

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TOTAL PETROCHEMICALS &
REFINING USA, INC.)
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)
Complainant,)
)
)
v.)
)
CSX TRANSPORTATION, INC.)
)
)
Defendant.)

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Office of Proceedings
November 5, 2014
Part of
Public Record
Docket No. NOR 42121

PETITION TO SUPPLEMENT THE RECORD

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Pursuant to 49 CFR § 1117.1, complainant, Total Petrochemicals & Refining USA, Inc. (“TPI”), hereby files this Petition to Supplement the Record (“Petition”). TPI requests that the Board accept into the evidentiary record certain evidence contained in TPI’s Rebuttal Evidence, which has been filed contemporaneous with this Petition, that otherwise might be considered impermissible rebuttal. Therefore, out of an abundance of caution, TPI submits this Petition.

TPI requests expedited consideration of this Petition in order to accommodate the procedural schedule proposed herein to avoid any delay to this proceeding.

TPI recognizes that defendant, CSX Transportation, Inc. (“CSXT”), should have the opportunity to reply to this supplemental evidence. Therefore, TPI proposes that CSXT reply within 30 days, on December 5, 2014, and that TPI submit any rebuttal within 2 weeks, on December 19, 2014, which is the same date that the parties will submit final briefs. This should be ample time for both parties given the nature and scope of the supplemental evidence and will allow the record to close on December 19th, consistent with the existing procedural schedule.

In STB Docket No. 42070, *Duke Energy Corp. v. CSX Transp., Inc.*, slip op. at 4 (served March 25, 2003), the Board stated that a petition to supplement the evidentiary record would be granted upon a demonstration that the material sought to be introduced is central to the movant's case, could not reasonably have been introduced earlier, and would materially influence the outcome of the case. TPI submits that it has substantially satisfied these requirements and/or such standards should not apply in this case. Furthermore, principles of fairness and equity dictate that the Board should grant this Petition.

TPI requests to supplement the record in three respects.

First, TPI seeks to supplement the record with the argument presented in its Rebuttal Parts III.H.b.i. and ii. Those arguments challenge the Board's so-called *Otter Tail* cross-subsidy test, first announced in STB Docket No. 42071, *Otter Tail Power Co. v. BNSF Ry. Co.*, slip op. at 10-11 (served Jan. 27, 2006). This was not an issue for TPI in its Opening Evidence because there were no cross-subsidies, and thus TPI reasonably did not submit this argument earlier.

TPI's Rebuttal Evidence, however, does show a possible *Otter Tail* cross-subsidy on one line segment that would increase the prescribed rate for Lane B-93. Although the Board announced the *Otter Tail* cross-subsidy test in the aforementioned decision of the same name, it did not actually apply the test in that case or in any subsequent case. Therefore, this proceeding may present the first application of that test and also the first opportunity for any party to contest the lawfulness of that test.

Second, TPI seeks to correct a mistake that it made in its Opening Evidence, but which CSXT either did not notice or chose not to correct. That mistake is discussed in TPI's Rebuttal Part III.F.7.a. Specifically, in Opening, TPI included over \$528 million of investment costs for 19 intermodal facilities (including land, engineering, mobilization and contingencies) under the

mistaken belief that those facilities were CSXT's responsibility in the real world and thus also would be the TPIRR's responsibility. Furthermore, CSXT has sought to add even more intermodal facility costs in its Reply Evidence that TPI did not include in its Opening. But according to a November 5, 2010 letter from CSXT's counsel that TPI discovered while preparing its Rebuttal Evidence, these facilities are the responsibility of CSX Intermodal Terminals, Inc. ("Terminals"), and CSXT merely pays a lift fee to Terminals for the handling of containers and trailers at these facilities, which TPI has included in its evidence.

TPI has corrected this mistake in its Rebuttal Evidence by eliminating all investment costs for these facilities (except those related to rail infrastructure). TPI's correction eliminates the following investment items that it mistakenly included in Opening: land (III.F.1), guard booths (III.F.7.j), turntables (III.F.7.m), yard lighting (III.F.7.t.i.), yard paving (III.F.7.t.ii), yard drainage (III.F.7.t.iii.), and fencing (III.F.7.t.iv.). TPI also has rejected CSXT's addition of the following intermodal facility costs that TPI did not include at all in Opening: yard offices (III.F.7.h), in/out gates (III.F.7.n), maintenance pads (III.F.7.o), air compressor buildings and yard air systems (III.F.7.q), hostler fueling areas (III.F.7.r), and vehicle service and repair buildings (III.F.7.s).

Notably, although TPI mistakenly included investment costs for intermodal facilities in its Opening Evidence, it did not include any of the revenue that Terminals receives from its operation of those facilities. Because Terminals is not part of CSXT, TPI did not receive those revenues from CSXT in Opening. Therefore, the inclusion of intermodal facility investment costs without any of the revenue adversely affects TPI on both the cost and revenue sides of the DCF model. Thus, principles of equity and fairness strongly demand that the Board grant this Petition.

Although the November 5, 2010 CSXT letter predates the filing of TPI's Opening Evidence, more than three years had passed between receipt of that letter and TPI's February 18, 2014 submission of Opening Evidence, due to the Board's bifurcation of market dominance and the process of updating discovery after the market dominance decision. Consequently, that letter was overlooked during TPI's preparation of Opening Evidence. The Board's standard for supplemental evidence asks whether the material "could not reasonably have been introduced earlier." TPI submits that its oversight was reasonable in the context of the massive volume of discovery in this case, including two separate rounds, and the length of time that had passed between the receipt of the CSXT letter and the submission of Opening Evidence. Moreover, this supplemental evidence does not modify the foundation of TPI's case, but rather, it addresses a straight-forward factual question — whether CSXT is responsible for these intermodal facilities — and the equally straight-forward solution either to include or exclude the associated investment costs. CSXT need only agree that it is not responsible for these facilities or demonstrate that it is responsible. It is in the public interest to develop the SAC analysis based upon correct facts, which is the predicate for TPI's submission of supplemental evidence on intermodal facilities.

Third, TPI seeks to correct the following two spreadsheet input errors that it made in Opening, and which CSXT either failed to notice or ignored:

- In Rebuttal Part III.F.2.b.i, TPI corrects an input error in the clearing and grubbing quantities for valuation section ACL-5-FL.
- In Rebuttal Part III.F.5.b.ix, TPI corrects a double-count of the abutments for bridges that replace oversized culverts.

Because TPI did not discover these errors until it was preparing Rebuttal Evidence, it was unable to submit an Errata. Furthermore, it is not even clear that TPI must submit this Petition for the Board to accept these two corrections. In Docket No. NOR 42113, *Ariz. Elec. Power Coop., Inc. v. BNSF Ry. Co. and Union Pac. R.R. Co.*, slip op at 95 (served Nov. 22, 2011), the Board accepted similar corrections of an Opening Evidence mistake by the complainant on rebuttal without the need for a petition to supplement the record on the basis that such evidence was “necessary to reflect actual culverts that would be replicated.” Here, TPI’s supplemental evidence is necessary to reflect actual clearing and grubbing and actual bridge abutments.

For the foregoing reasons, TPI asks the Board to accept the aforementioned supplemental evidence and adopt TPI’s proposed procedural schedule for reply and rebuttal. TPI also requests expedited consideration of this Petition.

Respectfully submitted,



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November 5, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November 2014, I served a copy of the foregoing upon counsel for defendant CSXT via electronic mail and U.S. first-class mail, postage prepaid, at the address below:

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