

Via Messenger

April 22, 2013

Chairman Daniel R. Elliott, III
Surface Transportation Board
395 E Street SW
Washington, D.C. 20423

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RE: STB Finance Docket No. 42121, Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc.

Dear Chairman Elliott:

In a letter dated March 22, 2012, Total Petrochemical & Refining USA, Inc. ("TPI") requested that you investigate the cause of delay in the above-referenced proceeding and asked for your assistance in returning this case to a timely schedule. At that time, the Board had bifurcated the market dominance and rate reasonableness portions of the case, and the parties had fully submitted their market dominance evidence more than six months earlier. Although it had been over twenty-two months since TPI had filed its complaint, the Board had yet to even rule on its jurisdiction over the challenged rates. It has now been over a year since TPI submitted that letter and there still has been no market dominance decision from the Board. When the Board decided to bifurcate the market dominance and rate reasonableness issues in this case, it stated that it would rule "as expeditiously as possible." See Board decision at p. 7 (served April 5, 2011).

TPI's complaint has been pending before the Board longer than any other rate case currently under consideration. Moreover, those other cases have progressed further than TPI's case and are on pace to be completed before TPI's case. TPI filed its Complaint nearly three years ago, on May 3, 2010. The other pending rate cases and their status are as follows:

- M&G Polymers USA, LLC ("M&G") was the next to file, in Docket 42123, on June 18, 2010. Although that case has since settled, it was on a parallel track with TPI's case for a bifurcated market dominance determination. TPI and M&G had completed their evidentiary submissions on market dominance just one month apart. However, while M&G received a market dominance decision on September 30, 2012, TPI has not yet received a decision in its case over six months later.
- E.I. du Pont de Nemours and Company ("DuPont") filed its Complaint in Docket 42125 on October 7, 2010, more than five months after TPI. DuPont just recently filed its

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rebuttal evidence on both market dominance and stand-alone costs, and is currently on schedule for a final Board decision by March 15, 2014.

- SunBelt Chlor Alkali Partnership (“SunBelt”) filed its Complaint in Docket 42130 on July 26, 2011, more than a year after TPI. SunBelt is scheduled to file its rebuttal evidence on both market dominance and stand-alone costs on June 3, 2013, and is currently on schedule for a final Board decision by April 22, 2014.
- Intermountain Power Agency (“IPA”) filed its Complaint in Docket 42136 on May 30, 2012, more than two years after TPI. IPA is scheduled to file its rebuttal evidence on both market dominance and stand-alone costs on July 3, 2013, and is currently on schedule for a final Board decision by May 7, 2014.

Even if the Board were to issue a market dominance decision today, TPI still faces at least two more years of litigation before receiving a final Board decision on the reasonableness of the challenged rail rates. Because discovery in this case closed on October 15, 2010, the information produced is nearly three years old and will need to be updated prior to the submission of SAC evidence. The submission of SAC evidence will require approximately a year to complete, and the Board has 9 months after the close of the record under the statute to issue a final decision. When all is said and done, this case will have taken six years from Complaint to final decision, assuming the Board issues a market dominance decision promptly.

This proceeding already has become the poster child for shipper claims that the rate reasonableness process is overly burdensome and broken. Those claims, however, have been based on the cost and complexity of the SAC standard, which historically cost \$4-6 million to litigate over 3 years. But TPI’s experience has added a whole new dimension of cost that is attributable solely to the lengthy delay that it has encountered in obtaining a market dominance decision. As TPI previously informed the Board, the tariff rates that it is paying are significantly higher than even the contract rates that it turned down as unreasonable – a sum in excess of \$110,000 per week. In just the 18 months that TPI has been waiting for a market dominance decision, that comes to over \$8.5 million. Over the course of six years, that amount will exceed \$34 million, which is far longer and greater than TPI reasonably expected when it began this proceeding.

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TPI has been extremely patient. However, without some assurance that a market dominance decision is imminent, the only option remaining to TPI may be to request a *writ of mandamus* from the Court of Appeals. TPI very much desires to avoid that option, but it does not know how else to move this case forward. Therefore, TPI is asking the Board for some guidance as to when it intends to issue a market dominance decision.

Sincerely,



Jeffrey O. Moreno

David E. Benz

Counsel for Total Petrochemicals & Refining USA, Inc.

cc: Ann D. Begeman, STB Vice Chairman
Francis P. Mulvey, STB Member
G. Paul Moates, counsel for CSX Transportation, Inc.
Paul A. Hemmersbaugh, counsel for CSX Transportation, Inc.
