it would have us apply under either of these proposals.) We fail to see how either proposal would simplify the processing of rate cases substantially or remove the existing deterrent to the filing of rate complaints by captive shippers. Under either procedure railroads would present potentially detailed and extensive submissions as to why product and/or geographic competition ought to be considered, and shippers would have to respond in kind. Thus, cases would still begin with substantial, hotly contested litigation over threshold issues of product and geographic competition and, if past history is any guide, our resolution of such issues would often be challenged on judicial review, extending the litigation over these issues.<sup>47</sup>

Alternatively, AAR suggests modifying the discovery that is available regarding product and geographic competition so as to reduce the discovery burdens to an acceptable level. Even if discovery could be satisfactorily curtailed,<sup>48</sup> however (our experience having been to the contrary), such measures

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<sup>47</sup> For this reason, even though in isolated cases consideration of geographic competition may be “less onerous than those associated with product competition” (AAR Pet. at 15-16), we decline to complicate proceedings by adopting a policy that would require threshold litigation in each case as to whether a particular type of indirect competition should be considered.

<sup>48</sup> Our own attempts to rein in the use of discovery as a litigation weapon in the *FMC* case were largely ineffective, and we ultimately had to foreclose any discovery on the issue of product and geographic competition. While acknowledging that discovery disputes have delayed the *FMC* case substantially, AAR argues that the delays occurred not because of the burden of producing such information but rather as a result of the shipper’s attempt to resist the production of such information. AAR misses the central point of our rulings in *FMC* — that it was improper for the railroad to use discovery to shift onto the shipper the railroad’s burden of identifying such forms of  
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would not relieve the shippers and this agency of the other substantial evidentiary and adjudicatory burdens discussed above, nor would the resulting chilling effect on potential regulatory challenges to rates on captive traffic be avoided.

AAR further suggests that limits on evidentiary presentation be imposed such as by limiting the use of expert witnesses. We fail to see how this measure would have a major impact. Experts would likely still be needed to analyze and develop responses to the opposing party's evidence and arguments, and indeed could be used to assist in preparing the testimony of company witnesses. Thus, we doubt that precluding the formal testimony of expert witnesses would significantly lessen the evidentiary burden.

Finally, UP suggests that we provide for case-by-case exceptions to the policy announced in the *1998 Decision* where a carrier provides assurances that (1) no discovery will be sought from the shipper on product and geographic competition, (2) the carrier will provide discovery on product and geographic competition matters to the shipper, and (3) no antitrust-type inquiry will result from the introduction of product and geographic competition evidence.<sup>49</sup> Again, rather than simplifying the market dominance inquiry, such a case-by-case approach would further complicate the process by requiring threshold litigation on whether the issues of product and geographic competition sought to be introduced would lead to an antitrust-type inquiry. Moreover, UP's proposal only addresses the discovery burden, not the evidentiary burden on the shipper of responding to the carrier's claims of product and geographic competition, nor the burden on the agency of analyzing those claims. For that reason, we have no confidence that UP's proposal would have a significant impact on the perceived inaccessibility of the rate complaint process.

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<sup>48</sup>(...continued)

competition and demonstrating their effectiveness.

<sup>49</sup> UP asserts that the *FMC* case meets these criteria. We disagree. As noted above (n.35, *supra*), UP has tendered detailed evidence and argument regarding competition for the shipper's products in foreign and domestic markets, the shipper's ability to substitute products, and the ability to change manufacturing processes. A substantial effort could be required on FMC's part to respond to, and on our part to evaluate, the plethora of non-transportation evidence related to the end-market use of the various products that are the subject of the rate complaint. This is precisely the type of evidence that we have no special expertise to evaluate and that prevents us from making an expeditious market dominance determination. Moreover, we fail to see how this would not be an antitrust-type inquiry. Thus, UP's proposed test would not support an exception in the *FMC* case.

#### D. Application to Pending Cases

Finally, UP argues that we are precluded from applying our revised policy to the *FMC* case. UP acknowledges that prior changes to the market dominance procedures have been applied to then-pending cases,<sup>50</sup> but argues that, under the Supreme Court's ruling in *Bowen*,<sup>51</sup> such revisions can no longer be applied to cases that are pending at the time the change is made.

