

PUBLIC VERSION
BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
June 24, 2016
Part of
Public Record

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

BRIEF OF COMPLAINANT
CONSUMERS ENERGY COMPANY

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Dated: June 24, 2016

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ACRONYMS

The following acronyms are used:

ATC	Average Total Cost
BNSF	BNSF Railway Company
CAGR	Compounded Annual Growth Rate
CERR	Consumers Energy Railroad
CP	Canadian Pacific Railway
CSXIT	CSX Intermodal Terminals, Inc.
DCF	Discounted Cash Flow
IHB	Indiana Harbor Belt Railroad
MDOT	Michigan Department of Transportation
MSRR	Michigan Shore Railroad
NS	Norfolk Southern Railway Company
RCAF-A	Rail Cost Adjustment Factor, adjusted for productivity
R/VC	Revenue-to-Variable Cost
RTC	Rail Traffic Controller Model
SAC	Stand-Alone Cost
SARR	Stand-Alone Railroad
UP	Union Pacific Railroad Company
URCS	Uniform Railroad Costing System

CASE GLOSSARY

The following short form case citations are used:

<i>AEPCO 2011</i>	<i>Ariz. Elec. Power Coop., Inc. v. BNSF Ry. & Union Pacific R.R.</i> , STB Docket No. 42113 (STB served Nov. 22, 2011)
<i>Coal Rate Guidelines or Guidelines</i>	<i>Coal Rate Guidelines, Nationwide</i> , 1 I.C.C.2d 520 (1985), <i>aff'd sub nom. Consolidated Rail Corp. v. United States</i> , 812 F.2d 1444 (3d Cir. 1987)
<i>CP&L</i>	<i>Carolina Power & Light Co. v. Norfolk S. Ry.</i> , 7 S.T.B. 235 (2003)
<i>Duke/CSXT</i>	<i>Duke Energy Corp. v. CSX Transp. Inc.</i> , 7 S.T.B. 402 (2004)
<i>Duke/NS</i>	<i>Duke Energy Corp. v. Norfolk S. Ry.</i> , 7 S.T.B. 89 (2003)
<i>DuPont</i>	<i>E.I. DuPont De Numours and Co. v. Norfolk S. Ry.</i> , Docket No. 42125 (STB served March 24, 2014, updated Oct. 3, 2014)
<i>Ex Parte No. 715</i>	<i>Rate Regulation Reforms</i> , Ex Parte No. 715 (STB served July 18, 2013)
<i>FMC</i>	<i>FMC Wyo. Corp. v. Union Pac. R.R.</i> , 4 S.T.B. 699 (2000)
<i>Major Issues</i>	<i>Major Issues in Rail Rate Cases</i> , Ex Parte No. 657 (Sub-No. 1) (STB served Oct. 30, 2006)
<i>M&G</i>	<i>M&G Polymers USA, LLC v. CSX Transp., Inc.</i> , NOR 42123 (STB served Sept. 27, 2012, updated Dec. 7, 2012)
<i>Nevada Power II</i>	<i>Bituminous Coal - Hiawatha, Utah to Moapa, Nevada</i> , 10 I.C.C. 2d 259 (1994)
<i>Otter Tail</i>	<i>Otter Tail Power Co. v. BNSF Ry.</i> , Docket No. 42071 (STB served Jan. 27, 2006)
<i>Sunbelt</i>	<i>Sunbelt Chlor Alkali Partnership v. Norfolk S. Ry.</i> , Docket No. 42130 (STB served June 20, 2014)
<i>TMPA</i>	<i>Texas Mun. Power Agency v. Burlington N. & Santa Fe Ry.</i> , 6 S.T.B. 573 (2003)

- TPI* *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, Docket No. 42121 (Complaint filed May 3, 2010)
- WFA I* *Western Fuels Ass'n, Inc. & Basin Electric Power Coop. v. BNSF Ry.*, STB Docket No. 42088 (STB served Sept. 10, 2007)
- WFA II* *Western Fuels Ass'n, Inc. & Basin Electric Power Coop. v. BNSF Ry.*, Docket No. 42088 (STB served Feb. 18, 2009)
- WPL* *Wisconsin Power & Light Co. v. Union Pac. R.R.*, 5 S.T.B. 955 (2001)
- WTU* *West Tex. Utils. Co. v. Burlington N. R.R.*, 1 S.T.B. 638 (1996), *aff'd sub nom. Burlington N. R.R. v. STB*, 114 F.3d 206 (D.C. Cir. 1997)

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**BRIEF OF COMPLAINANT
CONSUMERS ENERGY COMPANY**

Complainant, Consumers Energy Company (“Consumers”), submits this Brief¹ in support of its Complaint against Defendant, CSX Transportation, Inc. (“CSXT”) for prescriptive rate relief and reparations for past overcharges (including interest), pursuant to 49 U.S.C. §§ 10701, 10704 and 11704.

As attested to by the elected representatives of the citizens and electric ratepayers of the State of Michigan – including both United States Senators, thirteen (13) Members of the U.S. House of Representatives, and the Attorney General of the State – the Board is called in this proceeding to act firmly in the public interest and enforce U.S. rail transportation policy “to maintain

¹ In accordance with the Board’s June 3, 2016 Order in this proceeding, this Brief summarizes the evidence of record that supports the relief requested, does not exceed sixty (60) pages in length, and does not present any new or revised evidence.

reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital...”². The Board’s regulatory authority represents the only viable option available to Consumers to control the cost of coal transportation to its J.H. Campbell Generating Station.

The evidence presented by Consumers in this case establishes that CSXT possesses market dominance³ over the transportation of coal to Campbell, and that the rates at issue (which are established in Tariff CSXT-13952) substantially exceed 180% of the variable cost of service.⁴ Therefore, the Board has jurisdiction to regulate those rates. The evidence also establishes that the challenged rates are unreasonably high under both the SAC and Revenue Adequacy Constraints of the *Coal Rate Guidelines*, and therefore are unlawful under 49 U.S.C. § 10701(d). Based on the record assembled in this proceeding, Consumers is entitled to the prescription of just and reasonable rates under 49 U.S.C. § 10704, and an award of damages (including interest) pursuant to 49 U.S.C. § 11704(b) for all amounts charged by CSXT for coal transportation service to Campbell since January 1, 2015, in excess of the lawful maximum rates.

² 49 U.S.C. § 10101(6).

³ Market dominance is defined in 49 U.S.C. § 10707.

⁴ See 49 U.S.C. § 10707(d)(1).

From the First Quarter of 2015 through the First Quarter of 2016, the lawful maximum rates for CSXT service to Campbell are as follows:

<u>Quarter</u>	<u>Maximum Rate Per Ton</u>
1Q2015	\$10.22
2Q2015	\$10.36
3Q2015	\$10.29
4Q2015	\$10.15
1Q2016	\$11.51

Commencing with the Second Quarter of 2016 and extending through December 31, 2024, the lawful maximum rates for the subject service are the *lesser* of (1) the rate equivalents to the R/VC ratios set forth below, or (2) the Revenue Adequacy maximum rate.⁵

<u>Year</u>	<u>Maximum R/VC Ratio</u>
2016	419.9%
2017	310.6%
2018	325.4%
2019	327.3%
2020	302.3%
2021	298.8%
2022	280.3%
2023	282.0%
2024	252.4%

The Board' final decision in this proceeding should grant in full the relief requested by Consumers.

⁵ The Revenue Adequacy maximum rate for any quarter is { } per ton, adjusted by the net increase (if any) in the RCAF-A from the First Quarter of 2015 to the subject quarter.

I.

CSXT POSSESSES MARKET DOMINANCE OVER COAL TRANSPORTATION TO CAMPBELL

There is no dispute that the challenged rates produce R/VC ratios that vastly exceed the 180% jurisdictional threshold prescribed by 49 U.S.C. § 10707(d)(1).⁶ The “quantitative” element of the market dominance test clearly is met.

Longstanding and consistent precedents addressing the matter of “qualitative” market dominance clearly establish that the basic test of “effective competition” is whether “there are any alternatives sufficiently competitive (alone or in combination) to bring market discipline to [the railroad’s] pricing.” *WTU*, 1 S.T.B. at 645, quoting *Metro. Edison Co. v. Conrail, Inc.*, 5 I.C.C. 2d 385, 410 (1989). It is not sufficient simply to look at whether a physically possible alternative does or could exist, for “[e]ven where feasible transportation alternatives are shown to exist, those alternatives may not provide ‘effective competition.’” *DuPont* at 17. To be “effective,” any purported alternative⁷ must

⁶ In its Reply, CSXT raised a single point of contention regarding Consumers’ Opening Evidence on variable costs. On Rebuttal, Consumers demonstrated that CSXT’s claim is without merit, and that its proposed adjustment to the Phase III URCS calculation process should be rejected. *See* Consumers Rebuttal at II-2-5.

⁷ It also is well-established that the only alternative(s) to be considered are those that represent direct transportation competition between the origin(s) and destination(s) to which the challenged rates apply. *DuPont* at 16; *Minn. Power, Inc. v. Duluth, Missabe & Iron Range Ry.*, 4 S.T.B. 64, 66-67 (1999). In this proceeding, the inquiry thus is limited to whether an operationally feasible and economically competitive transportation alternative exists for the movement of coal from the Chicago area to Campbell. *See* Consumers Rebuttal at II-10.

be proved to act as an actual, reasonable constraint on a railroad's pricing. *Ariz. Pub. Serv. Co. v. United States*, 742 F.2d 644, 650-651 (D.C. Cir 1984); *McCarty Farms, Inc. v. Burlington N. Inc.*, 3 I.C.C. 2d 823, 832 (1987).

In this case, CSXT claims that it faces effective intermodal competition for its transportation service to Campbell. It bases this claim not on the actual existence of an alternative transportation system, but on the argument that with a sufficient capital investment, Consumers *could create* one of two (2) new options: a lake vessel movement from the capacity-limited KCBX Terminal to an as-yet unbuilt coal unloading platform in Pigeon Lake; or a vessel move from KCBX to the Cobb dock at Muskegon, MI, where coal would be transloaded into railcars for delivery to Campbell by the MSRR. The Board has never accepted such an argument in a case under the *Coal Rate Guidelines*, and as Consumers' Rebuttal Evidence clearly demonstrates, CSXT has utterly failed to present a justification for setting new precedent.

A. CSXT's Alleged Transportation Alternatives Are Not Operationally or Economically Feasible

Consumers' Rebuttal Evidence demonstrates with clarity that the intermodal "alternatives" hypothesized by CSXT and its consultants suffer from design flaws and other obstacles that make them physically infeasible. Even if these disqualifying defects are assumed away, CSXT's consultants have dramatically understated the costs of these alleged "options."

