

**BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD**

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RAIL FUEL SURCHARGES (SAFE HARBOR)

REPLY COMMENTS OF CSX TRANSPORTATION, INC.

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REPLY COMMENTS OF CSX TRANSPORTATION, INC.

CSX Transportation, Inc (“CSXT”) respectfully submits these Reply Comments in response to the Board’s Advance Notice of Proposed Rulemaking regarding the Safe Harbor provisions of its fuel surcharge rules. *See Rail Fuel Surcharges (Safe Harbor)*, STB Docket No. 661 (Sub-No. 2) (S.T.B. served May 29, 2014) (“ANPR” or “Notice”). As CSXT stated in its opening comments, a rulemaking to re-visit the safe harbor provision of the Board’s rules is neither necessary nor appropriate. The Board’s safe harbor provision serves important and valuable functions for carriers, shippers, and the public, and its use has enhanced transparency, credibility, and ease of administration of rail fuel surcharges. At the same time, the fuel surcharge rules adopted in STB Ex Parte 661 have effectively addressed the Board’s concerns about any potential for customer confusion or misunderstanding about the operation of a rail carrier’s fuel surcharges. Comments submitted in the opening round of this proceeding provide no basis to revisit the safe harbor or to commence another fuel surcharge rulemaking proceeding.

I. CSXT RESPONSES TO BOARD QUESTIONS REGARDING THE SAFE HARBOR.

The Board solicited comments on four specific, limited questions in the ANPR opening this proceeding. *See* Notice at 3.¹ Below, CSXT summarizes its response to those questions.

First, the Board asked “whether or not the phenomenon that we observed in *Cargill* (a growing spread between a rail carrier’s internal fuel costs and the HDF Index) was likely an aberration.”

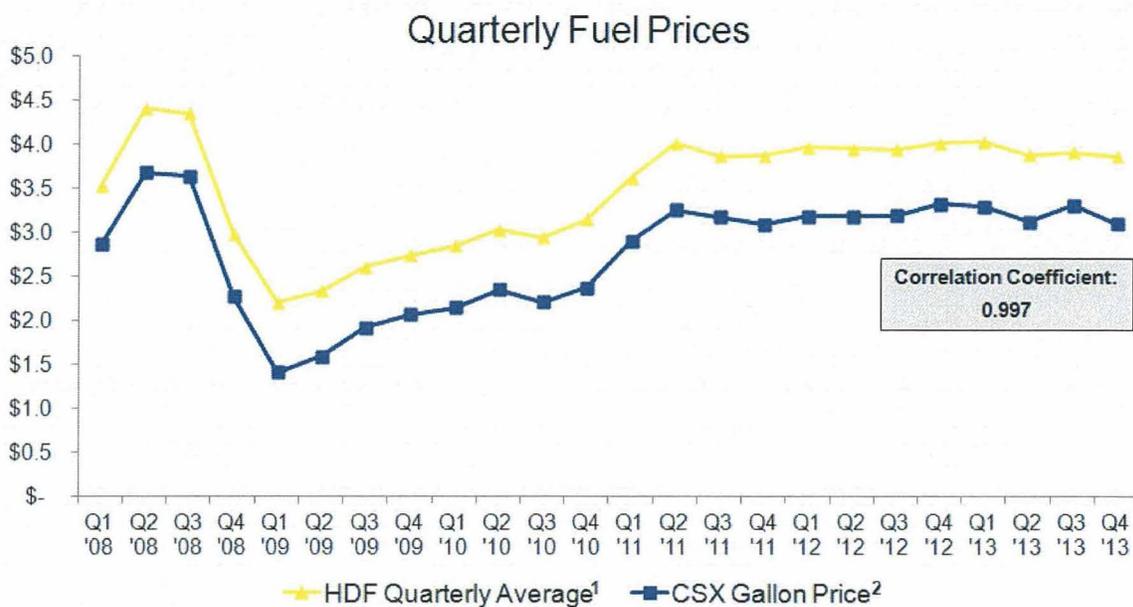
¹ The Board also sought comments on matters “bear[ing] on whether the safe harbor should be modified or removed.” Notice at 3. However, the Board did not seek comments on any and all subjects bearing any relationship to fuel or fuel surcharges in general. Nor did the limited Notice request proposals for re-opening the Board’s fuel surcharge standards and rules other than the safe harbor provision. Several commenters disregarded the parameters of the Notice and raised issues and proposals well outside the narrow scope of this proceeding, including proposals that effectively would use fuel surcharge *practices* rules to regulate rail *rates*. The Board should confine this proceeding to the targeted questions announced in the Notice, and disregard all comments that are beyond the proper scope of the proceeding.

Id. CSXT cannot speak for the experience of other carriers, but CSXT’s own experience is that the average annual “spread” between the HDF Index price and CSXT’s internal fuel price remained fairly constant during the full years 2008 through 2013.² That is, for each of the relevant years, changes in CSXT’s internal fuel prices closely tracked changes in the HDF Index prices. As the following graph illustrates, from 2008 through mid-2014, there was an extremely close correlation between changes in quarterly average HDF Index prices and CSXT internal fuel prices reported quarterly to the Board. *See* Table 1, *infra*. The correlation coefficient between quarterly changes in the HDF Index and the CSXT internal fuel cost during that period was 0.997, or only 0.003 short of a perfect correlation of one (1).³ *See id*; *see also* Exhibit 1 hereto. This experience is consistent with shippers’ advocacy of the use of the HDF Index adopted by the Board as a safe harbor in *Rail Fuel Surcharges*. *See, e.g., Rail Fuel Surcharges*, STB Ex Parte No. 661 at 11 (S.T.B. served Jan. 26, 2007) (“*Fuel Surcharges*”) (noting general agreement among commenters that the HDF Index “accurately reflects changes in fuel costs in the rail industry”).

² Within those years, there was somewhat more quarterly variation (resulting in both increasing and decreasing “spreads” between the HDF Index and CSXT internal fuel costs within a year). However, the effects of such limited short-term volatility were largely offsetting and did not result in significant annual variations. *See* Table 2, *infra*.

³ If fuel used for vehicles and functions other than locomotives (*e.g.*, fuel used for motor vehicles and power equipment) were excluded—as in the quarterly reports CSXT submits to the Securities and Exchange Commission—the correlation between change in HDF Index prices and changes in CSXT’s average internal fuel prices for the same period would be 0.998.

Table 1
Changes In CSXT’s Internal Fuel Cost And Changes In The HDF Index Are Closely Correlated (Supporting Data at Exhibit 1)



¹ Simple average of monthly U. S. No. 2 Ultra Low Sulfur Diesel Retail Prices (www.eia.gov)
² CSXT's Quarterly Report of Rail Fuel Surcharges (www.stb.dot.gov)

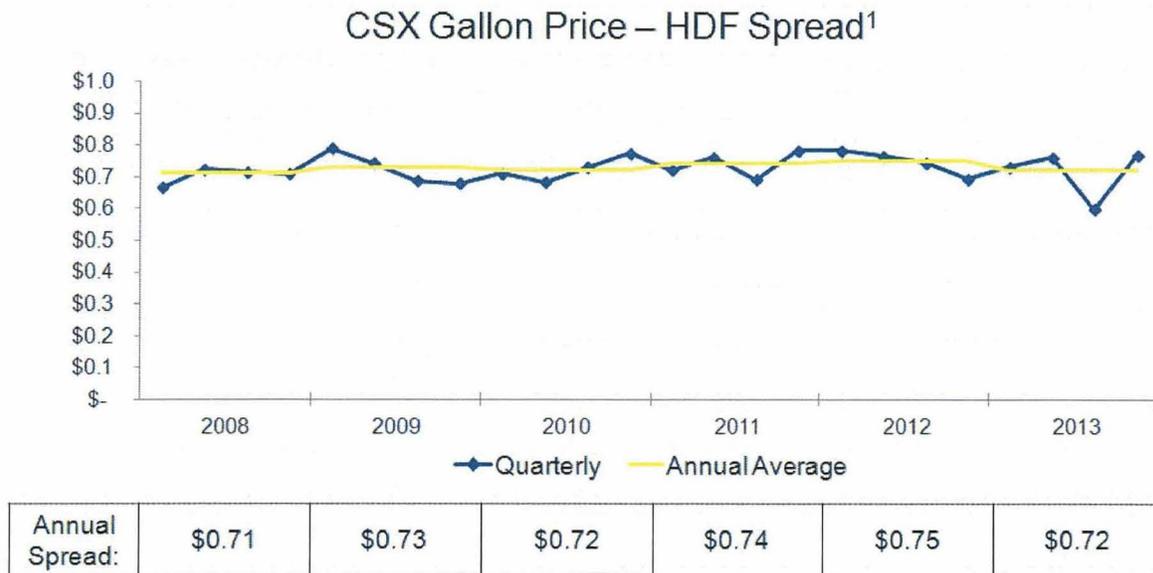
The tight correlation between changes in HDF Index prices and changes in CSXT’s reported fuel costs illustrated above more than satisfies the Board’s requirement that factors used in a carrier’s fuel surcharge formula bear a reasonable nexus to the carrier’s increased fuel costs.⁴ See *Dairyland Power Co-op v. Union Pacific*, STB Docket No. 42105 at 5-6 (S.T.B. served July 29, 2008) (“*Dairyland*”). As the Board has repeatedly emphasized, a precise match between fuel surcharge revenues and a carrier’s incremental fuel costs is neither possible nor required. See, e.g., *id.* at 5-6. Given the number of variables and the difficulty of precise measurement of a carrier’s “actual” fuel cost for any given movement, shipper, or traffic, the correlation between

