

BEFORE THE
SURFACE TRANSPORTATION BOARD

TOTAL PETROCHEMICALS & REFINING
USA, LLC

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42121

CSXT's REPLY TO TPI'S MOTION FOR PROCEDURAL SCHEDULE AND MOTION FOR EXPEDITED DECISION ON COMPLAINANT'S THIRD MOTION TO COMPEL

Defendant CSX Transportation, Inc. ("CSXT") respectfully submits this consolidated Reply to Complainant Total Petrochemicals & Refining USA, LLC's ("TPI's") Motion for Procedural Schedule ("Procedural Schedule Motion") and Motion for Expedited Decision on Complainant's Third Motion to Compel ("Expedited Decision Motion") (collectively, "Motions").¹ The Motions are the result of the parties' inability to agree about several procedural matters in the wake of the Board's May 31, 2013 decision in the market dominance phase of this case ("*Decision*"), a decision that both CSXT and TPI have asked the Board to reconsider.

First, because the resolution of the pending petitions for reconsideration filed by both parties could significantly affect the scope of the case and the size and nature of any SARR that TPI may propose, the Board should adopt a procedural schedule for rate reasonableness that begins on the day that it decides those petitions. Such a schedule is consistent with the schedule

¹ Because TPI's two motions are interrelated, CSXT is filing a consolidated reply to simplify the record.

agreed to by the parties in *M&G v. CSXT*, which similarly proposed that the rate reasonableness phase would not begin until the Board resolved a petition to reconsider its market dominance decision and pending comments on that decision. *See* Joint Motion for Procedural Schedule, *M&G Polymers USA, LLC v. CSXT*, STB Docket No. 42123 (“*M&G*”), at 2 (filed Dec. 13, 2012).

Second, TPI’s proposed procedural schedule would substantially prejudice CSXT by giving it inadequate time to prepare reply evidence in what the Board has recognized will be an “extraordinarily complicated” case² and by proposing the complete elimination of final briefs. The Board instead should adopt a procedural schedule that gives CSXT equal opportunity to prepare complete and well-documented evidence and to fully address the issues in this case. TPI’s proposal to eliminate final briefs—which are now a standard part of the Board’s procedural schedule and an essential tool for focusing the issues—is a transparently self-serving attempt to limit CSXT’s ability to present arguments to the Board. Final briefs are particularly important because complainants have made it a routine practice to submit bare-bones evidence on opening and strategically save much of their evidence for rebuttal. Final briefs that address the whole record in the case are an important safeguard against this abuse of rebuttal evidence and a critical tool to facilitate the Board’s evaluation of what will likely be a voluminous evidentiary record in this proceeding.

Third, TPI’s “Expedited Decision Motion” demanding an “expedited decision on TPI’s Third Motion to Compel” is unnecessary and should be denied. Expedited Decision Motion at 5. While it is not at all clear that TPI has a right to additional discovery, CSXT has voluntarily agreed to produce additional, more recent data to TPI, including extensive traffic, density, and

² *TPI v. CSXT*, STB Docket No. 42121, at 7 (served Apr. 5, 2011).

forecast data. As discussed above, CSXT believes that the Board should resolve the pending petitions for reconsideration before the parties embark on supplemental discovery and development of rate reasonableness evidence. Whatever procedural schedule the Board finds appropriate, it should deny the Third Motion to Compel, because the parties have agreed that CSXT will produce updated information responsive to a narrowed set of discovery requests. TPI's further suggestion that the parties have agreed to preclude the use of any "private" information that does not fall within narrow categories dictated by TPI is flatly incorrect. CSXT has not agreed to TPI's new proposed language, which is a unilateral effort to impose a vague and overbroad limitation on the parties' rights under the Board's rules.

I. THE PROCEDURAL SCHEDULE FOR RATE REASONABLENESS SHOULD BEGIN WHEN THE BOARD COMPLETES THE MARKET DOMINANCE PHASE BY DECIDING THE PETITIONS FOR RECONSIDERATION.