The issue is whether application of the revised market dominance procedures would result in prohibited retroactivity. A new procedural rule generally "does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating [adoption of the procedure]."<sup>52</sup> Moreover, a policy change is not retroactive "merely because it \* \* \* upset[s] expectations based on prior law."<sup>53</sup> Rather, retroactivity depends upon "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event."<sup>54</sup> We must look to whether application of our revised policy would impair vested rights, increase liability, or impose new duties with respect to past conduct.<sup>55</sup>

UP argues that application of the *1998 Decision* to the *FMC* case would impair a right it had to charge any rate on traffic that is subject to effective product or geographic competition, free from constraint. We disagree. Under the statute, no railroad rates are unconstrained. Rather, railroad rates are

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<sup>50</sup> See, e.g., *Product and Geographic Competition*, 2 I.C.C.2d 1, 18 (1985). UP suggests that our delaying of the effective date of the *1998 Decision* for nearly a month after the service date of that decision demonstrates an intent on our part not to apply the new procedures to pending cases. That is not true. Our routine practice is to delay the effective date of our decisions in order to allow for the filing of stay petitions; the delayed effectiveness has no bearing on whether changes to our procedures should be applied to pending cases. Indeed, the ICC's previous revisions to the market dominance procedures were applied to then-pending cases, even though there had been a delayed effective date for those revisions. See, *Product and Geographic Competition*, 2 I.C.C.2d at 19 (published at 50 Fed. Reg. 46,189 (1985) with an effective date of December 6, 1985).

<sup>51</sup> *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (generally holding that administrative rules will not be construed so as to have retroactive effect).

<sup>52</sup> *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994) (*Landgraf*); see also, *Procedures to Calculate Interest Rates*, 9 I.C.C.2d 528, 539-40 (1993) (post-*Bowen* case applying new procedures to compute interest to pending case).

<sup>53</sup> *Landgraf*, 511 U.S. at 269.

<sup>54</sup> *Id.* at 270.

<sup>55</sup> *Id.* at 280. See also, *Bergerco Canada v. United States Treasury Dept.*, 129 F.3d 189, 193 (D.C. Cir. 1997) (*Bergerco Canada*). While *Landgraf* addressed whether a statute could be applied retroactively, its principles are also applicable to agency rules. *Goodyear Tire & Rubber Co. v. Department of Energy*, 118 F.3d 1531, 1536 (Fed. Cir. 1997).

constrained either by market forces or by regulation, and the rates must be reasonable regardless of which force constrains them.<sup>56</sup> Thus, the market dominance provision does not shield unreasonably high rates; it merely directs the agency's limited resources to those rates that are not constrained by readily apparent competitive markets.<sup>57</sup>

Moreover, UP's rate conduct should have been no different had the revised market dominance procedures already been in effect.<sup>58</sup> As FMC succinctly observes:<sup>59</sup>

UP cannot argue that it would have set lower rates had it known that the Board would not consider product and geographic competition in making its market dominance determination in this case. Indeed, such an argument would be an admission that product and geographic competition was not effective to constrain UP's rates to reasonable levels. Similarly, UP cannot argue that it would have set higher rates if it knew product and geographic competition would not be considered. If product and/or geographic competition in fact constrain UP's rates, they do so by virtue of their very existence, independent of whether the Board chooses to consider the factors.

UP further argues that application of the new market dominance procedures would increase its liability for past conduct by eliminating a defense to liability. UP relies upon *Hughes Aircraft*<sup>60</sup> for the proposition that the elimination of a preexisting defense to a cause of action is prohibited retroactivity. In *Hughes Aircraft*, however, legislation had created a new cause of action where none had existed at the time the conduct took place (*i.e.*, a person that could not bring suit when the conduct took place could bring suit under the new law). Our *1998 Decision* did not create a new cause of action by, for example, announcing for the first time that rates must be reasonable. Nor did it take away the market dominance defense (as indeed we could not do). It merely narrowed the type of

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<sup>56</sup> 49 U.S.C. 10101(1), (6).

<sup>57</sup> The determination of market dominance was "not designed to be an ultimate regulatory standard," but rather was intended only to serve as "a threshold test to direct the [agency's] regulatory activities into areas where the public interest needs protection." S. Rep. No. 499, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 61.

<sup>58</sup> UP suggests that it relied on the ICC's prior finding in *Allied Chemical Corp. v. Ann Arbor R.R.*, 1 I.C.C.2d 492 (1985) that the soda ash traffic at issue was subject to effective geographic competition. UP was not entitled to rely on that case, however, as the ICC's finding was vacated on judicial review, in *General Chemical Corp. v. United States*, 817 F.2d 844, 850 (D.C. Cir. 1987), on the ground that it was not supported by the evidence of record. *See, Bergerco Canada*, 129 F.3d at 193 ("retroactivity law is concerned with the protection of reasonable reliance"). *Cf. Railroad Cost Recovery Procedures — Productivity Adjustment*, 5 I.C.C.2d 434, 471 (1989) (in consideration of carriers' reliance, ICC applied productivity adjustment on a prospective basis only).

