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**I. PREFACE AND SUMMARY OF ARGUMENT**

Pursuant to 49 C.F.R. § 1115.3(b), Defendant CSX Transportation, Inc. (“CSXT”) submits this Petition for Reconsideration of certain aspects of the Surface Transportation Board’s (“Board’s”) September 14, 2016 Decision in this case.<sup>1</sup> While the Board correctly resolved many of the disputed issues in this case and the *Decision* appropriately found the rates at issue to be reasonable, CSXT believes that some of the Board’s rulings were material errors that the Board should reconsider under Section 1115.3(b). If the Board were to grant TPI’s expected petition for reconsideration in whole or in part,<sup>2</sup> the errors challenged in this Petition could have a material effect on this case. Moreover, several of the issues addressed in this Petition are likely to have a precedential effect on future cases.

CSXT is not moving to reconsider every issue on which it disagrees with the Board’s rulings. The Board has made clear that petitions for reconsideration will be granted only where a party demonstrates a “material error” and that such petitions are not an opportunity to present new evidence or arguments that could have been presented earlier.<sup>3</sup> In light of the restrictive standard of 49 C.F.R. § 1115.3(b), CSXT focuses this Petition on issues where the *Decision* clearly committed a material error when evaluating particular elements of the record evidence.

CSXT has organized this petition to be consistent with the Board’s standard evidentiary order for SAC issues.

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<sup>1</sup> See *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121 (STB served Sept. 14, 2016) (“*Decision*”). See also *TPI v. CSXT*, STB Docket No. 42121 (STB served Sept. 22, 2016) (extending time to file petitions for reconsideration). Separately, the parties are filing a joint supplemental petition for technical corrections.

<sup>2</sup> While CSXT does not know for certain that TPI is planning to file a petition for reconsideration, TPI has sought and received an extension of time to file such a petition.

<sup>3</sup> See *Texas Mun. Power Agency v. Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 42056, at 2 (STB served Sept. 27, 2004); *SunBelt Chlor Alkali P’shp v. Norfolk Southern Ry. Co.*, STB Docket No. 42130, at 2 (STB served June 30, 2016).

In the Traffic and Revenue section (III-A), the *Decision* materially erred in three ways. First, allowing TPI to include certain high-priority intermodal shipments in its traffic group despite the TPIRR's failure to meet the service standard that TPI itself adopted in its opening evidence ignores the transportation needs of those shipments, incorrectly departs from Board precedent, and shifts the burden of proof to the defendant railroad. Second, the *Decision* materially erred by allowing TPI to claim an inflated share of revenue that could not be associated with actual shipment records. Third, the *Decision* allowed TPI to re-allocate surplus coal shipments above a plant's capacity to other destinations, a simplification tool appropriate in past cases but not in this case where forecasts are being applied at the plant level.

In the Operating Expenses section (III-D), the *Decision* contains six material errors that the Board should reconsider. First, the *Decision's* conclusion that TPIRR road and local train crews could work an average of 270 starts per year does not account for new hours of work rules that make an average 270 starts impossible to achieve. Second, the *Decision's* determination that TPIRR could obtain more favorable terms for its locomotive maintenance Managed Services Agreement ("MSA") is both a departure from precedent and contradicted by the evidence. Third, the decision not to include customer service support personnel ignores the need for functions that no other TPI personnel would perform. Fourth, the *Decision* erred by rejecting CSXT's unit value approach to ad valorem taxes, which reflects how railroads pay ad valorem taxes in the real world, in favor of a demonstrably incorrect route-mile methodology proffered by TPI. Fifth, the *Decision* failed to include the cost of CSXT-owned intermodal lift equipment and hostlers, in the face of evidence that demonstrates that TPIRR would pay inadequate rental costs for this equipment. Sixth, the *Decision* understated operating expenses at the Intermodal Lift at Bedford Park by using a "per container" standard, rather than the number of lifts per container.

Seventh, the *Decision* also departed from precedent by failing to include maintenance costs for lighting and parking areas.

Finally, the *Decision* contains multiple material errors in the Road Property Investment section (III-F). The *Decision* agreed that TPIRR could not install a fully functional Positive Train Control (“PTC”) system in 2010 but then allowed TPIRR to purchase PTC-compliant radios that did not exist in 2010 and did not make it bear the cost of outfitting foreign locomotives with radios. The *Decision* ignored real-world engineering practices when it adopted TPI’s costs regarding insulated joints, ignoring that steel rail must be installed with such joints. The *Decision* ignored the best evidence in the record when it rejected CSXT’s proposal for ballast material unit and transportation costs which factored in the different unit costs of various quarries. Lastly, the *Decision* allowed TPI to ignore the cost of three intermodal yards that were necessary for the SARR’s operating plan.

## II. THE BOARD SHOULD RECONSIDER CERTAIN MATERIAL ERRORS.

### A. *Stand Alone Traffic Group.*

#### 1. **It Was Material Error To Disregard The Needs Of High-Priority Intermodal Shipments.**

A fundamental requirement of any SAC presentation is that the SARR must meet the transportation needs of its selected traffic group “by providing service that is equal to (or better than) the existing service for that traffic.”<sup>4</sup> CSXT demonstrated that certain high-priority intermodal shipments for two customers (UPS and Threads Express) would experience longer transit times than that traffic experienced in CSXT’s real-world operations, because of TPI’s plan to transport the traffic over a “leapfrog” route requiring multiple additional interchanges between TPIRR and the residual CSXT. CSXT proposed that the traffic be removed from TPIRR’s traffic group and operating plan because TPI had failed to demonstrate that TPIRR would meet the needs of those shippers. *See* CSXT Reply III-A-8–III-A-10, III-A-38.

