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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Record

M&G POLYMERS USA, LLC

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42123

**CSX TRANSPORTATION, INC.'S MOTION TO HOLD
THE RATE REASONABLENESS PHASE OF THIS CASE
IN ABEYANCE PENDING RESOLUTION OF CENTRAL ISSUES**

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jurisdiction and rules governing central components of the Board's rate reasonableness analyses. Given this great uncertainty, and the Board's recent suggestion that parties could litigate these pending issues in the course of individual adjudications, requiring the parties to develop and file SAC evidence before those rules are settled may result in substantial further litigation and appeals, and delay the ultimate resolution of this case well beyond the time it will take the Board to establish consistent rules that will apply to this and future cases.

There is a very important difference in the posture of this case and the two cases in which the Board recently denied abeyance motions. In *DuPont v. Norfolk Southern*, STB Docket No. 42125, and *Sunbelt Chlor Alkali v. Norfolk Southern*, STB Docket No. 42130, the complainant had already filed its opening evidence when the defendant filed a motion seeking to hold the case in abeyance. Here, neither party has filed any rate reasonableness evidence. Indeed, the Board has not even issued a final ruling on market dominance, which will determine which rates and lanes are subject to rate reasonableness challenge in this case, and M&G itself has filed a petition for reconsideration of the Board's recent market dominance decision.¹ Thus, no party has selected traffic, designed a SARR, or developed or filed other rate reasonableness evidence in reliance on the Board's recent proposed market dominance rule, or on the cross-over traffic rules the Board proposes to amend in the *Rate Regulation Reforms* rulemaking. Because neither party has filed rate reasonableness evidence in this case—indeed, M&G believes discovery has not even been completed—holding this case in abeyance until the Board adequately addresses the substantial uncertainty that presently exists regarding jurisdictional

¹ In addition, the fact that M&G has twice requested substantial additional discovery in recent months indicates that it believes it does not yet have the information it needs to develop SAC evidence, even assuming the lanes at issue in this case were to be those over which the Board ruled it would have jurisdiction under its proposed new market dominance test.

determinations and substantive SAC rules would not prejudice to the parties' ability to present full evidence under the rules the Board is about to establish.

BACKGROUND

M&G filed its original rate complaint on June 18, 2010. On January 27, 2011, CSXT moved for expedited consideration of market dominance evidence. M&G withdrew its opposition to CSXT's motion, effectively consenting to bifurcation of this case. The Board granted CSXT's motion and bifurcated the market dominance jurisdictional determination and rate reasonableness phases of this case. *See M&G Polymers, USA v. CSX Transportation, Inc.*, STB Docket No. 42123 (served May 6, 2011). As part of that decision, the Board held "the rate reasonableness portion of this case in abeyance until after the Board examine[d] the parties' market dominance evidence." *Id.* at 3. M&G and CSXT submitted market dominance evidence in accordance with the schedule established by the Board, concluding with M&G's submission of rebuttal market dominance evidence.

On September 27, 2012, the Board issued a market dominance decision, finding that CSXT lacked market dominance over six issue lanes but possessed market dominance over the remaining 36 lanes for which CSXT had contested market dominance.² *See M&G Polymers, USA v. CSX Transportation, Inc.*, STB Docket No. NOR 42123, at 21 (Sept. 27, 2012) ("*Market Dominance Decision*"). *Market Dominance Decision* created a new qualitative market dominance rule, which the Board referred to as the "limit price" test. *See id.* That new proposed rule would mark a substantial departure from the rules the Board and the ICC have applied for the last 30 years by, *inter alia*, relying on cost-based *quantitative* measurements and a mathematical formula to establish a presumption regarding *qualitative* market dominance, and

² CSXT did not contest market dominance in 26 separate lanes, covering 18 of the challenged rates. *See Market Dominance Decision* at 20.

comparing a hybrid revenue-to-variable cost ratio of a specific transportation alternative to an unrelated statistic designed to measure a carrier's overall revenue needs. Recognizing that its proposed new rule would be a very substantial departure from its longstanding market dominance rules, the Board authorized the parties to submit comments on the proposed new rule. *See Market Dominance Decision* at 4, 18.

After several interested persons filed objections to the Board's adoption of an entirely new market dominance rule without affording potentially affected persons an opportunity to provide input, the Board issued an order providing that such persons could submit comments as *amici curiae* in the case. *See M&G Polymers v. CSXT*, Decision (October 25, 2012). On November 28, 2012, all four Class I rail carriers, the Association of American Railroads and several shippers and shipper groups all submitted comments, most opposing the Board's new proposed market dominance rule. In addition to the comments submitted by the parties and several *amici*, M&G has filed a motion seeking reconsideration of the *Market Dominance Decision*. *See Petition for Reconsideration of M&G Polymers, USA, LLC*, STB Docket No. NOR 42123 (Oct. 17, 2012); *CSXT's Reply to M&G Polymers USA's Petition for Reconsideration* (Nov. 6, 2012). That Reconsideration Petition is also pending before the Board.

