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Via Messenger

March 22, 2012

Chairman Daniel R. Elliott, III  
Surface Transportation Board  
395 E Street SW  
Washington, D.C. 20423

**RE: STB Finance Docket No. 42123, M&G Polymers USA, LLC v. CSX Transportation, Inc.**

Dear Chairman Elliott:

M&G Polymers USA, LLC ("M&G") respectfully requests that you investigate the cause of delay in the above-referenced proceeding. We further request your assistance in returning our case to a timely schedule, especially with regard to the market dominance issue currently under review. It has now been over twenty-one months since M&G Polymers USA, LLC ("M&G") filed its complaint, and the Board is still trying to determine if it even has jurisdiction over the challenged rates. This delay ensures that that this case will exceed the 2-3 year duration that has been typical of SAC rate cases and will impose a large financial penalty upon M&G.

During the Board's June 23, 2011 public hearing in Ex Parte No. 705, *Competition in the Rail Industry*, M&G testified that the tariff premium that it must pay to CSXT while this case is pending is several million dollars annually. To date, M&G has paid over \$6 million in rate premiums to CSXT on top of its legal fees. This premium is merely the difference between the tariff rate and the CSXT contract offer that M&G rejected as unreasonable. The Board explained to M&G that this structure was designed to avoid penalizing the railroads during these rate reasonableness cases. Surely it is clear that the pendulum has swung entirely the other way as M&G's penalty continues to accrue at a minimum rate of \$60,000 per week just for the tariff premium.

M&G must pay this premium simply for the right "to play the game," without any assurances that any of it will be returned. If M&G "wins," this money will be returned with virtually no interest; while a loss means that CSXT keeps this huge supra-market windfall – which is much higher than the CSXT contract rate that M&G rejected as unreasonably high. In other words, the shipper must gamble with this tariff premium, a premium that increases the longer the case lasts. For the polyester manufacturing industry, which operates on razor thin margins, the tariff premium has a major negative impact on both the cash flow and bottom line results of M&G Polymers.

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M&G previously cautioned the Board of the danger of delay that would accompany bifurcation of this case. Among other things, M&G noted that bifurcation “could extend this case beyond three years.”<sup>1</sup> M&G later withdrew its opposition to bifurcation only after the Board’s decision in Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., STB Docket No. 42121 (“TPI”) (served April 5, 2011), clearly signaled the Board’s strong inclination to bifurcate. Recognizing the inevitability of some delay, M&G elected to mitigate the impact by agreeing to bifurcation and seeking an expedited market dominance schedule.

In its decision to bifurcate this proceeding, the Board acknowledged M&G’s concerns and stated that it would rule “as expeditiously as possible.” See Board decision at p. 3 (served May 6, 2011). However, the progress of this case has been anything but expeditious. M&G filed its Rebuttal Evidence on Market Dominance on August 4, 2011, but the Board has yet to issue its decision in the market dominance phase of the case, well over seven months later. In fact, the current delay in issuing just a market dominance decision is fast approaching the 9-month statutory limit for final decisions in rate cases, which typically include both market dominance and complex evidence on rate reasonableness. 49 USC § 10704(c)(1).

The delays in this proceeding provide support to those critics who claim that the rate reasonableness process is overly burdensome and favors the railroads. In Ex Parte No. 705, CSXT and other railroads asserted that no changes in policy are needed because shippers that believe their rail rates are too high have a “ready remedy” in filing a rate case at the Board.<sup>2</sup> According to CSXT, “[t]he Board’s rate reasonableness procedures are robust, cost-effective, and efficient” and “[t]he Board processes rate reasonableness cases expeditiously.”<sup>3</sup> The delays in the M&G rate case demonstrate the fallacy of those remarks.

The delays also are contrary to the national rail transportation policy established by Congress and statutes as far back as the 4R Act.<sup>4</sup> The Board has previously recognized “the long-standing Congressional intent that market dominance be a practical determination made without delay.”<sup>5</sup> The Board has also recognized that “the path envisioned by Congress” involved “more expeditious resolution of large rate disputes.”<sup>6</sup> More broadly, the Board is directed by statute to engage in “fair and expeditious regulatory decisions.” 49 USC § 10101(2). Similarly,

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<sup>1</sup> See M&G Reply in Opposition to Motion at 4-5 (filed Feb. 18, 2011).

<sup>2</sup> Supp. Comments of CSXT at 10 (filed July 26, 2011 in E.P. 705).

<sup>3</sup> Id. at 10 and 17. See also Supp. Comments of Norfolk Southern Railway at 16 (filed July 25, 2011 in E.P. 705) (describing current rate case procedures as “entirely adequate”).

<sup>4</sup> Former 49 USC § 1(5)(d) (1976) directed the Interstate Commerce Commission to establish market dominance procedures “designed to provide for a practical determination without administrative delay.”

<sup>5</sup> Market Dominance Determinations – Product and Geographic Competition, 3 STB 937, 938 (1998).

<sup>6</sup> Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 3 (served Oct. 30, 2006).

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the Board is "to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part." 49 USC § 10101(15).

The lack of forward progress in this case is highly prejudicial and damaging to M&G's operations and planning for the future. M&G implores the Board to act promptly.

Sincerely,



Jeffrey O. Moreno

David E. Benz

*Counsel for M&G Polymers USA, LLC*

Fredrick J. Fournier

*M&G Polymers, USA, LLC; Director,*

*Global Sales and Marketing*

cc: Francis P. Mulvey, STB Vice Chairman  
Ann D. Begeman, STB Member  
G. Paul Moates, counsel for CSXT  
Paul A. Hemmersbaugh, counsel for CSXT

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