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Ms. Cynthia Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

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Re: September 27, 2012 Decision in Docket No. NOR 42123, *M&G Polymers USA, LLC v. CSX Transportation, Inc.*

Dear Ms. Brown:

I write on behalf of BNSF Railway Company regarding the Board's September 27, 2012 decision in Docket No. NOR 42123, *M&G Polymers USA, LLC v. CSX Transportation, Inc.* In that decision, the Board announced what it characterized as a "refined approach" to the Board's existing process for analyzing whether a rail carrier possesses qualitative market dominance over traffic to which a challenged rate applies. The decision suggests that the Board intends to apply this new "limit price" approach in other rate reasonableness cases. *See, e.g.,* Decision at 20 ("Given the importance of guiding party conduct *in future cases...*"). However, the Board's ambiguous use of the term "parties" throughout its decision makes it unclear whether the Board's request for comment is an invitation to all interested parties or just to M&G and CSXT.

As a non-party without access to the highly confidential portion of the Board's analysis of the record in this case, it is difficult for BNSF to fully assess the potential impact and application of the Board's new "limit price" approach. But even as generally described in the Board's public decision, the new approach appears to be a radical departure from the Board's well-established approach for assessing qualitative market dominance.

BNSF believes that all interested parties should have the appropriate opportunity to comment on the Board's new approach, and requests permission to file such comments. Given the dramatically different nature of the new approach and the Board's apparent intention to apply it in other rate reasonableness cases going forward, BNSF believes that the Board should commence a formal notice and comment rulemaking proceeding to receive comments on this issue. Notably, all of the parties who have submitted letters in response to the Board's decision—including M&G—seem to agree that applying the new "limit price" test in other cases after only receiving comments in the NOR 42123 proceeding is the wrong course given potential Administrative Procedures Act concerns.

If the Board clarifies that all interested parties may comment but only as part of the NOR 42123 proceeding, the Board should extend the deadline for such comments, allowing parties the opportunity to study the Board's decision, including an appropriately redacted public version of the Appendix.

Sincerely,

Richard E. Weisler