filed by September 30, 2019, and should address whether the issuance of a certificate of interim trail use in this case would be consistent with the grant of an adverse abandonment application.[1] Each trail use request must be accompanied by the appropriate filing fee. *See* 49 CFR 1002.2(f)(27).[2]

Comments on the EA will be due by September 30, 2019.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer to the full abandonment regulations at 49 CFR pt. 1152.

Board decisions and notices are available at *www.stb.gov*.

Decided: August 28, 2019.

By the Board,

Allison C. Davis,

Director, Office of Proceedings.

Aretha Laws-Byrum,

Clearance Clerk.

[FR Doc. 2019–19015 Filed 9–3–19; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 661 (Sub-No. 2)]

Rail Fuel Surcharges (Safe Harbor)

In 2006 and 2007, the Board inquired into and made findings regarding rail carrier practices related to fuel surcharges in *Rail Fuel Surcharges,* Docket No. EP 661. A fuel surcharge is a separately identified component of the total rate that is charged for the involved transportation and that is designed to recoup increases in the carrier's fuel costs. Rail shippers had voiced concerns to the Board that these fuel surcharges, because they were typically calculated as a percentage of the base rate [1] for the transportation, recovered amounts over and above the carriers' actual increased fuel costs. *See* Hr'g Tr. at 38–40, 44–45, 47–49, 52, 61–62, May 11, 2006, *Rail Fuel Surcharges,* EP 661. In response, the Board stated that the term ''most naturally suggests a charge to recover increased fuel costs associated with the movement to which it is applied,'' and if a fuel surcharge is used as ''a broader revenue enhancement measure, it is mislabeled.'' *Rail Fuel Surcharges,* EP 661, slip op. at 7. The Board concluded that a rate increase resulting from a rate-based fuel surcharge, where ''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.* As such, the Board prohibited fuel surcharges expressed as a percentage of the base rate. *Id.* at 1, 6–8. The Board directed that any fuel surcharge program applied to regulated traffic must be based on attributes of a movement (such as mileage) that directly affect the amount of fuel consumed. *Id.* at 9.

The Board also, however, established as a ''safe harbor'' an index [2] upon which carriers could rely to measure changes in fuel costs for purposes of a fuel surcharge program. The Board stated that a carrier's use of that index would not be subject to a reasonableness challenge because the index had already been subject to notice and comment scrutiny. *Id.* at 11.

In 2013, the Board dismissed a complaint by Cargill, Incorporated, challenging fuel surcharges imposed by BNSF Railway Company (BNSF) over a five-year period under a fuel surcharge program applicable to agricultural and industrial products. *Cargill, Inc.* v. *BNSF Ry.,* NOR 42120, slip op. at 1, 7 (STB served Aug. 12, 2013). In its decision, the Board observed that, if measured by its ''internal'' fuel costs (the amounts BNSF actually paid for fuel) instead of the safe harbor HDF Index, BNSF's fuel surcharge revenues exceeded its incremental fuel costs (*i.e.,* those additional fuel costs caused by a rise in fuel prices above a certain level) by $181 million. *Id.* at 14. Nevertheless, the Board noted that, under the safe harbor provision adopted in *Rail Fuel Surcharges,* Docket No. EP 661, carriers are ''entitled to rely on the HDF Index as a proxy to measure changes in their internal fuel costs'' [3] and concluded that, using the HDF Index as the measure, BNSF had not over-recovered its incremental fuel costs over the five-year period covered by the complaint. *Id.* at 14. At the same time, however, the Board also gave notice that it would be issuing an Advance Notice of Proposed Rulemaking (ANPRM) to give shippers, rail carriers, and other interested parties the opportunity to comment on the safe harbor provision, including whether it should be modified or removed. *Id.* at 17–18.

In May 2014, the Board issued an ANPRM to gain a better understanding of whether the sort of growing spread between HDF-based costs and actual costs seen in *Cargill* was unique to BNSF during a period of particularly high price volatility (or instead a widespread phenomenon in the rail industry) and to determine whether to modify or remove the safe harbor provision. *Rail Fuel Surcharges (Safe Harbor),* EP 661 (Sub-No. 2), slip op. at 2–3 (STB served May 29, 2014). In the ANPRM, the Board asked whether the growing-spread phenomenon observed in *Cargill* was aberrational; whether there are problems associated with the Board's use of the HDF Index as a safe harbor in judging the reasonableness of fuel surcharge programs; whether any problems with the safe harbor could be addressed through a modification of it; and whether any problems with the safe harbor are outweighed by its benefits. *Id.* at 3.

