No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re WESTERN COAL TRAFFIC LEAGUE,	)
Petitioner.	)

PETITION FOR WRIT OF MANDAMUS

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April 9, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 21(d) and 28(a)(1)(A), Petitioner hereby certifies as follows:

A. Parties

Petitioner is the Western Coal Traffic League ("WCTL"). Respondents are the Surface Transportation Board of the United States ("STB") and the United States of America.

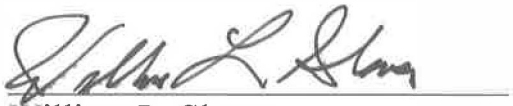
B. Ruling Under Review

WCTL challenges the STB's unreasonable delay in taking action in *Rail Fuel Surcharges (Safe Harbor)*, STB Docket No. EP 661 (Sub-No. 2) (Advance Notice of Proposed Rulemaking served May 29, 2014).

C. Related Cases

Petitioner is not aware of any related case(s).

Respectfully submitted this 9th day of April, 2019.



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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioner, the Western Coal Traffic League ("WCTL"), hereby submits the following corporate disclosure statement:

WCTL is a voluntary national trade association, whose regular membership consists entirely of shippers of coal mined west of the Mississippi River. WCTL advocates the interests of its members before regulatory agencies, legislative bodies, and state and federal courts. WCTL is an active participant in the rulemaking proceeding *Rail Fuel Surcharges (Safe Harbor)*, STB Docket No. EP 661 (Sub-No. 2), which forms the subject of this Petition. WCTL has not issued shares or debt securities to the public and does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Respectfully submitted this 9th day of April, 2019.

William L. Slover

Counsel for the Western Coal Traffic League

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GLOSSARY

Ag Surcharge Tariff	BNSF's Mileage-Based Fuel Surcharge Applied to its Agricultural and Industrial Traffic
ANPRM	Advance Notice of Proposed Rulemaking
APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*
BNSF	BNSF Railway Company
Board	Surface Transportation Board
CURE	Consumers United For Rail Equity
EIA	Energy Information Administration
EP	Ex Parte
HDF	Highway Diesel Fuel
ICC	Interstate Commerce Commission
NITL	The National Industrial Transportation League
NPRM	Notice of Proposed Rulemaking
STB	Surface Transportation Board
USDA	U.S. Department of Agriculture
UP	Union Pacific Railroad Company
WCTL	Western Coal Traffic League

INTRODUCTION

This Petition requests the Court to issue a writ of mandamus directing the Surface Transportation Board ("STB" or "Board") to take action in a pending proceeding of huge financial consequence to rail shippers, and one in which the Board has arbitrarily delayed taking any action for four and one-half years.

In 2007, the Board determined that rail carriers providing transportation subject to the Board's regulatory jurisdiction could collect fuel surcharges only to the extent necessary to recover their actual incremental fuel costs. The Board held that if carriers collected fuel surcharges that exceeded their actual incremental fuel costs – *i.e.*, used their fuel surcharge programs as profit centers – they were engaged in a prohibited unreasonable practice.

In a 2013 unreasonable practice complaint case brought by a rail shipper, the Board found that the defendant carrier had collected fuel surcharges that exceeded its actual incremental fuel costs by approximately $181 million. Nevertheless, the Board did not find the carrier was engaged in an unreasonable practice. Instead, the Board held that the so-called "safe harbor" provisions it had also adopted in its 2007 decision required the Board to determine the carrier's incremental fuel costs using higher retail fuel prices the carrier did not pay, rather than the lower wholesale fuel prices the carrier actually paid.

Recognizing that its safe harbor ruling allowed the defendant carrier to

engage in fuel surcharge profiteering, the Board issued an Advance Notice of Proposed Rulemaking ("ANPRM") in *Rail Fuel Surcharges (Safe Harbor)*, STB Docket No. EP 661 (Sub-No. 2) ("*Safe Harbor*") on May 29, 2014. The Board requested comments on whether the safe harbor provision should be modified or removed. Specifically, the Board sought comments on whether the profiteering the Board excused in its 2013 decision was an "aberration" limited to the facts of that case, and, if not, what actions the Board should take to address the profiteering.

Petitioner Western Coal Traffic League ("WCTL"), an association of western coal shippers, presented detailed comments in *Safe Harbor* demonstrating that the carrier profiteering the Board found in its 2013 decision not only was not an aberration, but was rampant throughout the rail industry, resulting in carriers collecting hundreds of millions of dollars in profits from their shippers under the guise of "fuel cost recovery." WCTL requested that the Board remove the safe harbor and adopt new rules to eliminate carrier fuel surcharge profiteering. Many other shippers, and shipper associations, joined in, or supported, WCTL's comments.

