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June 1, 2016

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Cynthia T. Brown, Chief  
 Section of Administration  
 Office of Proceedings  
 Surface Transportation Board  
 395 E Street, SW  
 Washington DC 20423

Re: Docket No. NOR 42142, Consumers Energy Co. v. CSX Transportation, Inc.

Dear Ms. Brown:

On May 26, 2016, CSX Transportation, Inc. (“CSXT”) filed an Errata to its Reply Evidence in the above-referenced proceeding for the single purpose of submitting one workpaper that had been inadvertently omitted from its initial filing. The workpaper at issue is a pdf of a 1974 trackage rights agreement, which CSXT referenced repeatedly in its Reply evidence and on which CSXT predicated one of its two alternative methodologies for determining trackage rights fees. As CSXT explained in its Errata filing, CSXT was not aware of the missing workpaper until Consumers Energy Company (“Consumers”) noted the omission in its Rebuttal Evidence.

Consumers objects to CSXT’s Errata filing, arguing that CSXT’s errata prejudices Consumers and that the 1974 trackage rights agreement should have been produced in discovery. But Consumers’ claims of prejudice ignore its role in creating the claimed “prejudice.” The ordinary practice in SAC cases has been for parties to notify the other party about missing or incomplete workpapers to enable the correction of such errors expeditiously and without Board intervention. That is what CSXT did with the numerous missing workpapers in Consumers’ Opening evidence – on multiple occasions it notified Consumers of omissions and unsupported numbers, and gave

Cynthia T. Brown

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Consumers an opportunity to correct them.<sup>1</sup> Many of the issues in Consumers' Opening errata are issues that CSXT brought to Consumers' attention.<sup>2</sup>

Here, Consumers chose not to inform CSXT of the missing 1974 trackage rights agreement, even though CSXT's evidence made clear that the agreement was the source for its calculations.<sup>3</sup> Consumers could have informed CSXT that it believed a workpaper was missing from CSXT's Reply filing before it filed its Rebuttal Evidence, just as CSXT did for Consumers. Had Consumers requested the missing 1974 trackage rights agreement, it would have been promptly provided. Consumers should not be rewarded for its silence. To promote the efficient management of these complex disputes, the Board should encourage parties to raise simple evidentiary issues directly with each other rather than bringing all such issues to the Board.<sup>4</sup>

Furthermore, Consumers is not prejudiced in any way. In its Reply, CSXT made clear that it intended to rely upon the 1974 trackage rights agreement and laid out its

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<sup>1</sup> See Attachment A (email chain containing three separate messages to Consumers identifying missing workpapers or requesting workpaper support for hard-coded values).

<sup>2</sup> Compare Consumers Opening Errata WP "Consumers\_November 2 2015\_Opening Electronic Workpaper Index Annotated.xlsx" lines 96, 446, 640, 641, 671, 672, 745, with Attachment 1 at 3 (Consumers Annotated Workpaper Index includes workpapers identified as missing by CSXT).

<sup>3</sup> See CSXT Reply at III-D-155-56 (discussing 1974 NS/CSXT trackage rights agreement, identifying the rate, making clear that "this rate was negotiated on the basis of 1974 traffic levels" and suggesting that "the rate negotiated in the 1974 agreement would offer an alternative that does not reflect the reciprocal aspect of the current NS/CSXT agreement"); CSXT Reply WP "NS552.pdf" at 13 (referencing existence of June 1974 trackage rights agreement).

<sup>4</sup> Cf. Decision, *Consumers Energy Co. v. CSX Transp. Inc.*, STB Docket No. NOR 42142 at 1-2 (served April 2, 2015) (noting that "Consumers filed its motion without conferring with CSXT" and requiring the parties "to meet and confer" and report back to the Board); Decision, Docket No. NOR 42142 at 2 (served April 6, 2016) ("The Board strongly encourages parties to meet and confer on issues such as this prior to petitioning the Board for relief.").

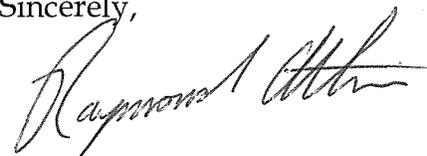
Cynthia T. Brown  
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argument in full. CSXT Reply at III-D-155-56. Consumers thus was apprised of CSXT's full arguments for why the 1974 trackage rights agreement is a more accurate proxy of CERR trackage rights expenses than a reciprocal rate, of the 1974 rate that CSXT used to begin its analysis, and of CSXT's indexing calculations. The only thing the pdf workpaper provides is the source of the rate in the 1974 trackage rights agreement, which cannot be disputed.<sup>5</sup> And Consumers has not even hinted at any specific argument that it could have made based on the text of the agreement itself that it could not have made on Rebuttal.

Finally, Consumers' discovery complaints are a red herring. Consumers tellingly does not identify any discovery request that it believes called for the production of the 1974 trackage rights agreement. There was none. Consumers' discovery request for joint facilities agreements was expressly limited to those "that were in effect during all or any portion of the period from January 1, 2011 to the present." Consumers Request for Production No. 56. CSXT cannot be penalized for not producing a document that Consumers did not request.

