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Via Messenger

March 22, 2012

Chairman Daniel R. Elliott, III  
Surface Transportation Board  
395 E Street SW  
Washington, D.C. 20423

**RE: STB Finance Docket No. 42121, Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc.**

Dear Chairman Elliott:

Total Petrochemical & Refining USA, Inc. ("TPI") respectfully requests that you investigate the cause of delay in the above-referenced proceeding. We further request your assistance in returning our case to a timely schedule, especially with regard to the market dominance issue currently under review. It has now been over twenty-two months since TPI filed its complaint in the above-captioned rate case, and the Board has failed to even rule on its jurisdiction over the challenged rates.<sup>1</sup> Since TPI filed this case, it has spent over \$11,000,000 paying CSXT's punitive tariff rates while waiting on the Board's decision. TPI filed its Rebuttal Evidence on Market Dominance on September 6, 2011, but the Board has yet to issue its decision in the market dominance phase of the case, well over six months later. In fact, the current delay in issuing just a market dominance decision is fast approaching the 9-month statutory limit for final decisions in rate cases, which typically include both market dominance and complex evidence on rate reasonableness. 49 USC § 10704(c)(1).<sup>2</sup>

When it decided to bifurcate the market dominance and rate reasonableness issues in this case, the Board stated that it would rule "as expeditiously as possible." See Board decision at p.

<sup>1</sup> The Board has previously recognized "the long-standing Congressional intent that market dominance be a practical determination made without delay." Market Dominance Determinations – Product and Geographic Competition, 3 STB 937, 938 (1998). The Board has also recognized that "the path envisioned by Congress" involved "more expeditious resolution of large rate disputes." Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 3 (served Oct. 30, 2006). More broadly, the Board is directed by statute to engage in "fair and expeditious regulatory decisions." 49 USC § 10101(2). Similarly, the Board is "to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part." 49 USC § 10101(15).

<sup>2</sup> The progress of this proceeding means that CSXT will at some point likely raise the three-year issue of 49 USC § 11701, as defendant railroads have regularly done recently. See, e.g., NS Reply to Motion at 23-25 (filed Dec. 20, 2011) in STB Docket No. 42125, E.I. du Pont de Nemours & Company v. Norfolk Southern Railway Company. TPI vehemently rejects the view that a three-year limit applies to its rate case, but railroads have asserted this claim in the past and are likely to do so again.

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7 (served April 5, 2011). However, almost a year after the Board decided to bifurcate this matter, we still have no decision.

The delays in this proceeding directly support shipper claims that the rate reasonableness process is overly burdensome and favors the railroads. CSXT and other railroads assert that no changes in policy to facilitate competition in the rail industry are needed because shippers that believe their rail rates are too high have a “ready remedy” in filing a rate case at the Board.<sup>3</sup> According to CSXT, “[t]he Board’s rate reasonableness procedures are robust, cost-effective, and efficient” and “[t]he Board processes rate reasonableness cases expeditiously.”<sup>4</sup> Under these “robust, cost-effective, and efficient” procedures, TPI pays transportation rates significantly higher than the market rate – a sum in excess of \$110,000 per week,<sup>5</sup> which over the course of 3 years exceeds \$17 million.

When TPI filed its Complaint, it did so with the full knowledge and understanding that SAC cases require 2-3 years to complete and that TPI’s case might fall at the longer end of that range. However, even if the Board were to issue a market dominance decision sometime this April, it is clear that this case will now extend well beyond 3 years. The 3-year anniversary of TPI’s Complaint will be in May 2013. If the Board issues a market dominance decision in April 2012, even under an aggressive SAC schedule, final briefs would not be filed until February 2013. Assuming that the Board takes the full nine months provided by statute to issue a final decision, the *earliest* that TPI could expect this case to conclude would be December 2013, which would be *three and a half years* after filing its Complaint. During those additional seven months, TPI will pay CSXT over \$3.3 million above the “market” rate. No matter the outcome, CSXT effectively obtains a multi-year, virtually no-interest loan from TPI in the form of several years of this tariff premium.

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<sup>3</sup> Supp. Comments of CSXT at 10 (filed July 26, 2011 in E.P. 705).

<sup>4</sup> *Id.* at 10 and 17. See also Supp. Comments of Norfolk Southern Railway at 16 (filed July 25, 2011 in E.P. 705) (describing current rate case procedures as “entirely adequate”).

<sup>5</sup> The Board was previously informed of this figure in a letter filed by TPI on June 6, 2011. By “market rate,” TPI refers to the difference between the challenged tariff rates and the contract rates that TPI rejected as unreasonable when it elected to pursue regulatory relief. That premium would be much higher if TPI were comparing the tariff rate against what TPI believes to be a “reasonable” rate.

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TPI implores the Board to act promptly. Further delays only continue to reward the anticompetitive behavior that drove TPI to this process in the first place.

Sincerely,



Jeffrey O. Moreno

David E. Benz

*Counsel for Total Petrochemicals & Refining USA, Inc.*

cc: Francis P. Mulvey, STB Vice Chairman  
Ann D. Begeman, STB Member  
G. Paul Moates, counsel for CSXT  
Paul A. Hemmersbaugh, counsel for CSXT