

**PUBLIC VERSION**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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CONSUMERS ENERGY COMPANY	)	
	)	
	)	
	)	
Complainant,	)	
v.	)	Docket No. NOR 42142
	)	
CSX TRANSPORTATION, INC.	)	
	)	
	)	
Defendant.	)	
	)	

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**REBUTTAL EVIDENCE OF COMPLAINANT**

**NARRATIVE**

**(Volume 1 of 2)**

CONSUMERS ENERGY COMPANY

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Dated: May 20, 2016

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## ACRONYMS

The following acronyms are used:

AAR	Association of American Railroads
AEI	Automatic Equipment Identifier
AEO	2015 Annual Energy Outlook Update Forecast
AII-LF	All-Inclusive Less Fuel Index, published by AAR
AMTO	Assistant Manager of Train Operations
ATC	Average Total Cost
ATF	Across-the-Fence
BNSF	BNSF Railway Company
BRC	Belt Railway Company of Chicago
CAPM	Capital Asset Pricing Model
CERR	Consumers Energy Railroad
CMM	Coal Marketing Module
CMP	Constrained Market Pricing
CN	Canadian National Railway
COC	Cost of Capital
COD	Cost of Debt
COE	Cost of Equity
CP	Canadian Pacific Railway
CSXIT	CSX Intermodal Terminals, Inc.
CSXT	Defendant CSX Transportation, Inc.
CTC	Centralized Traffic Control
CWR	Continuous Welded Rail
DCF	Discounted Cash Flow
DOT	Department of Transportation
DP	Distributed Power Configuration
DTL	Direct To Locomotive
EIA	Energy Information Administration
EPA	Environmental Protection Agency
ERM	Environmental Resources Management
FAS-PAS	Fail-Safe Audible Signal—Power Activated Switch
FED	Failed/Dragging Equipment Detector
FRA	Federal Railroad Administration
GAAP	Generally Accepted Accounting Principles
GTM	Gross Ton-Mile
GWR	Gross Weight on Rail
HDF	On-Highway Diesel Fuel Index
IHB	Indiana Harbor Belt Railroad
MERC	Midwest Energy Resources Company
MGT	Million Gross Tons

MISO	Mid-Continent Independent System Operator
MLO	Manager of Locomotive Operations
MMM	Maximum Markup Methodology
MOW	Maintenance of Way
MRP	Market Risk Premium
MSDCF	Multi-Stage Discounted Cash Flow
MSRR	Michigan Shore Railroad
MTO	Manager of Train Operations
NS	Norfolk Southern Railway Company
PPI	Producer Price Index
PRB	Powder River Basin
PTC	Positive Train Control
RCAF-A	Rail Cost Adjustment Factor, adjusted for productivity
RCAF-U	Rail Cost Adjustment Factor, unadjusted for productivity
ROI	Return On Net Investment
ROW	Right of Way
R/VC	Revenue-to-Variable Cost
RSIA	Rail Safety and Improvement Act of 2008
RTC	Rail Traffic Controller Model
S&P	Standard & Poor's
SAC	Stand-Alone Cost
SARR	Stand-Alone Railroad
STEO	Short-Term Energy Outlook
T&E	Train & Engine
UP	Union Pacific Railroad Company
URCS	Uniform Railroad Costing System
WCTL	Western Coal Traffic League

## CASE GLOSSARY

The following short form case citations are used:

<i>AEPCO 2002</i>	<i>Ariz. Elec. Power Coop., Inc. v. BNSF Ry. &amp; Union Pacific R.R.</i> , Docket No. 42058 (STB served Aug. 20, 2002)
<i>AEPCO 2011</i>	<i>Ariz. Elec. Power Coop., Inc. v. BNSF Ry. &amp; Union Pacific R.R.</i> , STB Docket No. 42113 (STB served Nov. 22, 2011)
<i>AEP Texas</i>	<i>AEP Tex. N. Co. v. BNSF Ry.</i> , Docket No. 41191 (Sub-No. 1) (STB served Sept. 10, 2007)
<i>APS</i>	<i>Ariz. Pub. Serv. Co. and Pacificorp. v. The Atchison, Topeka &amp; Santa Fe Ry.</i> , 2 S.T.B. 367 (1997)
<i>Cargill</i>	<i>Cargill, Inc. v. BNSF Railway</i> , STB Docket No. 42120 (STB served Aug. 12, 2013)
<i>Coal Rate Guidelines or Guidelines</i>	<i>Coal Rate Guidelines, Nationwide</i> , 1 I.C.C.2d 520 (1985), <i>aff'd sub nom. Consolidated Rail Corp. v. United States</i> , 812 F.2d 1444 (3d Cir. 1987)
<i>Coal Trading</i>	<i>Coal Trading Corp. v. The Baltimore &amp; Ohio R.R.</i> , 6 I.C.C.2d 361 (1990)
<i>CP&amp;L</i>	<i>Carolina Power &amp; Light Co. v. Norfolk S. Ry.</i> , 7 S.T.B. 235 (2003)
<i>Duke/CSXT</i>	<i>Duke Energy Corp. v. CSX Transp. Inc.</i> , 7 S.T.B. 402 (2004)
<i>Duke/NS</i>	<i>Duke Energy Corp. v. Norfolk S. Ry.</i> , 7 S.T.B. 89 (2003)
<i>DuPont/NS</i>	<i>E.I. DuPont De Numours and Co. v. Norfolk S. Ry.</i> , Docket No. 42125 (STB served March 24, 2014, updated Oct. 3, 2014)
<i>Ex Parte No. 664</i>	<i>Petition of the Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model In Determining the Railroad Industry's Cost of Equity Capital</i> , Ex Parte No. 664 (Sub-No. 2) (pending)

<i>Ex Parte No. 715</i>	<i>Rate Regulation Reforms</i> , Ex Parte No. 715 (STB served July 18, 2013)
<i>Ex Parte No. 722</i>	<i>Railroad Revenue Adequacy</i> , Ex Parte No. 722 (pending)
<i>FMC</i>	<i>FMC Wyo. Corp. v. Union Pac. R.R.</i> , 4 S.T.B. 699 (2000)
<i>IPA</i>	<i>Intermountain Power Agency v. Union Pac. R.R.</i> , STB Docket No. 42136 (Complaint filed May 30, 2012)
<i>KCP&amp;L</i>	<i>Kansas City Power &amp; Light Co. v. Union Pac. R.R.</i> , STB Docket No. 42095 (STB served May 19, 2008)
<i>Major Issues</i>	<i>Major Issues in Rail Rate Cases</i> , Ex Parte No. 657 (Sub-No. 1) (STB served Oct. 30, 2006)
<i>M&amp;G</i>	<i>M&amp;G Polymers USA, LLC v. CSX Transp., Inc.</i> , NOR 42123 (STB served Sept. 27, 2012, updated Dec. 7, 2012)
<i>Nevada Power II</i>	<i>Bituminous Coal - Hiawatha, Utah to Moapa, Nevada</i> , 10 I.C.C.2d 259 (1994)
<i>OG&amp;E</i>	<i>Oklahoma Gas &amp; Electric Co. v. Union Pac. R.R.</i> , Docket No. 42111 (STB served July 24, 2009)
<i>Otter Tail</i>	<i>Otter Tail Power Co. v. BNSF Ry.</i> , Docket No. 42071 (STB served Jan. 27, 2006)
<i>Sunbelt</i>	<i>Sunbelt Chlor Alkali Partnership v. Norfolk S. Ry.</i> , Docket No. 42130 (STB served June 20, 2014)
<i>TMPA</i>	<i>Texas Mun. Power Agency v. Burlington N. and Santa Fe Ry.</i> , 6 S.T.B. 573 (2003)
<i>TPI</i>	<i>Total Petrochemicals &amp; Refining USA, Inc. v. CSX Transp., Inc.</i> , Docket No. 42121 (Complaint filed May 3, 2010)
<i>WFA I</i>	<i>Western Fuels Ass'n, Inc. &amp; Basin Electric Power Coop. v. BNSF Ry.</i> , STB Docket No. 42088 (STB served Sept. 10, 2007)
<i>WFA II</i>	<i>Western Fuels Ass'n, Inc. &amp; Basin Electric Power Coop. v. BNSF Ry.</i> , Docket No. 42088 (STB served Feb. 18, 2009)

