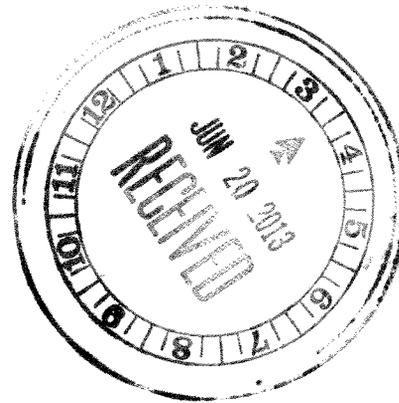


234441

June 20, 2013

via hand delivery

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



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

Dear Ms. Brown:

Enclosed for filing in the above-captioned case please find an original and ten (10) copies of the **Public Version** of the Petition for Reconsideration ("Petition") of Total Petrochemicals & Refining USA, Inc. ("TPI"). TPI has also enclosed the original and ten (10) copies of the **Highly Confidential Version** of the Petition. A check for \$250 is included to cover the filing fee required by 49 CFR § 1002.2.

I have enclosed one additional paper copy of each pleading for stamp and return. Kindly date-stamp the additional copies for return to this office by messenger.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

Jeffrey O. Moreno  
Counsel for Total Petrochemicals & Refining USA, Inc.

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Enclosures

cc: Counsel for defendant CSX Transportation, Inc.

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

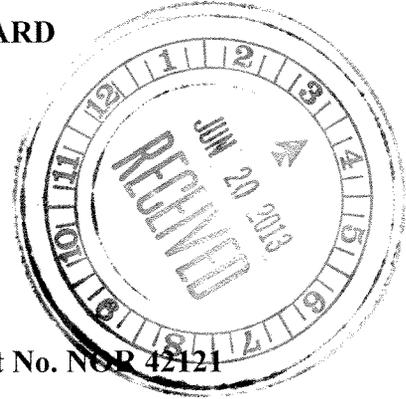
TOTAL PETROCHEMICALS &  
REFINING USA, INC.

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.



Docket No. NCR 42121

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PETITION FOR RECONSIDERATION OF  
TOTAL PETROCHEMICALS & REFINING USA, INC.

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TRANSPORTATION BOARD

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June 20, 2013

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JUN 20 2013

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TRANSPORTATION BOARD

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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<b>TOTAL PETROCHEMICALS &amp;</b>		)	
<b>REFINING USA, INC.</b>		)	
		)	
	<b>Complainant,</b>	)	
		)	
	<b>v.</b>	)	<b>Docket No. NOR 42121</b>
		)	
<b>CSX TRANSPORTATION, INC.</b>		)	
		)	
	<b>Defendant.</b>	)	
<hr/>		)	

**PETITION FOR RECONSIDERATION**

Pursuant to 49 CFR § 1115.3, Complainant Total Petrochemicals & Refining USA, Inc. (“TPI”) respectfully petitions the Surface Transportation Board (“Board”) to reconsider, on grounds of material error, two aspects of the May 31, 2013 decision (“Decision”) in the above-captioned proceeding. In support of this Petition, TPI states as follows.

**I. PREFACE AND SUMMARY OF ARGUMENT.**

In the Decision, the Board applied the standard of 49 USC § 10707 to find that CSX Transportation, Inc. (“CSXT”) is market dominant over 91 of 104 issue movements.<sup>1</sup> Additionally, the Board found that CSXT is market dominant as to one of TPI’s customers in three other lanes (lanes B-60, B-80, and B-112).<sup>2</sup>

<sup>1</sup> CSXT did not contest its market dominance over 26 of the 104 issue movements. See Decision at 28. See also TPI Rebuttal Evidence at p. I-1 (filed September 6, 2011). Therefore, of the 78 disputed lanes, the Board found CSXT market dominant over 65 of them.

