

December 21, 2012. CSXT further requests that the Board adjust the procedural schedule to require the parties to redesignate the Highly Confidential Appendix to the Decision before October 26, 2012. The ability of CSXT in-house counsel and personnel to participate in evaluating and preparing comments on the Decision will be significantly impeded until they are allowed to review the Board's actual analysis and application of its proposed new methodology contained in the Appendix.

CSXT respectfully asks the Board for expedited consideration of this Motion. Because of the very short schedule the Board established for comments, CSXT further asks that Complainant M&G Polymers USA, LLC ("M&G") file its reply to this Motion no later than Wednesday, October 10.¹

I. BACKGROUND

M&G filed its original rate complaint on June 18, 2010. On January 27, 2011, CSXT moved to bifurcate the market dominance and rate reasonableness phases of the case. After initially opposing CSXT's motion, M&G withdrew its opposition to bifurcation on April 15, 2011, and the Board bifurcated the case. *See M&G v. CSXT*, STB Docket No. 42123 (served May 6, 2011). M&G and CSXT submitted market dominance evidence in accordance with the Board's procedural schedule, concluding with the submission of M&G's rebuttal evidence on August 4, 2011.

On September 27, 2012, the Board issued a decision on market dominance, finding that CSXT lacked market dominance over six issue lanes but possessed market dominance over the remaining lanes in M&G's Complaint. *See Decision at 21*. The Board's decision relies on its application of a newly-announced approach for determining whether feasible intermodal

¹ CSXT has discussed this Motion with counsel for M&G, who represented that M&G opposes this Motion.

alternatives “represent competition sufficient to restrain rates effectively.” *Id.* at 13. The proposed approach, which the Board created *sua sponte* without input from the parties, has three parts. First, for each challenged rate the Board proposes to “calculate the price that, if the railroad charged above that level, would result in a significant loss of traffic,” which it calls the “limit price.” *Id.* Second, the Board “will compare the limit price to the railroad’s variable costs of providing the service at issue.” *Id.* at 14. If the resulting ratio exceeds the railroad’s most current RSAM figure, the Board will “preliminarily conclude that the alternative cannot exert competitive pressure sufficient to constrain rates effectively.” *Id.* Third, the Board will “consider whether the alternative has any intangible features sufficient to overcome the applicable preliminary conclusion.” *Id.*

Recognizing the novelty of its approach, the Board “strongly encouraged” parties to submit comments on it and on potential alternatives. *Id.* at 5 (“If there is a better general approach to this issue, if there is a superior benchmark that can be used to guide this inquiry, or if the application of the refined approach to the facts of this case is somehow flawed, parties are strongly encouraged to use this comment period to bring such concerns to our attention.”). The Board, however, only provided parties 30 days to analyze its new proposed approach and to prepare and submit the detailed comments it requested. *See id.* at 21.

II. ADDITIONAL TIME IS NEEDED TO RESPOND TO THE BOARD’S REQUEST FOR COMMENTS.

The Decision makes a significant and substantive change to the Board’s approach in evaluating qualitative market dominance, and additional time is needed for CSXT to respond adequately to the Board’s request for comments. The Board’s proposal creates a new quantitative test that would establish a rebuttable presumption of market dominance if the cost of alternative transportation for a rail movement would produce a “limit price R/VC” greater than

the defendant's RSAM. This new formula is a substantial departure from the fact- and situation-specific qualitative analysis that the Board has long used for assessing qualitative market dominance, and it has significant implications for both this case and other pending and future cases.

The Board has made clear both that it expects parties to bring any concerns about its new approach to the Board's attention in the comment period and that it expects parties to use their comments to submit any ideas they have for "a better general approach" or "superior benchmark[s]." Decision at 5. CSXT and its consultants and counsel are diligently working to evaluate the Board's decision and the potential legal, administrative, and public policy implications of the new approach. CSXT is further analyzing potential responses to the Board's request for "a better general approach" or "a superior benchmark" that could be used to inform the approach that the Board proposes to adopt. *Id.* But while CSXT is dedicating substantial resources to responding to the Board's request, CSXT does not believe that it can provide the full and complete analysis that the Board requests within the 30-day timeframe set forth in the Decision.

