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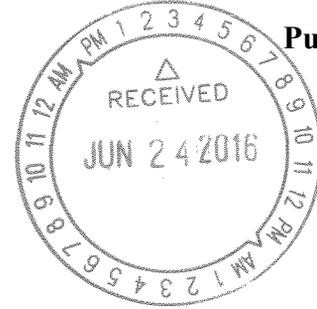
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Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423



Re: Consumers Energy Company v. CSX Transportation, Inc.
STB Docket No. NOR 42142

Dear Ms. Brown:

Enclosed for filing in the above-referenced matter is Defendant CSX Transportation, Inc.'s ("CSXT's") Final Brief and a Motion to Strike. The filing includes:

- 1) An original and ten copies of the Highly Confidential version of CSXT's Final Brief. Double braces (e.g., "{{ }}") signify material designated Highly Confidential pursuant to the Board's March 17, 2015 Protective Order ("Protective Order"), and single braces (e.g., "{ }") designate Confidential material. These materials should not be placed in the Board's public docket or on its website.
- 2) An original and ten copies of the Public version of CSXT's Final Brief. Material that is designated Highly Confidential or Confidential pursuant to the Board's Protective Order is redacted from the Public version. These materials may be placed in the Board's public docket and posted on its website.
- 3) Three sets of disks containing the highly confidential and public version of the Brief in searchable pdf format.

Cynthia T. Brown
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- 4) An original and ten copies of the Highly Confidential version of CSXT's Motion to Strike and an original and ten copies of the Public Version; and three sets of disks containing both versions in searchable pdf format.

Please date-stamp the extra copies and return them to our messenger. Thank you for your assistance in this matter. If you have any questions, please contact the undersigned.

Sincerely,



Matthew J. Warren

MJW:aat
Enclosures
cc: Kelvin J. Dowd

BEFORE THE
SURFACE TRANSPORTATION BOARD

CONSUMERS ENERGY COMPANY)	
)	
Complainant,)	
)	
v.)	Docket No. NOR 42142
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant.)	
)	

FINAL BRIEF

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Dated: June 24, 2016

Contains Color Images

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The following short form case citations are used herein:

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<i>Duke/NS Reconsideration</i>	<i>Duke Energy Corp. v. Norfolk Southern Railway Co.</i> , 7 S.T.B. 862 (2004)
<i>DuPont</i>	<i>E.I. DuPont de Nemours & Co. v. Norfolk Southern Railway Co.</i> , STB Docket No. 42125 (served Mar. 24, 2014)
<i>FMC</i>	<i>FMC Wyoming Corp. v. Union Pacific Railroad Co.</i> , 4 S.T.B. 699 (2000)
<i>Guidelines</i>	<i>Coal Rate Guidelines, Nationwide</i> , 1 I.C.C.2d 520 (1985)
<i>Rate Regulation Reforms</i>	<i>Rate Regulation Reforms</i> , STB Ex Parte No. 715 (served July 18, 2013)
<i>Standards II</i>	<i>Standards For Railroad Revenue Adequacy</i> , 3 I.C.C.2d 261 (1986)
<i>SunBelt</i>	<i>SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Co.</i> , STB Docket No. 42130 (served June 20, 2014)
<i>TMPA II</i>	<i>Texas Municipal Power Agency v. Burlington Northern & Santa Fe Railway Co.</i> , 7 S.T.B. 803 (2004)
<i>TPI</i>	<i>TPI Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.</i> , STB Docket No. 42121

ACRONYMS

AAR	Association of American Railroads
AFE	Authorizations for Expenditure
AREMA	American Railway Engineering and Maintenance-of-Way Association
ATC	Average Total Cost
BNSF	Burlington Northern Santa Fe Railway Company
BRC	Belt Railway of Chicago
CERR	Consumers Energy Railroad
CMP	Constrained Market Pricing
COC	Cost of Capital
CREATE	Chicago Region Environmental and Transportation Efficiency Program
CSX	CSX Corporation
CSXT	CSX Transportation, Inc.
CTCO	Chicago Transportation Coordination Office
CWR	Continuous Welded Rail
CWS	Carload Waybill Sample
DOT	Department of Transportation
EIA	Energy Information Administration
G&A	General & Administrative
ICC	Interstate Commerce Commission
IHB	Indiana Harbor Belt Railway
ISA	Intercarrier Service Agreement
KCBX	KCBX Terminals, Inc.
MDOT	Michigan Department of Transportation
MGT	Million Gross Ton
MOW	Maintenance-of-Way

MPSC	Michigan Public Service Commission
NS	Norfolk Southern Railway Company
OPEC	Organization of the Petroleum Exporting Countries
PRB	Powder River Basin
ROI	Return on Investment
ROW	Right-of-Way
RSAM	Revenue Shortfall Allocation Method
RTC	Rail Traffic Controller
SAC	Stand-Alone Cost
SARR	Stand-Alone Railroad
STB	Surface Transportation Board
TIH	Toxic-by-Inhalation Hazard
UP	Union Pacific Railroad Company
URCS	Uniform Rail Costing System

INTRODUCTION

One of the virtues of the Stand-Alone Cost (“SAC”) test is that it can assess the reasonableness of rates in a variety of settings. SAC can be used for complex carload networks, for operationally straightforward western coal cases, and for operations through the nation’s busiest rail hub. The key, of course, is that each application of SAC must consider the unique circumstances of the issue traffic and other selected traffic. Only then can the SAC analysis both account for all the costs of serving the selected traffic group and fairly measure the revenues attributable to the Stand-Alone Railroad (“SARR”) for its role in serving that group.

In this case, the key circumstance is that the issue movement involves the operation of heavy, long coal trains through Chicago. This requires the SAC analysis to account for the operational realities and congestion that all railroads face in Chicago; to construct interchange tracks and crossing diamonds in ways that do not interfere with other railroads; to construct bridges without encumbering vehicles and pedestrians; and to otherwise acknowledge the real-world costs of operating through the most complex rail terminal in North America. Consumers’ evidence fails to account for these costs, with trains that zip through “the most congested rail chokepoint in the Chicago area, and perhaps the United States”¹ at impossible speeds; bridges and interchange tracks that unacceptably interfere with surrounding transportation infrastructure; and a staffing plan that omits many of the people needed to coordinate operations in this busy terminal. Many of the flaws in Consumers’ evidence stem from its failure to fully appreciate how operating trains through Chicago is different from operating them in the open countryside.

At the same time it understated the costs of operating the Consumers Energy Railroad (“CERR”), Consumers substantially overstated the revenues attributable to the SARR. For instance, Consumers awards the CERR revenue credit for originating and terminating traffic at

¹ See Reply at I-2 n.2 (citing description of Amtrak Chicago Gateway Blue Ribbon Panel).

the 59th Street Intermodal Terminal—even though it deliberately chose not to construct that terminal and assumed that CSX Terminals would actually be performing the complex work of originating and terminating trains for the CERR.

Just as the unique circumstances of operating in Chicago must factor into the SAC analysis, the unique geographical circumstances here have significant implications for whether the challenged rate is subject to effective competition. Both Chicago and the destination J.H. Campbell plant are on the shores of Lake Michigan and have access to robust marine competition. Indeed, Consumers' Cobb plant (located just thirty miles north of the Campbell plant) historically received Western coal by water from Chicago or other Great Lakes ports. This real-world history is the best refutation to Consumers' grossly inflated claims about the alleged costs of water transportation to Campbell and the supposed logistical obstacles to that transportation. The real-world costs of indisputably effective competition to the Cobb plant are a far superior measure of the effectiveness of competition to Campbell than the Limit Price Test. Because Consumers had a choice between bringing this rate case and pursuing alternative transportation to Campbell at costs comparable to those it used to displace rail transportation at Cobb entirely, it enjoys effective competition for the issue traffic. The Interstate Commerce Act does not permit shippers with those options to pursue rate cases to see if they can obtain a regulatory rate lower than the rate dictated by the transportation market.

Consumers' revenue adequacy claim is deeply flawed. Two flaws are particularly dispositive. First, granting "revenue adequacy" rate reductions greater than those allowed by SAC would create the sort of cross-subsidy that rate regulation is designed to prevent. Second, CSXT has never been found revenue adequate in a single annual determination.

In this Brief, CSXT summarizes its position on the major evidentiary disputes in the case. Three issues should be addressed at the outset. First, CSXT has limited its Brief to those areas

where a summary of its arguments and evidence may be helpful to the Board. For the issues not addressed in this brief, CSXT rests on its Reply Evidence. Second, much of Consumers' Rebuttal evidence is improper, either because Consumers is attempting to change positions that CSXT accepted on Reply; to challenge Board precedent for the first time on Rebuttal; or to present new evidence or arguments. This improper rebuttal evidence should be stricken for the reasons detailed in CSXT's Motion to Strike. Third, Consumers begins its Rebuttal with a puzzling complaint about "derogatory" language in CSXT's Reply. *See* Reb. at I-1 n.2. Consumers provides almost no examples of this allegedly objectionable language, nor does it explain how these unidentified CSXT statements could possibly be worse than Consumers' own intemperate attacks, which include a cascade of insults but few supporting facts.² Consumers appears most agitated because it was caught using an outdated forecast of coal volumes at Campbell two months after it provided a more recent, lower volume forecast to its regulator, and because CSXT accurately said it was "misleading" for Consumers to pretend that the outdated forecast represented "its best estimates" without acknowledging that it had just presented a different forecast to its regulator.³ But it is the facts that are damning, not CSXT's rhetoric. The Board can judge for itself whether Consumers' representation that its January 2015 projection of coal volumes "reflects . . . its best estimates" was misleading when that representation was made just two months after Consumers submitted a different forecast to its regulator. *See infra* at 8-11.

I. CONSUMERS HAS FAILED TO PROVE THAT CSXT POSSESSES MARKET DOMINANCE OVER THE ISSUE TRAFFIC.

As CSXT explained in its Reply Evidence, this case presents a tale of two Consumers coal plants, the B.C. Cobb plant and the J.H. Campbell plant. Both plants are located on inlets off

² *See, e.g.*, Reb. at II-61 ("condescending"); III-A-2 ("Pejorative Claptrap"); III-A-56 ("scurrilous"); III-D-117 ("deceptive"); III-D-118; III-D-133 ("purposely misleading and inflammatory"); III-G-5 ("arrogantly").

³ Reply at III-A-6; Opening at III-A-6.

the shores of Lake Michigan, and both have received coal from Western origins that is transported by rail through Chicago. But historically the Cobb plant received 100% of its coal by water transportation, either from the KCBX terminal in Chicago or from the MERC terminal in Duluth. This real-world example of Consumers using water transportation at Cobb is the best measure of the physical feasibility and the economic competitiveness of water transportation to Campbell. And the pre-litigation studies Consumers performed of its options concluded that Cobb-style water transportation to Campbell was {

}⁴

To narrow the issues for the Board's consideration, CSXT accepted many of Consumers' own statements and much of its evidence about water competition. For example, CSXT accepted many of the assumptions in Consumers' own pre-litigation studies of potential water transportation to Campbell. *See, e.g.*, Reply at II-B-43. CSXT accepted a Consumers workpaper {{

}} *Id.* at II-B-34.

And CSXT accepted many of Consumers' own operating cost estimates, disagreeing only where CSXT had clear evidence that a cost was unnecessary or overstated. *See id.* at II-B-43-44. But instead of using Rebuttal to respond to the relatively few challenges CSXT made to its Opening Evidence, Consumers and its experts decided to revisit many of the assumptions that CSXT had accepted. Consumers now tries to impeach its own evidence of KCBX capacity, to revise many costs that its expert proposed on Opening, to introduce new evidence from new witnesses attempting to explain away the workpapers that Consumers submitted on Opening, and even to launch new assaults on established Board precedent. As CSXT explains in its Motion to Strike,

⁴ {

}; *see also* Reply at II-B-36-37.

all this is improper rebuttal evidence, and the Board should not consider it. The adversarial process cannot work if a complainant is allowed to try to “improve” its opening evidence on rebuttal rather than defend it.

Regardless, the evidence shows that alternatives to CSXT rail transportation are physically feasible, economically practical, and effective competition. While it is impossible to fully discuss each of these topics here, CSXT addresses some of the significant issues below.

Effective Competition Need Not Accommodate 100% of The Issue Traffic. For the first time on Rebuttal, Consumers challenges Board precedent that an effective competitive alternative does not have to handle all the issue traffic volume. Consumers says that these prior cases are distinguishable because this case requires “construction” to develop a new option. Reb. at II-22-27. But it does not point to a single sentence from a single prior case supporting such a limitation, and the Board has long recognized that shippers can be expected to make reasonable investments to develop competitive options.⁵ Nor does it offer a substantive response to Professor Murphy’s expert opinion that the Board’s precedent accords with economic principles (just an inexplicable *non sequitur* that his opinion should be discounted because he is not personally “offering to finance the necessary construction.”) Reb. at II-24.

Alternative Transportation Is Permittable. CSXT’s evidence showed that Consumers received reports from several outside experts showing that either a Direct Water Option or a Cobb Rail Option was physically feasible and permittable. *See* Reply at II-B-20-29; II-B39-40. On Rebuttal, Consumers introduced a statement from the authors of one of those reports arguing

⁵ See Reply at II-B-15-16. Consumers’ reliance on *DuPont* and *FMC* for a new argument that the Board only recognizes effective competition from a new alternative “if the estimated cost of construction was modest” ignores that the cost-effectiveness of construction is a function of the amount of traffic in question. For example, the movement in *FMC* involved “115,000 to 120,000 tons of coke annually”—less than 3% of the volumes at issue here—and the “significant investment” required “to accommodate large-scale trucking operations” had an amortized cost of approximately a million dollars per year. *FMC*, 4 S.T.B. at 711-12. An option that accommodates 3.5 million tons of coal per year would justify far higher spending.

that their report was a limited study that did not examine permitting and regulatory issues. It is plainly improper for Consumers to save these witnesses for Rebuttal for the purpose of impeaching a study that Consumers relied upon in Opening. But even if their statement were considered, it ignores that Consumers received multiple reports from other experts who

{

}⁶ Moreover, Consumers’ repeated claim that

TranSystems’s proposal could not be permitted because zoning would only allow a “near shore” dock is mistaken. CSXT’s proposals are for “near shore” construction in every sense of the word, and are designed to minimize impacts on navigation.⁷

Other Feasibility Issues. Mr. Barbaro’s statement that TranSystems included no dock or berthing dolphins—and instead only mooring dolphins—betrays a lack of understanding of marine infrastructure. Mooring dolphins and berthing dolphins are the same thing—as is illustrated by {

}⁸ In a protected harbor like Pigeon Lake,

the dolphins proposed by TranSystems would amply secure vessels. And Consumers’ claim that it might not be able to instantaneously hire articulated tug barges for Campbell service is not only wrong but beside the point. If Consumers were to proceed with dock construction, there is little doubt that it could arrange to charter the necessary vessels. As CSXT demonstrated on Reply, there is ample capacity in the Great Lakes fleet, and Consumers could line up suitable vessels if the market knew it were pursuing a water option. *See* Reply at II-B-37-38.