As a threshold matter, Consumers has shown that consistent with precedent⁸ and basic notions of utility prudence, the kinds of unproven projects that CSXT theorizes – which require capital investments of up to { } – could only be advanced rationally if they offered an *assurance* of the actual benefits of effective competition. This, in turn, requires that the hypothetical alternative(s) offer the ability to entirely replace CSXT for coal shipments to Campbell. However, it is beyond dispute that this cannot be accomplished using either of CSXT’s Chicago-based water “options,” due to the lack of coal storage capability at the KCBX Terminal and Consumers’ unavoidable contractual obligations to its origin rail carrier and coal supplier to tender and receive shipments { }.⁹ These facts establish the operational infeasibility of CSXT’s hypothetical alternatives.

If it is assumed *arguendo* that Consumers would need to replace CSXT for only a portion¹⁰ of its Campbell coal requirements, the evidence still shows that the Direct Water and Cobb Rail systems proposed by CSXT are operationally impractical. The fatal flaws in CSXT’s plans include:

⁸ *TMPA*, 6 S.T.B. at 584 and n. 11.

⁹ Consumers Rebuttal at II-21-30.

¹⁰ CSXT’s Reply presumes that 75% of Campbell’s annual requirements could be directed to one of its intermodal “options.” As Consumers’ expert Dr. Barbaro shows, however, even if one assumes that CSXT’s hypothetical alternatives are viable, the actual maximum potential diversion percentage is less than 50%. *See* Barbaro Rebuttal Report at 52-53.

1. A gross overestimate of the available transloading capacity at KCBX terminal.
2. A Direct Water unloading scenario that omitted essential facilities needed to stabilize vessels during the unloading process.
3. An unsupported assumption that articulated tug barges would be available for use in the Direct Water plan, when in actuality there are none in service on the Great Lakes that meet CSXT's consultants' design specifications.
4. Assumptions of unrealistic vessel transit times, unloading facility operating times, and rail-vessel coordination at KCBX, all of which adversely affect hypothetical vessel operations.
5. An assumption that 50,000 ton capacity vessels would be used for the Cobb Rail plan, when KCBX lacks the capability of handling such vessels.¹¹
6. Ignorance of the terms of CSXT's own lease agreement with the MSRR, {

} essential to the Cobb Rail plan.¹²

Separately, an analysis of CSXT's consultants' cost estimates, principally undertaken by Dr. Barbaro, shows that even if one assumes away all of the operational obstacles to CXST's proposed "options," the carrier's consultants have seriously underestimated the costs associated with each plan, and thus

¹¹ See Consumers Rebuttal at II-58; Barbaro Rebuttal Report at 84-85.

¹² See Consumers Rebuttal at II-39-42; II-54-56; Barbaro Rebuttal Report at 53-56, 83-84.

significantly overstated their value as potential competitive threats to CSXT service to Campbell. For example:

1. CSXT's consultants assumed that CSXT would charge the same rate to haul as little as 25% of Campbell's annual requirements that it charges now to move 100%, ignoring clear evidence that the carrier in fact would charge a substantial premium on any undiverted tonnage.¹³

2. CSXT's consultants underestimated the amount of initial and annual dredging that its Direct Water plan would require in Pigeon Lake, and ignored entirely the costs of litigation that would be virtually certain to arise from environmental groups and other expected opponents of the project.

3. CSXT's consultants knowingly relied on an out-of-date estimate of transloading costs at the KCBX Terminal, understating the actual costs by more than 100%.

4. CSXT's consultants underestimated the cost of vessel transportation from the KCBX Terminal under both the Direct Water and Cobb Rail plans, and left out or understated elements of operating costs for their proposed Pigeon Lake unloading platform, including vessel and rail demurrage costs.

5. CSXT's consultants omitted costs for essential rail facilities in connection with their Cobb Rail plan, and under-designed the type of conveyor that would be needed to transfer coal from vessels to railcars.

¹³ See Consumers Rebuttal at II-49-52; *Ariz. Pub. Serv. Co.*, 742 F.3d at 654; *Ariz. Pub. Serv. Co. v. A.T. & S.F. Ry. Co.*, 2 S.T.B. 367, 377 n. 23 (1997).

6. CSXT’s consultants underestimated costs for a new rail loadout at the Cobb site, by not accounting for modern controls, mandatory dust suppression, and other key features.

7. CSXT’s consultants failed to include any costs for land acquisition for the Cobb Rail plan, even though they acknowledged that it would be necessary.

8. CSXT’s consultants miscalculated Consumers’ cost of capital for both plans.¹⁴

Taken together, the cost understatements resulting from the many documented errors and omissions in CSXT’s consultants’ work total at least { } per ton for CSXT’s Direct Water plan, and at least { } per ton for the Cobb Rail “option.” At an actual cost of at least { } per ton and { } per ton,¹⁵ respectively, neither of CSXT’s proffered “alternatives” legitimately could be characterized as “effective to restrain [CSXT’s] rail rates to a reasonable level.” *McCarty Farms*, 3 I.C.C. 2d at 832.

B. CSXT’s Alternatives Would Face Crippling Regulatory and Permitting Obstacles

Board precedent recognizes that regulatory and/or permitting requirements, as well as the likelihood of community opposition to a construction project, can make a hypothetical “build” infeasible as a potential source of

¹⁴ See Consumers Rebuttal at II-46-52, II-58-60; Barbaro Rebuttal Report at 59-72, 87-90.

¹⁵ See Consumers Rebuttal at II-15; Barbaro Rebuttal Report at Figures 1-1 and 1-3.

effective competition. *See WTU*, 1 S.T.B. at 652. In this case, CSXT dismissed the extensive regulatory approval and permitting requirements that would apply to its proposed “alternatives” – particularly its Direct Water plan – as an inevitable part of “any new potential project,”¹⁶ and relied on misrepresentations of work performed in 2014 by consultants retained by Consumers¹⁷ to assume that any regulatory obstacles easily could be overcome. As Consumers showed in its Rebuttal Evidence, at least four (4) elements or assumptions underlying CSXT’s plans likely would prompt regulators to deny critical approvals:

1. CSXT assumed without foundation that because the 6.48 square mile wide, 75-foot deep Muskegon Lake has supported industrial vessel traffic for decades, the 225 acre, shallow and recreational Pigeon Lake could do the same.¹⁸

2. The mid-lake unloading platform designed by CSXT’s litigation consultants for installation in Pigeon Lake would violate locally-applicable zoning regulations, {
}.¹⁹

3. Both of CSXT’s proposed “alternatives” would involve dredging and discharge activities that are subject to numerous state, federal, and even

¹⁶ CSXT Reply at II-B-37.

¹⁷ The consultants who undertook that work – Messrs. Michael Petro and Paul Bovitz of Advisian, Inc. – submitted a Verified Statement as part of Consumers’ Rebuttal, detailing CSXT’s mischaracterizations of their analyses and conclusions, and correcting the record to show that CSXT’s attributions are without foundation. *See, e.g., Petro and Bovitz V.S.* at 25-27.

¹⁸ *See Consumers Rebuttal* at II-31-33.

¹⁹ *See id.* at II-44.

international rules. Included among the requirements are permits issued under Section 404 of the Clean Water Act, permits which likely would be denied for what the regulatory authorities would consider redundant transportation facilities.²⁰

4. The dredging in Pigeon Lake required for CSXT's Direct Water plan would impact almost 33% of a near-pristine lake bottom, and introduce toxic discharges and spoils into a historically non-commercial ecosystem. The extensive and entirely predictable landowner and community opposition to what would be a virtual "taking" of Pigeon Lake was ignored by CSXT, along with the obvious permitting challenges and associated litigation costs.

Consumers presented compelling and probative evidence of the permitting and environmental impact obstacles to constructing a vessel unloading facility in Pigeon Lake and developing the infrastructure needed for the Cobb Rail plan on Opening, which evidence effectively remains unchallenged by CSXT.

C. Competitive Market Forces Do Not Constrain CSXT's Campbell Coal Rates

Where genuine transportation competition exists, it is plainly reflected in a carrier's pricing practices. Likewise, the lack of any real rate response to an allegedly competitive threat is strong evidence that the "threat" is illusory. *See WTU*, 1 S.T.B. at 645; *Metro. Ed. Co.*, 5 I.C.C. 2d at 410. *See also*,

²⁰ *Id.* at II-44-45. As Consumers' expert Dr. Barbaro reported, a Section 404 permit just recently was denied for the proposed Gateway Pacific Terminal project in Washington State, based on adverse local waterway use impacts. *See* Barbaro Rebuttal Report at 45.

Ariz. Pub. Serv. Co., 742 F.2d at 650. In this case, four (4) different objective indicators point to a complete lack of competitive pressure on CSXT to moderate its pricing on Consumers' Campbell coal traffic.

First, CSXT responded to the failure of the parties' attempted contract negotiations in 2014 by increasing its Campbell line-haul rate by {
 } overnight. CSXT was neither threatened with, nor did it experience any loss of traffic or revenue as a result of this action.²¹ CSXT has claimed in this proceeding that concerns over potential intermodal competition have affected its rate decisions, but its actions say otherwise. By establishing the challenged rates without any real fear of traffic losses, CSXT effectively confirmed its market power. *McCarty Farms*, 3 I.C.C. 2d at 832; *Market Dominance Determinations and Consideration of Prod. Competition*, 365 I.C.C. 118, 129 (1981).

Second, as Consumers' evidence demonstrates, prior to the initiation of this case CSXT was charging Consumers approximately {
 } on a *nominal* basis for service from Chicago to Campbell than it was for service from the same interchange to Consumers' Karn-Weadock complex near Essexville, MI. The Campbell move is less than half the distance, and the route and other basic traffic and operating characteristics for the two (2) movements (including railcar ownership) are essentially the same. The determinative difference is that Karn-Weadock benefits from actual transportation competition.²²

²¹ See Consumers Opening at I-12.

²² See Consumers Rebuttal at II-71-72.

Third, application of the Board’s Limit Price Test confirms that the Direct Water and Cobb Rail “alternatives” proposed by CSXT do not represent effective competition.²³ CSXT’s collateral attacks on the Board’s use of this test have been raised and rejected previously,²⁴ and Consumers’ Rebuttal shows that the various “adjustments” that CSXT concocts in an effort to inflate its RSAM for purposes of this case are without merit.²⁵ As demonstrated therein, the limit price ratios applicable to the actual costs of CSXT’s proposed Direct Water and Cobb Rail alternatives are { }, respectively, several multiples of CSXT’s current RSAM of 265%.²⁶

Fourth, even if one was to exercise an extraordinary suspension of disbelief and take CSXT’s error and omission-ridden cost estimates at face value, its proposed “alternatives” reflect rates nearly equal to or even higher than the challenged rates, which exceed 500% of variable costs.²⁷ As the Board held in 2012 in *M&G*:

[I]f that same alternative serves only to prevent the railroad from charging rates above 500% of variable costs, then it is equally clear to us that the marketplace is not placing sufficient discipline on

²³ See Consumers Opening at II-53-54.