At the same time, the Board is in the midst of a major rulemaking intended to modify and amend its rules governing rate reasonableness cases. *See Rate Regulation Reforms*, STB Ex Parte No. 715 (July 25, 2012) (hereinafter "*Rate Regulation Reforms*"). Included among the Board's proposed rules is a new rule limiting the use of cross-over traffic, and a rule that would make significant modifications to the Board's rules regarding allocation of cross-over traffic revenues, issues that are already in a great deal of flux, and have been the service of considerable uncertainty, debate and litigation. The Board has provided for three rounds of comments on its

proposed new rules, the second of which will be completed this week. Once rebuttal filings have been made in a little over a month, the Board will have a full written record and evidence on which to make determinations regarding the proposed rules.

SUMMARY

Part I of this Motion discusses the Board's proposed new market dominance rule, the uncertainty it has created regarding what Complaint lanes and rates in this proceeding are subject to the Board's jurisdiction, and the wisdom of deferring the rate reasonableness phase of this case until rational, definitive market dominance rules are more firmly established. Part II discusses the pending *Rate Regulation Reforms* rulemaking (Ex Parte 715) and the further reasons the Board should hold the rate reasonableness phase of this case in abeyance until it issues new cross-over traffic rules in that expedited rulemaking. The third and final round of comments in that case are due in early January, so any delay due to the completion of the rulemaking likely would be relatively short. Part III summarizes the reasons that adopting a new market dominance rule or new cross-over revenue allocation rule in an individual adjudication such as this case would violate the Administrative Procedure Act and render such rules invalid and inapplicable. Part IV explains that the procedural posture of this case—neither party has submitted any rate reasonableness evidence—avoids concerns about unfairness or detrimental reliance resulting from holding the rate reasonableness phase of this case in abeyance. Holding the case in abeyance at this juncture would be in the best interests of the parties and the Board. Efficient resolution of this rate dispute will avoid unnecessary waste of resources and additional litigation, and should contribute to a more sound result.

I. THE BOARD'S MARKET DOMINANCE DECISION AND NEW PROPOSED MARKET DOMINANCE RULE HAVE CREATED GREAT UNCERTAINTY ABOUT THE LAWFUL, APPLICABLE RULE, AND THE BOARD'S JURISDICTION OVER RATES CHALLENGED IN THIS CASE.

A finding of market dominance is a prerequisite to the Board's consideration of a rate reasonableness challenge—a jurisdictional threshold that determines whether the Board has the power to consider the reasonableness of a challenged rate. *See* 49 U.S.C. § 10707. The Board may evaluate the reasonableness of a challenged rate only if it first determines it has jurisdiction to consider that rate—if a carrier lacks market dominance over the transportation to which the challenged rate applies, the Board has no jurisdiction or authority to adjudicate the reasonableness of that rate. *See id.*

The Board's proposed new limit price test—and responses of interested parties to that proposed new rule—have generated great uncertainty as to what rules will apply in this case, as well as to which rates ultimately will be at issue in the rate reasonableness phase. CSXT, M&G, the other Class I carriers, shippers, and carrier and shipper organizations have all filed comments expressing a variety of concerns about the proposed limit price rule. Many commenters, including CSXT, believe the limit price rule to be unlawful, arbitrary, and capricious, and would not survive judicial review. M&G's petition for reconsideration of the Market Dominance Decision further compounds the uncertainty, and effectively demonstrates M&G's own doubts about the legality of the proposed new rule and test.

Plainly, the Board's market dominance rules are now in a state of flux and uncertainty. Until those rules are lawfully established and settled and such rules are applied to determine which rates are actually subject to challenge in this case, the rate reasonableness phase of the case should not proceed. Going forward with the rate reasonableness phase of the case before final, rational market dominance rules are applied would create a substantial risk that the parties

could devote substantial resources to filing SAC evidence only to be forced later to submit additional or substitute evidence based on a different set of rates, traffic lanes and movements. The more prudent course is to continue holding the rate reasonableness phase of this case in abeyance until essential jurisdictional rules have been lawfully finalized and properly applied, thereby more firmly and definitively establishing the rates subject to challenge in this case.

A. The Board Has Proposed to Replace its Existing Qualitative Market Dominance Rules with a Fundamentally Different Rule of Dubious Validity.