<sup>2</sup> In the Decision, the Board divided the 104 lanes into 84 separate rates. See Decision at 2 (n. 6). Moreover, the Board has used the prefix “J” where the parties used “B”. Thus, Lane B-60 is J-60. See Decision at 2 (n. 5).

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The Board took a two-step approach to evaluating qualitative market dominance in the Decision. First, the Board evaluated whether any feasible alternatives existed for the challenged CSXT rail transportation. Decision at 4, 15-16, and 35-53. In this analysis, the Board used the term “feasible” to mean simply whether the alternative is “possible from a practical standpoint.” Decision at 4 (n. 9). In other words, feasibility does not necessarily mean effective competition under 49 USC § 10707(a). If feasible alternative transportation was found to exist, the Board then moved to step two, application of the Limit Price Methodology (“LPM”), which itself is a multi-step process. Decision at 4 and 16-17.

The first error identified by TPI is with the Board’s determination of the Limit Price for the transportation alternative to the challenged CSXT service. This error has three parts. The Board failed to include (1) bulk terminal costs and (2) inventory carrying costs that would be incurred by TPI in using the alternative transportation evaluated by the Board, and (3) the Board failed to adjust the applicable rail car costs given that the time required for the alternative transportation differs from TPI’s current transportation. The Board’s rejection of these three additional cost factors results from the Board’s erroneous belief that prepositioning of rail cars at bulk terminals is not necessary for transload service, a belief that is unsupported by the evidence submitted in this proceeding.

The second error for which TPI seeks reconsideration concerns Lane B-112. The Board erred in its feasibility determination for one of TPI’s customers in this lane, Cherokee Carpets. The Board should have found that there is no feasible alternative transportation on the basis of {{ its need to use rail cars for

storage. The Board’s treatment of Cherokee conflicts with its finding of market dominance as to all other similarly situated customers, and, therefore, the Board erred.<sup>3</sup>

**II. THE BOARD’S EXCLUSION OF ADDITIONAL TRANSLOAD COSTS FROM THE LIMIT PRICE WAS MATERIAL ERROR.**

Despite TPI’s evidence regarding the facts surrounding the issue lanes and the polymer industry, the Board rejected the additional inventory carrying costs, additional terminal storage fees, and the adjustment to rail car costs that would be necessary to provide the alternative transportation utilized in the LPM.<sup>4</sup> Decision at 53-57. The Board’s rejection of costs for all three categories constitutes material error. See, e.g., FMC Wyoming Corp. and FMC Corp. v. Union Pacific Railroad Company, 4 STB 699, 714 (n. 28) (2000) (Board states that additional costs inherent in switching to truck transportation “would have to be considered in determining how much lower the truck rate would need to be in order to provide an effective competitive alternative.”).

There is a fundamental difference between the transload alternatives proposed by CSXT and those proposed by TPI, and that difference is the source of the Board’s material error in excluding TPI’s additional terminal storage fees, rail car costs, and inventory carrying costs. TPI includes all three added costs because it must preposition rail cars at the bulk terminals in order to provide the service required by its truck customers. Specifically, TPI’s transload alternative presumes that TPI would preposition rail cars within a network of carefully selected bulk terminals from which it would fill customer orders for truckload quantities upon receipt. In

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<sup>3</sup> All text within single brackets is {CONFIDENTIAL} and all text within double brackets is {{HIGHLY CONFIDENTIAL}} pursuant to the Protective Order adopted in this proceeding in the Board’s decision served on June 23, 2010.

<sup>4</sup> ~~These additional costs can and should be applied to whichever of TPI’s or CSXT’s transload transportation costs (i.e., rail, terminal, plus truck charges) the Board has determined would produce the lowest Limit Price.~~

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contrast, CSXT’s transload alternative presumes that TPI would not ship a rail car to a bulk terminal until it has received an order for a full rail car from the customer. The Board erroneously concludes that TPI’s additional transload costs are for a “higher quality” transload service and that TPI’s polymer customers would accept the lower quality CSXT transload service. In fact, there is no evidence in the record that CSXT’s alternative would be acceptable to TPI’s customers, while there is ample evidence that it would not be acceptable.