²⁴ See Consumers Rebuttal at II-62-64.

²⁵ *Id.* at II-64-68. Notably, however, if CSXT’s artificially and unrealistically low cost estimates for its two (2) “options” are corrected solely for the two (2) most obvious omissions and errors, the resulting limit price ratios are higher than even the hyper-inflated RSAMs produced by CSXT’s “adjustments.” *Id.* at II-68 n. 200.

²⁶ *Id.* at II-68.

²⁷ *Id.* at II-6.

the carrier's behavior and that Congress would have intended for the Board to investigate the reasonableness of those rates.

M&G at 17. *See also, FMC*, 4 S.T.B. at 718. Nothing on the record respecting CSXT's pricing at Campbell suggests the presence of any competitive constraints.

CSXT clearly enjoys market dominance over the coal transportation service that is subject to the challenged rates.

II.

THE CHALLENGED RATES ARE UNREASONABLE UNDER THE *GUIDELINES*' STAND-ALONE COST CONSTRAINT

The better evidence of record shows that under a proper application of the *Coal Rate Guidelines*' SAC constraint, the challenged CSXT rates are unreasonably high, in violation of 49 U.S.C. § 10701(d). Consumers is entitled to a Board order prescribing reasonable, lawful rates pursuant to 49 U.S.C. § 10704, and to an award of reparations (both principal and interest) under 49 U.S.C. § 11704(b). Consumers' Opening and Rebuttal Evidence, including the accompanying Exhibits and workpapers, detail the SAC calculations that support Consumers' requested rate relief. This portion of Consumers' Brief summarizes the key issues in dispute between the parties, and the reasons why they should be resolved in Consumers' favor.

A. The CERR Traffic and Revenues are Supported by Precedent and the Weight of Evidence

Consumers' case-in-chief with respect to the traffic and revenues that would be available to the hypothetical CERR was set forth in Part III-A of its

Opening Evidence. That evidence was updated and restated, with certain permissible adjustments in response to CSXT's Reply, in Part III-A of Consumers' Rebuttal Evidence.

1. **The CERR Traffic Group is Viable**

Consistent with precedent, Consumers assembled the CERR traffic group by identifying subsets of the "types and amounts of traffic moving over the [CSXT] system,"²⁸ which it rightfully then assumed were representative of the traffic that would move over the CERR in the future.²⁹ Invoking the right of a complainant under the *Guidelines* to seek to maximize operational efficiency as well as traffic density,³⁰ Consumers limited the traffic that would be handled by the CERR to traffic that both entered and exited the CERR system in intact trains, and excluded certain types of other traffic (such as TIH shipments).

CSXT's protestations notwithstanding, there was nothing unusual or inappropriate about the CERR traffic selection process. The *Guidelines* afford Consumers broad flexibility to select the traffic that the CERR would move,³¹ and nothing in the *Guidelines* or cases thereunder supports CSXT's argument that the CERR should be compelled to handle *all* of the traffic of any shipper that it elects to serve. As Consumers clearly showed in Rebuttal, for example, many approved

²⁸ *Sunbelt* at 5. See also, *AEPCO 2011* at 4.

²⁹ *AEPCO 2011* at 16; *CP&L*, 7 S.T.B. at 250.

³⁰ *Guidelines*, 1 I.C.C. 2d at 543. See also, *WFA I* at 15 ; *TMPA*, 6 S.T.B. at 612 (Morgan, commenting).

³¹ *Guidelines*, 1 I.C.C. 2d at 543-544. See also, *WTU*, 1 S.T.B. at 657; Consumers' Rebuttal at III-A-5-7.

traffic groups in previous cases included the coal traffic of third party utility shippers, while *excluding* their less profitable and/or less efficient limestone movements over the same lines.³² Consumers likewise demonstrated that no modifications to the ATC revenue allocation methodology affirmed in *Ex Parte No. 715* were needed or appropriate to reflect the CERR traffic group, as all off-line costs for, *e.g.*, assembling or breaking up trains prior to or after movement over the CERR would be fully covered by revenues assigned to the residual CSXT or other connecting carrier(s).³³

Equally without merit is CSXT's objection to the inclusion of certain petcoke trains in the CERR traffic group. As Consumers explained in painstaking detail in its Rebuttal Evidence,³⁴ the CSXT claim that the petcoke trains did not actually move over the lines replicated by the CERR in the real world is based on misrepresentations of the carrier's own train data. These data errors, which, *inter alia*, show trains moving inexplicably back-and-forth between pairs of stations³⁵ or occupying two (2) different tracks at the same time,³⁶ were only discernable after an exhaustive review of CSXT's Reply workpapers.³⁷ Taken together, they disqualify CSXT's case for exclusion of the petcoke trains.

³² See *WFA II* at 11; *TMPA*, 6 S.T.B. at 588; *WPL*, 5 S.T.B. at 967; *WTU*, 1 S.T.B. at 657.

³³ See Consumers Rebuttal at III-A-12-13.

³⁴ *Id.* at III-A-15-34.

³⁵ *Id.* at III-A-23.

³⁶ *Id.* at III-A-27.

³⁷ *Id.* at III-A-17.

The same holds true for CSXT’s third principal proposed CERR traffic group adjustment: the deletion of certain traffic that moves between Calumet Park and Curtis.³⁸ CSXT’s asserted ground is that an adjusted version of Consumers’ Opening transit time analysis showed an increase in transit time ({

}³⁹) as compared to CSXT’s own records. However, as Consumers showed on Rebuttal, CSXT’s “analysis” ignored several key metrics, as well as the entire matter of service reliability, and the claimed time differential was due entirely to the Board’s standard convention of including an arbitrary 30 minutes of “dwell time” for each interline movement.⁴⁰ Particularly given that CSXT has {

}⁴¹ the single *de minimis* differential offered by the carrier cannot overcome the greater body of evidence submitted by Consumers on Opening and in Rebuttal showing that the CERR would “meet the transportation needs of the traffic in the group” by providing service that overall was “equal to (or better than) the existing service for that traffic.” *TMPA*, 6 S.T.B. at 589, *citing Nevada Power II*, 10 I.C.C. 2d at 272-273.

³⁸ See CSXT Reply at III-A-13.

³⁹ See Consumers Rebuttal at III-A-36.

⁴⁰ *Id.* at III-A-37-54.

⁴¹ *Id.* at III-A-36.

2. Consumers' Evidence of CERR Traffic Volumes is the Most Accurate

Consumers' Rebuttal Narrative (at III-A-56-73) responds in detail to CSXT's various criticisms of Consumers' Opening Evidence concerning historic and projected traffic volumes for the CERR. Some adjustments to Consumers' Opening calculations were made to reflect updated information.⁴² Otherwise, however, CSXT's challenges were shown to be without merit.

a. Campbell Coal Traffic

Consumers showed on Rebuttal both that CSXT's sensational charge that Consumers sought to "mislead" the Board about long-term coal consumption forecasts for Campbell was utterly groundless,⁴³ and that the September 2015 computer model output that was included in a Consumers customer rate filing with the Michigan Public Service Commission (and on which CSXT relies) is not the most accurate available *long-term* forecast of Campbell coal use.⁴⁴ Consumers' Ventyx Strategist model, which is the program actually used by the company for long-term forecasts and was the principal source for Consumers' Campbell coal volume forecast, shows very similar results both as of January 2015 (the forecast run used by Consumers) and as of September 2015, when the MPSC filing was made.⁴⁵ In contrast, CSXT proposed combining the outputs of two (2) different

⁴² See Consumers Rebuttal at III-A-65-66 and III-A-71.

⁴³ See Consumers Rebuttal at I-14-15 and III-A-56-58.

⁴⁴ *Id.* at III-A-58-60.

⁴⁵ *Id.* at III-A-60-62 and Table III-A-4. Indeed, if the Board elected to rely on the later model run, projected issue traffic volumes would be *increased*. *Id.*

models with two (2) different structures and purposes,⁴⁶ a clear recipe for unreliable results.

Board precedent supports reliance on forecasts prepared in the ordinary course of business that specifically are used as planning tools for actual operations.⁴⁷ Even where “actual” coal burn statistics differ somewhat from the early year forecast numbers, the Board has stressed the reliability of models that are designed to project volumes over the long term.⁴⁸ The Ventyx Strategist model meets this criteria, and is a superior tool to the “mixed” forecast approach advocated by CSXT. Similarly, inasmuch as the evidence clearly established that all units at the Campbell Station will remain fully operational at least through 2024,⁴⁹ no consideration should be given to CSXT’s argument that trends in coal consumption *elsewhere* in the country should impact Campbell coal volume projections for the CERR.

⁴⁶ *Id.* at III-A-60.

⁴⁷ *FMC*, 4 S.T.B. at 731; *WTU*, 1 S.T.B. at 662-663; *Nevada Power II*, 10 I.C.C. 2d at 269, 270.

⁴⁸ *See WPL*, 5 S.T.B. at 969-970. *See also, WFA I* at 28-29 (forecasts shift, and revisions should be used only when a “significant change” is observed).

⁴⁹ *See Consumers Rebuttal* at III-A-62.

b. 2020 to 2024 General Freight and Intermodal Volumes

The parties do not differ significantly on the issue of general freight and intermodal traffic volumes over the 2015-2019 time period,⁵⁰ but CSXT argues against Consumers' use of a CAGR developed from CSXT's internal business forecasts for 2020-2024 volumes, preferring an Energy Information Administration ("EIA") forecast of Industrial Sector Macroeconomic Indicators.⁵¹ CSXT's argument should be rejected.

The use of a CAGR approach to project SARR traffic beyond the final year of a defendant carrier's internal forecast has been endorsed repeatedly by the Board⁵² as a tool for developing a measured and reliable volume trend.⁵³ CSXT argues against it here based on its comparison of 2015 traffic volumes, but as the Board has acknowledged elsewhere, it is just as likely that a forecast will understate growth as overstate it,⁵⁴ and a CAGR approach accounts for this and evens out fluctuations through the use of multi-year forecast data. In contrast, the EIA forecast that CSXT proposes cannot even be used without modifications – which CSXT helpfully offers to make in order to favor its own case – and it measures neither CSXT rail volumes nor rail volumes generally.⁵⁵ It clearly is

⁵⁰ See *id.* at III-A-65-66 and III-A-70-71.