As CSXT explained in its Comments on the Board's *Market Dominance Decision*, the ICC established its market dominance rules following passage of the Staggers Act through notice-and-comment rulemaking. *See M&G Polymers, USA v. CSX Transportation, Inc.*, STB Docket No. NOR 42123, "CSXT Comments on the Proposed 'Limit Price' Approach to Determining Qualitative Market Dominance" ("CSXT Comments"), at 13-17.³; *see also Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118 (1981) ("*Market Dominance Determinations*").⁴ CSXT also explained in detail the reasons it believes the proposed limit price rule is unlawful, illogical, arbitrary, and capricious and would not survive judicial review. *See generally id.*

³ CSXT hereby incorporates to this Motion those Comments, as if set forth in their entirety herein.

⁴ In the 4R Act of 1976, Congress limited the rate reasonableness jurisdiction of the Board's predecessor, the Interstate Commerce Commission ("ICC"), to circumstances in which the "carrier has market dominance" over the service for which the rate was charged. *See* 4R Act at § 202(b). Congress defined market dominance as "an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies." *Id.* at § 202(c). The market dominance statute was significantly modified by the Staggers Act, which added what has come to be known as the "quantitative" market dominance test. *See* Staggers Act, Pub. L. 96-448, § 202(d)(2); 49 U.S.C. § 10709(d)(2) (1982). The statutory market dominance provisions were re-codified in the present Section 10707 by the ICC Termination Act, but their substance was not changed.

In addition to the very significant substantive flaws in the proposed new rule, any lawful amendment to the Board's existing market dominance rules could be adopted only through full notice-and-comment rulemaking. Adopting the fundamentally different "limit price" qualitative market dominance test in an adjudication would violate the Administrative Procedure Act ("APA"). Well-established administrative law requires a rulemaking for any substantive amendment or repeal of an existing legislative rule, like the market dominance rule adopted in *Market Dominance Determinations*. See CSXT Comments at 29-38; 5 U.S.C. §§ 551, 553.

The Board has proposed, *sua sponte*, to modify its market dominance rules in the context of this individual adjudication, and to apply a new "limit price" rule to determine qualitative market dominance in this case and apparently in future cases. See *M&G Polymers, USA v. CSX Transportation, Inc.*, STB Docket No. NOR 42123, at 13 (Sept. 27, 2012). Recognizing the novelty of its proposed new rule, the Board "strongly encouraged" parties to the case to submit comments on it and on potential alternatives. *Id.* at 5. In response to requests from several interested entities, the Board subsequently provided interested persons a limited opportunity to submit comments as *amicus curiae*. *M&G Polymers, USA v. CSX Transportation, Inc.*, STB Docket No. NOR 42123 (Oct. 25, 2012). Comments were filed by numerous carrier and shipper interests on November 28, 2012. Those comments overwhelmingly oppose the Board's proposed new test. See, e.g., CSXT Comments (opposing proposed test on numerous legal, economic and policy grounds, supported by verified statements of prominent economists); Comments of Alliance for Rail Competition, Montana Wheat and Barley Ctte, et al., *M&G v. CSXT*, STB No. NOR 42123 (Nov. 28, 2012) (strongly opposing proposed new market dominance rule).

B. The Substantial Uncertainty and Confusion Caused by the Board’s Proposed Market Dominance Rules Strongly Favors Deferring the Rate Reasonableness Phase Until Firm, Rational, and Stable Market Dominance Rules Are Established.

The Board’s limit price rule proposal would mark a profound change to qualitative market dominance analysis. M&G—which was the primary beneficiary of the new rule proposed in the *Market Dominance Decision*—recognized this fact when it sought reconsideration of the Board’s decision. As M&G explained, “[g]iven the controversy that already is surrounding the newly-adopted [limit price] methodology, M&G asks the Board to reconsider its extensive reliance upon that methodology in this case” *M&G Polymers, USA v. CSX Transportation, Inc.*, STB Docket No. NOR 42123, M&G Petition for Reconsideration at 2 (Oct. 17, 2012). Thus, M&G apparently believes the potential invalidity of the proposed market dominance rule and surrounding uncertainty are so great, that it has asked the Board to reconsider a decision in which it largely prevailed. *See id.* at 1 (“Although M&G agrees with [the Board’s] conclusion, it believes that changed circumstances and material error warrant reconsideration of several aspects of that Decision.”).