Indeed, the Board typically gives parties much more than 30 days to comment on similarly significant proposals to alter existing rate case rules. For example, the Board allowed nearly three months for initial comments in the *Simplified Standards for Rail Rate Cases* rulemaking.² And the Board established a 91-day comment period for its most recent proposal to

² See *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) (July 28, 2006 (originally giving parties 63 days for initial comments); *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) (Sept. 15, 2006) (extending time period for initial comments by 25 days, for total of 88 days).

revise its rules for rate cases. *Rate Regulation Reforms*, STB Ex Parte No. 715 (July 25, 2012).³ A similar three-month timeframe is appropriate here, for evaluating and effectively commenting on the Board's entirely new qualitative market dominance approach is no less complex and time-consuming than commenting on the Ex Parte 715 proposals. In particular, responding to the Board's request to identify "a better general approach" or "superior benchmarks" for use in a qualitative market dominance analysis will require substantial investigation and study that cannot reasonably be completed within 30 days. To force the parties to submit comments in 30 days would be arbitrary, capricious and unsound policymaking. CSXT respectfully asks that the Board grant it an extension of 55 additional days to prepare the responsive comments that the Decision requests. The requested extension would result in a total time for comments of less than 90 days from the date of the Board's Decision, an adequate but not unreasonable period of time for the parties to develop and submit comments on the Board's entirely new proposed approach to qualitative market dominance determinations.

III. THE BOARD SHOULD DIRECT THE PARTIES TO SUBMIT A REDESIGNATED APPENDIX BEFORE OCTOBER 26.

Separately, the Board should amend the procedural schedule to require the parties to redesignate the Appendix to the Decision well before comments on the Board's new approach are due. Under the procedural schedule set forth in the Decision, the entire Appendix would remain Highly Confidential until 15 days after the filing of comments on the Decision. *See* Decision at 21. CSXT respectfully suggests that this sequencing is exactly backwards, because such a schedule unduly hampers the ability of CSXT in-house personnel to evaluate the Decision and to participate in the preparation of Comments on it. While the basic contours of the Board's

³ *Cf. Demurrage Liability*, STB Ex Parte No. 707 (May 7, 2012) (initially granting 49 days for opening comments); *Demurrage Liability*, STB Ex Parte No. 707 (June 13, 2012) (extending due date for opening comments by 60 days, for total of 109 days).

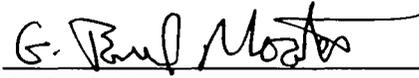
proposed approach are described in the public decision, the Appendix's detailed discussion of market dominance issues and lane-by-lane application of the new approach provide essential information about how the test would operate and about the sort of "intangible features" that the Board considers sufficient to overcome a presumption of market dominance. CSXT's in-house counsel and personnel require access to all parts of the Decision – including the portions of the Appendix that will ultimately be declassified because they do not contain M&G highly confidential information. And, they need sufficient time before the deadline for comments to allow them to analyze the Appendix and contribute meaningfully to the preparation of comments. Finally, CSXT's outside counsel and consultants require the informed assistance of their clients in analyzing the full implications of the Decision. Therefore, CSXT respectfully requests that the parties be required to submit agreed confidentiality designations for the Appendix by October 26.⁴

CONCLUSION

For the foregoing reasons, CSXT respectfully requests that the Board extend the deadline for comments on its proposed new approach to determining qualitative market dominance to December 21, 2012 and instruct the parties to submit agreed confidentiality designations for the Appendix by October 26, 2012. Because of the short available time, CSXT further requests that the Board consider and decide this Motion as expeditiously as possible.

⁴ In all events, the Board should establish a date for redesignation that precedes the deadline for comments by a period adequate to allow the parties themselves to participate in the development of comments.

Respectfully submitted,



G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Peter J. Shutz
Paul R. Hitchcock
John P. Patelli
Kathryn R. Barney
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

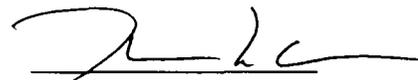
Counsel to CSX Transportation, Inc.

Dated: October 2, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2012, I served a copy of the foregoing CSX Transportation, Inc.'s Motion to Modify Procedural Schedule by U.S. mail or more expeditious method of delivery, upon:

Jeffrey O. Moreno
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036


Matthew J. Warren