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BEFORE THE
SURFACE TRANSPORTATION BOARD

CONSUMERS ENERGY COMPANY **Complainant,** **v.** **CSX TRANSPORTATION, INC.** **Defendant.**	**Docket No. NOR 42142**

MOTION TO DISMISS REVENUE ADEQUACY CLAIM

Pursuant to 49 U.S.C. § 11701(b) and 49 C.F.R. § 1111.5, CSX Transportation, Inc. ("CSXT") moves to dismiss the Revenue Adequacy claim in Paragraph 18 of the Complaint, because Consumers Energy Company ("Consumers") has failed to satisfy the fundamental prerequisite of "advis[ing] the Board and the defendant fully in what respects [the revenue adequacy constraint] ha[s] been violated" by CSXT. 49 C.F.R. § 1111.1(a). Consumers' failure to provide any facts that support its conclusory assertion that CSXT is revenue adequate is particularly egregious because the Board and its predecessor the Interstate Commerce Commission ("ICC") have found CSXT ***revenue inadequate every year for 28 years***, with a cumulative present value revenue shortfall of ***$30 billion*** over the past 15 years. Against that long history, Consumers' assertion that "CSXT is earning adequate revenues within the meaning of 49 U.S.C. § 10704(a)(2) and (3)" lacks any plausible foundation. Original Complaint, *Consumers Energy Co. v. CSX Transp. Inc.*, STB Docket No. 42142, at ¶ 5 (filed Jan. 13, 2015) ("Compl."). In short, there are no reasonable grounds to investigate claims that CSXT is actually revenue adequate, notwithstanding 28 years of agency findings to the contrary. Dismissing the unfounded allegation will simplify this case, promote private sector resolution, and avoid entangling this dispute with the ongoing proceeding in *R.R. Revenue Adequacy*, STB Docket No. Ex Parte 722.

BACKGROUND

On January 13, 2015, Consumers filed a rate complaint with the Board. In that complaint, Consumers challenges the common-carrier rate established by CSXT for unit train coal transportation from an interchange with BNSF Railway Company ("BNSF") in the heart of Chicago to the J.H. Campbell Generating Station ("Campbell") in Port Sheldon Township, Michigan. Much of the Complaint follows the now-settled formula for a Stand-Alone Cost ("SAC") case. It describes the basic facts of this dispute (some of which CSXT denied in its Answer), alleges that CSXT possesses market dominance over coal transportation to Campbell (which CSXT denies in its Answer), and contends that CSXT is charging an unreasonable rate under the Board's SAC Constraint.[1]

Inexplicably, the complaint also includes the bald allegations that CSXT is revenue adequate and that the rate is therefore also unreasonable under the Revenue Adequacy Constraint of *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987). Specifically, Paragraph 5 asserts that: "CSXT is earning adequate revenues, within the meaning of 49 U.S.C. § 10704(a)(2) and (3) and the Revenue Adequacy Constraint of the Board's *Coal Rate Guidelines*." Compl. at ¶ 5. Then, in Paragraph 18, Consumers contends that CSXT's charges are unreasonable "both under the Stand Alone Cost Constraint and under the Revenue Adequacy Constraint of the *Coal Rate Guidelines*." *Id.* at ¶ 18. No facts set forth in the complaint support either Consumers' assertion that CSXT is earning adequate revenues or its claim that the challenged rate could violate the Revenue Adequacy Constraint.

[1] While CSXT denies that the challenged rate is unreasonable under the Stand-Alone Cost test, it is not moving to dismiss that claim at this time.

Consumers' failure to support its claim is particularly notable because the STB and ICC have found CSXT revenue inadequate *every single year for almost three decades*! The annual industry average cost of capital and CSXT return on investment ("ROI") findings of the STB and ICC are set forth below in **Table 1**. (The year 1986 was the first year that the ICC published a separate revenue adequacy finding for CSXT.)