⁵¹ *Id.* at III-A-68.

⁵² See *Sunbelt* at 173; *DuPont* at 261; *FMC*, 4 S.T.B. at 730.

⁵³ *Sunbelt* at 173.

⁵⁴ *FMC*, 4 S.T.B. at 731.

⁵⁵ See Consumers Rebuttal at III-A-69.

inferior to a methodology based on CSXT's own traffic data. CSXT offered nothing persuasive in support of its approach, which in this case appears to be designed solely to reduce the CERR's traffic volumes.

c. Crude Oil

In its Reply, CSXT proffered a new traffic forecast as a substitute for the one produced to Consumers in discovery, and used by Consumers to project future crude oil traffic for the CERR.⁵⁶ As Consumers demonstrated in its Rebuttal Evidence, CSXT's belated offering should be rejected.

Board precedent is clear that non-public forecasts introduced by railroad defendants in their reply presentations should not be accepted in preference to course-of-business forecasts prepared prior to litigation.⁵⁷ CSXT attempted to support its proffer by referring to examples of Board-accepted updates of EIA coal forecasts,⁵⁸ but the comparison is invalid. In the case cited by CSXT, the Board was substituting one public and policy neutral published forecast for another.⁵⁹ Here, CSXT offers an unverifiable, internally-prepared forecast for a single commodity in lieu of the projection that it produced to Consumers in discovery. This is improper under the Board's *Guidelines* decisions, and should be rejected. *FMC*, 4 S.T.B. at 733.

⁵⁶ *Id.* at III-A-72.

⁵⁷ *Duke/NS*, 7 S.T.B. at 114; *TMPA*, 6 S.T.B. at 603.

⁵⁸ CSXT Reply at III-A-26.

⁵⁹ *See Duke/NS*, 7 S.T.B. at 145.

Consumers’ updated and restated calculation of traffic volumes for the CERR, which is set out in its Rebuttal e-workpaper “Summary of CERR Traffic Volumes and Revenues_Rebuttal.xlsx,” tab “Summary,” is the better evidence of record.

3. Consumers’ Calculated Revenues for the CERR Represent the Better Evidence of Record

In its Reply presentation, CSXT followed a fairly standard pattern for railroad defendants in cases under the *Guidelines* by arguing for about a one-third reduction in the revenues available to the CERR over the 2015-2024 study period, as compared to Consumers’ Opening Evidence.⁶⁰ In large measure, CSXT’s lower CERR revenues can be traced to its unmeritorious reductions in CERR traffic volumes, which are addressed *supra* and in Consumers’ Rebuttal at III-A-2-73. The remaining differences are attributable to updates to certain indices – which Consumers adopted on Rebuttal⁶¹ – and to CSXT’s alternative treatments of revenue divisions on cross-over traffic and revenues from fuel surcharges. As Consumers detailed in its Rebuttal⁶² and summarizes below, CSXT’s approaches to these issues largely are without merit.

⁶⁰ See Consumers Rebuttal at III-A-119, Table III-A-5.

⁶¹ See Consumers Rebuttal at III-A-74-75.

⁶² *Id.* at III-A-77-118.

a. Cross-Over Revenue Divisions

In its Opening Evidence, Consumers applied the ATC revenue divisions methodology adopted by the Board in *Ex Parte No. 715*.⁶³ CSXT leveled four (4) basic claims against Consumers' revenue allocation on cross-over traffic, arguing that there are "biases" in the methodology that favor the CERR.⁶⁴ None of CSXT's claims are valid.

First, it is not at all true that Consumers' traffic selection criteria – which emphasized operational efficiency by only including traffic that moves in intact trains – leaves CSXT undercompensated for the costs of its residual service. For almost 57% of the merchandise traffic in question, the CERR interchanges the trains with rail carriers *other than CSXT*, and thus handles intact and pre-blocked trains just as CSXT does in the real world.⁶⁵ CSXT incurs no residual service costs at all on this traffic. For the trains that are interchanged by the CERR with CSXT, the ATC methodology – which is based on the *incumbent's* total costs – ensures that cross-over revenues follow and fully compensate CSXT for any and all residual costs. There is no empirical evidence offered by CSXT in support of its claim that ATC undercompensates the residual defendant when a significant volume of SARR traffic moves in overhead or bridge service,⁶⁶ and its claim here is contradicted by its own position in *TPI*, where CSXT (as a bridge carrier)

⁶³ Consumers Opening at III-A-11.

⁶⁴ See CSXT Reply at III-A-32, III-A-51-54.

⁶⁵ See Consumers Rebuttal at III-A-80-82.

⁶⁶ See Consumers Rebuttal at III-A-84.

argued that ATC *overcompensates* the originating/terminating carrier.⁶⁷ Since the ATC “biases” that CSXT alleged do not exist, the movement-specific adjustments that it proposed as remedies⁶⁸ have no merit.

Second, there is no support for CSXT’s claim that the URCS Phase III empty return ratio for unit train/trainload shipments should be adjusted for ATC purposes. The fact that 100% of the loaded trains handled by the CERR do not return empty via the same route is unremarkable; that is how trains are handled on the CSXT system routinely (the off-SARR empty return ratio often is less than 100% as well). Also, as Consumers showed on Rebuttal, an empty return ratio adjustment for the CERR would require a corresponding adjustment for the residual CSXT (which CSXT did not acknowledge), and the acceptance of differences between the CERR’s operations and CSXT’s as a basis for one URCS adjustment would open the door to numerous other adjustments,⁶⁹ the very result that the Board in *Major Issues* cited as a key reason why *no* movement-specific adjustments to URCS would be permitted.⁷⁰

Third, CSXT’s argument that the CERR’s revenues from traffic originating or terminating at CSXIT’s 59th Street Intermodal Terminal should be reduced, and its costs increased, to account for the maintenance and operation of

⁶⁷ *Id.* at III-A-85, n.191.

⁶⁸ *Id.* at III-A-86-93.

⁶⁹ *Id.* at III-A-95-96.

⁷⁰ *See Major Issues* at 22.

the terminal⁷¹ is contrary to precedent and without merit. The 59th Street facility is owned and operated by CSXIT, a wholly separate entity from CSXT, and the relationship between those two (2) subsidiaries of CSX Corporation is strictly that of a customer and supplier. As the Board held in *DuPont*,⁷² where a third party service provider is not a subsidiary of the defendant, the SARR is not responsible for any portion of the third party's facilities costs beyond the compensation received by such third party from the defendant in the real world. CSXIT is not a subsidiary of CSXT, and Consumers demonstrated in Parts III-D and III-F of its Rebuttal Narrative that all the compensation due CSXIT for the services it provides to CSXT are covered by the CERR. As such, the CERR is entitled to the same origination and termination revenues that are received by CSXT, for traffic that the CERR originates and terminates at 59th Street.⁷³

Finally, Consumers showed on Rebuttal that beyond an update to CSXT's 2014 URCS and certain other minor recalculations,⁷⁴ none of the "technical" adjustments that CSXT proposed for the CERR's ATC revenue divisions were necessary or appropriate. As discussed in the Rebuttal Narrative,

⁷¹ See Consumers Rebuttal at III-A-98-99.

⁷² *DuPont* at 47-49.

⁷³ See Consumers Rebuttal at III-A-101-102.

⁷⁴ Consumers updated its calculations to incorporate the Board's 2014 URCS costs for CSXT, which had not been available when Consumers prepared its Opening Evidence. See Consumers Rebuttal at III-A-102-103. Consumers also adjusted the fixed cost calculations to reflect the addition of 0.6 track miles, and a corrected proration of CERR mileage between 22nd Street and Curtis. *Id.* at III-A-110.

route densities for movements over the CERR and off-SARR were developed using data produced by CSXT in discovery. After initially providing Consumers with density statistics from its business records, CSXT superseded that data with a “special study” of density that it represented was more accurate. Consumers therefore used the study to develop density statistics for ATC purposes. In its Reply, however, CSXT sought to change aspects of its study, claiming errors in the data and/or its application to the line segments replicated by the CERR. As Consumers showed on Rebuttal, CSXT’s attempt to discredit its own study – which it previously represented to Consumers was superior to the carrier’s normal business records – is contrary to established precedent⁷⁵ and unsupported by the facts.⁷⁶ Its proposed adjustments should be rejected.

b. Fuel Surcharge Revenue

CSXT advocated two (2) revisions to Consumers’ Opening calculations of fuel surcharge revenue for the CERR, neither of which should be accepted.⁷⁷

First, CSXT argued that fuel surcharge revenues for the third and fourth quarters of 2015 should be based on what it claimed were the then-current tariff parameters. However, this creates a mismatch with the more consequential calculation of line haul revenues for the same quarters, which were based on third

⁷⁵ *Texas Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 803, 813 (2004).

⁷⁶ *See* Consumers Rebuttal at III-A-104-111.

⁷⁷ *See id.* at III-A-112-117. Consumers agreed with CSXT’s proposal to update certain EIA forecasts. *Id.* at III-A-118.

and fourth quarter 2014 revenues adjusted for traffic growth. Consumers used this approach on Opening, and CSXT accepted it.⁷⁸ By selectively updating one minor portion of the CERR's revenues (fuel surcharges), while adjusting the other predominant component (line haul revenue) using a different methodology, CSXT improperly manipulated the revenue data, skewing the results.⁷⁹

Second, CSXT improperly called for application of a fuel surcharge tariff specific to post-January 1, 2015 traffic to freight rates that were developed prior to that date. As Consumers explained, when railroads apply new fuel surcharge terms with an updated (higher) strike price for the benchmark fuel price per gallon, they adjust the then-current line haul rates at the same time, in order to ensure that the revenues collected from the subject traffic both before and after the effective date of the updated surcharge are equal.⁸⁰ In proposing to apply an updated surcharge with a higher strike price to pre-January 1, 2015 CERR traffic rates, CSXT did not increase those rates in order to maintain revenue neutrality. The result was an artificial reduction in per ton revenue for the CERR.⁸¹ Consumers' approach, which preserved neutrality by maintaining the pre-January 1, 2015 methodology to calculate post-contract surcharge revenue for the CERR, is superior, and should be endorsed by the Board.⁸²

⁷⁸ *Id.* at III-A-114.

⁷⁹ *Id.* at III-A-115.

⁸⁰ *Id.*

⁸¹ *See id.* at III-A-116-117.

⁸² *Id.* at III-A-117.