M&G has good reason to be concerned about the validity of the proposed new rule and about potential legal challenges to that proposed rule. The Board received comments from a number of railroad and shipper parties opposing the proposed rule, and expressing substantial confusion about its rationale and application.⁵ The cogent, substantial arguments raised against

⁵ For example, the Arkansas Electric Cooperative Corporation questioned whether the new rule would apply to coal rate cases. *M&G Polymers*, STB Docket No. 42123, Comments of AECC at 5 (Nov. 28, 2012). Union Pacific raised the possibility that the new rule could defy Congressional intent, which calls into question its ability to withstand judicial review. *M&G Polymers*, Comments of Union Pacific Railroad Company at 24. The Alliance for Rail Competition was concerned the new rule was an “excessively restrictive test,” that would make rate challenges less available to some shippers, thus contradicting the Board’s intention to make its rate review process more broadly available. *See id.*, Comments of ARC, et. al at 3, 7.

the proposed new limit price test, and resulting uncertainty about whether it will actually be applied in this case, counsel that it would not be a wise use of the resources of the parties or the Board to proceed with the rate reasonableness phase of this case at this juncture.

A jurisdictional requirement is not something on which the Board may issue a preliminary ruling and then revisit at some later time. Either the Board has jurisdiction over a challenged rate or it does not. If the Board directs that the rate reasonableness phase of the case go forward and later determines that application of a lawful market dominance rule would find it lacked jurisdiction over some or all of the 42 lanes that CSXT contested on the basis of market dominance (or had jurisdiction over rates it had previously ruled were outside its jurisdiction), the parties would be sent back to the drawing board to select traffic and design a SARR based upon the rates and traffic over which the Board has jurisdiction. In that event, the substantial time and resources the parties had devoted to developing and submitting rate reasonableness evidence up to that point would have been wasted.

Moreover, The Board's precedents indicate that it is appropriate to hold a pending case in abeyance when the Board proposes a fundamental change to its rules, such as proposed "new limit price" rule. The Board's proposed change plainly would effect a fundamental change to the way it determines market dominance, and hence whether it has jurisdiction over challenged rail rates. *See, e.g.,* CSXT Comments at 13-28, 38-55. As the Board reaffirmed less than a week ago, it is appropriate to hold pending cases in abeyance when the Board proposes "a fundamental change to the [rate case] process." *See DuPont et al v. NS*, STB Docket Nos. NOR 42125, 42130 Decision at 4 (late release Nov. 29, 2012). It is difficult to imagine a change more basic or "fundamental" than a radical change to the rules governing the determination of whether the agency has jurisdiction to hear a rate challenge at all.

Further, the Board previously recognized the importance in this particular case of resolving market dominance prior to moving to the rate reasonableness phase. The Board bifurcated the case after M&G withdrew its opposition. *M&G Polymers, USA v. CSX Transportation, Inc.*, STB Docket No. NOR 42123, at 2 (May 6, 2011). But the main substantive reason that M&G effectively conceded the motion appears to have been its recognition that its position was similar to that of the complainant in a parallel pending case, *Total Petrochemicals USA, Inc. v. CSXT*, STB Docket No. NOR 42121. In *Total Petrochemicals*, the Board had found that deferring the rate reasonableness phase until after resolution of the market dominance determination, was appropriate because “considerable uncertainty exists regarding some traffic lanes.” *Total Petrochemicals USA, Inc., supra*, at 6 (April 4, 2011). Further, the Board found that any delay to the proceeding caused by bifurcation was appropriate, in part because resolution of the issue could significantly reduce the complexity of the case. *Id.* at 7. The Board also found that if it allowed “stand-alone cost evidence to be filed now and later found some number of lanes of traffic to be outside [its] jurisdiction, 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.” *Id.* The same logic applied equally to the Board’s decision to bifurcate the M&G case. *See M&G Polymers USA, supra*, Decision served May 6, 2011.

Today, the same logic continues to apply: in the face of “considerable uncertainty” and doubt about which rates and lanes will ultimately be subject to the Board’s jurisdiction, the wise course is to defer the development and submission of rate reasonableness evidence until

resolution of that uncertainty.⁶ Any time “saved” now by a premature commencement of the rate reasonableness phase would be more than offset by the time lost when the parties are required to develop and submit new evidence.

II. THE BOARD SHOULD HOLD THIS CASE IN ABEYANCE FOR A SECOND REASON: THE PENDING RULEMAKING DESIGNED TO AMEND CROSS-OVER TRAFFIC RULES AND LIMITS.