Capital Costs. CSXT stands by its Reply estimates of capital costs. While the parties’ disputes about these costs are too detailed to be addressed here, the reasonableness of CSXT’s

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⁷ *See* Reply Ex. II-B-1 at Appendix 1. {

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⁸ {

}

estimates is shown by how close they are to the studies Consumers commissioned before filing this case. In contrast, the massive gap between Consumers’ Rebuttal estimate and those pre-litigation estimates is an apt illustration of the degree to which Mr. Barbaro inflated costs.

ESTIMATES OF ALTERNATIVE TRANSPORTATION COSTS

	WorleyParsons ⁹	CSXT Reply ¹⁰	Consumers Rebuttal ¹¹
Direct Water Option	{ }	\$73.0 Million	{ }
Cobb Rail Option	{ }	\$17.9 Million	{ }

Operating Costs. Consumers stands by its Opening estimate for terminal costs but does not dispute that it was based on { } or persuasively explain why that { }
 { } Indeed, Consumers’ arguments are self-contradictory. It first says that a high terminal rate is needed to justify the allegedly higher operating costs of direct loading (without explaining why direct loading is more expensive); then it says that a high rate is needed to pay for ground storage. Reb. Ex. II-1 at II-1 at 64-65. Both can’t be true. As for other operating costs, Consumers should not be allowed to change costs that CSXT accepted or to posit new costs that it did not include on opening. Mot. to Strike at 7-9.

Cobb Shows The Effectiveness of Competition. CSXT showed on Reply that the real-world example of Cobb is the best evidence of an effective competitive rate. See Reply at II-B-51-55. Consumers’ only response is to claim that Cobb was “captive” to water. Reb. at II-12. On the contrary, Cobb had access to service from a host of water carriers through multiple ports—that is the very opposite of “captivity.” The fact that a plainly competitive movement would be judged as noncompetitive by a limit price test using unadjusted Revenue Shortfall Allocation

⁹ { }

¹⁰ CSXT Reply Ex. II-B-1 at 37 (Water Route Alternative I-B construction cost estimate); *id.* at 28 (Cobb-Rail construction cost estimate).

¹¹ Rebuttal Ex. II-B-1 at 99

Method (“RSAM”) is powerful evidence that the Limit Price Test is not accurately measuring what competition is effective. *See* Reply at II-B-62-64.

Unadjusted RSAM is a Poor Benchmark of Effective Competition. Consumers offers no substantive rejoinder to the several RSAM adjustments CSXT proposed that show how RSAM is out of line with economic realities. *See* Reply at II-B-64-69. Instead, Consumers complains that these adjustments are “tricks” and “ploys,” without explaining why they do not substantially improve upon an unadjusted RSAM benchmark. *Reb.* at II-67-69. And its suggestion that CSXT does not respect RSAM’s “role in the Limit Price Test” ignores that the Board invited parties to propose alternative benchmarks for the Limit Price Test.¹² The Limit Price Test is unlawful and should be abandoned entirely, but even if the Board were to retain some form of the test it has no basis for continuing to use unadjusted RSAM as the benchmark of effective competition.

II. CONSUMERS IS GROSSLY OVERESTIMATING BOTH THE REVENUES AND TONNAGES FROM ITS SELECTED TRAFFIC GROUP.

A. The More Recent Forecasts of Issue Traffic that Consumers Submitted to its State Regulator Are Better Evidence Than Outdated Forecasts.

On Opening Consumers presented rosy projections for the issue traffic based on internal forecasts generated ten months earlier and represented that this forecast reflected “its best estimates with respect to future coal sources and volumes by coal origin on an annual basis.” Opening at III-A-6. Yet two months before filing its Opening Evidence, Consumers submitted a materially lower volume forecast to the Michigan Public Service Commission (“MPSC”). CSXT rejected the outdated internal forecast in favor of the recent MPSC forecast. Reply at III-A-17.¹³

¹² *Reb.* at II-66; *M&G*, STB Docket No. 42123, at 5 (STB served Sept. 27, 2012).

¹³ For 2021-2024, CSXT assumed the same growth rates as shown in Consumers’ old forecasts. An alternative would have been to use EIA coal forecasts. But what would be patently unreasonable is to use the forecast provided to the state regulator for 2015-2020 and then jump to the much higher, but dated, internal forecast for 2021-2024 that relies on assumptions about natural gas prices that are no longer credible.

Consumers declares that it was entitled to provide the STB and MPSC materially different forecasts because the MPSC forecast was prepared after the close of discovery. *Reb.* at III-A-56-57. But CSXT never argued that Consumers was supposed to provide the public MPSC forecast to CSXT in discovery. What CSXT argued is that Consumers should not have claimed that the outdated forecast represented “its best estimates” when it had just given its regulator a materially different forecast based on updated information. *See Reply* at III-A-17. Consumers’ denunciations of CSXT for pointing out the discrepancy between Consumers’ representations to the STB and its representations to the MPSC are difficult to understand, except perhaps as displaced anger that Consumers was caught giving alleged “best estimates” to the Board shortly after it provided materially different (and less favorable) estimates to MPSC. *See Reply* at II-A-17-20.

Consumers offers no logical justification for the Board to rely upon an outdated forecast instead of the more recent public forecast provided to the state regulator. First, Consumers claims that the differences between the January 2015 forecast and the forecast submitted to the MPSC were “influenced” by the challenged rate itself. *Reb.* at III-A-57. This is utter fiction. The figure below shows that the dramatic differences are driven by Consumers’ input assumptions regarding the price of natural gas.¹⁴

¹⁴ The figure was derived from workpapers to show the assumed weighted-average delivered natural gas price to Consumers’ Zeeland 3 and 4 gas-fired units as follows:

- PROMOD – Jan 21, 2015 (Op. WP “CONSUMERS-002901...”): Divide fuel costs (rows 938, 984, 2386, and 2432) by fuel burn in MMBtu (rows 941, 987, 2389, and 2435).
- Strategist – Jan 8, 2015 (Op. WP “CONSUMERS-002900...”): Divide fuel costs (rows 31589, 31599, 42093, and 42103) by fuel burn (rows 31592, 31602, 42096, and 42106)
- PROMOD – Sep 30, 2015 (Reply WP “Consumers Application 2015 09 30”): Divide “Burn Dollars” (Line 1, column (d) on page 57 and Line 7 on page 59) by “Burn Volume” (Line 1, column (c) on page 57 and Line 1 on page 59).
- Strategist – Oct 8, 2015 (Reb. WP “2015 9+3 MISOOONLY Final 2045.REP”): Divide fuel costs (rows 31643, 31653, 41855, and 41865) by fuel burn (rows 31646, 31656, 41858, and 41868).

{{ }}
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Second, Consumers seeks to bolster the reliability of the January 2015 Strategist forecast with a revised Strategist forecast from October 2015. The results are suspiciously similar. How can the Strategist model produce nearly identical results when natural gas prices plummeted between January and October of 2015? The answer is that the second Strategist run lowered the delivered price for fuel to the Campbell plant.

{{ }}¹⁵

¹⁵ The figure was derived from workpapers to show the weighted-average delivered coal price to Consumers' J.H. Campbell Plant as follows:

- PROMOD – Jan 21, 2015: Divide fuel costs (rows 28, 83, 138, 1476, 1531, and 1586) by fuel burn in MMBtu (rows 31, 86, 141, 1479, 1534, and 1589).

By changing the input assumption for the delivered price of fuel, Consumers offset the stark drop in natural gas prices. It artificially improved the dispatch economics in the October 2015 Strategist run such that the model assumed higher coal-fired dispatch despite significantly lower competitive natural gas prices. Consumers' discussion on Rebuttal of the October 2015 Strategist forecast model suggests that the model run results are comparable. They are not.

Finally, Consumers suggests that the Board cannot perform a SAC analysis using a volume forecast for the issue traffic that is allegedly depressed by the challenged rate. *See* Reb. at III-A-57. As demonstrated above, this speculation is not the reason for the changing forecast. Regardless, the Board must assume the challenged rate is reasonable until the evidence proves otherwise. To permit Consumers to prove its case by speculating about higher volumes—because it believes (but has yet to prove) the challenged rate is unreasonable—is circular reasoning.

In the end, the verified forecasts Consumers submitted to its own regulator for the issue traffic just two months before the opening evidence in this case are the best evidence of record.

B. Failing to Recognize the Sea Change in Crude Oil Traffic Would be Arbitrary.

The plunge in crude oil shipments is well publicized. As Reuters reports, “Crashing oil prices and the end in December of a four-decade U.S. crude export ban . . . has hammered the oil-by-rail industry.”¹⁶ {{

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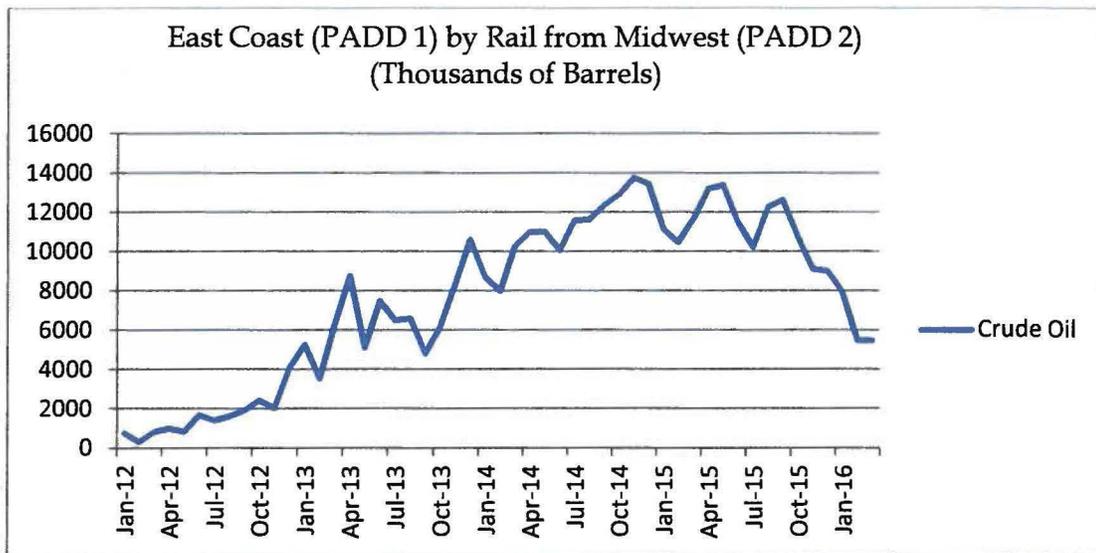
-
- Strategist – Jan 8, 2015: Divide fuel costs (rows 31377, 31391, 31405, 41881, 41895, and 41909) by fuel burn in MMBtu (rows 31382, 31396, 31410, 41886, 41900, and 41914)
 - Strategist – Oct 8, 2015: Divide fuel costs (rows 31427, 31441, 31455, 41639, 41653, and 41667) by fuel burn in MMBtu (rows 31432, 31446, 31460, 41644, 41658, and 41672)

¹⁶ Jarrett Renshaw, *Once in high demand, North Dakota oil-by-rail shunned on East Coast*, REUTERS (Jan. 25, 2016), <http://www.reuters.com/article/us-railways-crude-plains-all-amer-idUSKCN0V31CX> (last visited June 20, 2016) (emphasis added).

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Unable to challenge the headline-grabbing decline in the market, Consumers raises two legal arguments. First, it argues that the revised internal forecast is “made for litigation and less preferred to those created before litigation arose.” Reb. at III-A-72. But the earlier internal forecasts relied on by Consumers were also developed and produced in 2015, after this litigation arose. More fundamentally, the updated internal forecast is vastly superior. As of this filing, the price for West Texas Intermediate crude has rebounded to approximately \$50 per barrel. Recent public news continues, however, to report pessimism over the crude-oil-by-rail market, *particularly to East Coast refineries*. For example, OPEC’s June Oil Market Report foresaw “trouble for U.S. producers that have to ship crude to eastern refineries by rail because it is cheaper to ship crude by tanker from West Africa than by rail from North Dakota.”¹⁸ And the most recent data reported by the Energy Information Administration (“EIA”), shows the precipitous drop in shipments by rail to the East Coast.¹⁹



¹⁸ Paul Ausick, *OPEC Sees Continued Declines in Non-OPEC Crude Supply*, 24/7 WALL ST., <http://247wallst.com/energy-economy/2016/06/13/opec-sees-continued-declines-in-non-opec-crude-supply/#ixzz4CL5AuNit> (last visited June 22, 2016) (emphasis added).

¹⁹ This public data tracking crude oil shipments by rail can be found on the EIA website. See http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=p&s=esm_epc0_rail_r10-r20_mbbf&f=m (last visited June 22, 2016).

Second, Consumers argues that the Board should continue to use the flawed forecast because it would be improper to mix the older and newer internal forecasts. Reb. at 73. This is a classic example of no good deed going unpunished. CSXT chose to update its forecast only for crude oil shipments because only that commodity experienced a sea change in volumes. If mixing the older and newer internal forecasts creates some unspecified concerns, then the Board could use the updated CSXT forecasts, {{

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The Board is obligated to “judge the reasonableness of a carrier’s rates based on the best evidence available at the time of its decision.”²⁰ CSXT respectfully submits that prescribing a maximum lawful rate for 10 years based on the outdated projections of the crude oil market would be the definition of arbitrary decision making.

C. The Board Should Reject Consumers’ Unrealistic Merchandise Traffic Selection.

Consumers’ proposal to carve up traffic from merchandise customers stretches the bounds of reasonableness and should be rejected. Consumers posits that the CERR would serve a particular customer on a given day only if its traffic happened to arrive in a way that minimized the cost of serving that customer: *i.e.*, on trains that required no switching in Chicago and contained no TIH shipments.²¹ How a hypothetical railroad would make this snap decision in real time continues to be a mystery. And no real-world customer would contract with a railroad on such restrictive terms. Reply at III-A-8-9.

Consumers’ response captures this case in a nutshell. Consumers believes it has no obligation to “demonstrate an ability to persuade individual shippers to volunteer as members of

²⁰ *Duke/NS Reconsideration*, 7 S.T.B. at 864 (2004).