Table 1
STB/ICC Revenue Adequacy Findings

Year	Cost of Capital	CSXT ROI	STB/ICC Finding
2013	11.32%	10.00%	Revenue Inadequate
2012	11.12%	10.81%	Revenue Inadequate
2011	11.57%	11.54%	Revenue Inadequate
2010	11.03%	10.85%	Revenue Inadequate
2009	10.43%	7.30%	Revenue Inadequate
2008	11.75%	9.34%	Revenue Inadequate
2007	11.33%	7.61%	Revenue Inadequate
2006	9.94%	8.15%	Revenue Inadequate
2005	12.20%	6.23%	Revenue Inadequate
2004	10.10%	4.43%	Revenue Inadequate
2003	9.40%	4.00%	Revenue Inadequate
2002	9.80%	5.20%	Revenue Inadequate
2001	10.20%	4.60%	Revenue Inadequate
2000	11.00%	3.60%	Revenue Inadequate
1999	10.80%	3.80%	Revenue Inadequate
1998	10.70%	8.10%	Revenue Inadequate
1997	11.80%	9.80%	Revenue Inadequate
1996	11.90%	8.90%	Revenue Inadequate
1995	11.70%	6.50%	Revenue Inadequate
1994	12.20%	8.10%	Revenue Inadequate
1993	11.40%	5.20%	Revenue Inadequate
1992	11.40%	0.10%	Revenue Inadequate
1991	11.60%	NM[2]	Revenue Inadequate
1990	11.80%	6.80%	Revenue Inadequate
1989	11.50%	6.10%	Revenue Inadequate
1988	11.70%	0.92%	Revenue Inadequate
1987	11.60%	5.89%	Revenue Inadequate
1986	11.70%	5.46%	Revenue Inadequate

This unbroken string of annual agency determinations of CSXT's revenue inadequacy is particularly significant because flaws in those annual calculations significantly overestimate railroads' actual progress toward revenue adequacy. As

[2] "NM" indicates that the railroad incurred an operating loss, resulting in a negative return.

CSXT and other railroads have explained to the Board in Ex Parte 722, the Board's annual revenue adequacy findings do not value rail infrastructure on a replacement cost basis and therefore underestimate the actual revenues necessary for a railroad to earn a reasonable return on its investment.

In its complaint, Consumers disregarded this overwhelming body of agency findings. Instead, it made the mystifying assertion that CSXT is nonetheless somehow "earning adequate revenues." *See* Compl. at ¶ 5.

The Board recently instituted the Ex Parte 722 proceeding to reexamine the continued viability of the Revenue Adequacy Constraint. The STB observed that in the three decades since the concept was discussed in *Coal Rate Guidelines*, the Board "has not yet had the opportunity to address how the revenue adequacy constraint would work in practice in large rail rate cases." Notice, *R.R. Revenue Adequacy*, STB Docket No. Ex Parte 722, at 4 (served April 2, 2014) ("Notice"). The Board then elaborated on why a reexamination of the Revenue Adequacy Constraint was warranted:

> Both the structure of the rail industry and the flow of commerce have continued to change substantially over the past decade. In the last several years, questions have been raised regarding the agency's methodology for determining revenue adequacy and whether it appropriately measures the financial condition of the railroad industry. These questions cover a range of issues, such as the viability of the Board's current methodology and possible alternative methodologies, what it means to be revenue adequate and how such a finding should impact the railroads, and how to apply the revenue adequacy constraint in regulating rates, among many others. *Id.*

In response, an avalanche of public comments poured into the agency. Over 30 parties filed substantive comments, with supporting statements from 18 economists and consultants. The list of testifying economists and consultants included: Joseph Kalt (Harvard University); Kevin Murphy (University of Chicago); Bradford Cornell (California Institute of Technology); Robert Willig (Princeton University); David Sappington (University of Florida); Roger Brinner (SandPointe, LLC); Emil Frankel (former Assistant Secretary for Transportation Policy USDOT);

Kelly Eaken, Mark Meitzen, and Philip Schouch (Christensen Associates); Michael Baranowski (FTI Consulting); Ram Willner (Berkley Research Group); Gerald Faulhaber (Emeritus, University of Pennsylvania); Harvey Levine (independent transportation consultant); Gerald Fauth (Fauth & Associates); Hal Singer and Kevin Caves (Economists, Inc.); and John Hennigan (MiCRA). This diverse group of parties, economists, and consultants offered a broad range of viewpoints on the viability of the Revenue Adequacy Constraint.

