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February 12, 2010

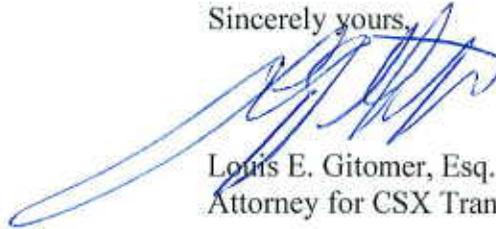
Ms. Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D. C. 20423

RE: Finance Docket No. 35314, *Massachusetts Coastal Railroad, LLC-  
Acquisition-CSX Transportation, Inc.*

Dear Ms. Brown:

Enclosed for efilng is the Response of CSX Transportation, Inc. Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,



Louis E. Gitomer, Esq.  
Attorney for CSX Transportation, Inc.

Enclosure

CSXT-5

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35314

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MASSACHUSETTS COASTAL RAILROAD, LLC  
-ACQUISITION-  
CSX TRANSPORTATION, INC.

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RESPONSE OF CSX TRANSPORTATION, INC. TO COMMENTS OF THE  
BROTHERHOOD OF RAILROAD SIGNALMEN AND BROTHERHOOD OF  
MAINTENANCE OF WAY EMPLOYEES DIVISION/IBT

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Dated: February 12, 2010

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SURFACE TRANSPORTATION BOARD

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CSX Transportation, Inc. (“CSXT”) responds to the Comments of the Brotherhood of Railroad Signalmen and Brotherhood of Maintenance of Way Employees Division/IBT filed on January 25, 2010 (the “Comments”). The Brotherhood of Railroad Signalmen (“BRS”) and Brotherhood of Maintenance of Way Employees Division/IBT (“BMWE”) are wrong in arguing that the transaction presented to the Surface Transportation Board (the “Board”) in the minor Application filed on November 24, 2009 by the Massachusetts Coastal Railroad LLC (“Mass Coastal”) and CSXT pursuant to 49 U.S.C. § 11323(a)(2) and 49 C.F.R. §1180 (the “Application”) is not an appropriate transaction and does not involve the proper parties.

**BACKGROUND**

CSXT and Mass Coastal are seeking approval from the Board for Mass Coastal to acquire the permanent freight easement being retained by CSXT in the South Coast Lines, consisting of (1) the New Bedford Subdivision, which is 18.40 miles between milepost QN 13.40 at Cotley Jct. and milepost QN 31.80 at New Bedford, (2) the Fall River Subdivision, which is 14.20 miles

between milepost QNF 0.00 at Myricks and milepost QNF 14.20 at Fall River, and (3) 0.08 mile of the North Dartmouth Industrial Track between milepost QND 0.00 and milepost QND 0.08, collectively a distance of approximately 32.68 miles (the “South Coast Lines”), in the Commonwealth of Massachusetts (the “Commonwealth”). The acquisition proposed in this proceeding will follow the transaction where CSXT has agreed to sell the South Coast Lines, along with other lines, to the Commonwealth acting through the Massachusetts Department of Transportation (“MADOT”) and retain a permanent freight easement over the South Coast Lines.<sup>1</sup>

CSXT has also agreed to grant Mass Coastal overhead trackage rights over its Middleboro Subdivision (1) between Mass Coastal’s interchange tracks at Taunton, approximately at milepost QN 11.6, and Mass Coastal’s freight operation at milepost QN 13.4, a distance of about 1.8 miles; and (2) connecting at milepost QN 13.3, between milepost QNB 13.3 and Mass Coastal’s interchange tracks at Middleboro, approximately at milepost QNB 20.4, a distance of about 7.1 miles, for a total distance of 8.9 miles (the “Trackage Rights Line”), so that Mass Coastal can connect the South Coast Lines to its existing lines.<sup>2</sup>

In the MADOT Transaction, CSXT has agreed to sell the real estate and track and materials (the “CSXT Property”) to MADOT, while retaining a permanent freight easement that

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<sup>1</sup> On November 24, 2009, MADOT filed a Notice of Exemption under 49 C.F.R. §1150 and a concurrent motion to dismiss in *Massachusetts Department of Transportation–Acquisition Exemption–Certain Assets of CSX Transportation, Inc.*, Finance Docket No. 35312 (the “MADOT Transaction”). The Notice of Exemption became effective on December 24, 2010. See *Massachusetts Department of Transportation–Acquisition Exemption–Certain Assets of CSX Transportation, Inc.*, Finance Docket No. 35312 (STB served December 10, 2009).