The record in *Safe Harbor* closed in October 2014. Since then, the Board has taken no action and has claimed its inaction is justified based on its interpretation of a law Congress passed in 2015 that reauthorized the STB and directed the Board to speed-up, not slow-down, its resolution of long-delayed STB

regulatory proceedings. In August 2017, WCTL filed a petition asking the Board to decide *Safe Harbor* promptly. The Board summarily denied WCTL's petition. The Board's inaction irreparable injures shippers by allowing carriers to collect hundreds of millions of dollars in fuel surcharge profits.

The Court should issue a writ of mandamus because WCTL has a clear right to a decision in *Safe Harbor*; the Board's failure to act for four and one-half years is clearly unreasonable; and WCTL has no other practical means of redress to protect its member companies from continued irreparable injury. WCTL respectfully requests that the Court issue an order directing the Board, *inter alia*, to decide *Safe Harbor* within ninety days.

STATEMENT OF JURISDICTION

This Court has jurisdiction under the Hobbs Act to review final STB orders, 28 U.S.C. § 2342(5), and, to preserve that jurisdiction, has authority to issue writs of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), to address claims of unreasonable STB delay. *See Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) ("*TRAC*") ("Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction."); 5 U.S.C. § 706(1) (directing statutory review courts to "compel agency action" that has been "unreasonably delayed").

WCTL has standing to invoke the Court's jurisdiction because it actively participated as a party in *Safe Harbor*; its individual members would have standing to bring this Petition; WCTL's organizational interests include participation in STB rulemaking proceedings affecting coal transportation rates and practices; and the relief WCTL requests does not require participation of its individual member companies. WCTL's member companies would have standing to individually pursue this writ because they pay carrier fuel surcharges; in *Safe Harbor*, the Board is addressing whether its current fuel surcharge unreasonable practice rules should be changed to protect shippers from carrier use of fuel surcharges as profit centers; and the injuries WCTL member companies are currently incurring as a result of the delay will be redressed if the Court grants WCTL's request for relief.

STATEMENT OF RELIEF SOUGHT

WCTL respectfully requests that the Court issue a writ of mandamus directing the STB to take action in *Safe Harbor* within ninety days of the Court's issuance of such writ by either (i) publishing a Notice of Proposed Rulemaking ("NPRM") or (ii) serving a final decision explaining why it is discontinuing the proceeding. If the Board decides to issue an NPRM, WCTL requests that the Court also direct the STB to complete that proceeding within one year of publishing the NPRM, or such other time the Court determines to be reasonable.

STATEMENT OF THE ISSUE PRESENTED

Whether the STB's failure to take action in *Safe Harbor* for four and one-half years constitutes unreasonable delay warranting an order from this Court compelling such action.

STATEMENT OF FACTS

A. The STB's *Fuel Surcharges* Proceeding

In 2003, the Nation's railroads began to aggressively impose very high fuel surcharges on their traffic. The carriers claimed that these surcharges were necessary to recoup their increased fuel costs; however, as their new fuel surcharge payments skyrocketed, many shippers believed the carriers were deceptively using their fuel surcharge programs as profit centers. A-2.

In 2006, the STB instituted *Rail Fuel Surcharges*, STB Docket No. EP 661 ("*Fuel Surcharges*") to investigate shipper claims that railroads were using their fuel surcharges as profit centers. *Fuel Surcharges*, slip op. at 2 (A-2) (served Mar. 14, 2006) ("*Fuel Surcharges I*"). After holding a public hearing, issuing an interim decision (*id.* (served Aug. 3, 2006) ("*Fuel Surcharges II*") (A-4 to -13)), and receiving public comments, the STB issued a final decision on January 26, 2007 ("*Fuel Surcharges III*") (A-14 to -28). Five of the Board's rulings are pertinent here:

First, the Board held that if carriers used their fuel surcharges as profit centers, they were engaged in a deceptive practice prohibited under 49 U.S.C. § 10702(2) (requiring rail practices to be "reasonable"). A-20. The STB explained the "term 'fuel surcharge' most naturally suggests a charge to recover increased fuel costs associated with the movement to which it is applied" and concluded that "imposing rate increases . . . when there is no real correlation between the rate increase and the increase in fuel costs for that particular movement to which the surcharge is applied, is a misleading and ultimately unreasonable practice." *Id*.

Second, the Board affirmed its preliminary conclusion in *Fuel Surcharges II* that "it is an unreasonable practice" for carriers "to compute fuel surcharges as a percentage of the base rates," because "a fuel surcharge program that increases all rates by a set percentage stands virtually no prospect of reflecting the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied." A-19. The Board ordered carriers to stop using percent-of-rate fuel surcharges on all common carrier rail shipments within ninety days of its decision (April 26, 2007). A-23.