²¹ Consumers thus assumes that if customer X’s traffic arrives on train BNSF 123 on Monday and BNSF 123 contains cars that need to be switched in Chicago, then Customer X’s Monday traffic is NOT in the SARR’s traffic. But, if Customer X’s traffic arrives on train BNSF 123 on Wednesday, and BNSF 123 contains no cars that need to be switched in Chicago that day, then Customer X’s Wednesday traffic IS included in the SARR’s traffic base.

the SARR's traffic group. To the contrary, a complainant is entitled to select *any* traffic, and can presume its inclusion in that group so long as the SARR demonstrates the capability to transport that traffic in a manner comparable or superior to the service provided by the defendant." Reb. at III-A-11. But the goal of the SAC analysis is to simulate the rate that would exist in a contestable marketplace, where the failure to entice customers would be the death knell of any new entrant. Moreover, Consumers' argument would lead to CSXT's real-world rates being gauged by a fictional railroad providing service that is contrary to all real-world norms. CSXT cannot carve up the demands of its merchandise customers, embracing those requests it desires to handle on a particular day, while discarding the same customer's requests that are too vexing to accept the next. Put differently, CSXT cannot refuse to fulfill its common carrier obligation to a customer simply because that customer's traffic arrives on a train that requires intermediate switching. Permitting the CERR to do so does not reveal any inefficiency or cross-subsidy; it just rests the SAC analysis on selection criteria that make a mockery of the real-world customer relationship.

D. As the Board Recognized In Ex Parte 715, Hook-and-Haul Merchandise Cross-Over Traffic Seriously Biases the SAC Analysis.

Consumers makes no bones about the fact that it is proposing to serve precisely the kind of carload, merchandise cross-over traffic that the Board singled out in Ex Parte 715 as creating a significant bias in the SAC analysis. The CERR would accept only trains in trainload service. Dismissing the Board's concerns and ignoring its invitation to correct the bias by adjusting the ATC revenue allocation formula, Consumers capitalizes on the Board's finding that "because ATC allocates revenues based on costs, it appears the facilities replicated by the SARR receive more revenue than is warranted." *Rate Regulation Reforms* at 16. Heeding the Board's call, CSXT adjusted the Board's ATC revenue allocation to treat these movements as more efficient, lower-cost trainload movements by adjusting both the variable and fixed costs components of the allocation formula to align with Consumers' selected traffic. *See Reply* at III-A-37-38.

On Rebuttal, Consumers continues to offer silence rather than solutions. “Nothing in EP 715,” according to Consumers, obligates it to “address[] a ‘problem’ that does not exist.” Reb. I-13. Consumers is wrong. In EP 715, the agency urged parties in rate cases to address this issue by adjusting the costs for this kind of traffic to treat the traffic like “the more efficient, lower cost trainload movements that they would be.” *Rate Regulation Reforms* at 26. Consumers cannot argue that the adjustments proposed by CSXT are prohibited movement-specific adjustments, when the Board sanctioned those kinds of adjustments. Reb. at III-A-90-93.²²

Consumers’ new arguments miss the mark. Consumers argues that because the ATC divisions are based on the incumbent’s operations, not that of the SARR, that there are no biases. *Id.* at III-A-88-89. Consumers’ position is contradicted by the Board’s EP 715 decision. It ignores the fact that, in Consumers’ mind, the CERR would replicate the trainload service that CSXT provides to the selected traffic group in Chicago (as it excluded any train where CSXT performed any switching in Chicago). Indeed, the dominant feature of the traffic selection criteria was to “limit[] the class of merchandise traffic that would be handled by the CERR to traffic that entered the CERR in intact trains, and would move intact over the CERR to the point of exit without any intermediate switching.” Reb. at III-A-2. In its zeal to portray the relative ease of operations through Chicago, Consumers boasts that freight switching and train building for the traffic it assumes the CERR will handle is performed by CSXT at locations outside the Chicago Terminal. *Id.* at III-C-23. Yet Consumers refuses to adjust the ATC revenue allocation (and MMM calculation) to treat this traffic like the more efficient, low cost trainload movements Consumers proclaims it would be. CSXT’s solution is therefore the best evidence of record.

²² *Rate Regulation Reforms* at 27 (noting CSXT’s argument that Board could correct the bias by allowing movement-specific adjustments to URCS); *id.* (“But shippers and a significant portion of the carrier community agree that the disconnect can be cured by a more accurate allocation of costs to the SARR, and that restrictions on [carload cross-over] traffic are unnecessary assuming allocation improvements are made.”); *id.* at 28 (“parties in pending cases are free to advocate in their individual proceedings ways to address this issue”).

E. The SARR Should Not Be Credited With Revenues For Services It Neither Would Perform Nor Pay For at the 59th Street Intermodal Facility.

CSXT and CSX Terminals are sister companies, both first-tier subsidiaries of CSX Corporation. As of June 26, 2010, CSX Terminals owns the 59th Street intermodal terminal, except for the underlying land. Under the agreement between CSXT and CSX Terminals, CSXT pays CSX Terminals a fee equal to 110% of all CSX Terminals' operating costs, less any revenues from third parties. Thus, the expenses of providing intermodal terminal services are either incurred directly by CSXT (e.g., land ownership and train inspections) or indirectly through the payment to CSX Terminals for its operating costs.

A SARR that accounts for the investment costs for the 59th Street intermodal terminal and accounts for all the direct and indirect operating expenses for originating and terminating traffic at that terminal is entitled to the full ATC revenue allocation for originating and terminating the intermodal traffic. For example, in *TPI* the SARR included the investment costs for the land and the terminal at the 59th Street intermodal yard,²³ and it would be entitled to the full ATC origination and termination credit if it accounts for those investment costs and all operating services.

In this case, Consumers hopes to have its cake and eat it too by incurring a fraction of the total costs and retaining the same generous revenue share. Based on Consumers' evidence, the hypothetical CERR would incur **30%** of the operating expenses that CSXT pays CSX Terminals,²⁴ **0%** of the operating expense incurred directly by CSXT, and **0%** of the real estate

²³ *TPI* included these investment costs on opening, and the Board denied a later request by *TPI* to amend its evidence. *TPI*, STB Docket No. 42121, at 5 (July 24, 2015).

²⁴ As CSXT explained on Reply, Consumers first took a scalpel to the total payments by CSXT, carving away any expense items that it felt were not directly linked to the intermodal trains that would be handled by the CERR. See Reply at III-A-44. Although the CERR would serve a huge majority of CSXT's intermodal shipments flowing to and from this intermodal terminal, Consumers then cleaved the expenses using a number of lifts that represented barely one-half of

investment. *See* Reply at III-A-44. Indeed, the clearest example is the failure of Consumers to include any of the cost of the Chicago real estate that CSXT, not CSX Terminals, owns.²⁵

Consumers also plainly failed to account for the costs of maintaining the facility, utilities to keep the lights on, or clerical labor necessary to support the facility's functions, all expenses paid for by CSXT. Yet while proposing to pay just a fraction of the real-world cost incurred by CSXT, Consumers claims it "is entitled to the same revenue that CSXT receives." Reb. at III-A-98.

Consumers offers two rationales. First, Consumers observes that CSX Terminals is a sister company, not a subsidiary of CSXT. Consumers maintains that it was entitled to refuse to construct the 59th Street facility under current agency precedent. *See* Reb. at III-A-98-102. This misses the point. CSXT acknowledged that CSX Terminals is not a subsidiary of CSXT. But whether Consumers is entitled to the generous ATC revenue allocation for terminating and originating traffic does not turn on the corporate form of the relationship.

The question is whether the expenses and services replicated by the CERR would match those embedded in the ATC revenue allocation. If not, then providing the CERR the generous revenue allocation will grossly bias the results. Here, all the investment and operating costs incurred by CSXT to originate intermodal traffic at the 59th Street facility are reflected in the generous ATC revenue allocation. The direct and indirect operating expenses incurred by CSX Terminals are also reflected in ATC because CSXT pays those expenses. Like any other payment to third parties, those operating expenses are then reported in the annual R1 and captured in the Board's Uniform Rail Costing System ("URCS") model. The corporate form is irrelevant. The ATC methodology in turn determines an unbiased revenue allocation based on the full average

CSXT's activity at the terminal. Consumers has offered no explanation for not including all the direct operating expenses paid by CSXT.

²⁵ In two places, Consumers claims that it explains in Part III-F "how Consumers accounted for all the relevant operating costs and investment." Reb. at III-A-99; *see also id.* at III-A-102. But III-F contains no such explanation.

total cost of originating and terminating that traffic. In other words, the ATC revenue allocation reflects a share of revenue based on **100%** of the operating expenses CSXT pays CSX Terminals, **100%** of the operating expenses incurred directly by CSXT, and **100%** of the real estate investment.

At most, STB precedent gives Consumers a choice. Because CSX Terminals is only a sister company and not a subsidiary, Consumers could either replicate the facility entirely (the *TPI* approach) or step into the shoes of CSXT and acquire the expensive real estate in Chicago that is owned by CSXT, replicate those services provided by CSXT directly, and then pay the same full charges for all services provided by CSX Terminals.²⁶ Consumers did neither. It chose instead to construct its SARR to the doorstep of the 59th Street facility, and then stop. It failed to include the real estate costs, the expenses incurred directly by CSXT, or the full payments paid to CSX Terminals.

Consumers' second defense is that there are other customers at the 59th Street facility and that somehow justifies a generous revenue share. *See* Reb. at III-D-162. Consumers offers no evidence to support this claim. But whatever other revenues CSX Terminals recovers from third parties are irrelevant to the question presented here. It is undisputed that CSXT pays CSX Terminals 110% of all operating costs incurred (including the depreciation of fixed CSX Terminals assets), less anything collected from third parties. But Consumers has refused to "step into the shoes" of CSXT and pay those same charges. For example, it stripped out the costs of maintaining the facility and depreciation expenses. And it bears repeating that Consumers included none of the expensive real estate in its SAC analysis, expenses that are captured in the Board's URCS model and thus reflected in the ATC revenue allocation.

²⁶ CSXT does not agree with the Board's disparate treatment of facilities that are owned by sister companies, or other subsidiary companies of its holding company, CSX. That disagreement is not relevant to the issue presented here.

The juxtaposition between this case and the *TPI* approach to the 59th Street facility illustrates how easily a complainant can manipulate the ATC revenue allocation and bias the entire SAC analysis. The goal in allocating revenue from cross-over traffic is to minimize the degree of bias and imprecision that follows inevitably from this modeling device. The D.C. Circuit has permitted the use of this simplifying device, but also cautioned that its approval might change if the record revealed that the revenue allocation was biasing the results. *See BNSF 2006*, 453 F.3d at 482. If the Board permits a complainant to avoid the full expenses of originating and terminating traffic, yet receive the same revenue allocation, then the imprecision implicit in the use of cross-over traffic will have grossly “overestimate[d] the revenues generated by a SARR to a degree that outweighs any efficiency gains.” *Id.* at 483. The Board should not permit Consumers to have its cake (by claiming dramatically lower operating and investment costs) and eat it too (by receiving the same generous revenue allocation).

F. The CERR Should Not Receive Revenues for Non-Issue Empty Unit Trains that are Routed Around the Congested Chicago Gateway.

An unusual feature of this case is the real-world decision of CSXT to route 15% of empty unit trains of non-issue traffic away from Chicago.²⁷ While Consumers excluded those empty trains from its operating plan and expenses, ATC revenue allocation assumes an empty-return ratio of 100%. The revenue allocation thus rewards the CERR for handling empty trains that it does not handle. CSXT therefore adjusted the on-SARR variable costs to match the services being replicated,²⁸ leaving the revenue for the empty unit trains that do not traverse the CERR with the residual CSXT. *See Reply* at III-A-38-42.

Consumers disagrees. It correctly observes that CSXT’s adjustment assumes the empty-loaded ratio for the entire movement is 100%. Consumers argues, however, that any adjustment

²⁷ *See Reply* WP “2014 CSXT URCS Empty Load Ratios.xlsx.”

²⁸ *See Reply* WP “Carload URCS_SARR Inputs_Reply.xlsx,” Col. W.

to reflect the fact that only 85% of the unit trains in the traffic group are routed back through Chicago must also adjust the revenue allocation to reflect the true empty-loaded ratio for each movement. *See* Reb. at III-A-95. In the same breath, Consumers argues that this would be a prohibited movement specific adjustment and “inevitably would lead to further adjustments.” *Id.*

The Board should reject both arguments. First, CSXT reasonably accepted the assumption in URCS that unit trains have a 100% empty-loaded ratio *from the origin to destination*. URCS was designed to cost movements from the origin to destination, not for a 30-mile segment along the route in question, and this is an established assumption in the general purpose costing model. There is no logic to demanding that CSXT set aside this general URCS assumption to address a feature of Chicago regarding the rerouting of empty trains, and it is worth noting that Consumers could have, but elected not to, perform this allegedly counterbalancing step itself. Second, slippery slope arguments are a poor substitute for preventing a biased revenue allocation. Permitting simple adjustments needed to correct an obvious bias in the revenue allocation—like the undisputed fact that empty trains are routed around Chicago—does not mean that the Board must allow unlimited future adjustments.

G. The Board Should Not Depart From its Long-Standing Preference for Neutral Government Forecasts.

The Board “regards the forecasts developed by the EIA, a neutral governmental source, as more reliable than forecasts developed by private parties for litigation, which are inherently subject to manipulation.”²⁹ CSXT follows this preferred approach. From 2015 to 2019, CSXT accepted the forecasts used by Consumers that relied on CSXT internal forecasts for the same time period, with the exception of crude oil noted above. *See* Reply at III-A-21. But

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²⁹ *TMPA II*, 7 S.T.B. 803, 822 (2004).

}} CSXT therefore used long-term EIA forecasts for those years. *See id.* at III-A-22-23.

On Rebuttal, Consumers continues to use the outdated CSXT forecasts rather than EIA data. *See Reb.* at III-A-68. First, it claims that extending the CSXT internal forecasts for four more years using the compound annual growth rate (“CAGR”) approach is supported by agency precedent. Second, it argues—contrary to all available evidence—that there is no reason to believe that the internal CSXT forecasts for 2015-2019 are now inaccurate and cannot be relied upon to forecast 2020 to 2024 traffic levels. Third, it claims that the use of EIA forecasts in this context is unprecedented and “prone to manipulation.” Fourth, Consumers observes that these neutral government forecasts are general economic forecasts not tailored to the traffic moving through Chicago.

None of these justifications support discarding neutral government forecasts in favor of a CAGR approach that rests on dated and unreliable internal CSXT forecasts. The Board is well aware of the shifting economics of rail transportation in the 18 months since the 2015 internal CSXT forecasts were developed. Given the system-wide drop in rail traffic, extending this outdated internal forecast to 2020 to 2024 would plainly produce unreliable projections.

Moreover, the fact that CSXT is now advocating the use of current, neutral government forecasts to predict traffic levels in 2020 to 2024—and that the STB accepted the use of a CAGR methodology in the past—offers no basis to reject CSXT’s arguments. The first time a railroad advocated the use of EIA forecasts in past rate cases the argument was similarly “unprecedented.” But the Board wisely chose to displace the array of internal forecasts in favor of neutral government forecasts that are inherently less subject to manipulation, even if the government forecast is not specifically tailored to the selected traffic group. Doing so helps

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simplify the complex SAC presentation by focusing the dispute on picking the best neutral government forecast. It also permits the Board to use more current government forecasts, rather than forecasts that are inevitably overtaken by recent events.