In rejecting TPI’s added costs for transloading, the Board stated:

While TPI may choose to preposition its product at bulk terminals in advance of orders, this allows TPI to provide a higher quality service to its customers than rail provides and therefore should not be part of a direct comparison of the costs of the transportation alternatives.

Decision at 54 (underline added). The Board has this backwards. Only by prepositioning rail cars at the terminal can transloading be considered a comparable service to direct rail. The Board’s error exists on three levels.

First, the evidence in this case demonstrates that rail customers do not view transloading as a higher quality of service than direct rail service.<sup>5</sup> Thus, TPI does not preposition rail cars at bulk terminals to provide higher quality service to rail customers, as the above-quoted statement presumes. Rather, TPI prepositions rail cars at bulk terminals to provide basic service to its truck customers. As TPI thoroughly explained in its evidence, its bulk terminal network is designed to serve truck customers and TPI only delivers polymer to rail customers from a bulk terminal in emergency situations, and even then, only if doing so would not interfere with its service to the truck customers served by that terminal.<sup>6</sup>

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<sup>5</sup> See TPI Op. at II-B-17-19; TPI Reb. at II-B-15-21; TPI Reb. Ex. II-B-31 at 14-15.

<sup>6</sup> TPI Op. at II-B-7, 31 (n. 23); TPI Reb. at II-B-105-06.

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Second, if TPI were to use a bulk terminal to serve an existing rail customer, that customer would become a truck customer and would require the same basic service as TPI's other truck customers. TPI prepositions its product at bulk terminals because this is the absolute minimum level of service that truck customers require. As TPI witness Granatelli testified, because a bulk truck supply chain does not permit most polymer purchasers to retain the inventory levels that are essential to their operations, truck deliveries must be carefully timed with their production schedules, which means that a customer expects and needs bulk truck orders to be filled within 48 hours.<sup>7</sup> TPI Reb. at II-B-17. Mr. Granatelli also explained that polymer purchasers "routinely retain hopper car inventory at or near their plants" in order to ensure that polymers are always available for the purchasers' manufacturing processes, which are "fine-tuned to very close tolerances." Id. at II-B-16 (underline added). Under CSXT's transload alternative, there would not be any inventory at or near TPI's customers. In order to provide economical 48-hour truck delivery, TPI explained that loaded rail cars must already be at a nearby bulk terminal before the customer orders a bulk truck delivery. TPI Op. at II-B-32; TPI Reb. at II-B-17-18 and 93-94.

If TPI adopted CSXT's transload proposal and waited until receiving a bulk truck order before starting the rail-truck transload process, there would be a delay of one-and-a-half to three weeks for a truck delivery to arrive.<sup>8</sup> This would constitute a substantial reduction in service

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<sup>7</sup> TPI also referenced the expert railroad testimony of former Southern Pacific employee Larry Ruple in the Union Pacific-Southern Pacific merger to support this point. TPI Rebuttal at II-B-25-28. Mr. Ruple noted that polymer end-users usually have "limited on-site storage capability" and utilize the rail car as their "rolling silo/warehouse." TPI Reb. Ex. II-B-31 at 14-15. He also stated that polymer end-users usually "require just in time inventory supply" (Id. at 14), which TPI's customers (like most polymer end-users) obtain either by using rail cars as on-site storage or purchasing from inventory stored at a nearby bulk terminal.

<sup>8</sup> ~~An average estimate of one-and-a-half to three weeks is based upon the time for rail transportation, a day or two for rail car switching at the terminal, and a day or two for bulk truck~~

level that the Board has failed to consider in its market dominance determination. Customers will not wait this long, and cannot plan their production process this far in advance, for truck deliveries. TPI Reb. at II-B-19. Because TPI could not meet its customer's expectations, TPI would lose their business. Thus, TPI's prepositioning of rail cars at bulk terminals is a basic level of service, not a premium service as the Board erroneously concludes.