A. The Board Has Proposed Major Changes to Its Cross-over Traffic Rules.

The pending *Rate Regulation Reforms* rulemaking provides another reason to hold the rate reasonableness phase of this case in abeyance for a short period. As discussed above, the Board is nearing the end of the comment period in *Rate Regulations Reforms*. The new rules proposed in that proceeding include those governing permissible cross-over traffic and allocation of cross-over traffic revenues. The Decision initiating the *Rate Regulation Reforms* rulemaking explained some of the problems with current cross-over traffic rules, including the Board’s concern about the distorting effect of increasing and expanding use of such traffic, particularly in cases like this one that involve carload and multi-car traffic. *See Rate Regulation Reforms* at 16-17. The Board’s proposed rules would limit the use of cross-over traffic and revise the rules governing allocation of cross-over traffic revenues. *Id.* at 17.

The *Rate Regulation Reforms* NPRM reviewed the recent history of methods for allocating cross-over traffic revenues between the SARR and the residual incumbent. *Id.* at 6-8, 16-18. The Board expressed dissatisfaction with both the ATC method it had adopted in notice-

⁶ A determination that some additional lanes are or are not within the Board’s jurisdiction could have a substantial or even transformative effect on the design of the Complainant’s SARR, and could significantly alter the parties’ SAC evidence. Thus, if there is any significant change to the Board’s market dominance rules between now and the time of the final rate reasonableness decision, it is likely that some or all of the SAC evidence submitted by the parties in the interim would be rendered moot or unusable. In that event, the parties would be required to re-file rate reasonableness evidence at great additional expense.

and-comment rulemaking and “Modified ATC,” the *ad hoc* new method the Board created and applied in *Western Fuels*. See *Western Fuels v. BNSF*, STB Docket NOR No. 42088, Decision at 14 (served Sept. 10, 2007) (“*Western Fuels I*”); *id.*, Decision at 12-13 (Feb. 18, 2009) (“*Western Fuels II*”). The Board proposed a third alternative method while soliciting other alternative proposals. *Rate Regulation Reforms* at 17-18. The Board also effectively acknowledged that the “Modified ATC” it created and applied *sua sponte* in an individual rate case (*Western Fuels*) allocates crossover traffic revenues in a manner that inadequately accounts for economies of density. See *id.* Thus, despite this summer’s decision of a divided Board to apply Modified ATC in the individual long-running *Western Fuels* case,⁷ the unanimous decision in Ex Parte 715 essentially acknowledged that this *ad hoc* method is not appropriate for other cases or for the longer term.⁸ Compare Decision, *Western Fuels Ass’n et al v. BNSF Railway Co.*, STB Docket No. NOR 42088 (served June 15, 2012) with *Rate Regulation Reforms* at 6-8, 16-18; see *DuPont et al v. NS*, STB Docket Nos. NOR 42125, 42130 Decision at 9 (Nov. 29, 2012) (explaining that “the Board chose to uphold its use of th[e Modified ATC] methodology in the one case where it had been applied, rather than fixing it first.”) (C. Begeman, dissenting).

B. The Board Should Hold This Case in Abeyance Until the Cross-over Traffic Rules are Finalized.

The Board has effectively acknowledged that cross-over traffic rules are broken and is in the middle of rulemaking proceeding to fix them. See *Rate Regulation Reforms* at 16-18. *Id.* It

⁷ See *Western Fuels v. BNSF Railway*, STB Docket No. NOR 42088 (served June 15, 2012).

⁸ As Commissioner Begeman observed in her dissent in the *Western Fuels* remand, it is not fair to SAC case parties (complainants or defendants) for the Board to apply an admittedly inferior cross-over traffic revenue allocation methodology in an ongoing case at the very same time the Board is conducting a notice-and-comment rulemaking to adopt a more considered, better, and sound replacement methodology. See Decision, *Western Fuels Ass’n et al v. BNSF Railway Co.*, STB Docket No. NOT 42088 (“*STB Remand Decision*”), slip op at 13-14 (served June 15, 2012).

would be unfair and irrational to apply broken rules to CSXT and M&G in this case, and unwise and inefficient to attempt to create alternative rules in the context of this single case.

Based on the last several SAC cases, it is exceedingly likely that M&G will include a substantial amount of cross-over traffic in its SARR traffic group. Accordingly, the rules that are applied to this traffic will be very important to the results of the Board's rate reasonableness analysis in this case. It makes little sense for the rate reasonableness phase of the case to proceed until the Board completes its *Rate Regulation Reforms*. As Commissioner Begeman recently stated:

The Board's decision suggests that pending cases would proceed using the existing SAC processes, but that arguments to change those same processes would be entertained within individual cases. I am not convinced, however, that the Board can or should adopt significant changes to its methodologies outside of a formal rulemaking process. The fact that the Board has started a rulemaking to include the proposed SAC changes indicates that, at the very least, it agrees that the formal rulemaking process is the appropriate way to proceed. Now is the time for the Board to firmly commit itself to swiftly completing the *Rate Regulation Reforms* rulemaking, rather than inviting the parties to maneuver around it. . . . Unfortunately, this decision [denying abeyance motions] causes more uncertainty than it answers about how, exactly, these cases will be adjudicated. On the one hand, it will subject parties to litigating rate cases under flawed methodologies that the Board has essentially disavowed, while on the other, it will entertain significant modifications to the SAC process within the context of these same cases.