Given the Board's stated preference for long-term government forecasts and the obvious changes in the marketplace in the last 18 months, EIA forecasts for 2020 to 2024 are the best evidence of record.

H. The CERR Should Not Be Credited With Revenues For Calumet Park Trains For Which It Fails to Match CSXT's Service Standard.

For certain selected traffic, the CERR cannot provide the same level of service that CSXT provides in the real world. CSXT proved on Reply that Consumers' Opening operating plan failed—based on its own Rail Traffic Controller (“RTC”) evidence—to provide the same level of service for certain short haul cross-over movements. Specifically, east and westbound trains that would travel only 9.9 miles on the CERR between Calumet Park and Curtis would be 15% and 40% slower, respectively, than the average transit times provided by CSXT. *See Reply at III-A-13-14.*

This traffic must be removed from the traffic group under established agency precedent. The Board has observed: “Tremendous flexibility is permitted in the design of the SARR. But we require that these hypothetical operations be feasible and supported and that they provide shippers included in the analysis **the same or superior service** as provided by the actual operations of the defendant railroads.” *Arizona Elec. Power Coop., Inc. v. BNSF Ry. Co.*, STB Docket No. 42113, at 10 (STB served Nov. 22, 2011) (emphasis added). This is a cardinal rule of SAC theory and the test that Consumers properly cited on Opening to support its traffic group and operating plan.

On Rebuttal, Consumers seeks to alter this fundamental test. Consumers argues that it should be permitted to retain this traffic absent evidence that the CERR would lose the traffic

entirely. According to Consumers, delays of 15% or 40% are *de minimis* when compared to the total transit time of the movement and would not cause the CERR to lose that traffic entirely. Reb. at III-A-37-50. The Board should reject this attempt to change its long-standing test that the SARR must provide the same or superior service as provided by the incumbent in the real world. Consumers embraced that test on Opening and should not be permitted to do an about-face and challenge it for the first time on Rebuttal. Moreover, a relaxed standard for short-haul cross-over movements makes no sense and would corrupt the SAC analysis. Most cross-over traffic movements reflect a small portion of the overall service provided by the defendant railroad. If the Board abandons its bedrock requirement that the SARR provide “the same or superior service” it will be left adrift, forced to decide on a case-by-case basis just how “inferior” the service can be before the traffic should be excluded from the traffic group.

I. The Board Should Correct the Technical Error in the Density Evidence used by Consumers to Allocate Revenues under ATC.

The final revenue issue addressed here is the gross error in the density data for a 0.35-mile segment within Chicago. Consumers’ ATC allocation assumes that the 0.35-mile segment from milepost DC 15.00 to milepost DC 15.35 on CSXT’s mainline route has virtually no density: only 100,000 net tons.³¹ This supposedly empty 0.35-mile stretch, however, is sandwiched between two segments with over 80-million gross tons. *See* Reply at III-A-51.

Consumers flatly refused to accept or correct this obvious technical error in the density data. *See* Reb. at III-A-103. Nowhere does Consumers argue that the segment in question actually has only 100,000 gross tons. That would be a nonsensical position, as the CERR’s selected traffic moving over this same segment generates a density exceeding 50 million gross tons.³² Rather, Consumers argues that CSXT cannot produce a study of system-wide densities in

³¹ Opening WP “2014 Fixed Costs For ATC (Final).xlsx,” Worksheet “2014_Density,” Row 337.

³² *See* Opening Table III-C-5 at III-C-12, row “75th St. to IHB Blue Island Connection.”

response to a discovery request, and then “jettison the study when it does not like the results.” *Id.* at III-A-104.

Consumers’ indifference to the truth is disappointing and finds no support in STB precedent. “In complex rate cases such as this,” the Board has explained, “parties are encouraged to bring computational or technical errors to the Board’s attention. In recent SAC cases, the parties have uncovered errors in the spreadsheets that had been provided by the parties and relied upon by the Board, as well as technical mistakes made by the Board itself in its calculations. The Board is committed to promptly correcting any such technical errors.”³³ Given this commitment to correcting technical errors, “the Board routinely allows the correction of minor technical errors in SAC rate cases. Given the size and complexity of such cases—in which thousands of data points are submitted—a standard that allows parties to correct minor errors is both appropriate and necessary.”³⁴

The only case cited by Consumers in support of its position is *TMPA II*. But in fact that case supports correcting the error. There, the agency forced the railroad to permit the shipper to conduct a special study of locomotive fuel consumption. The parties had negotiated a study methodology, which was tested and validated by the shipper’s witness. *TMPA*, however, was not satisfied with the results of this study, which showed fuel consumption rates higher than BNSF’s system-average rates. So it challenged the results of its own special study.

Consumers cites this case to support the proposition that a party cannot “turn around and distance itself from its own special study, when it does not like the result.” *Reb.* at III-A-105-106. On the contrary, in *TMPA* the Board *permitted* the shipper to challenge its own special study, but ultimately “was not persuaded that *TMPA*’s adjustments *produced a more accurate*

³³ *Pub. Serv. Co. of Col. d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 42057, at 2 (served Dec. 14, 2004).

³⁴ *DuPont* at 34.

picture of the variable locomotive fuel cost than did the unadjusted study results (with exclusion of a few anomalous study observations).” *TMPA II* at 813 (emphasis added). In other words, the Board was seeking the truth, not binding parties to an obviously erroneous special study. Applying that same standard here, the Board should accept CSXT’s adjustment to the density data between milepost DC 15.00 to milepost DC 15.35 as facially more accurate.

III. CSXT’S OPERATING EVIDENCE SHOULD BE ACCEPTED.

A. The Board Should Adopt CSXT’s Operating Plan And Related Expenses.

Consumers’ Rebuttal rejected the vast majority of the adjustments to its Opening operating plan proposed by CSXT. Consumers asserts that “CSXT’s Reply operating evidence is predicated on outdated notions of Chicago operations and misunderstandings of the current environment.” Reb. at III-C-4. Consumers’ operating experts (Messrs. Orrison and Holmstrom) opine that CSXT’s Reply “depicts rail operations of the 1980’s and 1990’s” and “does not reflect the operations in the [Chicago] terminal today.” *Id.* at III-C-8, III-C-25. Indeed, Consumers suggests that the Blue Ribbon Panel that recently reported on operating challenges in the Chicago terminal area is living in the past! *Id.* at III-C-9.

The assessment of current Chicago terminal operations presented by Consumers’ experts is flatly contradicted by the record. Consumers’ own workpapers demonstrate that the 321 trains included in Consumers’ peak period train list experienced a total of 1,195 delay events—including 642 “Enroute Train Delays”—during the 2014 Base Year.³⁵ Nearly 80% of those delays had a duration of 15-60 minutes, and 17% caused trains to be held for more than one hour. Reply at III-C-13. These real-world facts fatally undermine Consumers’ claim that CERR trains would not experience significant delays while operating through the busy Chicago terminal area.

³⁵ See Opening WP “Peak Unit Merch Trains v5 20151009 w Peak LE Consist and Growth Trains w delayv4.xlsx,” Worksheet “peak_week,” Columns V and W; Reply at III-C-12-13.

Consumers relies on the “experience” of its operating experts³⁶ as the primary rationale for rejecting several of the operating plan adjustments proposed by CSXT:

Bad-Ordered Loaded Issue Cars. Consumers’ SARR failed on Opening to account for the transportation of all of the issue traffic from Chicago to Consumers’ Campbell plant in West Olive, MI. Specifically, Consumers ignored its own carloads that are bad-ordered en route and move in CSXT merchandise trains from Barr Yard to West Olive.³⁷ Because CERR would not operate any merchandise trains over that route, CSXT proposed to build a 750-foot track to hold bad-ordered cars at Barr Yard and stop one CERR train per week to add the cars for delivery to the plant. *See Reply at III-C-40-43.*

Rather than adopting this efficient, common-sense solution to a real-world operating scenario that the CERR would be unable to avoid, Consumers offered a litany of reasons why it should not be required to account for the movement of those loaded *issue traffic* cars. Consumers’ assertion that requiring the CERR to “track and transport such a trivial number of cars” would prove that “the SAC process is broken beyond all repair” (Reb. at III-C-85) is nonsense. The most fundamental requirement for a “feasible” operating plan is that it account for all the train service required to transport the SARR’s traffic from origin (or on-SARR point) to destination (or off-SARR location). *DuPont* at 38. Consumers’ claim that it could not have known about the bad-ordered cars on Opening (Reb. at III-C-86) is irrelevant—CSXT clearly identified the cars on Reply, yet Consumers refused to account for them in its Rebuttal operating

³⁶ Consumers’ criticism of CSXT witness John Gibson for primarily having “experience in planning” ignores both that operations planning is the essential expertise necessary to design an operating plan and that Mr. Gibson’s testimony is based on his specific observations of the operations at issue here. *See, e.g., Reply WP “Gibson Field Notes.pdf.”*

³⁷ Consumers failed to account for these cars because of its unorthodox traffic selection. Because Consumers categorically eliminated any traffic moving in a train that would require switching by the CERR, it failed to select the CSXT merchandise trains in which bad-ordered loaded coal cars are transported to West Olive.

plan.³⁸ Consumers complains that “[CSXT] has offered no proof they were bad-ordered,” but does not suggest any alternative reason why single-car shipments of Consumers coal traffic would appear in Chicago. Whether bad-ordered or not, the CERR is required to account for the transportation of all issue traffic to West Olive. Relying on nothing more than witness Orrison’s “extensive experience,” Consumers claimed that “BNSF’s policy is to place bad-ordered cars on a subsequent West Olive train on BNSF’s own network between the PRB and Cicero, IL.” *Id.* at III-C-94. Witness Orrison’s supposed knowledge of BNSF “policy” is refuted by the real-world event records, which show those cars were transported as single-car shipments on merchandise trains from Barr Yard to West Olive. *See Reply at III-C-41.*³⁹ Witness Orrison’s alternative theory that CSXT itself may have removed the cars from a BNSF train at 71st Street (Reb. at III-C-88) is both factually untrue and beside the point. If loaded issue cars were indeed bad-ordered at 71st Street, the CERR would also be required to remove them from the train, switch them to Barr Yard for repair, then place them in a subsequent CERR train for delivery to West Olive—*precisely as CSXT proposed.*

In short, neither witness Orrison’s experience nor Consumers’ unsupported speculation provide any basis for relieving Consumers from the obligation to account for the complete movement of all issue traffic. Consumers’ failure to so do renders its operating plan infeasible. The Board should adopt CSXT’s common-sense solution for handling bad-ordered issue cars.

Train Delays. As CSXT’s Reply (at III-C-7-27) demonstrated, Consumers failed to adequately account for the delays that CERR trains would inevitably experience as they move through the busy Chicago terminal area. On Rebuttal, Consumers continued to insist that CERR trains would be virtually immune to the delays that affect other carriers operating through

³⁸ Consumers assumed that the CERR would receive 100% of the CSXT revenue for these cars, yet refused to account for their movement over the CERR network to West Olive.

³⁹ *See Reply WP “BadOrdered Carloads in NonUnit Trains.xlsx.”*

Chicago. Witnesses Orrison and Holmstrom contend that the creation of the Chicago Transportation Coordination Office (“CTCO”) in 2000 “ushered in a new era for Chicago’s train operations,” and their testimony suggests that significant train delays are a relic of the past. Reb. at III-C-8-24. Consumers’ characterization of current Chicago operations is belied by the facts—it bears repeating that the trains selected by Consumers for its SARR experienced a total of 1,195 real-world delay events in just 9 days during the 2014 Base Year.⁴⁰ Consumers sought to defend its modeling of only 54% of foreign line train delays on the grounds that the CERR would operate only 54% of CSXT’s real-world trains, arguing that “[it] reasonably assumed that the relationship between delays and [train] volume would be proportionate.” Reb. at III-C-43-44⁴¹ However, Consumers offered no justification for failing to include in its RTC simulation 54% of the other delay events identified *in its own workpaper*. Consumers’ quibbling about whether “EnRoute Train Delays” that occurred at or near foreign line crossings were, in fact, attributable to conflicting foreign train movements (Reb. at III-C-40 -42) is irrelevant—regardless of the precise nature of the delay, there is no basis for assuming that the CERR would never experience such events. Consumers’ rejection of *every* delay event posited by CSXT at 22nd Street, where CERR trains must await permission to enter the lines of BNSF or UP (Reb. at III-C-51-52), is especially implausible. Consumers offered no alternative explanation as to why real-world CSXT trains would be held at the “end of the line.”

⁴⁰ See page 25 and n. 35, *supra*.

⁴¹ Consumers’ theory that the frequency of foreign line crossing delays would be directly proportionate to the number of trains operated by CERR (as compared to CSXT) is incorrect. The primary determinant of whether (and how often) CERR trains would be held by a foreign dispatcher would depend on the volume of conflicting traffic on the foreign carrier’s line. Consumers posits that the CERR’s merchandise traffic would grow by 30%, and its intermodal traffic would increase by 62%, in the Peak Year. Because such economic growth would increase traffic on all railroads operating through Chicago, the frequency of conflicting train movements at foreign-controlled interlockings would likewise be greater than in the Base Year.

Train Lengths. Consumers understated the number of trains that the CERR would be required to operate in the Peak Year by allowing certain trains to exceed the lengths prescribed by CSXT's Interline Service Agreements ("ISAs") with its Chicago interchange partners. *See* Reply at III-C-27-40. While Consumers acknowledged that connecting carriers would determine the length of trains delivered to it in Chicago (Reb. at III-C-57), it nevertheless rejected the train length adjustments proposed by CSXT to comply with the ISAs.⁴² Based on his alleged involvement in negotiating CSXT's ISAs, witness Orrison "flatly denie[d] that the ISA train sizes [sic] were ever meant as a hard and fast limit." Indeed, Consumers argues that the ISAs themselves "are, at best, loosely defined arrangements." Reb. at III-C-59.

Once again, Consumers' position is belied by both the plain language of the ISAs and CSXT's real-world experience. The ISAs, on their face, prescribe the train lengths that CSXT and connecting carriers have agreed to interchange at Chicago.⁴³ Moreover, the Base Year train event data confirm that 94% of the merchandise trains and 98% of the intermodal trains selected by Consumers for its SARR complied with the lengths set forth in the applicable ISAs.⁴⁴ These

⁴² Consumers' suggestion that the CERR (and its interchange partners) could simply defer the movement of excess cars to a subsequent day rather than "clear its entire inventory of traffic every day" violates SAC principles. Reb. at III-C-78. Holding cars in that manner would add 24 hours to the transit time of such cars, resulting in a failure by the CERR to meet the service requirements of customers. Consumers' suggestion would also require connecting carriers (who determine train lengths) to alter their operations for the CERR's benefit.