The railroad community maintained that the constraint is antiquated and has no continuing viability and therefore urged the STB to abandon it. CSXT observed that the measurement of revenue adequacy is fundamentally flawed because the annual findings are not premised on replacement costs.[3] The Association of American Railroads ("AAR") observed that there is no public policy rationale for limiting rail revenues under a Revenue Adequacy Constraint and that system-wide revenue adequacy is a goal to promote, not a ceiling to restrict revenues.[4] BNSF argued that the revenue adequacy yardstick is inappropriate for use as a rate regulation tool because it tells nothing about the complex markets in which BNSF operates.[5] Union Pacific Railroad ("UP") observed that its improved financial health resulted from competitive conduct that had benefited customers,

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[3] CSXT Op. Comments, *R.R. Revenue Adequacy*, STB Docket No. Ex Parte 722 (filed Sept. 5, 2014).

[4] AAR Op. Comments, *R.R. Revenue Adequacy*, STB Docket No. Ex Parte 722 (filed Sept. 5, 2014). The ICC long-ago determined that the appropriate measure for determining revenue adequacy "should be a rate of return equal to the cost of capital." *Bessemer & Lake Erie R.R. Co. v. ICC*, 691 F.2d 1104, 1110 (3d Cir. 1982). In doing so, however, the ICC acknowledged that "[s]uch a standard is widely agreed to be the *minimum* necessary to attract and maintain capital in the railroad, or any other, industry." *Standards for R.R. Revenue Adequacy*, 364 I.C.C. 803, 809 (1981) (emphasis added). The Third Circuit upheld the single ROI standard adopted by the agency, echoing that the cost of capital is a standard that is "widely agreed to be the *minimum* necessary to attract and maintain capital in the railroad, or any other, industry." *Bessemer*, 691 F.2d at 1110 (quoting *Standards*, 364 I.C.C. at 809) (emphasis added).

[5] BNSF Op. Comments, *Railroad Revenue Adequacy*, STB Docket No. Ex Parte 722 (filed Sept. 5, 2014).

validating continued regulation based on competitive market principles.[6] Sound public policy, UP reasoned, requires that railroads have the incentive and the opportunity to earn returns in excess of their cost of capital to promote optimal investment in innovation and growth. And Norfolk Southern Railway ("NS") argued that the annual revenue adequacy findings were plagued with measurement errors, including not using replacement costs, unwisely excluding billions in deferred taxes from the investment base, and failing to measure revenue adequacy over the average life of railroad investments.[7] More fundamentally, NS argued that an independent, top-down Revenue Adequacy Constraint on rates would stifle innovation, productivity and investment.

Not surprisingly, shippers had their own divergent opinions on the meaning of revenue adequacy and how to apply a Revenue Adequacy Constraint. Shipper interests largely assumed the railroads have attained the status of revenue adequacy, without acknowledging either the flaws in the STB's annual calculations that overstate rail returns or the decades in which railroad were found revenue inadequate, even under the flawed methodology. They also avoided any serious analysis of the meaning of revenue adequacy and its economic and policy implications. Instead, they used the proceeding as an opportunity to seize upon improved railroad financial performance as a pretext for imposing new regulatory limits on railroad pricing. For example, Arkansas Electric Cooperative Corporation ("AECC") urged the Board to attempt to regulate firm-wide revenues in a manner that hearkens back to discredited rate-of return regulation for public utilities.[8] The

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[6] UP Op. Comments, *R.R. Revenue Adequacy*, STB Docket No. Ex Parte 722 (filed Sept. 5, 2014).

[7] NS Op. Comments, *R.R. Revenue Adequacy*, STB Docket No. Ex Parte 722 (filed Sept. 5, 2014).