The *Decision* concluded that “CSXT has failed to support the use of a bright-line, exclusively transit time-based service standard for this traffic.” *Decision* at 41. The Board stated that, even if transit time were the “most relevant consideration” in evaluating service quality for time-sensitive shipments, “CSXT provided no evidence of contract or tariff terms that may have demonstrated with specificity how these particular customers measure on-time performance,” and that such evidence was necessary to show that TPIRR would not meet the traffic’s needs. *See id.* The Board should reconsider this conclusion, for several reasons.

First, the Board’s rejection of transit time (as reflected in the RTC simulation) as the appropriate indicator of service quality for the traffic is inconsistent with both Board precedent

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<sup>4</sup> *Decision* at 41 (emphasis added). *See also Arizona Elec. Power Coop., Inc. v. Burlington N. & Santa Fe Ry. Co. and Union Pac. R.R. Co.*, STB Docket No. 42112, at 10 (STB served Nov. 22, 2011) (“*AEPCO 2011*”) (“[w]e require that these hypothetical operations be feasible and supported and that they provide shippers included in the analysis the same or superior service as provided by the actual operations of the defendant railroads.”) (emphasis added).

and rail industry practice. Prior SAC decisions have adopted RTC-based transit times as the basis for determining whether a SARR's service would be equal to or better than the incumbent carrier's service. For example, in *AEP Texas North Co. v. BNSF Ry. Co.*, STB Docket No. 41191, at 10 (served Sept. 7, 2007), the Board held that a proposed internal reroute would satisfy customer requirements where "the parties' agreed-upon RTC simulation shows that, despite the greater length, the [SARR's] transit times for this traffic would be comparable to or shorter than BNSF's actual transit times." Likewise, the Board has long relied upon RTC-based "cycle time" to measure a SARR's ability to meet the needs of shippers transporting unit trains of coal.<sup>5</sup> The requirement that carriers include system-average train speed in the periodic reports filed pursuant to Ex Parte No. 724 constitutes a further recognition by the Board that train speeds (and the resulting transit times) are a critical measure of service quality. Indeed, train velocity and transit time are metrics that CSXT and other railroads monitor to assess their service performance.

A comparison of over-the-road train transit times is especially appropriate where, as here, the traffic at issue moves in "intact" trains.<sup>6</sup> Unlike merchandise traffic, which moves in single car shipments or multi-car "blocks" and must be switched between trains at one or more serving yards, intermodal trains typically move directly from origin to destination without intermediate handling. Absent such handling, a comparison of point-to-point transit times accurately reflects the degree to which the SARR is providing service that is equal to (or better than) the real-world service. The transit times generated by RTC provide an objective basis for such a comparison.

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<sup>5</sup> See, e.g., *TMPA*, 6 S.T.B. at 595 (Board found reroute acceptable where the SARR cycle time for the traffic "would be shorter than the current BNSF cycle time.").

<sup>6</sup> Indeed, TPI itself advocated train transit time (as reflected in the RTC simulation) as the basis for determining whether TPIRR's service would be equal to or better than CSXT's real-world service. See TPI Op. III-C-22-24 ("the complainant shipper must demonstrate that its SARR can provide service to its customers (i.e., traffic group members) that meets their requirements. TPI has accomplished this by showing that the train transit times during the peak period in the Peak Year are similar to or lower than the CSXT's actual transit times during the comparable period of the most recent year for which data is available." (emphasis added)).

The inherently time-sensitive nature of intermodal traffic further supports the use of transit time as the best indicia of service quality for such movements.<sup>7</sup>

Second, the *Decision* incorrectly shifts the burden of proof regarding the SARR's ability to meet customer requirements from the complainant to the defendant. The *Decision* effectively establishes a new requirement that, where the RTC evidence indicates that the SARR's train transit time is not equal to or better than the incumbent's service, the defendant carrier must demonstrate that shippers of the traffic would withdraw their business on account of that transit time increase. Such a requirement is inconsistent with the longstanding SAC principle that the complainant—not the defendant—bears the evidentiary burden to prove that the SARR's physical plant and operating plan are sufficient to enable it to provide “the same or superior service as [that] provided by the actual operations of the defendant railroad.”<sup>8</sup> It is further inconsistent with the basic principle that a complainant that is seeking the contributions of other cross-over traffic for its SARR must at least demonstrate that its SARR would serve the needs of that cross-over traffic. It would subvert the purposes of the SAC test if a complainant could

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<sup>7</sup> The Board's observation that CSXT's Reply workpaper “Transit Time Restated.xlsx” “did not compare the TPIRR and real-world transit times for the complete origin-to-destination movements” (*Decision* at 41, n. 24) is beside the point. The RTC evidence submitted by the parties in SAC cases does not attempt to model the entire origin-to-destination movement of cross-over traffic. Indeed, the Board's stated rationale for permitting complainants to use the cross-over traffic device is to relieve the parties of the burden of preparing such evidence. TPI followed that practice, limiting its Opening Evidence to an analysis of the SARR's lines. *See* TPI Op. III-C-24 (“TPIRR's 2019 peak-week train transit times (and cycle times where available) for train movements over the various TPIRR line segments are equivalent to or faster than the real-world CSXT transit times for the comparable trains moved during the 2012 peak week.”). It would be unreasonable to base a finding that the SARR can provide service “equal to or better than” the defendant carrier on evidence that the incumbent could somehow “make up” on its portion of the movement time lost by trains while operating on the SARR's lines.

