

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42123

M&G POLYMERS USA, LLC

v.

CSX TRANSPORTATION, INC.

Digest:<sup>1</sup> This decision grants in part and denies in part CSX Transportation, Inc.'s motion to modify the procedural schedule in this Stand-Alone Cost proceeding, and extends to November 28, 2012, the deadline for filing comments regarding the refined qualitative market dominance methodology set forth in the Board's September 27, 2012 decision. This decision also explains that (1) the parties to this proceeding may file comments regarding the refined methodology as well as the application thereof contained in the highly confidential appendix included with our prior decision, and (2) other interested parties may file comments regarding the refined methodology.

Decided: October 25, 2012

On June 18, 2010, M&G Polymers USA, LLC (M&G) filed a complaint challenging the reasonableness of various common carrier rail transportation rates established by CSX Transportation, Inc. (CSXT) for the transportation of polyethylene terephthalate (PET)<sup>2</sup> in carload traffic. M&G alleges that CSXT possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed using the Board's Stand-Alone Cost (SAC) test.

The default procedural schedule in SAC proceedings provides for evidence on market dominance and rate reasonableness to be submitted simultaneously. See Expedited Procedures for Processing Rail Rate Reasonableness, Exemption & Revocation Proceedings, 1 S.T.B. 754, 760 (1996). However, in response to an unopposed motion, we bifurcated this proceeding into separate market dominance and rate reasonableness phases, directed the parties to confine their initial submissions to the issue of market dominance, and held the rate reasonableness phase of

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> PET is a plastic pellet substance that is widely used in many consumer and industrial applications such as plastic bottles, food packaging, and carpet fiber.

this proceeding in abeyance pending review of the parties' market dominance evidence. M&G Polymers USA, LLC v. CSX Transp., Inc., NOR 42123, slip op. at 3-4 (STB served May 6, 2011). In a decision served on September 27, 2012, we concluded that CSXT possesses market dominance with respect to 36 of the 42 rates challenged by M&G and lacks market dominance with respect to the other six. Because that decision refined the Board's approach to the analysis of qualitative market dominance, we gave parties 30 days to submit comments with respect to that refined approach. We further ordered M&G and CSXT to (1) confer and submit a proposed procedural schedule to govern the rate reasonableness phase of this proceeding no later than 15 days following the end of the comment period, and (2) each prepare and submit a version of the highly confidential appendix<sup>3</sup> that specifically identifies proposed redactions of any confidential and highly confidential information contained therein no later than 15 days following the end of the comment period. M&G Polymers USA, LLC v. CSX Transp., Inc., NOR 42123, slip op. at 21 (STB served Sept. 27, 2012).

On October 2, 2012, CSXT filed the subject motion to modify the procedural schedule, in which it seeks to have the Board extend the time for filing comments until December 21, 2012, and adjust the procedural schedule to require redesignation of the highly confidential appendix before October 26, 2012.<sup>4</sup> As the basis for its request, CSXT asserts that the Board's refined approach to the analysis of qualitative market dominance "is novel and unprecedented," and that responding to the Board's invitation to comment "will require significant and time-consuming analysis."<sup>5</sup> CSXT further argues that redesignation of the highly confidential appendix must occur prior to the deadline for filing comments to allow its in-house personnel to participate fully in the review of the Board's prior decision and contribute meaningfully to the preparation of comments.<sup>6</sup> M&G filed its reply in opposition to CSXT's motion on October 9, 2012. M&G asserts that any delay is extremely prejudicial and would constitute a financial windfall to CSXT.<sup>7</sup> M&G further asserts that an extension of the procedural schedule is unnecessary given that CSXT's counsel has a demonstrated ability to meet deadlines of 30 days or less, and that, while CSXT has failed to show that its in-house personnel need access to confidential information, M&G has already provided CSXT a confidential version of the appendix to avoid

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<sup>3</sup> In light of the prevalence of competitively sensitive information in this case, our analysis of the record in what is currently designated the highly confidential appendix was initially provided only to the parties' outside counsel. Our September 27, 2012 decision explained that a public version of this appendix would be released after M&G and CSXT were given an opportunity to propose redactions of any confidential and highly confidential information contained therein.

<sup>4</sup> CSXT has requested expedited consideration of its motion.

<sup>5</sup> CSXT Motion at 1.

<sup>6</sup> Id. at 5-6.

<sup>7</sup> M&G Reply at 3-4.

any controversy on this issue.<sup>8</sup> In addition, Union Pacific Railroad Company, Norfolk Southern Railway Company, and BNSF Railway Company have filed letters seeking clarification regarding their ability to file comments regarding the refined quantitative market dominance methodology set forth in our prior decision. On October 17, 2012, M&G filed a petition for reconsideration of our September 27, 2012 decision.<sup>9</sup>

To permit sufficient time for the preparation of comments, an extension of the comment period is appropriate. As a result, we will extend the deadline for filing comments in this proceeding to November 28, 2012. We believe a 30-day extension properly balances the need for additional time to prepare comments with the need to move the case forward expeditiously. M&G and CSXT may file comments regarding the refined methodology, as well as the application thereof contained in the highly confidential appendix included with our September 27, 2012 decision. Other interested parties may file comments regarding the refined methodology.<sup>10</sup> We will likewise extend the deadline for filing a proposed procedural schedule to govern the rate reasonableness phase of this proceeding by 30 days to December 13, 2012. In order to permit the public to access a version of the appendix promptly, we will not extend the deadline for M&G and CSXT each to prepare and submit a version of the highly confidential appendix that specifically identifies proposed redactions of any confidential and highly confidential information contained therein, the deadline for which remains November 13, 2012.<sup>11</sup>

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<sup>8</sup> *Id.* at 5-9. While CSXT raises a valid concern regarding the participation of in-house personnel in the review of the Board's prior decision and the preparation of comments, we agree with M&G that its provision of a confidential version of the appendix to CSXT on October 3, 2012, alleviates this concern.

<sup>9</sup> M&G's petition for reconsideration remains pending and will be addressed in a separate decision.

<sup>10</sup> Other interested parties may submit their comments along with a motion to participate as *amicus curiae*, but will not be permitted to intervene as parties to this private rate dispute. While amici may present their views on the refined qualitative market dominance methodology set forth in the main body of the Board's September 27, 2012 decision, they will not be granted access to confidential information and will not be allowed to broaden the issues in this proceeding. *See, e.g., Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, NOR 42056, slip op. at 2 (STB served Sept. 27, 2004).

<sup>11</sup> Because comments filed by parties other than M&G and CSXT will focus on the refined methodology rather than its application to the facts of this case, such parties do not require access to the appendix prior to the end of the comment period. Regardless, a public version of the appendix will be prepared and released as quickly as possible after November 13, 2012.

It is ordered:

1. CSXT's motion is granted in part and denied in part. The deadline for filing comments regarding the refined qualitative market dominance methodology set forth in our prior decision in this proceeding shall be extended to November 28, 2012. M&G, CSXT, and other interested parties may submit comments on or before that date. M&G and CSXT shall confer and submit a proposed procedural schedule to govern the rate reasonableness phase of this proceeding by December 13, 2012. M&G and CSXT each shall prepare and submit a version of the highly confidential appendix that specifically identifies proposed redactions of any confidential and highly confidential information contained therein by November 13, 2012.

2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.