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SERVICE DATE – DECEMBER 19, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42121

TOTAL PETROCHEMICALS & REFINING USA, INC.

v.

CSX TRANSPORTATION, INC.

Digest:¹ CSX Transportation, Inc. (CSXT) and Total Petrochemicals & Refining USA, Inc. (TPI) each filed a petition for reconsideration of the Board's May 31, 2013 decision in this proceeding. In this decision, the Board denies both petitions for reconsideration, allows the Association of American Railroads to participate as *amicus curiae*, and denies a TPI motion for leave to file a supplementary reply to CSXT's petition for reconsideration.

Decided: December 18, 2013

This decision (1) denies the petition for reconsideration of CSX Transportation, Inc. (CSXT); (2) denies the petition for reconsideration of Total Petrochemicals & Refining USA, Inc. (TPI); (3) allows the Association of American Railroads (AAR) to participate as *amicus curiae*; and (4) denies a TPI motion for leave to file a supplementary reply to CSXT's petition for reconsideration.²

BACKGROUND

On May 3, 2010, TPI filed a complaint challenging the reasonableness of rates established by CSXT for the transportation of polypropylene, polystyrene, polyethylene, styrene, and base chemicals between 104 origin and destination pairs, located primarily in the Midwestern and Southeastern United States. TPI alleges that CSXT possesses market

¹ 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).

² The parties designated certain information in this decision as confidential or highly confidential. While we attempt to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, we determined that we could not present our findings with respect to issues in this case without disclosing certain information.

dominance over the traffic and requests that maximum reasonable rates be prescribed pursuant to the Board's Stand-Alone Cost (SAC) test.

On October 1, 2010, CSXT filed a motion for expedited determination of jurisdiction over the challenged rates (motion to bifurcate). CSXT argued that its service over 97 of the 120 lanes that were challenged in the first amended complaint were subject to effective competition from rail, truck, or rail-truck transportation alternatives, and, therefore, not subject to the Board's rate reasonableness jurisdiction. On October 21, 2010, TPI replied in opposition to the motion to bifurcate.

In Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc. (Bifurcation Decision), NOR 42121 (STB served Apr. 5, 2011), the Board determined that it was appropriate to bifurcate this proceeding into separate market dominance and rate reasonableness phases, holding the rate reasonableness portion of the proceeding in abeyance and postponing the submission and consideration of rate reasonableness evidence, if necessary, until after the Board made a determination on the issue of market dominance. TPI submitted its Opening Market Dominance Evidence (Opening Evidence) on May 5, 2011. CSXT filed its Reply Market Dominance Evidence (Reply Evidence) on August 5, 2011. TPI filed its Rebuttal Market Dominance Evidence (Rebuttal Evidence) on September 6, 2011. On May 31, 2013, the Board, with Vice Chairman Begeman dissenting, issued a decision determining the issue of market dominance for each lane (Market Dominance Decision) and found that CSXT is market dominant over certain lanes, requiring the rate reasonableness phase to proceed.

TPI and CSXT filed petitions for reconsideration of the Market Dominance Decision on June 20, 2013. TPI filed an unopposed motion to extend to July 24, 2013, the deadline for replies to the petitions for reconsideration, and the Board granted that motion on June 21, 2013. TPI and CSXT filed replies to the petitions for reconsideration on July 24, 2013. Also on July 24, 2013, AAR filed a petition to intervene and *amicus curiae* comments on the Market Dominance Decision. On July 26, 2013, TPI filed a reply in opposition to AAR's petition to intervene.³ On July 30, 2013, TPI filed a motion for leave to file a supplemental reply to

³ TPI argues that we should deny AAR's petition to intervene because the timing of the filing is prejudicial to TPI. TPI Reply to AAR Petition to Intervene 1-2. We will allow AAR to participate as *amicus curiae*, but will not allow AAR to intervene as a party to this private rate dispute. In Arizona Public Service Co. v. Burlington Northern & Santa Fe Railway, 7 S.T.B. 69, 71-72 (2003), the Board allowed trade associations to participate as *amicus curiae*, although they had not filed their petitions until the deadline (and, in one case, after the deadline) for replies to the petition for reconsideration at issue in that decision. The Board explained that the trade associations' filings would not broaden the issues in that proceeding. Here, TPI acknowledges that AAR's comments are largely redundant of the arguments made by CSXT in its petition for

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CSXT's petition for reconsideration and a supplemental reply. CSXT filed a reply in opposition to TPI's motion for leave to file a supplemental reply on July 31, 2013.

In a decision served on July 19, 2013, the Board, with Vice Chairman Begeman dissenting, addressed motions related to TPI's request for supplemental discovery and ordered CSXT to begin producing the supplemental discovery responses agreed to by the parties and to complete supplemental production no later than October 17, 2013. On September 26, 2013, the Board served a decision establishing a procedural schedule for the rate reasonableness phase of the proceeding.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.3(b), the Board will grant a petition for reconsideration only upon a showing that the prior action: (1) will be affected materially because of new evidence or changed circumstances; or (2) involves material error. Alleghany Valley R.R.—Petition for Declaratory Order, FD 35239, slip op. at 3 (STB served July 16, 2013).

CSXT's Petition for Reconsideration

CSXT's Arguments Regarding Use of the Limit Price Approach

CSXT seeks reconsideration of the Board's decision to utilize the limit price approach in this case, and makes a number of arguments in support of its contention that the Board committed material error by relying on that approach in the context of the qualitative market dominance inquiry. First, CSXT claims that the limit price approach constitutes an R/VC-based presumption that is barred by 49 U.S.C. § 10702(d)(2), and that the Board's stated rationale⁴ as to why the approach does not contravene § 10702(d)(2) lacks merit.⁵ Second, CSXT claims that use of the limit price approach in an individual adjudication violates the Administrative

(. . . continued)

reconsideration. TPI Reply to AAR Petition to Intervene 2. Given this redundancy, we conclude that *amicus curiae* participation by AAR will neither broaden the issues nor delay this proceeding, and that TPI will not be prejudiced by AAR's participation as *amicus curiae* (AAR will not have access to confidential information). Moreover, given the redundancy between the arguments made by AAR and those made by CSXT, AAR's arguments will not be separately discussed in this decision.

⁴ Market Dominance Decision, slip op. at 21-22.

⁵ CSXT Petition 1-5.