Because the ultimate scope of this case will be defined by the Board's resolution of the parties' petitions for reconsideration of the *Decision*, the procedural schedule for rate reasonableness should begin on the date the Board resolves those petitions. As CSXT explained in its Petition for Reconsideration, the STB's adoption of the limit price test for qualitative market dominance constituted material error warranting reconsideration, because the limit price test violates the statute, because the Board's amendment of the market dominance rules without a notice-and-comment rulemaking violates the Administrative Procedure Act, and because the limit price approach is otherwise arbitrary and unlawful. The Board should reconsider its decision and assess qualitative market dominance under its longstanding and lawfully adopted market dominance rules. If the Board does so, CSXT believes the Board will find that CSXT lacks market dominance over the remaining case lanes challenged on market dominance grounds. *See Decision* at 35-58 (rejecting nearly all arguments made by TPI regarding the cost and feasibility of alternative transportation). Conversely, the relief sought by TPI in its Petition

for Reconsideration would effectively change the limit price presumption on several of the lanes for which the Board found that CSXT lacked market dominance by inflating the cost of those options. Although CSXT believes that TPI's Petition is meritless,³ if the Board were to grant TPI's request, several of the lanes dismissed in the *Decision* would be added back to this case.

In short, until the Board resolves the petitions for reconsideration, the actual case lanes for which a SAC analysis will be required are in flux. Changes to the case lanes at issue could have significant effects on the SARR configuration, traffic selection, and operating plan. And if the Board were to grant CSXT's petition to reject the limit price test and apply its traditional market dominance test, substantial numbers of lanes would have to be dismissed, and the scope of this case could be reduced to the point where the parties might be willing to enter mediation and reopen commercial negotiations to resolve the remaining disputes. It is also conceivable that TPI might consider a *Simplified Standards* approach for a reduced set of lanes rather than a full SAC analysis.

The Board has recognized the potential problems created by dismissing lanes on market dominance grounds after the development of SAC evidence. *See TPI v. CSXT*, STB Docket No. 42121, at 7 (served Apr. 5, 2011) ("the result could be an evidentiary record inconsistent with the assumptions underlying the complainant's selection of a traffic group and the facilities necessary to serve that group"). To avoid these problems, and to spare CSXT the considerable burden of having to generate substantial quantities of discovery data that could prove unnecessary if the Board grants its petition, the rate reasonableness phase should await the Board's full resolution of the market dominance questions that affect the scope of this case. For this reason, CSXT

³ CSXT will file its reply to TPI's Petition on or before July 24, 2013, consistent with the schedule approved by the Board. *See TPI v. CSXT*, STB Docket No. 42121 (served June 21, 2013) (granting TPI request to extend period for replies to petitions for reconsideration).

proposes a procedural schedule that would begin on the day that the Board issues a decision on the parties' petitions for reconsideration.⁴

TPI's assertion that CSXT's proposal to complete the market dominance phase before proceeding to the rate reasonableness phase amounts to an unauthorized "stay" is nonsense. *See* Procedural Schedule Motion at 4. In the first place, CSXT does not seek to "stay" the *Decision*, which indeed does not have any effects that could be "stayed." The *Decision* was a jurisdictional determination whose ordering paragraphs only instructed the parties to confer and propose procedural schedules and redactions to the Highly Confidential Appendix. *See Decision* at 30. CSXT has complied with those orders, and the fact that the parties do not agree on a procedural schedule does not mean that CSXT is seeking a "stay." Moreover, CSXT's proposal is indistinguishable from the joint proposal of the *M&G* parties that the procedural schedule for the rate reasonableness phase of that case begin on "the service date of the Board's final market dominance decision." Joint Motion for Procedural Schedule, *M&G*, at 2 (filed Dec. 13, 2012). The Board should adopt a similar framework here.

II. TPI'S PROPOSALS TO LIMIT CSXT'S TIME TO FILE REPLY EVIDENCE AND TO ELIMINATE FINAL BRIEFS ARE INEQUITABLE AND SHOULD BE REJECTED.