⁴ Under the Board’s existing safe harbor rules, the HDF Index is conclusively presumed to be an accurate and sufficient measure of incremental changes in the carrier’s fuel costs for purposes of calculating fuel surcharges. The close correlation shown above demonstrates that the use of changes in the HDF Index as a measure of changes in CSXT fuel prices would be sufficient to satisfy the “reasonable nexus” requirement even in the absence of a “safe harbor” presumption.

CSXT’s incremental fuel cost changes (calculated in the manner directed by the Board) and changes in the HDF Index price is quite close. *See id.* At least for CSXT, changes in the HDF Index are an accurate proxy for changes in average CSXT fuel costs as reported.

Moreover, as the next chart illustrates, the average annual “spread” between changes in CSXT’s reported fuel costs and changes in the HDF Index has been nearly constant during the six full years in which CSXT has used the HDF Index safe harbor for its fuel surcharge program (2008 through 2013). *See* Table 2. During that entire period, that annual average spread (depicted by the nearly flat yellow line) varied by only four cents, from a low of \$0.71 to a high of \$0.75. Minor fluctuations within that narrow band exhibited no long term directional trend—the spread grew slightly and shrank slightly over that period, ending one cent larger than it began six years earlier.

Table 2
Fluctuations In The Spread Are Minor And Exhibit No Long-Term Directional Trends



¹ Spread calculated as the difference between the simple average of monthly U. S. No. 2 Ultra Low Sulfur Diesel Retail Prices (www.eia.gov) and CSXT’s gallon price, CSXT’s Quarterly Report of Rail Fuel Surcharges (www.stb.dot.gov)

As illustrated, the “spread” between changes in CSXT’s reported fuel costs and changes in the HDF Index has been quite consistent over time. CSXT experienced no significant “growing spread” between internal fuel prices and the HDF Index price from 2008 through 2013. Any significant annual variation from the average spread, were it to occur in the future, would indeed be an aberration based on CSXT’s experience to date.

Second, the Board asked “whether there are problems associated with the Board’s use of the HDF Index as a safe harbor in judging the reasonableness of fuel surcharge programs.” Notice at 3. As nearly all parties agree, and as demonstrated in the preceding discussion, changes in the HDF Index closely track changes in CSXT’s and other carriers’ average fuel cost. And, use of a public, objective fuel price index for mileage-based fuel surcharge programs has increased the transparency and credibility of such programs for shippers. Thus, despite some commenter complaints that are either factually incorrect, beyond the scope of this safe harbor proceeding, or seek impractical precision, CSXT responds that there are not significant problems with use of the HDF Index as a safe harbor.

Third, the Board asked whether any problems with the safe harbor could be addressed by a modification. *See* Notice at 3. Because the current safe harbor rules are reasonable and consistent with the principles and objectives articulated by the Board in *Fuel Surcharges*, the safe harbor requires no modification. *Finally*, the Board inquired whether any problems with the safe harbor are outweighed by its benefits. *Id.* Because there are no significant problems created by the safe harbor, and it provides benefits for both shippers and carriers, the answer is yes, any problems associated with the safe harbor are outweighed by its benefits.

II. GUIDING PRINCIPLES.

As CSXT explained in its opening comments, certain fundamental rules, principles, and policies should guide the Board’s consideration of the safe harbor provision of its fuel surcharge

rules. *See* CSXT Opening at 1-5. Because a number of other opening comments disregard them, CSXT again summarizes governing principles, policies, and limits.

A. First Principles.

First, the Board may determine the reasonableness of the level of rail transportation rates only in rate reasonableness proceedings initiated on complaint. *See, e.g.*, 49 U.S.C. §§ 10701, 10704, 10707, 11701. It is firmly established that the reasonableness of the amount of a rail rate, or any component of a rail rate—including a fuel surcharge—may not be determined in an unreasonable practices case. *See, e.g., Union Pacific v. ICC*, 867 F.2d 646 (D.C. Cir. 1989); *Dairyland* at 5 (“where ‘the so-called practice is manifested *exclusively* in the level of rates . . .’ it must be regulated under the Board’s jurisdiction over unreasonable rates, rather than its jurisdiction over unreasonable practices.”) (quoting *Union Pacific*) (emphasis in original). As the Board more specifically explained, a shipper may not maintain an unreasonable practices claim based on the amount of a fuel surcharge applied to its traffic. *See id.*

Many comments and proposals in this proceeding seek to circumvent that delineation of the Board’s authority by requesting that the Board regulate the level of carrier fuel surcharges through its unreasonable practices authority. The various claims and assertions that carriers are earning “too much” from fuel surcharges or from the component of base rates attributable to fuel costs, and proposals for changes to limit or reduce such “over-recovery” are all claims that the *level* of some rates are unreasonable. But as the Board and courts have made clear, the regulatory regime established by Congress allows the Board to regulate the level of rail rates only through its rate reasonableness jurisdiction, not as an unreasonable practice. *See, e.g., Dairyland* at 5. Complaints about the *amount* of fuel surcharges are complaints about the *level* of rail rates, which may be addressed only in a rate reasonableness case. *See Union Pacific*, 867 F.2d 646.

Notwithstanding the contrary wishes of some commenters, the Board may regulate rates only under its rate jurisdiction and procedures, and must take care not to “cross that boundary [between regulation of rates and regulation of practices] and impermissibly regulate rate levels.” *See id.; Fuel Surcharges* at 7 (“[W]e are not limiting the total amount that a rail carrier can charge for providing rail transportation through some combination of base rates and surcharges. Rather, we are only addressing the manner in which railroads apply what they label a fuel surcharge.”). Neither this proceeding nor any reasonable practices proceeding may be used to determine the reasonableness of the amount of a transportation rate charged by a rail carrier.

Second, proposals for greater and more burdensome regulation of carrier fuel surcharges or other components of rail rates face a heavy burden of justification under the national Rail Transportation Policy established by Congress. That highly successful policy favors limited regulatory intervention in the rail transportation marketplace and mandates that reasonable rail rates be determined, “to the maximum extent possible,” by “competition and the demand for [rail transportation] services.” 49 U.S.C. § 10101(1). Further, the national policy established by Congress seeks “to minimize the need for Federal regulatory control over the rail transportation system . . .” *Id.* § 10101(2). Imposition of onerous, costly, and burdensome new data collection, analysis, and reporting requirements concerning rail fuel surcharges generally would be inconsistent with those overarching policies. *See Fuel Surcharges* at 10 (“We seek to minimize the degree of Federal regulatory control” over rail carriers’ fuel surcharges).

Third, in considering comments and suggestions for new or expanded rules regarding fuel surcharge practices, the Board should bear in mind the limited basis and purpose of its fuel surcharge rules. The entire basis for the new fuel surcharge rules the Board adopted in *Fuel Surcharges* was to ensure that the fuel surcharges charged by rail carriers were not mislabeled or

based on a misrepresentation. *See Fuel Surcharges* at 6-8. Any modification of the fuel surcharge safe harbor rule that the Board might consider should proceed from that premise and focus on the narrow purpose of ensuring that a rail carrier fuel surcharge program is not designed or applied in a manner that constitutes a misrepresentation.