⁴³ *See* Reply WP "Chicago ISAs.pdf," from discovery document "Interline Service Agreements (CSXT-CNSMR-HC-25271 to 25493.pdf."

⁴⁴ *See* Reply at III-C-32 and n.62. Consumers' assertion that CSXT and its interline partners "exceeded the ISA train lengths for 55% of the merchandise and intermodal train symbols" (Reb. at III-C-66) is, at best, disingenuous. Consumers' 55% calculation includes any train symbol for which Consumers was able to identify even a single Base Year train longer than the ISA-prescribed limit. *See* Reb. WP "Peak Period Trains_Rebuttal.xlsx," Tab ISA_Length." By contrast, CSXT's analysis, which is based upon train counts across all train symbols, demonstrates that virtually all of the real-world trains interchanged between CSXT and connecting carriers in Chicago during the Base Year complied with the applicable ISAs.

real-world data thoroughly discredit Consumers' assertion that the train lengths prescribed by the carriers' ISAs represent nothing more than "loosely defined arrangements."

The Board should adopt the Peak Year train lengths posited by CSXT, which are consistent with both the terms of CSXT's ISAs and its real-world experience.⁴⁵

Compensation for Third Locomotive on Run-Through Trains. Consumers posited that, if trains received in interchange had more than two foreign road locomotives attached, the CERR would not remove the third locomotive but would instead isolate it in the idle position while operating on CERR. *See* Opening at III-C-32. However, Consumers failed to account for the cost of such "excess" foreign locomotives while on the CERR's lines. Reply III-C-50-51, III-D-13-16.⁴⁶ On Rebuttal, Consumers asserted that the CERR should not be required to incur costs for foreign locomotives that are not required to power CERR run-through trains, because "the [CERR's] interchange partners have no expectation of compensation" for those units. Reb. at III-C-104. Consumers' new position is contrary to both the terms of the CSXT-BNSF run-through power agreement—which the CERR purported to adopt—and with common sense. {{

⁴⁵ Based on that real-world experience, CSXT's Reply permitted up to 6% of merchandise trains and 2% of intermodal trains to exceed the ISA-prescribed limits. Reply at III-C-38-39.

⁴⁶ Consumers' Opening implied that such costs were included in its locomotive expense calculations, but CSXT demonstrated that they were not. *Id.*

⁴⁷ {{

}} Under Consumers' theory, a railroad could disclaim responsibility for the cost of foreign locomotives that sat idle in a yard for several days awaiting a return train assignment, because the units were "not needed" to power a train during that time. Consumers presented no evidence to support its claim, and the Board should include in the CERR's locomotive expenses the cost of all foreign units while on the CERR's lines.

Operational Staffing. Witnesses Orrison and Holmstrom opined that virtually every CERR crew could complete two train assignments per shift, *every day*, without exceeding their permitted hours of service. *See* Opening at III-C-80. As CSXT demonstrated, this assumption is inconsistent with both the realities of real-world railroading in Chicago and the train transit times generated by Consumers' RTC simulation. Reply at III-C-69-71; III-D-34-39. On Rebuttal, Consumers' doubled down on this incredible claim, going so far as to assert that "one [CERR] crew could handle *up to four trips in a day* over most of the shorter moves (*i.e.* Curtis to Dolton)." Reb. at III-D-20 (emphasis added). Consumers proffered no evidence whatsoever that real-world train crews operate multiple trains through Chicago during a single shift—much less that they do so 100% of the time.⁴⁸

Consumers further understated the required number of peak period train crews by assuming (unrealistically) that fully 100% of CERR crew persons would work every day during the peak week. *See* Reply at III-D-40-44.

B. CSXT's Evidence on Other Operating Expenses Should Be Accepted.

1. Only CSXT's G&A Evidence Accounts for the CERR's Unique Needs.

Consumers' primary argument for its G&A staffing plan is that it is allegedly in line with "benchmarks" from recent SAC cases like *DuPont* and *TPI*. But as CSXT explained in its Reply,

⁴⁸ Consumers also shortchanged Crew and Dispatch Support. CSXT provided a 24/7 position for crew and dispatch support, which is particularly needed because of the CERR's unconventional traffic selection and inability to predict which trains it will handle in advance. Reply at III-D-58-62. Consumers' refusal to adequately staff this function would make it impossible for the CERR to achieve even the aggressive crewing assumptions CSXT proposed.

this argument ignores the fact that large SARRs can achieve economies of scale that are unavailable to smaller railroads. Benchmarking to smaller SARRs is similarly problematic, because the CERR's location and traffic group mandate more intensive G&A staffing than the traffic groups of rural coal-only SARRs. Benchmarking is a useful tool, but what is necessary in any SAC case is to consider the specific functions that the SARR must perform to serve its traffic group and whether it has sufficient staffing to perform those functions. In multiple areas, Consumers does not provide the CERR with sufficient staffing to perform these functions.

For example, one-third of the difference between CSXT's and Consumers' staffing plans is attributable to Consumers' failure to provide adequate police for the CERR in Chicago. Consumers provided just three security agents for the entire CERR on the theory that one officer could handle each SARR state. But CSXT presented evidence of crime-rate statistics and the police forces maintained by other railroads operating in Chicago that demonstrated that a single Illinois officer could not possibly manage the CERR's security needs in Chicago. In light of those needs, CSXT proposed eight additional security agents and an assistant police chief. On Rebuttal, Consumers added the assistant chief but not a single additional security agent. Consumers quibbles that CSXT's crime statistics are "hearsay"⁴⁹ (without presenting contrary evidence) and says that it can have far less police than other Chicago railroads because it has fewer yard-track miles (without explaining why yard track miles are a better metric of policing needs than the amount of high-value intermodal and other traffic being handled by the CERR). But Consumers does not convincingly explain how the CERR could achieve loss and damage figures comparable to CSXT's with a Chicago police force far below that of CSXT and other Chicago-area railroads.

⁴⁹ Consumers' objection is nonsense, since virtually all of the evidence submitted by the parties in this case would qualify as "hearsay" in civil court, and Consumers presents no evidence that contradicts CSXT's statistics.

Consumers even failed to add G&A staff on Rebuttal when CSXT identified an essential business need that Consumers had ignored on Opening. Instead, Consumers assigned that function to the workload of employees it proposed on Opening. For example, Consumers' Opening provided Marketing Managers who were responsible for setting and maintaining rates, interacting with interchange partners on interline rates and Interline Service Agreements, and preparing forecasts. *See* Opening at III-D-53. CSXT's Reply demonstrated that the CERR would also need someone with responsibility for customer contact about rates, rules, accessorial charges, and maintenance programs that might affect service. *See* Reply at III-D-79. Consumers recognized on Rebuttal that this function would be needed, but instead of adding even a single employee to perform it, Consumers simply said that the Marketing Managers would do this as well. *See* Reb. at III-D-66. Consumers took the same approach with several other functions it ignored on Opening.⁵⁰ It is difficult to credit the idea that Consumers' Opening G&A staffing had so much excess capacity that it could handle multiple functions that Consumers failed to include on Opening.

Consumers' low G&A staffing is also driven by absurd assumptions. For example, Consumers uses an attrition rate for the SARR that explicitly excludes attrition due to retirements and death—on the theory that the SARR would not hire anyone within ten years of retirement and would use physicals to screen out any employee who might die within ten years.⁵¹ A blatantly discriminatory plan to exclusively hire a workforce of young, fit employees is not consistent with real-world railroading.⁵²

⁵⁰ *See, e.g., id.* at III-D-71 (acknowledging the need to manage long-term investments but assigning the responsibility to an employee proposed on Opening); *Id.* at III-D-82-83 (acknowledging HR functions but assigning them to staff or outsourcing proposed on Opening).

⁵¹ *See* Reb. at III-D-112-113. This justification was offered for the first time on Rebuttal, and should be stricken for the reasons set forth in CSXT's Motion to Strike.

⁵² Consumers' evidence provides neither the HR budget to handle the administration and review of physicals it claims that it will use to screen out anyone who might die in the near future nor

2. Only CSXT Provides An Adequate Maintenance of Way Workforce.

Most of the difference between the parties' maintenance of way evidence is attributable to two areas: track crew staffing and signals staffing. On each of these issues CSXT's staffing plan is consistent with Board precedent and real-world staffing, and Consumers' is not.

Consumers' Opening evidence posited that the CERR would have substantially fewer track workers than have been found necessary in past cases. Consumers proposes a total of three track crew foremen and six track crew members, totaling nine track crew field personnel for the CERR's 218.7 track miles. *See* Opening at III-D-94. This ratio of one track crew field worker for every 24.3 track miles is nearly double than that accepted in *SunBelt*, where the ratio was one track crew field worker for every 13.7 miles.⁵³ Consumers achieved this implausible result both by proposing larger track crew districts than in any recent case and by proposing smaller three-person track crews instead of the standard four-person crew. Neither assumption is defensible.

Track Crew Districts. Consumers argues that it can have large track crew districts because of the relatively low density of the Rural Segment of its network (Porter to West Olive); it thus has one crew responsible for that entire 122-route-mile segment. *See* Reb. at III-D-130; Opening at III-D-98. Consumers' claim that this segment "simply does not require that much maintenance as it has only 8 MGT per year" ignores that maintenance needs are affected both by relative tonnage and by the length of the track to be maintained. Reb. at III-D-130. While tonnage is a significant contributor to overall wear-and-tear and thus track maintenance needs, much of a track crew's workload is also dictated by the sheer amount of track it must maintain. For example, track crew responsibilities like inspections, drainage maintenance, weed and brush

the legal budget for the class action age discrimination suit that would result from hiring practices designed to weed out employees who might die or retire in the near future.

⁵³ *See SunBelt* at 20, 77 (accepting 13 track crew foremen and 39 track crew members for network of 714 track miles; 13 foremen + 39 crew members = 52 track crew field workers; 714 miles/52 track crew field workers = 13.7).

control, and snow fighting are largely proportional to the length of track to be maintained. And distance and travel time are significant factors in the analysis; travel time alone makes it implausible to think that one crew based in West Olive could adequately maintain 122 route miles stretching all the way to Porter. *See Reply at III-D-125.* CSXT's proposal to add one additional Chicago-based crew to help maintain the Rural Segment addresses these deficiencies and brings the CERR's average track crew district size in line with Board precedent.⁵⁴

Track Crew Size. In the same vein, Consumers' attempt to reduce track crews from the standard four-person crew to a three-person crew should be rejected. *See Reply at III-D-123-125.* Consumers does not dispute that the Board regularly has approved MOW plans with four-person track crews and does not identify a single case to the contrary. And Consumers provided no evidence that could justify a change in the accepted track crew size or that such crews could be as efficient or effective as a standard four-person crew. Instead it argues that a different defendant in a case that the Board did not decide apparently chose not to dispute a proposal for three-person track crews. *See Reb. at III-D-129.* But the litigation decision of a different railroad in a different case to accept a three-person track crew proposal is irrelevant to whether such a proposal is workable here or consistent with what the Board has held is required.

Signals Maintenance. On Opening, Consumers argued that "the number of Signal Maintainers is a function of the number of AAR signal units," and that CERR staff could maintain a higher than average number of AAR signal units because the CERR would not need to make "immediate repairs" to "grade crossing signals malfunction[s]." Opening at III-D-107. CSXT showed that Consumers overestimated the number of AAR signals units for which a maintainer could be responsible and that its assumption that the CERR could short-staff signals maintenance because "a grade crossing signal malfunction will not substantially impair the

⁵⁴ Compare Reply at III-D-125 (proposing CERR track crew districts averaging 53 miles) with *SunBelt* at 73 (track crew districts averaging 54 track miles).

operation of the CERR” is unacceptable. Reply at III-D 128-31; Opening at III-D-107. It would seriously distort the SAC test to allow a SARR to cut costs by burdening the communities through which it operates with above-average grade crossing signal failures (and indeed Consumers’ operating plan does not account for an increased rate of signals failures).

Consumers’ assertion that it would flag intersections when signals failed is beside the point. Decreasing the signals maintenance workforce means that there will be more signal failures and more resulting disruptions to the communities through which the CERR operates. That isn’t identifying efficiencies—it is shirking on maintenance at the cost of the community.

Consumers also waited until Rebuttal to claim that AREMA units are not a useful measure of signal maintenance needs and that it instead relies on its expert’s “experience.” But Consumers itself purported to use AREMA units to judge signals maintenance on Opening, and it cannot change that position on Rebuttal. And Consumers’ suggestion that AAR signals units are not used by railroads is flatly wrong; as its own workpapers demonstrate, signals units are a common way to allocate relative responsibilities in joint facility agreements.⁵⁵

3. The CERR Must Account For The Full Cost Of Operating Over NS Trackage Rights Through Chicago.

Consumers stands fast in its misplaced reliance upon a post-Conrail acquisition reciprocal trackage rights agreement between Norfolk Southern and CSXT for the costing of the CERR’s operations over the NS line between the connection to the BRC at Rock Island Junction, IL and Porter, IN. Reb. at III-D-150. That reciprocal arrangement reflects the extensive trackage rights that CSXT and NS each use over the other’s lines on routes across their entire respective systems. That reciprocal rate does not represent the full costs of the trackage rights segments and in particular contains little, if any, of the rental component inherent in conventional trackage

⁵⁵ See Opening WP “JFA Part 2 of 4 (CSX-CNSMR-HC-28110 to 29506)” at 028320, 028858; Opening WP “JFA Part 3 of 4 (CSX-CNSMR-HC-29507 to 30332)” at 030025.

rights agreements. *Id.* at III-D-146. Consumers cannot take advantage of the low per-mile rate negotiated between NS and CSXT because the CERR is incapable of offering the same reciprocal terms to NS as CSXT does in the real world. *See Reply* at III-D-146-49.⁵⁶

CSXT therefore used the Board's established "SSW Compensation Methodology" to more accurately identify the trackage rights fee that a carrier without reciprocating segments like the CERR could negotiate with NS. *Reply* at III-D-150. The SSW Compensation Methodology calculates both the fixed costs and the rental component necessary to compensate the owning carrier for the tenant's use of its tracks. *See Reply* at III-D-150. CSXT offered a complete analysis of the rate that would be charged under the SSW Compensation Methodology and developed a trackage rights charge of \$1.47. *See Reply* III-D-151-54. Consumers produced no critique of CSXT's analysis other than to claim that the analysis is "unnecessary" and dismiss it out of hand because CSXT offered a second alternative approach. *Reb.* at III-D-153.