<sup>59</sup> FMC Motion to Strike, January 26, 1999, at 7, footnote omitted.

<sup>60</sup> *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S.Ct. 1871 (1997).

evidence we find it practicable to consider in determining whether there is market dominance.

Finally, UP argues that application of our revised policy would impose new duties with respect to transactions already completed, by allowing previously lawful rates to be held unlawful. But the market dominance provision was never meant to serve as a license for railroads to charge unlawfully high rates. Moreover, as explained in the *1998 Decision*,<sup>61</sup> because under our rules the market dominance and rate reasonableness presentations are made simultaneously,<sup>62</sup> UP must mount (and has mounted) a defense to the reasonableness of the challenged rates regardless of what type of market dominance evidence is permitted or excluded. Thus, our new policy does not impose new duties on UP. Moreover, UP's potential liability has not changed. The railroads readily concede that rates that are constrained by effective product or geographic competition will not be found unreasonable under the stand-alone cost test that will be used in the *FMC* case.<sup>63</sup> Thus, our new policy will not result in previously lawful rates being held unlawful.

Accordingly, we find that the revised policy should be applied to the *FMC* case and all other pending and future rail rate cases.

#### E. Summary

After considering the arguments raised by the railroad interests and again reviewing the law on the issue, we reaffirm our prior conclusion that we possess discretion as to what form of competition we will consider in our market dominance determinations, in view of the modest objective of the market dominance determination, the need for practicality, and the Congressional directive to expedite the rail rate complaint process. Our decision to no longer consider indirect competition (whether product competition, geographic competition, or some hybrid of the two) is necessary and appropriate, based on the record and years of experience, to remove the undue burdens and obstacles that their consideration imposes on the filing and processing of rate complaints by captive shippers. While we have tried some, and the railroads have suggested other, more limited modifications to our market dominance procedures, we do not believe that these alternatives would adequately address our concerns.

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<sup>61</sup> *1998 Decision*, at 948-49.

<sup>62</sup> 49 CFR 1111.8.

<sup>63</sup> AAR Open., V.S. Kalt/Willig at 17. *Accord*, January 27, 1983, V.S. of Willig in ICC Docket No. 38186S, *Pennsylvania Power and Light v. Consolidated Rail Corp.* 4 S.T.B.

Finally, we find no legal or policy reasons why the revised market dominance procedures should not be applied to pending cases.

We certify that this action will not have a significant economic impact on a substantial number of small entities. We note, however, that, to the extent small entities may be affected, the impact will be beneficial, as the new policy will enable captive shippers to avail themselves of their statutory rights more expeditiously and at less expense.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

*CHAIRMAN MORGAN*, commenting:

Last year, we held extensive public hearings directed at issues relating to access and competition in the railroad industry. At those hearings, and during the period preceding them, we heard various interests discuss their concerns about rail regulation and the state of the industry today. Some focused on problems with inadequate service, some focused on relief from unreasonably high rates, and others focused on labor-related issues. Some recommended specific changes to make existing law work better, while others recommended more dramatic changes in policy. Some expressed concern about whether our processes needed to be changed, given the explicit Congressional mandate in the ICCTA that we expedite cases.

I take very seriously all of the issues that were brought to our attention in those hearings, and indeed, the Board has taken action where appropriate to address the concerns that were raised. In the rates area, we have responded to concerns raised by shippers and to the specific Congressional directives in the ICCTA. We have adopted new rate complaint processing rules. We have developed "small rate case guidelines" to use where our standard guidelines are not practicable. We have provided relief in individual rate cases, and we have interpreted the statute so as to permit "bottleneck" rate relief under certain circumstances. And we have redoubled our efforts to process rate cases expeditiously.

There are, of course, limits to what we can do. Our statute requires a delicate and complex balancing of a variety of factors, and substantive changes that would dramatically alter the policies embodied in the rate regulatory process must come from Congress. In non-substantive matters, however, the public has a right to expect that we will do all that we can to simplify and expedite the process, and it is in that vein that I endorse the elimination of product and geographic competition from the Board's market dominance consideration.

Indeed, of the various concerns that were raised during last year's hearings, in many ways the one that concerns me most is the one that we address here.



That is because, rather than presenting an issue of substantive policy (as to which I see room for differing views), this case principally concerns our administrative process — more specifically, procedural access to a fundamental statutory remedy. The statute provides that a shipper required to pay an unreasonable rate may come to the Board for relief. As the agency administering that statute, we must do all within our power to ensure that our procedures in fact provide shippers with real access to the relief that Congress has made available.