Procedure Act (APA) because the approach replaces or substantially amends a legislative rule and was not adopted via notice-and-comment rulemaking.⁶ Third, CSXT claims that the Board's justification for using the limit price approach is misguided, because the approach seeks to solve what CSXT claims is a non-existent problem of untenable transportation alternatives presented by extreme hypotheticals and does not further the Board's goal of simplifying the qualitative market dominance inquiry.⁷ Fourth, CSXT claims that the limit price approach is an unreliable and economically incoherent methodology for determining the effectiveness of competition.⁸ Finally, CSXT claims that the Board's adoption of the limit price approach improperly shifts the burden of proof from the complainant to the railroad, makes the effectiveness of competition depend upon the identity of the railroad due to use of the RSAM component, and fails to define what intangible features would be sufficient to overcome what CSXT calls the limit price presumption.⁹

In response, TPI argues that the Board's use of the limit price approach in this case does not constitute material error. TPI first asserts that nothing in § 10702(d)(2) prohibits the limit price approach.¹⁰ Second, TPI argues that notice-and-comment rulemaking is not required because the limit price approach does not repudiate the existing market dominance guidelines, and because neither the market dominance guidelines nor the approach itself are legislative rules.¹¹ Third, TPI argues that the limit price approach has a fundamental and rational economic link to market dominance, and that the Board's use of the approach therefore is not arbitrary and capricious.¹² Fourth, TPI asserts that—contrary to CSXT's mischaracterizations—the limit price approach was not designed solely to address extreme hypotheticals, that the approach will indeed simplify the market dominance inquiry, and that CSXT has put forth plainly contradictory positions that the Board should summarily reject.¹³ Finally, TPI argues that the limit price approach does not shift the burden of proof on market dominance to the defendant, that CSXT's complaint about each rail carrier having a different RSAM figure is irrelevant because the market dominance inquiry should be railroad-specific, and that the Board has provided adequate

⁶ Id. at 5-10.

⁷ Id. at 10-14.

⁸ Id. at 14-15.

⁹ Id. at 15-18.

¹⁰ TPI Reply to CSXT Petition 1-4.

¹¹ Id. at 4-8.

¹² Id. at 8-10.

¹³ Id. at 10-14.

guidance as to what intangible features could be sufficient to overcome the Board's preliminary market dominance conclusion.¹⁴

For the reasons set forth below, we conclude that CSXT has failed to identify any material error in the Market Dominance Decision regarding use of the limit price approach in the qualitative market dominance context.

49 U.S.C. § 10707. We disagree with CSXT's contention that § 10707(d)(2) expressly bars us from utilizing the limit price approach when considering qualitative market dominance.¹⁵ As explained in our prior decision in this case, that statutory provision only precludes the Board from establishing market dominance and rate reasonableness presumptions based solely on the fact that the R/VC ratio "for the transportation to which the rate applies" is equal to or greater than 180%. The limit price approach establishes no such presumption, but rather reflects a set order of considerations relevant to the issue of qualitative market dominance that are to be examined in turn—(1) a threshold practical feasibility analysis; (2) calculation of the limit price ratio and its comparison to the defendant railroad's RSAM figure; and (3) a consideration of intangible features.

Moreover, even if the limit price approach did utilize some form of presumption (which it does not), the plain language of the statute only prevents the Board from creating a presumption of market dominance based on the fact that the challenged rate produces a markup at or above 180% of variable cost. The statute is silent as to whether a presumption could be drawn from a higher markup above variable costs (e.g., 500% or 1000%) or based on a markup above RSAM. While CSXT seems to believe that § 10707(d)(2) prevents our use of R/VC ratios for any qualitative market dominance purpose, a permissible and more reasonable interpretation is that the plain language of the statute only prohibits us from establishing 180% as a presumption demarcation point.¹⁶ Had Congress wished to prevent the establishment of all potential R/VC-

¹⁴ Id. at 14-18.

¹⁵ Section 10707(d)(2) states that "[a] finding by the Board that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than 180 percent does not establish a presumption that—(A) such rail carrier has or does not have market dominance over such transportation; or (B) the proposed rate exceeds or does not exceed a reasonable maximum."

¹⁶ Cf. Mr. Sprout, Inc. v. United States, 8 F.3d 118, 124 (2d Cir. 1993) (recognizing that the ICC, federal courts, and Congress have all employed actual R/VC ratios "as a valid and reliable measure of market power in the rail industry" and concluding that the ICC's use of such ratios in its "threshold inquiry" on the issue of market dominance was not an abuse of discretion).

based presumptions—as opposed to the very specific 180% figure—it could have done so. But it did not.

CSXT nonetheless argues that the Board’s interpretation renders § 10707(d)(2) “entirely superfluous” given the other provisions of § 10707.¹⁷ Simply because §§ 10707(b) and 10707(d)(1)(A), when read together, require the Board to make market dominance findings for all challenged traffic with actual R/VC ratios at or over 180% does not mean that the Board is prevented from using an R/VC-based test at some level above 180% as part of a multi-factored analysis. Even assuming *arguendo* that the limit price approach makes use of an R/VC-related benchmark as one component of its multi-factor analysis, under the approach the Board continues to make individualized market dominance findings both for traffic falling above that particular level and for traffic falling between that level and 180%.¹⁸

Furthermore, the limit price approach does not utilize the rail rate generated by the challenged movement in its calculation of the limit price R/VC ratio. Section 10707(d)(2) is very specific, referring only to a 180% R/VC ratio presumption with respect to the “rate charged by a rail carrier.” The limit price R/VC ratio, in contrast, is based on the price of a proffered alternative to that particular rail movement, and reflects the highest price the rail carrier theoretically could charge the shipper without causing a significant amount of the issue traffic to be diverted to the proffered alternative. Therefore, assuming *arguendo* that the limit price approach includes some form of a presumption and that the statute prevents any presumptions based on the R/VC ratio of the challenged rate (no matter how high), our approach still would not run afoul of § 10707(d)(2) because it does not utilize the challenged rail rate in its calculation of the limit price R/VC ratio. CSXT contends that there is “no practical distinction between a ‘limit price R/VC’ comparison to RSAM and an actual R/VC comparison,” due to the fact that the transportation alternatives at issue in this case all have rates comparable to the challenged CSXT rates.¹⁹ But the price of the challenged rail movement and the price of the alternative—charged by an unaffiliated entity—undeniably are two separate figures and do not necessarily have a direct causal relationship with one another. Simply because the statute speaks to Board

¹⁷ CSXT Petition 2.

¹⁸ While we disagree with CSXT’s contention that our interpretation of § 10702(d)(2) results in surplusage, we note that courts tolerate a degree of surplusage for a variety of reasons. See, e.g., Lamie v. United States Tr., 540 U.S. 526, 536 (2004) (explaining that “[s]urplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute”); United States v. Atl. Research Corp., 551 U.S. 128, 137 (2007) (explaining that “hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all costs”).

¹⁹ CSXT Petition 3.

use of a 180% R/VC ratio presumption associated with the challenged rail rate does not mean that it similarly does so with respect to the alternative transportation rate. In sum, we find none of CSXT’s statutory arguments persuasive and decline to read further restrictions into the statute beyond those specifically set forth by Congress.

Administrative Procedure Act. CSXT next argues that use of the limit price approach requires its adoption via notice-and-comment rulemaking, due to the fact that the prevailing market dominance guidelines set forth in Market Dominance Determinations and Consideration of Product Competition (1981 Market Dominance Determinations), 365 I.C.C. 118 (1981), were adopted in this manner. Such a proposition would be true only if (1) the current market dominance rules were binding legislative rules rather than flexible evidentiary guidelines; and (2) the limit price approach represented a departure from those rules. The guidelines described in 1981 Market Dominance Determinations, however, do not constitute a legislative rule, but rather represent an interpretive statement of agency policy regarding the procedures to be followed in connection with the submission of market dominance evidence and the types of evidence that the agency will consider in that inquiry.²⁰ Despite CSXT’s contrary assertion,²¹ the limit price approach is not a legislative rule because the approach neither has binding effect nor limits our discretion. See, e.g., McLouth Steel Prods. v. Thomas, 838 F.2d 1317, 1320 (D.C. Cir. 1988). As we explained in the Market Dominance Decision, slip op. at 26, parties in future cases remain free to “advocate alternative benchmarks or methods for determining whether a particular feasible transportation alternative provides effective competition.”

