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

**RE:** Docket No. NOR 42123, *M&G Polymers USA, LLC v. CSX Transportation, Inc.*

Dear Ms Brown:

I am writing on behalf of M&G Polymers USA, LLC (“M&G”) in response to the letters submitted by Union Pacific Railroad Company (“UP”) and Norfolk Southern Railway Company (“NS”) in the above-referenced docket on October 9, 2012. Both railroads ask for clarification of the Board’s September 27 Decision in this docket as to the following two questions:

1. Whether the Board intended to solicit comment from the general public on the refined approach to qualitative market dominance set forth in the Decision; and
2. Whether the Board intends to apply this refined approach in future cases.

As to the first question, M&G believes that the Board did not solicit comments from the general public and that it would not be appropriate or lawful for the Board to do so. This case concerns the named parties, M&G and CSX Transportation, Inc. (“CSXT”), and soliciting comments from the general public could be argued to unlawfully turn this proceeding into a notice and comment rulemaking without following APA procedures. As to the second question, M&G takes no position, except to support the Board’s efforts to develop an objective standard that will make the market dominance determination easier for all stakeholders to assess.

The questions and the arguments presented by UP and NS highlight a concern that M&G has with the Board’s adoption of the refined approach in this proceeding. M&G lauds the Board for developing an objective approach to determining whether alternative transportation provides “effective” competition. This approach has the potential to spare future complainants from the multi-year process that M&G has experienced in order to get a decision on market dominance that will allow M&G to participate in the “Stand-Alone Cost” phase of this case. This two-phased process, with each phase measured in years, cannot be what Congress intended when it adopted a rail transportation policy “to provide for the expeditious handling and resolution of all proceedings...permitted to be brought under this part.” 49 U.S.C. 10101(15). However, the

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Board's attempt to use M&G's case to address this problem holds the potential to impose even greater delay upon M&G.

The September 27 Decision is less than two weeks old and already CSXT has asked for a 55 day extension of the 30 day comment period on the refined approach, and now UP and NS have expressed their desire to participate and to also request an extension. In addition, they have argued that the Board should, indeed must, conduct a notice and comment rulemaking, especially if it intends to apply its refined approach to future cases. Both railroads clearly intend to argue that both the refined approach and the process by which it was adopted are flawed, and undoubtedly they would appeal any decision that rejects their arguments, as would CSXT.

If the Board would broaden this proceeding to involve other parties, or initiate a notice and comment rulemaking on its refined approach that would be applicable to M&G's case, M&G would stand to suffer significantly more delays before obtaining a market dominance decision, much less a final decision on rate reasonableness. This case would likely be held up while comments on the refined approach are considered and any changes are applied to M&G's facts. Then, there is the probable appeal. If the refined approach is reversed on appeal, M&G would find itself back at square one on a judicial remand of market dominance. Indeed, the prejudice to M&G at that point could be much greater than just the consequences of delay because, by the time an appeal of a final decision can be filed, M&G would have fully litigated rate reasonableness too.<sup>1</sup> Thus, a remand might require the resubmission of rate reasonableness evidence.

Moreover, it is apparent that, if the Board relies solely on the refined approach in this proceeding, M&G is at risk for the consequences of potentially years of uncertainty and delay. This need not occur.

M&G believes that the refined approach is defensible. However, it is seriously concerned that the Board has relied solely upon that approach when there is ample complementary evidence that provides an independent basis for the Board's conclusions, and indeed would confirm the Board's conclusions under the refined approach. The primary value of the refined approach is in determining whether effective competition exists for those lanes where the transportation alternative has a similar or lower rate. For many of the case lanes, the Board need only look at the significantly *higher* alternative transportation rates to conclude that those rate levels *cannot* be effective competitive constraints. In this proceeding, however, M&G also has presented evidence of *enormous* CSXT rate increases over just a short, 2-year, time span without *any* loss of traffic to lower rate alternatives. The Board has long held that the absence of any diversion after a reasonable time following a rate increase constitutes evidence that alternative transportation is not an effective competitive constraint. Furthermore, although comparable or

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<sup>1</sup> A Board decision adopting the refined approach in this case would be interlocutory, and thus not subject to appeal until after the Board issues a final decision on rate reasonableness.

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lower rates for alternative transportation have been found to constitute evidence of effective competition when railroads have *reduced* their rates to meet the competitive threat, in this case CSXT has *increased* its rates by a substantial magnitude in nearly every disputed case lane to match the alternative transportation rates. A holistic assessment of these facts easily enables the Board to reach the same market dominance conclusions in the September 27 Decision as it has by resort to the refined approach.<sup>2</sup> M&G will be filing a Petition for Reconsideration of the September 27 Decision next week that presents this, among other, arguments in greater detail.

If the Board makes these independent market dominance findings, the prejudice to M&G from delays associated with the controversy surrounding the refined approach can be substantially mitigated, if not avoided altogether. That is because, even if the refined approach ultimately is appealed, there will be independent grounds for a reviewing court to still affirm the market dominance results in this case. Therefore, any infirmities that a court might find in the refined approach would not require M&G to start all over. Furthermore, the Board still could apply its refined approach in this case, and pursue a separate rulemaking in order to deal with cases filed in the future.

At bottom, an important concern for M&G is to keep its case moving forward to an expeditious conclusion. The controversy surrounding the refined approach adopted in the September 27 Decision, as evidenced by the UP and NS letters, is a major obstacle. Therefore, M&G urges the Board to issue a decision, in response to M&G's soon to be filed Petition for Reconsideration, that also confirms the results of the September 27 Decision on the basis of a traditional market dominance analysis.

Sincerely,



Jeffrey O. Moreno  
*M&G Polymers USA LLC*

Cc: G. Paul Moates, *Counsel for CSXT*  
Michael L. Rosenthal, *Counsel for Union Pacific Railroad*  
John M. Scheib, *Counsel for Norfolk Southern Railway*

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<sup>2</sup> The presence of independent evidence that corroborates the results produced by the refined approach also could help the Board to justify the reasonableness of that approach in this case.

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