- WPL*                      *Wisconsin Power & Light Co. v. Union Pac. R.R.*, 5 S.T.B. 955 (2001)
- WTU*                      *West Tex. Utils. Co. v. Burlington N. R.R.*, 1 S.T.B. 638 (1996), *aff'd sub nom. Burlington N. R.R. v. STB*, 114 F.3d 206 (D.C. Cir. 1997)
- Xcel I*                     *Public Service Co. of Colorado d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 589 (2004)
- Xcel II*                    *Public Serv. Co. of Colorado d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry.*, Docket No. 42057 (STB served Jan. 19, 2005)



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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<b>CONSUMERS ENERGY COMPANY</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. NOR 42142</b>
	)	
<b>CSX TRANSPORTATION, INC.</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

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**PART I**

**COUNSEL’S ARGUMENT AND SUMMARY OF THE EVIDENCE**

This is the Rebuttal Evidence of Complainant, Consumers Energy Company (“Consumers”), in support of its Complaint seeking the prescription of just and reasonable rates for the rail transportation of coal by Defendant, CSX Transportation, Inc. (“CSXT”) from rail interchanges in the area of Chicago, IL to Consumers’ J.H. Campbell Generating Station near West Olive, MI. Herein, in accordance with the standards governing the submission of rebuttal evidence<sup>1</sup> and the Board’s July 15, 2015 and April 20, 2016 procedural orders, Consumers responds to the substantive elements of CSXT’s March 7, 2016 Reply Evidence (hereinafter “CSXT Reply”).<sup>2</sup> In certain specifically identified respects,

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<sup>1</sup> See, e.g., *Duke/NS*, 7 S.T.B. at 101.

<sup>2</sup> CSXT’s Reply Evidence is rife with exaggerated rhetoric that all too often crosses the line into the realm of insult and invective. Consumers respectfully submits that such language adds nothing of value to this proceeding, and is as



Consumers makes adjustments to components of its November 2, 2015 Opening Evidence in direct response to data presented or points raised in the CSXT Reply. By and large, however, Consumers herein shows that CSXT's critiques, revisions, arguments and evidentiary adjustments are without basis or merit, and should be rejected.

The better evidence of record clearly demonstrates that (1) the Board has jurisdiction over the transportation to which the Tariff CSXT-13952 rates at issue in this proceeding apply, within the meaning of 49 U.S.C. § 10707; (2) the rates established by Tariff CSXT-13952 for application to Consumers' Campbell coal traffic – which as of the First Quarter of 2016 stood at 559% of the unadjusted system average variable cost of service – are unreasonable and unlawful under 49 U.S.C. § 10707(d)(1) pursuant to the Stand-Alone Cost Constraint of the *Coal Rate Guidelines*<sup>3</sup>; (3) the rate increase imposed by CSXT on Consumers' Campbell traffic effective January 1, 2015 was unlawful under the *Guidelines*' Revenue Adequacy Constraint and 49 U.S.C. § 10701(d)(1); (4) the maximum lawful rate for the subject service pursuant to 49 U.S.C. §§ 10704(a)(1) and 11701(a) as of January 1, 2015 was \$ 10.22 per ton; (5) Consumers is entitled to a prescription of the maximum rates that can be assessed by CSXT for coal

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disrespectful to the Board as it is to Consumers. A few of the charges leveled by CSXT are so egregious that they demand a response, and in those instances Consumers does set the record straight. In choosing to ignore the rest, however, Consumers should not be taken as excusing or accepting CSXT's derogatory style.

<sup>3</sup> *Coal Rate Guidelines – Nationwide*, 1 I.C.C. 2d 520 (1985), *aff'd. sub nom., Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987).

transportation service to Campbell for the period January 1, 2015 through December 31, 2024, as set forth in Part III-H hereof; and (6) Consumers is entitled to a payment of reparations by CSXT for all charges collected under Tariff CSXT-13952 in excess of the maximum rates prescribed by the Board, between January 1, 2015 and the date of CSXT's compliance with the prescription order, together with interest calculated in accordance with 49 C.F.R. Part 1141.1, *et seq.*

## **SUMMARY OF REBUTTAL EVIDENCE**

### **PREFACE**

In the remainder of this Part I, Consumers briefly summarizes the evidence presented in Parts II, III and IV of this Rebuttal. The overall weight of the evidence in this case clearly entitles Consumers to the rate relief sought in its Original Complaint.

### **A. MARKET DOMINANCE**

#### **1. Quantitative Market Dominance**

CSXT concedes that the challenged rates exceed 180% of the variable cost of the subject service, and thus satisfy the quantitative jurisdictional threshold prescribed by 49 U.S.C. § 10707(d)(1). Nevertheless, CSXT advocates an adjustment to one (1) of the nine (9) traffic and operating inputs used in the Board's URCS model: miles in the loaded direction.<sup>4</sup> The proposed adjustment should be rejected.

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<sup>4</sup> CSXT Reply at II-A-2-5.

At the core of CSXT's complicated explanation for its adjustment is the fact that CSXT generally handles empty Consumers trains returning to Chicago about six (6) miles farther than it moves trains in the loaded direction. This is a typical occurrence in unit train coal movements. URCS procedures, however, count only loaded miles traveled by the carrier whose costs are being measured, and adjustments to address scenarios such as those raised by CSXT here were both considered and rejected by the Board in *Major Issues* and following decisions.<sup>5</sup> See II-2-5, *infra*.

Tables II-A-1-5, *infra*, show the updated variable costs for CSXT service to Campbell through the First Quarter of 2016, based on the Board's 2014 CSXT URCS system average unit costs<sup>6</sup> and the Board's "OG&E" indexing procedures.<sup>7</sup>

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<sup>5</sup> *Major Issues* at 58; *KCP&L* at 6.

<sup>6</sup> Subsequent to the filing of Consumers' Opening Evidence, which calculated variable costs using 2014 CSXT unit costs developed by Consumers' experts, the Board released its 2014 URCS. CSXT Reply at II-A-6 n.10. Subsequent to *that*, however, CSXT's Form R-1 for 2015 became available. Consumers' Rebuttal variable cost presentation uses 2015 CSXT URCS unit costs developed by Consumers' experts.

<sup>7</sup> *Oklahoma Gas & Electric Co. v. Union Pac. R. Co.*, STB NOR 42111 (STB served July 24, 2009 and October 26, 2009).

## 2. Qualitative Market Dominance

CSXT claims that its rates for coal service to Campbell – which currently stand at 559% of variable costs – are the product of and are constrained by effective competition, not from transportation alternatives that actually exist, but from alternatives that allegedly *could* exist if Consumers was to commit to a massive capital spending program. The hypothetical options advanced by CSXT are: (1) a lake vessel movement from the KCBX South Terminal near Chicago to an as-yet unbuilt vessel unloading platform and conveyor to be installed in the middle of Pigeon Lake near the Campbell site; and (2) a lake vessel movement from KCBX to the dock previously used by Consumers’ now-shuttered Cobb Station near Muskegon, MI, followed by a rail movement to Campbell handled by the Michigan Shore Railroad (“MSRR”), over trackage leased from CSXT and new as-yet unbuilt rail infrastructure at Cobb and connected to the CSXT tracks near Campbell.<sup>8</sup> The Board has never endorsed such theoretical claims as demonstrating the absence of market dominance.<sup>9</sup> As Consumers conclusively shows in Part II-B, none of the key claims advanced by CSXT in support of its fantasy theories is valid.

CSXT first argues that vessel service to Campbell via Pigeon Lake must be feasible, because that body of water is “nearly identical” to Muskegon

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<sup>8</sup> See II-8, *infra*.

<sup>9</sup> *TMPA*, 6 S.T.B. at 584; *WTU*, 1 S.T.B. at 651.