[8] *See*, AECC Op. Comments, *R.R. Revenue Adequacy*, STB Docket No. Ex Parte 722, at 22-24 (filed Sept. 5, 2014) (proposing a percent reduction approach that would calculate refunds for shippers with rates above 180% R/VC to eliminate "supracompetitive earnings").

Alliance for Rail Competition ("ARC") sought rate roll-backs based on the same outdated rate-of-return regulation principles.[9] Other shippers suggested that the Board could apply rate freezes[10] and rate caps[11] to implement a Revenue Adequacy Constraint. Many urged the STB to explore these issues in more depth in a rulemaking proceeding.

In reply comments, the AAR observed that these shipper interests failed to present any economic rationale or supporting expert testimony for the arbitrary methodologies they proposed.[12] They presented no economic justification for going down a regulatory path that has been largely abandoned even in industries where rate of return regulation might otherwise be economically appropriate. They failed to explain how attempts to limit a railroad's firm-wide revenues to a prescribed "revenue adequate" level could be rationally applied when most traffic (and most revenue) is not even subject to regulation. And two notable economists explained that arbitrary price controls would override market signals and harm the public interest by distorting and inhibiting railroad incentives to make investments that reduce costs, improve service, and expand capacity.[13]

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[9] *See, e.g.*, ARC, *et al.* Op. Comments, *R.R. Revenue Adequacy*, STB Docket No. Ex Parte 722, at 24 (filed Sept. 5, 2014) ("ARC Op. Comments") (urging the Board to return to shippers the "excess revenues" earned by a revenue adequate railroad).

[10] *See* Comments Submitted by Concerned Shipper Associations, *R.R. Revenue Adequacy*, STB Docket No. Ex Parte 722, at 13 (filed Sept. 5, 2014) (proposing that revenue adequate railroads may not raise rates on market dominant traffic except to account for inflation); Joint Op. Comments of the Western Coal Traffic League, *et al.*, *R.R. Revenue Adequacy*, STB Docket No. Ex Parte 722, at 30-33 (filed Sept. 5, 2014) (same).

[11] *See* ARC Op. Comments at 33 (advocating a "Two-Benchmark" approach that would apparently cap rates for market dominant traffic at RSAM); Comments Submitted by Olin Corp., *R.R. Revenue Adequacy*, STB Docket No. Ex Parte 722, at 7-9 (filed Sept. 5, 2014) (advocating an R/VC rate cap at an unspecified level).

[12] AAR Rep. Comments, *R.R. Revenue Adequacy*, STB Docket No. Ex Parte 722,(filed Nov. 4, 2014).

[13] *See* Rep. V.S. Kalt, AAR Rep. Comments at 24-26; Rep. V.S. Murphy, UP Rep. Comments, *R.R. Revenue Adequacy*, STB Docket No. Ex Parte 722, at 8-18 (filed Nov. 4, 2014).

This collection of conflicting testimony has been submitted to the STB, which has indicated that it plans to hold a public hearing on these issues. *See* Notice at 5.

ARGUMENT

The STB should dismiss the allegation that the challenged rate is unreasonable under the Revenue Adequacy Constraint for three reasons. First, Consumers has provided no reasonable grounds to investigate such an unsubstantiated claim. Even under the Board's imprecise measurement of revenue adequacy—which is not based on replacement costs as strongly recommended by numerous eminent economists—CSXT has not earned a ROI equal to the industry average cost of capital *for almost 30 years*. In fact, the present value of the amount by which CSXT has under-recovered over the last fifteen years ($30.1 billion) exceeds CSXT's 2013 net book value ($17.1 billion) by approximately 75%.

Second, dismissal will simplify this dispute. It will permit the parties and the Board to focus on critical and complex questions, such as:

- *Market Dominance*: whether CSXT has market dominance over the transportation at issue especially given the plant's location in Port Sheldon Township and its direct lake access;
- *Chicago Congestion*: how to judge the reasonableness of the rate under the SAC test for transportation through the seriously congested Chicago gateway; and
- *Light Density Line*: how to account for the cross-subsidy issues presented by the significant mileage of light-density lines from northern Indiana all the way to the Campbell generating plant.