Even if the guidelines set forth in 1981 Market Dominance Determinations were deemed to be legislative in nature, the limit price approach does not constitute a departure from those rules. The overall framework for evaluating potential transportation alternatives reflected in the limit price approach—including consideration of issues related to practical feasibility, economic feasibility, and the existence of any intangible features related either to the proffered alternative

²⁰ See, e.g., W. Coal Traffic League v. United States, 719 F.2d 772, 780 (5th Cir. 1983) (en banc) (affirming 1981 Market Dominance Determinations, noting that the ICC’s guidelines were not intended “to establish hard and fast rules for every situation,” and asserting that courts “must remain cognizant of the Supreme Court’s direction that the formulation of procedures is basically to be left within the discretion of the agencies to which Congress has confided the responsibility of substantive judgments” (internal quotation and alteration marks omitted)); see also Notice of Proposed Policy, 35 Fed. Reg. 83342, 83345 (Dec. 18, 1980) (Clapp, Comm’r, concurring) (stating in connection with the 1981 market dominance proceeding that “[o]ne must also question whether it is wise to propose issuance of a mere policy statement, which theoretically is subject to notice without change, when adoption of specific rules would avoid this uncertainty”).

²¹ CSXT Petition 6.

or the challenged rail transportation—encompasses the same factors described by the prevailing guidelines. As a result, the limit price approach excludes no factor the Board has previously stated it will consider in its qualitative market dominance analysis. Thus, CSXT’s assertion that the limit price approach “would effectively repeal the Board’s existing fact-and-circumstance-specific totality analysis and replace it with an arbitrary mechanical formula”²² is groundless.

Moreover, even if the refined approach incorporates additional elements to consider within the Board’s qualitative market dominance analysis, the 1981 Market Dominance Determinations decision set forth “flexible guidelines” for the submission of qualitative market dominance evidence—specifically stating that: (1) such evidence “may include price-cost ratios;”²³ (2) the evidence is to focus on the central question of whether “[e]ffective competition” exists; and (3) “types of evidence [regarding] the feasibility or nonfeasibility of” proposed alternatives other than those specifically enumerated would be considered. 365 I.C.C. at 119, 122, 133. CSXT attempts to sidestep this conclusion by arguing that the limit price approach conflicts with the 1981 Market Dominance Determinations decision because that decision eliminated use of the “cost test” presumption. Under the “cost test” presumption, a rebuttable presumption of market dominance arose when the rate at issue exceeded the variable cost of providing the service at issue by 60% or more (i.e., when the challenged movement generated an R/VC ratio greater than or equal to 160%). CSXT argues that the “cost test” presumption is similar to the limit price approach and thus, the limit price approach represents agency reversion to an already-discarded market dominance methodology. CSXT is incorrect. Unlike the “cost test” presumption, the limit price approach establishes a multi-factor framework for evaluating potential transportation alternatives while using neither actual R/VC ratios nor presumptions. Moreover, while the 1981 Market Dominance Determinations decision eliminated several other presumptions in addition to the “cost test” presumption, the decision does not state that the agency would never again use any rebuttable presumption in the market dominance analysis. Thus, even assuming arguendo that the limit price approach does involve the use of some form of presumption, the approach would not run afoul of the 1981 Market Dominance Determinations decision because that decision did not prohibit the agency from subsequently adopting new and different market dominance presumptions. As a result, CSXT’s claim that the limit price approach is unlawful because it conflicts with the 1981 Market Dominance Determinations decision must be rejected.

The final component of CSXT’s APA claim asserts that neither the Board’s solicitation of comments in M&G from interested non-parties regarding the limit price approach, nor the

²² Id. at 8.

²³ This statement makes it clear that rather than constituting a flat prohibition on the use of R/VC ratios in the qualitative market dominance context, the 1981 Market Dominance Determinations decision specifically contemplated such use.

Board’s discussion in the Market Dominance Decision of a limited subset of the comments received during the M&G comment period, satisfies the APA’s notice-and-comment rulemaking requirement.²⁴ Our procedural structure in M&G was neither intended as, nor did it constitute, notice-and-comment rulemaking. In this case, we set forth no legal obligation that would bind an entity that is not a party to this case. The final component of CSXT’s APA claim therefore fails to identify a material error in the Market Dominance Decision.

Justification for the Limit Price Approach. We disagree with CSXT’s claim that our justification for using the limit price approach is misguided or inadequately supported. CSXT portrays the approach as designed solely to address the problem of ridiculous transportation alternatives presented by extreme hypotheticals. However, as we pointed out in the Market Dominance Decision, slip op. at 3, market dominance is a particularly complicated issue in cases like this one because, while the movement origins and/or destinations can be served via rail (for the most part) only by the defendant carrier, the products at issue can be transported via either rail or truck (demonstrated by the fact that the complaining shipper annually transports a not insignificant amount of the products via truck or truck/rail combination). But the fact that some competition exists, or that the price of the alternative happens to be similar to the challenged rate, does not in itself demonstrate that such competition is effectively constraining a carrier’s pricing—i.e., whether the competitive alternative is sufficient to deter the carrier from charging monopoly prices for the transportation at issue.²⁵ CSXT simply ignores the fact that the conundrum presented by the horse and buggy example—the faulty assertion that similar price necessarily equals effective competition—is not limited only to such “patently ridiculous” alternatives, but is present with respect to other, seemingly more reasonable, transportation alternatives. The limit price approach represents our attempt to develop an objective method for drawing a line between those feasible transportation alternatives that effectively constrain carrier

²⁴ CSXT Petition 9-10.