Lake, where the Cobb dock is located.<sup>10</sup> However, as Consumers shows, the actual facts are quite different. Muskegon Lake is over *sixteen times* the size of Pigeon Lake and over twice as deep, and has been used for regular industrial, commercial vessel transportation since early in the last century. In contrast, Pigeon Lake is a relatively pristine and environmentally sensitive recreational body, which has no history of meaningful commercial use. A detailed examination of the respective geographies, shoreline characteristics, environmental conditions, bottom sediment characteristics and other factors relevant to suitability for coal vessel traffic shows that the two (2) lakes are far from “identical.”<sup>11</sup>

CSXT goes on to offer distorted characterizations both of Consumers’ previous statements concerning the potential study of transportation alternatives and the reports of consultants retained for this purpose<sup>12</sup> to argue that they had confirmed the feasibility of competitive “water options,” and that Consumers’ expert witness in this case – Dr. Ralph Barbaro – now seeks to contradict them.<sup>13</sup> As the authors of the study that CSXT principally invokes

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<sup>10</sup> See, e.g., CSXT Reply at I-7.

<sup>11</sup> See Consumers Rebuttal at II-28-36, *infra*; Petro and Bovitz V.S. at 28-46.

<sup>12</sup> In its Opening Evidence, Consumers explained how it had reviewed the potential for opening Campbell up to vessel transportation in the past, but concluded that the costs were too high and the permitting and regulatory obstacles too great to warrant more detailed studies of potential feasibility. See Consumers Opening at II-16-32.

<sup>13</sup> CSXT Reply at I-9-10.

clearly explain in their Statement included in this Rebuttal, however, CSXT has grossly misrepresented both the scope of their previous work and their conclusions, and invented conflicts with Dr. Barbaro's far more detailed analysis which do not exist.<sup>14</sup> These authors confirm that they were not asked to opine on the economic feasibility or competitiveness of the scenarios that they reviewed; that they did not do so; and that their preliminary work did *not* include a number of issues and cost quantifications that would be central to any true feasibility analysis. Dr. Barbaro, whose Opening Evidence Report *did* examine all relevant factors before concluding that no feasible transportation alternatives to CSXT existed,<sup>15</sup> updated, refined and expanded upon the prior consultants' work. He did not "attack" it.

In opposition to Dr. Barbaro's detailed expert Report, CSXT principally offers the views of TranSystems, Inc., a consulting firm.<sup>16</sup> Relying on a "desktop analysis," TranSystems claims that Consumers could access the so-called Direct Water Route to Campbell for a total equivalent cost (including all necessary capital investment and operating expenses) of only { }, and the alternative Cobb-Rail Route at a cost of { }. On the

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<sup>14</sup> Petro and Bovitz V.S. at 18-28.

<sup>15</sup> Consumers Opening at II-32-52.

<sup>16</sup> CSXT also invokes the opinions of its witnesses Professor Kevin Murphy and a certain Captain Edward Hogan, on issues related to market dominance. However, Professor Murphy acknowledges his reliance on CSXT and its other witnesses for the factual underpinnings of his opinions, and the views attributed to Captain Hogan are not supported by any written statement, documentation, workpapers, or actual evidence of any kind.

“strength” of this analysis, CSXT claims that Consumers could divert enough coal traffic away from its rail route (supposedly 75% of Campbell’s annual volume) to effectively discipline CSXT’s pricing. Herein, and in Dr. Barbaro’s Rebuttal Report, all of these claims are shown to be fallacious.

First, as unproven projects that would require as much as {  
} in Consumers’ capital to execute, prudent utility practice and Board precedent<sup>17</sup> support the position that TranSystems’ alternatives would have to be able to completely replace CSXT in order to *ensure* effective competition. As Consumers showed on Opening and CSXT does not dispute, the lack of coal storage capacity at KCBX and the terms of Consumers’ origin rail and coal supply contracts makes that impossible.<sup>18</sup>

Second, even if the “partial diversion” envisioned by CSXT is entertained, the plans sponsored by TranSystems are not feasible. For example:

- The mid-lake platform designed for its Direct Water Route would violate applicable zoning laws.
- Capacity limitations at KCBX and at TranSystems’ unloading platform would limit the actual “diversion” potential to less than 50% of Campbell’s annual coal shipments.
- The articulated tug vessels specified for use in the TranSystems Direct Water Route do not exist.

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<sup>17</sup> *TMPA*, 6 S.T.B. at 584.

<sup>18</sup> Consumers Opening at II-16-19.

- The terms of MSRR’s track lease agreement with CSXT  
 {  
 }
- TranSystems ignores the significant obstacles to permitting the facilities needed for its plans, including in particular Section 404 of the Clean Water Act, which could mandate denial of an essential permit for the Direct Water Route due to the availability of CSXT rail service.

Third, if the foregoing barriers to feasibility are ignored, CSXT’s consultants’ plans dramatically understate the capital and operating costs for each “alternative.” Correcting only two (2) of the most obvious errors – their use of an outdated KCBX Terminal fee, and their failure to account for the higher rates that CSXT would charge on the share of Campbell’s annual shipments that could not be diverted – adds { } to TranSystems’ artificially low cost estimates, and pushes them significantly above the rates that Consumers currently pays. Correcting for all of TranSystems’ errors and omissions, as Dr. Barbaro does in his Rebuttal Report, the capital and operating costs for the Direct Water Route actually range between { }, and the corresponding Cobb-Rail costs increase to { }.

Finally, while it is obvious from the corrected costs that neither of CSXT’s proffered “alternatives” could represent effective competition, consideration of the Board’s Limit Price Test and the real world example of CSXT’s pricing on a *competitive* Consumers coal movement confirm the carrier’s



market dominance. CSXT's legal challenges to the Limit Price Test are without merit, and previously have been rejected by the Board. Its fallback efforts to concoct a "false positive" test outcome using an imaginary rail movement, or to manufacture adjustments to the Board's RSAM calculations that would justify its monopoly pricing at Campbell, are without foundation and obviously results-oriented. And it has no real explanation for the significant rate disparity that CSXT previously maintained between shipments bound for Campbell and nearly identical shipments routed to Consumers' Karn-Weadock complex, beyond the obvious facts that the former is captive while the latter enjoys actual, effective transportation competition.

The Board clearly has jurisdiction over CSXT's unreasonable tariff rates on coal shipments to Campbell.

**B. THE CHALLENGED RATES ARE UNREASONABLY HIGH UNDER THE SAC CONSTRAINT**

The rates at issue comprise approximately { } for Consumers to transport coal from Wyoming to Campbell, even though CSXT handles less than 13% of the overall line-haul, and as already shown, they exceed 500% of the variable cost of service. Nevertheless, CSXT asserts in its Reply that “the challenged rate is reasonable under a proper application of the SAC test.”<sup>19</sup>

In this Rebuttal, Consumers responds in detail to CSXT’s substantive criticisms of and proposed adjustments to Consumers’ Opening Evidence under the SAC Constraint. In those instances where Consumers agrees that an adjustment is appropriate, the adjustment is reflected in Consumers’ Rebuttal restatement. As to the significant majority of CSXT’s critiques, however, Consumers shows why they are without basis or merit. Consumers’ Rebuttal restatement confirms the conclusion that was supported by its Opening Evidence: the challenged rates substantially exceed maximum reasonable levels under the SAC Constraint, and both prescriptive relief under 49 U.S.C. §§ 10704(a)(1) and 11701(a), and an award of reparations under 49 U.S.C. § 11704(b), together with interest, should be granted by the Board.

Consumers presented its full and complete case-in-chief in its Opening Evidence,<sup>20</sup> and has met its *prime facie* responsibility to design the

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<sup>19</sup> CSXT Reply at I-14.

<sup>20</sup> *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 445 (2001).

CERR and “support[ ] the feasibility of all components of its design and cost elements.”<sup>21</sup> This is confirmed further by the evidence presented in Part III of this Rebuttal, which is summarized briefly in the following sections of this Part I.

Taken together, Consumers’ Opening and Rebuttal SAC evidence represents the better evidence of record.

### 1. **Traffic and Revenues**

In Part III-A, Consumers responds in detail to the various criticisms offered by CSXT of the processes by which the CERR traffic group was selected, the volume and nature of the traffic that would be handled were determined, and the revenues that would be earned by the CERR over the 2015-2024 time period were calculated. Some of the principal elements of Consumers’ Rebuttal with respect to these issues are summarized briefly here.

First, Consumers demonstrates that its basic selection in methodology – which prioritizes operational efficiency as well as traffic density – is firmly rooted in the grouping principles at the core of the *Coal Rate Guidelines*,<sup>22</sup> and consistent with prior precedent. *See* III-A-2-11. Contrary to CSXT’s selective reading of the *Guidelines*, the focus of the grouping concept is on *traffic*, not individual *customers*,<sup>23</sup> and as CSXT itself elsewhere has acknowledged, a complaining shipper under the SAC Constraint selects its traffic

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<sup>21</sup> *FMC*, 4 S.T.B. at 723.