<sup>2</sup> See the concurrently filed and directly related notice of exemption in *Massachusetts Coastal Railroad, LLC-Trackage Rights Exemption-CSX Transportation, Inc.*, Finance Docket No. 35314 (Sub-No. 1X).

will enable CSXT to continue to provide common carrier rail service. MADOT proposes to acquire the CSXT Property in two stages. At the First Closing, MADOT proposes to acquire the remaining 4.87 miles of the Grand Junction Branch between milepost QBG 0.00 and milepost QBG 2.70 and between milepost QBG 5.70 and milepost QBG 7.87, the remaining 1.10 miles of the Boston Terminal Running Track between milepost QBB 0.00 and milepost QBB 1.10, the South Coast Lines, and 6.00 miles of the North Dartmouth Industrial Track between milepost QND 0.00 and milepost QND 6.00 (the “First Closing Lines”).<sup>3</sup> At the Second Closing, MADOT proposes to acquire portions of the Boston Main Line consisting of the 22.92-mile Framingham to Worcester segment between milepost QB 21.38 and milepost QB 44.30 and the 9.71 miles Cove to Newton segment between milepost QB 1.12 and milepost 10.83<sup>4</sup> (the “Second Closing Line”).<sup>5</sup> The commuter service over the MADOT Lines will continue to be provided by the Massachusetts Bay Transportation Authority (“MBTA”), a non-carrier. Maps of the lines being sold by CSXT to MADOT are part of the Application.

As noted, CSXT will retain a permanent freight easement over the MADOT Lines so that it can continue to provide common carrier service to its shippers. Details concerning the

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<sup>3</sup> CSXT previously sold the track and material between milepost QND 0.08 and QND 6.00 (the “Bay Colony Line”) to the Bay Colony Railroad Corporation (“Bay Colony”) and leased the real estate to Bay Colony. *Bay Colony Railroad Corporation—Acquisition and Operation Exemption—CSX Transportation, Inc., as Operator for New York Central Lines, LLC*, STB Finance Docket No. 34446 (STB served January 16, 2004). Pursuant to the agreement between CSXT and MADOT, Bay Colony will continue to provide common carrier service over the Bay Colony Line. MADOT is acquiring only the real estate for the Bay Colony Line, it is not acquiring the track and materials.

<sup>4</sup> CSXT is only selling the track and materials on the Cove to Newton segment. The real estate was previously sold to the Massachusetts Turnpike.

<sup>5</sup> The First Closing Lines and the Second Closing Line are collectively referred to as the “MADOT Lines.”

permanent freight easement and operations under the permanent freight easement are provided in the *MADOT Transaction*. CSXT has agreed, with the consent of MADOT, to sell the permanent freight easement over the South Coast Lines to Mass Coastal. MBTA will execute operating and maintenance agreements with Mass Coastal.

Currently, MBTA does not provide commuter service over the South Coast Lines. However, MADOT contemplates a commuter operation as discussed in the *MADOT Transaction*. CSXT will continue to interchange with Mass Coastal at Middleboro pursuant to the trackage rights and will consolidate its Taunton interchange at Cotley Junction to include traffic for the South Coast Lines.

CSXT will address the issues raised in the Comments as they relate to the CSXT sale of the permanent freight easement to Mass Coastal.

### **STATUTORY CRITERIA**

CSXT and Mass Coastal filed a joint minor Application under 49 U.S.C. §11323(a)(2), seeking approval from the Board for Mass Coastal to acquire the Permanent Freight Easement over the South Coast Lines. The Permanent Freight Easement consists of the right to operate a freight railroad over the South Coast Lines.<sup>6</sup> Mass Coastal will succeed to the rights of CSXT under the Permanent Freight Easement, including CSXT's carrier operations.<sup>7</sup> Subject to the approval of MADOT, which has already been given, CSXT intends to sell the Permanent Freight

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<sup>6</sup> The acquisition of a permanent freight easement has been previously authorized. See *Portland & Western Railroad, Inc. – Acquisition and Operation Exemption – Union Pacific Railroad Company*, STB Finance Docket No. 34792 (STB served November 24, 2006); and *Pacific Sun Railroad, L.L.C.-Lease and Operation Exemption-BNSF Railway Company*, STB Finance Docket No. 35173 (STB served May 27, 2009).

<sup>7</sup> *Southern Pacific Transportation Co.-Merger*, 334 I.C.C. 866, 871 (1969).

Easement to Mass Coastal so that Mass Coastal can replace CSXT as the provider of common carrier operations to the shippers who request rail service over the South Coast Lines.