<sup>8</sup> *AEPCO 2011* at 10. *See also* *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520, 543 (1985) (“[P]roponent of a SAC model must show that the alternative is feasible and could satisfy the shipper's needs.”); *Carolina Power & Light, Co. v. Norfolk Southern Ry. Co.*, 7 S.T.B. 235, 259 (2004) (“CP&L carries the burden of demonstrating that its operating plan would meet the needs of the traffic group it selected.”); *Duke Energy Corp. v. CSX Transp., Inc.*, 7 S.T.B. 402, 430 (2004) (same); *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, 7 S.T.B. 89, 121 (2004) (same).

obtain a rate reduction by proposing a SARR that would provide worse service to other rail shippers. And it is unreasonable to require a railroad to prove that it would lose traffic if it provided worse service. While it is a basic principle of economics that worse service causes lost business, it will often be nearly impossible to prove that a particular customer would be lost.<sup>9</sup> Imposing such a new evidentiary burden on the defendant railroad would enable complainants to include in their traffic group shipments for which the SARR's train service was inferior to that provided by the defendant in its real-world operations.

Finally, requiring parties to present detailed evidence about whether specific shippers would withdraw traffic in response to increased transit time would make SAC proceedings more complex. The *Decision* reflects the Board's concern regarding the complicated (and expensive) nature of the SAC process.<sup>10</sup> Train transit times generated by the RTC Model are an objective and readily ascertainable standard for judging the ability of a SARR to provide the same (or better) service as the incumbent railroad—particularly for trains that move “intact” across the network. Further complicating the SAC analysis by requiring parties to conjure evidence regarding hypothetical actions that specific shippers might take in response to changes in transit time would represent a major step backward in the Board's efforts to simplify SAC cases.

## **2. The Board Materially Erred By Allowing TPI to Claim Revenues From Traffic Not Served by the TPIRR.**

The Board materially erred by allowing TPI to claim an inflated share of revenue that could not be associated with actual shipment records. For various reasons, waybill data may be

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<sup>9</sup> CSXT did submit an article (which TPI relied upon as well) documenting the loss of certain UPS intermodal traffic in response to a decline in service. *See Decision* at 40-41, n. 23.

<sup>10</sup> *See e.g., Decision* at 58 (declining to adopt CSXT's proposal to calculate car type-specific peaking factors, despite “persuasive argument about the differences in car supply requirements between unit train networks and carload networks” because “the burdens of such an enterprise would make the SAC analysis far too complicated”). *See generally id.* at 46-47 (Vice Chairman Miller commenting); *id.* at 47 (Commissioner Begeman, dissenting in part).

missing a unique shipment key to link movements and easily determine if a shipment travels on the SARR. When this occurred, TPI used an overly inclusive approach to attributing the revenue. The step is akin to TPI's traffic selection process, which CSXT showed was deficient on Reply and which TPI corrected on Rebuttal. *See* CSXT Reply III-A-2; TPI Reb. III-A-4. For waybills missing shipment keys, TPI looked for any field that matched the SARR to select those revenues. *See* CSXT Reply III-A-27. So if a waybill did not have a shipment key but showed a destination on the SARR, TPI selected all of that revenue even if only 25% of cars to that destination travel on the SARR. This allowed TPI to assume that over 99% of CSXT revenue in these waybills without shipment keys are selected for TPIRR, compared to 86.9% of traffic with shipment keys that it selected.<sup>11</sup>

CSXT proposed an alternative and more accurate approach to match revenue records to actual shipments; where that matching failed, CSXT applied a percentage adjustment to select revenue to the SARR. The Board rejected CSXT's method, arguing that "TPI's approach allocates only a portion of the revenue to TPIRR when one of the other waybill fields matches, and allocates no revenue to TPIRR for a significant portion of the records in question." *Decision* at 209-10. But this statement is unsupported by the workpaper cited. *See* CSXT Reply III-A-28. The issue facing the Board is not ATC revenue allocation,<sup>12</sup> but rather traffic selection. TPI has improperly included traffic which does not actually travel on the SARR and applied its ATC percentage calculation to revenue from that traffic, and its approach should be rejected.

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<sup>11</sup> The Board's comment that TPI did not select 99% of the revenue is incorrect. When TPI's waybill selection workpaper is filtered for blanks, it shows that TPI selected over 99% of the CSXT Net Revenue (less demurrage). *See* TPI Op. WP "CSXT\_TRAFFIC\_INSCOPE\_OFFSARR\_NOSHIPKEYS\_36MONTHS.xlsx." The workpaper cited in the *Decision* is two steps downstream from the waybill selection step. For the 86.9% figure, see CSXT Reply III-A-3, where TPI dropped 13.1% of traffic that touched the SARR.

<sup>12</sup> The *Decision's* comparison of the parties' ATC percentages is irrelevant. *Decision* at 210, n.121. TPI applied its ATC percentage to \$187 million in CSXT non-shipment key revenues while CSXT applied it to \$170 million. The difference is in the waybill selection process.

**3. The Board Materially Erred By Allowing TPI to Re-Allocate Coal Volumes In Ways That Exceeded Plant Capacity.**

The *Decision* also materially erred by allowing TPI to re-allocate coal volumes in excess of a plant's capacity. In prior cases, coal forecasts were applied at the national or Origin Region level. *See* CSXT Reply at III-A-14. Here, CSXT applied the growth rate from its forecast for each specific SARR destination, a methodology the Board adopted. *See Decision* at 206. But despite adopting CSXT's granular approach, the Board allowed TPI to re-allocate coal volumes in excess of a plant's 85% capacity limit. *See id.* Such a re-allocation might have been an appropriate simplifying short cut in past cases that used national or regional forecasts. But in this case forecasts are applied at a granular destination level, and there is no overage which can be reallocated.<sup>13</sup> There is no justification for allocating coal tonnage in excess of a plant's capacity to other locations when CSXT's more refined methodology is being applied at the destination level.

