

**BEFORE THE  
SURFACE TRANSPORTATION BOARD****CONSUMERS ENERGY COMPANY****Complainant,****v.****CSX TRANSPORTATION, INC.****Defendant.****Docket No. NOR 42142****CSX TRANSPORTATION, INC.'S REPLY TO CONSUMERS ENERGY  
COMPANY'S MOTION TO FURTHER MODIFY PROCEDURAL SCHEDULE**

CSX Transportation Inc. ("CSXT") hereby responds to Consumers Energy Company's ("Consumers") April 13, 2016 Motion to Further Modify the Procedural Schedule ("Motion"). Consumers requests an additional 30 days in which to finalize its Rebuttal Evidence, which is currently due on May 6, 2016. CSXT opposes Consumers' Motion.

Although a 30-day extension of time in a SAC rate case may not appear to be unreasonable standing alone, a grant of Consumers' Motion would enlarge the time that the parties agreed, and that the Board ordered, for Rebuttal by 50%—from two months to three months. The procedural schedule for the orderly and expeditious processing of this case—which involves a stand-alone railroad of only 168 route miles, far smaller than the large SARRs in recent cases such as *DuPont* and *TPI*—should not be altered so significantly without an equally significant justification.<sup>2</sup>

---

<sup>1</sup> See *DuPont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42125, at 14 (served Mar. 24, 2014) (8,020 route miles); *TPI Rebuttal Evidence, Total*

Consumers has no justification and offers no good cause for an extension. The Board recently announced that Board staff will be meeting with stakeholders to discuss ways to expedite and streamline rate cases.<sup>3</sup> CSXT submits that one of the best ways to do so is to only permit extensions of a procedural schedule when a party demonstrates good cause for such an extension. Consumers has not satisfied that standard here, and its Motion should be denied.

Consumers bases its request solely on the putative “burden on Consumers’ experts and counsel imposed by the need to resolve the problems with CSXT’s Reply Evidence as described in Consumers’ March 14 Petition and the Board’s April 6 ruling.” Motion at 3. But Consumers fails to acknowledge that the vast majority of the 164 alleged “violations [by CSXT] of the procedural order for the presentation of evidence” cited by Consumers in support of its Petition for Technical Conference were rejected by the Board and that Consumers’ Petition was denied. Consumers is relying upon the same claims that supported its rejected Petition as the basis for giving it a significant, 50% increase in the amount of time for filing of its Rebuttal Evidence. Those overblown and rejected claims provide no “good cause” for affording Consumers the litigation advantage of additional time to respond to CSXT’s Reply Evidence.

---

*Petrochemicals Inc. v. CSX Transp. Inc.*, STB Docket No. 42121, at III-B-2 (filed Nov 5, 2014) (6,912 route miles).

<sup>2</sup> Although the parties have filed evidence in this proceeding on market dominance and on Consumers’ invocation of the revenue adequacy constraint, the sole basis for its extension request is its claim of problems with the workpapers underlying CSXT’s SAC Reply Evidence. Consumers does not suggest that it requires more time to address the market dominance and revenue adequacy issues.

<sup>3</sup> See STB Status Letter to U.S. House Appropriations Transportation Subcommittee, at 1 (Apr. 1, 2016).

Furthermore, Consumers has had more than enough time. With the parties' consent, the Board adopted a procedural schedule under which Consumers would file opening evidence three months after the close of discovery, CSXT would file reply evidence four months after opening, and Consumers would file rebuttal evidence two months after reply.<sup>4</sup> This schedule already contemplated that Consumers would have more time to prepare evidence than CSXT. Ultimately, Consumers received even more time after it was granted a 30-day extension to file its Opening Evidence. While Consumers acknowledges that extension in its Motion (at 2), it failed to mention that the extension was to Consumers' benefit alone. CSXT did not oppose that request.