²⁵ Market Dominance Decision, slip op. at 17; see also Ariz. Pub. Serv. Co. v. United States (APS 1984), 742 F.2d 644, 651 (D.C. Cir. 1984) (explaining that “the mere existence of some alternative does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure”). CSXT references the House Report to the Staggers Act for the proposition that similarity between the rail rate and the price of a transportation alternative conclusively demonstrates that competition is present. CSXT Petition i, 12 (citing H.R. Rep. No. 96-1035 (1980)). The House Report, however, never confronts the issue of whether the transportation alternative is effectively constraining the rail rate, and fails to account for the possibility of price similarity between “patently ridiculous” alternatives and rail rates. CSXT concedes that the issue of “patently ridiculous” alternatives is not purely hypothetical, see CSXT Petition 11 (conceding that “the problem the limit price test purports to address is mostly a hypothetical one” (emphasis added)) and, as a result, its reliance on the House Report is misplaced.

pricing and those that do not. Id. at 27. The limit price itself is intended to reflect the highest price the rail carrier could theoretically charge the shipper without causing a significant amount of the issue traffic on the particular rail movement to be diverted to the proffered alternative. Comparing the limit price R/VC ratio of a feasible transportation alternative to the carrier's RSAM demonstrates whether the alternative is cost competitive for purposes of our market dominance inquiry²⁶ because truly competitive traffic—i.e., traffic over which the carrier does not possess pricing power—would not be priced above the average R/VC ratio needed from all potentially captive traffic—i.e., traffic other than that over which the carrier does not possess pricing power—in order to achieve revenue adequacy. Employing a multi-factored test that includes an objective component that relies in part on RSAM helps to ensure that the market dominance analysis balances the revenue needs of the carrier with the need to protect captive shippers from the abuse of market power. Id. at 5. While prior decisions addressing the issue of market dominance considered whether alternatives were effectively constraining carrier pricing, see, e.g., McCarty Farms v. Burlington N., Inc., 3 I.C.C.2d 822, 827-32 (1987), we continue to believe that development of a more objective methodology will both simplify and help to better guide our inquiries. By providing a set order of considerations that enables prospective complainants to better assess the merits of their position before deciding to file a case, and that will facilitate the submission of evidence from both parties in the event a case is filed, the limit price approach brings greater structure to the qualitative market dominance inquiry.

Economic Foundation. We reject CSXT's wide-ranging claims that use of the limit price approach is economically incoherent and unreliable for purposes of determining the effectiveness of competition. CSXT offers a broad array of related arguments that: (a) the limit price approach ignores the relationship between the rail rate and the price of the alternative; (b) RSAM is a flawed benchmark for measuring the effectiveness of competition in a particular market; (c) high R/VC ratios do not indicate a lack of effective competition, particularly in an industry like the rail industry with high fixed costs; (d) presuming market dominance from any figure above RSAM is inconsistent with differential pricing principles and the goal of revenue adequacy; (e) use of URCS variable costs rather than actual marginal costs impairs the reliability of the limit price approach; (f) the Lerner Index does not support use of the limit price approach in industries like the rail industry with high fixed costs; and (g) comparing a movement's limit price R/VC ratio to the carrier's RSAM is not relevant to the qualitative market dominance analysis. CSXT raised many of these arguments in M&G, and we addressed them in the Market Dominance Decision. Again, the mere fact that a rail carrier has priced its services right at the threshold where, if slightly higher, it might begin to lose traffic to an alternative does not indicate that the alternative is constraining the rate effectively. Market Dominance Decision, slip op. at 17.

²⁶ Of course, concluding that an alternative is not cost competitive for purposes of our market dominance inquiry has no bearing on the ultimate issue of whether the underlying rail rate is unreasonable, which is a distinct inquiry.

Use of RSAM as a component of the limit price approach is appropriate. Employing an objective methodology relying in part on RSAM ensures that the market dominance analysis balances the revenue needs of the carrier with the need to protect captive shippers from the abuse of market power. Id. at 5, 25-27. Comparing a market-specific figure (the limit price R/VC ratio) to a carrier-specific figure (RSAM) provides an estimate of whether the alternative is low enough to generate competitive pressure,²⁷ given that RSAM measures the average markup the carrier would need to charge all of its potentially captive traffic in order to earn adequate revenues as measured under 49 U.S.C. § 10704(a)(2).²⁸ Using RSAM as one component of the limit price approach is not inconsistent with differential pricing, given that it is the limit price R/VC ratio (rather than the actual R/VC ratio) that is compared to RSAM. Thus, carriers are free to employ differential pricing by charging rates above or below RSAM as long as there are alternatives that are priced low enough to exert competitive pressure. CSXT's argument that use of the limit price approach is inappropriate because high R/VC ratios standing alone are not reliable indicators of market dominance misconstrues both the overall structure of the approach and the very nature of the methodology underlying that approach. Market Dominance Decision, slip op. at 23-25. As the Board has explained in prior cases, high R/VC ratio levels can be used to support ultimate conclusions regarding the competitive effectiveness of transportation alternatives when such conclusions are supported by other evidence.²⁹ Calculation of the limit price R/VC ratio is but a single component of the refined approach, which is specifically structured to consider a variety of other factors relevant to the qualitative market dominance inquiry separate and apart from the limit price R/VC ratio. Finally, the question of whether or not high R/VC ratios are reliable indicators of market dominance is ultimately irrelevant in the limit price context, given that the limit price R/VC ratio is based on a different number than the actual R/VC ratio generated by the rail rate. Market Dominance Decision, slip op. at 24.

²⁷ The Board has previously indicated that an R/VC ratio which falls below the carrier's RSAM number indicates that the rate at issue is "being constrained by...market forces." Simplified Standards, slip op. at 81.

²⁸ Moreover, CSXT's various complaints suggesting that use of the RSAM benchmark is inappropriate due to the high fixed costs inherent in the railroad industry are inapposite, given that a carrier's RSAM figure specifically takes into account the particular revenue needs, and therefore the fixed costs, of that carrier on a system-wide basis. CSXT takes issue with the system-average nature of the RSAM benchmark. This characteristic of the RSAM benchmark exists (at least in part) because of the underlying system-average nature of URCS (the Board's general purpose costing system), rendering system averages an inescapable part of the Board's market dominance inquiry, regardless of whether or not the RSAM benchmark is used.

²⁹ See E.I. du Pont de Nemours & Co. v. CSX Transp., Inc. (DuPont I), NOR 42099, slip op. at 8 (STB served June 30, 2008); McCarty Farms, 3 I.C.C.2d at 832.

CSXT's argument that use of the limit price approach is inappropriate because the approach uses a carrier's variable costs, or because the approach uses URCS variable costs rather than actual marginal costs, is incorrect given that the prevailing market dominance guidelines specifically contemplate consideration of the costs associated with the challenged rail movement. See 1981 Mkt. Dominance Determinations, 365 I.C.C. at 122, 133.³⁰ The costs of providing the transportation at issue are relevant to the qualitative market dominance inquiry in accordance with the prevailing guidelines. Market Dominance Decision, slip op. at 24-25. Furthermore, URCS is the Board's general purpose costing system adopted for all regulatory costing purposes, including those used in market dominance determinations.³¹

Burden of Proof. CSXT's argument that the limit price approach impermissibly shifts the burden of proof does not convince us that use of the approach in this case constitutes material error. The limit price approach does not, in fact, shift the burden of proof in the qualitative market dominance context from the complainant to the defendant. The limit price approach encompasses the same factors described by the prevailing market dominance guidelines, see 1981 Mkt. Dominance Determinations, 365 I.C.C. at 132-33, and simply reflects a set order of considerations relevant to the issue of qualitative market dominance that are to be examined in

³⁰ See also Ariz. Pub. Serv. Co. v. Atchison, Topeka & Santa Fe Ry., 2 S.T.B. 367, 375 n.15 (1997) (asserting that the "rates that would be charged by a competing mode [of transportation] are relevant to an evaluation of whether that mode provides effective intermodal competition" to the movement at issue); Salt River Project Agric. Improvement & Power Dist. v. United States, 762 F.2d 1053, 1060 (D.C. Cir. 1985) (identifying the ICC's consideration of cost evidence in the course of its market dominance inquiry); APS 1984, 742 F.2d at 650 (explaining that the prevailing "guidelines state that evidence of effective competition may include 'the transportation costs of the rail and motor carrier alternatives'").