Fourth, the Board should consider any unreasonable practice claims on a case-by-case basis. If an individual shipper believes a carrier's fuel surcharge as applied to that shipper is based upon a misrepresentation, the available regulatory remedy is for the shipper to file an unreasonable practices complaint. *See Fuel Surcharges* at 8 (“[O]ur authority to determine whether any particular fuel surcharge applied by a specific railroad is an unreasonable practice . . . is limited to proceedings begun on complaint.”). The unreasonable practices statute contemplates individual adjudications initiated by complaint, and does not provide for a generalized determination of the overall reasonableness of a fuel surcharge program in its many different applications or award of reparations or damages based on such a general and undifferentiated analysis. Thus, evidence that carriers are engaging in unreasonable practices in the general design or application of fuel surcharges, addition of burdensome new regulations or reporting requirements would be unnecessary and inappropriate.

Fifth, any change the Board may propose to make to the safe harbor provision of its fuel surcharge rules (or any other aspect of those rules), must operate *prospectively* only. It would be both unfair and unlawful for the Board to propose any change to those rules that would apply retrospectively to practices a carrier followed in conformity with existing Board rules. CSXT (and presumably other rail carriers governed by the Board's fuel surcharge rules) has developed and applied its fuel surcharge program to comply with, and in good faith reliance on, the Board's current rules, including the safe harbor provision. As the Board recognized in establishing its

new fuel surcharge rules, because carriers are entitled to rely on existing rules, practices, and precedents, any change in those parameters must operate prospectively to future conduct only. *See Fuel Surcharges* at 10. Carrier fuel surcharges and practices that complied with existing rules—including the current safe harbor—lawfully may not form the basis for retroactive unreasonable practices findings or remedies. *See, e.g., Health Insurance Ass’n v. Shalala*, 23 F.3d 412, 422-24 (D.C. Cir. 1994); *Association for Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992); *see generally Bowen v. Georgetown Hospital*, 488 U.S. 204 (1988). Thus, any proposed changes to the Board’s safe harbor rules may not be applied retroactively.

Sixth, rail customers are interested in the total price they pay for rail transportation service, not what portion of that price may be necessary to cover carrier’s fuel costs or any other individual component of the carrier’s costs of providing the transportation service. Shippers make transportation decisions based on the “all-in” price offered by various comparable transportation alternatives, not based on any element of the transportation provider’s costs. Thus, even in a rate reasonableness case, the Board does not consider whether or to what extent a challenged rate “recovers” any particular cost of the rail transportation service to which the rate applies.

Finally, the Board should proceed cautiously before proposing any significant changes to its fuel surcharge rules. The numerous variables affecting fuel prices; railroads’ purchase and consumption of fuel in different circumstances and conditions and for different types of traffic; the Board’s limited rate reasonableness jurisdiction; and a number of other factors would make it difficult to fashion a broad rule of general application that would be fair, easily administrable, and avoid creating market distortions and other unintended consequences. *See, e.g., Cargill, Inc.*

v. *BNSF Ry. Co.*, STB Docket No. 42120 at 18 (S.T.B. served Aug. 12, 2013) (“*Cargill*”) (C. Mulvey separate expression) (indicating that any proposal to remove safe harbor “goes far beyond” concerns raised in the single fuel surcharge case the Board has adjudicated to final decision, and warning against unintended consequences of abandoning HDF Index safe harbor). Because of the complexity, difficulties, and demonstrated potential for unintended negative consequences of broad pronouncements or changes to rules governing fuel surcharges, the Board should not propose any change in its fuel surcharge rules before studying the matter carefully.

B. Additional Principles Implicated by Opening Comments.

Comments and proposals submitted in the opening round of this proceeding implicate additional basic rules and principles. *First*, the scope of this proceeding is limited to review of the safe harbor for rail fuel surcharges established in *Fuel Surcharges*. *See* ANPR at 1-3. The limited scope of this proceeding does not extend to any aspect of fuel surcharges that is not related to the existing safe harbor and “whether the safe harbor . . . should be modified or removed.” *See id.* at 3 (enumerating four specific topics on which the Board seeks comments, all related to the question of “whether the safe harbor provision of *Fuel Surcharges* should be modified or removed.”). Comments proposing wide-ranging changes in other elements of fuel surcharges; reporting, data-collection, analysis and recordkeeping requirements; and other subjects not directly related to the safe harbor, are outside the scope of this proceeding and should not be considered.⁵

⁵ As a matter of administrative law, an agency may not take action regarding matters outside the announced scope of a proceeding. *See, e.g., CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009); 5 U.S. C. §§ 553 (b), (c). Consistent with that rule and sound policy, it would not be fair or appropriate for the Board to consider subjects or issues outside the announced scope of this proceeding. *See, e.g., Prometheus Radio Project v. FCC*, 652 F.3d 431, 449-54 (3d Cir. 2011) (invalidating agency action because its notice did not fairly apprise public the agency was contemplating that action); *United Mine Workers of America v. MSHA*, 407 F.3d

Many commenters seem to have misunderstood this safe harbor inquiry as an invitation to re-visit other matters addressed and decided in *Fuel Surcharges*, *Cargill* and other decisions. But this proceeding is addressed to the narrow subject of the reasonableness of using the HDF Index as a safe harbor for carriers who wish to use changes in that Index as the measure of changes in their fuel cost. Other issues raised in the *Cargill* decision or other proceedings simply are not properly presented in this proceeding, and the Board should reject attempts to expand this proceeding to any and all subjects having any relation to rail carrier fuel surcharges. Simply put, if a comment does not directly address the safe harbor rule the Board established in *Fuel Surcharges*, it is not a proper subject for consideration in this limited proceeding.

Second, the calls by shipper groups and other commenters for the imposition of a variety of burdensome new data, analysis, and reporting requirements suggest a misperception of the narrow scope and purpose of the Board’s fuel surcharge rules. As the Board stressed in *Fuel Surcharges*, the limited purpose of the fuel surcharge rules it adopted pursuant to its unreasonable practices jurisdiction is to ensure that carriers do not “mislabel” as a fuel surcharge a program or charge that is actually designed or applied “as a broader revenue enhancement measure.” See *Fuel Surcharges* at 7. The reporting rules the Board adopted are intended only to “provide an overall picture of the use of fuel surcharges” by carriers for general oversight purposes and to “reflect aggregate data on fuel costs and fuel surcharge revenue.” *Rail Fuel Surcharges*, STB Ex Parte No. 661(Sub-No. 1) at 3, 5 (S.T.B. served Aug. 8, 2007) (“*Surcharge Reporting*”).⁶

1250, 1259 (D.C. Cir. 2005) (important purpose of notice and comment requirement is “to ensure fairness to affected parties”).

⁶ The Board also concluded that two practices (computing fuel surcharges as a percentage of a base rate and applying to the same traffic both a fuel surcharge and a rate increase based on a cost index that includes a fuel cost adjustment) were unreasonable and directed carriers to

The Board's reporting requirements are *not* designed to be used to determine whether a particular fuel surcharge program as applied to specific traffic constitutes an unreasonable practice; whether the level of a particular fuel surcharge or rail rate is unreasonable; or to award damages or prescribe remedies for specific fuel surcharges alleged to constitute unreasonable practices or rates. Such determinations may be made only in an individual adjudication based on a specific complaint filed by an affected party. As the Board summarized in *Fuel Surcharges*,

[o]ur authority to determine whether any particular fuel surcharge applied by a specific railroad is an unreasonable practice, and to award damages on that basis, is limited to proceedings begun on [formal] complaint. 49 U.S.C. § 10704(b), 11701(a).

Fuel Surcharges at 8. The general rules and reporting requirements the Board adopted in *Surcharge Reporting* strike a reasonable balance between the provision of information sufficient to allow the Board to conduct general oversight of fuel surcharge practices and its statutory mandates to minimize federal regulatory control and to limit specific reasonableness inquiries to adjudications initiated by complaint. *See Fuel Surcharges* at 10. As the Board concluded in rejecting additional rules and requirements and emphasizing the properly limited nature of the general, high-level rules it established, "should any shipper have concerns that any particular revised fuel surcharge program is being administered in a manner that constitutes an unreasonable practice, it may file a complaint with the Board." *Id.* The Board's reasoning remains equally sound today, and shippers have provided no evidence or reason to impose additional general rules or reporting requirements.

Third, the Board should consider clarifying the scope and limits of its reasonable practices rulings regarding rail fuel surcharges. Many comments and proposals seem to be based

eliminate those two practices. *See Fuel Surcharges* at 1, 6, 10-11. No commenter in this proceeding has presented evidence indicating that carriers are presently engaged in either practice.

on the mistaken view that *Fuel Surcharges* required that carriers' fuel surcharge programs be finely calibrated to recover precisely the incremental cost of fuel consumed by the traffic subject to that charge. Several commenters further presume that, despite the manifest complexity and difficulty of developing accurate incremental fuel costs for any specific rail traffic, anything short of precise recovery of "actual" carrier fuel costs should be deemed an unreasonable practice and require a carrier to pay reparations for any "over-recovery" of its incremental fuel costs. CSXT believes this misunderstands the intent of the Board's rulings in *Fuel Surcharges* and the scope and limits of its reasonable practices authority.