Section 11323(a)(2) requires Board approval and authorization for “a purchase, lease, or contract to operate property of another rail carrier by any number of rail carriers.” Section 7 of the Transportation Act of 1940, Pub. L. 76-785 (1940), through the amendment of Section 5(2)(a)(i), required a railroad to obtain approval “for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another.”

Section 5(2)(a)(i) was codified as 49 U.S.C. §11343(a)(2)<sup>8</sup> in 1978 to read “a purchase, lease, or contract to operate property of another carrier by any number of carriers.” “The words ‘or any part thereof’ are omitted as surplus.” H. Rept. No. 95-1395 at 161. Indeed, the recodification was to “restate, without substantive change, laws enacted before May 16, 1978....” Pub. L. 95-473 (1978), 92 Stat. 1466. “Congress has unequivocally forbidden any interpretation that would substantially change the [Interstate Commerce Act].” *Atchison, Topeka and Santa Fe Railway Co. v. U.S.*, 617 F.2d 485, 491 (7<sup>th</sup> Cir. 1980).

Hence, Section 11323(a)(2) authorizes the Board to approve not only the purchase of the properties of one railroad by another, but also “any part” of the properties. It is beyond dispute that an easement is a recognized property interest that may be conveyed.<sup>9</sup> The Permanent Freight Easement is an intangible property right that CSXT reserved to itself as a part

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<sup>8</sup> The predecessor to section 11323(a)(2).

<sup>9</sup> The Permanent Freight Easement is considered an easement in gross under Massachusetts property law. It is well established under Massachusetts law (as well as in other jurisdictions) that such easements can be conveyed. See, e.g., *Watson v. YMCA of Greater Boston, Inc.*, 2006 WL 2578271, at \* 5 (Mass. Land Ct. Sept. 8, 2006) (“When drafted correctly, an easement in gross may be assigned or conveyed.”).

of the transaction in which CSXT agreed to sell the CSXT Property sold to MADOT. The Permanent Freight Easement portion of the assets of the South Coast Lines contains the portion that is subject to Board jurisdiction. Even under the current language of Section 11323(a)(2), the purchase of the Permanent Freight Easement by Mass Coastal from CSXT is the purchase of “property” by one rail carrier from another rail carrier.

Control under section 11323(a) involves the control of one or more rail carriers by a rail carrier or a non-carrier. *See* 49 U.S.C. §11323(a)(3, 4, and 5). Control has not been interpreted as the ability to dictate use of the assets owned by one party for fulfillment of the common carrier obligation by a rail carrier that is authorized to operate over those assets. BMW and BRS argue that ownership of the land and track material on the South Coast Lines, exclusive of the Permanent Freight Easement, creates some type of control by MADOT of Mass Coastal’s operations that requires Board approval. Were that the case, the owner of the land underlying the tracks and materials, where the rail carrier operates through an easement over the real estate, would require approval from the Board every time there was an acquisition of the property, whether through purchase or some lesser estate. Such a drastic change in policy would require thousands of owners of real property and other assets used by railroads to seek approval of each transaction, even though those people are not railroads.

The statute requires the Board to approve the Application of Mass Coastal to acquire the Permanent Freight Easement over the South Coast Lines unless it is anticompetitive.

Specifically,

In a proceeding under this section which does not involve the merger or control of at least two Class I railroads, as defined by the Board, the Board shall approve such an application unless it finds that--

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

49 U.S.C. §11324(d).

Finally, as required by 49 U.S.C. 11326, CSXT and Mass Coastal have agreed to provide employees labor protection under *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), as modified by *Wilmington Term. RR, Inc.—Pur. & Lease—CSX Transp., Inc.*, 6 I.C.C.2d 799, 814-826 (1990), *aff'd sub nom. Railway Labor Executives' Ass'n v. I.C.C.*, 930 F.2d 511 (6<sup>th</sup> Cir. 1991).

#### ARGUMENT

BMWE and BRS wrongly argue that the sale of the Permanent Freight Easement from CSXT to Mass Coastal is not a proper transaction under Section 11323(a)(2). They claim that “There is no such transaction under the ICA”. Comments at 2. BMWE and BRS are also in error when they argue that MADOT is a required party to the proposed transaction between CSXT and Mass Coastal when they say that “the Commonwealth has not sought approval of its part in this transaction”. *Id.*

BMWE and BRS do not address the statutory criteria under section 11324(d) that must be met in order for the Board to deny the Application. BMWE and BRS do not argue, much less provide evidence, that the sale of the Permanent Freight Easement over the South Coast Lines from CSXT to Mass Coastal is anticompetitive. As CSXT and Mass Coastal have demonstrated in the Application, the sale of the Permanent Freight Easement over the South Coast Lines from CSXT to Mass Coastal is not anticompetitive. Moreover, there are public benefits that will arise

from the transaction proposed in the Application.