The standard procedural schedule in SAC cases affords substantial advantages to complainants. Complainants have three filings: (1) opening evidence, in which the complainant has the right to select the SARR's traffic and design optimally sized facilities and a least-cost, most-efficient operating plan; (2) rebuttal evidence, in which the complainant has the final evidentiary word on all issues in the case; and (3) a final brief addressing the evidence in the record and focusing the Board's attention on the issues the complainant believes to be most

⁴ If the Board were to decide the petitions for reconsideration on different dates, the procedural schedule would begin when both petitions have been resolved.

significant. A defendant, on the other hand, has just two filings: a single evidentiary filing of reply evidence that responds to opening evidence, and a final brief to address the evidence in the record. Apparently unsatisfied with these procedural advantages, TPI seeks to further its advantage by limiting the time for CSXT to prepare reply evidence and by eliminating CSXT's ability to file a final brief altogether. Neither request is reasonable, and the Board should deny them.

A. CSXT's Time to Prepare Reply Evidence Should Give It Equal Opportunity to Address The Complex Issues in This Case As TPI Will Have for Its Opening Evidence.

CSXT requires more time for its reply evidence than was contemplated by the initial procedural schedule in this case and the one that TPI has proposed, because this case is likely to present the same complexities as those raised by the SAC evidence in *E.I. du Pont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42125 ("*DuPont/NS*"). *DuPont/NS* is similar to the present case in terms of the variety of commodities, the number of traffic lanes covered by the challenged rates, and the sheer geographic scope of the likely SARR. The experience in that case should guide the Board in establishing the procedural schedule here. In *DuPont/NS*, the Board observed "the unusual scope and complexity" of the proceeding. *DuPont/NS*, STB Docket No. 42125, at 2 (served Jan. 13, 2012). Similarly, the Board has accurately described the instant case as "extraordinarily complicated." *TPI v. CSXT*, STB Docket No. 42121, at 7 (served Apr. 5, 2011). Both proceedings involve numerous and diverse traffic lanes, meaning that the TPI SARR will likely cover nearly every state on the CSXT system.⁵ And because the rates TPI is challenging are rates for carload traffic, it is certain that TPI—like DuPont—will have to select a significant amount of carload traffic for its SARR, a

⁵ TPI's discovery requests sought data from CSXT related to its traffic and operations for twenty states and the District of Columbia.

selection that will significantly complicate the development of an operating plan for that traffic and the necessary SARR facilities for handling, classification, and switching of that traffic.

TPI is correct that CSXT agreed to only 120 days for its reply in February of 2011. *See* Procedural Schedule Motion at 5. But that agreement predated the experience in *DuPont/NS*, which illustrated how complex and time-consuming it is to develop SAC evidence for a carload network stretching across the entire Eastern United States. In *DuPont/NS*, Norfolk Southern (“NS”) had 214 days between the submission of DuPont’s opening evidence and the submission of NS’s reply evidence.⁶ For this case, CSXT proposes that its reply evidence be due 180 days after TPI files its opening evidence.

Not only is 180 days less time than NS had to prepare its reply evidence in *DuPont/NS*, it is less than the total of 195 days that CSXT’s procedural schedule affords TPI to prepare its opening evidence. It should not be forgotten that TPI must have already done substantial work on its opening evidence, since the Board’s order bifurcating market dominance was issued just 24 days before TPI’s full opening evidence was due. Moreover, CSXT produced over 43,000 pages and 100 gigabytes of data during the original discovery period, so TPI has ample information to develop most of its evidence before CSXT produces additional data. CSXT’s requested 180-day period to prepare reply evidence is appropriate to ensure that the parties have equal opportunity to develop documented and well-supported evidence.

B. Final Briefs Are An Essential Tool for Summarizing the Key Issues in a Complex Record.

TPI’s most egregiously one-sided proposal is its attempt to eliminate CSXT’s opportunity to file a final brief in the case. There should be no mistake—TPI is proposing a one-sided cut to

⁶ One NS extension was attributable to DuPont’s filing a substantial errata 17 days after submission of its opening evidence. But even counting from the date of that errata, NS had 197 days to prepare reply evidence.

CSXT's ability to file a final brief addressing all the evidence. TPI all but admits that it would reserve to itself the right to file the equivalent of a final brief as part of its rebuttal evidence. *See* Procedural Schedule Motion at 7 (claiming that TPI's final brief would be "redundant" of what TPI would plan to include in its rebuttal evidence). By eliminating one of the two filings that CSXT is permitted to make in the SAC phase of this proceeding—and thus precluding CSXT from addressing any legal arguments to the evidence TPI submits on rebuttal—TPI seeks to dramatically tilt the playing field in its favor and to seriously prejudice the Board's ability to reach a fair decision that comports with due process.