Third, the Board ruled its finding that percent-of-rate fuel surcharges are unlawful would not be "retroactive," because "railroads may have reasonably relied" on prior agency precedent approving carrier use of percent-of-rate fuel surcharges "in formulating their fuel surcharge programs." *Id*. The Board

acknowledged that the practical effect of this ruling was to deny shippers the opportunity to file unreasonable practice cases seeking damages predicated on carrier use of percent-of-rate fuel surcharges prior to April 26, 2007. *Id*.

Fourth, the Board held a shipper could file an unreasonable practice complaint with the Board if, after carriers had an opportunity to adjust their fuel surcharge programs to comply with the Board's rulings, the shipper believed a carrier was administering its revised fuel surcharge program in a manner that constituted an unreasonable practice. *Id*.

Fifth, the Board concluded shippers would benefit from carriers using "a single, uniform index to measure changes in fuel prices" in their fuel surcharge tables. A-24. The Board found that historical changes in one set of publicly available fuel prices – the retail highway diesel fuel ("HDF") prices collected and published by the Energy Information Administration ("EIA") (A-15) – "closely correlate[d]" to the historical changes in carriers' actual wholesale diesel fuel prices, and thus "accurately reflect[ed] changes in fuel costs in the rail industry." A-24. Therefore, the Board concluded carrier use of EIA-published HDF prices in their fuel surcharge tables was reasonable. *Id*. The STB held it would not require carriers to use the EIA-published HDF prices in their fuel surcharge tables, but deemed HDF prices "a 'safe harbor' upon which carriers can rely," while "[u]se of an alternative index may be subject to challenge." *Id*.

B. The STB's *Cargill* Decision

Following the Board's decision in *Fuel Surcharges III*, most carriers decided to apply (or to continue to apply) mileage-based fuel surcharges on their STB-regulated traffic. These tariffs included a mileage-based fuel surcharge tariff that BNSF Railway Company ("BNSF") applied to most of its agricultural and industrial traffic ("Ag Surcharge Tariff"). *Cargill, Inc. v. BNSF Ry.*, STB Docket No. 42120, slip op. at 2 (A-30) (served Aug. 12, 2013). BNSF's Ag Surcharge Tariff contained a table showing EIA-published HDF price levels with corresponding fuel surcharges in cents per loaded car-mile. A-32. For example, if the applicable HDF price was $2.48 per gallon at the time of shipment, the table showed the fuel surcharge was $0.31 per loaded car mile.

In 2010, Cargill, Inc. filed a complaint with the Board, alleging, *inter alia*, that BNSF was engaged in an unreasonable practice by using its Ag Surcharge Tariff as a profit center. A-33. BNSF moved to dismiss Cargill's profit center claims, but the Board denied BNSF's motion. A-33 to -34. The Board ruled Cargill could proceed on its profit center claims and "present evidence to demonstrate that design elements in the challenged fuel surcharge allow BNSF to recover substantially in excess of the actual incremental cost of fuel incurred in providing the rail services to the entire traffic group to which the surcharge applies." A-37, n.15.

To meet this burden of proof, Cargill calculated the fuel surcharge revenues BNSF collected, and the incremental fuel cost increases BNSF actually incurred, on all traffic subject to the Ag Surcharge Tariff from 2006 to 2010. A-35. This traffic group included over 5.6 million shipments. *Id*. Cargill's evidence demonstrated BNSF was using its Ag Surcharge Tariff as a profit center because the fuel surcharge revenues BNSF collected during the five-year period substantially exceeded its actual incremental fuel costs. *Id*.

The Board agreed. A-42. After making its actual cost determinations, the Board found that BNSF had utilized its Ag Surcharge Tariff to collect "some $181 million" in fuel surcharge profits between 2006 and 2010. *Id*. However, the STB did not find that BNSF's profiteering constituted an unreasonable practice. Instead, the STB construed its "safe harbor" ruling in *Fuel Surcharges III* as requiring Cargill to calculate BNSF's incremental fuel costs using the higher retail HDF prices in the Ag Surcharge Tariff, rather than the lower wholesale prices BNSF actually paid for fuel. *Id*. When the STB substituted the higher HDF prices BNSF did not pay for the lower prices BNSF actually paid, the $181 million overcharge was eliminated. *Id*. Since using HDF prices in the STB's cost analysis resulted in no over-recovery, the Board concluded BNSF had not engaged in an unreasonable fuel surcharge practice. *Id.*

The Board acknowledged that it was not rejecting Cargill's profit center claims "lightly" because the safe harbor (as construed by the Board), "provides rail carriers with an unintended advantage" by "allow[ing] [a] rail carrier to recover more than its incremental fuel costs" and "effectively . . . immuniz[ing] that over-recovery from scrutiny." A-45. Concerned this "could lead to future abuse," the STB stated it would issue an ANPRM to explore whether carrier HDF-based profiteering was a "widespread phenomenon" that could "undermine the usefulness of the current safe harbor provision." *Id*.

