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Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Dear Ms. Brown:

In a decision issued on September 27, 2012 in STB Docket No. NOR 42123 (“Decision”), a rate case filed by M&G Polymers USA, LLC (“M&G”) against CSX Transportation, Inc. (“CSXT”), the Board sought comment from parties regarding a new rule—a “limit price” test—for determining whether a railroad has qualitative market dominance over transportation to which a challenged rate applies. Norfolk Southern Railway Company (“NS”)¹ submits this letter (1) because the Board’s decision is ambiguous in asking for comments from “parties” such that NS is uncertain whether it has been asked to respond and (2) to express NS’s concern that the Board appears to be adopting a significant substantive change to its qualitative market dominance rules without abiding by the explicit requirements of the Administrative Procedure Act (“APA”).

Further, it appears from the Decision that the Board is concerned—with good reason—about the validity and defensibility of its test. See Decision at 5 (expressly seeking comments from parties regarding a list of concerns). That concern is justified as the Board’s newly proposed test is fundamentally flawed in many ways, would violate the Interstate Commerce Act and relevant precedent, and is economically unsound and irrational.

First, because the language of the Decision is unclear and confusing, NS is not sure what the Board intends. On one hand, it appears that the Board seeks comments generally from all interested or potentially affected persons, not just the litigants in *M&G v. CSXT*. The Decision ambiguously uses the term “parties” when inviting comments, as opposed to saying “the parties” or using the names of the parties to the specific adjudication in which the Decision

¹ NS is not a party to STB Docket No. NOR 42123

issued. See e.g., Decision at 5 (“parties are strongly encouraged”); compare Decision at 21 (“we are providing parties 30 days to submit comments”) with Decision at 21 (“M&G and CSXT shall confer and submit” and “M&G and CSX each shall prepare”). In addition, it appears that the Board proposes to apply its new test to pending and future cases. Specifically, the Board describes its new rule as an attempt to develop an “objective approach that can be used to readily resolve the central market dominance inquiry.” Decision at 5. That sentence suggests that the new test is one that the Board would seek to apply in the future in other cases. In that sense, the Decision implies that the use of the term “parties” – rather than a narrower term such as “the parties” – is intended to be a broader invitation issued to any interested parties, not just to M&G and CSXT.

On the other hand, the Decision sometimes specifically asks CSX and M&G to take actions, which suggests that the Board may have meant the term “parties” to refer only to CSX and M&G. In addition, the Decision asks “parties” to comment on whether the application of the “limit price” test “to the facts of this case is somehow flawed” (Decision at 5), but NS and other interested members of the public do not have access to any information regarding the application of the Board’s new test to the case. See Decision (Public Version excludes Highly Confidential Appendix, which applies the new test to facts of case). And, the deadline for M&G and CSXT to submit proposed redactions for a public version of the Appendix is after the close of the comment period. See Decision at 21. Those statements and timing imply that the Board seeks comment only from the complainant and defendant in STB Docket No. NOR 42123.

The Board should clarify these ambiguities and its intentions with respect to the new rule and provide parties proper notice. NS is not a party to the *M&G v. CSXT* case. But NS does have a significant, concrete interest in the legal and economic validity of the Board’s market dominance procedures. NS intends to demonstrate in its reply evidence in the pending rate case *E.I. du Pont de Nemours & Co. v. Norfolk Southern Railway Company*, STB Docket No. NOR 42125, that NS is not market dominant over a substantial number of the challenged lanes – using as evidence DuPont’s own contracts with trucking companies that compete with NS. If the Board intended the Decision to constitute notice that such evidence will no longer be deemed relevant to its jurisdictional market dominance determination, then it is required to afford NS and other interested parties clear, adequate notice and a reasonable opportunity to comment.

Second, the new “limit price” test would be a sharp break from the Board’s existing and longstanding rules on qualitative market dominance, which were adopted through notice and comment rulemaking by the Interstate Commerce Commission (“ICC”) in *Market Dominance Determinations*, 365 I.C.C. 118 (1981), and can only be pursued through notice and comment rulemaking. During the *Market Dominance Determinations* rulemaking, the ICC specifically rejected the use of rebuttable presumptions for the purposes of qualitative market dominance analysis, stating, “We have decided to discontinue the use of rebuttable presumptions as a tool to develop this qualitative evidence and to replace them with general guidelines.” *Market Dominance Determinations* at 119; *id.* at 120 (“Time has shown that the use of rebuttable presumptions has not enhanced the accuracy of market dominance determinations. While they

did serve a useful purpose while we gained experience, the factors determining the degree of competition faced by a rail carrier are too numerous and too varied to be gauged, with any reasonable degree of accuracy, by so few measures.”). Indeed, not only did the ICC reject reliance on rebuttable presumptions generally, but it also specifically rejected rebuttable presumptions based upon revenue to variable cost ratios (“R/VC”) concluding, “[t]here are any number of reasons why a high price/cost ratio may not be indicative of true market power on the part of the railroad. Reliance on such ratios will, therefore, not only be misleading, but will preclude more relevant information from being introduced.” *Id.* at 122.