The Board's core purpose and intent in its *Fuel Surcharges* rulings was to ensure that carriers did not misrepresent or mislabel their fuel surcharge programs. *See Fuel Surcharges* at 6-7. To that end, the Board adopted a few general rules for fuel surcharges on regulated traffic, including a prohibition on fuel surcharges based on a percentage of the base rate. Most relevant here, the Board promulgated a general rule that a separate charge that a carrier labels a "fuel surcharge" must be based on movement characteristics or criteria having "a reasonable nexus to fuel consumption." *Id.* at 9. Significantly, the Board did not require that a fuel surcharge program be finely calibrated to recover exactly a carrier's incremental fuel costs. As the Board recognized, given the myriad variables and unknowns affecting fuel costs for different rail traffic, such precision would be impossible. Rather, in order to avoid misrepresentations, the Board required only that a fuel surcharge be designed and intended to have a *reasonable* nexus to a carrier's fuel consumption. *See id.*

The Board should clarify that a fuel surcharge program that is designed and intended to have such a reasonable nexus is presumptively reasonable. The mere fact that, under some circumstances or in some periods, application of a fuel surcharge may result in revenues that

exceed some measure of incremental fuel costs for some traffic does not demonstrate that the fuel surcharge formula lacks the required reasonable nexus. Nor should incidental divergence between the change in a carrier's fuel surcharge and its internal fuel price as reported to the Board constitute an unreasonable practice. Periodic variations between and among different fuel price measures or fuel consumption levels are to be expected and do not evidence a misrepresentation or unreasonable practice. The Board's fuel surcharge rules should—and in CSXT's view, do—require only a reasonable nexus, not more.

In addition, the Board could helpfully clarify that variation in the amount of fuel surcharge revenues collected for a given change in a carrier's fuel cost does not, alone, render its fuel surcharge misleading, or based on a misrepresentation. Particularly among sophisticated parties such as Class I rail carriers and their customers, it should be clear that a carrier does not misrepresent its fuel surcharge program or engage in an unreasonable practice if it: (i) expressly discloses the fuel surcharge; (ii) fully and adequately explains the provisions of its fuel surcharge mechanism and how they will be applied; and (iii) applies the fuel surcharge in the manner it disclosed and explained. Such a clarification would not prevent a shipper from challenging the amount of a fuel surcharge in a rate reasonableness case, it would simply establish that a fuel-surcharge-based unreasonable practices claim is not available if the fuel surcharge in question complies with the foregoing requirements. It also would go far to forestall unnecessary time- and-resource-consuming unreasonable practices litigation.

Finally, any proposal for increased railroad data gathering, analysis or reporting must compare any potential enhancement of the Board's ability to discharge its limited regulatory functions against the burden and cost of such additional reporting. As discussed, the threshold test in this proceeding should be whether the proposed reporting requirement addresses the safe

harbor provision. If it does not, then the Board should not consider the proposal any further in this proceeding. Comments proposing increased reporting and analyses that *are* directly related to the safe harbor rules should be further evaluated to determine whether and how such expanded requirements would aid the Board in discharging its limited statutory authority over rail carrier practices, particularly in light of the national policy to limit federal regulatory intervention in the rail transportation system. *See Fuel Surcharges* at 10; 49 U.S.C. §§ 10101(1), (2), 11701. If the Board determines that a specific additional reporting requirement related to its safe harbor rule would aid it in discharging its statutory responsibilities (*i.e.*, its limited authority to regulate carrier practices without a specific formal complaint), then it should consider—in a future rulemaking proceeding based on specific concrete proposed reporting requirements—whether the value of such additional reporting would justify the additional burdens and costs of that expanded reporting.

III. THE BOARD SHOULD MAINTAIN THE EXISTING SAFE HARBOR MEASURE OF CHANGES IN RAIL CARRIER FUEL COSTS.

The core question in this proceeding is whether the Board should modify or remove the safe harbor provision of its fuel surcharge rules. Despite various commenters' wide-ranging complaints and proposals about extraneous subjects, the scope of this inquiry as delineated by the Notice is properly limited to the safe harbor. As CSXT explains below, the safe harbor rules established by the Board provide significant benefits to both carriers and shippers, and there is no basis in this record for removing or modifying the existing safe harbor rules.

The Board's primary aims in promulgating new rules to govern fuel surcharges were to ensure that fuel surcharges are not mislabeled or misleading, and that fuel surcharge programs be based on factors having a "reasonable nexus to fuel consumption." *Fuel Surcharges* at 1, 6-9. To promote transparency and credibility of fuel surcharge programs, the Board adopted the

Energy Information Administration’s (“EIA”) neutral, public HDF Index as a “safe harbor” measure of changes in fuel prices that carriers could use in their fuel surcharge programs. *Id.* at 11 (noting “strong support” by shippers for use of a “single, uniform index to measure changes in fuel prices . . . [to] better ensure accuracy, transparency and accountability, and thereby enhance the credibility of fuel surcharges in the eyes of those who pay them.”). Use of the HDF Index safe harbor has served the Board’s objectives well by providing a transparent, credible, easily administered, and accurate measure of changes in carrier fuel costs as the baseline for reasonable fuel surcharge programs. Neither the *Cargill* case nor the contentions of any commenter in this proceeding provides any basis for the Board to abandon its safe harbor rule and the benefits it affords to rail shippers and carriers.

A. An Index-Based Safe Harbor Has Manifold Benefits for All Parties.

The availability of a safe harbor for fuel surcharge mechanisms using the public HDF Index has substantial benefits for shippers, carriers, and the public. *See generally, Cargill* at 1-3, 7-14. The use of that public Index promotes transparency for shippers and the Board regarding how carriers calculate and charge for certain fuel expenses. Use of a public index issued by a neutral government agency (EIA) also promotes customer confidence in the accuracy and verifiability of a carrier’s fuel surcharge. Further, use of an objective, transparent fuel price index enhances predictability of the amount of fuel surcharges over time.⁷ When a carrier uses a public fuel cost index, all parties know in advance exactly how fuel surcharges will respond to changes in the specified fuel price index. And, because the HDF Index, its historic levels, and forecasts of its future levels are readily available, the use of that public Index facilitates planning,

⁷ Of course, the volatility of fuel prices themselves makes it difficult to predict them with any precision, particularly in the short term.

including measures to mitigate the effect of potential volatility in fuel prices, by shippers and carriers alike.

Another advantage of using the public HDF Index as a safe harbor is that it makes fuel surcharge mechanisms more simple and easy to administer. Carriers using the HDF Index as the basis for a clearly described fuel surcharge mechanism can readily apply such a program without detailed and complex calculations for various different customers, traffic and conditions. And customers can readily implement simple formulas in their purchasing and accounting systems, use those formulas and index values to verify carriers' charges are correct, and promptly resolve any errors or discrepancies without complex analyses.

The transparency and simplicity of application of a straightforward formula to readily verifiable indices also serves to reduce the potential for carrier-shipper disputes about fuel surcharges, while minimizing the need for Board intervention to resolve any disputes that may arise. Generally, the application of an arithmetic formula to known, agreed inputs is objective and not subject to complicated disputes. Thus, use of a safe harbor should greatly reduce the incidence and costs of disputes about fuel surcharges.

Another, related advantage of a safe harbor is that it should reduce the complexity and cost of any unreasonable practices proceedings regarding a carrier's fuel surcharge program. If a shipper brings an unreasonable practice challenge addressed to a railroad fuel surcharge that uses the HDF Index, the safe harbor provision eliminates the need for the parties and the Board to expend time and resources litigating whether changes in that Index adequately track changes in the fuel prices paid by the carrier. The Board reaffirmed these advantages, and the difficulty of

accurately calculating changes in a carrier's internal fuel costs for specific traffic or customers, in rejecting Cargill's "Profit Center" claim. *See Cargill* at 7-14.⁸

Finally, as CSXT and other commenters have confirmed in this proceeding, the HDF Index is a very good proxy for changes in carriers' average fuel costs. *See* Table 1, *supra*; BNSF Opening Comments at 8-10 (Aug. 4, 2014); UP Opening Comments at 8-9 (Aug. 4, 2014). The three U.S. carriers who use the HDF Index in their fuel surcharge programs each demonstrated a correlation coefficient in excess of 0.99 between their internal fuel costs and changes in the HDF Index. Not surprisingly, no commenter has proposed an alternative index that it contends is better correlated with carriers' internal fuel costs.