The 15 comments and 10 replies received in response to the ANPRM were varied, and many did not directly address the Board's question about whether the ''growing-spread'' phenomenon seen in *Cargill* was an aberration.[4] A few commenters supported the repeal of the safe harbor provision,[5] while others supported retaining the safe harbor provision either outright or in some modified

[1] In a letter submitted on July 18, 2019, the Town of Newcomb asserted, among other things, that the time to file a request for interim trail use had expired. Although the Board's notice served on September 28, 2018, stated that any request for an interim trail use/railbanking condition would be due by October 25, 2018, the proceeding was held in abeyance on October 23, 2018, before the deadline for such requests.

[2] The Board recently updated its user fees, which will become effective on September 6, 2019. *Regulations Governing Fees for Servs. Performed in Connection with Licensing & Related Servs.–2019 Update,* EP 542 (Sub–No. 27) (STB served July 31, 2019).

[1] The Board has referred to fuel surcharges that are calculated as a percentage of base rate as ''rate-based fuel surcharges.'' *See, e.g., Rail Fuel Surcharges,* EP 661, slip op. at 6–7 (STB served Jan. 26, 2007).

[2] That index was the Energy Information Administration's former ''U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon),'' now known as the Highway Diesel Fuel Index (HDF Index).

[3] As the Board put it, ''what the safe harbor means is that if a rail carrier uses the HDF Index [in its fuel surcharge program] to measure changes in its fuel costs, then that is how the Board will measure these changes as well, rather than by looking at evidence of changes in the rail carrier's internal fuel costs.'' *Cargill,* NOR 42120, slip op. at 9.

[4] The following parties submitted comments and/or replies in response to the ANPRM: The U.S. Department of Agriculture; Arkansas Electric Cooperative Corporation (AECC); Colorado Springs Utilities; Consumer United for Rail Equity (CURE); DOW Chemical Company (DOW Chemical), Highroad Consulting, Ltd (Highroad Consulting); Mercury Group; National Coal Transportation Association; National Industrial Transportation League (NITL); National Grain and Feed Association; Allied Shippers (Western Coal Traffic League, American Public Power Association, Edison Electric Institute, National Rural Electric Cooperative Association, South Mississippi Electric Power Association and Consumers Energy Company); BNSF; Canadian National Railway Company; CSX Transportation, Inc.; and Union Pacific Railroad Company (UP).

[5] (*E.g.,* Allied Shippers Comments 3, Aug. 4, 2014.)

form.[6] Some commenters claimed the *Cargill* outcome was an aberration,[7] while another said there was insufficient evidence to answer the question of whether the phenomenon seen in *Cargill* was an aberration.[8] Finally, some commenters urged more study of that particular question or of fuel surcharge programs generally.[9]

The Board recognizes and appreciates that commenters devoted substantial time and effort to responding to the ANPRM. Since the comment period closed in 2014, the Board has been unable to reach a majority decision on what additional Board action should be taken in response to the comments received. Because of the lack of a majority opinion and in the interest of administrative finality, the Board Members agree that this docket should be discontinued.

It is ordered:

1. This docket is discontinued.

2. Notice of the Board's action will be published in the **Federal Register**.

3. This decision is effective on the date of service.

Decided: August 28, 2019.

By the Board, Board Members Begeman, Fuchs, and Oberman. Board Members Begeman, Fuchs, and Oberman commented with separate expressions.

BOARD MEMBER BEGEMAN, commenting:

Since casting—reluctantly—my vote in *Cargill, Inc.* v. *BNSF Railway,* it has been my position that the ''safe harbor'' provision should be eliminated. In *Cargill,* BNSF recovered through fuel surcharges far more than its actual incremental fuel costs. *See Cargill, Inc.* v. *BNSF Ry.,* NOR 42120, slip op. at 14. Yet the Board found that Cargill had failed to prove that the carrier had engaged in an unreasonable practice, ''in large measure'' because, since 2007, rail carriers have been entitled to rely on a Board-endorsed fuel index—the HDF Index—as a proxy to measure changes in their fuel costs for purposes of their fuel surcharge programs. *Id.* at 1, 9.

Cargill led me to question why the Board adopted rules in 2007 that would permit a carrier to recover substantially more than its incremental fuel costs, simply because the carrier uses a particular index in its fuel surcharge formula.[1] I believe it is especially misguided that, since *Cargill,* the safe harbor provision has been retained despite the Board's recognition that the safe harbor gives carriers an ''unintended advantage''—the ability to over-recover incremental fuel costs for as long as conditions permit but then to revise their fuel surcharge programs when new conditions would lead to an under-recovery. *See id.* at 17.