CSXT offering a conservative alternative (an indexed 1974 pre-Conrail acquisition rate) does not relieve Consumers of its duty to address the SSW Compensation Methodology. CSXT explained in its *Reply* that the SSW Compensation Methodology calculations are necessary to accurately reflect the current fee that the CERR could negotiate in the real world, taking into consideration current traffic levels, the realities of operating in the Chicago terminal, and the current value of the line. *See Reply* at III-D-155. Consumers had no response.

Moreover, Consumers' argument is hopelessly circular. It dismissed the SSW rate because CSXT offered an alternative based on the 1974 agreement. It then dismissed the 1974 agreement as unsupported. But if the alternative is unsupported (because Consumers objected to

⁵⁶ Because Consumers cannot assume all of the terms, conditions, and prerequisites of the reciprocal agreement, it is not permitted to "step into the shoes" of CSXT. *Arizona Electric Power Cooperative, Inc. v. Burlington Northern & Santa Fe R.R. Co.*, 6. S.T.B. 322, 328-29 (2003).

the 1974 agreement being introduced into the record) then the unsupported agreement cannot also be used to dismiss the SSW rate. Consumers cannot prevail on both arguments.

In the end, Consumers recognized that the { } rate it used on Opening is a *reciprocal* rate that does not reflect the full value paid by CSXT for access to this congested corridor. It instead protested that it had no idea of the reciprocal nature of the rate and stuck to its Opening position as “the best evidence of record available to Consumers on Opening.” Reb. at III-D-153.⁵⁷ That is not the test. Once CSXT proved that the { } reciprocal rate was inappropriate, its unchallenged SSW evidence became the best evidence of record and must be adopted.

4. CSXT’s Ad Valorem Tax Evidence Should Be Accepted.

CSXT’s Reply accepted Consumers’ ad valorem methodology for Indiana and Michigan and made one correction to its methodology for allocating unit value in Illinois.⁵⁸ While Consumers allocated unit value to Illinois based solely on the percentage of CERR route miles, CSXT showed that the State of Illinois actually allocates railroad unit value with a formula that incorporates both a property factor (*i.e.*, route mileage) and a use factor (*i.e.*, percentage of traffic units, revenue, and tons originated and terminated). *See* Reply at III-D-158-159 & nn.319-321.

Consumers does not dispute that the tax workpapers in the record show that Illinois actually considers this “use factor,” and instead says that this does not reflect “what the State of Illinois calls for in its property tax code.” Reb. at III-D-159-60. But Consumers’ representation of what the tax code “calls for” omits the final sentence of the statute it cites, which makes clear

⁵⁷ Consumers makes much of the fact that Consumers “had no way of knowing that these rates were reciprocal in the development of its Opening evidence.” Reb. at III-D-150. Yet Consumers itself acknowledges that CSXT produced the July 4, 2002 Letter Agreement in discovery. *See id.* at III-D-152. Consumers is charged with reviewing the discovery produced to it, particularly when CSXT’s discovery pdfs were bookmarked to ease the identification of individual agreements.

⁵⁸ For railroads like the CERR that operate in multiple states, the unit value method requires the taxing state to both determine the total unit value of the railroad and how much of that value should be attributed to that state.

that tax authorities have wide discretion to use different methodologies to allocate unit value.⁵⁹

The actual methodology that Illinois used is thus plainly consistent with the statute, and the

Board should accept CSXT's evidence because it best replicates that methodology.

IV. CSXT'S ROAD PROPERTY INVESTMENT EVIDENCE SHOULD BE ACCEPTED

A. CSXT's Real Estate And Real Estate Acquisition Costs Should Be Accepted.

CSXT's land appraisal was consistent with modern appraisal practices, based on substantial on-the-ground observation, and is the best evidence of record. While space precludes a detailed response to the arguments in Consumers' Rebuttal, many of the critiques of CSXT's process are seriously mistaken.⁶⁰ In contrast, Consumers' appraisal uses an across-the-board segmentation of the subject property that overlooks the highest and best use of the adjacent properties. *See* Reply at III-F-8. The selection of comparable sales, analysis, and valuation is undocumented and not supported by comparable sales.⁶¹ **Over 79%** of the comparable sales used in the Smith appraisal are invalid or not comparable to the across-the-fence parcels.

In addition, Consumers failed to include the well-established transaction costs of acquiring land, including title work, surveys, appraisals, negotiations, and closing costs.⁶²

Consumers claims that CSXT's costs are higher than the acquisition costs proffered in prior

⁵⁹ *See* 35 Ill. Comp. Stat. 200/11-100 ("Nothing in this section shall be construed to preclude the use or substitution of other factors or methods as may appear reasonable and necessary in determining the proportion of a railroad's operating property within this State.").

⁶⁰ For example, Consumers' Rebuttal misclassifies highest and best use on several of the critiqued sales (sales 19185, 36587, 5070); shows an aerial view of an "agricultural" property, cutting off a portion showing an industrial park (sale 19185); and claims that a forfeiture for ad valorem taxes totaling \$2,504 should be used as the value for a sale that occurred five years earlier for \$43,050 (sale 3500).

⁶¹ Reply at III-F-12; Reply Ex. III-F-1 at 52-54, 68-70, 80-81, 97-100, 118-120, 135-139, 151.

⁶² *See DuPont* at 141 ("The Board . . . considers these to be transaction-specific costs which the [SARR] should reasonably expect to incur while purchasing each parcel of needed real estate."); *SunBelt* at 104.

cases,⁶³ but ignores that those costs were “conservative”⁶⁴ and offers none of its own. The costs sponsored by CSXT’s expert Mr. Rex accurately reflect the cost of acquiring a right-of-way through urban Chicago.⁶⁵ Because Consumers failed to offer any alternative real estate acquisition costs,⁶⁶ the Board should accept CSXT’s evidence as the only evidence on record.

Finally, CSXT’s real estate indexing methodology accurately reflects real estate appreciation. CSXT conducted two valuations; one dated January 1, 2013 and one dated January 1, 2015 and compared the results. *See* Reply Ex. III-F-1 at 154. The resulting difference between CSXT’s two evaluations is a more accurate measure of appreciation than Consumers’ index.

B. CSXT’s Earthwork Costs Should Be Accepted.

1. The Board Should Continue to Use Means Unit Costs.

The primary difference between the parties’ earthwork estimates is the oft-litigated issue of unit costs. Consumers argues that the Board should break with its long practice of using R.S. Means unit costs and instead should adopt costs that Consumers developed from certain Michigan Department of Transportation (“MDOT”) highway construction projects. But CSXT showed that the difference between these MDOT costs and Means costs is entirely attributable to understatements in Consumers’ cost calculations. When those understatements are corrected, the MDOT data actually produce *higher* common excavation costs per cubic yard than Means. *See*

⁶³ Reb. at III-F-21. Consumers also claims that it was “unable to identify easements.” *Id.* at III-F-20. Consumers never informed CSXT that it was unable to identify easements along the ROW, and such easements were plainly available in the discovery record. *See, e.g.*, “v64684.pdf” and “58093.pdf” produced in Discovery and Opening WPs “Val Map Index IL IN MI.xlsx,” Tab “Sheet3” at Line 1349 and “Deed Index.xlsx,” Tab “Sheet1” at Line 3876.

⁶⁴ NS Reply, *DuPont* at III-F-287 (“Mr. Mathewson has developed a conservative estimate of what the [SARR] would have to pay for real estate acquisition costs on a per parcel basis.”).

⁶⁵ In fact, CSXT’s costs remain conservative, as the parcel count used for the mainline represents just 31% of the *current* across-the-fence parcels along the mainline.

⁶⁶ Consumers’ suggestion that a \$300-400 home appraisal used for mortgage purposes is an appropriate measure for the detailed appraisal completed for right-of-way acquisition/condemnation is incorrect and reflects a misunderstanding of the industry.

Reply at III-F-32-36, III-F-48. There is no reason for the Board to abandon Means costing in favor of such a flawed measure.

The Board has historically recognized that R.S. Means construction costs are the most reliable method to estimate SARR earthwork unit costs.⁶⁷ One of the advantages of using Means is that Means costs can be tailored to the unique circumstances of a SARR's construction. This is possible because Means costs are built from the ground up using component grading items. (Figure III-F-8 on Reply at III-F-47 is a good example of this). Such a bottom-up calculation can incorporate assumptions that would lead to optimally efficient construction and consistency with underlying grading quantities derived from the ICC Engineering Reports, and it is thus inherently superior to a selection of unit costs from MDOT projects that do not demonstrably correspond to component grading items required for SARR construction.⁶⁸

Consumers has complained in this case that, because Means costs are developed from a mix of large and small projects, they do not sufficiently account for economies of scale. But the MDOT calculations Consumers proposes as a Means alternative are also derived from a mix of projects, so they suffer from the exact same "flaw" Consumers purports to identify. And Means does a much better job of identifying economies of scale than the MDOT costs do, because Means allows for the selection of larger, more efficient equipment associated with larger projects. *See* Reply at III-F-28-29. Means also reflects economies of scale by allowing the SARR to assume that it will achieve full equipment and labor utilization. *See id.* Means unit costs

⁶⁷ *See SunBelt* at 105; *DuPont* at 149; Reply at III-F-25 & nn. 44-46 (collecting cases using Means for unit costs).

⁶⁸ Consumers' complaint that Means unit costs are not based on construction projects that are similar to the CERR is thus meritless. The ability to tailor Means costs from the ground up makes it a far better proxy for SARR construction costs than any other available alternative.

assume that the equipment and labor underlying the Means item are producing at full output for a given day's work and include no downward adjustment for idling.⁶⁹

CSXT's evidence shows that the MDOT costs are not lower than Means costs because they account for economies of scale or otherwise find efficiencies that Means does not. Rather, they are lower because Consumers did not include all the earthwork costs from the projects it cites. *See* Reply at III-F-33-35. Most glaringly, Consumers' calculations of MDOT common excavation costs excluded the costs of placing and compacting excavated materials as embankment. *See id.* at III-F-33-34. The necessary earthwork for creating a smooth and level roadbed requires both cuts (*i.e.*, removing materials at elevations above the planned roadbed) and fills (*i.e.*, using excavated material to fill in terrain at elevations below the planned roadbed). Embankment is the essential task of filling in terrain with excavated materials and is a separate bid item in the MDOT materials.

CSXT showed that 19 of the 21 MDOT projects relied upon by Consumers separately accounted for excavation costs and embankment costs, and that Consumers nonetheless failed to include those embankment costs in its unit cost calculations. *See* Reply III-F-33-34. Consumers' claim that excavated materials are the property of the contractor is a red herring—the MDOT Handbook clearly defines excavation and embankment as separate pay items, and nearly all of the MDOT projects selected by Consumers include separate embankment costs. *See id.*

Consumers' claim that embankment should be ignored because "CSXT follow[ed] Consumers' Opening approach in calculating the Wayne County excavation unit costs" is nonsense. *Reb.* at

⁶⁹ Consumers attempted on Opening to argue that a CSXT Authorization for Expenditure ("AFE") showed earthwork unit costs lower than Means, but on Reply, CSXT showed that Consumers had omitted "Misc Grading" costs from its calculations. *See* Opening at III-F-25; Reply at III-F-30-31. When those costs are distributed evenly across all grading cost categories in the invoice, the AFE's common excavation unit costs are higher than Means costs. Reply at III-F-31 (average AFE cost of {{ }}; Means cost of \$5.61). Tellingly, Consumers does not argue that a different methodology for distributing Misc. Grading costs would lead to total common excavation costs below Means.

III-F-40. CSXT did not follow Consumers' approach in any respect; rather, CSXT's evidence showed that Consumers' MDOT approach contained multiple errors and that the Board should continue to use Means. The fact that CSXT did not include an urban embankment adjustment among the host of errors that it identified in Consumers' calculations plainly is not "following" Consumer's approach or somehow conceding that embankment costs are unnecessary. There is no justification for excluding these excavation costs.⁷⁰

CSXT also demonstrated that Consumers' use of primarily rural MDOT projects to estimate grading costs in urban areas was misguided. *See Reply* at III-F-34-35. Grading costs tend to be higher in urban areas due to operational complexities and geographic restrictions. MDOT data from urban Wayne County reflect these substantially higher grading costs—averaging almost three times the costs of rural projects. *See id.* at III-F-35. But Consumers' selection criteria exclude any urban projects from its analysis. Consumers argues that its exclusive use of rural projects is acceptable because it uses the Means location index. The MDOT data shows, however, that applying a Means location index to rural MDOT grading projects does not bring the costs of those projects close to the actual cost levels for urban MDOT grading projects. *See id.* at III-F-35 n.67.

It is also clear that the MDOT bids include a significantly higher mobilization percentage (averaging 7.6%) than the percentage that Consumers uses for the CERR (2.7%). *See Reply* at III-F-34. These higher mobilization estimates increased the effective cost of earthwork items (and every other line item in the bids). Consumers rejects CSXT's mobilization adjustment because "CSXT provides no evidence that mobilization costs for an entire project affects the unit

⁷⁰ Consumers is also mistaken when it claims that CSXT should have averaged excavation and embankment costs rather than adding them together. *Reb.* at III-F-41. The reason these costs are added together is that excavating dirt from a cut and placing this same dirt in a fill are separate activities for the same common excavation quantities included in the ICC Engineering Reports. CSXT adheres to precedent by assuming that 70% is re-used as fill and 30% is wasted.

cost of one component of that project.” Reb. at III-F-43. But as the party advocating a break with Board precedent, it is Consumers’ burden to show that its Means alternative is an accurate representation of the earthwork costs it seeks to replicate. Here, where Consumers’ cost substitute fails to include embankment costs, excludes all high-cost urban projects, and ignores the extent to which a higher mobilization factor effectively creates higher unit costs, Consumers falls far short of carrying that burden.

For all these reasons, an accurate comparison to MDOT projects would actually produce unit costs significantly higher than Means costs. *See Reply at III-F-48.* Means costs remain the best evidence of the earthwork unit costs that would be incurred by an optimally efficient SARR, and the Board should continue to apply them in place of the MDOT costs Consumers seeks to use for clearing and grubbing, common earthwork, and borrow.⁷¹

2. The Board Should Continue to Recognize The Need for Land for Waste Excavation.

The parties agree that 70% of the materials excavated during construction would be re-used as fill and 30% would be wasted along the right-of-way. In past cases the Board has recognized that the SARR would be responsible for purchasing land along the right-of-way to dispose of this waste.⁷² But Consumers does not include those costs, instead arguing that the CERR would incur zero costs for land for waste excavation because on MDOT projects waste material is the responsibility of the contractor. *See Opening at III-F-35; Reb. at III-F-66.*

This issue is easily resolved if the Board adheres to its precedent on using Means. Means costs explicitly do not include the cost of land for waste excavation, so if the Board uses Means

⁷¹ The shortcomings of using MDOT costs are particularly apparent for borrow, where Consumers seeks to use a unit cost figure based on 6,370 cubic yards of borrow from four highway projects in rural Michigan to estimate the costs of over 1 million cubic yards of railroad borrow in Chicago. *See Reply at III-F-49-50 & Table III-F-10.* CSXT’s use of an nation-wide average borrow unit cost developed in Means and consistently accepted by the Board is vastly superior evidence. *See id.*

⁷² *See SunBelt at 119; DuPont at 170.*

these costs must be included. *See Reply at III-F-52.* But even if the Board were to accept some MDOT unit costs, it is unreasonable to conclude that the CERR would not have to purchase any land for waste disposal. As CSXT showed on Reply, the narrow right-of-way that Consumers proposes for the CERR precludes disposal of waste on the right-of-way without additional land. *See Reply at III-F-52.* There is no reason to think that rail contractors facing those more complex waste disposal needs would accept an MDOT provision that highway project contractors would dispose of waste without a corresponding cost increase.