C. The STB's *Safe Harbor* ANPRM

In May 2014, the Board issued the ANPRM it referenced in *Cargill*. *See Safe Harbor* (Notice served May 29, 2014) (A-47 to -49). The ANPRM requested comments on several topics, including whether the fuel surcharge profiteering BNSF pursued in *Cargill* was "an aberration;" whether the Board should "modif[y] or remove[]" the safe harbor; and whether the Board should undertake any other remedial actions. A-49.

In their responsive comments, many shippers presented detailed evidence supporting their shared position that BNSF's fuel surcharge profiteering in *Cargill* was hardly "an aberration," but instead was just the tip of the rail industry's profiteering iceberg. For example, WCTL presented a study demonstrating that during the three-year period from 2011 to 2013, BNSF's and Union Pacific

Railroad Company's ("UP") use of HDF prices in their fuel surcharge tariffs "resulted in BNSF collecting fuel surcharge profits of over $593,000,000 and UP collecting fuel surcharge profits of over $253,000,000." A-78, -91, -106 to -107, -124. Other shippers and shipper representatives presented corroborating evidence showing carriers were continuing to use their fuel surcharges as profit centers. *See, e.g.*, A-53 to -57, -59 to -63 (Comments of Consumers United for Rail Equity ("CURE")); A-65 to -67 (Comments of The Nat'l Indus. Transp. League ("NITL")); A-69 to -70 (Comments of the U.S. Dep't of Agric. ("USDA")).

Shippers also emphasized the STB's application of its safe harbor in *Cargill* was based on a basic error in logic. A-91 to -93, -110, -116 to -119. In *Fuel Surcharges III*, the STB adopted the safe harbor because it found that changes in the higher retail HDF prices were closely correlated to changes in the lower wholesale prices carriers actually pay for fuel. A-24. However, a close correlation in HDF price changes does not result in a close correlation in actual fuel cost changes. A-91 to -93, -110, -116 to -119, -125 to -127. For example, if the retail HDF fuel prices increased from $2.00 per gallon to $4.00 per gallon and wholesale prices increased from $1.00 per gallon to $2.00 per gallon, both increases would be perfectly "correlated" as 100% increases. Nevertheless, the absolute dollar increases are significantly different – the HDF price increased by $2.00 per gallon, whereas the wholesale fuel price increased by only $1.00 per gallon. A-92. Thus,

a shipper paying fuel surcharges based on HDF price changes would pay an inflated surcharge based on a $2.00 increase in HDF prices, even though the carrier actually incurred only a $1.00 increase in its wholesale fuel prices. *Id*.

In its comments, WCTL urged the STB to stop rail fuel surcharge profiteering by, *inter alia*, eliminating the safe harbor provision and issuing an NPRM for new rules requiring carriers to calculate fuel surcharges based on *actual* wholesale fuel price changes. A-89 to -96; A-136 to -137. Other parties also urged the Board to eliminate fuel surcharge profiteering. *See, e.g.*, A-52, -58 (CURE); A-70 (USDA); A-67 (NITL). The record in *Safe Harbor* closed following the Board's receipt of reply comments on October 15, 2014.

D. The STB's Response to the STB Reauthorization Act

Following the close of the administrative record in *Safe Harbor*, Congress enacted the STB Reauthorization Act of 2015, Pub. L. No. 114-110, 129 Stat. 2228 (2015) ("Reauthorization Act"). The STB's responses to two provisions in this new law are pertinent here.

1. STB Quarterly Reports

In the Reauthorization Act, Congress addressed concerns about the "sometimes glacial pace"[1] of major proceedings before the Board by directing the

[1] *Freight Rail Reform: Implementation of the STB Reauthorization Act of 2015: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 114th Cong. 47

Board, *inter alia*, to provide Congress with quarterly progress reports on its major unfinished regulatory proceedings. Reauthorization Act § 15(b) (codified at 49 U.S.C. § 1304 note).

The Board began providing responsive quarterly reports in April 2016. A-155 to -156. In its first two quarterly reports (April and July 2016), the Board set September 2016 as the target date for next action in *Safe Harbor*. A-156; A-158. In its third quarterly report (October 2016), the Board pushed this date back to January 2017, citing the press of business in other proceedings as the reason for the delay. A-170. Starting with its fourth quarter 2016 report (January 2017), and continuing in all subsequent reports, the Board has delayed the target date for next action to a future date "to be determined" ("TBD"), claiming the delay is necessitated by the "transition" between the Obama and Trump Administrations and potential changes in the composition of the Board.[2] A-172.

2. Five Member Board

During the legislative deliberations preceding the enactment of the Reauthorization Act, some stakeholders expressed concerns that federal sunshine

(A-159) (Aug. 11, 2016) (Prepared Statement of Hon. Ann D. Begeman, Member, STB) (acknowledging the Board's "reputation for its sometimes glacial pace").