Third, the STB should not attempt to define the continuing validity (if any) of the Revenue Adequacy Constraint in an individual case while it is considering the issues raised in Ex Parte 722. In Ex Parte 722, the agency received public comments advocating a wide range of options. It would be poor public policy to try to grapple with those complex issues in any individual case, given the broad implications for the entire freight rail industry. But it would be nonsensical to craft standards of industry-wide implication here, where the STB has found CSXT revenue inadequate every year for almost 30 years.

I. There are no reasonable grounds to investigate the challenged rate under the Revenue Adequacy Constraint.

In reviewing a motion to dismiss, the STB will view all alleged facts in the light most favorable to the complainant. But in accordance with 49 U.S.C. § 11701(b) and 49 C.F.R. § 1111.1(a), Consumers must, at a minimum, state reasonable grounds for an investigation. *See S. Miss. Elec. Power Ass'n v. Norfolk S. Ry. Co.*¸ STB Docket No. NOR 42128 (served April 21, 2011) (dismissing shipper's unsupported claim that certain railroad charges and practices were unreasonable). While a complainant need not plead every factual detail that might be relevant, the statute and regulations require that a complaint provide some *reasonable* explanation of the facts underlying each allegation in the complaint.

Here, Consumers has offered no reasonable grounds for a complex investigation of the challenged rate under the Revenue Adequacy Constraint. The annual revenue adequacy findings are understating CSXT's true revenue needs to maintain and replace its existing network because the findings are based on depreciated historic costs and not the current value of CSXT's network. Yet even under the Board's conservative annual determinations, CSXT has been revenue inadequate in every year of the 28 years for which such a determination has been made. *See* **Table 1**, *infra*.

Consumers ignores these agency findings entirely. Nor does Consumers offer any other factual basis to support its allegation that CSXT is somehow revenue adequate. In short, as the complaint does not identify a scintilla of support for its bare revenue adequacy allegation, it plainly does not provide the specificity required by § 1111.1(a).

Indeed, CSXT's revenues have fallen $30 billion short of "revenue adequacy" on a present value basis over the past 15 years according to the Board's annual findings.[14] **Table 2** below reveals the annual pre-tax revenue adequacy shortfall under the STB's prior findings. CSXT adjusted the revenue shortfalls to current values using the industry average cost of capital, the same index used by the STB in its discounted cash flow analysis for SAC cases. The result is a massive, multi-billion dollar shortfall.

[14] CSXT offers a 15-year analysis of its revenue adequacy shortfall simply as a matter of convenience and data availability. It should not be interpreted as a concession by CSXT that a 15-year analysis period is the proper time frame for measuring revenue adequacy.

Table 2
Annual CSXT Revenue Adequacy Shortfall
(Dollars in 000s)

Year	CSXT ROI	Cost of Capital	Revenue Adequacy Overage/ (Shortfall)[15]	Present Value Overage/ (Shortfall)[16]	Cumulative Overage/ (Shortfall), 2013$
2013	10.00%	11.32%	($368,181)	($368,181)	($368,181)
2012	10.81%	11.12%	($84,130)	($93,569)	($461,750)
2011	11.54%	11.57%	($7,478)	($9,261)	($471,011)
2010	10.85%	11.03%	($46,490)	($64,078)	($535,089)
2009	7.30%	10.43%	($814,006)	($1,242,332)	($1,777,422)
2008	9.34%	11.75%	($600,221)	($1,017,627)	($2,795,049)
2007	7.61%	11.33%	($897,724)	($1,697,657)	($4,492,706)
2006	8.15%	9.94%	($411,455)	($860,823)	($5,353,528)
2005	6.32%	12.20%	($1,328,230)	($3,086,306)	($8,439,834)
2004	4.43%	10.10%	($1,162,127)	($3,001,298)	($11,441,133)
2003	4.00%	9.40%	($1,013,335)	($2,872,176)	($14,313,309)
2002	5.20%	9.80%	($840,794)	($2,611,906)	($16,925,215)
2001	4.60%	10.20%	($1,019,941)	($3,485,258)	($20,410,472)
2000	3.60%	11.00%	($1,352,338)	($5,110,898)	($25,521,371)
1999	3.80%	10.80%	($1,086,438)	($4,553,530)	**($30,074,901)**