Third, if there is no rail car prepositioned at the bulk terminal, then transloading would constitute a significant reduction in service that would preclude a direct comparison with the costs of rail service. All the benefits of truck transportation would evaporate and only the drawbacks would remain. The transportation would be a few days slower than direct rail service, because it would include a rail segment of approximately the same length from the rail origin, plus a few days for switching at the terminal, transloading, and truck transportation to the facility. Yet, the trucks cannot be used as storage, and delivery must be carefully planned to fit in the production process so trucks can be unloaded immediately. In sum, the transportation is slower, no storage is possible, and impossibly precise scheduling would be required. In other words, a transload alternative that does not include prepositioning rail cars at the bulk terminal is not comparable to direct rail service at all.

CSXT has not pointed to any real-world examples of a polymer producer that provides regular service to a truck customer via a transload alternative that does not entail the prepositioning of rail cars at the bulk terminal. Even CSXT's witness, Gordon Heisler, who managed the polymer supply chain for Sunoco, Inc. for 4 years, does not claim that Sunoco ever

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loading and transportation. {{

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used this form of transload alternative as the primary form of transportation to serve any of its customers. While he argues that this form of transloading is possible, he does not show that it would be acceptable to any polymer purchaser. The Board’s failure to recognize this fundamental disconnect constitutes material error.

In the following subsections, TPI addresses additional factors associated with the need to preposition rail cars at bulk terminals in order to provide the level of service required by truck customers, as those factors pertain to each of the three categories of additional transload costs: bulk terminal storage charges, inventory carrying costs, and rail car lease and maintenance costs.

**A. Bulk Terminal Storage Costs.**

Prepositioning rail cars requires TPI to incur bulk terminal storage costs that are not incurred with direct rail service. As part of its evidence, TPI showed that its experience transloading polymers through bulk terminals for delivery by truck has averaged {{ }} of terminal dwell time for TPI’s rail cars. TPI Opening at II-B-30-31; TPI Rebuttal at II-B-92. By subtracting the free time available at the respective bulk terminals,<sup>9</sup> TPI was able to determine the bulk terminal storage charges that would be incurred if it converted a rail customer to a transload customer. TPI Opening at II-B-30-31.<sup>10</sup>

In rejecting TPI’s bulk terminal costs, the Board reasoned that polymers “can move through bulk terminals more quickly.” Decision at 54. This may be true under CSXT’s transload proposal, which does not require prepositioning rail car inventory at the bulk terminals.

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<sup>9</sup> The free time at most bulk terminals used for alternative transportation is ten (10) days. See TPI Opening workpaper “Transload Cost Analysis” (sheet “Terminal Charges”). This workpaper is in folder “Ex. II-B-5 & 6 Workpapers”.

<sup>10</sup> On Opening, the bulk terminal charges were part of column Y of the workpaper “Transload Cost Analysis” (sheet “STB Exhibit II-B-5”). See also sheet “Terminal Charges”. This workpaper is in folder “Ex. II-B-5 & 6 Workpapers”. On Rebuttal, the bulk terminal charges were in workpaper “Exhibit II-B-23” (column AI).

As demonstrated above, however, that would not provide the most basic level of service that TPI's customers require when placing a truck order. Therefore, CSXT's transload proposal is neither realistic nor feasible.

**B. Inventory Carrying Costs.**

In its evidence, TPI explained that it would incur additional inventory carrying costs when engaging in a rail-truck transload alternative to CSXT direct rail service. TPI Op. at II-B-32-33; TPI Reb. at II-B-96-101.<sup>11</sup> The Board correctly recognized that inventory carrying costs are a "legitimate factor to consider in a market dominance inquiry." Decision at 57. The Board also correctly noted that, when shipping to a customer directly by rail, the inventory carrying costs are "borne by TPI's customers," and when shipping by transload, those costs are "borne instead by TPI." Decision at 57. Yet, the Board still excluded TPI's inventory carrying costs from the Limit Price calculation.