³¹ CSXT argues that the Lerner Index does not reliably demonstrate the presence or absence of market dominance in industries like the rail industry with significant fixed costs. Unlike the Lerner Index, the limit price approach is not a direct comparison of railroad rates to costs—it is rather a measure of the effectiveness of feasible alternatives to railroad services. Competition (or a lack thereof) drives pricing behavior in the marketplace. We note that CSXT's criticism fundamentally misunderstands the purpose of the Board's market dominance inquiry. When the Board concludes that a carrier possesses "market dominance" over certain transportation, its conclusion does not constitute a finding that the carrier has engaged in the abuse of monopoly power. In contrast to the Lerner Index, which typically is used to support such a finding, a Board conclusion of "market dominance" signals only that the Board has found reason to investigate the challenged rate for unreasonableness, i.e. monopoly abuse. Consideration of whether the carrier has in fact engaged in monopoly abuse occurs in the SAC portion of the case.

turn. To meet its burden of establishing a prima facie case that the defendant possesses market dominance over the challenged movement, the complainant on opening must demonstrate that (1) a transportation alternative is not practically feasible, (2) the limit price R/VC ratio associated with a practically feasible alternative exceeds the defendant's RSAM figure, or (3) the limit price R/VC ratio associated with a practically feasible alternative falls below the defendant's RSAM figure but there are intangible features indicating that the defendant otherwise possesses market dominance over the challenged movement. Only if the complainant fulfills its initial burden must the defendant on reply demonstrate that a feasible transportation alternative generating a limit price R/VC ratio below the defendant's RSAM figure exists, or that there are intangible features indicating that the defendant otherwise lacks market dominance over the challenged movement. If the defendant meets its burden on reply, the complainant on rebuttal must then either demonstrate that the defendant's proposed transportation alternative is not feasible or that there other intangible features indicating that the defendant otherwise possesses market dominance over the challenged movement.

Identity of the Railroad. CSXT criticizes the limit price approach because it makes the effectiveness of competition depend upon the identity of the railroad. Contrary to CSXT's argument, the fact that the RSAM figure is different for each carrier is not a shortcoming of the limit price approach. Indeed, the qualitative market dominance inquiry can and should be carrier-specific, as that inquiry seeks to determine whether feasible transportation alternatives effectively constrain a specific defendant's pricing (rather than the pricing decisions of carriers generally). See, e.g., McCarty Farms, 3 I.C.C.2d at 825 (explaining that the Board looks "to see if there are any alternatives sufficiently competitive...to bring market discipline to [a particular carrier's] pricing"). As TPI points out,³² carrier-specific information is already used to determine market dominance, which is appropriate given that individual rail carriers have unique cost structures and revenue needs. Because RSAM will vary from carrier to carrier and change over time to reflect gradual changes in the degree of differential pricing needed by a particular carrier, we continue to believe that RSAM provides a reasonable measure of effective competition specific to the case at hand.

Intangible Features. We believe the Market Dominance Decision provides adequate guidance regarding the use of intangible features. As we explained there, the presence of certain unquantifiable costs or benefits of the challenged transportation or the alternative transportation may be sufficient to undermine the preliminary conclusion regarding market dominance for a particular movement, and the weight to be accorded to any such intangible feature will depend on the scale of divergence between the RSAM figure and the limit price R/VC ratio. Market Dominance Decision, slip op. at 17-18. We also provided both general and specific examples of such intangible features. Id. at 18 nn.60-61. These examples were not intended as an exhaustive

³² TPI Reply to CSXT Petition 17.

list of what intangible features we might consider. Indeed, we recognize that such features may include shipper-specific, carrier-specific, movement-specific, or commodity-specific factors when appropriate.³³

In sum, none of CSXT's arguments convince us that we committed material error by relying on the limit price approach in the Market Dominance Decision.

CSXT's Arguments Regarding Use of Customer Verified Statements

CSXT argues that the Board materially erred by relying on customer verified statements as evidence of storage needs of particular customers.³⁴ CSXT claims that the Board disregarded evidence that the customer verified statements were boilerplate drafted by TPI and were contradicted by other evidence in the record.³⁵ CSXT asserts that the Board's decision to discredit verified statements filed by customers that received at least 10% of their shipments by truck should have extended to verified statements by customers that received any truck shipments.³⁶ Similarly, CSXT claims that the Board erred by not considering evidence that the customers signed the verified statements without considering whether the statements actually applied to them and its argument that the statements were signed by brokers that direct deliveries to bulk terminals.³⁷ CSXT argues that these inconsistencies, combined with a lack of corroborating evidence, should have led the Board to give no weight to any of the customer verified statements.³⁸

³³ See, e.g., M&G, slip op. at 58-59 (concluding that the challenged Apple Grove-Belpre rail transportation provided advantages over the proposed direct truck alternative because the movement's destination was a railcar storage facility and the alternative would have both (a) necessitated significant railcar repositioning simply for purposes of storage and (b) foreclosed the possibility of subsequent delivery via truck due to product integrity concerns); id. at 59 (concluding that the proposed direct truck alternative provided advantages over the challenged Apple Grove-Clifton Forge rail transportation because direct trucking generally provides certain customer-related benefits, such as the ability to respond more quickly to customer delivery requests).

³⁴ CSXT Petition 18-20.

³⁵ Id. at 19.

³⁶ Id.

³⁷ Id. at 19 n.30.

³⁸ Id. at 18-19.

CSXT also argues that the Board's reliance on evidence that in-house CSXT personnel could not review creates due process and fairness issues.³⁹ Finally, CSXT claims that the Board's acceptance of the statements will lead defendants to seek extensive third-party discovery in future proceedings.⁴⁰

TPI replies that, while corroborating evidence was not required, it submitted extensive corroborating evidence, including testimony and traffic data.⁴¹ TPI argues that the verified statements were valid and were not contradicted by other evidence.⁴² In particular, TPI claims that its evidence showed that customers without any storage can receive limited truck shipments when necessary but cannot rely on truck shipments as a general matter, and therefore the low level of truck shipments to certain customers for which the Board accepted verified statements does not contradict the validity of the statements.⁴³ TPI argues that it refuted CSXT's other claims of inconsistencies between the verified statements and other evidence.⁴⁴

TPI argues that the Board has already rejected similar arguments regarding confidentiality designations in this proceeding.⁴⁵ Finally, TPI argues that the Board should not reject the verified statements due to speculation about their potential effect on future cases.⁴⁶

The Board did not err by accepting a limited subset of the customer verified statements as evidence of those customers' storage needs. The Board considered the statements regarding storage needs in light of truck shipments, and concluded that some statements were contradicted by evidence that customers received more than 10% of their product volume by truck.⁴⁷ Market Dominance Decision, slip op. at 44-47. The low level of truck shipments received by some of the customers for which the Board accepted a verified statement does not, however, contradict the validity of the statements accepted by the Board. As TPI explains, customers without storage

³⁹ Id. at 19-20.

