



of Jurisdiction Over Challenged Rates, CSXT is the moving party and CSXT has the burden of showing that the previously adopted procedural schedule should be altered so that this proceeding could be bifurcated into separate market dominance and stand-alone cost (“SAC”) phases. Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, Ex Parte No. 527, 1 STB 754, 760, n. 10 (1996). Under the current procedural schedule, TPI’s burden of proof on qualitative market dominance applies to TPI’s Opening Evidence and Rebuttal Evidence, which will be filed in 2011. Obviously, TPI does not have the burden of proof in replying to a motion originally filed by CSXT.

Second, CSXT improperly attempts to use its Response to transform its “suggestion” of oral argument in its original “Motion for Expedited Determination of Jurisdiction Over Challenged Rates” (“Jurisdiction Motion”), into a “request” for oral argument. In its Jurisdiction Motion, CSXT mentioned in passing that “should the Board wish to schedule an oral argument,” it do so promptly after TPI submits its market dominance evidence in response to a Board order granting CSXT’s motion. Jurisdiction Motion at 4 [underline added]. CSXT’s only other reference to an oral argument occurs in its “Conclusion,” where CSXT states, “should the Board deem it advisable, hold an oral argument on qualitative market dominance.” Id. at 24 [underline added]. At no point did CSXT present any argument as to why the Board should hold an oral argument.

Apparently realizing this fact, CSXT attempts to use its “Response” as a vehicle not only to transform its “suggestion” into a “request,” but also to inappropriately alter the very subject of its original oral argument “request.” CSXT’s original reference to oral argument contemplates that the Board would issue an order that bifurcates the market dominance and rate reasonableness phases of this proceeding, establishes a procedural schedule for the submission of market

dominance evidence, and then if desirable, schedules an oral argument on market dominance. Jurisdiction Motion at 4. In its Response, at 4-5, however, CSXT asks the Board to “schedule oral argument on CSXT’s [Jurisdiction Motion].” CSXT has changed the very subject matter of the oral argument. This is a procedurally improper attempt by CSXT to blur the distinction between a Board decision on its Jurisdiction Motion and a decision on market dominance, as a means to entice the Board into rendering a decision on market dominance through the Jurisdiction Motion. As TPI noted in its Reply to CSXT’s Jurisdiction Motion, at page 2, the Board should not, and indeed cannot, decide market dominance on the basis of CSXT’s Jurisdiction Motion.

The Board also should reject CSXT’s request for oral argument on its Jurisdiction Motion because that would only increase the cost of litigation and delay the procedural schedule. Any oral argument would require planning by the Board, preparation by the parties, and a time delay while the Board prepares its post-argument decision. As described in TPI’s earlier Reply to the Jurisdiction Motion (at pages 3-7), TPI would be harmed and compromised in its efforts to prepare its Opening Evidence by such delay. Given the Board’s recent practice of holding oral argument in SAC cases after the evidentiary record has closed, CSXT will have ample opportunity to present its position to the Board at the appropriate time.<sup>1</sup> The Board should reject

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<sup>1</sup> Despite representations to the contrary, CSXT manages to slip an improper reply to TPI’s Reply Evidence into two footnotes as an example of why the Board should schedule oral argument. Response, at 4-5, notes 3 and 4. If this is CSXT’s best example, it is sorely lacking. The issue to which CSXT contends the Board would benefit from oral argument is “the extent to which a complainant can manufacture market dominance by adopting policies that allegedly limit its options to rail service.” *Id.* And the example cited is TPI’s decision to use an “optimal” number of transload facilities that must meet minimum standards. *Id.*, n. 4. CSXT’s argument misses the point. Too many bulk terminals imposes administrative, inventory, and rail car costs upon TPI that must be considered in a market dominance analysis. TPI Reply at 23-24. In addition, it is patently absurd for CSXT to suggest that TPI’s quality, security, and safety standards for bulk terminals should be disregarded in a market dominance analysis. Would CSXT also suggest that TPI ignore the safety rating of a motor carrier because that motor carrier is offering competitive rates?

CSXT's improper attempts to delay this proceeding, through its Jurisdiction Motion, so that this case may continue under the current procedural schedule.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that this 4th day of November 2010, I served a copy of the foregoing upon Defendants in the following manner and at the addresses below:

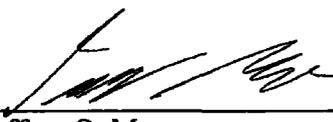
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