Final briefs have been included in all recent schedules for stand-alone cost cases, because they provide the parties an important opportunity to address the central issues in the case after all of the evidence has been submitted and analyzed. *See Wisconsin P&L v. Union Pacific R.R. Co.*, STB Docket No. 42051, at 1 (served Nov. 15, 2000) ("briefs, properly employed, can focus the issues and thereby contribute to greater efficiency in analyzing the record"). The SAC evidence submitted in a complex case is voluminous, and parties typically disagree about hundreds of separate issues. Final briefs that summarize the evidence and arguments on the most important issues in the case play an even more critical role in a case like this one, which likely will involve a large network, a diverse traffic mix, and substantial carload operations.

The recent *DuPont/NS* case that TPI cites as an example of the supposed "abuse" of final brief in fact illustrates how useful they are. The evidentiary record in *DuPont/NS* consisted of thirteen volumes of evidence, 3,043 narrative pages, 165 exhibits, and thousands of workpapers. That massive evidentiary record was summarized in briefs that totaled 170 pages for NS and 84 pages for DuPont, which means that each brief amounted to less than 0.6% of the total length of

the narrative evidence (let alone exhibits and workpapers).⁷ It is far from “rote” to have parties submit briefs to address the most important issues in such complex cases.

Moreover, TPI’s claim that NS’s brief “was a point-for-point response to the DuPont rebuttal SAC evidence” is not accurate. *Procedural Schedule Motion* at 7. To take one example, DuPont’s Rebuttal Evidence devoted 77 pages to evidence of general and administrative (“G&A”) expenses—approximately twice the number of pages that DuPont devoted to G&A on opening. But NS’s brief spent just 8 pages on G&A, hardly a “point-by-point” response.

TPI’s more general claim that briefs are being used as “surrebuttal” is meritless. *Id.* The key limitation on any final brief is that it cannot present new evidence. Complainants are entitled to the last word as an evidentiary matter. But it is essential to the fairness of the proceedings for each party to have an opportunity to address legal arguments to the whole of the evidentiary record. If a party were to submit improper new evidence in a final brief that goes beyond the scope of the evidence, the other party may file a motion to strike. But the prospect of potentially improper surrebuttal is no reason to eliminate CSXT’s ability to submit a brief that addresses all of the evidence in the case.

Moreover, it is beyond ironic that TPI complains about the “abuse [of] final briefs” by Defendants who have the temerity to actually respond to the litany of new evidence presented for the first time in rebuttal filings—including very notably in *DuPont/NS*. *Procedural Schedule Motion* at 8. Complainants have increasingly employed a strategy of submitting incomplete, bare-bones opening evidence and withholding significant portions of their evidence for rebuttal,

⁷ TPI complains that NS submitted eight exhibits with its final brief. But one of those exhibits was a list of impermissible rebuttal items, three were publicly available documents, and the remainder were excerpts from the evidence that were appended for the Board’s convenience. *See* NS Final Br., *DuPont/NS*, at v (filed June 14, 2013). Moreover, DuPont submitted its own exhibit and a workpaper with additional calculations. *See* DuPont Final Br., *DuPont/NS*, at 11 n.7 (filed June 14, 2013)

in a transparent effort to shield that evidence from the scrutiny of the adversarial process. For example, the Rebuttal SAC filing in *DuPont/NS*—authored by the same counsel and consultants engaged by TPI in the present case—was *three times* the length of its opening SAC submission.⁸ And TPI’s own conduct on Rebuttal during the market dominance phase of this proceeding—where it submitted rebuttal evidence that was nearly three times the length of its opening evidence and included several arguments struck by the Board as improper rebuttal—suggests that it may attempt to engage in the same gamesmanship in the SAC phase.⁹ This reflects a flagrant disregard for the Board’s repeated admonitions that SAC complainants “submit their best evidence on opening, so that each party has a fair opportunity to reply to the other’s evidence”¹⁰ and leaves the defendant railroad with no choice other than to do the best it can on brief to address the misstatements, errors and omissions in rebuttal filings within a limited time period and without submitting new “surrebuttal” evidence itself. What TPI really seeks is to foreclose CSXT from any opportunity to address whatever evidentiary excesses and distortions TPI may include in its rebuttal filing—in other words, to “just be quiet and sit down.” Such a procedure would no doubt serve TPI’s interests, but it would deny CSXT a fair and reasonable opportunity to address the complete evidentiary record on SAC issues. And it would deprive the Board of