<sup>22</sup> *Coal Rate Guidelines*, 1 I.C.C. 2d at 544.

<sup>23</sup> *TMPA*, 6 S.T.B. at 586.

group in its “sole and informed discretion,” and is entitled to exercise that discretion “to select traffic in a manner that most advantages it under the ATC methodology.”<sup>24</sup> Nothing in the Board’s precedents supports CSXT’s theory that a SARR must agree to handle *all* of the traffic of any third party shipper that it elects to serve; indeed, previous coal rate proceedings offer numerous examples of SARRs that select a given shipper’s unit train coal traffic, while declining to handle the same shipper’s lower volume limestone movements that travel over the same lines in the real world.<sup>25</sup>

Likewise, nothing in the Board’s *Ex Parte No. 715* decision<sup>26</sup> obligates Consumers to propose modifications to the ATC methodology to address a “problem” that does not exist.<sup>27</sup> Under ATC, any costs associated with the assembly of trains before they are interchanged to the CERR, and/or the distribution of segments of trains after they leave the CERR, are properly assigned to the carrier(s) that perform those functions, and the ATC revenue allocation follows the costs. *See* III-A-11-13, *infra*. In this case, Consumers has

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<sup>24</sup> Joint Reply Comments of CSX Transportation, Inc. and Norfolk Southern Ry., *Rate Regulation Reforms*, Ex Parte No. 715 (filed December 7, 2012) at 23.

<sup>25</sup> *See WFA II* at 11; *WPL*, 5 S.T.B. at 967; *WTU*, 1 S.T.B. at 657.

<sup>26</sup> *See Ex Parte No. 715* at 28.

<sup>27</sup> CSXT Reply at I-19.

scrupulously followed the Board’s precedents; there has been no “shunning” of its “concerns.”<sup>28</sup>

Second, Consumers shows that CSXT’s proposed exclusion of certain petcoke trains from the CERR traffic group is based on a misrepresentation of the carrier’s *own data*, and totally unfounded, and that its deletion of other trains moving between Calumet Park and Curtis, IN on grounds of “inferior service”<sup>29</sup> ignores key metrics and service reliability, and highlights CSXT’s exploitation of a fixed, hypothetical “dwell time” that Board procedures compel Consumers to add to each interline movement.<sup>30</sup> In both cases, the flaws in CSXT’s claims were only discernable after close, painstaking and time-consuming analyses of complex data that was produced by CSXT in discovery, but then misrepresented by CSXT in its evidence.<sup>31</sup>

Third, CSXT’s charge that Consumers sought to “mislead[ ]” the Board regarding forecasted coal volumes to the Campbell Station<sup>32</sup> is beyond the pale. The September 2015 Michigan Public Service Commission filing that CSXT contends was withheld by Consumers was among a wide class of documents that was excused from production *by written agreement between the parties*, based upon discovery closure dates. Moreover, as shown in Section III.A.2.a., *infra*, the

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<sup>28</sup> CSXT Reply at I-19.

<sup>29</sup> CSXT Reply at III-A-13.

<sup>30</sup> *See* Section III.A.1.a.

<sup>31</sup> *Id.*

<sup>32</sup> CSXT Reply at I-20.

computer model run provided to the MPSC was *not* an update of Consumers’ long-term coal forecast, which is prepared using a different model designed for that purpose. Indeed, when the results of a September 2015 run of the actual long-range forecast model are compared to Consumers’ Opening Campbell coal forecast (which was produced by the same model and provided to CSXT and the Board), the total consumption figures over the 2017-2024 time period are within 0.9% of each other, with the September 2015 forecast showing slightly *higher* volumes.<sup>33</sup>

In the balance of Part III-A, Consumers addresses and rebuts the remainder of CSXT’s challenges to Consumers’ Opening Evidence concerning the CERR’s traffic volumes and revenues over the 2015-2024 study period.

Consumer’ Rebuttal restatement includes minor adjustments that result in a { } reduction in total volumes, and a { } reduction in total revenues.

## **2. Stand-Alone Railroad System**

As discussed in detail in Part III-B, the parties are in general agreement regarding the CERR’s route, constructed miles, joint facility miles, mainline tracks and branch lines (or lack thereof). The relatively few, meaningful objections that CSXT’s Reply raised to Consumers’ Opening Evidence are summarized below. With one exception, all of CSXT’s proposed additions or adjustments to the CERR’s structure and configuration are without merit.

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<sup>33</sup> See Table III-A-4, *infra*.

Consumers accepts one of CSXT's proposed changes to the CERR's interchange configurations: the addition of the 0.6 mile so-called Buffington Connection at the Pine Junction interchange. The related materials and costs for this extra track are described in Part III-F, *infra*. Two (2) other interchange modifications suggested by CSXT, however, are unnecessary.

First, CSXT proposes to change CERR's plan for its Dolton Interchange by re-routing the track around certain existing facilities, adding both to the length and cost of the interchange track. However, CSXT does not challenge – or even address – Consumers' Opening explanation of the reasons for its initial design, and the adequacy of that design to meet the CERR's needs. Since CSXT offers nothing beyond a more expensive “option” to accomplish the same purpose, Consumers rejects the proposed change.<sup>34</sup>

Second, CSXT advocates another costly change for the Dolton Interchange: the addition of a highway overpass at Cottage Grove Avenue to alleviate delays allegedly occurring as a result of parked CERR trains. As Consumers shows, however, its Opening Operating Plan took account of the potential for a train to block the at-grade crossing, and specifically designed the relevant portion of the plan to avoid the blockage. Consumers' RTC model results confirmed that none of the CERR trains moving through the interchange during the peak period blocked the crossing. CSXT's proposed highway overpass is unnecessary.

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<sup>34</sup> See Section III.B.1.c, *infra*.

Next, CSXT argues for the addition of a new siding near the Campbell Station, and another new bad order holding track in the Barr Yard. As Consumers explains in Section III.C.B.1, *infra*, however, neither of these tracks is needed. Consumers' RTC model results showed that no additional facilities were needed to handle trains at Campbell,<sup>35</sup> and Consumers' experts already provided track space for bad ordered cars near Barr Yard as part of the train inspection plan, which CSXT accepted.

Finally, CSXT challenges Consumers' plan for the CERR to access the IHB's Blue Island Yard via trackage rights, as CSXT does in the real world, and pay the fee for such access pursuant to the trackage rights agreement to which CSXT is a party today. Consumers did not include any road property investment for this joint facility because CSXT does not own it (in whole or in part).<sup>36</sup> However, CSXT claims that the CERR should pay for a { } interest in the IHB, because CSXT's *parent* company has such an interest.

The position advanced by CSXT here is identical to that argued by the defendant in *DuPont*, and rejected by the Board. There, as here, Norfolk Southern Railway's corporate parent had an indirect ownership interest in a shortline, and the railroad sought to impose the cost of that investment on the SARR. The Board rejected the adjustment, ruling that because the shortline

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<sup>35</sup> Indeed, CSXT's own RTC run revealed that no Campbell trains actually used the siding that CSXT added.

<sup>36</sup> See Section III.B.3, *infra*.



interest was held by the parent, and not the defendant railroad, the railroad had to “present a valid argument for ignoring this structure” and demonstrate that the *railroad* incurred costs beyond the use fees for the joint facility. *DuPont* at 49. As Consumers shows in Section III.B.4.a, *infra*, CSXT has offered nothing beyond what the defendant in *DuPont* presented and the Board rejected. CSXT does not own any portion of the IHB; the corporate distinctions between CSXT and its parent are real and scrupulously adhered to; the share of IHB controlled by the parent is not listed in schedule 310 of CSXT’s R-1; and CSXT has not shown that it enjoys preferential terms governing its trackage rights.<sup>37</sup> The fact is that CSXT and its predecessor railroads have been accessing the Blue Island facilities for over 100 years, and have always done so as a fee-paying trackage rights tenant of the facility. Because CSXT does not own any part of the IHB, the CERR need not make any investment in that company or its road property either.