⁴⁰ Id. at 20.

⁴¹ TPI Reply to CSXT Petition 19.

⁴² Id. at 19-20.

⁴³ Id. at 19.

⁴⁴ Id. at 19-20 (citing Rebuttal Evidence II-B-72 to II-B-77).

⁴⁵ Id. at 20 (citing TPI v. CSXT, NOR 42121, slip. op. at 4 (STB served July 15, 2011)).

⁴⁶ Id.

⁴⁷ In fact, CSXT acknowledges that “[t]he Board rightly chose to disbelieve verified statements where customers received at least 10% of their shipments by truck.” CSXT Petition 19.

can accept a limited amount of truck shipments,⁴⁸ and the Board specifically acknowledged this in its decision, noting TPI's claims that some truck shipments are necessary when customers are low on inventory. Id. at 45.

CSXT claims that the Board disregarded its argument that some verified statements were signed by brokers that direct delivery of the shipments to bulk terminals and that the Board should have discredited these affidavits. However, the Board addressed this argument with its finding that the two brokers for which the Board accepted verified statements as evidence of storage needs "did not receive at least 10% of their past shipments via truck for some or all of their facilities listed in the verified statements." Id. at 46 n.176. We find that the Board did not err in this conclusion because CSXT did not explain in its Reply Evidence why verified statements by brokers that direct deliveries to bulk terminals should be discredited.⁴⁹ CSXT merely noted the brokers' statements in relation to an argument that the Board should discredit the statements of end-use customers that direct deliveries to bulk terminals, but then receive deliveries by truck. CSXT argued that because these customers regularly receive truck deliveries, the Board should disregard evidence that indicates such customers are unable to receive truck deliveries. However, we do not agree that the Board should treat brokers similarly to end-users that receive truck shipments from bulk terminals. Unlike those customers, the Board does not know how a broker ultimately delivers its product to customers. Therefore, there was no obvious reason for the Board to automatically discredit evidence that indicated a broker's need for rail delivery. CSXT provided no additional explanation of the broker argument in its petition.⁵⁰ Given the lack of explanation by CSXT, the Board sufficiently considered the claim, id., and we find that the Board did not err because there was nothing ambiguous in the brokers' verified statements that the Board accepted, nor any other reason to disregard the veracity of storage constraints at the brokers' destinations.

Further, the Board did not err by disregarding CSXT's arguments on the validity of the verified statements as a group. CSXT points to its Reply Evidence discussion of the verified statements, in which it claims that various inconsistencies, including statements signed by customers that routinely direct shipments to transload facilities, statements signed by customers that alleged truck shipments would lead to congestion despite the very low volume of product they receive from TPI, allegedly unsupported statements claiming handling costs associated with truck shipments or capital expenditures necessary for truck shipments, and excessively similar statements signed by diverse customers all should have led the Board to reject the verified

⁴⁸ TPI Reply to CSXT Petition 19.

⁴⁹ See Reply Evidence II-44 n.53.

⁵⁰ See CSXT Petition 19 n.30.

statements as a group.⁵¹ In its petition, CSXT noted that certain customers that received very low volumes of shipments from TPI claimed that the few truck shipments it would take to replace rail shipments would cause congestion and require capital expenditures.⁵² However, this argument does not go to the storage issue for which the Board accepted the statements, and, consistent with CSXT's arguments, the Board found that most of the claims made in the statements did not provide enough information for the Board to reach any conclusions beyond those related to storage. *Id.* at 46-47. As CSXT pointed out in its reply market dominance evidence, several of the verified statements show that TPI's customers altered the verified statements to apply to their facilities.⁵³ This indicates that neither a blanket acceptance nor rejection of the evidence was appropriate, and the Board therefore reviewed each statement and made customer-specific determinations.

The Board's decision to examine the verified statements for probative evidence and to conclude that the selected group of verified statements provides evidence of certain customers' storage needs was therefore within its discretion.⁵⁴ See Norfolk S. Ry.—Petition for Exemption—In Balt. City & Balt. Cnty., Md., AB 290 (Sub.-No. 311X), slip op. at 10 (STB served Jan. 27, 2012) (“It is within the Board’s discretion to determine how much weight to accord to evidence submitted by parties; the exercise of this discretion does not constitute material error”). CSXT cites no authority that requires additional evidence to corroborate evidence the Board otherwise finds informative, but, as shown by its decision, the Board examined the verified statements in light of other evidence submitted by the parties. Market Dominance Decision, slip op. at 44-47. Therefore, CSXT has not shown that the Board erred when it weighed the evidence and accepted some of the verified statements as valid evidence.⁵⁵

⁵¹ Reply Evidence II-42 to II-45.

⁵² CSXT Petition 19 n.30 (citing Reply Evidence II-42 to II-45).

⁵³ Reply Evidence II-40.

⁵⁴ CSXT argues that TPI customer Cherokee's verified statement demonstrates the unreliable nature of the verified statements because that customer claimed it needed rail service due to lack of storage, but in fact received all of its product by transload service. CSXT Reply to TPI Petition 9. However, the Board did not accept the verified statement as evidence of the customer's storage needs, and we have addressed CSXT's argument about the generally unreliable nature of the verified statements here.

⁵⁵ In its motion for leave to file a supplemental reply to CSXT's petition for reconsideration, TPI claims that CSXT improperly used its reply to TPI's petition for reconsideration as an opportunity to present new arguments supporting CSXT's petition for reconsideration.

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The Board previously addressed CSXT's argument that the Board's reliance on evidence that in-house CSXT personnel could not review creates due process issues. TPI v. CSXT, NOR 42121, slip. op. at 4 (STB served July 15, 2011). The Board concluded that, because CSXT's outside counsel and consultants would have full access to materials, CSXT's rights were protected. Id. Finally, CSXT's assertion that future defendants will seek extensive third-party discovery as a result of the Board's decision to rely on the evidence in some of the verified statements is not a valid reason for the Board to reject probative evidence in this case. The Board will continue to address discovery disputes on a case-by-case basis.

TPI's Petition for Reconsideration

TPI's Arguments Regarding Prepositioning

TPI argues that the Board erred by concluding that transloading alternatives do not require product to be prepositioned at bulk terminals and, therefore, the Board erred by excluding

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CSXT replies that the Board should deny TPI's motion for leave to file a supplemental reply because, rather than arguing against the allegedly improper arguments made by CSXT, TPI actually argues in support of its own petition for reconsideration. CSXT also argues that its reply to TPI's petition only responds to that filing and therefore a supplemental reply by TPI is not necessary.