⁸ In *DuPont/NS*, the Stand Alone Cost Narrative of DuPont’s rebuttal was 511 pages—over three times the length of the 156-page Stand Alone Cost Narrative in DuPont’s Opening. It contained significant amounts of impermissible rebuttal, which NS cataloged and identified in an exhibit to its final brief. See NS Final Br., *DuPont/NS*, STB Docket No. 42125, Ex. 1 (filed June 14, 2013).

⁹ See Motion to Strike, *TPI v. CSXT*, at 2 (filed Sept. 29, 2011) (comparing length of TPI Opening and Rebuttal and noting multiple new witnesses and arguments TPI presented on Rebuttal); see *Decision* at 9 (granting motion to strike several aspects of TPI Rebuttal for violating rules on rebuttal evidence).

¹⁰ *Public Service of Colorado d/b/a Xcel Energy v. Burlington Northern & Santa Fe Railway Co.*, Docket No. 42057 (served April 4, 2003), at 2.

the benefit of the parties' arguments and insights into what will inevitably be a very large and complicated evidentiary record.¹¹

In short, when TPI claims that final briefs summarizing the arguments and evidence are “unnecessary,” what it really means is that it would prefer to file its summary of arguments and evidence as part of its rebuttal and preclude CSXT from having the same opportunity. The Board should reject this transparently one-sided proposal, and adopt CSXT’s reasonable request for a 60-day period for final briefs.¹²

C. TPI’s “Tariff Premium” Argument Should Be Disregarded.

TPI attempts to bolster its procedural schedule by arguing that it is prejudiced by delay in this proceeding because of its payment of what it pejoratively and incorrectly describes as a “tariff premium” to CSXT. Procedural Schedule Motion at 9-10. TPI defines the “tariff premium” as “the amount by which the challenged tariff exceeds that last contract proposal of CSXT, which TPI rejected as unreasonably high.” *Id.* at 9. In other words, TPI is complaining about its payment of the lawful tariff rates established by CSXT for the issue traffic, rates that are presumptively reasonable unless and until the Board holds otherwise. In short, only the Board, not TPI, may determine whether the challenged rates are “unreasonably high.” Absent such a determination, TPI is simply paying—as it must—the applicable and lawful rates for its traffic. Thus, in no event can there be an lost “tariff premium” for TPI. If TPI wins its case, CSXT will be required to pay as reparations any amounts found by the Board to be above the

¹¹ The Board should also recognize that the only other procedural paths for CSXT, or any other railroad defendant in a SAC case confronted with an overreaching rebuttal filing from the complainants, are to file a motion for leave to submit surrebuttal—an avenue which obviously would add more time to the procedural schedule—or to file one or more motions to strike improper rebuttal—also an avenue that would add time for complainant’s reply and for the Board to sift through the motion and the offending rebuttal evidence in order to decide the motion.

¹² This time frame is consistent with the procedural schedules in *DuPont/NS* and *SunBelt v. NS*.

levels of the reasonable rates.¹³ And TPI's claim that even if it loses its case "CSXT retains the tariff premium" makes little sense, for in such a circumstance CSXT would not be "retaining the tariff premium" but rather would be retaining the payment of its reasonable rates. *Id.* at 10.

TPI also claims that it is "severely prejudicial" for it to have to continue doing business in the "competitive global marketplace" without knowing whether CSXT's rates are reasonable, and that such uncertainty "hampers TPI's ability to plan for the future and compete in the global marketplace." *Id.* These claims are difficult to take seriously, given the fact that TPI is part of Total, S.A., a multinational corporation with worldwide oil, gas, and chemicals interests that operates in 130 countries around the world and had gross revenues for 2012 of \$257 Billion and an adjusted net income of \$15.9 Billion.¹⁴ (TPI's 2012 revenues were thus over 21 times greater than CSXT's.¹⁵) It defies credibility for TPI to claim that its "ability to plan for the future and compete in the global marketplace" is any meaningful way hindered by its concern about the "tariff premium" that it contends is "now in excess of \$17 million and growing every day." *Id.*¹⁶

For all of the above reasons, CSXT requests that the Board adopt the following procedural schedule:

¹³ TPI disparagingly claims that any such reparations would be "with virtually no interest," but that is simply an improper collateral attack on the interest rate for such payments established pursuant to regulation. Procedural Schedule Motion at 10.