The ICC observed "that revenue adequacy is a long-term concept that calls for a company, over time, to average [a] return on investment equal to its cost of capital." *Coal Rate Guidelines*, 1 I.C.C.2d at 536. What "long-term" means is undefined, however. In 1985, the ICC stated that it "will not attempt to decide here what period of time may be sufficiently representative in every case. This will vary depending upon the carrier's traffic base and the relative stability of the economy at the time." *Id.* at 536, n.37. Not surprisingly, the meaning of "long-term" is a matter of some debate in Ex Parte 722. The railroad industry has urged the Board to look to the economic life of railroad assets, while shippers have advocated a far shorter time

[15] Overage/(Shortfall) restated on a pre-tax basis consistent with STB's RSAM calculation. *See Simplified Standards for Rail Rate Cases—Taxes in Revenue Shortfall Allocation Method*, STB Docket No. Ex Parte 646 (Sub-No. 2) (served Jan. 22, 2010) (adopting railroad-specific average state tax rates for each Class I railroad for use in the RSAM calculation).

[16] Present value calculated by compounding at industry-average cost of capital.

period not to exceed a business cycle. Of note, however, Professor Cornell cautioned against using a business cycle to gauge revenue adequacy. He explained that "any period of time short of the full life of railroad assets is too short to make an accurate financial assessment." Cornell V.S., NS Op. Comments at 28. He also explained that there are several problems with trying to measure revenue adequacy just over the average business cycle. "Despite the name," Professor Cornell explained, "business cycles are not cyclical; rather, they are random in time periods they span, in the magnitudes of their peaks and valleys, and in their rates of growth and decline." *Id.* at 27. "For investors to be willing to finance railroad operations, they must expect that they will be able to earn their cost of capital, on average, *over the life of the investment*." *Id.* at 31 (emphasis added).

The Board need not (and should not) resolve the dispute over the proper time frame for "long-term revenue adequacy" in this case. Under *any* time frame, CSXT has fallen below the agency's measurement of revenue adequacy. Moreover, if the Board examined revenue adequacy just over an assumed ten-year business cycle, CSXT's revenues would fall $11.4 billion short of earning a ROI equal to or exceeding the industry average cost of capital during the period from 2004 to 2013.[17]

Agency precedent does permit a party to challenge these annual findings in a particular adjudication. *See, e.g., Bituminous Coal – Hiawatha, UT, to Moapa, NV*, 6 I.C.C.2d 1, 7 n.24 (1989); *R.R. Revenue Adequacy – 1987 Determination*, 4 I.C.C.2d 731, 731 (1988). The STB has not yet elaborated on what kinds of "probative evidence" it will permit in an individual case (yet another issue framed in Ex Parte 722). But the ICC announced that principle against a backdrop of withering attacks on the accuracy of its annual findings. As the ICC could find no practical way to

[17] In *Major Issues in Rail Rate Cases*, STB Docket No. Ex Parte 657 (Sub-No. 1), at 62 (served Oct. 30, 2006), *aff'd sub nom. BNSF v. STB*, 526 F.3d 770 (D.C. Cir. 2008), the agency adopted a ten-year horizon as sufficient to cover an average business cycle.

place its annual finding on a sounder economic foundation (*i.e.*, replacement costs), the ICC offered parties in individual cases the chance to submit probative evidence on the true and accurate ROI for the defendant carrier. Consumers could, in theory then, challenge the true value of CSXT's assets used to gauge revenue adequacy.[18] But the current discrepancy between book values and replacement costs means that the STB's annual findings are almost certainly overstating CSXT's actual ROI.[19]

In the end, there must be some minimum showing required before the Board will permit this kind of burdensome allegation to proceed. The agency's annual findings provide that gate-keeping function. CSXT has fallen $30 billion short of revenue adequacy over the last 15 years. In these circumstances, Consumers bears a heavy burden to support its assertion of revenue adequacy. Its conclusory complaint allegation falls woefully short of that mark, and the allegation that the challenge rate is unreasonable under the Revenue Adequacy Constraint should be dismissed.