Consumers' Rebuttal restatement of revenues for the CERR is summarized in its Table III-A-5,⁸³ and represents the better evidence of record.

B. Consumers' System Design, Operating Plan and Operating Costs for the CERR are Well-Supported

The final CERR system design and operating plan, and restated operating costs, are explained and supported in detail in Parts III-B, III-C and III-D of Consumers' Rebuttal Evidence. A summary of each of the issues between the parties with respect to these subjects, and their proper resolution, is beyond the limitations of this Brief. Consumers' Rebuttal restatement constitutes the best evidence of record on each of these individual issues. Summarized below are those elements that have the greatest impact on the overall SAC analysis.

1. CERR System Design

As compared to the SARRs at issue in most of the prior cases brought under the *Guidelines*' SAC Constraint, the CERR is a very modest-sized and simple stand-alone system. Consumers and CSXT generally agree on the CERR's route, mileage, and basic constituent components. In its Rebuttal Evidence, Consumers added a 0.6 mile connecting track at the CERR's Pine Junction Interchange, as proposed by CSXT.⁸⁴ Otherwise, however, the changes to the CERR system advocated by CSXT are unnecessary.

CSXT claimed that two (2) costly infrastructure additions should be made to CERR's Dolton Interchange: a re-routed track around certain existing

⁸³ *Id.* at III-A-119.

⁸⁴ *See id.* at III-B-6.

facilities, and a highway overpass at Cottage Grove Avenue.⁸⁵ As Consumers showed, however, the first change came with no justification beyond CSXT's opinion that it was a good idea, and Consumers' RTC model simulation demonstrated that the Cottage Avenue overpass was not needed in order to avoid traffic delays.⁸⁶ Likewise, CSXT's advocacy of an additional siding at the Campbell Station and another bad order holding track at Barr Yard was rebutted by Consumers' RTC simulation (which showed that an additional siding at Campbell was not needed), and Consumers' train inspection plan, which included bad order tracks at Barr Yard and was accepted by CSXT.⁸⁷

CSXT also challenged Consumers' assumption that the CERR would access IHB's Blue Island Yard just as CSXT does, and pay the same trackage rights fee that CSXT pays, arguing that Consumers did not include any road property investment for the facility. As Consumers showed, however, CSXT's reasoning – that the CERR should cover the { } share in IHB that CSXT's *parent* holds – was rejected by the Board in *DuPont*, where it was affirmed that a SARR only is responsible for investments that the *defendant* has made.⁸⁸ CSXT does not own any portion of the IHB, and no showing was

⁸⁵ *Id.* at I-16.

⁸⁶ *Id.* at III-B-6-9.

⁸⁷ *See id.* at III-B-13-16.

⁸⁸ *DuPont* at 47-49.

made that CSXT enjoys preferential trackage rights terms. As such, there is no basis to require the CERR to invest in IHB's road property.⁸⁹

2. The CERR Operating Plan

The feasibility of Consumers' operating plan for the CERR was confirmed both by Consumers Rebuttal RTC Model simulation, and by CSXT's own RTC run.⁹⁰ Nevertheless, CSXT leveled a significant number of unfounded criticisms at Consumers' plan, most of which essentially are results-oriented and all of which are addressed in detail in Part III-C of Consumers' Rebuttal Evidence. Four (4) of the carrier's key arguments are reviewed here.

First, CSXT repeatedly claimed that Consumers had not properly addressed the complexity of rail operations in the Chicago area.⁹¹ However, CSXT's assertions deceptively implied that the CERR would run through downtown Chicago, when in fact the small portion of the CSXT system replicated by the CERR is located 12 miles southeast of the city center. Additionally, CSXT ignored the fact that while the CERR replicates virtually the entire track infrastructure that CSXT operates on the CERR route, it only handles about 54% of the CSXT traffic, and all of that is unit trains or intact trainloads. These facts contribute significantly to the smooth operations reflected in Consumers' RTC simulation.

⁸⁹ See Consumers Rebuttal at III-B-19-28.

⁹⁰ See *id.* at III-C-125-126.

⁹¹ See, e.g., CSXT Reply at III-C-7.

Second, CSXT argued that Consumers’ plan did not include enough time for delays associated with foreign railroad operations. However, CSXT’s purported support for this assertion is not the data that it produced to Consumers in discovery – data that Consumers relied on in its modeling. Instead, CSXT rested its claim on supposed additional delays that CSXT disclosed *for the first time* in its Reply Evidence. Board precedent clearly supports Consumers’ right to rely on the information it received from CSXT in discovery, and disfavors CSXT’s attempt to impeach its own data.⁹² CSXT’s challenges to Consumers’ train delay modeling are unfounded.

Third, CSXT attacked Consumers’ projections that the CERR train lengths would grow over the 2015-2024 time-period as inconsistent with “real world” railroading and the terms of various Interline Service Agreements (“ISAs”). As Consumers showed, however, CSXT *itself* plans to lengthen trains in pursuit of productivity gains, and the ISAs in question set targets (not limits) for train lengths, targets that routinely are exceeded.⁹³ In other words, CSXT’s critiques are undermined by its own practices and documents.

Finally, CSXT argued that the CERR operating plan is flawed because it allegedly doesn’t fully account for the handling of 82 bad-ordered rail cars out of the over 41,000 cars that move to Campbell in the base year.⁹⁴ This

⁹² See *AEPCO 2011* at 103. See also, *Texas Mun. Power Agency*, 7 S.T.B. at 813.

⁹³ See *Consumers Rebuttal* at III-C-57-59.

⁹⁴ See *id.* at III-C-86-87.

ridiculous and unprecedented claim is “supported” by assumptions rather than facts, and according to Consumers’ experienced operations expert, it misrepresents the manner in which BNSF – the railroad that would bad-order the cars in question – handles bad-ordered utility coal cars in the first place.⁹⁵

Consumers’ restated CERR operating plan as set out and explained in Part III-C of its Rebuttal presentation is the better evidence of record.

3. The CERR’s Operating Expenses

Along with artificially depressing SARR revenues, a favored railroad defensive tactic in cases under the *Guidelines* is to inflate a SARR’s operating expenses. CSXT adopted the tactic in this case, writing up the CERR’s annual operating expenses by 22%⁹⁶ largely on the false predicate that the 160-mile, optimally efficient, Class II CERR should be managed and staffed like a huge, unionized Class I railroad. Part III-D of Consumers’ Rebuttal Evidence responded to each of CSXT’s myriad criticisms, and in a few instances (such as the number of road locomotives and the addition of helper service for the Campbell trains at Saugatuck Hill) adjusted the CERR’s operations in response. In the main, however, CSXT’s criticisms here – as elsewhere in the SAC Constraint paradigm – are without merit, and should be rejected. For example:

- CSXT argued for an increase in the number of railcars needed by the CERR for non-issue traffic (with an attendant increase in cost), without any

⁹⁵ See *id.* at I-22.

⁹⁶ See *id.* at III-D-3, Table III-D-1 ($(\$66.3 - \$54.3) / \$54.3 \times 100 = 22\%$).

support in or verification by the foreign car data produced by CSXT in discovery.⁹⁷

- CSXT inflated the CERR's operating personnel requirements by 30% based solely on a desktop mathematics exercise that ignored the actual planned operations of the CERR, even arguing for a re-crewing of more than half the trains moving to Campbell when CSXT's own RTC Model simulation showed that it wasn't necessary.⁹⁸

- CSXT added non-operating staff to the CERR without showing any necessary functions that they would perform, essentially assuming – contrary to SAC theory⁹⁹ – that the CERR must conduct its affairs exactly as CSXT does.

- CSXT proposed to more than double the size of the CERR's general and administrative staff relative to annual revenue, from 2.22 persons per \$10 million to 4.84 persons per \$10 million, even though *CSXT itself* advocated only a 1.16 per \$10 million ratio in *TPI*, and the average ratio approved by the Board in the last ten (10) decisions under the *Guidelines* is 1.43 per \$10 million.¹⁰⁰

- CSXT inflated the CERR's maintenance-of-way staffing and costs based upon a comparison with the Board's findings in *Sunbelt*, even though

⁹⁷ See *id.* at III-D-14-16.

⁹⁸ See *id.* at III-D-17-30.

⁹⁹ See *Sunbelt* at 12; *AEPCO 2011* at 16. See also, Consumers Rebuttal at III-D-31-44.

¹⁰⁰ See Consumers Rebuttal at III-D-50-52.

the SARR in that case was three (3) times the size of the CERR. A more probative metric – employee concentration – shows that Consumers’ maintenance staffing concentration for the CERR is higher than those approved by the Board in each of the five (5) recent cases that CSXT claimed as guiding precedents.¹⁰¹

Where a complainant’s evidence is feasible and supported by reliable data, it is to be used for the SAC analysis unless the defendant proves otherwise and “offers feasible and realistic alternative evidence that avoids the infirmities” in the complainant’s case. *Duke/NS*, 7 S.T.B. at 100-101. Merely asserting a “better way” to accomplish a given SARR function is not enough to warrant rejection of the complainant’s evidence in favor of the defendant’s.¹⁰² On the matters of the design, operating plan and operating costs for the CERR, Consumers has presented solid evidence supporting the feasibility of its operating parameters and costs, and CSXT has responded with little more than what it claims is a “better way.” Consumers’ Rebuttal Evidence should be adopted by the Board.

C. Consumers’ Road Property Investment Costs are the Best Evidence of Record

Consumers’ final restatement of road property investment for the CERR is set out and explained in detail in Part III-F of its Rebuttal Evidence. Consumers’ cost estimates are reasonable, based on real-world costs, and at \$2.64

¹⁰¹ *See id.* at III-D-120-122 and Table III-D-12.

¹⁰² *General Procedures*, 5 S.T.B. at 446.

million per track mile¹⁰³ are consistent with the Board-approved costs in *DuPont*.¹⁰⁴ Conversely, CSXT on Reply presented costs that are 163.2% of Consumers' Opening calculations, and at \$3.83 million per track mile exceeded the Board-approved costs for *Sunbelt's* SARR, and were 139% of the costs that the Board approved in *DuPont*,¹⁰⁵ where the SARR required 71 yards, ten (10) major locomotive facilities¹⁰⁶ and 60,962.5 linear feet of tunnels.¹⁰⁷

Consumers responded in detail to each of CSXT's claims for higher road property investment costs¹⁰⁸ in its Rebuttal Evidence. Discussed briefly below are the three (3) components that together represent over 80% of the

¹⁰³ See Consumers Rebuttal at III-F-2; Consumers Rebuttal e-workpaper "Track Quantities-2015_Rebuttal.xls," tab "Track Quantities," cells J37 & H32 (222.69 = 233.98 track miles - 11.29 track miles at Barr Yard).