[2] In its most recent quarterly report (dated Apr. 1, 2019), the Board notes that two new Members joined the Board in January 2019, but continues to identify the next action date in *Safe Harbor* as "TBD." A-176.

laws prohibited a quorum of the Board (then, any two Members of the three-Member Board) from discussing pending matters with each other, except in public meetings. *Freight Rail Reform: Implementation of the STB Reauthorization Act of 2015: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 114th Cong. 33, 33-34 (A-163 to -164) (Aug. 11, 2016) (Prepared Statement of Hon. Deb Miller, Vice Chairman, STB). They maintained that application of these quorum requirements was one reason why STB proceedings proceeded at a "glacial" pace.

Congress responded by enacting Sections 4 and 5 of the Reauthorization Act. Reauthorization Act § 4 (codified at 49 U.S.C. § 1301(b)); *Id*. § 5 (codified at 49 U.S.C. § 1303(a)). Section 4 "expand[ed] membership of the STB from three members to five in order to address inefficient quorum requirements." *STB Reauthorization Act of 2015: Rep. of the Comm. on Commerce, Sci., & Transp. on S. 808*, S. Rep. No. 114-52 at 11 (2015) ("Senate Commerce Committee Report").[3] Section 5 "allow[s] for limited instances in which a majority of Board members can communicate without requiring a full public meeting." *Id*. Section 5 "appl[ies] for any number of STB board members, with or without the expansion to five members." *Id*. While expanding the Board from three to five Members,

[3] No changes were made to Sections 4 and 5 between the release of the Senate Commerce Committee Report and the adoption of the Reauthorization Act.

Congress expressly retained a provision in prior law stating, "[a] vacancy in the membership of the Board does not impair the right of the remaining members to exercise all of the powers of the Board." 49 U.S.C. § 1301(b)(6) (previously codified at former 49 U.S.C. § 701(b)(7)).

In her July 2017 Quarterly Status Letter, STB Chairman Begeman informed Congress that the Board construed the Reauthorization Act as directing it to take no action to decide *Safe Harbor*, or several other long-delayed rulemaking proceedings, until the Board had a "full complement" of five Board Members:

> [I]t remains appropriate for the Board's larger regulatory proceedings to be considered by a full complement of members before taking major action (the Board is currently comprised of two Democrats and one Republican, and there are two vacancies) . . . .

A-174. New Board Members are appointed by the President, subject to Senate confirmation. 49 U.S.C. § 1301(b)(1). The Board has not been comprised of more than three Members since the Reauthorization Act was signed into law.

E. WCTL's August 2017 Petition

In August 2017, WCTL filed a petition asking the Board to end its "regulatory freeze" in *Safe Harbor*, and three other pending rulemaking proceedings, and to decide these proceedings forthwith. *See* WCTL Petition to Terminate the Regulatory Freeze in Four Pending Proceedings, *Petition by the WCTL Regarding Four Regulatory Dockets*, STB Docket No. EP 740 (Aug. 11,

2017) (A-138 to -151). WCTL argued that the STB's delays were fundamentally unfair to shippers because in each proceeding, the Board was considering changes in current law, which, if adopted or pursued, would benefit the public interest in reasonable rail rates and practices. A-143 to -144. WCTL also argued that the Board's "full complement" justification for its delays turned the Reauthorization Act upside down because in that Act, Congress encouraged the Board to speed-up, not slow-down, its consideration of pending proceedings. A-144 to -146.

Two major shipper associations supported WCTL's petition, while the Association of American Railroads ("AAR"), and one of the AAR's member railroads, opposed it. A-152. The Board denied WCTL's petition in a decision served on May 17, 2018. A-152 to -153. The Board acknowledged that it was "aware of the interest in its pending dockets," but concluded that instituting a new proceeding to decide the pending proceedings in a timely manner "would not be a good administrative practice or an efficient use of resources." A-152.

Then-Board Vice Chairman Miller appended a separate comment to the decision. A-153. She explained that while she supported the outcome, shippers have spent "years waiting for action" and "deserve a response." *Id*. She stated the "lost time" due to the freeze "hangs heavy," and cautioned that "there will frequently be periods in the future where there are vacancies on the Board, and if

the agency waits until there is a full complement [of Board members], very little will get accomplished." A-154.