¹⁴ See Total, Société Anonyme, "Fourth quarter and full-year 2012 results," available at http://www.total.com/MEDIAS/MEDIAS_INFOS/6176/EN/Total-2012-en-results-outlook-130213-pr-V4.pdf.

¹⁵ See CSX, "CSX Quarterly Financial Report, Fourth Quarter 2012," available at <http://investors.csx.com/phoenix.zhtml?c=92932&p=quarterlyearnings2012>.

¹⁶ The significance of the claimed "\$17 million tariff premium" to TPI's "ability to compete" is put in perspective by the fact that only a month ago Total, S.A., settled an enforcement matter for over \$398 million. See <http://www.justice.gov/opa/pr/2013/May/13-crm-613.html>. That amount far overshadows what TPI in its Motion characterizes as its "opportunity cost for pursuing regulatory relief." *Id.* at 9.

Day	Event
0	Board issues decision on petitions for reconsideration. CSXT commences supplemental discovery production.
90 (+90)	Close of Supplemental Discovery
195 (+105)	TPI Opening Evidence
375 (+180)	CSXT Reply Evidence
450 (+75)	TPI Rebuttal Evidence
510 (+60)	Final Briefs

III. TPI's EXPEDITED DECISION MOTION IS UNNECESSARY.

TPI's Expedited Decision Motion should be rejected by the Board as unnecessary and premature. CSXT already has agreed to supplement its production of certain types of data, and the only remaining issues are (1) when the rate reasonableness phase of this proceeding (and such production) should begin; and (2) whether TPI may limit CSXT from relying on data produced in discovery that does not relate to one of the specific requests that TPI has asked CSXT to "update." The first of these issues was addressed above in Section I, where CSXT explained the good reasons for the Board to rule on pending market dominance petitions before instituting a procedural schedule for rate reasonableness. The second is discussed below.

TPI misstates the terms of an alleged agreement between TPI and CSXT. *See* Expedited Decision Motion at 2. The parties agreed on what CSXT would produce in updated discovery. CSXT did not agree to, and rejects, TPI's proposal to preclude CSXT from using in its Reply Evidence any nonpublic information that was not (1) produced during the original discovery period or (2) produced during the supplemental discovery production period and "covered by" one of the requests TPI that specifically requested be updated (*i.e.*, TPI Requests for Production 18-19, 20-23, 30-31, 34-36, 149, and 156-157). *Id.* TPI's attempt to restrict CSXT's Reply Evidence is both unnecessary and overbroad. The Board's rules already preclude parties from

relying on evidence that was not produced in response to a proper discovery request.¹⁷ But TPI's proposed limitation is broader than that governing rule: for example, TPI's proposed language would prevent CSXT from using information that was not within the scope of a TPI discovery request, and even from relying on information that CSXT produced within the supplemental discovery period if TPI does not deem it to be "covered by" one of its enumerated requests.

TPI's attempt to limit the scope of nonpublic information that CSXT may use in Reply strictly to the supplemental information CSXT produces in response to one of TPI's enumerated requests is inappropriate and must not be countenanced by the Board. Such a rule would enable TPI to prevent CSXT from presenting information that is relevant to the issues in this case—and potentially harmful to positions taken by TPI—by simply declining to request that CSXT update that category of information during the supplemental discovery period.