The parties are in agreement on all other issues of consequence related to the CERR’s configuration, as explained fully in Part III-B. The RTC model simulations with respect to operations over the CERR are addressed in Part III-C.

### **3. CERR Operating Plan**

The operating plan for the CERR was designed by recognized railroad operations experts, including Mr. John Orrison, former Vice President – Network Planning for CSXT and an individual intimately familiar with railroad

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<sup>37</sup> *DuPont* at 47-49.

operations in the Chicago area and on many of the actual lines replicated by the CERR. The feasibility of the CERR plan was confirmed through a simulation of CERR operations during its peak traffic period, using the Board-approved RTC Model.

In Part III-C of this Rebuttal, Consumers responds in detail to the many criticisms of the CERR plan leveled by CSXT in its Reply, the vast majority of which are unfounded, and are intended simply to erode the efficiency of the CERR and drive up its costs. Some of the principal claims raised by CSXT are addressed in summary fashion below. Tellingly, however, despite the many arguments, speculations, unsupported claims and specious proposed adjustments included in CSXT's Reply, the carrier's own competing RTC Model run also confirms the feasibility of the CERR plan.<sup>38</sup>

CSXT's first major assertion is that Consumers underestimated the complexity of rail operations in the Chicago area.<sup>39</sup> However, most of the statistics that CSXT cites in support of its dire picture are dated, and the carrier deliberately ignores the many recent and ongoing operational and infrastructure improvements in the area, which are catalogued by Consumers' experts.<sup>40</sup> CSXT also ignores both the fact that the portion of its system replicated by the CERR is some 12 miles southeast of downtown Chicago – not in the heart of the city – and

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<sup>38</sup> See Section III.C.B.2.e, *infra*.

<sup>39</sup> See, e.g., CSXT Reply at III-C-7.

<sup>40</sup> See Section III.C.A.

the impact of the CERR's reduced train counts as compared to CSXT. As Consumers shows, the CERR handles only 54% of the trains that CSXT operates in the same territory, but moves them over a system that replicates *almost all* of the same mainline track infrastructure that CSXT has in place today. Moreover, 50% of CERR's traffic is unit trains, and all traffic is moved over the CERR in intact trainloads. The smaller scale of CERR's operations easily explains the improvements in speed and fluidity observed in Consumers' RTC Model as compared to historic periods.<sup>41</sup>

Another criticism raised by CSXT is that Consumers' plan did not include enough time for delays caused by foreign railroad operations. On Opening, Consumers modeled delays that were identified by CSXT in the data produced in discovery, maintaining the same relationship to peak period operations that was observed in the disclosed data vis-à-vis historic operations. In Reply, however, CSXT claimed *for the first time* that the data produced in discovery was not complete, and offered additional delays for incorporation into the RTC Model. Consumers rejects this belated offering, as should the Board. It is well-established that complainants in SAC cases are entitled to rely on data produced by the defendant in discovery, and that the defendant generally cannot impeach its own information.<sup>42</sup> Moreover, as Consumers shows, CSXT's claimed

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<sup>41</sup> See Section III.C.B.2, *infra*. While not required to do so, Consumers offers some examples of inefficiencies in current CSXT operations through the territory that the CERR avoids.

<sup>42</sup> See *AEPCO 2011* at 103.

delays are not corroborated by reliable evidence. Consumers' approach to foreign line delays was reasonable and well supported by the delay data that was produced by CSXT in discovery. CSXT's assumptions regarding additional delays and/or different delay locations are unfounded.

Also unfounded are CSXT's claims that the CERR operating plan doesn't account for all the trains needed to transport the peak period traffic volumes. For example, CSXT argues that Consumers' expectation that CERR train sizes will grow in the 2015-2024 time period is inconsistent with the realities of real-world railroading,<sup>43</sup> while the evidence shows that real-world Class I railroads – and *specifically CSXT* – plan to lengthen trains and sidings in order to improve productivity.<sup>44</sup> Similarly, CSXT claims that CERR train lengths could not increase without violating alleged limits in Interline Service Agreements (ISA) with other railroads, even though its own evidence and the documented practices of its interline partners shows that ISA “limits” are actually targets, and routinely are exceeded without consequence.<sup>45</sup> And CSXT's distortion of Consumers' train list development procedures, coupled with its flawed reliance on 365 individual daily operating plans instead of a single, comprehensive plan as the *Guidelines*

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<sup>43</sup> CSXT Reply at III-C-27.

<sup>44</sup> See Section III.C.B.1, *infra*.

<sup>45</sup> *Id.*

contemplate,<sup>46</sup> lead to absurd growth train additions and built-in inefficiencies that serve only to artificially drive up the CERR's costs.

Finally, CSXT makes the unprecedented claim that a SARR's operating plan must guess at and account for the actions of third party carriers handling bad-ordered cars off-SARR, and their hypothetical impacts on-SARR. CSXT's claim relates to only 82 out of over 41,000 cars moving to Campbell in the base year.

CSXT's absurd claim concerns a few loaded cars bound for Campbell that are bad-ordered by BNSF while on that carrier's lines. CSXT assumes – without evidence – that those cars end up in Barr Yard, then criticizes Consumers for not accounting for these cars in the CERR operating plan. As confirmed by Consumers' expert Mr. Orrison (who once served as a BNSF Assistant Vice-President), however, BNSF's standard practice for a bad-ordered Consumers car in the loaded direction would be to set it out for repair on BNSF's lines, then return it for delivery on a following BNSF train headed for Chicago. Thus, not only is there no evidence to support CSXT's scenario, what reliable evidence there is indicates that it doesn't happen. There is no justification for any adjustments to the CERR operating plan or RTC Model to address CSXT's bad-order claims.

As shown in the balance of Part III-C, for all the colorful rhetoric employed by CSXT, the fact is that it generally accepts the parameters of

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<sup>46</sup> See, e.g., *Sunbelt* at 12.

Consumers' plan, and most of the evidence offered by Consumers on Opening. What differences remain are addressed specifically by Consumers, and in most cases CSXT's criticisms are shown to be without merit. In those few instances where a minor adjustment to Consumers' plan and RTC Model inputs would be appropriate, Consumers makes the change. Its Rebuttal RTC Model simulation confirms the feasibility of the CERR operating plan.

#### 4. **CERR Operating Expenses**

As noted *supra*, the CERR is a very modest-sized railroad, with 50% of its traffic comprised of unit train movements and the balance consisting of intact trainload shipments. The CERR operating plan is sized to the railroad, and Consumers' calculation of annual operating expenses is based on the plan and the output of the RTC Model simulation of CERR operations.

In Reply, CSXT predictably advocates a dramatic 22% write-up of the CERR's operating expenses, using an approach that reflects the mindset of a large, unionized Class I railroad with procedures and layers of supervision that are unnecessary to manage an efficient, new Class II carrier. Consumers responds in detail to CSXT's evidence concerning the CERR's operating expenses in Part III-D, and briefly summarizes the salient points here.

Consumers' Rebuttal plan increases the number of road locomotives from 12 to 15, based on accepted adjustments to certain dwell times, and adds dedicated helper service for the issue traffic at Saugatuck Hill, as that is less costly

than the run-through approach that CSXT ignored.<sup>47</sup> However, there is no basis for the further additions proposed by CSXT, as Part III-C shows that the purported justifications – foreign line delays and increased train holds – are not supported by the facts. Likewise, CSXT’s proposed increase in the number of railcars needed by the CERR for non-issue traffic is not based on credible evidence, as the data on foreign cars produced by CSXT in discovery do not permit verification of its claims.<sup>48</sup>

As a Class II railroad with a small system configuration, one (1) local customer and only one (1) locally served facility, the CERR plainly does not have to be staffed like a Class I railroad. CSXT ignores this, however, and advocates a totally unnecessary 30% increase in operating personnel based on a desktop mathematics exercise sponsored by a witness with no experience staffing railroad operations, rather than an actual analysis of CERR operations. Among other obvious flaws, CSXT’s overstaffing plan includes re-crewing 58% of the trains moving to Campbell, even though CSXT’s *own RTC Model* shows no need for it.<sup>49</sup> Similarly, CSXT ignores the fact that a crew starting a shift at one end of the CERR would not necessarily have to return to the start point before beginning a second run, and appears to assume that the CERR must mimic every feature and

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<sup>47</sup> See Section III.D.1.a, *infra*.