**B. Operating Expenses.**

**1. The Board Materially Erred By Its Failure To Acknowledge Amendments To The Hours Of Service Statute.**

TPI posited that TPIRR road and local train crews would work an average of 270 starts per year, but it did not present any analysis demonstrating how more than 3,000 TPIRR crewpersons could achieve such a level of productivity. Rather, it argued that its position is supported by the Board's findings in prior SAC cases. *See* TPI Reb. III-D-31. The Board adopted TPI's position on the ground that it is "consistent with longstanding Board precedent."

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<sup>13</sup> CSXT demonstrated the significance of this issue in its Reply in discussing the Somerset Plant (Lockport, NY). The plant emerged from bankruptcy in 2012. CSXT expected the plant's generator to slowly ramp back up to full capacity, but plant generation recovered more quickly than expected in TPIRR's base year. Applying the growth rates for Somerset in the forecast to the higher than projected base year tons would result in TPIRR coal volumes to Somerset that would exceed its 85% plant capacity factor by 2014. *See* CSXT Reply III-A-15.

*Decision* at 63. The Board erred in finding that it would be feasible for TPIRR's 3,000+ road and local train crews to average 270 train starts per year.

In particular, the *Decision* failed to address the impact of the more stringent hours-of-service restrictions mandated by the Rail Safety Improvement Act of 2008, Pub. L. 110-432 (2008) ("RSIA"), codified at 49 U.S.C. § 21103. RSIA required—for the first time—that a crew working six consecutive days have 48 consecutive hours (or two full days) of rest before reporting back for duty. *See* 49 U.S.C. § 21103(a)(4)(A). Under certain circumstances (including a situation where a crew completes its sixth day of service at a non-home terminal), a crew may work a seventh consecutive day, provided that the crew has an off-duty period of 72 consecutive hours (or three full days) before returning to work. The law also imposed an overall limit of 276 hours per month during which a train crew can be on duty, waiting for deadhead transportation (or in deadhead transportation) or performing any other mandatory service for a carrier. *See id.* at § 21103(a)(1).

Those new restrictions make it extremely unlikely (if not virtually impossible) for all TPIRR crews to achieve an average of 270 annual train starts. As CSXT demonstrated (Reply at III-D-54-56), a TPIRR crew that worked for six consecutive days, followed by two days off-duty, then worked another six consecutive days, followed again by two days off, and repeated that pattern continuously throughout the entire year could work no more than 274 days in a calendar year.<sup>14</sup> Taking into account the days required for mandatory rules and safety training (which count as "on-duty" days for purposes of the RSIA's hours-of-service provisions), vacation, illness, and personal leave, it would not be feasible for TPIRR crews to operate trains 270 days per year.

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<sup>14</sup> The calculation of 275 days in CSXT's Reply Evidence was based upon a 365-day year. In reality, because Christmas Day is a holiday observed throughout the rail industry, the greatest number of days that a crew could theoretically work in a year is 274 out of 364 days.

In support of its position, CSXT presented data regarding the number of annual train starts worked by road and local train crews in its real-world operations and showed that fewer than 1% of CSXT’s crews actually achieved 270 train starts in 2010, and even the top 5% of CSXT crews worked only { } shifts per year. CSXT Reply III-D-56, Table III-D-9. TPI failed to proffer any evidence to demonstrate how TPIRR—which purports to operate the same train services as CSXT—could achieve an average of 270 train starts by its entire workforce of more than 3,000 road and local crews across TPIRR’s 6,900-mile rail system.<sup>15</sup>

The “longstanding precedent[s]” upon which TPI (TPI Reb. III-D-31) and the Board (*Decision* at 63) relied are all SAC cases that were decided prior to the passage of the RSIA. The SARRs at issue in those cases were not subject to the RSIA’s more stringent hours-of-service provisions. By contrast, as a SARR commencing operations in 2010, TPIRR must comply with those statutory mandates. Neither TPI’s evidence nor the Board’s *Decision* contained any analysis of the likely impact of the RSIA on TPIRR’s train operations. The only record evidence that did so was CSXT’s Reply analysis, which demonstrated convincingly that it would be extremely difficult (if not impossible) for a carrier of the size and scope of TPIRR to achieve such an unprecedented level of productivity in the post-RSIA legal environment.

As the Board has stated on numerous occasions, “the assumptions used in the SAC analysis, including the operating plan, nonetheless must be realistic, *i.e.*, consistent with the

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<sup>15</sup> TPI’s attempt to justify its assumption that TPIRR crews would average 270 train starts per year on the grounds that it used the actual wages of those (very few) CSXT crews who actually worked 270 shifts in calculating TPIRR’s crew costs (*see Decision* at 63, *citing* TPI Op. III-D-12–13) is unavailing. Using those wage data in calculating expenses does nothing to explain how TPIRR’s entire road and local train workforce could achieve an average of 270 train starts without running afoul of the RSIA’s hours-of-service restrictions.

underlying realities of real-world transportation.”<sup>16</sup> The notion that TPIRR’s entire road and local train crew workforce could work an average of 270 shifts per year is utterly inconsistent with the realities of real-world railroading (and, in particular, the statutory limitations imposed by the RSIA). The Board should reconsider its determination with respect to the number of shifts that TPIRR crews would work, and base its decision instead on CSXT’s analysis.