II. Dismissing the revenue adequacy allegation will reduce the complexity of this dispute, conserve party and Board resources, and promote judicial economy.

This case involves the transportation of coal through the most congested gateway in North America: Chicago. As described in the complaint, CSXT receives trainloads of coal at an interchange with BNSF in the middle of Chicago, near 22nd Street. These slow-moving coal trains then traverse through the heart of Chicago, competing for limited capacity with commuter, passenger and other freight trains. The Board is acutely aware of the service challenges facing the Chicago gateway and

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[18] However, neither CSXT nor Consumers can challenge either (1) the historical cost-of-capital findings or (2) the agency's long-standing decision to gauge revenue adequacy on a single ROI standard. This would constitute an improper collateral attack on prior agency rulemakings.

[19] Official government data collected by the Bureau of Economic Analysis (BEA) reveals that railroad ROI under the proper replacement costs measurement falls over 50 percent below the ROI based on historic costs. *See* Brinner V.S, AAR Op. Comments at 24.

the need for greater rail infrastructure investment to meet the rising demand for limited rail capacity in that region. *United States Rail Service Issues—Performance Data Reporting*, STB Docket No. Ex Parte 724 (Sub-No. 4), at 6 (served Dec. 30, 2014) ("The Board continues to recognize the longstanding importance of Chicago as a hub in national rail operations and the impact that recent extreme congestion in Chicago has had on rail service in the Upper Midwest and nationwide.").

This case will therefore be complicated enough without unfounded Revenue Adequacy claims. It will be the first rate dispute to spotlight Chicago congestion issues and explore how a carrier can permissibly engage in congestion pricing under the SAC constraint. And there will be other contentious debates. For example, the Campbell plant is located in Port Sheldon Township and has direct lake access. This will inevitably raise questions about whether feasible and competitive alternatives exist from lake vessels. Moreover, while the challenged movement starts in the congested Chicago gateway, it ends by traversing over 100 miles of light density line to reach the Campbell plant. This case will therefore also present questions about the proper application of *PPL*[20] and *Otter Tail*[21] cross-subsidy tests, given the long, light-density line needed to serve the Campbell plant.

Dismissal of the unfounded Revenue Adequacy allegations will simplify this dispute. It will help limit discovery, focus the parties on the difficult issues in this case, and promote a private-sector resolution of this dispute. Dismissal will also help conserve scarce agency resources, for an agency that is already burdened by a substantial workload. And if the Board does not dismiss the Revenue Adequacy allegation, it is likely that other railroads and shippers may feel compelled to seek to intervene in this dispute, to provide their unique voice and perspective on this

[20] *PPL Montana, LLC v. Burlington N. & S.F. Ry.*, STB Docket No. NOR 42054 (served Aug. 31, 2004), *aff'd sub nom. PPL Montana, LLC v. STB*, 437 F.3d 1240 (D.C. Cir. 2006).

[21] *Otter Tail Power Co. v. BNSF Ry.,* STB Docket No. *NOR 42071*, (served Jan. 27, 2006), *aff'd sub nom. Otter Tail Power Co. v. STB*, 484 F.3d 959 (8th Cir. 2007).

contentious issue. Such additional complexity is wholly unwarranted given the STB's findings that CSXT has been revenue inadequate for almost three decades.

III. Given the ongoing proceeding in Ex Parte 722, the Board should not try to develop the proper parameters of the Revenue Adequacy Constraint in an individual case.