¹⁰⁴ \$2.66 million/ track mile = \$34,381 million /12,905 track miles. See *DuPont* at 138 (total road property investment costs – tunnel costs) and at 46 (12,905 total track miles, excluding yards).

¹⁰⁵ CSXT's costs exceed Sunbelt's costs of \$3.35 million per track mile and DuPont's costs of \$2.75 million per track mile ($\$3.83/\$2.75 \times 100 = 139\%$). $\$3.83$ million = $\$879.9$ million/229.82 track miles. See Consumers Rebuttal at III-F-2 (Rebuttal Table III-F-1); CSXT Reply e-workpaper "Track Quantities_2015_Reply.xls," tab "Track Quantities," cells J37 & H32 (229.82 track miles = 241.11 track miles - 11.29 track miles in Barr Yard). Sunbelt's \$3.35 million per track mile = $\$2,524.37$ million /752.44 track miles. See *Sunbelt* at 96 and at 20 (752.44 track miles, not including yard track). DuPont's \$2.75 million per track mile = $\$35,462$ million /12,905 track miles. See *DuPont* at 46, 138.

¹⁰⁶ See *DuPont* at 233-34; NS Reply (filed Nov. 30, 2012) at III-C-192 (DARR yards by type) and III-F-259-60 (locomotive repair facilities).

¹⁰⁷ *DuPont* at 138, 210-211.

¹⁰⁸ See Consumers Rebuttal at III-F-2.

difference in road property costs between CSXT's Reply and Consumers'

Rebuttal:¹⁰⁹ bridges, roadbed preparation and tracks.

1. Bridges

Consumers on Opening presented reasonable bridge construction costs based on an actual physical inspection of the lines that the CERR is replicating, and CSXT's bridge inventory data produced in discovery. Consumers omitted costs for the Calumet Sag Channel Bridge and the Chicago Sanitary Canal Bridge (the "Sanitary Bridges") because these projects were publicly funded. With the exception of six (6) spans, CSXT's Reply disputed all bridge designs and costs submitted by Consumers,¹¹⁰ and included costs for the Sanitary Bridges. As Consumers demonstrated in its Rebuttal, the Board should reject CSXT's cost increases.

a. CSXT's Modifications to Consumers' Bridge Designs are Unnecessary

Consumers' engineers designed the CERR bridges to have the same opening size, span length and capacity as the existing CSXT bridges that are on the CERR route. Consumers' engineers derived the standard bridge designs and costs using CSXT projects, substituting pre-cast components so that the individual bridge design types could be altered to accommodate specific location

¹⁰⁹ CSXT's land acquisition costs were classified as mobilization. *See id.*

¹¹⁰ *See* CSXT Reply e-workpaper "Bridge Costs_Reply.xlsx," tab "Route Bridges," at column P.

requirements.¹¹¹ CSXT argued for numerous design revisions in its Reply, failing to recognize that Consumers' bridge types¹¹² are easily modified, and that the costs represent a conservative average of the necessary components.¹¹³

CSXT made several mistakes in its critiques of Consumers' bridge designs, unnecessarily altering almost all designs to increase span length and/or increase potential flow rates. CSXT's revisions resulted in bridge designs that were more than double or even triple the length of the span needed or being replicated.¹¹⁴ CSXT also rejected Consumers' "Bridge Type 3" design as not being long enough, even though it easily can be adjusted to have a longer span.¹¹⁵

Likewise, CSXT's proposed changes to the bridge designs to increase flow rates are unnecessary. Consumers' bridge designs with precast wing walls can be built to provide vertical backwalls, which provide the same opening dimensions as CSXT's proposed use of wall abutments.¹¹⁶ This is entirely consistent with SAC theory.¹¹⁷ Additionally, CSXT's criticism that Consumers'

¹¹¹ See Consumers Opening at III-F-66.

¹¹² Developing representative bridge types is a standard approach in cases under the *Guidelines*' SAC Constraint. See *Sunbelt* at 140-143; *DuPont* at 214.

¹¹³ For example, all bridge costs include costs for rip rap and pre-cast wing wall panels, even though these components are not always required. See Consumers Rebuttal e-workpaper "Bridge Costs_Reply_Rebuttal.xlsx," tab "Bridge Type 1," rows 11 & 15; tab "Bridge Type 2," rows 16 & 22; tab "Bridge Type 3," at rows 18 & 25.

¹¹⁴ See Consumers Rebuttal at III-F-103-104.

¹¹⁵ See *id.* at III-F-104-105.

¹¹⁶ See Consumers Rebuttal at III-F-101.

¹¹⁷ See, e.g., *Sunbelt* at 12; *TMPA*, 6 S.T.B. at 586.

bridge designs require additional piers that will obstruct water flow is unfounded.¹¹⁸ While Consumers' engineers designed bridges with additional piers, the overall horizontal cross-sectional length of the piers is less than the piers on the existing CSXT bridges, which means Consumers' bridges obstruct *less* water flow.¹¹⁹ For four (4) of the five (5) bridges at issue, Consumers' engineers also divided the bridge into three spans, which effectively relocated the piers from the direct middle to the side of the waterway, where the river is less deep and flowing at a relatively reduced rate.¹²⁰

b. The CERR is Not Responsible for the Costs of the Publicly Funded Sanitary Bridges

Consumers on Opening presented evidence that construction of the Sanitary Bridges was funded by the City of Chicago.¹²¹ Under established precedent, since CSXT (or its predecessor) did not have to pay for these bridges, the CERR likewise is not responsible for this investment.¹²² CSXT on Reply argued that while the published source that Consumers submitted as evidence indicates that the movable bridge component of the Chicago Sanitary Canal Bridge was publicly funded, allegedly it was not conclusive with respect to both

¹¹⁸ See CSXT Reply at III-F-94.

¹¹⁹ See Consumers Rebuttal at III-F-107.

¹²⁰ *Id.*

¹²¹ See Consumers Opening e-workpaper "Bascule Bridge Over CSSC Railway Gazette indicating that the Sanitary district paid.pdf."

¹²² See *DuPont* at 156; *TMPA*, 6 S.T.B. at 798.

bridges.¹²³ However, CSXT did not offer any contradictory evidence as to who paid the original cost, and it misinterpreted the article in question as showing that a 1901 span was railroad-funded, when the article actually showed that it was publicly funded and specifically mentioned opening the canal to navigation.¹²⁴ Google Earth images clearly showed that the bridges constructed along the canal all utilized the same design.¹²⁵ Consumers also presented additional research, including an online copy of the Daily News Chicago Almanac circa 1912, which confirmed the Sanitary District's funding of the Calumet-Sag Channel Bridge.¹²⁶ The better evidence clearly supports Consumers' conclusion that the CERR has no responsibility for investment costs for the Sanitary Bridges.

2. Roadbed Preparation

In its Opening Evidence, Consumers presented roadbed preparation costs based on winning contractor bid data from the Michigan Department of Transportation ("MDOT").¹²⁷ In its Reply, CSXT substituted R.S. Means' costs, increased its road property costs according to its reconfiguration of the CERR, and

¹²³ CSXT Reply at III-F-88-89.

¹²⁴ See Consumers Opening e-workpaper "Bascule Bridge Over CSSC Railway Gazette indicating that the Sanitary district paid.pdf." at 566.

¹²⁵ See Consumers Rebuttal e-workpapers "Cal-Sag Bridges Aerial.jpg;" "Cal-Sag Bridges #3-#7.jpg;" "Cal-Sag Bridges #5- #7.jpg."

¹²⁶ See Consumers Rebuttal e-workpaper "Sanitary District of Chicago_Calumet_Sag Bridge Construction.pdf."

¹²⁷ CSXT argued that losing bids should also have been used in developing the costs from MDOT data, but this is absurd because only winning bids represent actual construction costs. See Consumers Rebuttal at III-F-47-48.

revised its land cost calculation for waste quantities. None of CSXT's proposed cost increases are justified.

The Board should adopt the costs developed from the MDOT data in this case because it provides the best estimate of CERR roadbed preparation costs. Unlike R.S. Means, which incorporates data from numerous diverse projects across the United States, including projects in areas with hard rock and difficult terrain, the MDOT data is comprised of representative projects constructed in Michigan, with soil conditions and topography similar to those that would be encountered in constructing the CERR. Board precedent supports the use of MDOT data, as Consumers "is entitled to choose the low-cost bidder."¹²⁸ CSXT's argument that Consumers is making "yet another run at well-established Board precedent"¹²⁹ misstates the recent decisions in *Sunbelt* and *DuPont*. In both cases, while the Board did not accept the complainants' proffered evidence, it specifically endorsed the prospective use of "real-world substitute[s] for R.S. Means."¹³⁰

The Board in *Sunbelt* and *DuPont* took issue with costs for the entire SARR being developed based on a single, relatively small project with different soil conditions than would be faced by the SARR. In *Sunbelt*, the Board determined that the evidence did not support using "a single, 1.3-mile rail

¹²⁸ In *WTU*, the Board held that it was appropriate to use "WTU's unit costs...because they are based upon actual quotations...[and that] WTU is entitled to choose the low-cost bidder for earthworks." *WTU*, 1 S.T.B. at 704.

¹²⁹ CSXT Reply at III-F-23-24.

¹³⁰ See *Sunbelt* at 107-108; *DuPont* at 149.

relocation project in Tennessee” as a “proxy for all 578 miles of line that the SBRR would have to build...through stretches of wetlands in Alabama, Mississippi, and Louisiana.”¹³¹ Similarly, in *DuPont*, the Board stated that R.S. Means was more appropriate given “the size, scope, and geographic and topographic diversity of the DRR.”¹³² However, in both cases the Board affirmed that project costs could be appropriate, stating that a “real-world substitute” could be used so long as it included “more than one estimate to avoid potential aberrations.”¹³³ The use of MDOT data to estimate roadbed preparation costs for the CERR is exactly the scenario contemplated by the Board in *Sunbelt* and *DuPont*, as multiple MDOT projects were used to develop the costs,¹³⁴ and the CERR has a limited geographic scope that is only 30% the size of the *Sunbelt* SARR,¹³⁵ and is less than 2% the size of the *DuPont* SARR.¹³⁶ Most significantly, the surface work area represented by the MDOT data used by Consumers totals about 160 miles, which is nearly equal the size of the roadbed preparation area for

¹³¹ *Sunbelt* at 107.

¹³² *DuPont* at 149.

¹³³ *Sunbelt* at 107-108; *DuPont* at 149.