**2. The *Decision*’s Treatment Of Locomotive Maintenance Costs Is Material Error Because It Allowed The TPIRR To Obtain A Better Deal Than CSXT Despite Stepping Into The Railroad’s Shoes.**

Rather than develop its own locomotive maintenance plan (and related cost estimate), TPI adopted the locomotive maintenance costs set forth in a MSA provided in discovery. *See* TPI Op. III-D-5. On Reply, CSXT identified certain cost items provided for in that contract that TPI failed to include. *See* CSXT Reply III-D-24–26. On Rebuttal, TPI accepted several of those items but objected to including the cost of management and technical support provided by the MSA vendor on the basis that TPIRR would have fewer locomotive types than CSXT and its assertion that “TPIRR’s locomotive fleet is stable and the types of locomotives included in the fleet do not change, nor are units added to the agreement on a frequent basis, and no units are removed from the agreement.” TPI Reb. III-D-14 (emphasis added). The Board rejected the management fee and adopted (without discussion) TPI’s rationale. *See Decision* at 56-57.

SAC precedent permits a SARR to “step into the shoes” of the defendant railroad by adopting agreements to which the incumbent is a party. However, if a complainant does so, it must “assume that the SARR would have the benefit of the same opportunities under the same terms” as the incumbent carrier. *AEPCO v. BNSF Ry. Co.*, 6 S.T.B. 322, 328 (2002) (emphasis added). A complainant is permitted to adopt the incumbent carrier’s existing contract, but it

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<sup>16</sup> *Decision* at 20. *See, e.g., E.I du Pont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42125, at 36 (STB served March 24, 2014); *SunBelt*, STB Docket No. 42130 at 12; *AEPCO 2011* at 16.

may not assume that the SARR would enjoy more favorable terms than the incumbent carrier under that agreement.<sup>17</sup> Here, TPI elected to use the CSXT MSA as the basis for its locomotive maintenance estimate, rather than building up its own costs for TPIRR to provide its own locomotive maintenance function. Having made that choice, TPI was not permitted to selectively exclude cost items that CSXT pays under the MSA.

Moreover, the rationale for excluding the MSA management fee articulated by TPI (and adopted by the Board in the *Decision* at 56-57) is both incorrect and contrary to the record evidence. As CSXT's Reply showed, the management fee charged under the MSA is not based on how many different types of locomotives are covered by the MSA. Rather, it is calculated on the basis of the number of covered locomotives (of any type) during a given month and the daily rates for those locomotives. Indeed, the management fee in the June 2010 invoice relied upon by TPI is the same as it was during the original year of the MSA (except for inflation).<sup>18</sup> TPI's assertion that locomotives would not be added to or removed from TPIRR's locomotive fleet during the DCF period is likewise wrong. As reflected in the projection of later-year operating expenses in the DCF model, as TPIRR's traffic volumes increase, TPIRR must acquire additional locomotives to serve that traffic. Conversely, locomotives damaged or destroyed as a result of a derailment or other accident would need to be removed from the agreement (so that TPIRR would not incur monthly maintenance charges for such non-productive units).

For the foregoing reasons, the Board's decision to permit TPI to avoid paying the management and technical support fee provided for under the MSA was inconsistent with both

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<sup>17</sup> See *id.* at 328-29. See also *CP&L*, 7 S.T.B. at 255 (citing *West Texas Util. Co. v. Burlington N. R.R. Co.*, 1 S.T.B. 638, 667 (1996)). This well-established principle is a logical corollary to the fundamental SAC requirement that a SARR's operating plan must be "realistic, *i.e.*, consistent with the underlying realities of real-world railroading."

<sup>18</sup> See CSXT Reply WP "Locomotive Maintenance.xlsx," Tabs "GE\_Mgmt" and "BackupbySite\_June 2010\_Excerpt."

SAC principles and the record evidence, and therefore constitutes material error. The Board should correct that error by including in TPIRR's locomotive maintenance expenses the management and technical support fee that the real-world CSXT pays under the MSA.

**3. Failing To Accept CSXT's Evidence On Customer Service Support As The Best Evidence In The Record Was Material Error.**

The *Decision* incorrectly stated that “[n]either party submitted evidence that fully supports its position on the customer service personnel staffing requirements” but accepted TPI's proposal as the “best evidence of record.” *Decision* at 67. That determination was based on a number of erroneous assumptions. First, “TPI's operating plan is based on CSXT's historical trains and CSXT's real-world classification and blocking plan.” *See id.* at 24. Moreover, TPIRR's traffic will be further complicated by the presence of large volumes of leapfrog traffic. Therefore, CSXT is justified in using its own customer service staffing as a benchmark—which it applied conservatively<sup>19</sup>—to determine the staffing here.

The Board accepted TPI's incorrect claim that certain roles within CSXT's customer service staff are already accounted for in other TPIRR departments.<sup>20</sup> But that claim is belied by TPI's workpaper, which listed job titles for business systems personnel that are distinct from the

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<sup>19</sup> The assertion that CSXT's TPIRR staffing is “almost identical to the 2013 real-world CSXT staffing levels it provided to TPI in discovery” was formed on the basis of incorrect statements by TPI. *Decision* at 67. TPI claimed that CSXT only employed 151 customer service support personnel, Rebuttal III-D-38, but at a minimum TPI failed to include 70 personnel within the Operations – Services Design group in its calculation. *See* TPI Reb. WP “TPIRR Rebuttal 2013 Org Chart.xlsx,” Tabs “Mgmt Employes as of 6-30-2013” and “Pivot Results,” Cells C17:C22 and “Mgmt Employes as of 6-30-2013” columns D:E, which show 70 after excluding those involved with passenger operations. Moreover, CSXT maintains that its 50 personnel, which could be classified as “commercial” should also be included in the total. *See* CSXT Reply WP “Customer Service Scaling.xlsx,” Tab “Scaling Worksheet,” Cells B4:B24 (coal and bulk/automotive/intermodal customer service).