In particular, there is one category of information that CSXT may need to use when preparing its Reply Evidence that CSXT intends to make available to TPI should the Board order it. CSXT may use the MultiRail Freight Edition software licensed by Oliver Wyman in connection with the generation of CSXT's Reply Evidence on a SARR operating plan for the carload-heavy traffic mix that CSXT expects TPI to select. Although CSXT believes it is not obliged to purchase a software license for the proprietary MultiRail model for TPI's use, CSXT recognizes that the Board has not yet ruled on that issue. *See DuPont/NS*, STB Docket No. 42125, at 1 (Mar. 25, 2013) (denying as moot petition asking the Board to clarify that NS was not obligated to bear the cost of providing complainants with licenses or training for MultiRail). CSXT will discuss MultiRail issues with TPI soon (including the possibility of TPI's acquiring a

¹⁷ *See, e.g., AEP Texas v. BNSF Ry. Co.*, STB Docket No. 41191 (Sub-No. 1), at 80-81 (decided Sept. 7, 2007) (rejecting BNSF efforts to impeach Complainant's grading evidence with the original specifications because it was "information [BNSF] failed to produce during discovery").

single-use license that would be discounted from the full price), and CSXT hopes to reach a mutual understanding with TPI about these issues. If CSXT and TPI are unable to reach an understanding, CSXT may file a separate Motion for Clarification requesting that the Board confirm that CSXT is not obligated to purchase MultiRail for TPI's use and will not be prejudiced for not buying TPI a software license that TPI could acquire for itself.

In any event, CSXT recognizes that it is required to disclose to TPI any information that CSXT may decide to use to develop its Reply Evidence, either in CSXT's evidentiary filing itself or in supporting workpapers. However, there is no proper basis for restricting in advance CSXT's freedom to choose the information it may decide to use in its Reply Evidence or the kinds of analytical tools it may decide to bring to bear to respond to TPI's Opening Evidence, so long as such information and/or tools are equally available to TPI (either because they are publicly available or because CSXT provided them as discovery or in workpapers supporting its Reply Evidence).

TPI has suggested that it proposed this limitation "in consideration" of its reducing the number of discovery requests to be updated, but CSXT has already agreed to update the most significant and relevant categories of data, and it is not clear what other requests TPI still thinks could be updated. *See* June 5, 2013 Letter from J. Moreno to G. Paul Moates at 3 (attached hereto as Exhibit 1). As CSXT explained in its Reply to TPI's Third Motion to Compel, most of the discovery "update" requests raised in that motion seek to update discovery requests to which CSXT objected or for which the underlying information had not changed. TPI now has represented that its request to update does not encompass any of those requests. *See* Exhibit 1 at 2. If TPI nonetheless believes that additional discovery requests should be "updated," then CSXT would be willing to discuss such updating with TPI. If the parties were unable to agree,

TPI could seek relief from the Board at that time. But TPI's generalized request for the Board "to decide TPI's Motion to Compel"—a motion that requested "updating" of responses to many requests that TPI has since conceded need not be updated—is premature and would be a waste of the Board's time.

CONCLUSION

For the foregoing reasons, CSXT requests that the Board reject TPI's proposed procedural schedule, adopt the procedural schedule proposed in this Reply, and reject TPI's motion for an expedited decision.

Respectfully submitted,



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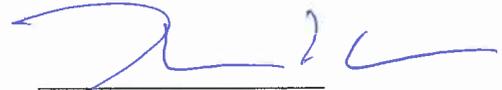
Counsel to CSX Transportation, Inc.

Dated: July 1, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2013, I served a copy of the foregoing CSX Transportation, Inc.'s Reply to TPI's Motion for Procedural Schedule and Motion for an Expedited Decision on Complainant's Third Motion to Compel by email and hand-delivery upon:

Jeffrey O. Moreno
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Matthew J. Warren

Exhibit 1

June 5, 2013

via electronic mail

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RE: Docket No. NOR 42121, *Total Petrochemical & Refining USA, Inc. v. CSX Transportation, Inc.*

Dear Paul:

I am writing with regard to the Board's May 31, 2013 decision in this proceeding. Specifically, the Board has directed Total Petrochemical & Refining USA, Inc. ("TPI") and CSX Transportation, Inc. ("CSXT") to confer and submit a proposed procedural schedule to govern the rate reasonableness phase of this proceeding by June 30, 2013. A very important predicate to developing a procedural schedule, however, is the resolution of TPI's request for updated discovery responses by CSXT.