B. Elimination of a Safe Harbor Would Reduce Transparency, Increase Uncertainty, and Increase the Likelihood and Complexity of Unreasonable Practices Cases Regarding Fuel Surcharges.

If the Board were to repeal the safe harbor provision of its fuel surcharge practices rules, it would eliminate the benefits of that provision to shippers, carriers, and the Board. Without a safe harbor, neither carriers nor their customers would know whether any metric a carrier used to measure changes in its fuel costs would be found to be reasonable if challenged. Further, without the safe harbor benefits of using a public index, carriers might instead choose to use another fuel cost measure that would have less transparency and visibility for shippers. Reduced transparency and predictability, and increased uncertainty resulting from removal of the safe harbor would necessarily render planning more difficult for shippers and carriers. In the event that a carrier chose to use a measure with less widespread acceptance by shippers than an index issued by a neutral government agency (such as the HDF Index), shippers might have less

⁸ Some of the complexities and difficulties attendant to any attempt to accurately calculate and analyze changes in a carrier's internal fuel costs in a specific case are illustrated in the Board's discussion of arguments raised by Cargill regarding BNSF's incremental fuel costs, set forth in Part I of the Board's decision in that case. *See id.*

confidence in that the amount of fuel surcharges they pay is reasonable and accurately calculated and applied. *See Cargill* at 11-12 (indicating that elimination of a publicly available fuel index safe harbor would be “inconsistent with the principles of uniformity, transparency, public availability, and neutrality advocated by shippers in the *Fuel Surcharges* proceeding”). This, in turn, could lead to more disputes about fuel surcharges and potentially to more unreasonable practices claims that would divert resources of shippers and carriers from their productive business activities.

As the *Cargill* decision foreshadows, unreasonable practices litigation regarding a carrier’s fuel surcharges would become far more complex in the absence of a safe harbor. *See Cargill* at 7-14 (discussing a few of the many potential arguments regarding whether the HDF Index was an accurate proxy for incremental changes in the carrier’s fuel costs). Disputes about what carrier fuel costs should be considered; how they should be measured; how they should be apportioned or allocated to a particular shipper’s traffic; whether and how fuel cost hedging by carriers or challenging shippers should be considered; and myriad other questions regarding the “actual” incremental change in a carrier’s fuel costs in a given period all would be complex, costly, and time-consuming. Moreover, because the Board-approved way to measure changes in a carrier’s fuel costs in different periods and under different conditions would likely be settled only after a number of cases addressing such complex issues, elimination of a safe harbor could result in prolonged uncertainty, making business planning for carriers and their customers more difficult.

IV. CSXT RESPONSES TO SPECIFIC COMMENTS AND PROPOSALS.

A. **The Comparisons Presented by Dow Chemical are Largely Meaningless or Misleading.**

The Dow Chemical Company (“Dow”) presents several numerical comparisons to support its claims that a “growing spread” between a carrier’s internal fuel costs and the HDF Index that the Board observed in *Cargill* “is not an aberration,” and to call for rules requiring more reporting by rail carriers. As demonstrated below, most of Dow’s comparisons are either meaningless or provide no basis for imposition of new rules and reporting requirements.

1. **The Simple Difference Between the Percentage Change In Fuel Surcharge Revenue Versus Percentage Change In Fuel Costs is Meaningless.**

Dow presented a table listing, for each U.S. Class I carrier, the overall percentage change in fuel surcharge revenue from 2007 to 2014, the percentage change in the carrier’s total fuel costs for the same period, and the “simple difference” between those figures. *See* Opening Comments of Dow Chemical Co. at 9 (Aug. 4, 2014) (“Dow Comments”). Dow claims that the fact that four carriers’ percentage change in fuel surcharge revenues was greater than their percentage change in fuel costs suggests those carriers’ fuel surcharges are improper and warrant further investigation. *See id* Dow Comments at 9. Dow’s arithmetic is unconnected to its allegations, and provides no basis whatsoever for “further investigation.”

By their nature, fuel surcharges that apply to only a portion of a carrier’s total fuel cost increase by greater percentages than a carrier’s overall fuel costs. Because a carrier’s total fuel costs include all fuel it consumes and not just the portion covered by a fuel surcharge, equal changes in absolute dollars in the carrier’s fuel costs and in its fuel surcharge revenues will necessarily comprise a greater percentage of fuel surcharge revenues, because total fuel costs start from a larger base, as shown in Dow’s Exhibit 1. Because the portion of a carrier’s fuel

cost below the trigger price is “covered” by the base rate and not by the fuel surcharge, the portion of a carrier’s fuel costs covered by a fuel surcharge will always be smaller than its total fuel costs (which by definition include costs covered by the base rate *and* costs covered by the fuel surcharge). As the following hypothetical example illustrates, any fuel surcharge with a trigger price greater than zero cents per gallon will always mean that an equal change in total fuel cost and fuel surcharge revenue will generate a greater *percentage* increase in fuel surcharge revenue. Contrary to Dow’s suggestion, this does not indicate that a fuel surcharge program is unreasonable.

Table 3
Comparing The Percentage Change in a Carrier’s Total Fuel Price To The Percentage Change In Its Fuel Surcharge Is Misleading

Hypothetical example of period-over-period growth calculations assuming a \$2.00 HDF strike price, a \$0.80 CSX gallon price – HDF spread, and a perfect recovery of incremental fuel expense:

	HDF Price	Fuel Expense	Fuel Surcharge	Δ Fuel Expense	Δ Fuel Surcharge
Prior Period:	\$ 3.00	\$ 2.20	\$ 1.00		
Current Period:	\$ 2.50	\$ 1.70	\$ 0.50	-23%	-50%
	\$ 3.00	\$ 2.20	\$ 1.00	0%	0%
	\$ 3.50	\$ 2.70	\$ 1.50	23%	50%
	\$ 4.00	\$ 3.20	\$ 2.00	45%	100%

The “simple difference” in percentages cited by Dow is the *expected* result across a range of surcharge and fuel cost changes, including a fuel surcharge assumed to perfectly recovers precisely a carrier’s exact incremental fuel cost changes as depicted in the above hypothetical. Dow’s comparison is disingenuous and misleading.

2. Dow's Speculation Regarding the Relationship Between Fuel Surcharges and Incremental Changes in Fuel Costs is Not Supported by its Analysis.

Despite acknowledging that its own regression analysis shows a close correlation between changes in rail carriers' fuel prices and changes in the HDF Index, Dow again relies on deeply flawed and confused comparisons to insinuate that "it is unclear" whether or how carriers' fuel surcharges are related to incremental changes in their fuel costs. *See* Dow Comments at 10-11.⁹ But the confusion and lack of clarity that Dow cites is of its own making.

Once again, the foundation of the confusion is Dow's comparison of percentage changes from different baselines and using different metrics. Without even mentioning, let alone taking into account, the applicable trigger price(s) (and corresponding base period fuel surcharge levels) used by any of the carriers, Dow compares percentage changes in the HDF Index price with percentage changes in carriers' fuel surcharges. *See id.* In the first instance, the different percentage changes in two figures having a much different initial base level (HDF Index price/gallon and individual carriers' fuel surcharges per mile), without more, provides no basis for meaningful comparison of those changes or to make any inferences whatsoever about the strength of correlation between incremental changes in a carrier's fuel costs (measured by the HDF Index) and its fuel surcharge revenues.

Second, Dow compounds the confusion by comparing proportionate change in fuel cost *per gallon* with the change in a carrier's fuel surcharge revenue *per mile*. What Dow utterly fails to explain is why, in what manner, and to what extent it believes those two much different metrics *should* be correlated. The compound effect of these two fundamental errors make Dow's

⁹ As CSXT has demonstrated, the actual correlation between changes in the HDF Index and changes in CSXT's fuel costs as reported to the Board is much tighter than that presented by Dow. *See* Table 1, *supra*, at 3.

comparisons meaningless for purposes of evaluating the connection between an individual carrier's change in fuel costs and the corresponding change in its fuel surcharge.