<sup>20</sup> *See, e.g., Decision* at 67 (*e.g.*, business systems personnel).

positions that TPI claimed were being duplicated in TPIRR's IT department.<sup>21</sup> Moreover, the *Decision's* comment that CSXT has proposed customer service personnel who are duplicated in Sales and Marketing (*Decision* at 67) is incorrect because the personnel in those departments provide separate and distinct functions. Customer service employees must respond to customer service inquiries—something that may be even more challenging than in the real world given the complications of leapfrog traffic. *See* CSXT Reply III-D-64. Customer service personnel must also, for example, proactively monitor and report on service; schedule customer set outs, placements, and pickups; and implement customer service process improvements. *Id.* III-D-65–67. By contrast, marketing is focused on maintenance and development of relationships with customers, development of business plans, review of customer equipment needs, and management of rate authorities. *Id.* at III-D-110, 113. If TPI wants to propose a combined customer service and marketing group, that is its prerogative. But it must explain how such a small staff can handle such a wide array of responsibilities for so many customers.

Finally, CSXT's evidence is the best evidence of record because it is supported by reference to the real-world CSXT and the necessary functions of a customer service department. TPI, by contrast, has no basis for its figure whatsoever. On Opening, TPI claimed its G&A evidence was supported by a 1994 Chicago & North Western ("CNW") staffing figure. CSXT explained at length why the CNW figure was flawed: it was supported by a single person's memory, it was inconsistent with that same individual's testimony in other cases, and it assumed impossible efficiencies. *See* CSXT Reply III-D-82–90. Unlike TPI's unsupported and incorrect benchmark, CSXT submitted a conservative proposal based on benchmarking to the real-world CSXT. Therefore, CSXT's customer service staffing is the best evidence of record.

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<sup>21</sup> *See* TPI Reb. WP "TPIRR Rebuttal 2013 Org Chart.xlsx," Tab "Mgmt Employes as of 6-30-2013" and STB WP "STB\_TPIRR Operating Expense\_Rebuttal\_Supplemental.xlsx," Tab "STB G&A Personnel."

**4. The *Decision* Mistakenly Adopts A Per-Route Mile Calculation For Ad Valorem Taxes.**

TPI proposed ad valorem taxes on the basis of a per route-mile calculation. *Decision* at 127. In Reply, CSXT explained that in 14 TPIRR states, a unit method is used to assess ad valorem taxes—a fact undisputed by the parties or the Board. *See* CSXT Reply III-D-240–41. Despite that real-world fact, the Board cited the *SunBelt Reconsideration*<sup>22</sup> decision in rejecting CSXT’s approach. *See Decision* at 128.

In *SunBelt Reconsideration*, the Board explained that it preferred the route-mile approach to ad valorem taxes “because of its ease of application” and because NS’s unit-value approach purportedly contained “flaws and unanswered questions.” *SunBelt Reconsideration* at 13. And the Board asserted in the *Decision* that “CSXT’s application of a profitability-based methodology in this case contains the same flaws and unanswered questions that led the Board to reject that methodology in the *Sunbelt 2016* decision.” *Decision* at 128. That is not accurate. CSXT’s unit value approach differed from the *SunBelt* methodology in several important respects, and indeed was designed to address some of the alleged “flaws” cited in *SunBelt Reconsideration*. (These “flaws” were first raised by the complainant in rebuttal evidence in *SunBelt*.) *SunBelt Reconsideration* provides no support for the Board’s decision to reject CSXT’s methodology here.

First, one of the key “flaws” cited in *SunBelt Reconsideration* was the so-called “apples-to-oranges” issue raised by the incumbent’s income being calculated after tax but not the SARR’s. *Id.* But in the instant case, CSXT did calculate operating income for both the incumbent and the SARR on a pre-tax basis, so this *SunBelt* “flaw” does not exist here.

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<sup>22</sup> *SunBelt Chlor Alkali P’shp v. Norfolk Southern Ry. Co.*, STB Docket No. 42130 (STB served June 30, 2016) (“*SunBelt Reconsideration*”).

Second, *SunBelt Reconsideration* found that the defendant's approach failed to address the impact of deferred taxes. *Id.* Once again, that flaw does not exist here, for the net railway operating income ("NROI") calculated by CSXT for both the SARR and incumbent in the TPI case is calculated before deferred taxes.

Third, *SunBelt Reconsideration* alleged a "fundamental inconsistency" between arguing that a SAC case fails because the SARR cannot cover costs and that the SARR must pay higher taxes because it is profitable. *Id.* at 13-14. But there is no inconsistency. Ad valorem taxes are based on NROI, but SAC analysis measures not just gross profits, but whether a railroad is earning a reasonable return.<sup>23</sup> A railroad—indeed, any business—may be profitable for taxation purposes but still not provide an adequate return to investors. *Id.* That reality is reflected in the real-world where many railroads are found revenue inadequate by the Board but still pay ad valorem taxes to the states.

Fourth, *SunBelt Reconsideration* argued that the defendant failed to demonstrate that the relationship between the SARR's and incumbent's NROI in the first year would remain consistent over the life of the SARR. *Id.* at 13. But this issue only shows why CSXT's estimate is conservative; the Board's DCF model confirms that the SARR's income will dramatically increase over the DCF period. *See Decision* at 228, Table D-3. Thus, if anything, the ratio of SARR-income-to-incumbent-income would only increase over time.