In a letter dated July 18, 2012, TPI requested that CSXT update certain of its discovery responses related to the Stand-Alone Cost ("SAC") analysis. CSXT rejected TPI's request as premature and overbroad in a letter dated July 27, 2012. However, CSXT also stated that:

After the Board rules and the parties have had a chance to review the Board's decision and consider the nature and scope of any rate challenge that may remain, CSXT is willing to discuss with TPI whether and to what extent any additional discovery may be necessary or appropriate.

TPI subsequently filed a Motion to Compel, which the Board held in abeyance, in an August 23, 2012 decision, because the Motion pertained to rate reasonableness and the Board previously had held the rate reasonableness portion of this case in abeyance. Now that the Board has directed the parties to propose a procedural schedule for rate reasonableness, it is both necessary and appropriate for us to address this unresolved discovery issue. However, in lieu of reviving its Motion to Compel, TPI seeks to determine, in light of CSXT's above-quoted statement, whether and to what extent CSXT is in fact willing to supplement its discovery responses.

June 5, 2013

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In its reply to TPI's Motion to Compel, CSXT invoked the following objections to TPI's request for supplementation:

1. TPI's supplementation requests are burdensome because they would require CSXT to go through the entire traffic data generation process for an additional two years of data, without any attempt to narrow the scope or burden. Reply at 12-13, 19.
2. TPI requested that CSXT supplement responses to requests to which CSXT objected, to which CSXT did not produce responsive information, or which TPI did not pursue. Reply at 16-17.
3. TPI requested supplementation of responses that would not change over time. Reply at 17-18.
4. TPI requested supplementation of responses for information that does not exist or is publicly available. Reply at 18-19.
5. TPI requested supplementation of responses for information to which it is not entitled. Reply at 19.

Most of the foregoing objections refer to information that is beyond the scope of what TPI intended for CSXT to supplement. By asking CSXT to supplement its discovery responses, TPI was not seeking information to which CSXT had objected and not produced, that had not changed since CSXT's original production, or that did not exist or was publicly available. Rather, TPI only intended that CSXT supplement the actual information that it previously had produced to TPI, to the extent such information existed and had changed, from June 2010 through the present. In other words, the scope of TPI's request to supplement was intended to be the same scope as CSXT's prior responses, but for the extended time period.

Traffic data, of course, is the single largest component of TPI's supplementation request. Nearly 3 years of additional SAC-related information, beyond June 2010, now exists. For example, CSXT now has actual traffic and revenue data for the balance of 2010, 2011, 2012 and a part of 2013, which would obviate the need to rely upon forecasts for those time periods. In addition, CSXT would have more recent internal forecasts that include years not covered by its forecasts that were available in June 2010. Although TPI recognizes that there is a burden associated with the production of such data, this also is among the most critical data to a SAC analysis, and it would be fundamentally unfair to deny this information to TPI.

In recognition of TPI's discovery needs and CSXT's burden concerns, TPI proposes a narrowed scope for updating discovery that is focused upon traffic, revenue and density data; positive train control; and forecasts. The foregoing subject matter is encompassed by the following TPI document requests:

1. Traffic Volume -- #20, #21, #22, #23, #34, #35, #36
 2. Revenue -- #20, #34, #35, #36
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3. Density Data -- #18, #19
4. Forecasts -- #29, #30, #31, #156, #157
5. PTC -- #149

In consideration of this narrower scope for updated discovery, other than updated discovery responses covered by the foregoing requests, neither party will use private information in the rate reasonableness phase of this case that was not previously produced prior to the close of discovery on October 15, 2010. This proposal is similar to the discovery update agreement reached between CSXT and M&G Polymers in Docket 42123.

TPI also proposes the following procedural schedule for CSXT's consideration:

Day	Event
0 (May 31)	STB's final market dominance decision
90 (+90) (Aug. 29)	CSXT completes updating of discovery responses
195 (+105) (Dec. 12)	TPI Opening Evidence
315 (+120) (April 11)	CSXT Reply Evidence
390 (+75) (June 25)	TPI Rebuttal Evidence
420 (+30) (July 25)	Final Briefs

This schedule is identical to the one that M&G and CSXT jointly proposed to the Board in Docket 42123, with one exception. The above schedule provides CSXT with an additional 30 days to update its discovery responses.

Please let me know whether TPI's proposal for both updated discovery and a procedural schedule is acceptable to CSXT.

Sincerely,



Jeffrey O. Moreno