Of course, the market dominance threshold inquiry is designed to free railroads from having to litigate cases where the shipper can exercise self-help by using available alternatives. But where the market dominance inquiry discourages the filing of meritorious complaints and frustrates the rate relief process set up by Congress, we must correct our procedures. Here, as the record amply demonstrates, even where a shipper is willing to file a complaint, the seemingly endless discovery process followed by a detailed analysis of product and geographic competition issues can tie up the Board's processes.

The railroads argue that we acted rashly here by adopting an extreme measure; if discovery is a problem, the railroads say, we can fix it with narrowly tailored rather than broad relief. Discovery clearly has been used as an offensive weapon and has created an uneven playing field. But even without discovery, litigation relating to product and geographic competition can be overbearing.

Indeed, in the *FMC* case, where we ultimately foreclosed all discovery on product and geographic competition, the defendant railroad has nevertheless submitted over 1800 pages of materials on product and geographic competition in its opening presentation alone. If the complaining shipper had to respond to all of that evidence and we had to resolve myriad non-transportation issues before we could consider the underlying rate complaint, there would be little simplification or improvement in the process.

In the end, eliminating product and geographic competition from the market dominance analysis does not take away the railroads' ability to show that the rates at issue are reasonable. I am thus convinced that the broader action we are taking here is necessary to ensure a level playing field for all parties in accordance with the policies embodied in the law.

For these and all of the other reasons expressed in the Board's decision, I believe that we must deny the petitions for reconsideration.

*COMMISSIONER BURKES*, commenting:

I commend the Board for bringing a sense of balance and finality to what has become, over the years, an issue difficult to get a handle on. But today we bring a degree of closure to an odyssey that began as early, at least, as 1976. In *Special Proc. for Findings of Market Dominance*, 353 I.C.C. 875, 886 (1976), the ICC determined that the introduction of considerations of product and geographic competition, in rebutting a presumption of Market Dominance, would necessarily embroil the agency in costly, complex, and time consuming antitrust-type litigation that would not likely be, in the final analysis, dispositive of whether a carrier's rate was unreasonably high. Since that time, however, the ICC and its successor, the Board, have not been consistent in their views of the materiality of product and geographic competition, when rebutting a presumption of Market Dominance. Such inconsistency has certainly fueled the debate.

The administrative process is not, nor should it be, static. I believe that it was in recognition of the necessary fluidity of the administrative process that Congress entrusted both the ICC and the Board with the broad discretion to develop useful yet meaningful methods of determining Market Dominance and rate reasonableness. And try as they may, the petitioners cannot really doubt in this instance that such discretion, no matter how exercised, is by statutory design, and is judicially sustainable.

I believe that now the Board has finally got it right, not just in terms of the construction and application of the law, but more important, in terms of economic fairness. Specifically, ICCTA defines Market Dominance as "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." To me, with respect to statutory construction, logic suggest that the words "for the transportation to which a rate applies" would exclude the consideration of traffic beyond that for which the rate applies, *i.e.*, the transportation of other products and/or from other locations.

On the other hand, with respect to economic fairness, I have difficulty embarking upon consideration of factors, such as product and geographic competition, that in effect brings unnecessary scrutiny of a shipper's manufacturing, marketing, and industrial decisions. Why require a shipper to do this? Why position such a road block making it difficult, costly, and time consuming for a shipper to make its case, when the existence of such competition on its face will likely not produce a rate challenge in the first place. In other words, when weighing the equities of excluding geographic and product competition as a carrier defense, I find it hard to conclude that carriers will be significantly harmed, because the existence of such competition will, if effective,

have already constrained rates, perhaps below even the statutory jurisdictional threshold, preventing a shipper from bringing a rate case in the first place.

By contrast, I believe the Board has correctly assessed the record in finding that years of administrative experience demonstrates that the inclusion of considerations of product and geographic competition has resulted in delays and expensive litigation, working more to discourage, in effect, legitimate shipper complaints about excessive rates.

As aforementioned, I believe that the Board has reached a forward thinking result here. And that there is sufficient statutory, economic, and record support justifying the Board's determination.

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*It is ordered:*

1. The petitions for reconsideration of AAR and UP are denied.
2. The request of UP to consider product and geographic competition in the *FMC* proceeding is denied.
3. The new market dominance procedures are applicable to all pending and future cases.
4. This decision will be effective August 1, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes. Chairman Morgan and Commissioner Burkes commented with separate expressions.