REASONS WHY THE WRIT SHOULD ISSUE

This Court has found a writ of mandamus compelling agency action is warranted when three conditions are met: (i) the agency has a "clear duty to act" (*In re Core Commc'ns, Inc*., 531 F.3d 849, 855 (D.C. Cir. 2008) (internal quotation marks and citation omitted)); (ii) the agency has "unreasonably delayed the contemplated action" (*id*. (internal quotation marks and citation omitted)); and (iii) the petitioner has no "adequate alternative means of attaining the relief [it] desires." *Id*. at 860; *accord In re Am. Rivers & Idaho Rivers United,* 372 F.3d 413, 418 (D.C. Cir. 2004). Each condition is satisfied here.[4]

I. THE STB HAS A CLEAR DUTY TO ACT

Under the Administrative Procedure Act ("APA"), the STB has a clear statutory duty to "proceed to conclude a matter presented to it" "[w]ith due regard for the convenience and necessity of the parties . . . and within a reasonable time." 5 U.S.C. § 555(b). The STB's publication of the ANRPM in *Safe Harbor* is a "matter presented to the agency" – indeed, the STB instituted the proceeding on its

[4] Satisfaction of these conditions also demonstrates WCTL's "clear and indisputable" right to relief. *Am. Hosp. Ass'n v. Burwell,* 812 F.3d 183, 189 (D.C. Cir. 2016).

own initiative – and the Board is obligated to decide the proceeding "within a reasonable time." *See Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1158 (D.C. Cir. 1983) (finding an agency violated its duty under the APA by not concluding an ANPRM proceeding within a reasonable time); *Am Rivers*, 372 F.3d at 419 (finding an agency was required under the APA to conclude the matter presented to it within a reasonable time).

The APA also requires the STB to give "[p]rompt notice . . . of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding," along with a "brief statement of the grounds for denial." 5 U.S.C. § 555(e). WCTL and other shippers filed comments in *Safe Harbor* requesting that the Board promulgate an NPRM. A-136 to -137. If the Board intends to deny that request, it is obligated to provide WCTL, and the other shippers, "prompt notice" of its denial in a judicially reviewable final decision explaining its actions. 5 U.S.C. § 555(e); *accord Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (holding that under 5 U.S.C. § 555(e), "an agency must articulate an explanation for its action").

The STB's clear duty to act is also manifested in the Interstate Commerce Act (as amended by the Interstate Commerce Commission ("ICC") Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) ("Termination Act")), 49 U.S.C. § 10101 *et seq*. Congress has entrusted the STB with specified economic

oversight authority over the Nation's freight railroads. *Id*. This authority includes taking actions to ensure railroads engage in reasonable practices. *Id.* § 10702(2). The Board held in *Fuel Surcharges III*, and reaffirmed in *Cargill*, that carrier use of fuel surcharges as profit centers is an unreasonable practice. A-20; A-35.

The central issue in *Safe Harbor* is whether the Board's own policies continue to permit railroads to collect hundreds of millions of dollars in unlawful surcharge profits. The Board itself instituted *Safe Harbor* to address these issues, and it has a clear duty under 49 U.S.C. § 10702(2) and 5 U.S.C. § 555(b) to not only answer the questions it raised, but to answer them in a timely manner.

II. THE STB HAS FAILED TO DISCHARGE ITS DUTY TO ACT IN A TIMELY MANNER

The APA directs this Court to compel agency action unreasonably delayed. *See* 5 U.S.C. § 706(1). When determining whether an agency's delay is "so egregious as to warrant mandamus," this Court typically considers the six factors it set forth in *TRAC*. *Id*., 750 F.2d at 79-80. The STB's failure to advance *Safe Harbor* beyond the ANPRM stage in nearly four and one-half years clearly constitutes unreasonable delay and warrants a writ of mandamus.

A. The STB's Delay is Excessive

The first *TRAC* factor provides that "the time agencies take to make decisions must governed by a rule of reason." *Id*. at 79. Although "there is 'no *per*

se rule on how long is too long' to wait for agency action," this Court has found "a reasonable time for agency action is typically counted in weeks or months, not years." *Am. Rivers*, 372 F.3d at 419; *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) ("a reasonable time for an agency decision could encompass months, occasionally a year or two, but not several years or a decade") (internal quotation marks and citation omitted).

The STB's delay in deciding *Safe Harbor* is clearly unreasonable because its inaction has dragged on for years. The Board first identified carrier abuse of its safe harbor provisions in its decision in *Cargill*, served in August 2013 – over five and one-half years ago. A-29. The Board promised at that time to address this abuse in a new rulemaking proceeding, and then waited over eight months before issuing its *Safe Harbor* ANPRM in May 2014. A-47. The Board received comments, and the record closed in *Safe Harbor* in October 2014 – over four and one-half years ago. Since then, the STB has taken no action.

B. The STB's Delay Contravenes Congressional Directives

The second *TRAC* factor asserts "where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for the rule of reason." *Id*., 750 F.2d at 79. Here, Congress has repeatedly indicated its clear expectation that the STB resolve regulatory proceedings, such as *Safe Harbor*, expeditiously.

