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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CONSUMERS ENERGY COMPANY)	
)	
Complainant,)	
)	
v.)	Docket No. 42142
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant.)	
)	

**COMPLAINANT’S REPLY TO
DEFENDANT’S MOTION TO COMPEL**

Complainant Consumers Energy Company (“Consumers”), pursuant to 49 C.F.R. Part 1114.31(a)(2), hereby replies to the Motion to Compel (“Motion”) filed by Defendant CSX Transportation, Inc. (“CSXT”) on April 2, 2015. For the reasons set forth below, the Motion is without merit and should be denied.

INTRODUCTION

CSXT’s First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents in this proceeding principally were focused on two (2) topics: (1) the likely volume of coal that would be transported to the Campbell Station by rail over the ten-year Stand Alone Cost (“SAC”) analysis period; and (2) whether coal transportation to Campbell, which has always taken place via CSXT and has been subjected to a rate approaching 450% of the variable cost of service, nevertheless enjoys

“effective competition” from other rail carriers or modes of transport. In pursuit of information related to these topics, CSXT served six (6) Requests for Admission; thirty-two (32) Interrogatories (many of which had sub-parts); and twenty-three (23) Requests for Production (which also had sub-parts).

In its Responses,¹ Consumers provided the information sought by CSXT in the vast majority of its discovery requests, and agreed to broad document production, which already has begun. Included within the information and documents already provided or to be provided to CSXT are comprehensive data regarding current and future expected coal use at Campbell, which is generated and retained by Consumers in the ordinary course of business, and non-privileged documents from 2007 to the end of 2014 that relate to Consumers’ consideration and study of hypothetical alternatives to CSXT service for coal deliveries to Campbell, a subject that has been of interest to Consumers in light of the persistently high rates demanded by CSXT for rail transportation.²

Notwithstanding Consumers’ informative responses and timely document production, CSXT – first by letter³ and then through its Motion – has sought to increase the discovery burden on Consumers with demands for additional documents that are irrelevant, redundant, and/or beyond the scope of reasonable discovery in a case like this. Specifically, CSXT has asked the Board for an order compelling Consumers to produce:

¹ A copy of Consumers Responses and Objections to CSXT’s Discovery Requests (“Responses”) is attached to CSXT’s Motion as Exhibit 3.

² As Consumers advised CSXT in the Responses and will demonstrate in the evidentiary phase of this proceeding, the result of such consideration and study was the conclusion that there are no effective, competitive inter- or intramodal alternatives to CSXT for coal transportation to Campbell. *See* Responses at 7.

³ *See* Motion, Exhibits 4 and 5.

1. Extensive, detailed information and documents concerning coal transportation to Consumers' facilities *other* than Campbell, even though Consumers already has or is producing the data regarding those facilities that arguably is relevant to CSXT's market dominance claims.
2. Documents related to Consumers' consideration of hypothetical alternatives to CSXT service to Campbell that pre-date 2008 (*i.e.*, that are more than seven (7) years old), even though they are unrelated to current conditions and the rates at issue in this case.
3. Extensive data related to coal consumption at the Consumers plants that are not at issue in the case, even though Consumers already is producing both extensive coal forecasting data for Campbell *and* the common source materials for all of Consumers' facilities.

Under applicable Board precedent and upon a fair consideration of the lack of any demonstrated need on CSXT's part for the additional production in question, it is clear that the carrier's Motion is without merit and should be denied.

ARGUMENT

I. CSXT'S DISCOVERY REQUESTS CONCERNING COAL TRANSPORTATION TO OTHER CONSUMERS FACILITIES ARE OVERBROAD AND UNDULY BURDENSOME

The CSXT rates at issue in this proceeding apply to coal transportation from a point near Chicago, IL to the Campbell Station near West Olive, MI, a CSXT-captive destination. In its Answer, CSXT nevertheless denied that it possesses qualitative market dominance over this transportation,⁴ and it has sought discovery of documents and information related to Consumers' consideration of hypothetical transportation alternatives to CSXT rail service for coal shipments to Campbell.⁵ As described *supra*,

⁴ See CSXT Answer at 4-5.

⁵ See Motion at 3-4; CSXT Interrogatory No. 18 and Request for Production No.

Consumers is producing documents responsive to these requests. In its Motion, however, CSXT presses a claim to entitlement to information concerning “all occasions” over the past three (3) years when Consumers has used non-rail transportation to move coal to facilities *other* than Campbell, and documents related to any such shipments.⁶ CSXT’s claim should be denied.