DuPont et al v. NS, STB Docket Nos. NOR 42125, 42130 Decision at 9 (Nov. 29, 2012) (C.

Begeman, dissenting). To avoid further confusion, litigation, and potential waste of resources of the Board and litigants, the Board should hold the rate reasonableness phase of this case in abeyance, expeditiously complete the *Rate Regulation Reforms* rulemaking, and apply the rules promulgated in that rulemaking to the rate reasonableness phase of this case.

III. AMENDMENT OR REPEAL OF NEW MARKET DOMINANCE RULES AND CROSS-OVER REVENUE ALLOCATION RULES WITHOUT FULL NOTICE-AND-COMMENT RULEMAKING WOULD VIOLATE THE APA.

A. Adoption of the Board's Proposed Rule in an Individual Adjudication Would Violate the Administrative Procedure Act.

As CSXT demonstrated in its Comments on the Board's market dominance decision in this case, because the ICC originally adopted its market dominance rule through notice-and-comment rulemaking, the Board may amend or replace that rule only through a notice-and-comment rulemaking. *See* CSXT Comments at 29-38. As CSXT explained, the D.C. Circuit has established that a federal agency such as the Board may not adopt a new rule that is inconsistent with an existing rule adopted in a rulemaking without conducting a notice-and-comment rulemaking. *See id.* The Court has admonished that "an administrative agency may not slip by the notice and comment rule-making requirements needed to amend a rule by merely adopting a de facto amendment to its regulation through adjudication." *Marseilles Land and Water Co. v. FERC*, 345 F.3d 916,920 (D.C. Cir. 2003); *see Shalala v. Guernsey Mem 'I Hosp.*, 514 U.S. 87, 100 (1995) (an agency interpretation that "adopt[s] a new position inconsistent with ... existing regulations" must follow APA notice and comment procedures). The proposed new market dominance rule would substantially amend and modify the current rules in a manner that is inconsistent with the existing rule. *See* CSXT Comments at 29-38. Therefore, the proposed new market dominance rule may not be adopted or applied in this case unless and until the Board has conducted a notice-and-comment rulemaking. *See id.*

B. New Cross-over Traffic Revenue Allocation Rules Must Also Be Adopted By Notice-And-Comment Rulemaking.

Like the market dominance rule, the Board's cross-over traffic revenue allocation rule may be amended only through notice-and-comment rulemaking. Adoption of such an amended rule in an individual adjudication such as this case would violate the APA and make any

resulting decision subject to reversal on appeal.⁹ Presently, it is unclear what cross-over traffic rules the Board will apply in this or other SAC cases. *See, e.g., DuPont et al v. NS*, STB Docket Nos. 42125, 42130 Decision at 8 (refusing to hold cases in abeyance pending expedited conclusion of *Rate Regulation Reforms*, but stating that “parties are free to address appropriate methods for costing and allocating [cross-over] revenues in the context of individual [SAC cases]”). However, substantial changes to the ATC rule made in this individual adjudication would be unlawful and subject to reversal for violating the APA.

The Board has asserted that amending its revenue allocation rules in individual rate cases is appropriate. *See, e.g., DuPont, SunBelt Chlor Alkali v. NS*, Docket Nos. NOR 42125, 42130 at 8 (decided Nov. 29, 2012) (“The question of which revenue allocation methodology should be applied within a particular rate case is a substantive question that is more appropriately addressed within the individual proceedings and will not be addressed further here.”). The Board’s reasoning is flawed for at least two reasons. *First*, as a matter of law, a legislative rule that was promulgated in a rulemaking in the first instance may be amended or repealed only in an APA notice-and-comment rulemaking, not in an individual adjudication. *See, e.g., 5 U.S.C. § 551, 553; Guernsey Mem ’I Hosp.*, 514 U.S. at 100. *Second*, resolving cross-over revenue allocation rules in an individual adjudication is not fair to the parties, who would have to expend time and resources preparing SAC evidence applying multiple different revenue allocation methodologies, and developing arguments for or against those multiple methods potentially including: Original ATC, “Modified” ATC, the alternative ATC proposed in Ex Parte 715, and other proposed methods. Given the compounding uncertainty regarding whether cross-over traffic limits will

⁹ Because the Board adopted ATC in notice-and-comment rulemaking (See STB Ex Parte 657 (Sub-No. 1), *Major Issues in Rail Rate Cases* (Oct. 30, 2006)), it may amend that rule only through a notice-and-comment rulemaking. *See* II.A, *supra*; CSXT Comments at 29-38.

apply in this case, proceeding with the rate reasonableness phase of this case before the Board completes the *Rate Regulation Reforms* rulemaking would be fraught with potential confusion and evidentiary submissions that do not meet one another or cannot be compared on an apples-to-apples basis. It is more reasonable and consistent with the law for the Board to hold this case in abeyance until it resolves cross-over traffic rules in the pending rulemaking.

