



SIDLEY AUSTIN LLP
 1501 K STREET, N.W.
 WASHINGTON, D.C. 20005
 (202) 736 8000
 (202) 736 8711 FAX

ratkins@sidley.com
 (202) 736 8889

BEIJING
 BRUSSELS
 CHICAGO
 DALLAS
 FRANKFURT
 GENEVA
 HONG KONG
 HOUSTON
 LONDON

LOS ANGELES
 NEW YORK
 PALO ALTO
 SAN FRANCISCO
 SHANGHAI
 SINGAPORE
 SYDNEY
 TOKYO
 WASHINGTON, D.C.

FOUNDED 1866

241007

June 29, 2016

By Electronic Filing

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

ENTERED
 Office of Proceedings
 June 29, 2016
 Part of
 Public Record

Re: Consumers Energy Company v. CSX Transportation, Inc.
STB Docket No. NOR 42142

Dear Ms. Brown:

On June 27, 2016, Consumers Energy Company (“Consumers”) submitted a letter stating that it “assumes that the Board will reject” the Motion to Strike that CSX Transportation, Inc. (“CSXT”) filed on June 24, 2016 (the “Motion”). Consumers’ assumption that the Board will deny the Motion without Consumers even having to defend its improper rebuttal on the merits is presumptuous and wrong.

Consumers’ claim that the Motion is untimely ignores the Board’s recent decision in *SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Co.* that explicitly sanctioned the filing of motions to strike well over 20 days after rebuttal. After a dispute over the length of briefs in which the defendant argued that it needed briefing space to address improper rebuttal, the Board held that the defendant instead should include any arguments about improper rebuttal “in a motion to strike.”¹ Significantly, the Board served this decision 42 days after the complainant filed its Rebuttal Evidence. Consumers’ claim that the Board’s rules require it to reject any motion filed more than 20 days after rebuttal cannot be squared with this explicit invitation for a motion that could not possibly meet that timeline. After this *SunBelt* ruling the defendant followed the Board’s invitation and submitted a motion to strike simultaneously with its final brief. CSXT followed the same practice here.

¹ See *SunBelt v. NS*, NOR 42130, at 2 (served July 15, 2013).

Cynthia T. Brown

June 29, 2016

Page 2

Indeed, *SunBelt* is just one example of recent Stand-Alone Cost cases in which the Board has accepted and addressed the merits of motions to strike submitted more than twenty days after the filing of rebuttal evidence.² Other examples include *Total Petrochemicals USA v. CSX Transportation, Inc.*³ and *M&G Polymers USA v. CSX Transportation, Inc.*⁴ The Board never suggested in any of these cases that the time limits of 49 C.F.R. § 1104.13 applied to a motion to strike.⁵

Even if the language of 49 C.F.R. § 1104.13 could be applied to motions to strike, there is ample good cause to consider CSXT's Motion. In the first place, the Board's recent practice of not requiring motions to strike rebuttal evidence to be filed within 20 days created a precedent on which CSXT reasonably relied. Even if the Board wishes to clarify that in future cases motions to strike should be filed within 20 days, it would be inappropriate to punish CSXT for not predicting that change in course. Conversely, Consumers does not claim that it has suffered any prejudice from the Motion being filed on June 24 rather than on June 9.⁶ In either case it has a full and fair opportunity to respond to the Motion on the merits.

Most importantly, the Board has a due process obligation not to consider improper rebuttal evidence, and it is precluded from relying on such evidence

² In *SunBelt*, the Motion to Strike was filed simultaneously with a final brief on July 26, 2013—53 days after Rebuttal Evidence was filed. See *SunBelt v. NS*, NOR 42130, at 6-12 (served June 20, 2014).

³ In *TPI*, a Motion to Strike was filed September 29, 2011—23 days after Rebuttal Evidence was filed. See *TPI v. CSXT*, NOR 42121, at 7 (served May 31, 2013).

⁴ In *M&G*, a Motion to Strike was filed September 30, 2011—57 days after Rebuttal Evidence was filed. See *M&G v. CSXT*, NOR 42123, at 7 (served Sept. 26, 2012).

⁵ The single case that Consumers cites in its letter is a one-paragraph Secretary decision approving an unopposed motion for extension of time for a “responsive pleading” to rebuttal evidence. See *AEP Texas North Co. v. BNSF Ry. Co.*, NOR 41191 (Sub-No. 1) (Aug. 11, 2004). A procedural ruling approving an extension that a party sought out of an abundance of caution does not establish that § 1104.13 applies to motions to strike, particularly when multiple more recent cases suggest the contrary.

⁶ Indeed, if CSXT had filed its Motion on June 9, Consumers might instead be complaining that it was unfair for CSXT to file the Motion while Consumers was in the midst of preparing its Brief.

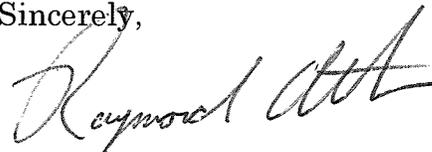
Cynthia T. Brown

June 29, 2016

Page 3

regardless of whether CSXT specifically moves to strike it.⁷ Entertaining CSXT's Motion will help the Board decide which portions of Consumers' Rebuttal Evidence it may consider and which it may not.

Sincerely,



Raymond A. Atkins

cc: Kelvin J. Dowd

⁷ See *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 63 (D.C. Cir. 1999) (“the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation”) (internal quotation omitted); *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 446 (2001) (“New evidence improperly presented on rebuttal will not be considered.”).