Finally, in *SunBelt Reconsideration* the Board *sua sponte* argued that there was an "apparent circularity" because the SARR NROI used to determine ad valorem taxes is itself calculated on the basis of revenues minus operating expenses that include ad valorem taxes. *SunBelt Reconsideration* at 13. But rather than applying a route-mile ad valorem tax

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<sup>23</sup> *E.I. du Pont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42125, *Brief of Norfolk Southern Railway Company*, at 80 (filed June 14, 2013).

methodology that “ignore[s] how most of the States calculate the Ad Valorem Taxes for railroads,” the Board could easily eliminate any circularity by removing the ad valorem tax deduction from the operating expenses used to calculate the SARR NROI. *DuPont* at 137.

**5. The Board Ignored Several Real-World Intermodal Lift Costs.**

CSXT’s Reply demonstrated that TPI failed to include the cost of CSXT-owned intermodal lift equipment and hostlers at certain intermodal facilities. *See* CSXT Reply III-D-251. On Rebuttal, TPI took the position that the cost of such equipment—which is essential to the operation of an intermodal facility—should not be included because “TPI included equipment rents in its development of lift costs, which should be sufficient given that TPI does not own nor receive revenues from the intermodal facilities.” TPI Reb. III-D-68–69. The Board agreed with TPI, finding that “CSXT does not explain why the total equipment rents TPI includes in the development of its costs are not sufficient.” *Decision* at 129.

Contrary to the Board’s finding, the insufficiency of the equipment rents included in TPI’s calculations is apparent on the face of the record. TPI accounted for “\$0” in equipment rents at 17 of the 19 intermodal facilities at which CSXT proposed to add the cost of intermodal lift equipment and/or hostlers.<sup>24</sup> It is obvious that such equipment would be needed to operate those 17 terminals. The Board should reconsider its decision to exclude the cost of CSXT-owned intermodal lift equipment and hostlers at those TPIRR facilities.

CSXT’s Reply also demonstrated that TPI understated the operating expenses that TPIRR would incur at its Bedford Park, IL intermodal facility. *See* CSXT Reply III-D-250. While TPI included in the TPIRR traffic group 99% of CSXT’s intermodal container traffic moving through Bedford Park, the operating expenses posited by TPI at that location amounted to only 60% of the costs incurred in CSXT’s real-world operations. *Id.* TPI characterized CSXT’s proposed

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<sup>24</sup> *See* CSXT Reply WP “TPIRR Reply Intermodal Lift and Ramp.xlsx,” Tab “UnitCost,” Row 6.

adjustment as “a departure from the approach used by both parties to calculate lift costs,” and asserted that its expense calculations accurately reflected “an estimate of lift fees per container.” TPI Reb. III-D-69 (emphasis added). The Board rejected CSXT’s proposed correction to TPI’s operating expense estimate for Bedford Park, finding TPI’s evidence to be “feasible and supported.” *Decision* at 130.

Both TPI and the Board misinterpret the basis for CSXT’s proposed correction of TPIRR’s Bedford Park operating expenses. The difference between the parties’ respective estimates is not attributable to a departure by CSXT from the basic approach used by both parties to calculate intermodal lift costs. Nor does it represent an attempt by CSXT to saddle TPIRR with “ancillary” expenses that are not directly attributable to the traffic that would originate and terminate at Bedford Park. Rather, the difference between the parties’ estimates resulted from TPI’s failure to account for the fact that a significant number of the containers that move through Bedford Park must be handled multiple times during their journey. While TPI based its operating expense calculation on the number of containers that TPIRR would handle at Bedford Park, CSXT’s calculations correctly accounted for the number of lift events that TPIRR would be required to perform in order to serve those containers.<sup>25</sup> CSXT handled 630,531 containers at Bedford Park in 2012 (630,197 of which were included in TPIRR’s traffic group). Those containers required a total of 1,002,934 lift events.<sup>26</sup> TPI’s failure to account for the need to perform multiple lifts for certain containers resulted in a substantial understatement of the expenses that would necessarily be incurred in serving Bedford Park intermodal traffic.

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<sup>25</sup> See CSXT Reply WP “TPIRR Reply Intermodal Lift and Ramp.xlsx,” Tab “Volumes\_All,” Row 72 (“Represents total occurrences of loads or lifts, including non-revenue shipments, intermediate lifts en route, multiple lift events.”).

<sup>26</sup> See CSXT Reply WP “TPIRR\_Selected\_Traffic.xlsx,” Tab “Summary,” Row 4 (630,531 containers); CSXT Reply WP “TPIRR Reply Intermodal Lift and Ramp.xlsx,” Tab “Volumes\_All,” Row 7 (1,002,934 lifts).

**6. It Was Material Error To Not Include Lighting and Pavement Maintenance Costs.**

As the *Decision* observed, the parties agreed that the cost of building maintenance would be two percent of total “building” costs, but disagreed as to how to calculate total building costs. *Id.* at 123. TPI limited the total to buildings, but CSXT included all facilities. *Id.* CSXT made this change to account for the cost of maintaining infrastructure such as yard lighting and pavement, which must be maintained if they are going to continue to operate effectively over the life of the SARR and beyond. Such maintenance costs are not accounted for elsewhere. Moreover, CSXT’s position is consistent with Board precedent. In *SunBelt*, the Board used the two percent calculation for all facilities as the basis for building maintenance costs. Neither TPI nor the Board has explained the reason for the departure from Board precedent.