<sup>48</sup> *Id.* at III.D.2.

<sup>49</sup> See Section III.D.3.a, *infra*.

experience of the current CSXT operation, which is flatly contrary to SAC theory.<sup>50</sup>

CSXT takes a similar approach to non-operating personnel, adding staff that are not needed to perform any functions of the CERR that Consumers had not already provided for an Opening, and proposing “managers over managers.”<sup>51</sup> CSXT’s fringe benefits calculations also are inflated, both by virtue of the addition of “fluff” employees, and by CSXT’s use of a three year (2012-2014) average of railroad fringe benefits ratios when the evidence clearly shows a consistent trend of reductions, due to enhanced management efficiencies. CSXT also excludes the Kansas City Southern Railway’s data, which showed the lowest fringe ratio among the carriers. On Rebuttal, Consumers continues to use 2014 fringe data (the most recent and representative information as of the CERR’s start date), and includes data for KCS.<sup>52</sup>

Consumers’ Opening Evidence on the CERR’s general and administrative (G&A) costs included a benchmark comparison to the Board’s findings in other recent cases, including *Sunbelt*, to demonstrate the conservative nature of Consumers’ staffing.<sup>53</sup> Despite the fact that CSXT itself has presented

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<sup>50</sup> *Id.* See *Sunbelt* at 12; *AEPCO 2011* at 16.

<sup>51</sup> See Section III.D.3.a.iii, *infra*.

<sup>52</sup> See Section III.D.3.a.iv, *infra*.

<sup>53</sup> Consumers Opening at III-D-35-42.



the same SARR revenue measures in its own benchmark analyses in prior cases,<sup>54</sup> it nevertheless proposes to almost *double* the CERR's G&A staffing, though it presents no case precedent or real-world Class II railroad comparisons that would support such an extreme staffing increase. As Consumers shows in Part III.D.3.b, *infra*, the average of the G&A ratios approved by the Board in ten (10) recent decisions under the SAC Constraint was 1.43 staff members per \$10 million of SARR revenue. In the *TPI* case – which involves a more complex SARR operation than this case – *CSXT* advocated a G&A ratio of 1.16 staff members per \$10 million. In comparison, Consumers' conservative G&A cost determination reflects a ratio of 2.3 staff members per \$10 million of revenue. There is no sound basis for *CSXT*'s inflated proposals in the present case,<sup>55</sup> which would produce an absurd ratio of 4.84 staff members per \$10 million and would yield commensurately excessive costs.<sup>56</sup>

CSXT's critiques of Consumers' Opening Evidence regarding the CERR's information technology requirements are addressed in Section III.D.3.b.vi. For the most part, *CSXT* accepts Consumers approach, but writes up some costs, either because of *CSXT*'s artificially inflated personnel roster or by

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<sup>54</sup> *Id.*

<sup>55</sup> *CSXT* inflates G&A through such inefficiencies as assuming that the most senior staff member responsible for a given function effectively would perform no substantive work. See Section III.D.3.b.ii, *infra*. *CSXT*'s material, supplies and equipment cost are derived from the same G&A overstaffing, and should be rejected as well.

<sup>56</sup> See Section III.D.3.b.ii and iii, *infra*.

proposing systems used by Class I railroads that the CERR wouldn't need.

CSXT's additions are unwarranted, and should be rejected.

Similarly, CSXT's proposal to expand the CERR's maintenance-of-way (MOW) staffing by 18 employees is without merit. Consumers' Opening Evidence on this subject was sponsored by its expert Mr. R. Lee Meadows, who served for 33 years in the Engineering Department of the Norfolk Southern Railway. In Rebuttal Section III.D.4, which Mr. Meadows also sponsors, Consumers shows that the MOW plan designed for the CERR takes careful account of the different types of line segments on the system (including what CSXT pointedly refers to as the "urban" and "rural" portions), and for the more maintenance critical areas provides for one MOW staffer for every 2.62 miles of line, a higher employee concentration than those found sufficient by the Board in each of the five (5) recent case that CSXT references in its Reply.<sup>57</sup>

CSXT's inflated MOW expenses rely heavily on bogus comparisons for their "validity." For example, CSXT proposes to add a Public Projects Engineer and an assistant, based on the outcome in *Sunbelt*. However, the SARR at issue in *Sunbelt* was three (3) times the size of the CERR, and included a much broader range of "public projects" territory. Consumers' Rebuttal MOW presentation is the better evidence of record.

In Section III.D.5, Consumers responds to CSXT's claim that the trackage rights fee paid by the CERR to NS for rights to operate between Rock

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<sup>57</sup> See Rebuttal Table III-D-12.

Island and Porter should be increased substantially from the rate specified in the relevant trackage rights agreements, due to “reciprocal” arrangements between CSXT and NS to which the CERR would not be a party. These arrangements supposedly provide additional consideration for the Rock Island-Porter trackage rights fee set out in the agreements produced to Consumers in discovery.

However, the connection between the CSXT-NS reciprocal arrangement and the Rock Island-Porter trackage rights was not disclosed by CSXT until it filed its Reply Evidence,<sup>58</sup> and {

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Therefore, if the Board does not ignore CSXT’s proffered reciprocal arrangement evidence entirely,<sup>60</sup> it should set the fee paid by the CERR based on the fees in place under the governing agreements prior to the CSXT-NS reciprocal arrangement, adjusted to current levels ({ }).<sup>61</sup> Under the circumstances, however, the better evidence is the fee used by Consumers on Opening ({ }).

Finally, in section III.D.9, *infra*, Consumers explains why CSXT is wrong that the CERR should pay more than an actual cost-based lift fee<sup>62</sup> on cars

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<sup>58</sup> See Section III.D.5.e, *infra*.

<sup>59</sup> *Id.*

<sup>60</sup> *Cf. FMC*, 4 S.T.B. at 733.

<sup>61</sup> See Section III.D.5.e, *infra*.

<sup>62</sup> CSXT did not present any evidence in Reply that contradicted the fee calculated by Consumers on Opening.

originating at CSXIT's 59<sup>th</sup> Street intermodal facility. Contrary to CSXT's claims, and as explained further in Section III-A-3.b.iii, CSXIT is not properly considered an "affiliate" of CSXT, and there is no legitimate basis to require the CERR to assume any investment costs or operating expenses in connection with the 59<sup>th</sup> Street facility. The agreement between CSXIT and CSXT addressing terminal services clearly contemplates that the facility would handle traffic for third parties (such as the CERR) for compensation. Consistent with CSXT's Intermodal Service Directory No. 1, that compensation is the cost of one lift at origin and one lift at destination, which Consumers calculated and included in its Opening Evidence of CERR Operating Expenses.<sup>63</sup>

**5. Non-Road Property Investment**

CSXT did not raise any issues with respect to Non-Road Property Investment that are separate from its claims regarding Operating Expenses, which Consumers addresses in Part III-D of this Rebuttal.

**6. CERR Road Property Investment**

Consumers' Opening Evidence on road property costs for the CERR was supported by real-world data from projects in the areas where the CERR system would be built, developed by recognized experts in their respective fields, and consistent with Board precedent. Nevertheless, but predictably, CSXT inflates the CERR's road property costs by more than 60%, through a combination of faulty theories, defective analyses, and outright "padding of the bill." In its

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<sup>63</sup> See Section III.D.9, *infra*.

Rebuttal restatement, Consumers adjusts the appropriate components of road property investment to accommodate the addition of the 0.6 mile Buffington Connection, referenced *supra*. Otherwise, as detailed in Part III-F and summarized briefly in major respects below, CSXT’s principal Reply claims are without merit, and should be rejected.

CSXT’s land value witness presented an analysis with so many unsourced “hard coded” values that a complete evaluation is not possible, in direct contradiction of the Board’s July 15, 2015 Procedural Order.<sup>64</sup> What can be concluded, however, is that he unnecessarily divided the CERR into small segments unrelated to property use or characteristics, which led to an artificial increase in parcel appraised values; he used unscreened sales data, which led to his including appraisals for parcels far away from the CERR configuration; and he erroneously represented sales recordations, such that actively farmed land was claimed as residential, and listed acreage was understated by 50%, so a claimed \$65,696.00 sales price was really \$33,287.00.<sup>65</sup> All told, the errors and omissions in CSXT’s Reply on land value<sup>66</sup> preclude its acceptance in preference to Consumers’ well-sourced and documented evidence.