The overarching principle of the 2007 decision is not currently before the Board. Rather, the question before the Board is how we can best implement the principle that a rail fuel surcharge program should accurately reflect the cost of fuel. The Board's 2014 ANPRM sought comments ''on whether the safe harbor provision . . . should be modified or removed.'' *Rail Fuel Surcharges (Safe Harbor),* EP 661 (Sub-No. 2), slip op. at 3. The comments received in response to the ANPRM have not allayed my concerns about the impacts of the safe harbor provision.

Since the ANPRM comments were filed five years ago, there hasn't been a majority to coalesce around any approach (mine or any other one) for a next action in this proceeding. Therefore, I will again reluctantly vote—this time, to close the proceeding rather than wait for a full complement of Board members in hopes that a majority view would be reached to repeal the safe harbor provision.

BOARD MEMBER FUCHS, commenting:

The Board has recognized that a fuel surcharge is part of the overall rate for rail transportation. When the Board determines market dominance and rate reasonableness, the challenged rate has included both the base rate and any fuel surcharge.[1] In *Rail Fuel Surcharges,* the Board set a framework for a complainant to pursue relief on its fuel surcharge separate from the processes available for relief on its overall rate.

Some public comments on the ANPRM ask the Board now to remove or modify the safe harbor provision in *Rail Fuel Surcharges* to make it easier, in effect, for a complainant to receive relief on its fuel surcharge. Such a change could exacerbate a tension that exists under the *Rail Fuel Surcharges* framework: The standard by which the Board is to review part of the rate (the fuel surcharge) is completely different from the standard by which it is to review the overall rate. In reviewing the reasonableness of the overall rate under 49 U.S.C. 10701(d)(1) and 10702, the Board allows for the differentiation of prices based on demand.[2] In reviewing the fuel surcharge, however, the Board is to consider part of the rate (the fuel surcharge) by essentially ignoring such demand-based differential pricing.[3] Because of the inconsistency in review standards, the Board might award relief on part of the rate (the fuel surcharge) even if it could not award relief on the overall rate. In effect, *Rail Fuel Surcharges* could be read as permitting the Board to award a form of rate relief to a complainant whose rate may be reasonable.[4] Whether or not the two approaches could be reconciled, I would not risk exacerbating this tension by modifying or removing the safe harbor provision.

At the same time, I also would not propose reversing *Rail Fuel Surcharges* here. Carriers have changed their fuel surcharge programs as a result of the decision, and the record suggests that those carriers and many customers have come to rely upon it. If the Board were to propose reversing *Rail Fuel Surcharges,* it could disrupt that reliance. I do not favor embarking on such a potentially disruptive course when no public commenter has made compelling case to reverse the decision and when the record suggests rail customers have continued concerns with their overall rates—both base rates and the fuel surcharges. Rather than focusing on *Rail Fuel Surcharges* at this time, the Board should address these concerns, as appropriate, by advancing reforms to its rate review processes, which apply to the overall rate.

BOARD MEMBER OBERMAN, commenting:

I agree that this docket should be discontinued. To be clear, I find the outcome in *Cargill* jarring because the carrier was permitted to collect sums far in excess of its true incremental fuel costs. Nevertheless, in my view that

[6] (*E.g.,* BNSF Comments 1, Aug. 4, 2014; AECC Comments 2–3, Aug. 4, 2014; UP Comments 7–11, Aug. 4, 2014; NITL Comments 8–9, Aug. 4, 2014; Highroad Consulting Reply 8, 10, Oct. 15, 2014.)

[7] (*E.g.,* BNSF Comments 9–11, Aug. 4, 2014; CURE Comments 2, 9–10, Aug. 4, 2014; UP Comments 8, Aug. 4, 2014.)

[8] (Dow Chemical Comments 7–8, Aug. 4, 2014.)

[9] (*E.g.,* NITL Comments 8–11, Aug. 4, 2014; Dow Chemical Reply 6–8, Aug. 15, 2014.)

[1] ''[W]hat the safe harbor means is that if a rail carrier uses the HDF Index [in its fuel surcharge program] to measure changes in its fuel costs, then that is how the Board will measure these changes as well, rather than by looking at evidence of changes in the rail carrier's internal fuel costs.'' *Cargill, Inc.* v. *BNSF Ry.,* NOR 42120, slip op. at 9.

[1] *See, e.g.,* Consumers Opening II–8, Nov. 2, 2015, *Consumers Energy Co.* v. *CSX Transp., Inc.,* NOR 42142 (chart showing base rate plus fuel surcharge equals rate).

[2] *See Rail Fuel Surcharges,* slip op. at 6, 8. *See, e.g., Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1), slip op. at 7–11 (STB served Sept. 5, 2007).

[3] This statement takes no position on the extent to which the labeling of a rate-based fee as a fuel surcharge affects rail customers' understanding of their rates and therefore affects their transportation decisions. I do note, however, that a tariff explains the calculation of a fuel surcharge and that a rate-based calculation is relatively simple.