¹³⁴ See Consumers Opening at III-F-13-16.

¹³⁵ *Sunbelt* at 20 (752.44 track miles, not including yard track); Consumers Rebuttal e-workpaper "Track Quantities-2015_Rebuttal.xls," tab "Track Quantities," cells J37 & H32 (222.69 = 233.98 track miles - 11.29 track miles at Barr Yard) (222.69 track miles ÷ 752.44 track miles x 100 = 29.6%).

¹³⁶ *DuPont* at 46 (Board accepted NS's configuration of 12,905 total track miles); Consumers Rebuttal e-workpaper "Track Quantities-2015_Rebuttal.xls," tab "Track Quantities," cells J37 & H32 (222.69 = 233.98 track miles - 11.29 track miles at Barr Yard) (222.69 track miles ÷ 12,905 track miles x 100 = 1.7%).

the entire CERR. This clearly establishes that the data is a valid “real world substitute.”¹³⁷

In addition to driving up the CERR’s costs through the use of R.S. Means, CSXT presented costs for utility relocation and land for waste that included unnecessary items. For example, CSXT posited that its CERR configuration requires the relocation of electric lines, but CSXT presented higher costs for replacement, not relocation.¹³⁸ Likewise, CSXT included costs for land to dispose of waste quantities, which Consumers showed on Opening is unnecessary because the MDOT contracts specify that the contractor owns the waste material and can repurpose it or sell it for profit.¹³⁹ In developing its proposed land costs for waste disposal, CSXT also used the CERR’s overall average land cost, instead of an average cost per acre for rural land, as required by the Board in *Sunbelt* and *DuPont*.¹⁴⁰

¹³⁷ See Consumers Opening e-workpapers “MDOT Clearing & Grubbing Unit Costs.xlsx,” tab “Contracts,” columns F & AE (sum of mileage in the project description for 14 of the 26 Tier 1 & 2 projects = 69.0 miles) and “MDOT excavation Unit Costs.xlsx,” tab “Contracts,” columns F & AE (sum of mileage in the project description for 20 of the 21 Tier 1 & 2 projects = 92.5 miles). 69.0 miles + 92.5 miles = 161.5 miles. There were no mileages associated with the four MDOT projects that Consumers utilized in its Rebuttal Evidence to calculate the unit cost for borrow excavation. In total, the 161.5 miles calculated above represents 34 of the 51 MDOT projects that Consumers relied on in its Rebuttal Evidence.

¹³⁸ See CSXT Reply at III-F-65; Consumers Rebuttal at III-F-74-75.

¹³⁹ See Consumers Rebuttal at III-F-66; Consumers Opening at III-F-35.

¹⁴⁰ *Sunbelt* at 119; *DuPont* at 170.

In summary, the Board should reject CSXT's cost increases for the CERR road property investment. Where CSXT's Reply raised a meritorious point, Consumers accounted for it in its Rebuttal Evidence. As shown there and summarized above, Consumers' Rebuttal restatement is consistent with Board precedent,¹⁴¹ and is the better evidence of record.

3. Track Construction

The primary point of dispute between the parties on the issue of track construction relates to transportation costs for the materials to the railhead, and from the railhead to the point of installation. On both issues, Consumers' evidence is sound and should be accepted.

To develop transportation costs for materials from the source to the railhead, Consumers relied on an AFE provided by CSXT during discovery.¹⁴² CSXT on Reply argued that the rate was "cherry-picked,"¹⁴³ but the fact remains that this is a rate that CSXT paid, and Consumers is allowed to step into CSXT's shoes and use it { }, for at least transportation of materials via UP.¹⁴⁴ The { } per ton-mile rate was not used by Consumers for transportation on carriers other than UP. Instead, Consumers used a conservative

¹⁴¹ See, e.g., *WTU*, 1 S.T.B. at 704.

¹⁴² See Consumers Opening e-workpaper "UP Rail Transportation Costs.PDF" at 8.

¹⁴³ See CSXT Reply at III-F-70-71.

¹⁴⁴ *Major Issues* at 37 (quoting *WTU*, 1 S.T.B. at 670).

\$0.035 per ton-mile rate that previously has been accepted by the Board.¹⁴⁵ While this rate was not specifically endorsed in *Sunbelt* and *DuPont*, the complainants in those cases failed to submit evidence supporting the validity of the rate.¹⁴⁶ Here, the { } demonstrates that the \$0.035 per ton-mile rate is a representative market rate. Consumers' evidence is reliable and meets the Board's precedential standards. *Duke/NS*, 7 S.T.B. at 100-101.

Consumers provided a quote from Ohio Rail, Inc. for the transport of materials from the railhead to the point of installation.¹⁴⁷ On Reply, CSXT implied that Ohio Rail, Inc. was unaware of what was required for the hypothetical project,¹⁴⁸ even though the same contractor bid for the complete track installation for the CERR. In Rebuttal, Consumers provided a phone log made by Consumers' engineers when originally requesting the bid, as evidence that the contractor was fully aware of all of the transportation requirements.¹⁴⁹ Consumers' transportation costs from the railhead to the point of installation should be accepted by the Board.

¹⁴⁵ See *Sunbelt* at 131; *DuPont* at 192-193.

¹⁴⁶ See *id.*

¹⁴⁷ See Consumers Opening e-workpaper "Ohio Track Cost Estimate.pdf" (Point 4: "Material transportation from delivery points is included in the quote.").

¹⁴⁸ CSXT Reply at III-F-74.

¹⁴⁹ See Consumers Rebuttal e-workpaper "Ohio Track Phone Log.pdf."

D. Consumers Properly Executed the DCF Model and Showed That the Challenged Rates Violate the SAC Constraint

In Parts III-G and III-H of its Rebuttal Evidence, Consumers explained in detail its execution of the Board's DCF Model as applied to the evidence in this case, and the maximum reasonable SAC rates that result. Consumers also showed that with a few, selected exceptions, such as information updates since the filing of its Opening Evidence and certain technical corrections,¹⁵⁰ CSXT's critiques of Consumers' evidence are without merit, and should be rejected. Following is a brief summary of the key points that are addressed in complete detail in Consumers' Rebuttal Evidence.

1. Cost of Capital

Reprising an argument that railroad defendants in SAC proceedings repeatedly have made without success, CSXT advocated the addition of a 6% equity flotation cost to the CERR's calculated cost of equity. The figure advanced by CSXT is substantially higher than those rejected by the Board in previous cases,¹⁵¹ and CSXT failed completely to meet the Board's *Sunbelt* test for inclusion of any equity flotation fee at all.¹⁵² There is, therefore, no basis for the Board to depart from precedent and approve such a fee in this case.

¹⁵⁰ See, e.g., Consumers Rebuttal at III-G-1, III-G-21-23.

¹⁵¹ See, e.g., *DuPont* at 274; *AEPCO 2011* at 138; *Duke/CSXT*, 7 S.T.B. at 433.

¹⁵² See *Sunbelt* at 184-185.

In *Sunbelt*, the Board held that in order for a flotation additive to be considered, the proponent railroad must present “evidence of the existence and size of the equity flotation fee for stock issuances of a similar size (and for transportation companies or other companies with a similar profile) as that needed by the SARR.”¹⁵³ In response, CSXT proffered a made-for-litigation study of initial public offerings across a broad spectrum of firms from various industries over a 10-year period.¹⁵⁴ Not only is the made-for-litigation aspect of the CSXT analysis inconsistent with the Board’s strong preferences,¹⁵⁵ but it is based on data that is not freely available to the public and cannot properly be verified.¹⁵⁶ Moreover, as Consumers showed on Rebuttal, the CSXT analysis did not include any transportation firms, or companies “of a similar size ... [and] with a similar profile to” the CERR, as the Board’s *Sunbelt* test requires.¹⁵⁷ Finally, CSXT wrongly assumed that a firm such as the CERR inevitably would incur high costs to issue equity through an initial public offering. As Consumers demonstrated, a relatively small, low-risk, high-return company such as the CERR – with a guaranteed revenue stream and a return on investment equivalent to those of established Class I railroads – would be an excellent candidate for a low cost

¹⁵³ *Sunbelt* at 185.

¹⁵⁴ See Consumers Rebuttal at III-G-4.

¹⁵⁵ See, e.g., *Duke/NS*, 7 S.T.B. at 145; *TMPA*, 6 S.T.B. at 603.

¹⁵⁶ Consumers Rebuttal at III-G-4-5 and n. 17.

¹⁵⁷ *Sunbelt* at 185. See Consumers Rebuttal at III-G-4-5.

private equity placement.¹⁵⁸ As the party with the burden of showing a basis to overturn an unbroken line of precedent, CSXT's failure to address this alternative substantively is a disqualifying failure of proof.

In addition to demonstrating the lack of merit in CSXT's equity flotation claim, Consumers showed why the Board should recognize the CERR's ability to structure its interest payments on debt capital in the same manner as CSXT and the other Class I railroads, and either distinguish or reconsider elements of its *Sunbelt* and *DuPont* decisions that imply a mandatory home mortgage-style structure.¹⁵⁹ Consumers demonstrated that its approach does provide for the full repayment of debt principal by the CERR as well as coupon interest, as the DCF Model specifically ensures that sufficient cash is generated every year to provide for both a return on *and* a return of debt and equity capital.¹⁶⁰ Consumers also showed that because the CERR's approach to debt structure mimics the actual experience of CSXT, the real world market scrutiny that concerned the Board in *Sunbelt* and *DuPont* effectively is applied to the CERR.¹⁶¹

Finally, Consumers' Rebuttal dispensed with two (2) other CSXT criticisms of Consumers' Opening Evidence on the issue of the CERR's capital costs, explaining how the carrier misconstrued the evidence to falsely claim that

¹⁵⁸ See Consumers Rebuttal at III-G-6-13.

¹⁵⁹ See *id.* at III-G-13-17.

¹⁶⁰ *Id.* at III-G-15-16. See also, Consumers Opening at III-G-5-8.

¹⁶¹ See Consumers Opening at III-G-9; Consumers Rebuttal at III-G-15 and n. 52.

Consumers was assuming the CERR would issue a single, 20-year debt instrument,¹⁶² and demonstrating that the CERR's approach to future changes in interest rates and the pattern of debt retirement is in accord with the Board's DCF Model.¹⁶³ Consumers' presentations on the matter of the CERR's cost of capital represent the better evidence of record.

2. **Present Value of Replacement Costs**

After Consumers included a terminal interest value in the DCF Model's capital carrying charge to reflect the constant capital structure for the CERR assumed by the Board, CSXT responded with a claim that it was necessary to "reestablish" the debt amortization schedule for replacement assets. As Consumers demonstrated on Rebuttal, however, its terminal interest value calculation already accounts for interest payments on future debt.¹⁶⁴ CSXT's proposed adjustment improperly would double-count the interest payments, and therefore is unacceptable.