In addition, Consumers' complaint that CSXT uses an average cost per acre to estimate the costs of land for waste rather than a rural cost lacks merit, because Consumers fails to account for the additional costs of that proposal. The CERR certainly could purchase only rural land for waste excavation, but if it did so it would have to account for the increased costs of hauling urban waste to those rural locations. *See Reply at III-F-52 & n.111.* Consumers does not provide those costs or show that they would not entirely offset any cost savings from buying rural land instead of urban land.

C. CSXT's Evidence on Track Construction Is The Best Evidence of Record.

1. CSXT's Ballast Transportation Costs Should Be Accepted.

The parties' disagreement on ballast transportation costs once again mirrors disputes that the Board resolved in past cases. For most ballast transportation Consumers "assumed" a \$0.035 ton-mile rate—the same rate that the Board rejected in *DuPont* and *SunBelt* as outdated and not reflecting "current market conditions."⁷³ CSXT showed that this rate was far below the average ballast transportation rates in the Carload Waybill Sample ("CWS"), a vendor quote CSXT obtained for this case, and the vendor quotes accepted in *DuPont* and *SunBelt*. *See Reply at III-F-72-73.* CSXT conservatively proposed using the lowest of these numbers: the average CWS ballast transportation rate. *See id.* at III-F-73.

⁷³ Opening at III-F-50; *DuPont* at 193; *SunBelt* at 131.

On Rebuttal Consumers continues to defend its “assumed” rate as reasonable, but offers nothing that specifically supports the \$0.035 figure. Instead, Consumers points to a {{ }} Union Pacific rate that it describes as an “interline courtesy rate.” Reb. at III-F-79. But it has no answer to CSXT’s Reply argument that the CERR could not take advantage of any “courtesy rates” that it would not be reciprocating, and particularly not rates that are part of the CREATE initiative (to which the CERR would not contribute). *See* Reply at III-F-70. Instead, Consumers replies with the bizarre argument that the rate “presumably is subject to audit and review.” Reb. at III-F-79-80. Even if that were true, “audit and review” has nothing to do with whether the rate is in line with rates available to a ballast shipper that could not reciprocate the “courtesy.”⁷⁴

Perhaps concluding that the best defense is a good offense, Consumers proceeds to attack CSXT’s evidence, asserting that the vendor quote CSXT submitted is a “ballpark guess” and an unreliable “made-for-litigation bid.” In the first place, Consumers’ attacks on this vendor quote ignore that the Board accepted similar quotes from the same vendor in *DuPont* and *SunBelt*. *See* Reply at III-F-72 & nn.158 & 159. More importantly, CSXT’s ballast transportation costs are not based on the bid that Consumers spends all its time attacking. CSXT’s costs are rather based on the average ballast rates in the most recent CWS; the vendor quote was submitted as additional support for the reasonableness of that estimate. *Id.* at III-F-73. Consumers does not even mention the CWS-derived rate that CSXT actually used in its Reply, let alone explain why that rate is not the best evidence of record.

In short, Consumers has failed to show why the CERR could use an interline courtesy rate for ballast transportation that is a small fraction of the average rate shippers pay for ballast

⁷⁴ Consumers’ Rebuttal suggestion that what it describes as an “interline courtesy rate” is not actually “interline” because it might ultimately be paid by public funding is wrong. Reb. at III-F-79. As CSXT showed on Reply, the actual invoice explicitly states that it is billed under the terms of an interline reimbursement agreement, specifically that “CSXT (B&OCT) has a reimbursement agreement with Union Pacific Railroad Company to reimburse 100% of UPRC’s project related costs.” Reply at III-F-71 n.155.

transportation. Because Consumers' ballast transportation rate is unsupported, and because Consumers' Rebuttal does not even address CSXT's well-supported CWS-derived alternative, CSXT's evidence on this issue should be accepted.

2. Consumers Understated Rail Train Costs.

On Opening, Consumers included the costs to rent one rail train for four days for the entire CERR, but did not explain how the CERR would manage to minimize rail train costs to that degree. *See* Opening III-F-57; Reply III-F-80-81. Since Consumers did not explain its plan, CSXT developed the actual amount of time a rail train would need to be rented to facilitate the unloading and distribution of rail, based on the standard real-world methodology where strings of rail would be pulled from the rail train directly to where they would be laid and skeletonized on the track, with the rail train moving progressively along the new track. *See* Reply at III-F-80-82. CSXT developed corrected costs based on these assumptions.

On Rebuttal, Consumers announces for the first time that it “contemplates” that the rail train could be unloaded in three days if the rail installation contractor uses Speedswings to unload 1,400 foot long strings of rail and drag them at the Speedswing's top speed of 20 miles per hour as far as 7.58 miles along the unfinished right-of-way (and apparently going over bridges, not stopping at crossings, and bending around curves). *See* Reb. at III-F-88-89. Even if Consumers were allowed to present such a new theory on Rebuttal (and it isn't), it would not work for multiple reasons: (1) common railroad industry best practice prohibits dragging rail on the ground without the use of rollers for *any* distance—much less 7 miles—because of the likelihood of damaging the rail; (2) Consumers has provided no evidence that CERR contractors would have accounted for such unusual operations in their quoted costs; and (3) Consumers' plan to simply leave 1,400 foot uninstalled strings of rail along the right-of-way until the contractor could reach them could block many grade crossings for indefinite lengths of time.

D. CSXT's Bridge Evidence Is The Best Evidence of Record.

1. The CERR Cannot Assume That A Public Entity Will Build Two of Its Bridges.

On Opening and Rebuttal Consumers has insisted that the CERR should not have to pay for the construction of the Calumet Sag Channel Bridge or the Chicago Sanitary Bridge because Consumers claims those bridges were built with public funds. But it has not proven that. On Opening, Consumers submitted a single newspaper article that did not mention one of the two bridges and only showed that public funds paid for a replacement movable bridge for the second. *See Reply at III-F-88-91.* After CSXT pointed this out (and agreed that the movable span could be paid for by public funds), Consumers responded with what it calls "additional research" supposedly constituting "direct evidence" that these bridges were constructed with public funds. *Reb. at III-F-100.* This blatantly improper rebuttal should be stricken. Moreover, it is plainly not "direct evidence" of anything. The workpaper Consumers submits indicates that the Sanitary District expended some funds on bridge construction and maintenance, but does not specifically tie those funds to the bridges at issue in this case. Nor does Consumers explain what line items in the almanac are the supposed "direct evidence."⁷⁵

2. Bridge Design Issues

CSXT's Reply Evidence identified significant problems with Consumers' bridge designs, many of which were attributable to its failure to provide sufficient space for below-bridge water flow and traffic. *See Reply at III-F-91-95.* CSXT identified these problems because it took Consumers' Opening seriously and assumed that it intended to use the proposed components in its bridge costs.

For example, Consumers' Opening bridge proposals used costs for standard precast abutment caps from a CSXT AFE and costs for rip rap. Because the precast abutment caps

⁷⁵ Consumers' claim that the bridges must have been built with public funds because they "look alike" is meritless; it is not unusual at all for bridges in the same area (which might have been built by the same engineers) to resemble each other. *Reb. at III-F-99.*

require a spill slope for support—and because the only conceivable purpose for rip rap in a bridge design would be to create spill slopes—CSXT recognized that Consumers’ designs contemplated spill slopes that would obstruct space under the bridges. CSXT developed alternative wall abutment costs to correct these issues. *See Reply at III-F-96.*

On Rebuttal, Consumers claims that that its Opening bridge design costs were just “average costs” and that in places where spill slopes are problematic it would forgo rip rap and use the funds it would have used for rip rap to offset the costs of wall abutments. This is a substantial change in bridge design on Rebuttal that is impermissible. By waiting until Rebuttal to claim that its bridge designs actually could be converted to wall abutments by removing rip rap costs and using “wing walls,” Consumers deprived CSXT of the opportunity to identify the multiple engineering problems with that claim, including the significantly increased longitudinal forces that wing walls must endure when spill slopes are removed (which CSXT’s designs account for and Consumers’ do not) and the vast differences between the volume of earth that must be excavated for a wall abutment and for a standard abutment cap.⁷⁶

CSXT also identified numerous instances where Consumers’ bridge plans dropped pilings in roadways or placed additional pilings to waterways.⁷⁷ Consumers’ response is that columns on overhighway bridges often can be placed in medians.⁷⁸ That misses the point, which

⁷⁶ Compare Reply WP “Wall Abutment Design.pdf” at 13 (showing 555 cubic yards of excavation for wall abutment) with Opening WP “Bridge Costs.xlsx,” tab “Bridge Type 1” at line 51 (showing 10 cubic yards of excavation for standard abutment).

⁷⁷ Consumers tries to excuse its failure to account for the actual span lengths and bridge layouts because that information is not detailed on CSXT’s bridge list. Consumers Reb. at III-F-104. But CSXT’s Engineering Experts were easily able to identify all relevant characteristics of the CERR bridges using Google Earth with the same information available to Consumers. CSXT Reply at III-F-97 n233. Consumers does not explain why its engineers did not do the same.

⁷⁸ Consumers’ Rebuttal workpapers confirm it is indeed adding new piers to the middle of roadways. Compare Reply WP “Bridge Costs_Reply_Rebuttal.xlsx”, tab “Route Bridges,” Cells O40 & P40 (showing that milepost DC 13.23 bridge would drop new pier in median and providing map coordinates showing that existing bridge had no pier in median); with Reb. WP “Bridge Costs_Reply_Rebuttal.xlsx”, tab “Route Bridges,” at line 40 (confirming that milepost

is that Consumers' designs *do not* match existing roadway configurations, and indeed that those designs would drop new columns on sidewalks or even in traffic lanes. *See* Reply at III-F-97 nn.234 & 235. Consumers cannot assume that the CERR could cut costs by increasing obstructions of pedestrian and vehicle traffic. If such an option were available in the real-world, then costs for longer, more expensive spans would never have been incurred.⁷⁹

E. Other Road Property Investment Items.

1. The CERR's Curtis Interchange Would Require a Flyover.

CSXT's Reply also showed that the CERR's proposed Curtis interchange operations would block Clark Road. CSXT proposed a flyover to ensure that the CERR's operations would not do so.⁸⁰ Consumers admits on Rebuttal that CERR operations would foul the road, but says that this is acceptable because Clark Road is bisected by other nearby at-grade crossings. Reb. at III-F-108. But there is a vast difference between an ordinary at-grade crossing that occasionally might block the highway for a few minutes at a time and an interchange crossing that would block the road for 30 minutes every time a train is interchanged. Consumers cannot assume that the CERR would create new blockages of existing roadways. This is particularly true for Clark Road, which is a main access road to multiple factories that use the road for customer pickups and deliveries. *See* Reply WP "Clark Flyover.pdf." Consumers' suggestion that the flyover should instead be a highway overpass fails because Consumers provides neither a specific explanation of the alleged "elevation problems" with a flyover nor evidence of the costs of its

DC 13.23 bridge would drop new pier in median); *see also* Reb. WP "Layout DC 13.23.pdf" (showing proposed bridge layout at milepost DC 13.23 with additional pier in middle of road); Reb. WP "Ashland Avenue.jpg" (example of mid-road piers Consumers proposed to add).

⁷⁹ Moreover, Consumers' complaint that CSXT developed a new type of span to correspond to span lengths over 50 feet instead of extending Consumers' Type III span is unwarranted. Consumers explicitly stated on Opening that its Type III span was designed to "span up to 50 feet," and CSXT explained why its choice to use a Through Plate Girder for spans over 50 feet in length is reasonable and economical. Op. at III-F-65; *see* Reply at III-F-103.

⁸⁰ Reply at III-B-6, III-F-64-65; Reply WPs "Clark Flyover Design.pdf" & "Clark Crossing Constraints.pdf."

highway overpass alternative. As CSXT explained in its Reply, a highway overpass would be costly and inefficient. *See* Reply at III-F-64 n.138.

2. The Dolton Junction Interchange Must Avoid Interfering With Other Railroads and Highway Traffic.

CSXT's Reply showed that Consumers' plan to construct an interchange track through a UP-CSXT joint facility at Yard Center ignored the terms of that joint facility agreement. *See* Reply at III-B-3-4. Consumers claims that CSXT ignored its "theoretical" analogy to the joint PRB Line, but that's not true. CSXT's Reply specifically responded to Consumers' argument by explaining that the Yard Center joint facility property is explicitly non-severable and that use of the property would require a 50% ownership interest in the joint facility. *See* Reply at III-B-4. Building around Yard Center is not a matter of convenience; it is the only way for the CERR to avoid the substantially higher costs of stepping into CSXT's shoes for the joint facility.

CSXT also showed that Consumers' planned interchange tracks at Dolton Junction would block Cottage Grove Avenue during interchanges. CSXT proposed a overpass to avoid such blockages. *See* Reply at III-B-6. Consumers' Rebuttal explanation for how it intended CERR trains to avoid blocking Cottage Grove Avenue by fouling the mainline during interchange is new, and it contradicts its Opening narrative that trains would be interchanged on the dedicated interchange tracks.⁸¹ Consumers should not be allowed to deviate from its Opening narrative.⁸²

3. CSXT's Evidence on Labor Costs Should Be Accepted.

Consumers also fails to include labor costs for field welds as a separate line item. While Consumers insists that its track labor quote must have included field welds, the quote itself does

⁸¹ Opening at III-C-21; *id.* at III-C-20 (figure).