In short, the addition of this single agreement to the record in this case does not prejudice Consumers in any meaningful way, and the Board should accept CSXT's Errata filing as part of the record.

Sincerely,



Raymond A. Atkins

cc: Daniel M. Jaffe

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<sup>5</sup> In this way, CSXT's Errata is unlike the Errata that Consumers references in the *PEPCO* proceeding. There, CSXT sought to adjust revenues reported on CSXT's traffic tapes, which would impact its entire SAC analysis. *Potomac Electric Power Co. v. CSX Transp., Inc.*, Docket No. 41989, at 7 (served Nov. 24, 1997). CSXT also notes that final briefs were not provided for in that matter. *See id.* (decision served June 18, 1997) (making no provision for final briefs in the procedural schedule).

**Warren, Matthew J.**

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**From:** Daniel M. Jaffe [dmj@sloverandloftus.com]  
**Sent:** Tuesday, November 24, 2015 2:54 PM  
**To:** Warren, Matthew J.; Kelvin Dowd; Katherine F. Waring  
**Cc:** Moates, G. Paul; Atkins, Raymond  
**Subject:** RE: Consumers v. CSXT

Matt,

RLBA=R.L. Banks & Associates. We'll check on the other items and advise.

Sincerely,  
Dan

Daniel M. Jaffe  
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202.347.7170 (Main Line)  
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**From:** Warren, Matthew J. [mailto:mjwarren@sidley.com]  
**Sent:** Tuesday, November 24, 2015 12:06 PM  
**To:** Kelvin Dowd; Daniel M. Jaffe; Katherine F. Waring  
**Cc:** Moates, G. Paul; Atkins, Raymond  
**Subject:** RE: Consumers v. CSXT

Kelvin, Dan, and Katherine,

Consumers Opening Workpapers "5 Trackage Rights Transit Times - Peak Period Base Year Train Transit Time Summary 2015 10-09.xlsx" and "5.1 Transit Times Comparison Hist vs RTC.xlsx" each contain transit-time values that are hard-coded. These workpapers do not provide the underlying calculations for those transit-time values or otherwise identify the source materials for those values. Please provide all calculations and source data records supporting the hard-coded values found in "5 Trackage Rights Transit Times - Peak Period Base Year Train Transit Time Summary 2015 10-09.xlsx" and "5.1 Transit Times Comparison Hist vs RTC.xlsx." In addition, please define "RLBA," which

appears in the title of the "Train Transit Summary WORK" tab in WP "5.1 Transit Times Comparison Hist vs RTC.xlsx."

Matt

**MATT WARREN**  
Partner

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**From:** Daniel M. Jaffe [<mailto:dmj@sloverandloftus.com>]  
**Sent:** Thursday, November 12, 2015 10:08 PM  
**To:** Warren, Matthew J.  
**Cc:** Kelvin Dowd; Moates, G. Paul; Atkins, Raymond; Katherine F. Waring  
**Subject:** Re: Consumers v. CSXT

Matt,

We'll check on this too.

Dan

On Nov 12, 2015, at 10:05 PM, Warren, Matthew J. <[mjwarren@sidley.com](mailto:mjwarren@sidley.com)> wrote:

Kelvin,

The following workpaper is also missing from the workpaper hard drive Consumers provided with its opening evidence. Please provide us with this workpaper and the missing workpapers we requested on Tuesday as soon as possible.

Section	Page	Missing Workpaper Name
III-C	Page III-C-63	RTC List.xlsx

Matt

**MATT WARREN**  
Partner

**Sidley Austin LLP**  
+1 202 736 8996  
[mjwarren@sidley.com](mailto:mjwarren@sidley.com)

**From:** Warren, Matthew J.  
**Sent:** Tuesday, November 10, 2015 4:30 PM  
**To:** [kjd@sloverandloftus.com](mailto:kjd@sloverandloftus.com)  
**Cc:** Moates, G. Paul; Atkins, Raymond; [dmj@sloverandloftus.com](mailto:dmj@sloverandloftus.com); 'Katherine F. Waring'  
**Subject:** Consumers v. CSXT

Kelvin,

The workpapers listed in the chart pasted below were cited in Consumers' Opening Narrative but were not included on the workpaper hard drive. Please provide them to us as soon as possible.

Matt

Section	Page	Missing Workpaper Name
II-B	Page II-55, FN 152	Consumers Energy 10-06-03.dox
III-F	Page III-F-5	Barr Yard Site Development Costs.xls
III-F	Page III-F-58	Turnout Materials.pdf
III-F	Page III-F-60	AREMA Chapter 30 TIES, Part 1 General Considerations, Section 1.7 F:
III-F	Page III-F-61	Anchoring.pdf
III-F	Page III-F-76	Telecom Site Map.pdf
III-F	Page III-F-86	Photos folder

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