In 1995, Congress created the STB as the successor agency to the ICC. *See* Termination Act, § 201 (codified at former 49 U.S.C. § 701). In the Termination Act, Congress enacted a new rail policy that directs the STB "to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought [before the Board]." 49 U.S.C. § 10101(15). The STB has violated this clear congressional directive by not handling and resolving *Safe Harbor* in an expeditious manner.

The STB is also engaging in an impermissible end-run around the timetable reporting obligations Congress adopted in the Reauthorization Act. In the Reauthorization Act, Congress supplemented the rail transportation policy by directing the Board to provide quarterly progress reports on all major unfinished rulemaking proceedings. Reauthorization Act § 15(b) (codified at 49 U.S.C. § 1304 note). Congress took this action to increase STB transparency and accountability, and improve the "glacial pace" (A-159) at which the Board was known to process many of its major rulemaking proceedings, including *Safe Harbor*. S. Commerce Comm. Rep. at 7-8.

Shortly after Congress passed the Reauthorization Act, then-Board Member Begeman correctly characterized the new quarterly reporting requirement as a "game-changer" because both the parties and the Board Members in the long-delayed Board proceedings will "know that deadlines exist and the target dates for

Board action." A-161. Similarly, then-Board Vice Chairman Miller correctly observed that Congress's "vision to create a [quarterly pending proceeding] reporting requirement was extremely pragmatic. Absent the reporting requirements of the Act, I strongly suspect that many of these proceedings would still be in a state of regulatory limbo." A-165.

In its first year of quarterly reporting (2016), the STB properly adhered to its Congressional directives by fixing specific dates for its next action in *Safe Harbor* – initially September 2016 (A-156, -158), and then January 2017 (A-170). However, in all subsequent reports, the STB has stated only that its next action in *Safe Harbor* is "TBD." *See, e.g.*, A-172, -176.

The Board's "TBD" designation eviscerates its congressionally mandated reporting requirement. With a "TBD" designation, there is no deadline for action, and *Safe Harbor* has returned to the same "regulatory limbo" it was in before Congress imposed the reporting requirement. A-165.

C. The STB's Delay is Unreasonable in the Sphere of Economic Regulation

The third *TRAC* factor notes "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake." *Id*., 750 F.2d at 79. Applying this factor in economic regulation cases, this Court has recognized that "[e]conomic harm is clearly an important consideration

and will, in some cases, justify court intervention." *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987). The STB's delay in *Safe Harbor* is unreasonable in the sphere of economic regulation, as demonstrated by this Court's precedent of finding agency delays of similar duration in economic regulation cases unreasonable. *See, e.g.*, *MCI Commc'ns Corp. v. FCC*, 627 F.2d 322, 325 (D.C. Cir. 1980) (four-year delay unreasonable); *Air Line Pilots Ass'n Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (five-year delay unreasonable); *Am. Rivers*, 372 F.3d at 419 (six-year delay unreasonable).

D. The STB's Delay is Not Due to Competing Agency Priorities

The fourth *TRAC* factor provides that "the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority." *Id*., 750 F.2d at 79. This factor is significant in cases where an agency claims its delay is due to the press of other agency business – that is not the case here.

The STB has not claimed its delay in deciding *Safe Harbor* is due to its need to act in cases of "a higher or competing priority." Indeed, it appears from the Board's October 2016 quarterly report to Congress that it was poised to take action in this proceeding in January 2017 (A-170), but, following the 2016 Presidential election, decided not to do so until it had a "full complement" of Members. A-174.

The Board clearly has the statutory authority to act with less than a "full complement" of Board Members (*see* 49 U.S.C. § 1301(b)(6)), and there is nothing

in the text or legislative history of the Reauthorization Act that even remotely suggests Congress intended for the Board to delay deciding *Safe Harbor* until it had a "full complement" of Board Members. Congress passed the Reauthorization Act "to improve inefficiencies at the STB and *reduce* delays." S. Commerce Comm. Rep. at 10 (emphasis added). Congress increased the size of the Board "to address inefficient quorum requirements," not to justify new delays in the Board's rulemaking proceedings. *Id*. at 11.

E. The STB's Delay is Irreparably Injuring Shippers

The fifth *TRAC* factor states that the Court should "take into account the nature and extent of the interests prejudiced by delay." *Id*., 750 F.2d at 79. The interests prejudiced by the Board's delay are precisely those the Board sought to protect when it instituted the now, long-delayed *Safe Harbor* rulemaking.

In 2013, the Board found in *Cargill* that its safe harbor rule allowed the defendant carrier (BNSF) to collect $181 million in profits under the guise of a cost-based fuel surcharge. A-42. The Board then instituted *Safe Harbor* to address whether it should remove the safe harbor protection in subsequent cases, or take any other actions that may be necessary to ensure that rail carriers do not utilize their fuel surcharges as profit centers. A-49.