The Board excluded inventory carrying costs in its calculation of the relevant Limit Prices because it reasoned that, since the "inventory carrying costs are the same [in both the direct rail and transload scenarios], it is simply a question of who bears these costs: TPI or its customers." Decision at 57. The Board's conclusion that it does not matter who bears the inventory carrying costs is at odds with the structure and purpose of the LPM. Under the LPM, the Board evaluates the price that the complainant would pay for alternative transportation. Decision at 17. This so-called "Limit Price" is the "highest price a carrier could theoretically

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<sup>11</sup> In its Opening workpaper "Transload Cost Analysis" (sheet "STB Exhibit II-B-5"), Column S is labeled "inventory carrying cost" but this column includes both inventory carrying cost and the rail car cost adjustment. Sheet "II-B-6 Inventory Carrying Cost" of the same workpaper shows that inventory carrying cost is Column P (extra capital per car). This workpaper is in folder "Ex. II-B-5 & 6 Workpapers". On Rebuttal, inventory carrying costs are found in workpaper "Exhibit II-B-23" at Column AG (extra capital per car). They are also found in Rebuttal workpaper "Inventory Carrying Cost Contested Lanes" at Column O (extra capital per car).

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charge a shipper without causing a significant amount of the issue traffic...to be diverted to a competitive alternative.” Id. Hence, the Limit Price is the price above which the complainant would select alternative transportation for the issue traffic. Because the Limit Price is defined by its effect on the complainant’s transportation choice, the Limit Price must necessarily include all costs that would be incurred by the complainant to use the alternative transportation.

As TPI showed in its evidence, it would incur sizeable additional inventory carrying costs for most of the issue movements when using a transload alternative to CSXT rail service.<sup>12</sup> Even if the total inventory cost remains the same under both alternatives, TPI must bear a greater share of those costs when transloading. If the Board ignores this shifting of inventory carrying costs from TPI’s customers to TPI, the Limit Prices in the LPM will not reflect the point at which TPI is likely to divert the traffic to the transload alternative.<sup>13</sup> CSXT thus would be able to price its transportation services well beyond the Limit Prices used by the Board without loss of traffic, and no effective competition would exist. As the Board recognized, inventory carrying costs are a legitimate business concern; therefore, they must be included in the calculation of Limit Prices. Decision at 57.

Furthermore, the Board has recognized the relevance of merely shifting inventory carrying costs in previous market dominance determinations. CF Industries, Inc. v. Koch Pipeline Company, L.P., 4 STB 637, 645-646 (n. 30) (2000) (“As CF points out, some rail-capable retailers...are unlikely to hold multiple railcars in storage in any event because they

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<sup>12</sup> See note 11, *supra*.

<sup>13</sup> This case is distinct, therefore, from a prior case where the Board stated that “[t]here are significant costs associated with whatever method FMC chooses to use to store coke, but there is no evidence that the storage costs related to motor transport would exceed those related to rail transport.” FMC, 4 STB at 712. Here, in contrast, TPI has shown that its costs definitely do increase when using transload transportation, and TPI has also offered evidence as to the exact amount of those costs.

would then bear the...inventory costs that are presently borne by terminal operators.") (underline added). To ignore that shift in this case would constitute an arbitrary and unexplained departure from the Board's own precedent.

The Board has erroneously misplaced the emphasis upon whether total inventory carrying costs have increased when the pertinent question should be whether TPI's inventory carrying costs have increased.

**C. Rail Car Costs.**

A transloading alternative that requires repositioning rail cars at the bulk terminal would cause changes in the length of time that rail cars are dedicated to customers. This would affect the number of rail cars that TPI requires to serve its customers, which in turn would affect TPI's rail car lease and maintenance costs. Therefore, TPI adjusted its transload costs, up or down as appropriate, to reflect these changes. TPI Op. at II-B-33-34.