IV. THE CASE IS AT AN APPROPRIATE STAGE FOR THE BOARD TO GRANT A MOTION FOR ABEYANCE.

The Board previously decided to hold the rate reasonableness portion of the case in abeyance. *See M&G Polymers, USA v. CSX Transportation, Inc.*, STB Docket No. NOR 42123, at 3 (May 6, 2011). While the Board has now issued an initial, contested ruling on market dominance and directed the parties to confer regarding a schedule for the rate reasonableness phase, it is not clear from that ruling that it intended to lift the abeyance order.¹⁰

A very significant difference between this case and other recent cases in which a party has requested that the Board hold a rate case in abeyance is that here, no party has yet filed any rate reasonableness evidence and no party would be substantively prejudiced by application of the new rules that the Board may promulgate.¹¹ In fact, the Board has directed the parties to file

¹⁰ CSXT recognizes that if the Board decides to apply the Market Dominance Decision without modification or further proceedings, it would be appropriate to lift the abeyance order and commence the rate reasonableness phase with respect to the rates over which the Board has ruled it has jurisdiction. And, it recognizes that the Board has ordered the parties to confer and submit a proposed schedule for the rate reasonableness phase of the case. *See M&G Polymers v. CSXT*, Decision at 2 (October 25, 2012). CSXT intends to confer with M&G with the aim of agreeing on such a proposed schedule, and it has taken steps to do so. If CSXT has misinterpreted the *Market Dominance Decision*, and the Board did intend to lift the abeyance order in that Decision, then CSXT requests that the Board reinstitute an order holding the rate reasonableness phase of this case in abeyance pending resolution of issues concerning governing market dominance rules and cross-over traffic rules.

¹¹ Thus, holding the rate reasonableness phase of this case in abeyance is not subject to the concerns the Board voiced about parties' reliance on the Board's prior rules, because neither party has filed any rate reasonableness evidence. *Cf. Rate Regulation Reforms*, Decision at 17,

a proposed procedural schedule the rate reasonableness phase of the case by December 13, 2012. Thus, even a proposed procedural schedule is not due for nine days. Moreover, M&G is seeking additional discovery, demonstrating that in its view discovery is not yet complete, and that it believes it needs more discovery to develop its SAC evidence. Thus, it could hardly be argued that the parties have relied on the previous rules to develop their SAC evidence.

In its recent abeyance decisions, the Board strongly considered fairness and reliance interests. One of its considerations was whether SAC evidence had been filed, including evidence regarding the design of the SARR and SARR operating plans. *See SunBelt Chlor Alkali v. NS*, Docket No. NOR 42125, at 7 (Nov. 29, 2012). Here, no rate reasonableness evidence has been filed, no SARR design or configuration has been submitted, and no operating plan has been filed. Indeed, the fact that M&G seeks substantial additional discovery suggests that it has not yet selected SARR traffic (including cross-over traffic), developed a SARR configuration, created a SARR operating plan, or calculated SARR revenues and cross-over revenue allocations. Thus, holding this case in abeyance pending issuance of cross-over traffic and market dominance rules would not be unfair. Rather, it would allow the parties to develop and submit one set of evidentiary submissions in an orderly fashion based on more clear, stable rules. Once the Board issues such rules, they will allow M&G to construct a case that includes only those lanes over which the Board has jurisdiction and avoid uncertainty and disputes concerning what cross-over traffic should or will be allowed and how cross-over revenues are allocated.

n.11 (stating that the Board did not propose to apply cross-over traffic limits to parties who had relied on prior precedents in litigating cases). The primary reliance argument in this case would be that both parties relied on the Board's existing market dominance rules in developing and submitting their market dominance evidence. Because M&G has submitted no SAC evidence, it cannot contend that its traffic selection or other aspects of its yet-to-be-filed evidence "relied" on the Board's very uncertain and in flux cross-over traffic revenue allocation rules.