Dow then further compounds its errors and resulting confusion by suggesting that the percentage changes in different carriers' fuel surcharges per mile should be similar and that differences in those percentage changes between carriers warrants "further investigation by the Board." Dow Comments at 10-11. Because the change in any given fuel surcharge over time is dependent on the amount of the fuel surcharge in the base period, however, the same absolute change necessarily will constitute a greater percentage of a lower starting base fuel surcharge rate. Again, this is basic arithmetic. It is hardly surprising, and probative of nothing relevant, that the percentage change in a fuel surcharge for a carrier starting at a base level of \$0.01/mile would be different from the percentage change for a carrier starting at a base level of \$0.13/mile. *See id.* at 11.¹⁰ Dow's calculations and comparisons display a fundamental misunderstanding of, or disregard for, these basic facts.

3. It is Unremarkable that the Proportion of Total Fuel Costs Covered by Fuel Surcharges Would Increase During a Period of Rising Fuel Prices.

Dow's assertion that carriers "are recovering an increasingly large percentage of their total fuel cost via fuel surcharge," if accurate, would hardly be surprising in a period of increasing fuel prices. Dow Comments at 8. As Dow concedes, "a rise in diesel prices, with no other changes, would [] result in an increase in fuel surcharge revenues as a percent of total fuel costs." Dow Comments at 12. As Dow further acknowledges, an increase in the portion of a carrier's total fuel costs that are subject to a fuel surcharge may be the result of an increased

¹⁰ Even if two carriers had identical fuel surcharge programs applied to precisely the same traffic, the use of different trigger prices (and hence different base period fuel surcharges) would mean that the same change in fuel costs would result in different percentage changes in their fuel surcharges.

proportion of a carrier's traffic that is covered by a fuel surcharge. *See id.* Regardless, the observation that carriers may be recovering an increased portion of their fuel costs through fuel surcharges during a time of rising fuel prices is neither surprising nor cause for concern. Indeed, all else being equal, the general increase in diesel fuel prices observed in recent years would be *expected* to increase the proportion of a carrier's total fuel costs covered by a fuel surcharge program.

Moreover, whether the proportion of a carrier's total fuel costs subject to a fuel surcharge is increasing, decreasing, or staying the same is not relevant to the safe harbor rules and issues in this proceeding. The matters properly at issue in this proceeding concern whether the Board, in exercising its reasonable practices authority, should maintain or modify the existing safe harbor measure of changes in a carrier's fuel prices for purposes of fuel surcharge programs. *See* ANPR at 1, 3. Neither Dow nor any other commenter has presented any evidence or argument contradicting the fact that there is a close correlation between changes in HDF Index prices and changes in carriers' incremental fuel costs. Assuming for the sake of discussion that Dow has correctly determined that a larger portion of some carriers' fuel costs are now covered by fuel surcharges than several years ago, it provides no argument that such an unremarkable development should raise regulatory concerns or has any implication whatsoever for the Board's safe harbor rule.

B. Claims Regarding Fuel Efficiency Improvements Are Outside the Scope of This Proceeding.

Dow cites, without context or analysis, a few limited data points regarding fuel efficiency improvements reported by some carriers, as the basis to assert that carriers should "revamp[] their fuel surcharge programs to take account of . . . efficiencies." Dow Comments at 15-16. Shipper claims regarding fuel efficiency have nothing to do with the subject of this proceeding,

the fuel surcharge safe harbor rules. Changes in fuel efficiency do not affect the relationship between a carrier's internal fuel prices and safe harbor index fuel prices. Nor do changes in fuel efficiency or consumption affect the policy merits of the use of a safe harbor index that carriers and shippers may rely upon as a measure of changes in fuel prices. Changes in fuel consumption, complex analyses of the effect of such changes on fuel costs per mile in different circumstances, and questions regarding whether or to what extent carriers' efficiency gains should be transferred to shippers (whether through "revamped" fuel surcharge programs or by other means), are well outside the limited scope of this safe harbor proceeding. The Board did not seek, and parties did not submit, information or comments that would allow meaningful review or analysis of these issues.

C. Responses To Allied Shippers Comments And Proposals.

The "Allied Shippers," consisting of various coal shippers, present five main arguments, four of which do not concern the safe harbor and thus are outside the scope of the proceeding. CSXT confines its response to Comments within the scope of this proceeding.

1. Comments Regarding the Subject of this Proceeding, the Safe Harbor Rules.

Allied Shippers contend that the "growing spread" observed in *Cargill* was not an aberration and that the Board should eliminate the safe harbor provision of its fuel surcharge rules in order to prevent the use of fuel surcharges as "profit centers." *See* Comments of the Western Coal Traffic League et al. at 1-2 (Aug. 4, 2014) ("Allied Shippers Comments"). But Allied Shippers fail to present law or evidence sufficient to support those positions.

Initially, Allied Shippers claim that a "growing spread" between a rail carrier's incremental fuel costs and the HDF Index safe harbor prices was not an aberration and presents data pertaining to two Western carriers to support that claim. *See* Allied Shippers Comments at

40-48. The Allied Shippers do not present such an analysis for CSXT and the text of their comments makes no specific claims regarding the spread between CSXT's incremental internal costs and HDF Index prices.¹¹ BNSF and UP have presented their own evidence and analyses and likely will respond to Allied Shippers claims in their Reply comments. In addition, CSXT further notes that even as presented by Allied Shippers, the data show not a consistently growing spread, but rather a spread that fluctuates on a quarterly basis, resulting in spreads that are sometimes larger and sometimes smaller. *See, e.g.*, Allied Shippers Comments at 42. This appears to illustrate primarily the well-known volatility of fuel prices and the effect of the timing lag between a change in fuel costs and the application of that change in a fuel surcharge program.

In any event, Allied Shippers do not present evidence demonstrating a "growing spread" between CSXT internal fuel costs and the HDF Index prices. As CSXT has shown, during the relevant period, changes in its fuel prices are closely correlated with changes in HDF Index prices and the average annual "spread" between those two measures did not vary significantly. *See* Tables 1, 2, *supra* at 3, 4.

Allied Shippers also mischaracterize the Board's holdings in *Fuel Surcharges*. They claim that the Board "held that carriers cannot use their fuel surcharges as profit centers." Allied Shippers Comments at 1. But this was not one of the Board's holdings in *Fuel Surcharges*. Indeed, the Board did not discuss the use of fuel surcharges as "profit centers" or even use that term in *Fuel Surcharges*. Instead, that term appears to have been coined and applied by the complainant in the *Cargill* case several years later. *See Cargill* at 5 (referring to complainant's "Profit Center" claim).

¹¹ In an exhibit, Allied Shippers' consultants assert that "the spread between HDF and CSXT fuel price has also increased since the 2006-2010 time period," without elaboration or explanation. *See* Allied Shipper Comments, V.S. T. Crowley, R. Mulholland at 7 ("V.S. Crowley/Mulholland").

In fact, the Board took care to make clear in *Fuel Surcharges* that it was *not* regulating or otherwise “limiting the total amount that a rail carrier can charge for providing rail transportation through some combination of base rates and surcharges.” *See Fuel Surcharges* at 7. As the Board recognized, evaluation of the level or amount of rail transportation rates or any component thereof may be done only in a rate reasonableness case brought on complaint. *See id.* at 7-8.¹² In exercising its reasonable practices authority (and not its rate reasonableness authority), the Board emphasized that it sought to ensure that rail carriers did not misrepresent or mislabel fuel surcharges, concluding that “[i]f railroads wish to raise their rates they may do so . . . but they may not impose those increases on their customers on the basis of a misrepresentation.” *Id.* at 7.

Thus, contrary to Allied Shippers’ claim, *Fuel Surcharges* did not “hold” that rail carriers could not earn a return on fuel costs or any other component of the costs of providing rail transportation service. Instead, the Board more narrowly prohibited carriers from charging fuel surcharges based on a misrepresentation, and adopted the HDF Index as a safe harbor proxy that carriers could use to measure changes in fuel prices. As the Board concluded in *Cargill*, the fuel surcharges challenged in that case were not based on a misrepresentation but rather on a reasonable application of a fuel surcharge (including use of the safe harbor rule) as disclosed in the applicable tariff. *See Cargill* at 1, 7-10.

Allied Shippers also attempt to diminish the significance of the high degree of correlation between the HDF Index and rail carriers’ internal fuel costs by contending that the “absolute” change in HDF and carrier fuel prices is more important than the correlation between those changes. *See Allied Shippers Comments* at 45-46. In support of this contention, the Allied

¹² Moreover, carriers obviously are allowed to charge rates that “recover” more than their incremental fuel costs. The cost of fuel is a variable cost of rail transportation service, and the Board lacks jurisdiction over rail common carrier rates that generate revenue-to-variable cost ratios below 180%. *See* 49 U.S.C. § 10707.