The STB's failure to act in *Safe Harbor* irreparably injures shippers. Even if the Board ultimately agrees with WCTL, and other shippers, and closes the safe

harbor loophole, it appears highly unlikely that it will give its ruling retroactive effect. For example, in *Fuel Surcharges III*, the Board refused to give retroactive effect to its ruling banning percent-of-rate fuel surcharges as an unreasonable practice, as railroads "may have reasonably relied" on prior ICC rulings sanctioning the use of those surcharges. A-23.

If the Board follows *Fuel Surcharges III* and finds that carriers reasonably relied on its safe harbor ruling in *Cargill*, shippers will have no remedy for all carrier HDF-based profiteering between 2007 and the effective date of the Board's new rules. Thus, every day of delay compounds the irreparable harm to shippers.

The same is true if the Board decides to discontinue *Safe Harbor*. In that case, shippers will have the right to appeal the Board's decision and, if successful on appeal, to ultimately prevail in proceedings before the Board. It is unlikely that any appeal will affect the Board's anticipated retroactivity rulings, so every day of delay adds to the irreparable harm to shippers.

The Board's delays also irreparably injure consumers. In *Safe Harbor*, the member companies of participating coal shipper associations are electric utilities. These utilities pay fuel surcharges to their carriers, and then pass-through the surcharge payments to their customers – electric utility ratepayers – as part of their customers' monthly electric bills. A-81. The Board's failure to act in *Safe Harbor* has resulted in carriers continuing to saddle shippers (and their customers) with

bloated profit-maximizing fuel surcharges that exceed the carriers' actual incremental fuel costs by hundreds of millions of dollars.

F. The STB's Delay is Improper

The sixth *TRAC* factor states, "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed." *Id*., 750 F.2d at 79. WCTL does not assert that the Board engaged in any ethically improper behavior, but, as discussed above, does assert that the Board's extensive delay is improper, because it ignores the Board's statutory directives to decide pending proceedings expeditiously and mistakenly twists the Reauthorization Act – an act that clearly directs the Board to speed up its consideration of long-delayed pending proceedings – into an excuse for continuing delay. The end result is that shippers, and their customers, continue to be irreparably injured.

III. WCTL HAS NO ADEQUATE ALTERNATIVE REMEDY

WCTL actively participated in the *Safe Harbor* ANPRM proceeding, which concluded in October 2014. A-76 to -137. WCTL waited patiently for the Board to act for almost three years. When the Board failed to do so, WCTL filed a petition in August 2017 respectfully requesting that the Board decide *Safe Harbor* promptly. A-138 to -151.

In a decision served in May 2018, the Board summarily rejected WCTL's request without even bothering to consider its merits. A-152 to -153. Since then, the STB has taken no action in *Safe Harbor*. Under these circumstances, WCTL's only remaining option for relief is to petition this Court for a writ of mandamus.

Since *Safe Harbor* has not advanced beyond the ANPRM stage, the Board has two decisional options: issue an NPRM, or issue a final appealable decision explaining its reasons for discontinuing the proceeding. WCTL respectfully requests that the Court order the STB to take one of these two actions no later than ninety days following the issuance of the Court's order. As discussed above, the Board appeared ready to take one of these two actions over two years ago, so imposing a ninety-day deadline for action is more than reasonable.

If the STB decides to publish an NPRM, WCTL also requests that the Court direct the Board to complete the proceeding within one year following the date of the NPRM's publication, or such other date the Court finds reasonable. Prompt publication of an NPRM is a step in the right direction, but WCTL, and other shippers, will not obtain any relief until the Board completes the NPRM process. Requiring the STB to complete the NPRM process in a reasonable time is justified, given that the Board has unreasonably delayed this proceeding for nearly four and one-half years, and such action is consistent with prior mandamus orders issued by this Court.

CONCLUSION

For the reasons set forth above, WCTL respectfully requests that the Court grant this Petition.

Respectfully submitted,

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Dated: April 9, 2019

Counsel for the Western Coal Traffic League

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 21(d) and 32(c)(2), I hereby certify that:

The foregoing petition complies with the type-volume limitation of Rule 21(d) of the Federal Rules of Appellate Procedure. This petition contains 6418 words, excluding the parts of the petition exempted by Rules 21(d) and 32(f) of the Federal Rules of Appellate Procedure.

The foregoing petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This Petition has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Times New Roman font.

Respectfully submitted this 9th day of April, 2019.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on this 9th day of April 2019, I electronically filed the foregoing Petition for Writ of Mandamus and Appendix with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. As Circuit Rule 21(c) requires, four paper copies of the foregoing petition and appendix will be hand delivered to the Court.

In addition, I caused true and correct copies of the foregoing Petition and Appendix to be served by first class mail, postage prepaid, or hand delivery on counsel for Respondent Surface Transportation Board, Respondent United States, and on all parties of record before the Surface Transportation Board in proceeding EP 661 (Sub-No. 2), as listed below.

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