After Consumers filed its Opening Evidence, CSXT identified multiple missing or incomplete workpapers. Rather than filing a motion with the Board, CSXT simply asked Consumers to correct these issues, which are not unusual in SAC cases. Consumers subsequently filed an Errata and a Supplemental Errata to provide workpaper and other corrections.<sup>5</sup> Some of those corrected workpapers were provided nearly 3 months after Consumers filed its Opening Evidence.<sup>6</sup> CSXT did not seek an extension of time based on these issues. The procedural schedule thus has afforded Consumers seven months to prepare evidence (five for opening and two for rebuttal) as compared to four for CSXT. There is no basis for giving Consumers another month.

---

<sup>4</sup> See Joint Motion for Procedural Schedule, Docket No. 42142 (served April 10, 2015) (approved by grant stamp).

<sup>5</sup> See Consumers Errata, Docket No. 42142 (filed Nov. 25, 2015); Consumers Supplement to Errata, Docket No. 42142 (filed Dec. 4, 2015).

<sup>6</sup> Consumers' Opening Evidence was filed on November 2, 2015. Consumers provided a corrected workpaper to CSXT on January 25, 2016.

The Board has been criticized extensively (and in CSXT's view, unfairly) for the time consumed by SAC cases. Yet, much of the prolonging of SAC cases has been a direct result of complainants' now-standard practice of extensively revising their cases in chief at the rebuttal stage. Properly presented, a rebuttal case should be limited to defending the complainant's case in chief against the criticisms and evidence of the railroad's reply. If the Board were to limit rebuttal filings to the appropriate scope, cases would move much faster to conclusion. And, Consumers would not need the additional time it is seeking here to restate its SAC case.

Moreover, if the Board were to grant Consumers' Motion, it will be signaling future SAC complainants that the Board is willing to extend procedural schedules without a legitimate showing of good cause, and even when those schedules have resulted from negotiated agreements between the parties and approval by the Board. Such a result would be wholly inconsistent with the Board's professed determination,<sup>7</sup> and Congress' express direction,<sup>8</sup> to process rate cases expeditiously.

Accordingly, CSXT submits that no good cause for the requested extension has been shown. To the extent that Consumers is arguably entitled to any

---

<sup>7</sup> See Testimony of Vice Chairman Miller before the Subcommittee on Railroads, Pipelines, and Hazardous Materials, Committee on Transportation and Infrastructure, U.S. House of Representatives, *Hearing on the 35th Anniversary of the Staggers Rail Act: Railroad Deregulation Past, Present, and Future*, at 10 (May 13, 2015) (noting that the Board is intent on improving the rate case process "so that cases are processed more efficiently, quickly, and accurately").

<sup>8</sup> Congress has imposed new stringent requirements on SAC timetables in the STB Reauthorization Act of 2015, P.L. 114-110 (2015). While those new requirements do not apply to this case, Congress clearly intends that the Board process SAC cases expeditiously.

additional time at all, it should be limited to no more than the 14 days that elapsed between CSXT's Reply Filing and its Response to Consumers' Petition.<sup>9</sup>

Respectfully submitted,



Peter J. Shudtz  
Paul R. Hitchcock  
John P. Patelli  
CSX Transportation, Inc.  
500 Water Street  
Jacksonville, FL 32202

Raymond A. Atkins  
G. Paul Moates  
Matthew J. Warren  
Terence M. Hynes  
Hanna M. Chouest  
Sidley Austin LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
(202) 736-8711 (fax)

*Counsel to CSX Transportation, Inc.*

Dated: April 15, 2016

---

<sup>9</sup> CSXT filed its Reply Evidence on March 7, 2016 and Responded to Consumers' Petition within 7 days of its filing, on March 21, 2016 (only 14 days after CSXT filed its Reply Evidence). A 14 day extension would make Consumers' Rebuttal filing date May 20, with simultaneous Final Briefs due on June 20.

## CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of April, 2016, I caused a copy of CSX Transportation, Inc.'s foregoing Reply to Consumers Energy Company's Motion to Further Modify Procedural Schedule to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

Kelvin J. Dowd  
Daniel M. Jaffe  
Christopher A. Mills  
Slover & Loftus LLP  
1224 Seventeenth St., N.W.  
Washington, D.C. 20036



Jake Thorn