Before addressing the two issues that BMW and BRS have raised, CSXT is compelled to respond to the insinuations of BMW and BRS that “CSXT and Mass Coastal seek to disguise the true nature of this transaction.” Comments at 7. CSXT and Mass Coastal have made this transaction as transparent as possible. They have filed the Application with the Board and provided the Purchase and Sale Agreement of Permanent Freight Easement (the “Agreement”). CSXT and Mass Coastal fully responded to the discovery propounded by BMW and BRS, as evidenced by the lack of follow-up discovery or the filing of a motion to compel. CSXT and Mass Coastal have complied with the Board’s most stringent rules for seeking authorization of a transaction.

With regard to the sale of the CSXT Property to MADOT, MADOT has filed a Notice of Exemption with the Board, which has become effective, which belies the argument made by BRS and BMW that MADOT has not sought authorization for its acquisition of the CSXT Property. CSXT notes that in addition to seeking authority from the Board, MADOT has also requested the Board to dismiss the Notice of Exemption under the nearly 20-year old precedent in *Maine, DOT-Acq. Exemption, Me. Central R. Co.*, 8 I.C.C.2d 835 (1991). As in the sale of the Permanent Freight Easement over the South Coast Lines from CSXT to Mass Coastal, CSXT and MADOT have followed accepted Board precedent and been completely transparent in the Notice of Exemption and Motion to Dismiss by presenting the appropriate agreements and responding to the discovery sought by BMW and BRS.

The sale of the Permanent Freight Easement over the South Coast Lines is a transaction subject to section 11323(a)(2). CSXT is a Class I carrier and Mass Coastal is a Class III carrier.

Not only does the Board have jurisdiction over the purchase of the property of another railroad, but also “any part thereof.” As the Board knows, a railroad can have different kinds of property interests that give it the right to utilize the right-of-way to perform common carrier service. That property interest may be ownership of the land in fee in the right-of-way and ownership of the track; lease of the land and track; ownership of an easement over land owned by others; or other forms of property interest. In this case, the Permanent Freight Easement is a property interest in the South Coast Lines. The assets comprising the South Coast Lines are the proverbial “bundle of sticks” often discussed in property appraisal and legal description analyses. The Board’s jurisdiction under section 11323(a)(2) attaches to the property or a portion of the property of a rail carrier. In this case, the Permanent Freight Easement is the stick in the bundle of sticks, i.e. the property interest, that allows the person holding that property interest to provide rail freight service on the South Coast Lines. Since CSXT is a carrier and Mass Coastal is a carrier and since Mass Coastal is purchasing from CSXT property rights to operate rail freight service over the South Coast Lines, the purchase of the Permanent Freight Easement over the South Coast Lines is a transaction under section 11323(a)(2).<sup>10</sup>

Next BMW and BRS claim that because MADOT consented to the purchase of the Permanent Freight Easement over the South Coast Lines by Mass Coastal from CSXT that MADOT must be a party to the proposed transaction under section 11323(a)(2). However, section 11323(a)(2) only regulates transactions between rail carriers and MADOT is not a rail carrier.

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<sup>10</sup> The purchase of a Permanent Freight Easement is analogous to the purchase of motor carrier operating rights approved by the Interstate Commerce Commission under former section 11343(a)(2).

Even if MADOT were a rail carrier, which it is not, MADOT is not selling its property to Mass Coastal. CSXT is selling a portion of its property to Mass Coastal – the rail freight easement. BMW and BRS also do not address the Board’s regulations at 49 C.F.R. Part 1180. The regulations provide that an “*applicant* means the parties initiating a transaction.” 49 C.F.R. §1180.3(a). The purchase of the Permanent Freight Easement over the South Coast Lines is a transaction between CSXT and Mass Coastal. MADOT did not initiate the transaction; it merely assented to the sale. MADOT’s assent to the purchase of the Permanent Freight Easement over the South Coast Lines is analogous to the transfer of a trackage rights grantee’s rights to operate under the trackage rights subject to the consent of the owner of the line. There, the Board only requires the grantee and the assignee to be parties before the Board. Another analogy is to the owner of the real estate underlying the track and materials. In many instances, the railroad operates over the real estate pursuant to an easement, often over a century old. When the track and materials are sold, the seller of the asset and buyer of the asset are parties before the Board, the owner of the underlying real estate is not a party and certainly not a rail carrier. However, under the theory proposed by BMW and BRS every grantor of the easement would need to become a party, and perhaps even a rail carrier. If the Board were to accept the theory of BMW and BRS, the Board would expand its jurisdiction, without legislation, over thousands or more land owners who have never been regulated by the Board. The BMW and BRS theory that every party that controls some of the assets comprising the line of railroad must be a party to a transaction before the Board is contrary to Board precedent.