The ICC explicitly rejected the use of rebuttable presumptions for purposes of market dominance determinations, and in particular those based upon R/VC ratios, and the Board may not now reverse those legislative rules in an individual adjudication. See Decision at 14 (creating rebuttable presumption of market dominance essentially based on R/VC analysis).² Indeed, the Board acknowledged the need for a notice-and-comment rulemaking to amend the qualitative market dominance rules established in *Market Dominance Determination* when it conducted such a rulemaking to amend the agency’s rules on product and geographic competition, as opposed to altering those rules through adjudication. See *Market Dominance Determinations—Product and Geographic Competition*, STB Ex Parte No. 627 (STB served Dec. 21, 1998).

Given this history, adoption of the new “limit price” test in *M&G v. CSXT* would be an impermissible amendment of prior legislative rules adopted through notice and comment rulemaking to implement Section 10707 of Title 49. See *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (“[i]f a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first,” subject to notice and comment requirements); *Broadgate Inc. v. U.S. Citizenship and Immigration Services*, 730 F.Supp.2d 240, 244 (D.D.C. 2010) (An “agency’s intent to exercise legislative power may be shown where the second rule effectively amends the previously adopted legislative rule, either by repudiating it or by virtue of the two rules’ irreconcilability.”). Accordingly, any application of the Board’s new “limit price” market dominance rule would be invalid absent notice-and-comment rulemaking in compliance with the APA.

If the Board seeks to adopt the new “limit price” test, it must commence a notice-and-comment rulemaking to allow all interested parties the opportunity to comment on the proposal, as required by the APA. An amendment to a legislative rule requires a notice-and-comment

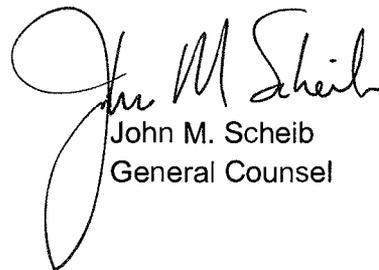
² The fact that the Board has characterized its proposed rebuttable presumption as a “preliminary conclusion” does not change the nature of what the Board is attempting to do. See Decision at 14 (“If the limit price R/VC ratio exceeds CSXT’s most recent RSAM figure, we will *preliminarily conclude* that the alternative cannot exert competitive pressure sufficient to constrain rates effectively.”) (emphasis added). Similarly, the fact that the Board labels the rule change announced in the Decision a “refinement” of its procedures does not change the fact that it is truly a reversal in policy. See *id.* at 21.

proceeding and cannot be achieved in an adjudication. *Marseilles Land and Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003) (holding that “an administrative agency may not slip by the notice-and-comment rule-making requirements needed to amend a rule by merely adopting a *de facto* amendment to its regulation through adjudication”); see *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995) (an agency interpretation that “adopt[s] a new position inconsistent with . . . existing regulations” must follow APA notice-and-comment procedures).

Third, it would be patently unfair to apply this new test to pending and future cases without affording all interested parties an adequate opportunity to comment. The Board’s proposed rule would have a significant impact on the qualitative market dominance analysis in *E.I. Du Pont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. 42125, and NS would strongly oppose the application of the test in that case and any other case to which NS is a party. As a non-party, NS presently has no right to participate in *M&G v. CSXT* and present its views, supporting evidence, and expert testimony that demonstrate that the test is fundamentally flawed in many ways, violates controlling statutes, and is economically unsound and irrational. Therefore, even apart from the Board’s obligations under the APA, it would be more efficient for the Board to address the merits of its new “limit price” test in one single rulemaking as opposed to litigating the issue piecemeal in multiple cases.

The Board should promptly provide clear and adequate notice regarding whether it seeks comments from the public and whether it intends to commence a rulemaking. If it does, the Board must comply with the APA, at which time NS would clearly have an opportunity to comment. However, being unable to determine what the Board intends from its ambiguous invitation to comment, NS does not want the Board to proceed with this proposal under the mistaken impression that NS has no interest in commenting if given clear, adequate notice.

Sincerely,



John M. Scheib
General Counsel

cc: Jeffrey O. Moreno
G. Paul Moates
Michael L. Rosenthal