[4] The view expressed here is not inconsistent with the way the Board addresses demurrage charges, which are distinct from rates under the statute and as a practical matter. *See, e.g.,* 49 U.S.C. 10746, 11708(b)(1)(A).

outcome was consistent with, if not mandated by, the safe harbor provision incorporated into the Board's fuel surcharge rules.

Railroads have the initiative to set rates under 49 U.S.C. 10701(c), and a regulated railroad rate can be set aside as unreasonable only if the Board finds market dominance. 49 U.S.C. 10701(d), 10707(c). Railroad *practices* can be found unlawful under 49 U.S.C. 10702 without a finding of market dominance, but it is well settled that the Board may not evade the limits on its rate review process by treating a rate matter as an unreasonable practice case. *Union Pacific R.R.* v. *ICC,* 867 F.2d 646 (D.C. Cir. 1989). Although there can be a ''conceptual overlap between railroads' 'practices' and their 'rates,'" *id.* at 649, when a practice is ''manifested *exclusively* in the level of rates that customers are charged,'' *id.,* a challenge to such a practice is in reality a challenge to the rate and may only be brought under the Board's rate reasonableness procedures. *See id.*

To me, the fuel surcharges that the Board is addressing are clearly components of the overall rates charged for the underlying transportation. To be sure, the ''truth-in-advertising'' aspect of the *Rail Fuel Surcharges* decision comes a bit closer to the ''practices'' arena, but the relief sought in *Cargill,* and that the Allied Shippers urge here, is still, at base, rate relief.

For all of these reasons, in my view, the Board should not have issued the *Rail Fuel Surcharges* decision in 2007, which created the fuel surcharges rules and their safe harbor provision. Today, I would take steps to reverse that decision in its entirety. However, no majority exists for such action.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2019–19053 Filed 9–3–19; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2019–0690]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Flight Operations Quality Assurance (FOQA) Program

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The collection involves the voluntary submission of information gained through the Flight Operations Quality Assurance (FOQA) Program. FOQA is a voluntary safety program designed to improve aviation safety through the proactive use of flight-recorded data. The information collected will allow operators to use this data to identify and correct deficiencies in all areas of flight operations.

DATES: Written comments should be submitted by November 4, 2019.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By mail: Sandra Ray, Federal Aviation Administration, Policy Integration Branch AFS–270, 1187 Thorn Run Road, Suite 200, Coraopolis, PA 15108.

By fax: 412–239–3063.

FOR FURTHER INFORMATION CONTACT: Sandra Ray by email at: *Sandra.ray@faa.gov;* phone: 412–329–3088.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–0660.

Title: Flight Operations Quality Assurance (FOQA) Program.

Form Numbers: There are no forms associated with this collection.

Type of Review: Renewal of an Information Collection.

Background: Flight Operations Quality Assurance (FOQA) is a voluntary safety program designed to improved aviation safety through the proactive use of flight-recorded data. Operators will use these data to identify and correct deficiencies in all areas of flight operations. Properly used, FOQA data can reduce or eliminate safety risks, as well as minimize deviations from regulations. Through access to de-identified aggregate FOQA data, the Federal Aviation Administration (FAA can identify and analyze national trends and target resources to reduce operational risks in the National Airspace System (NAS), air traffic control (ATC), flight operations and airport operations.

The FAA and the air transportation industry have sought additional means for addressing safety problems and identifying potential safety hazards. Based on the experiences of foreign air carriers, the results of several FAA-sponsored studies, and input received from government/industry safety forums, the FAA concluded that wide implementation of FOQA programs could have significant potential to reduce air carrier accident rates below current levels. The value of FOQA programs is the early identification of adverse safety trends, which, if uncorrected, could lead to accidents. A key element in FOQA is the application of corrective action and follow-up to ensure that unsafe conditions are effectively remediated.

Respondents: 71 Air Carriers (62 with existing programs and 9 carriers with new programs).

Frequency: Once for a certificate holders seeking approval of a program, monthly for certificate holders with an approved program.

Estimated Average Burden per Response: 100 Hours for certificate holders seeking approval of a new program, 12.0 hour per year for certificate holders with an approved program.

Estimated Total Annual Burden: 100 hours per new respondent, 12 hours annually per existing respondents.

Issued in Washington, DC, on August 29, 2019.

Sandra L. Ray,

Aviation Safety Inspector, FAA, Policy Integration Branch, AFS–270.

[FR Doc. 2019–19081 Filed 9–3–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Comment Request; Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies and Diversity Self-Assessment Template for OCC-Regulated Entities

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.