We will deny TPI's motion for leave to file a supplemental reply to CSXT's petition for reconsideration. The Board's rules do not allow replies to replies. 49 C.F.R. § 1104.13(c). Further, we find that TPI's arguments primarily address the merits of TPI's claim that we should reconsider the Board's market dominance finding as to Cherokee, rather than respond to allegedly improper arguments by CSXT. TPI's supplemental reply focuses on the credibility of the Cherokee verified statement and provides new details and argument regarding the Cherokee transportation. Although TPI cites to the record of the market dominance phase of the proceeding for these details, we did not find this level of specificity in our review of the cited record. See, e.g., Opening Evidence II-B-27 (arguing that some customers ask TPI to ship to a particular bulk terminal because the customer receive financial incentives from the rail carrier to do so); Rebuttal Evidence II-B-62 to II-B-66 (arguing that TPI must comply with customer requests to ship to a particular bulk terminal because customers may have contract commitments to that terminal or to a motor carrier that only has access to the particular terminal). It therefore appears that TPI's filing is an attempt to make new arguments to support the Cherokee evidence, rather than respond to BNSF's allegedly improper arguments.

from the calculation of limit prices the costs associated with prepositioning.⁵⁶ TPI claims that the Board erred in concluding that the additional transloading costs are for a higher-quality service.⁵⁷ TPI claims that its evidence showed that, without prepositioning, its rail customers will not accept transloading's drawbacks because transloading is slower than direct rail service and, unlike railcars, trucks cannot be used for storage at customer locations, requiring "impossibly precise" scheduling of truck deliveries.⁵⁸ Therefore, TPI claims, the bulk terminal storage costs, inventory carrying costs, and railcar costs associated with more than a full month of bulk terminal prepositioning are necessary for its current rail customers to accept transloading service.⁵⁹

TPI also argues that the Board erred by concluding that it does not matter whether TPI or its customers bear inventory carrying costs.⁶⁰ TPI claims that under the limit price method, the Board evaluates the price that the complainant would pay for the alternative transportation. According to TPI, even if inventory carrying costs are the same for rail and transloading alternatives, the Board must consider the shift of inventory carrying costs to TPI from its customers. Otherwise, the limit price calculations will not reflect the point at which TPI will divert traffic to transloading alternatives.⁶¹ TPI also claims that the Board's conclusion here is inconsistent with a previous market dominance decision considering inventory carrying costs.⁶²

CSXT responds that the Board correctly concluded that prepositioning is not required for transloading to be an effective and timely alternative to rail service and correctly excluded the costs associated with prepositioning.⁶³ CSXT argues that prepositioning products at bulk terminal facilities to ensure quick delivery to customers constitutes a premium service, which is comparable to TPI's premium truck delivery service, but is not comparable to the rail delivery at

⁵⁶ TPI Petition 3-11 (citing FMC Wyoming Corp. v. Union Pac. R.R., 4 S.T.B. 699, 714 n.28 (2000)).

⁵⁷ Id.

⁵⁸ Id. at 4-6.

⁵⁹ Id. at 3-11. In the underlying decision, the Board specifically details the number of days TPI claims are necessary for the bulk terminal, storage, and inventory carrying costs. See, e.g., Market Dominance Decision, slip op. at 53. For confidentiality reasons, the exact number of days has not been included in this reconsideration decision.

⁶⁰ TPI Petition 8-10.

⁶¹ Id. at 9.

⁶² Id. (citing CF Industries, Inc. v. Koch Pipeline Co., 4 STB 637, 645-46 n.30 (2000)).

⁶³ CSXT Reply to TPI Petition 3-8.

issue.⁶⁴ CSXT claims that the inventory carrying costs are also based on TPI’s assumption of more than a full month of storage, which CSXT believes is overestimated and should be rejected.⁶⁵ Further, CSXT notes that TPI admits that the transload options would only require an additional “day or two for railcar switching at the terminal and a day or two for bulk truck loading and transportation.”⁶⁶

The Board did not materially err in its consideration of the bulk terminal fees, inventory carrying costs, and railcar costs that TPI claims should be included in the calculation of limit prices for transloading alternatives. TPI bases all three of these costs on the assumption that transloading options would require more than a full month of storage, but TPI did not show that the more than a full month of additional costs it proposed were necessary to provide a comparable level of service to rail service. In fact, TPI now admits that transload options would require only two to four more days than rail service.⁶⁷ But TPI did not argue that the Board should include two to four days of the costs in its market dominance arguments to the Board. Instead, TPI argued for costs based on more than a full month of transit time, and therefore the Board did not err by rejecting TPI’s excessive estimates for the costs of these items. TPI’s failure to provide adequate evidence to support its excessive bulk terminal fees, railcar costs, and storage and inventory carrying cost numbers led to their exclusion from our limit price calculations. Market Dominance Decision, slip op. at 54 (“[W]e believe the product can move through bulk terminals more quickly than instances where TPI prepositions”); id. at 55 (“TPI’s claimed average number of hold days is inflated by loaded railcars that are prepositioned”); id. at 57 (“Absent evidence that the inventory will spend more time in the transportation chain under the proposed alternative, thereby increasing the inventory carrying costs, we find no basis to consider these costs in our analysis.”).

Further, while transloading service without prepositioning may be, as TPI admits, slightly slower than rail service, the Board concluded that TPI did not show that its customers would reject such transload options despite the lack of railcars for storage. The Board explained that, given the data on extensive truck shipments of the products at issue, transloading without prepositioning appeared to be a feasible alternative to rail service despite TPI’s claims that transload options require prepositioning, id. at 41-44, and that transload service with prepositioning was a higher-quality, just-in-time service not directly comparable to rail, id. at 54-55, 73-74. The Board examined TPI’s evidence that its customers lacked on-site storage to the extent that they could accept only very low levels of truck delivery and found that TPI had

⁶⁴ Id. at 3-4.

⁶⁵ Id. at 7 (citing Reply Evidence II-80).

⁶⁶ Id. at 3 (citing TPI Petition 5 n.8).

⁶⁷ TPI Petition 5 n.8.

proven its claims of storage needs for a subset of customers. Id. at 44-46. The Board therefore already addressed the storage argument in the Market Dominance Decision when it reviewed the individual customer verified statements, and we will not now address that argument again in the context of the prepositioning issue, in the absence of further evidence regarding our underlying conclusion that TPI's storage claims were excessive.

The reason that TPI claims its customers would reject transload service without prepositioning is the lack of railcar storage that TPI asserts would require "impossibly precise" scheduling of transload deliveries. TPI cites to its Opening Evidence and Rebuttal Evidence,⁶⁸ but we have reexamined this evidence and conclude that TPI did not show the need for the precise scheduling it claims is necessary. While the type of transload alternative the Board concluded is feasible here may require some additional planning, TPI did not show that it requires impossible precision. TPI's evidence on this point consists primarily of assertions that the industry does not, in practice, use transloading without prepositioning. TPI cites its opening data⁶⁹ that its customers choose shipment via rail over shipment via truck most of the time. However, as explained above, the Board interpreted the data, which showed significant amounts of truck shipments, as establishing the feasibility of truck service. Market Dominance Decision, slip op. at 41-44. TPI also cites, among other things, a customer email.⁷⁰ With regard to this email, however, the Board noted: "This email emphasizes the customer's concern with using the 'most economical' transportation option and refers to logistical advantages of rail. However, despite the customer's reference to the advantages of rail, the customer's primary concern seems to be cost [and therefore] the email does not establish customer preference as addressed in DuPont I for even the individual customer that submitted it." Id. at 44 n.170. Although the email, as the Board stated, referred to some logistical advantages of rail, the customer did not indicate that transloading would require impossible logistical precision.⁷¹ In its petition, TPI also cites its Rebuttal Evidence narrative, sponsored by an industry expert witness,⁷² and a Rebuttal Evidence exhibit which contained expert testimony regarding the polymer industry from a prior Board proceeding,⁷³ both of which presented arguments about prepositioning similar to those in its petition.⁷⁴ However, as discussed above, the Board explained its reasoning that data on

⁶⁸ Id. at 4-7.