**C. Road Property Investment.**

**1. The Best Evidence Of Ballast Material Unit and Transportation Costs Is A Weighted Approach.**

The *Decision* stated that it is accepting “TPI’s use of a simple average to calculate ballast material and transportation costs.” *Decision* at 149. In its Reply, CSXT explained why its proposed method for determining the average TPIRR ballast unit cost is appropriate. *See* CSXT Reply III-F-74–76. Because TPIRR would benefit from an efficient ballast distribution plan, in which ballast would come from quarries with the lowest delivered ballast costs to TPIRR railheads, it would obtain more ballast from some quarries than others. That reality makes a simple average weighing all quarries equally untenable. Instead, CSXT takes a simple average that weights each railhead equally. The weighting is accomplished based on the reasonable assumption that the ballast unit cost for a given railhead is from the quarry with the lowest delivered ballast cost. *See id.* at III-F-74–75. That approach is far more reflective of reality and constitutes the best evidence in the record. Contrary to the Board’s suggestion, this method of weighting the ballast unit cost by assigning equal weight to each railhead does not introduce

additional complexity. It is no more complicated to take a simple average of all railheads than to take a simple average of all quarries. In fact, the parties agreed to use this same method of taking a simple average of all railheads for calculating the average ballast transportation distance. *Decision* at 149.

**2. The Board’s Conclusion That CSXT Double Counted CWR In Its Insulated Joint Cost Evidence Is Material Error.**

The *Decision* improperly rejected CSXT’s unit cost for insulated joints because CSXT allegedly “double-counts” the cost of continuous welded rail along the joint. *Decision* at 169. The \$213 unit cost for insulated joints that TPI identified is the cost only of the joint itself. But that fails to account for the 20 feet of continuous welded rail (“CWR”) that is connected to the insulated joints, which is how CSXT calculated a unit cost of \$1,528.<sup>27</sup> In common and real-world engineering practice, CWR is installed in the initial tracklaying of CWR strands, and then wasted and replaced with an insulated joint section affixed to CWR. *See* CSXT Reply III-F-154. It is not double-counted but rather is double laid and therefore an appropriate cost to include.

**3. The Decision Contains Material Errors Regarding PTC Equipment.**

The *Decision* correctly found that TPIRR could not have a fully-functioning interoperable PTC system installed in 2010. *See Decision* at 173. But the *Decision* then rejected the logical consequence of that decision and allowed TPIRR to purchase 220 megahertz radios necessary for PTC even though they too were not available in 2010.<sup>28</sup> In doing so, the *Decision* failed to include the costs for wayside radios and antennas in 2010 and replacement 220

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<sup>27</sup> *See* CSXT Reply III-F-154–55; CSXT Reply WP “Insulated Joint.xlsx.”

<sup>28</sup> *See Decision* at 175. The reality of 220 MHz not being available is apparent from public sources. *See, e.g.,* Jeff Stagl, “PTC: Railroads Attempt To Get A Better Handle On Positive Train Control Implementation,” *Progressive Railroading* (Nov. 2011) *available at* [http://www.progressiverailroading.com/c\\_s/article/PTC-Railroads-attempt-to-get-a-better-handle-on-positive-train-control-implementation--28778](http://www.progressiverailroading.com/c_s/article/PTC-Railroads-attempt-to-get-a-better-handle-on-positive-train-control-implementation--28778) (“CSX Technology’s Lonegro expects Wabtec Corp. to develop the Class I’s train management system by early next year and MeteorComm L.L.C. to develop the rail industry’s 220 MHz radio by mid-2012. However, CSX will conduct pre-production tests on the radios before then, he says.”).

megahertz radios and antennas in 2018. *See Decision* at 175. The Board said that TPI's evidence was "feasible and supported," but TPI did not explain how TPIRR could purchase radios in 2010 that were not even available in 2014, when the evidence was submitted. The radios are a part of the PTC system. Just as a fully-functioning interoperable PTC system could not be installed in 2010, radios that were not being marketed at the time could not be purchased.

The Board also materially erred by finding that TPIRR would not be responsible for equipping foreign carriers' locomotives with equipment interoperable with TPIRR's PTC system for run through service. *Id.* at 176. The replacement radios for the 2018 fully functioning PTC system would be the responsibility of the foreign railroads. *See CSXT Reply III-F-164.* But if TPI plans to install an early PTC system in 2010 and then incur further costs to upgrade that system in 2018, it cannot expect foreign carriers to bear that double cost. For TPIRR's PTC system to work prior to 2018, it would need to equip the foreign railroads with radios. The Board's point that this appears to be "at odds with reality" (*Decision* at 176) is technically correct, because TPI's proposal to install PTC in two phases is different than how real-world railroads are implementing PTC. But TPIRR is responsible for the costs that flow from that decision.

**4. The Board Ignored The Best Evidence In Incorrectly Excluding Investment Costs For Three Necessary Intermodal Yards.**

TPI chose to include road property investment costs for 19 intermodal yards it viewed as necessary for TPIRR. *See TPI Op. III-B-7.* On Reply, CSXT demonstrated that three additional intermodal yards were necessary because, like the 19 yards the TPI included on Opening, they originate and terminate TPIRR container traffic. *See CSXT Reply III-B-19.* TPI conceded in rebuttal that the three intermodal terminals were needed. *See TPI Reb. III-B-8.* The Board agreed that TPI made the "choice on opening to build the 19 intermodal terminals" and, therefore, had to include all necessary costs for those terminals. *Decision* at 182-83. But the

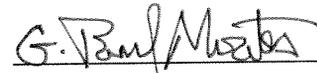
Board then incorrectly allowed TPIRR to treat some of the intermodal facilities necessary to serve the traffic group differently. *Id.* at 183. The Board did so with no explanation from TPI as to why the ownership or cost structure for the three intermodal terminals would be any different from the other 19. CSXT's inclusion of those costs—consistent with the treatment of the other terminals—is the best evidence in the record.

### III. CONCLUSION

For the reasons stated above, the Board should grant CSXT's Petition for Reconsideration and reconsider certain aspects of its *Decision*.

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Dated: October 24, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of October, 2016, I caused a copy of the foregoing  
CSX Transportation, Inc.'s Petition for Reconsideration to be served by hand-delivery upon:

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