3. **Bonus Depreciation**

Consistent with well-established precedent, Consumers' calculations assumed that the CERR would take advantage of bonus depreciation and other tax benefits that were provided under statutes enacted and/or in effect during its

¹⁶² See Consumers Rebuttal at III-G-17-19.

¹⁶³ *Id.* at III-G-18-19.

¹⁶⁴ See Consumers Rebuttal at III-H-4-5.

construction period.¹⁶⁵ Under these cases, CERR’s entitlement to the benefits is not dependent on whether CSXT experienced the same benefits at the same or during an earlier time.¹⁶⁶ Nevertheless, CSXT argued that conferring any tax benefit on the CERR that was not also enjoyed by CSXT amounts to a “reverse barrier to entry,” and should not be allowed.¹⁶⁷ The claims raised by CSXT were rejected recently by the Board in *Sunbelt* and *DuPont*,¹⁶⁸ and should be in this case as well.

As Consumers demonstrated on Rebuttal and the Board previously has endorsed, the fixed time period for construction of its system both opens a SARR up to certain benefits, and exposes the SARR to certain risks, which may or may not be shared precisely by the incumbent. To deny the SARR tax benefits on the grounds that they were not available to the incumbent while requiring the SARR to accept risks that the incumbent did not face – or denying the SARR the benefits of tax statutes and regulations that had applied to the incumbent but then expired¹⁶⁹ – would squarely violate SAC theory and the “hit and run entry” feature of the principle of contestability.¹⁷⁰ Additionally, the logical extension of CSXT’s argument is that the CERR must be constructed and operated in the same manner

¹⁶⁵ See, e.g., *Sunbelt* at 188-189; *DuPont* at 277-279; *McCarty Farms*, 2 S.T.B. at 525-529; *WTU*, 1 S.T.B. at 714.

¹⁶⁶ *Sunbelt* at 188-189.

¹⁶⁷ See CSXT Reply at III-H-3-6.

¹⁶⁸ *Sunbelt* at 188-189; *DuPont* at 277-279.

¹⁶⁹ See Consumers Rebuttal at III-H-7-8.

¹⁷⁰ See *id.* at III-H-8-10; *WTU*, 1 S.T.B. at 671-672.

as CSXT, as the CERR would be denied cost savings (*i.e.*, efficiencies) that CSXT did not experience itself. The Board consistently has rejected this concept as well.¹⁷¹

4. Discounted Cash Flow

As the Board recognized in *Sunbelt* and *DuPont*, certain assumptions in the Board's DCF Model historically created a mismatch between a SARR's cost of capital and its cash flows. The Board corrected this mismatch in those cases, and Consumers applied the same correction in this proceeding.¹⁷²

CSXT's Reply argued that the Board's *Sunbelt* decision did not adopt the correction made by Consumers, but Consumers showed on Rebuttal that CSXT was wrong.¹⁷³ Consumers also demonstrated that what CSXT alleged were "conceptual" and "mathematical" errors in the Board-approved approach actually are no such thing. CSXT's "conceptual error" claim reflects its apparent confusion of the DCF Model's use of 20 years as a maximum amortization period with a mandatory fixed period for all purposes, which it is not. Likewise, its alleged "mathematical error" springs from ignorance of the fact that lower than average interest payments during the second half of the amortization period are

¹⁷¹ *WFA II* at 14; *AEPCO 2011* at 10; *McCarty Farms*, 2 S.T.B. at 468; *Coal Rate Guidelines*, 1 I.C.C. 2d at 543.

¹⁷² *See Sunbelt* at 193; *DuPont* at 282-84; Consumers Opening at III-H-6-8; Consumers Rebuttal at III-H-12-13.

¹⁷³ *See* Consumers Rebuttal at III-H-13-14.

offset by higher payments during the first half.¹⁷⁴ The *Sunbelt* approach followed by Consumers is correct.

Considered in totality and as summarized in Consumers' Rebuttal,¹⁷⁵ the weight of the evidence of record in this case clearly establishes that the challenged CSXT rates for coal service to Campbell are unreasonably high, under the *Guidelines*' SAC Constraint.

III.

THE CHALLENGED RATES ARE UNREASONABLE UNDER THE *GUIDELINES*' REVENUE ADEQUACY CONSTRAINT

Consistent with established precedent, Consumers' Opening Evidence presented "competent and probative evidence"¹⁷⁶ demonstrating that CSXT has achieved long-term revenue adequacy as defined in the governing statute.¹⁷⁷ Also in accordance with precedent, Consumers showed that under the *Guidelines*' Revenue Adequacy Constraint, the rate increase that CSXT imposed on Consumers' Campbell coal traffic on January 1, 2015 through the application of Tariff CSXT-13952 was unlawful.¹⁷⁸

¹⁷⁴ *See id.* at III-H-15-16.

¹⁷⁵ *See id.* at III-H-17-25.

¹⁷⁶ *See Bituminous Coal – Hiawatha, UT to Moapa, NV*, 6 I.C.C. 2d 1, 7 n. 24 (1989); *Railroad Revenue Adequacy – 1987 Determination*, 4 I.C.C. 2d 731, 734 (1988).

¹⁷⁷ 49 U.S.C. § 10704(a)(2). *See* Consumers Opening at IV-11-41.

¹⁷⁸ *CF Indus., Inc. v. Koch Pipeline Co., L.P.*, 4 S.T.B. 637, 664 (2000), *aff'd sub nom.*, *CF Indus., Inc. v. STB*, 255 F. 3d 816, 828 (D.C. Cir. 2001); *Guidelines*, 1 I.C.C. 2d at 535-536.

CSXT's Reply for the most part did not challenge Consumers' extensive empiric evidence of CSXT's favorable financial condition, and the correlation between CSXT's showing under a variety of recognized financial metrics and the statutory revenue adequacy criteria. Instead, CSXT principally focused on two (2), equally unmeritorious arguments: (1) that Consumers cannot simultaneously pursue relief under both the SAC Constraint and the Revenue Adequacy Constraint;¹⁷⁹ and (2) that CSXT cannot be found to be revenue adequate for purposes of the *Guidelines* if it has not been found revenue adequate under the Board's *Ex Parte No. 552* series annual industry "snapshots." Consumers' Rebuttal Evidence thoroughly refuted both claims.

Obviously unable to deny the existence of a line of precedents affirming the right of shippers such as Consumers to pursue relief under the Revenue Adequacy and SAC Constraints at the same time,¹⁸⁰ CSXT basically argues that those precedents – and the Revenue Adequacy Constraint itself – were nullified by the Board's introduction of an internal cross-subsidy test into the SAC Constraint in *PPL Montana* and *Otter Tail*.¹⁸¹ As a threshold proposition, court decisions construing the Administrative Procedures Act make clear that a major component of a regulatory regime that was adopted after notice-and-comment rulemaking procedures cannot be overridden in a decision made in an individual

¹⁷⁹ See, e.g., CSXT Reply at I-32.

¹⁸⁰ See, e.g., *CF Indust., Inc.*, 4 S.T.B. at 656-662; *Bituminous Coal – Hiawatha, UT*, 6 I.C.C. 2d at 7; *Ark. Power & Light Co., v. Burlington N. R.R., et al.*, 1 I.C.C. 2d 757, 782-783 (1987); *Coal Rate Guidelines*, 1 I.C.C. 2d at 548.

¹⁸¹ CSXT Reply at I-33.

adjudication.¹⁸² Moreover, however, as Consumers demonstrated on Rebuttal, CSXT’s argument is inconsistent with contestable market theory. Multiple Board decisions clearly tie the cross-subsidy prohibition solely to the “bottom-up” SAC Constraint; it has no role whatsoever in the “top down” revenue adequacy context.¹⁸³ As Consumers’ expert witness Dr. Hennigan explained, CSXT’s theory both distorts the true nature of the Revenue Adequacy Constraint, and misrepresents the SAC rate as *the* undisputed reasonable rate, when contestable market theory holds that it only functions as an absolute *ceiling* on prices.¹⁸⁴

CSXT’s second principal argument on revenue adequacy – that its rates cannot be subject to the Revenue Adequacy Constraint because it has not been found revenue adequate in the annual industry “snapshots” – was rejected by the Board in this very case, when CSXT’s motion to dismiss Consumers’ Revenue Adequacy Constraint claim, *based on the same argument*, was denied.¹⁸⁵ Therein, the Board affirmed that for purposes of evaluating rates under the *Guidelines*, “other competent and probative evidence relative to the carrier’s revenue adequacy”¹⁸⁶ would be considered. Consumers has presented such evidence in both its Opening and Rebuttal submissions, and the few real challenges to that

¹⁸² See *Perez v. Mortgage Bankers Ass’n.*, 135 S. Ct. 1199, 1206 (2015); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹⁸³ See, e.g., *Sunbelt* at 5; *AEPCO 2011* at 4; *WFA I* at 7; *WPL*, 5 S.T.B. at 964 n. 18; *FMC*, 4 S.T.B. at 721 n. 51.

¹⁸⁴ See Consumers Rebuttal at I-44-46; IV-33-37; Hennigan Rebuttal Report at 7, 12-13.

¹⁸⁵ Decision served June 15, 2015.

¹⁸⁶ *Id.* at 2.

evidence leveled by CSXT have been shown to be without merit.¹⁸⁷ Consumers clearly has met its burden of proof vis-à-vis its entitlement to rate relief under the Revenue Adequacy Constraint.

IV.

CONCLUSION

Upon consideration of the full evidentiary record in this proceeding, the Board should issue a decision finding that CSXT possesses market dominance over the transportation to which the challenged rates apply, and that those rates exceed a maximum reasonable level and are unlawful. CSXT should be ordered to establish and maintain rates for coal transportation service to Campbell at levels no higher than those shown by Consumers' Rebuttal Evidence and summarized *supra*, for each of the years 2015 through 2024, and to pay Consumers reparations equal to the difference between freight charges calculated in accordance with such rates, and the charges actually paid by Consumers on all shipments moving under Tariff CSXT-13952 from January 1, 2015 through the effective date of the Board's order, along with applicable interest.

¹⁸⁷ See Consumers Rebuttal at IV-38-63.

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CERTIFICATE OF SERVICE

I hereby certify that this 24th day of June, 2016, I have caused copies of the Brief of Complainant Consumers Energy Company to be served by hand upon counsel for Defendant CSX Transportation, Inc. as follows:

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