Shippers present a hypothetical in which the price of one commodity is assumed to change—consistently and uniformly—by \$2 for every \$1 change in the price of another. *See id.* at 46, V.S. Crowley/Mulholland at 17. Allied Shippers’ hypothetical argument is unavailing for at least two reasons.

In the first instance, the relationship between commodity prices assumed by the hypothetical does not hold for the HDF Index and internal carrier fuel prices. Allied Shippers have not shown—nor could they—that there is a constant, direct linear relationship between the HDF Index and carrier fuel prices that produces an increasing differential as fuel prices increase, as they assumed in their hypothetical.

In fact, the actual data set forth in Allied Shippers own exhibits demonstrate there is not such a relationship between HDF and CSXT fuel internal fuel prices. *See* Allied Shippers Comments, V.S. Crowley/Mulholland Exhibit C/M-5. Contrary to the assumption on which the Allied Shippers hypothetical relies—that as HDF prices increases, the price differential (“spread”) consistently increases as well—the HDF and CSXT fuel costs computed by Allied Shippers indicate that the spread for CSXT has been fairly constant regardless of whether fuel costs are higher or lower. For the six quarters with the lowest fuel prices from 2007 through the first quarter of 2014, CSXT’s cost (as computed by Allied Shippers) averaged \$1.765 per gallon, and the spread averaged \$0.771. *See id.* For the six quarters with the highest fuel prices during the same period, the same chart indicates that CSXT’s fuel price averaged \$3.348 per gallon, and the spread averaged \$0.780. Thus, Allied Shippers’ own data shows that CSXT’s spread changed by less than one cent (\$0.009) between periods of low and high fuel costs.

Table 4

	Average HDF	Average CSXT Fuel Cost	Average CSXT Spread
Six Quarters during 2007-2014 with Lowest Fuel Cost (HDF<\$2.82)	\$2.536	\$1.765	\$0.771
Six Quarters during 2007-2007 with Highest Fuel Cost (HDF>\$3.96)	\$4.129	\$3.348	\$0.780
Difference	\$1.593	\$1.583	\$0.009

Source: Allied Shippers Comments, V.S. Crowley/Mulholland, Ex. C/M-5.

Thus, far from discrediting the correlation between the HDF Index and CSXT’s internal fuel costs, Allied Shippers’ data confirms that the spread between those costs has remained nearly constant over time, through higher and lower HDF Index prices.

Second, CSXT has separately demonstrated that the absolute spread between its reported internal fuel price and the HDF price has remained fairly constant and thus would satisfy Allied Shippers’ “absolute differential” criterion. *See* Table 2, *supra*, at 4. Thus, both the absolute differential between the HDF Index and CSXT internal prices and the correlation between changes in demonstrate there is no “growing spread” between those numbers.

The Allied Shippers’ last argument pertaining to the subject of this proceeding is that the Board should abolish the safe harbor and require carriers to compute and use “actual fuel price changes” in their fuel surcharge programs. *See* Allied Shippers Comments at 43-44. While this idea sounds deceptively simple, it is far from simple and such an approach would create more problems than it would solve. As the Board’s experience in the Cargill case illustrates, calculation of a carrier’s “actual” fuel costs is a complex, costly, time-and-resource- intensive process. But absent a rule specifying an objective proxy measure (such as the HDF Index), any unreasonable practices challenge would require substantial discovery and evidentiary presentations to allow a determination of the change in fuel prices alone, before considering

other issues. As the Board concluded at the end of its experience in the Cargill case, “without an accurate, publicly available fuel surcharge index, there would be no way, other than by filing a rate complaint case . . . to ensure that a rail fuel surcharge accurately reflects the rail carrier’s increased cost of fuel.” *Cargill* at 12.

Moreover, a carrier’s use of some internal index or other non-public estimate of its “actual” fuel costs would reduce transparency, accountability, and credibility of fuel surcharge programs in the eyes of shippers who pay those charges. The elimination of a safe harbor also would increase the likelihood of disputes over changes in a carrier’s fuel prices while simultaneously increasing the cost of resolving such disputes.

Allied Shippers also make the general claim that the Board’s unreasonable practices rules applied in *Dairyland* and *Cargill* will discourage shippers from bringing unreasonable practices challenges to carriers’ fuel surcharge programs. *See* Allied Shippers Comments at 59-63. This contention apparently proceeds from the erroneous premise that the Board has a responsibility to foster unreasonable practice challenges to fuel surcharge programs brought by individual shippers. But the Board has no such responsibility. To the contrary, the Board has a duty to ensure that shippers do not use reasonable practices claims to challenge the level or amount of fuel surcharges. What Allied Shippers and several other commenters are really advocating is an expedient shortcut to allow them to challenge a component of a rail transportation rate in a truncated reasonable practices claim, thereby allowing them to seek rate reductions in a quick-and-dirty process without going through the rigors and analyses of the Board’s rate reasonableness methodologies. But as the Board and the D.C. Circuit have made clear, the Board may not engage in rate regulation under its reasonable practices jurisdiction. *See, e.g., Union Pacific v. ICC*, 867 F.2d 646 (D.C. Cir. 1989); *Dairyland* at 5 (“where ‘the so-called

practice is manifested exclusively in the level of rates . . .’ it must be regulated under the Board’s jurisdiction over unreasonable rates, rather than its jurisdiction over unreasonable practices”). If a shipper wishes to seek a reduction in regulated transportation rates, including the fuel surcharge component of those rates, it must do so in the way mandated by Congress—through a rate reasonableness case. The Board has made available multiple different rate challenge methodologies, of varying cost, sophistication, and accuracy. Shippers are free to use any of those methods to challenge a rate they believe is unreasonable.

2. Comments Beyond the Scope of This Proceeding.

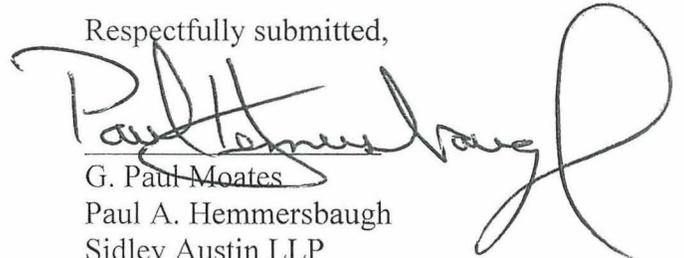
The Allied Shippers also present a number of comments and general proposals regarding matters unrelated to the safe harbor rule or the questions posed by the Board in the ANPR. As CSXT has established it is not fair or appropriate for the Board to consider subjects or issues outside the announced scope of this proceeding. *See, supra* at 10-11. The Board should only consider matters outside the limited scope of this safe harbor proceeding—if at all—in separate proceedings initiated by notice(s) properly defining the subjects, issues, and questions on which the agency seeks input and comment.

CONCLUSION

There is no reason for the Board to change the Safe Harbor provision of its fuel surcharge rules. To the contrary, stability in the Board's rules, the benefits to all parties from the availability of the existing Safe Harbor, and the interests of certainty and predictability all strongly favor concluding this proceeding without proposing any additional changes to the existing rules adopted just a few years ago. If the Board were to propose any change other than closing this proceeding with no further action—and it should not—CSXT urges it to proceed carefully and to adhere to the fundamental principles described in Section II of these comments.

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Dated: October 15, 2014

EXHIBIT 1

To

Reply Comments of CSX Transportation, Inc.

STB Ex Parte No. 661 (Sub-No. 2)

RAIL FUEL SURCHARGES (SAFE HARBOR)

CSXT Reply Comments
 STB Ex Parte 661 (Sub-No. 2)
 Exhibit No. 1

	HDF	CSX Gallon Price
Q1 2008	\$ 3.53	\$ 2.87
Q2 2008	\$ 4.41	\$ 3.68
Q3 2008	\$ 4.35	\$ 3.64
Q4 2008	\$ 2.98	\$ 2.27
Q1 2009	\$ 2.20	\$ 1.41
Q2 2009	\$ 2.33	\$ 1.59
Q3 2009	\$ 2.60	\$ 1.92
Q4 2009	\$ 2.74	\$ 2.06
Q1 2010	\$ 2.85	\$ 2.15
Q2 2010	\$ 3.03	\$ 2.35
Q3 2010	\$ 2.94	\$ 2.21
Q4 2010	\$ 3.15	\$ 2.37
Q1 2011	\$ 3.63	\$ 2.90
Q2 2011	\$ 4.01	\$ 3.25
Q3 2011	\$ 3.87	\$ 3.17
Q4 2011	\$ 3.87	\$ 3.09
Q1 2012	\$ 3.97	\$ 3.19
Q2 2012	\$ 3.95	\$ 3.19
Q3 2012	\$ 3.94	\$ 3.20
Q4 2012	\$ 4.02	\$ 3.32
Q1 2013	\$ 4.03	\$ 3.30
Q2 2013	\$ 3.88	\$ 3.12
Q3 2013	\$ 3.91	\$ 3.31
Q4 2013	\$ 3.87	\$ 3.10

Correlation Coefficient between HDF¹ and CSX Gallon Price²

	HDF	CSX Gallon Price
HDF		1
CSX Gallon Price	0.9974	1

¹ Simple average of monthly U. S. No. 2 Ultra Low Sulfur Diesel Retail Prices (www.eia.gov). See CSXT Reply Comments Exhibit 2, Pg. 2.