The Board rejected TPI's adjustment to transload costs to reflect these changes in rail car lease and maintenance costs based upon flatly incorrect restatements of TPI's evidence:

TPI assumes that the hold time at terminals would be equal to TPI's current average terminal hold time, but this assumption does not recognize that reliance on railcar storage varies among TPI's customers. Instead, hold time at bulk terminals is likely to be the same as the time railcars are currently stored at a customer's facility, resulting in no additional storage time and therefore no additional rail car lease and maintenance costs.

Decision at 55 (underline added). Both of the underlined statements are belied by TPI's own evidence.

As discussed at the beginning of this Part II, transloading would not eliminate the need to store the polymer in rail cars, but rather, it would require rail cars to be repositioned and held at the bulk terminal instead of the customer's facility. TPI Op. at II-B-33. Because TPI's bulk terminal network is optimized to serve multiple truck customers from the fewest number of

terminals, TPI's storage experience at its bulk terminals inevitably will be different from its customers' individual experiences. Id. (“for some lanes, transloading will add rail car costs while for other lanes it may reduce those costs”). Rather than imprecisely and inaccurately assume, as the Board did, that hold time is “likely to be the same,” TPI actually calculated the effect on rail car hold time when replacing direct rail delivery with transloaded truck delivery.<sup>14</sup>

Where TPI's terminal rail car hold times were less than its customer's hold time, TPI reduced the transload costs by the rail car savings. Conversely, where TPI's terminal hold times were greater than its customer's hold time, TPI increased the transload costs by the added rail car expense.

TPI Op. at II-B-33-34; TPI Reb. at II-B-91-96.<sup>15</sup> Thus, contrary to the Board's assertion, TPI both realized that rail car storage varies among its customers and accounted for that fact in its evidence by either increasing or decreasing transload costs by the change in rail car lease and maintenance costs.

### **III. THE BOARD ERRED WITH REGARD TO A TPI CUSTOMER IN LANE B-112.**

There are currently four (4) TPI customers in Lane B-112. For one of them, the Board found that alternative transportation was not feasible and, consequently, that no effective competition exists. Decision at 100 (n. 511). For the other three customers, the Board calculated a Limit Price R/VC ratio below the CSXT RSAM and, therefore, found that effective competition does exist. Decision at 99-100. One of these three customers is Cherokee Carpets.

See TPI Opening at II-B-140. {{

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<sup>14</sup> Calculations of customers' rail car hold time are found in TPI Opening workpaper “2010 Cust Hold Days” in the “Ex. II-B-5 & 6 Workpapers” folder.

<sup>15</sup> In its Opening workpaper “Transload Cost Analysis” (sheet “II-B-6 Inventory Carrying Cost”), the rail car cost adjustment is Column Q (extra fleet cost per car). This workpaper is in folder “Ex. II-B-5 & 6 Workpapers”. In its Rebuttal workpaper “Exhibit II-B-23”, the rail car cost adjustment is in Column AH (extra fleet cost per car). It is also found in Rebuttal workpaper “Inventory Carrying Cost Contested Lanes” at Column P (extra fleet cost per car).

}} that the Board relied upon to find a lack of feasible alternative transportation for other TPI customers. See Decision at 46. Moreover, Cherokee is not excluded from the “no feasible alternative” group under any of the exceptions listed by the Board on pages 44-46 of the Decision. As such, the Board’s finding of effective competition as to Cherokee in Lane B-112 was material error.

**IV. CONCLUSION**

For the foregoing reasons, TPI respectfully requests that the Board reconsider its Decision.

Respectfully submitted,



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June 20, 2013

CERTIFICATE OF SERVICE

I hereby certify that this 20th day of June 2013, I served a copy of the foregoing upon counsel for defendant CSXT via electronic mail, and first-class mail postage pre-paid at the address below:

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David E. Benz