The Board has prudently begun to explore the role (if any) for the Revenue Adequacy Constraint in modern railroad rate regulation. Notice at 4. The agency correctly observed that "[i]n the last several years, questions have been raised regarding the agency's methodology for determining revenue adequacy and whether it appropriately measures the financial condition of the railroad industry." *Id*. It therefore cast a wide net for public input. In Ex Parte 722, the Board itself raised fundamental questions about the continuing viability of the constraint, whether alternatives exist, how to properly measure revenue adequacy, and what it means to be revenue adequate.

As noted above, the public reaction was rich in content and diverse in viewpoints. Some shippers seem to view the Revenue Adequacy Constraint as yet another simplified rate reasonableness alternative to the SAC test. However, they do not share a common perspective on how to measure or apply this constraint. In contrast, the railroad community objects to the imposition of yet another simplified rate constraint. The railroads observe that (1) revenue adequacy should be a goal, not a cap on revenues; (2) measurement errors render the system-wide annual revenue adequacy findings useless as a standard to gauge the reasonableness of an individual rate; and (3) imposing a revenue adequacy cap would stifle innovation, productivity, and investments when there is a wide-ranging public outcry for greater private investment to meet the national demand for freight rail transportation. Given the measurement and incentive flaws, many railroads have suggested abandoning the antiquated constraint altogether and instead working to improve the SAC process.

It would be a mistake for the STB to evaluate the parties' evidence and arguments on what is an issue of much broader industry-wide significance, as evidenced by the pendency of Ex Parte 722. In general, "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974). But the Board has properly observed that where a decision would affect many companies that are not a party to the case, it may be an abuse of discretion to proceed via adjudication. *Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. & S.F. Ry.* Co, STB Docket No. 42057 (served June 8, 2004), *aff'd sub nom. BNSF Ry. v. STB*, 453 F.3d 473 (D.C. Cir. 2006). As the Supreme Court cautioned, "there may be situations where [an agency's] reliance on adjudication would amount to an abuse of discretion." *Bell Aerospace*, 416 U.S. at 294; *see also Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 335 (2002) ("Such [ ] important change[s] in the law should be the product of legislative rulemaking rather than adjudication"). Indeed, there is "near unanimity" between judges and academics in "extolling the virtues of the rulemaking process over the process of making 'rules' through case-by-case adjudication." 1 Pierce, Administrative Law (4th ed. 2002) § 6.8, p. 368.

Here, numerous parties spoke in Ex Parte 722 presenting their perspectives on a number of complex issues surrounding the Revenue Adequacy Constraint. If the Board permits this revenue adequacy claim to remain in this case, all the complex issues will remain to be decided, but most of the interested parties would be silenced. In general, permitting a complainant to try to define the proper scope of this constraint in an individual case would be a public policy mistake. It would, however, be a clear abuse of discretion to develop standards in this case. The ICC and STB has found CSXT revenue inadequate every year for 28 years, and, by the agency's own metrics, CSXT has fallen at least $30 billion short of revenue adequacy over the past 15 years. In the face of that overpowering evidence of revenue *inadequacy*, the Board should dismiss the unsupported claim and instead should explore the continued viability of the Revenue Adequacy Constraint in EP 722.

CONCLUSION

For the reasons set forth above, the Board should dismiss the allegation that the challenged rate is unreasonable under the Revenue Adequacy Constraint.

Respectfully submitted,

/s/ Raymond A. Atkins

G. Paul Moates
Raymond A. Atkins
Paul A. Hemmersbaugh
Matthew J. Warren
Hanna M. Chouest
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
(202) 736-8711 (fax)

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

Counsel to CSX Transportation, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March 2015, I served a copy of the foregoing Motion to Dismiss Revenue Adequacy Claim upon counsel for complainant Consumers Energy Company via electronic mail and U.S. first-class mail, postage prepaid, at the address below:

Catherine M. Reynolds
Senior Vice President and General Counsel
Kimberly C. Wilson
Supervisory Assistant General Counsel
Consumers Energy Company
One Energy Plaza
Jackson, Michigan 49201

Kelvin J. Dowd
Daniel M. Jaffe
Christopher A. Mills
Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036

Jake Thorn