The purpose of the transaction currently before the Board is to allow one rail carrier to sell its property rights – a rail freight easement - to another rail carrier under 49 U.S.C.

§11323(a)(2) based on arms length negotiations. Neither *County of Marin v. United States*, 356 U.S. 412 (1958) (*County of Marin*) nor *Allegheny Corp. v. Breswick*, 353 U.S.151 (1957) (*Breswick*) are on point regarding this transaction. At their core, both cases deal with the acquisition of control of one entity by another, either a carrier controlling a non-carrier or a non-carrier seeking authority to control a carrier. In each case, the Supreme Court looked at the underlying transaction to determine whether it met the statutory requirements to confer jurisdiction on the Interstate Commerce Commission (the “ICC”). In *County of Marin* the issue was whether the acquisition of a newly formed non-carrier by a carrier was within the ICC’s jurisdiction. In *Breswick* the question was what constitutes control of a carrier by a non-carrier. Neither of these issues is present in the current proceeding before the Board.

In *County of Marin*, the Court found that the transaction did not meet the statutory requirement. The parties sought ICC approval for the acquisition of control of a non-carrier holding company by a carrier for the sole purpose of avoiding State authority. The carrier sought to transfer its operating authority to the non-carrier in return for all shares in the non-carrier. The Court found that it was the nature of the transaction, a carrier acquiring a non-carrier shell with no property or function, which removed the transaction from the acquisition language of Section 5, under which jurisdiction was requested. Section 5 did not provide for the acquisition of control of a non-carrier by a carrier.

In *Breswick*, the Court again looked to the underlying nature of the transaction and affirmed the ICC’s conclusion that it had jurisdiction over the transaction because the prerequisite of the statute was met; a person that is not a carrier has control of one or more carriers and is seeking to acquire control of another carrier. The Court found that the nature of

the changed relationship between the parties was crucial in determining whether there was an acquisition of control. And by control the Court was referring to whether a person that was a non-carrier had control over one or more carriers.

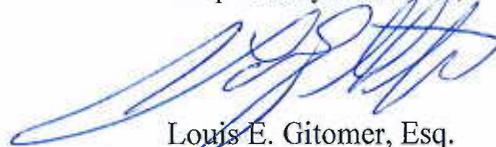
Just as in *County of Marin* and *Breswick*, CSXT asks the Board to look at the transaction before it in light of the statute. The transaction currently before the Board falls squarely within the language of the statute at 49 U.S.C. §11323(a)(2). Here, Mass Coastal, a class III rail carrier, seeks to purchase from CSXT, a class I rail carrier, CSXT's intangible property right – a freight easement - and accordingly the ability to provide common carrier freight service over the line in question.

#### CONCLUSION

CSXT and Mass Coastal have proposed the purchase of a Permanent Freight Easement over the South Coast Lines, which is a transaction pursuant to 49 U.S.C. §11323(a)(2). An easement is a recognized property right that can be conveyed. The Permanent Freight Easement over the South Coast Lines is a portion of the property of CSXT, a rail carrier. MADOT is not a party to the proposed transaction and is not subject to the jurisdiction of the Board under section 11323(a)(2). MADOT also is not an "applicant" under 49 C.F.R. §1180.3(a). MADOT does not control Mass Coastal and its ownership of certain of the assets comprising the line of railroad does not require the Board to assert jurisdiction over MADOT in the proposed transaction between CSXT and Mass Coastal.

CSXT respectfully requests the Board to reject the arguments made by BMWE and BRS in the Comments. CSXT further requests the Board to grant the Application since the proposed transaction does not pose any competitive issues, subject to the standard labor protective conditions.

Respectfully submitted,



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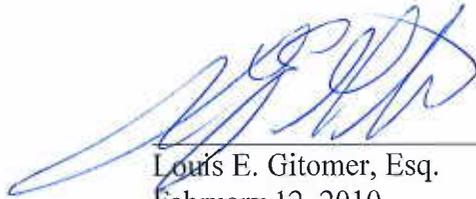
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Counsel for CSX Transportation, Inc.

Dated: February 12, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served electronically or by first class mail, postage pre-paid on the parties of record to this proceeding.



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Louis E. Gitomer, Esq.  
February 12, 2010