⁸² The alternative utility relocation costs Consumers proposed on Rebuttal should be rejected because they are not accompanied by any underlying source documentation showing that they are in any way comparable to the existing towers. Consumers relies on Means unit cost items for low-voltage distribution poles that at most are 100 feet high and are not comparable to the costs of relocating high-voltage transmission lines exceeding 150 feet and carrying six power lines.

not mention providing field weld labor.⁸³ Even if the contractor did intend to weld CWR lengths together every 1,400 feet as part of its quoted price, the majority of welds are at turnout locations.⁸⁴ Consumers also complains that CSXT inappropriately marked up signal and communications labor and materials costs, but CSXT was merely accepting Consumers' opening calculations on this point.⁸⁵

4. The CERR Must Account For Ancillary Costs for Crossings

Consumers' Opening did not provide for the costs of "drainage, traffic control, and pavement striping" for at-grade crossings. *See* Reply at III-F-137. On Rebuttal, Consumers argues that drainage would be included in roadbed preparation and that traffic control and pavement striping were the responsibility of local municipalities. *Reb.* at III-F-148. Consumers is wrong. For drainage, the costs to dig out the crossing as part of normal installation would be included in account 15 on the Engineering Reports for "Crossings and signs," and have no relationship to generalized excavation quantities included elsewhere.⁸⁶ Consumers does not explain how it elsewhere accounts for costs for "a small 4 [inch] perforated drain which would be installed during roadbed construction." *Reb.* at III-F-148. Nor does Consumers explain why necessary costs for traffic control or pavement markings would be incurred by some entity other than CERR. Since Consumers in Opening stated that it was paying for 100% of the crossing and made no argument for public funding, it cannot now suggest that traffic control or pavement markings would be covered by local governments.

⁸³ *See* *Reb.* WP "Ohio Track Cost Estimate.pdf"; Reply at III-F-82.

⁸⁴ *See* Reply WP "Track Quantities 2015_Reply.xls", tab "Track Quantities," at Cells E100:E101.

⁸⁵ *See* Opening WP "CERR Opening C-S Costs.xlsx," Tab "Components" at Column M and Tab "Signal & Comm Costs" at Columns F, J, and CA-EK. CSXT's acceptance of Consumers evidence on this point is also demonstrated by Reply WP "CERR C-S Costs_Reply.xlsx," Tab "Reply Summary," which shows the same total amount as Consumers opening when all changes are set to "No."

⁸⁶ *See, e.g.,* Opening WP "ICC Engineering Reports_CERR_opening.pdf" at 19.

5. CSXT's Facilities Evidence Is the Best Evidence of Record.

Space does not permit CSXT to fully address the facilities disputes in this case, except for the following three overarching issues. First, a railroad whose operations are centered in Chicago cannot expect to function efficiently if all managerial personnel are based in West Olive—160 miles away (and a drive of well over two hours in the best of conditions). A headquarters support building in Barr Yard is thus essential. *See* Reply at III-F-123. Second, Consumers' locomotive shop costs are based on a highly simplistic locomotive shop building that includes none of the complex concrete, pit, and other detail necessary for a real-world functioning locomotive shop. The Board should instead accept CSXT's locomotive shop costs, which are derived from a real-world project scaled to the same required dimensions as Consumers but predicated on reliable and comprehensive costs and design elements. *See id.* at III-F-125-129. Third, the CERR would need air compression facilities at Barr Yard to charge air brakes for departing locomotives. *See id.* at III-F-132-133. The fact that locomotives can be used in an emergency to recharge air does not mean that it is consistent with real-world railroading to make it a standard practice to use locomotives to recharge air in lieu of a yard air system. Consumers' criticisms of CSXT's costs as "inflated" are beside the point, because Consumers provided no alternative cost calculations for air compression facilities.

V. CSXT'S DISCOUNTED CASH FLOW EVIDENCE SHOULD BE ACCEPTED.**A. The CERR Would Incur Equity Flotation Costs.**

On Opening, Consumers dismissed the concept of equity flotation costs for the CERR by blithely asserting that the Board had never accepted them in a SAC case and they were too difficult to calculate in any event. Opening at III-G-5. On Reply, CSXT explained that the Board in *SunBelt* had in fact held that whether the SARR raised its needed equity capital "through one large IPO, or in smaller amounts over a longer time period, it would be unreasonable to assume

that the SARR would raise this capital in either case without paying some form of equity flotation fee.” *SunBelt* at 184.

Recognizing that the Board in that case nonetheless declined to adopt a flotation fee based upon a single offering, CSXT submitted a well-documented analysis by its expert investment banking witness Tobias, demonstrating that the average underwriting spread of 535 IPOs of \$100 million or more in all industries that came to market over the past decade was 6.3%. Reply at III-G-1, III-G-5.

On Rebuttal, Consumers dismissively characterized that detailed and highly probative evidence as a “made-for-litigation study” (Reb. at III-G-3, III-G-5), but that response cannot carry any weight because virtually all analyses conducted in a rate case have by definition been done for purposes of the litigation. (Consider for example the “made-for-litigation” analyses of Consumers’ market dominance witness Barbaro, and the “made-for-litigation” analysis of Michigan DOT highway construction projects upon which Consumers’ engineering witnesses relied for calculation of various elements of costs to construct the CERR.) Consumers further objects to Mr. Tobias’ analysis because it allegedly did not include companies “of a similar size...[and] with a similar profile” to the CERR. Reb. at III-G-5. But that observation overlooks the fact that the analysis included *all* IPOs over \$100 million over the past decade—if none of the companies which raised capital during that period precisely fit the “profile” of the CERR (an almost certain fact given that no one has financed a railroad to haul coal from Chicago to Michigan), it is clear that they all incurred significant underwriting costs.

The analysis sponsored by Mr. Tobias is the best evidence of record about the range of such costs and shows that large IPOs simply cannot be done with no equity flotation costs, as Consumers has assumed.⁸⁷

B. The Board Should Adhere to Precedent On The SARR's Interest Schedule.

Consumers' argument that the CERR should be allowed to structure the interest on the debt portion of its capital by providing for fixed interest payments is readily disposed of, because (as Consumers itself acknowledges) that approach has been thoroughly considered and rejected by the Board in prior cases. *See* Reb. at III-G-13, III-G-14. The Board has correctly held the approach advocated by Consumers—and previously advocated by DuPont and SunBelt in their cases against Norfolk Southern and rejected in both—would result in the payment of interest on the debt only and none of the principal. As the Board stated in *SunBelt* (at 191), “if the SARR pays only interest, and no principal, throughout the SAC analysis period, it has not paid for its assets. This debt financing approach would abandon the fundamental structure of the SAC test, a result we cannot allow.” Consumers has failed to show why this sound conclusion should be abandoned here. The Board should therefore adhere to the requirement that the CERR's financing approach include payment of both principal and interest on its assets.

VI. THE REVENUE ADEQUACY CLAIM SHOULD BE DISMISSED.

Consumers demands that the Board freeze in place the old expired contract rate in perpetuity, under the misguided belief that CSXT is “revenue adequate.” CSXT will not reargue on brief why the revenue adequacy test that produces Nixon-era rate freezes is irrational and

⁸⁷ The remainder of Consumers' Rebuttal evidence on flotation costs deals with new evidence regarding the possibility of the CERR's equity capital being raised through a private placement. Reb. at III-G-6, III-G-13. That new evidence constitutes improper rebuttal and is the subject of a Motion to Strike that CSXT is filing simultaneously with this Brief. But it bears noting that even if that improper rebuttal were to be considered, Consumers contends that use of a private placement rather than an IPO to finance the CERR would generate lower equity flotation costs, but not zero costs. Consumers' dogged insistence on claiming that the half billion dollars plus capital that CERR would have to raise would be completely costless is both irrational and unsupported.

should be abandoned entirely. Granting relief under the revenue adequacy constraint where none is justified under the SAC constraint would create an impermissible cross-subsidy in violation of the basic tenets of *Guidelines*. CSXT has not been revenue adequate for 29 consecutive years, with a cumulative shortfall of \$33.5 billion since 1999. Either reason offers ample basis to summarily dismiss Consumers' revenue adequacy claim.

A. Consumers Cannot Simultaneously Seek Relief Under Both the SAC Constraint and the Revenue Adequacy Constraint.

CSXT explained in its Reply that a centerpiece of the STB's rate regulations is the prohibition against cross-subsidies. *See* Reply at IV-28-29. The ICC long ago declared that "a captive shipper should not bear the costs of any facilities or services from which it derives no benefit."⁸⁸ A corollary "core economic underpinning of CMP is the principle that a shipper must cover its own attributable costs and only unattributable costs are to be allocated among the traffic group. Indeed, this theme permeates *Coal Rate Guidelines*."⁸⁹

This centerpiece of the STB's rate regulations—the prohibition of cross-subsidies—prevents Consumers from seeking relief under both the SAC and the Revenue Adequacy constraints. *See* Reply at IV-26-29. Stated simply, if the challenged rate passes muster under the Board's final SAC analysis, then by definition the costs to construct, operate, and maintain the portion of the CSXT rail system used by Consumers exceed the properly attributable revenues. Accordingly, any relief accorded Consumers under the Revenue Adequacy constraint would necessarily demand a cross-subsidy from the remaining "revenue adequate" portions of the CSXT system. No relief can be granted below those costs without tearing apart the basic fabric of CMP and the prohibition against cross subsidies.

⁸⁸ *Guidelines*, 1 I.C.C.2d at 523.

⁸⁹ *Otter Tail Power Co. v. BNSF Ry. Co.*, STB Docket No. 42071, at 24 (STB served Jan. 27, 2006).

Consumers offers no coherent defense on Rebuttal. First, Consumers suggests that this argument is contrary to *Guidelines*, which states that the individual constraints can be used individually or in combination. But CSXT already acknowledged those statements in *Guidelines*. Pointing backwards to general statements in agency guidelines offers no explanation for why, as the rate regulations have developed over the next three decades, Consumers should now be entitled to relief based on the system-wide revenue needs of CSXT, when the more precise SAC test proves unequivocally that none is merited.

Second, Consumers makes an inexplicable argument that contestable market theory does not identify SAC as the undisputed maximum reasonable price, but merely as the ceiling on the reasonable price—a distinction without a difference—and cites as “support” a statement by the venerable Professor Baumol: “No price is allowed to be higher than the stand-alone cost and no price is allowed to be lower than incremental costs, but any price in between these two levels is permitted.” Reb. at IV-33. It is unfathomable how Consumers can twist a clear statement by Professor Baumol that “any price in between these two levels *is permitted*” into support for the notion that the SAC constraint does not reveal the maximum permitted rate.

Third, Consumers argues that driving the maximum lawful rate below the level justified by a full SAC presentation does not create an internal cross-subsidy. It sidesteps the issues by noting that SAC is a bottom-up approach, the revenue adequacy constraint is a top-down approach, but both are guided by and seek to emulate competitive market principles. This is a truism that proves nothing. In this case, the SAC analysis will painstakingly calculate the costs attributable to serving Consumers through the congested Chicago gateway and then up a light-density line to Campbell. Prescribing a rate below that level would by definition mean that CSXT would not be permitted to recover the full costs attributable to serving Consumers. The result of the SAC analysis is the end game.

Finally, Consumers contends that these arguments are precluded by *CF Industries*.⁹⁰ But the issue raised here was never presented in *CF Industries*. And more importantly, that case is easily distinguishable from the facts here. In that case, the shipper was challenging rates for nearly the entire pipeline network, so that a system-wide SAC or system-wide revenue adequacy test might theoretically approximate the same result. Here, in sharp contrast, Consumers is challenging the rate to use a tiny fraction of the 21,000 mile CSXT network. The Board recognized, that “[t]he very purpose of the SAC test is to determine what [the defendant] needs to charge to earn ‘adequate’ revenues on the portion of its system that is included in the system of the SARR.”⁹¹ Once the SAC test shows what CSXT needs to charge to serve Consumers, that ends the inquiry.

B. CSXT Has Never Been Found “Revenue Adequate” For Even a Single Year.

For every year since 1986, the ICC and STB have found CSXT revenue inadequate. *See* Reply at IV-34-35. Indeed, CSXT has fallen more than \$33.5 billion short of “revenue adequacy” on a cumulative present value basis since 1999. *See id.* at IV-38-39.

Consumers dismisses these inconvenient annual findings. “It is, at most,” opines Consumers, “the compounded sum of a set of artificial annual shortfalls of measured revenues as compared to an industry COC calculation, which by the end of the period disappears within the statistical range of accuracy.” Reb. at IV-40. Notwithstanding this \$33.5 billion shortfall, Consumers elsewhere declares that it has shown that CSXT has achieved revenue adequacy “by a substantial measure, over a sustained period of time (at least five years), and is likely to remain revenue adequate for a substantial period of time into the future.” Reb. at IV-63.

⁹⁰ *CF Indus., Inc. v. Koch Pipeline Co.*, 4 S.T.B. 637 (2000).

⁹¹ *Pub. Service Co. of Col. d/b/a Xcel Energy v. Burlington Northern & Santa Fe Ry. Co.*, STB Docket No. 42057, at 6 (served Jan. 19, 2005); *BNSF 2006* at 480 (“the SAC test is designed to take into account the railroad’s need for revenue adequacy on the portion of its system that is included in the system of the [SARR]”).

But Consumers continues to sidestep these annual findings by (1) ignoring the single Return on Investment (“ROI”) standard and (2) arguing that the methodology for calculating the cost of capital is flawed and should be replaced. This is an impermissible attack on binding revenue adequacy standards that is prohibited by *Arkansas Power & Light Co. v. Burlington N. R.R.*, 3 I.C.C. 2d 757, 765 (1987), a case cited by CSXT but ignored entirely by Consumers. Rather, Consumers uses the idea that parties may submit “other probative evidence” as license to discard virtually every rule and standard regarding revenue adequacy and the cost of capital the agency has promulgated in the past. It remains unclear what the ICC meant when in the late 1980s it made those statements in four individual revenue adequacy findings, statements that disappeared once the standards adopted through notice and comment rulemaking were established and could be implemented. There are indeed important issues that must be litigated in a particular adjudication, such as what time period to use, what kind of pattern of returns in excess of the industry cost of capital should trigger a revenue adequacy constraint, and how the Board should apply this constraint once triggered. But in reaching those issues, the Board must follow the single ROI standard adopted in *Standards II*⁹² after notice and comment.

In the end, Consumers cannot overcome the uncontested fact that the ICC and STB have found CSXT to have fallen \$33.5 billion short of revenue adequacy over the last 15 years under the single ROI standard. The Board can and should dismiss the revenue adequacy portion of Consumers’ complaint on that basis alone.

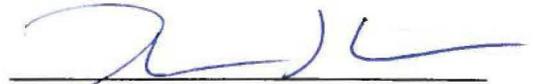
VII. CONCLUSION

For the reasons detailed in CSXT’s Reply Evidence and in this Brief, the Board should find that Consumers has failed to establish that CSXT possesses market dominance over the issue movement and that this case should be dismissed for lack of jurisdiction. If the Board

⁹² *Standards II*, 3 I.C.C.2d at 261.

nonetheless finds that it has jurisdiction, it should find that Consumers has failed to establish that the challenged rate is unreasonable under either the stand-alone cost test or a revenue adequacy constraint.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2016, I caused a copy of the foregoing Final Brief to be served by hand delivery or more expeditious means upon:

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