⁶⁹ Id. at 4 n.5.

⁷⁰ Id.

⁷¹ See Opening Evidence, Ex. II-B-9.

⁷² TPI Petition 4 n.5, 5 (citing Rebuttal Evidence II-B-15 to II-B-21).

⁷³ Id. at 4 n.5, 5 n.7 (citing Rebuttal Evidence, Ex. II-B-31 at 14-15).

⁷⁴ At TPI Petition 5, TPI also cites Opening Evidence II-B-32 and Rebuttal Evidence II-B-93 to II-B-94, but those pages merely contain unsupported assertions of TPI's argument. TPI

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extensive truck shipments contradict claims that the storage provided by railcars is essential to polymer customers and found that the claimed storage needs were only supported as to a subset of customers. Further, none of the experts' claims rebut TPI's own admission that a transload option will only "be a few days slower than direct rail service."⁷⁵ Therefore, TPI did not adequately support its claims that its customers can either be rail customers that use railcars for storage or transload customers that expect to receive just-in-time delivery,⁷⁶ and the Board did not err in its conclusions that (1) transloading without prepositioning is a more appropriate comparison to rail service than TPI's proposed just-in-time transloading service and (2) the accepted transloading alternative, in certain instances, provides an adequate alternative to discipline CSXT's pricing. See Market Dominance Decision, slip op. at 15-16, 73-74.

Additionally, the Board did not err in its conclusion that the inventory carrying costs claimed by TPI should be excluded from limit price calculations, although the Board's discussion of shifting inventory carrying costs was perhaps unclear. See id. at 57. The Board's discussion of shifting inventory costs was intended to clarify its rejection of TPI's argument that a transload alternative would necessarily add additional costs to the calculation. As the Board noted, "[i]nventory costs are a legitimate factor to consider in a market dominance inquiry...if the proposed transportation alternative was much slower," id., but in this case the Board did not conclude that the proposed alternative was much slower than direct rail service. Rather, the proposed transload alternatives accepted by the Board only marginally increase the transit times, and TPI failed to present evidence of what these true additional costs would be. In effect, TPI's billing practice for just-in-time prepositioning of truck deliveries would be irrelevant to the billing practice for a transload alternative that takes just a few more days because these are separate and distinct services. In the end, the Board noted an absence of evidence that inventory would spend more time in transit for the proposed transload alternatives. Id. The Board did not err in its conclusion that transloading without prepositioning is a viable alternative to rail service. Thus, as previously stated, the asserted inventory carrying costs would not be incurred.

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also cites to its claims that its bulk terminal network is carefully designed and cannot easily be expanded. TPI Petition 4 n.6. The Board addressed this argument in the Market Dominance Decision, slip op. at 50, finding, inter alia, that "TPI has raised no specific quality or capacity concerns related to CSXT's proposed terminals," and TPI does not argue that the Board erred in its analysis.

⁷⁵ TPI Petition 6.

⁷⁶ TPI refers to these customers as truck customers in its petition, but its description of what these customers expect is consistent with our description. See id. at 5 (explaining that for truck customers "TPI prepositions its product at bulk terminals because this is the absolute minimum level of service that truck customers require.").

TPI's Arguments Regarding Cherokee's Storage Needs

TPI also argues that the Board should have found that CSXT is market dominant as to TPI customer Cherokee because Cherokee submitted a verified statement that TPI claims shows Cherokee needs rail service due to insufficient storage capacity.⁷⁷ TPI claims that the Board's decision as to Cherokee is inconsistent with its findings regarding similarly situated customers.

CSXT replies that Cherokee receives all of its shipments by transloading service, which CSXT argues is inconsistent with Cherokee's statement that it requires rail service due to insufficient storage capacity.⁷⁸ CSXT reasons that receiving truck deliveries from one transloading facility should be just as feasible as receiving them from another.⁷⁹

TPI notes that there are four customers on lane J-112, but that the Board found that the alternative transportation was not feasible for only one.⁸⁰ Given the customer-specific nature of the verified statements it is appropriate that the Board would reach different conclusions for different customers on the same lane. Because Cherokee receives all of its product by transloading service,⁸¹ the Board did not err by finding that CSXT is not market dominant as to Cherokee. TPI's market dominance evidence gave no reason that a customer that receives its product by truck from a bulk terminal cannot accept shipments from a different bulk terminal instead. See id. at 45-46. Moreover, the Cherokee verified statement lists Cherokee's delivery location as Dalton, Ga., but TPI's Opening Evidence, Exhibit II-B-11, which was relied upon by the Board in its decision, does not even list Cherokee as a customer at the Dalton location. Thus, the Cherokee verified statement was too ambiguous for the Board to reach any other conclusion.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request filed by AAR to participate in this proceeding is granted in part. AAR is allowed to participate in this proceeding as *amicus curiae*.

⁷⁷ Id. at 11-12.

⁷⁸ CSXT Reply to TPI Petition 9-10.

⁷⁹ Id. at 2.

⁸⁰ TPI Petition 11.

⁸¹ Opening Evidence II-B-140.

2. TPI's motion for leave to file a supplemental reply to CSXT's petition for reconsideration is denied.

3. CSXT's petition for reconsideration is denied.

4. TPI's petition for reconsideration is denied.

5. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey. Vice Chairman Begeman dissented with a separate expression.

VICE CHAIRMAN BEGEMAN, dissenting:

Having dissented in the Board's May 30, 2013 decision on the market dominance portion of this rate proceeding, which is the subject of the petitions for reconsideration filed by both the plaintiff and the defendant in this case, I must dissent from today's decision.

As I explained in my earlier dissent, I am opposed to applying a "theoretical" price calculation—indeed, an artificial ratio—to the Board's rate case processes, particularly when it comes to an issue as important as market dominance. I also continue to have strong reservations about using RSAM and introducing the concept of revenue adequacy in the market dominance determination when the agency has yet to decide how the revenue adequacy constraint will be applied long term. See Coal Rate Guidelines, Nationwide (Coal Rate Guidelines), 1 I.C.C. 2d 520 (1985), aff'd sub nom. Consol. Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

We learned from the public comments allowed in the M&G case, although not allowed here, that the limit price approach is highly objectionable to shippers and carriers. Instead of pushing the new limit price methodology forward, the Board should establish a rulemaking to develop a more economically sound methodology to determine market dominance.