Board precedent is clear that the market dominance inquiry is limited to an examination of potential inter- or intramodal transportation alternatives “between the points to which the [challenged] rate applies” – in this case, between the Chicago area and the Campbell Station. *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Company*, STB Docket No. NOR 42038 (STB served May 11, 1999) at 3. *See also, Consolidated Paper, Inc. v. CNW Transportation Co.*, 7 I.C.C.2d 330, 336 (1991). The modes of transportation used by Consumers to move coal to its Cobb Station and to the Karn-Weadock facility are irrelevant, which makes discovery requests focused on those plants unduly burdensome. The Cobb Station receives only a fraction of the annual volumes shipped to Campbell, and unlike Campbell, it does not have to receive shipments year-round. The Karn-Weadock facility at Essexville is on the opposite side of the State of Michigan from Campbell, and also has an entirely different coal delivery configuration. Under these circumstances, precedents do not support compelling Consumers to produce information and documents in the nature of those sought by CSXT. *Waterloo Ry. – Adverse Abandonment – Lines of Bangor & Aroostook RR*, STB

⁶ Motion at 8-9; CSXT Interrogatory Nos. 11 and 13, and Requests for Production Nos. 4 and 5.

Docket No. AB-124 (Sub-No. 2) (STB served November 14, 2003) at 3. *See also Duke Energy Corp. v. CSX Transportation, Inc.*, STB Docket No. 42070, 2002 WL 1730020, at *3 (S.T.B. July 26, 2002).

CSXT argues in its Motion that the use of waterborne transportation for coal shipments to Cobb and Karn-Weadock is relevant to the issue of market dominance at Campbell because “the coal plants at issue have near-identical geographic characteristics,”⁷ but this simplistic formulation is factually wrong. The Cobb Station was designed for waterborne deliveries and has the infrastructure in place to handle them. Campbell, in contrast, has no such capability. Moreover, Cobb receives at most about 1,000,000 tons of coal each year (less than 25% of Campbell’s volume), with shipments moving only between March/April and December, when Lake Michigan is navigable. Campbell requires rail deliveries twelve months a year. The Karn-Weadock facility is located near Essexville, MI, entirely across the state from Campbell, and is in a protected bay that accesses Lake Huron, not Lake Michigan. It receives well under 1,000,000 tons of coal annually (and on a seasonal basis) by water.⁸ Other than the fact that all three (3) stations receive shipments of coal, the transportation “characteristics” of Campbell have little in common with those of the other stations.

Perhaps recognizing the absence of any direct relevance of the transportation modes used at Consumers’ other facilities to the question of Campbell’s captivity to rail, CSXT claims that information regarding the other plants could

⁷ Motion at 7.

⁸ The balance of Karn-Weadock’s annual coal requirements move by rail.

“illuminate the potential for Consumers” to use non-rail modes for Campbell,⁹ including “the sort of equipment and facilities that would be needed” and “the costs of a water delivery option.”¹⁰ However, these purposes do not support the relief sought by CSXT in its Motion. Information regarding the “sort of equipment and facilities” that would be needed to create a hypothetical, new water transportation system to serve Campbell are outlined in detail in the studies of this infeasible prospect that Consumers already is providing to CSXT in response to other discovery requests, which CSXT acknowledges.¹¹ Similarly, costs incurred by Consumers for vessel transportation of coal to Cobb and Karn-Weadock is among the data that already have been produced by Consumers, and that production potentially could be supplemented if additional responsive information is identified. Since CSXT already has access to the “illuminating” information that it now seeks, its Motion should be denied.

II. SO-CALLED “HISTORIC” STUDIES OF RAIL ALTERNATIVES ARE IRRELEVANT

It is well established that the relevant inquiry for qualitative market dominance purposes is whether the defendant faces effective transportation competition for the traffic subject to the challenged rate during the time period covered by the complaint, which in this case is January 1, 2015 through December 31, 2024. *See Consolidated Paper, Inc.*, 7 I.C.C.2d at 336-45; *Allied Chemical Corp. v. Ann Arbor Railroad System*, ICC Docket No. 38412S, 1988 WL 225622, at *4 (I.C.C. Jan. 4, 1988).

⁹ Motion at 8.

¹⁰ *Id.* at 7.

¹¹ Motion at 9.

See also, Dayton Power & Light Co. v. Louisville and Nashville Railroad Co., ICC Docket No. 37063, 1990 WL 287320, at *2 (I.C.C. Feb. 22, 1990). Discovery is limited to the covered time period, or to a reasonable prior (or subsequent) time period *if it “sheds light on the market conditions existing during the relevant period.” Amstar Corp. v. The Atchison, Topeka & Santa Fe Railway Co.*, ICC Docket No. 37478, 1987 WL 99931, at *1, 3 (I.C.C. Nov. 23, 1987); *Allied Chemical Corp., supra*.

In this case, Consumers is producing information and documents related to its consideration of hypothetical transportation alternatives to CSXT rail for Campbell coal deliveries that were generated from 2007 to the present; that is, the time period to which the challenged rate applies and up to eight (8) years prior to that time. Consumers’ production more than satisfies the applicable legal standard. In its discovery requests¹² and Motion, however, CSXT seeks information reaching back to 1988, some *twenty-seven (27) years* before the challenged rates were established. Motion at 9-11. It should be beyond dispute that conditions relevant to any examination of potential rail alternatives at that time – including environmental and other permitting requirements for new construction; facilities construction and operating costs; residential, recreational and other area development; resource availability; and affected community attitudes, just to name a few – have little or no relevance to conditions prevailing today, which are the proper subject of the market dominance inquiry.¹³ As the Board ruled in 2011 in an

¹² *See, e.g.*, CSXT Request for Production No. 3.