Complainant M&G may object that this case has been pending at the Board for a significant period of time, and its progress should not be delayed. It is true that the original Complaint in this case was filed in 2010, and that holding its rate reasonableness phase in abeyance could delay its initial resolution by a short additional period. But continuing to hold the case in abeyance is justified for three major reasons. *First*, any additional delay should not be extensive. The comment period in Ex Parte 715 is rapidly drawing to a close. *See Regulation Reforms* at 20. In little more than a month (including the end of the year holidays), the Board will have a full written record and evidence on which to base its decisions about the proposed rules and to promulgate the new rules it determines appropriate.

Second, any delay resulting from the Board's holding the rate reasonableness phase of the case in abeyance until it has properly issued clear governing rules would be significantly shorter and less disruptive than delays in previous cases, and would conserve the parties' resources. *Western Fuels* had been pending for eight years when the Board narrowly declined to defer a final decision until the *Rate Regulation Reforms* rulemaking promulgated a superior cross-over revenue allocation rule. *See id.* Decision at 12-14.¹² Here, the parties have not yet filed rate reasonableness evidence, and deferring this case until after the completion of the *Rate Regulation*

¹² *Western Fuels* complaint was filed in October of 2004. The parties conducted discovery, developed SAC evidence, and fully submitted three rounds of SAC evidence. *See Western Fuels I*. In 2007, the Board issued an initial SAC decision, finding the challenged rates did not exceed a reasonable maximum level. *Western Fuels I*, STB Docket No. 42088 at 10 (served Sept. 10, 2007). But, because the Board had adopted a new cross-over traffic revenue allocation rule ("ATC") during the pendency of the case, the Board re-opened the case to allow the parties to present supplemental evidence using the ATC revenue allocation method. *See id.* The Board decided the case 1 ½ years later, meaning four-and-a-half years elapsed between the filing of the complaint and the Board's initial rate reasonableness decision. *Western Fuels II*, STB Docket No. 42088. Following an appeal and remand necessitated by the Board's *sua sponte* application of a new cross-over revenue allocation method in that individual adjudication, the Board issued a decision on remand, *Western Fuels Ass'n v. BNSF*, STB Docket No. 42088, Decision (served June 15, 2012).

Reforms rulemaking and determination of governing market dominance rules would eliminate the possibility that the parties would be required to expend the time and resources to file two sets of SAC evidence. If the Board continues to hold this case in abeyance, promptly completes the rulemakings, and thereby avoids the need for new or supplemental evidence, it would be able to issue a rate reasonableness decision much sooner, and reduce the likelihood that decision will be overturned on appeal.¹³

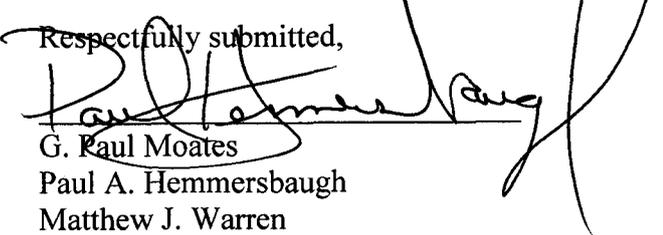
Third, while timely resolution of rate reasonableness cases is important and desirable, the goal of generating expeditious results does not outweigh the importance of solid analysis and decisions based on sound and rational rules adopted and applied in accordance with applicable law. As Commissioner Begeman recently explained, although resolving cases “once and for all as soon as possible” is desirable, the Board should not “ignore that valid concerns have been raised over what can be a critical factor used in determining the outcome of a rate challenge.” *Western Fuels Ass’n v. BNSF*, STB Docket No. 42088, Decision (served June 15, 2012 (C. Begeman, dissenting)).

¹³ If the Board issues a rate case decision pursuant to a jurisdictional determination made on the basis of a procedurally invalid rule, it is likely that a reviewing court would reverse the Board’s decision and remand the case to the Board for a new jurisdictional determination. In that event, once the Board made a new jurisdictional determination, presumably the parties would be entitled to submit new SAC evidence based upon the rates and lanes that the Board determined were subject to its jurisdiction under a valid market dominance rule and analysis. Such a course would consume far more time and resources than CSXT’s proposal that the Board hold further proceedings in this case in abeyance until it completes expedited rulemakings to address its market dominance and cross-over traffic rules.

CONCLUSION

For the foregoing reasons, CSXT requests the Board hold the rate reasonableness phase of this case in abeyance until it has determined and applied a rational and lawful market dominance rule, and has promulgated cross-over traffic rules in the pending notice-and-comment rulemaking.

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Dated: December 4, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December 2012, I caused the foregoing CSXT Motion to Hold the Rate Reasonableness Phase of this Case in Abeyance Until the Board Resolves Central Issues to be served by U.S. mail or more expeditious method of delivery, upon:

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