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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**COMPLAINANT’S PETITION FOR LEAVE TO FILE
SUPPLEMENTAL EVIDENCE OF EQUITY FLOTATION COSTS**

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Dated: July 14, 2016

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**COMPLAINANT’S PETITION FOR LEAVE TO FILE
SUPPLEMENTAL EVIDENCE OF EQUITY FLOTATION COSTS**

Complainant, Consumers Energy Company (“Consumers”), pursuant to 49 C.F.R. § 1117.1, hereby petitions for leave to file Supplemental Rebuttal Evidence limited to the determination of equity flotation costs attributable to the CERR,¹ the stand-alone railroad system that is the subject of evidence and argument previously filed in this proceeding by Consumers and by Defendant, CSX Transportation, Inc. (“CSXT”). In support hereof, Consumers shows as follows:

1. In a virtually unbroken string of precedents culminating in its June 20, 2014 decision in *Sunbelt*, the Board consistently rejected arguments by railroad defendants in proceedings under the SAC Constraint of the *Coal Rate Guidelines* that an

¹ In the interest of brevity, this Petition uses the same Acronyms and short form Case Citations that are defined at pages iii-v of Consumers’ June 24, 2016 Brief.

equity flotation cost or “marketing” fee should be included in the cost of capital for a SARR.² Indeed, prior to this year, the only time the Board approved of the inclusion of such a fee was when both the complainant and defendant agreed to it.³

2. Consumers’ Opening and Rebuttal Evidence, filed on November 2, 2015 and May 20, 2016, respectively, relied on the Board’s precedents spanning more than a decade, and excluded equity flotation fees from the cost of capital calculation. In its Rebuttal, Consumers noted the Board’s observation in *Sunbelt* that equity flotation costs could be considered if specific evidentiary showings were made by the railroad,⁴ but went on to show that the fees proffered by CSXT failed the *Sunbelt* test.⁵ Consistent with prior case law, Consumers did not present specific evidence concerning an alternate calculation of equity flotation costs, as the prevailing rule was that they should be excluded entirely.

3. On June 30, 2016, the Board served a decision in response to competing petitions for reconsideration in the *Sunbelt* case. Therein, the Board *reversed* its previous rulings on equity flotation costs, on which Consumers reasonably had relied, finding that “[t]he Board’s criticisms of NS’s supporting evidence were unwarranted”⁶

² See *DuPont* at 274; *AEPCO 2011* at 135-138; *Otter Tail* at E-2; *Duke/CSXT*, 7 S.T.B. at 433; *Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry. Co.*, 7 S.T.B. 589, 659 (2004); *TMPA*, 6 S.T.B. at 751; *WPL*, 5 S.T.B. at 1040.

³ See *AEP Tex. N. Co. v. BNSF Ry. Co.*, NOR 41191 (Sub-No. 1) (STB served May 15, 2009) at 23.

⁴ Consumers Rebuttal at III-G-2.

⁵ *Id.* at III-G-3-5. See *Sunbelt* at 183-185; *DuPont* at 274.

⁶ STB served June 30, 2016 at 30.

and that the previously prescribed evidentiary requirements “were too stringent.”⁷

Following these pronouncements, the Board approved a 2.1% equity flotation fee for the *Sunbelt* SARR.⁸

4. As the Board has acknowledged in prior cases under the *Coal Rate Guidelines*, where complainants reasonably have relied on existing rules or methodologies in preparing their evidence under the SAC Constraint, and those rules or methodologies are changed by the Board after the record has closed, considerations of fairness and administrative due process require that complainants that otherwise would be prejudiced be given an opportunity to submit supplemental evidence directed at the new rule or method. *See WFA* at 9, citing *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981); *Otter Tail* (STB served Nov. 21, 2003) at 1. Clearly such is the case here, with respect to equity flotation costs.

5. Unless Consumers is permitted to supplement the record on the issue of equity flotation costs, Consumers could be penalized unfairly for following what at the time was ruling precedent, and excluding an equity flotation fee from the cost of capital calculation. As Consumers showed on Rebuttal, CSXT’s proposed 6% fee is grossly

⁷ *Id.* at 31.

⁸ *Id.* at 32. The 2.1% figure, ostensibly based on the initial public offering for Facebook, is incorrect. CSXT itself presented a 1.1% flotation cost for Facebook in its reply evidence filed March 7, 2016. CSXT Reply Exhibit III-G-1 (p. 1, line 2). In its reply evidence in *Sunbelt*, NS claimed Facebook’s net proceeds were \$3.8 billion, relying on Facebook’s 10-Q filing for the second quarter of 2012. NS Reply at III-G-4 & n.5. In fact, the 10-Q specifies net proceeds of \$6.8 billion, presumably rounded down from \$6.84 billion (180 million shares at \$38 per share). *See* Facebook, Inc.’s 10-Q at 8, <https://www.sec.gov/Archives/edgar/data/1326801/000119312512325997/d371464d10q.htm>.

excessive, and not representative of the costs that might be incurred by a firm “of a similar size ... [and] with a similar profile”⁹ to the CERR.¹⁰ Now that the Board has reversed prior precedent and allowed the inclusion of such costs, Consumers must be given a fair chance to present probative evidence as to what that cost reasonably should be.

6. Consumers respectfully requests leave to make a supplemental evidentiary filing, strictly limited to the issue of the proper calculation of hypothetical equity flotation costs for the hypothetical CERR, within 20 days after the effective date of the Board’s order granting this Petition. Consumers further proposes that CSXT then be given 10 days to reply to Consumers’ submission, which reply should be limited solely to the evidence offered by Consumers. As the party with the ultimate burden of persuasion on the issue, Consumers then should be given 10 days to respond to CSXT’s reply filing.

7. Particularly in light of the due process rights at issue here, the relief requested herein will not unreasonably expand the scope of this proceeding, or unreasonably delay the Board’s resolution of the case.

WHEREFORE, Consumers requests that the Board grant this Petition, and the particular relief described in Paragraph 6 hereof.

⁹ *Sunbelt* at 185.

¹⁰ Consumers Rebuttal at III-G-4-5.

Respectfully submitted,

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Dated: July 14, 2016

Attorneys and Practitioners

CERTIFICATE OF SERVICE

I hereby certify that this 14th day of July, 2016, I have caused copies of Complainant's Petition for Leave to File Supplemental Evidence of Equity Flotation Costs to be served by electronic mail upon counsel for Defendant CSX Transportation, Inc. as follows:

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