² CSXT's Quarterly Report of Rail Fuel Surcharges (www.stb.dot.gov)

EXHIBIT 2

To

Reply Comments of CSX Transportation, Inc.

STB Ex Parte No. 661 (Sub-No. 2)

RAIL FUEL SURCHARGES (SAFE HARBOR)

CSXT Reply Comments
 STB Ex Parte 661 (Sub-No. 2)
 Exhibit No. 2

(in thousands)	STB QUARTERLY FUEL SURCHARGE REPORT				EIA	CSX Gallon Price - HDF Spread	
	Total fuel cost	Total gallons of fuel consumed	Total revenue from fuel surcharges	Revenue from fuel surcharges on regulated traffic	HDF	CSX Gallon Price	CSX Gallon Price - HDF Spread
Q1 2009	\$ 185,864	131,690	\$ 84,482	\$ 9,268	\$ 2.20	\$ 1.41	\$ 0.79
Q2 2009	\$ 179,839	113,357	\$ 44,604	\$ 2,352	\$ 2.33	\$ 1.59	\$ 0.74
Q3 2009	\$ 218,429	114,006	\$ 76,372	\$ 4,094	\$ 2.60	\$ 1.92	\$ 0.69
Q4 2009	\$ 243,673	118,137	\$ 93,262	\$ 5,762	\$ 2.74	\$ 2.06	\$ 0.68
Q1 2010	\$ 276,286	128,723	\$ 108,468	\$ 8,508	\$ 2.85	\$ 2.15	\$ 0.71
Q2 2010	\$ 297,679	126,916	\$ 118,589	\$ 10,288	\$ 3.03	\$ 2.35	\$ 0.68
Q3 2010	\$ 272,793	123,469	\$ 156,434	\$ 11,121	\$ 2.94	\$ 2.21	\$ 0.73
Q4 2010	\$ 340,046	143,418	\$ 168,747	\$ 12,672	\$ 3.15	\$ 2.37	\$ 0.77
Q1 2011	\$ 393,107	135,369	\$ 199,792	\$ 15,788	\$ 3.63	\$ 2.90	\$ 0.72
Q2 2011	\$ 422,185	129,797	\$ 291,639	\$ 19,407	\$ 4.01	\$ 3.25	\$ 0.76
Q3 2011	\$ 402,819	126,873	\$ 291,411	\$ 18,196	\$ 3.87	\$ 3.17	\$ 0.69
Q4 2011	\$ 414,032	133,943	\$ 270,550	\$ 17,924	\$ 3.87	\$ 3.09	\$ 0.78
Q1 2012	\$ 433,876	136,080	\$ 281,267	\$ 17,774	\$ 3.97	\$ 3.19	\$ 0.78
Q2 2012	\$ 402,214	126,248	\$ 301,571	\$ 16,681	\$ 3.95	\$ 3.19	\$ 0.77
Q3 2012	\$ 389,601	121,881	\$ 261,167	\$ 13,758	\$ 3.94	\$ 3.20	\$ 0.74
Q4 2012	\$ 412,737	124,159	\$ 287,652	\$ 15,530	\$ 4.02	\$ 3.32	\$ 0.69
Q1 2013	\$ 434,222	131,723	\$ 284,303	\$ 16,896	\$ 4.03	\$ 3.30	\$ 0.73
Q2 2013	\$ 388,886	124,563	\$ 301,114	\$ 15,876	\$ 3.88	\$ 3.12	\$ 0.76
Q3 2013	\$ 400,211	120,858	\$ 272,791	\$ 13,165	\$ 3.91	\$ 3.31	\$ 0.60
Q4 2013	\$ 398,898	128,736	\$ 291,704	\$ 15,260	\$ 3.87	\$ 3.10	\$ 0.77
Q1 2014	\$ 435,707	138,326	\$ 279,752	\$ 16,223	\$ 3.96	\$ 3.15	\$ 0.81
Q2 2014	\$ 407,103	133,121	\$ 317,630	\$ 17,693	\$ 3.94	\$ 3.06	\$ 0.88
2008	\$ 1,776,499	\$ 571,729	\$ 1,193,065	\$ 138,976	\$ 3.82	\$ 3.11	\$ 0.71
2009	\$ 827,805	\$ 477,190	\$ 298,720	\$ 21,476	\$ 2.47	\$ 1.73	\$ 0.73
2010	\$ 1,186,804	\$ 522,526	\$ 552,238	\$ 42,589	\$ 2.99	\$ 2.27	\$ 0.72
2011	\$ 1,632,143	\$ 525,982	\$ 1,053,392	\$ 71,315	\$ 3.85	\$ 3.10	\$ 0.74
2012	\$ 1,638,428	\$ 508,368	\$ 1,131,657	\$ 63,743	\$ 3.97	\$ 3.22	\$ 0.75
2013	\$ 1,622,217	\$ 505,880	\$ 1,149,912	\$ 61,197	\$ 3.92	\$ 3.21	\$ 0.72

EIA HDF Index Prices

Date	U.S. No 2 Diesel Ultra Low Sulfur (0-15 ppm) Retail Prices (Dollars per Gallon)
Feb-2007	2.513
Mar-2007	2.68
Apr-2007	2.847
May-2007	2.818
Jun-2007	2.826
Jul-2007	2.881
Aug-2007	2.881
Sep-2007	2.961
Oct-2007	3.087
Nov-2007	3.409
Dec-2007	3.356
Jan-2008	3.322
Feb-2008	3.386
Mar-2008	3.889
Apr-2008	4.094
May-2008	4.434
Jun-2008	4.687
Jul-2008	4.712
Aug-2008	4.315
Sep-2008	4.036
Oct-2008	3.589
Nov-2008	2.889
Dec-2008	2.457
Jan-2009	2.302
Feb-2009	2.205
Mar-2009	2.097
Apr-2009	2.225
May-2009	2.233
Jun-2009	2.532
Jul-2009	2.544
Aug-2009	2.638

Date	U.S. No 2 Diesel Ultra Low Sulfur (0-15 ppm) Retail Prices (Dollars per Gallon)
Sep-2009	2.63
Oct-2009	2.676
Nov-2009	2.797
Dec-2009	2.749
Jan-2010	2.849
Feb-2010	2.789
Mar-2010	2.918
Apr-2010	3.063
May-2010	3.073
Jun-2010	2.95
Jul-2010	2.912
Aug-2010	2.959
Sep-2010	2.946
Oct-2010	3.052
Nov-2010	3.14
Dec-2010	3.243
Jan-2011	3.388
Feb-2011	3.584
Mar-2011	3.905
Apr-2011	4.064
May-2011	4.047
Jun-2011	3.933
Jul-2011	3.905
Aug-2011	3.86
Sep-2011	3.837
Oct-2011	3.798
Nov-2011	3.962
Dec-2011	3.861
Jan-2012	3.833
Feb-2012	3.953
Mar-2012	4.127

Date	U.S. No 2 Diesel Ultra Low Sulfur (0-15 ppm) Retail Prices (Dollars per Gallon)
Apr-2012	4.115
May-2012	3.979
Jun-2012	3.759
Jul-2012	3.721
Aug-2012	3.983
Sep-2012	4.12
Oct-2012	4.094
Nov-2012	4
Dec-2012	3.961
Jan-2013	3.909
Feb-2013	4.111
Mar-2013	4.068
Apr-2013	3.93
May-2013	3.87
Jun-2013	3.849
Jul-2013	3.866
Aug-2013	3.905
Sep-2013	3.961
Oct-2013	3.885
Nov-2013	3.839
Dec-2013	3.882
Jan-2014	3.893
Feb-2014	3.984
Mar-2014	4.001
Apr-2014	3.964
May-2014	3.943
Jun-2014	3.906
Jul-2014	3.884
Aug-2014	3.838