Similarly, Consumers’ Opening Evidence presented efficient costs for CERR roadbed preparation, based on data from the Michigan Department of

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<sup>64</sup> See Order served July 15, 2015, Appendix, Paragraph 9.

<sup>65</sup> See Section III.F.1.b, *infra*.

<sup>66</sup> CSXT’s proposed 16% land acquisition “adder” is also unsupported. See Section III.F.1.b.iv; *Sunbelt* at 103-104, *DuPont* at 140-141.

Transportation on actual, publicly bid projects for virtually identical common excavation work, consistent with Board precedent.<sup>67</sup> CSXT argues for a doubling of the cost, citing *R.S. Means*, but even the authority that it cites – *DuPont* – rejected the shipper’s actual cost evidence only because the benchmark project was very small in comparison to the SARR.<sup>68</sup> In this case, Consumers analyzed over 1,000 MDOT projects, and selected 21 that were located within 100 miles of the CERR route, and have characteristics that match well with the CERR’s requirements. Consumers confirmed its cost estimates using CSXT project authorization records and actual invoices to CSXT for the AFE work, and demonstrates that CSXT’s various cost-adding stratagems have no merit.<sup>69</sup>

CSXT’s Reply proposes a significant write-up of the costs for track materials presented by Consumers on Opening, in part because of the unnecessary additional construction that CSXT suggests is needed at Campbell, Barr Yard and the Dolton Interchange. As shown in Part III-A and summarized *supra*, those extra assets are not needed by the CERR, so the material and transportation costs associated with them should be excluded. As shown in Section III.F.3.a-c,

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<sup>67</sup> See *AEPCO 2011* at 86-87; *WFA I* at 86.

<sup>68</sup> *DuPont* at 148-149 (project covered 1.3 miles while the SARR was over 7,000 miles in length).

<sup>69</sup> See Section III.F.2.a.iv. These include CSXT’s addition of embankment costs that already were included in the MDOT bids, the proposal for additional mobilization costs when the Board’s standard SAC model already covers them, and CSXT’s argument for using data from totally unrelated and unrepresentative property in Wayne County (Detroit) in lieu of the Means Location Factor Index (which CSXT also uses), to drive up CERR road preparation costs.

however, CSXT also inflates the CERR's costs for track materials that are required by proposing the use of premium rail where Consumers has shown it is not justified by the train speeds and traffic density that characterize the CERR, and by using a high "ballpark" estimate of transportation costs for ballast, ties and rail. *See* Section III.F.3.b.ii-iv and c.iii. In contrast, Consumers uses more reasonable transportation rates which have been approved by the Board in prior cases,<sup>70</sup> and are verified by an actual 2015 invoice received by CSXT and produced in discovery.<sup>71</sup>

A principal difference between the parties with respect to bridges on the CERR concerns the Calumet Sag Channel Bridge and the Chicago Sanitary Channel Bridge, in the Chicago area. Consumers did not include costs for construction of these bridges on Opening, because the evidence showed that construction had been funded by the City of Chicago, not CSXT's predecessor. Consistent with precedent, since CSXT did not have to incur the expense when it lines were built, the CERR does not have to absorb the cost either.<sup>72</sup> CSXT includes costs for these bridges in its Reply, but presents no evidence that the carrier originally incurred them. Based on further research, Consumers confirms

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<sup>70</sup> *See, e.g., AEPCO 2011* at 99-100.

<sup>71</sup> It is this contemporary verifying evidence that distinguishes Consumers' presentation from that which was not accepted by the Board in *Sunbelt*. As the Board held there, reliance on facts determined in prior cases is proper where current confirming evidence also is present. *Id.* at 131. Consumers has offered such evidence here.

<sup>72</sup> *See, e.g., DuPont* at 156; *TMPA*, 6 S.T.B. at 798; *FMC*, 4 S.T.B. at 802.

in this Rebuttal that the bridges in fact were public projects, and no associated costs properly should be borne by the CERR.<sup>73</sup> In all other consequential respects, Consumers' presentation on the types and costs of bridges on the CERR adheres to previous Board decisions,<sup>74</sup> and represents the better evidence of record.

The physical buildings requirements for the CERR are quite modest, in keeping with its small size and relatively simple traffic base. CSXT proposes various write-ups of the building costs, most of which are derived from its inflated staffing levels, or adds deliberately redundant facilities for functions such as fueling of locomotives or various maintenance activities that are unnecessary or already accounted for in Consumers' Opening Evidence.<sup>75</sup> While some adjustments proposed by CSXT are legitimate and have been made in Consumers' Rebuttal restatement, most of the nearly \$15 million in costs that CSXT seeks to add are unsupported, and should be rejected.

In contrast to the vast majority of CSXT's proposed road property cost estimates, which are unsupported and without merit, Consumers' Rebuttal restatement accepts a number of CSXT's changes to the costs for signals and communications. However, its proposed 15% across-the-board labor mark-up on materials double-counts labor costs for the CERR's construction that Consumers already accounted for directly, and CSXT has overstated costs for foundations,

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<sup>73</sup> See Section III.F.5.a, *infra*.

<sup>74</sup> *E.g.*, *Sunbelt* at 138-143.

<sup>75</sup> See Section III.F.7, *infra*.



fencing and a site engineer. *See* Section III.F.6.a and b. Consumers rejects these adjustments.

In sum, Consumers' Rebuttal restatement revises its Opening total for road property investment by about 8.6%, from \$539.20 million to \$585.61 million. This amount, which is the product of the better evidence of record, is \$294.29 million less than the hyper-inflated costs proposed by CSXT.

#### 7. **Discounted Cash Flow Analysis**

CSXT substantively raises two (2) challenges to Consumers' Opening CERR cost of capital calculations,<sup>76</sup> neither of which has merit.

Proffering a made-for-litigation review of selectively identified, non-public data, CSXT argues for the addition of a 6% equity flotation cost to the CERR's cost of equity calculation, reprising a position that the Board has consistently rejected in every SAC proceeding where (as here) the complainant has contested the additional cost. CSXT's proposal both conflicts with the Board's established antipathy to litigation studies based on non-public data,<sup>77</sup> and it fails to meet the Board's standard – most recently articulated in *Sunbelt*<sup>78</sup> – for even considering an equity flotation cost adjustment, which requires that the railroad present evidence “of the equity flotation fee for stock issuances of a

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<sup>76</sup> In its Rebuttal restatement, Consumers corrects a transposition error in its initial presentation of the 2013 cost of debt, which CSXT noted in its Reply. *See* III-G-1, *infra*.

<sup>77</sup> *Duke/NS*, 7 S.T.B. at 145; *TMPA*, 6 S.T.B. at 603.

<sup>78</sup> *Sunbelt* at 184-185.

similar size (*and for transportation companies or other companies with a similar profile*) as that needed by the SARR.”<sup>79</sup> The “study” that CSXT offers in support of its 6% flotation fee, which is dramatically higher than the proposed fees that have been rejected by the Board in previous cases, reflects no transportation firm data, and because of its proprietary nature, cannot even be probed to verify the claimed costs or analyze the profiles of the included firms.

The Board has acknowledged that “the costs of debt and equity are related to the debt-to-equity ratio.”<sup>80</sup> Reflecting the Modigliani-Miller theorem,<sup>81</sup> this means, for example, that if debt is cheaper than equity and a firm in the real world attempts to lower its overall cost of capital by replacing equity with an increased debt load, the resulting higher risk from the added leverage would push up the cost of debt, rebalancing the overall cost of capital at the previous level. It follows, then, that if equity is made more expensive by adding an external factor, such as a flotation cost, a firm in the real world would respond by adjusting its capital structure to increase the share represented by debt, in order to mitigate or balance the higher cost of equity. The CERR, however, is prevented from using this real world tool by the Board’s SAC methodology, which effectively requires the CERR to adopt and maintain the railroad industry average debt/equity capital

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<sup>79</sup> *Id.* (emphasis supplied).

<sup>80</sup> *Methodology to be Employed in Determining the Railroad Industry’s Cost of Capital*, STB Ex Parte No. 664 (STB served Aug. 20, 2007) at 8.