¹³ CSXT’s suggestion that Consumers’ references to the more recent study documents is a “made-for-litigation claim” (Motion at 11) is groundless. The information contained in the documents being produced to CSXT obviously will differ

analogous context, the feasibility of a transportation alternative under current or very recent conditions cannot be determined by reference to operations or conditions that prevailed over a dozen years earlier. *See Entergy Arkansas, Inc. v. Union Pacific Railroad Company*, STB Docket No. NOR 42104 (STB served March 15, 2011) at 10-14.¹⁴

CSXT rests its relevancy claim largely on Exhibit 6 to its Motion, which CSXT says is {

} In any event, it certainly cannot convert 25 year-old documents

from that included in documents 25+ years older, and just as obviously will be superior to those materials in terms of reflecting actual, recent and current conditions.

¹⁴ In the *Entergy* proceeding, this proposition was advocated successfully by the defendant railroad.

¹⁵ {

} In addressing it in this Reply, Consumers is not conceding that the document constitutes admissible evidence under the Board's Rules of Practice. 49 C.F.R. Part 1114.1.

¹⁶ {

}

into contemporary evidence that would be “relevant to the question presented here: [does] effective competition actually exist” for CSXT coal service to Campbell today and in the future. *Allied Chemical Corp., supra at* *4.¹⁷

CSXT’s request for an order compelling the production of “historical studies” should be denied.

III. CONSUMERS ALREADY IS PRODUCING COAL FORECAST INFORMATION FOR ALL OF ITS FACILITIES

CSXT’s Interrogatory No. 25 asks that Consumers “describe with specificity” thirteen (13) separate categories of data with respect to every electrical generating unit that Consumers operates, including original construction schedules and planned modifications, expected changes in production capacity, operations and maintenance expenses over a three-year period, and unit outages. CSXT’s Interrogatory No. 27 then requests six (6) categories of data relative to electricity production and fuel use forecasts for each unit, Interrogatory No. 28 asks for detailed descriptions of the methodology used to prepare the forecasts, and CSXT’s Requests for Production Nos. 16 and 19 effectively seek production of all documents related to the foregoing information. The scope of these discovery requests is exceedingly broad – it is not limited to

¹⁷ CSXT’s references to *Seminole Electric Coop. v. CSX Transportation Inc.*, STB Docket No. NOR 42110 (STB served Feb. 17, 2009) (Motion at 9, 11) are inapposite. Consumers does not object to producing documents dating to the 1980s and early 1990s because it believes that CSXT should be satisfied with other sources of the information that could be contained in those materials (if they exist). Consumers objects because any such information is irrelevant to whether CSXT faces effective competition at Campbell in 2015.

“forecasts” as CSXT’s Motion implies¹⁸ – and it extends well beyond the class of information that is relevant to this case (*i.e.*, projected volumes of coal traffic moving to the Campbell Station over the 2015-2025 time period). CSXT admits that Consumers has agreed to produce complete coal traffic forecast data for Campbell, but argues that the far broader scope of its requests is justified because documents and data related to other Consumers facilities might “contradict” the forecasts for Campbell. *See* Motion at 13-14. This argument reflects a fundamental misunderstanding of utility coal use forecasting, and CSXT’s request for an order compelling complete production of all requested data and documents should be denied.

In its production of coal forecasts for Campbell, Consumers will be including the full base of data upon which the forecasts rely. *Inter alia*, that data includes information on expected coal consumption at other Consumers’ facilities, which – as Consumers previously advised CSXT – is incorporated into the Campbell forecasts (that is, projected volumes at Campbell reflect expected generation at the other facilities relative to overall power demand). *See* Motion at 13. Forecast data for the other Consumers facilities are not developed separately from those for Campbell, such that they might “contradict” the Campbell forecasts. Rather, the forecasts for all plants – Campbell included – are drawn from the same comprehensive information sources, which Consumers will be producing to CSXT. This completely satisfies any *legitimate* interest that CSXT may have in data allowing it to test the veracity of Consumers’ Campbell coal traffic projections under a SAC analysis. CSXT’s demand for more extensive discovery

¹⁸ Motion at 13.

as described in its Interrogatory Nos. 25, 27 and 28 and Requests for Production Nos. 16 and 19, is unwarranted and should be denied. *See Duke Energy Corp., supra, at *4-6.*

CONCLUSION

For the reasons set forth herein, to the extent that it has not been rendered moot by Consumers' actual and planned document production as described in this Reply, CSXT's Motion to Compel should be denied.

Respectfully submitted,

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Dated: April 13, 2015

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CERTIFICATE OF SERVICE

I hereby certify that this 13th day of April, 2015, I caused a copy of the foregoing Complainant's Reply to Motion to Compel to be served by hand delivery and electronic mail on the following counsel for Defendant CSX Transportation, Inc.:

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I also caused the foregoing Motion to be served by overnight delivery on the following counsel for CSXT:

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