<sup>81</sup> Modigliani, F. and Miller, M.H., *The Cost of Capital, Corporation Finance, and the Theory of Investment*, 47 *Am. Economic Rev.* 261-97 (June 1958).

structure. CSXT's equity flotation cost adjustment neither acknowledges this disconnect, nor considers the obvious availability of lower cost sources of equity available to the CERR, such as a private placement.<sup>82</sup> Particularly given the facts that real-world railroads amass their equity over time through a combination of public offerings and accumulated equity, and the Board has never accepted a challenged argument that a SARR should be forced to raise all of its equity at once in a single public offering, the burden on CSXT of proving that its 6% equity flotation cost adjustment is justified can only be met by the clearest showing under the *Sunbelt* standard.<sup>83</sup> CSXT has not carried its burden in this case.

Consumers' Part III-G also presents the many valid reasons why the Board should reconsider elements of its *Sunbelt* and *DuPont* decisions and recognize the CERR's ability to structure its interest payments on debt capital in the same manner as CSXT and the other Class I railroads. Consumers shows that the CERR's debt payment structure as presented on Opening is fully consistent with the SAC Constraint's assumption that a SARR's capital structure does not change over time, and explains both how the CERR's approach does reflect market scrutiny, and why previously-expressed concerns over the full coverage of

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<sup>82</sup> See III-G-6-12, *infra*.

<sup>83</sup> It should be noted that the proffered equity flotation costs rejected by the Board in the past all have been substantially lower than the 6% proposed by CSXT. See *Sunbelt* at 185; *DuPont* at 274; *AEPCO 2011* at 138; *Duke/CSXT*, 7 S.T.B. at 433.

capital costs (*i.e.*, principal) are assuaged.<sup>84</sup> Consumers also dispels CSXT's lesser criticisms, demonstrating that the railroad's claim that Consumers assumes a single 20-year debt issuance is simply wrong,<sup>85</sup> and showing that the CERR's approach to changing future interest rates and the retirement of debt over time is fully consistent with the Board's DCF model.<sup>86</sup>

Consumers' presentations on the issue of the CERR's cost of capital are the better evidence of record. Consumers and CSXT concur on the inflation indices to be applied to the CERR's road property, with the exception of the land value index, which is addressed in Part III-F.<sup>87</sup> There are no differences between the parties with respect to tax liability for the CERR, or those aspects of the capital cost recovery calculations other than the issues referenced above.

## **8. Results of the SAC Analysis**

In Part III-H, Consumers responds to the arguments raised by CSXT in opposition to Consumers' execution of the DCF model, beyond those already addressed *supra* and in Part III-G.

First, Consumers shows that it properly corrected the DCF model's capital carrying charge to reflect the constant capital structure assumed by the Board, by including a terminal interest value. CSXT's proposal to add interest

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<sup>84</sup> See III-G-13-16, *infra*.

<sup>85</sup> See III-G-17-18, *infra*.

<sup>86</sup> See III-G-18-19, *infra*.

<sup>87</sup> See III-G-21-22 *infra*.

payments for future replacement assets double-counts interest, and therefore should be rejected. *See* Section III.H.i.e, *infra*.

Second, Consumers demonstrates how the CERR's access to and use of bonus depreciation made available through certain statutes enacted and/or in effect during its construction period, is fully consistent with prior agency precedent,<sup>88</sup> which recognizes both a SARR's right to realize benefits and its obligation to assume costs that would be experienced by a real world company constructing a rail system during that time, regardless of whether the incumbent (CSXT here) experienced exactly the same benefits and costs at an earlier time.<sup>89</sup> CSXT's arguments to the contrary set up an improper double-standard, whereby it would retain all the advantages (in terms of prevailing prices, tax laws, timing of investment, etc.) that it enjoyed while its system was being built and assembled, while limiting the CERR only to those beneficial conditions that CSXT also experienced during the 2011-2014 time period, contrary to basic SAC theory.<sup>90</sup> *See* Section III.H.1.f.

Third, Consumers' execution of the Board's capital recovery methodology and its terminal value calculation incorporates the same correction of the historic model mismatch between the SARR's cost of capital and its cash-

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<sup>88</sup> *WTU*, 1 S.T.B. at 714; *McCarty Farms*, 2 S.T.B. at 525-529.

<sup>89</sup> *Sunbelt* at 188-189; *DuPont* at 277-279.

<sup>90</sup> *WTU*, 1 S.T.B. at 671-672.

flows that the Board incorporated in *DuPont* and *Sunbelt*.<sup>91</sup> While CSXT appears to dispute the validity of the correction, the Board made clear in *Sunbelt* that the terminal value adjustment made by Consumers is appropriate. *Sunbelt* at 193. In its Reply, CSXT claims that there are both conceptual and mathematical errors in the Board-approved approach, but neither criticism has merit. CSXT’s “conceptual” error confuses the model’s use of 20 years as a *maximum* amortization period with a fixed assumption for all purposes (a distinction which existed prior to *Sunbelt*), and its asserted “mathematical” error ignores the fact that lower than average interest payments during the second half of the 20-year amortization period are offset by higher than average payments during the first half.<sup>92</sup> Consumers’ reliance on the *Sunbelt* approach represents the better evidence of record.

Finally, Consumers shows that CSXT’s proposed adjustments to the standard URCS index used by Consumers to calculate the MMM ratios are without merit, for the same reasons as were acknowledged by the Board in *Sunbelt* and *DuPont*,<sup>93</sup> and that its argument for the belated introduction of a cross-subsidy analysis once the Board finds that CERR revenues exceed cost fails based on

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<sup>91</sup> See Section III.H.1.h, *infra*; *Sunbelt* at 193; *DuPont* at 282-284.

<sup>92</sup> See Section III.H.1.h, *infra*.

<sup>93</sup> See Section III.H.3, *infra*; *Sunbelt* at 196; *DuPont* at 285-286.

CSXT's own failure to identify any portion of the CERR that allegedly is not self-supporting.<sup>94</sup>

Consumers' Rebuttal restatement shows that total CERR revenues exceed SAC by significant margins in each year of the analysis period. Applying MMM properly and consistent with the Board's most recent and applicable precedent, Rebuttal Table III-H-2 shows the maximum R/VC ratios for each year of the model. As of the First Quarter of 2015, the maximum lawful rate for CSXT coal service to Campbell under the *Guidelines*' SAC Constraint was \$10.22 per ton, based upon an updated variable cost of \$2.85 per ton<sup>95</sup> and a MMM ratio of 358.6% for 2015.

**C. CSXT'S JANUARY 1, 2015 RATE INCREASE  
VIOLATED THE REVENUE ADEQUACY CONSTRAINT**

In its Opening Evidence (Part IV), Consumers showed that (1) CSXT had achieved revenue adequacy under the criteria set out in 49 U.S.C. § 10704(a)(2) on a long-term basis, and was likely to remain so into the future; and (2) as a result, under a proper application of the *Guidelines*' Revenue Adequacy Constraint, the January 1, 2015 rate increase imposed by CSXT on Consumers' Campbell traffic through Tariff 13952 was unlawful.

CSXT's Reply advances two (2) principal arguments in opposition to relief for Consumers under the Revenue Adequacy Constraint. First, CSXT

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<sup>94</sup> See Section III.H.3, *infra*; *WFA II* at 10.

<sup>95</sup> See Table II-A-1, *infra*.

claims that Consumers cannot pursue relief under both the SAC Constraint and the Revenue Adequacy Constraint of the *Guidelines* at the same time.<sup>96</sup> Second, CSXT asserts that it cannot be found revenue adequate for purposes of reviewing an individual rate under the *Guidelines*, because it never has been found revenue adequate under the Board’s annual industry “snapshot” test utilized in the *Ex Parte No. 552* series.

In Part IV of this Rebuttal, Consumers responds to and refutes every claim and assertion offered by CSXT, in detail and with clear and convincing evidence. As summarized below, neither of the carrier’s cornerstone arguments has merit.

Consumers’ right to simultaneously pursue relief under two (2) of the four (4) *Guidelines*’ constraints is well-established under prior, court-approved precedent. Starting with the *Guidelines* themselves, it long has been settled that “the various constraints contained in the CMP may be used individually or in combination” to determine whether a given rate or rate increase is reasonable.<sup>97</sup> In practice, the Board and its predecessor repeatedly have adjudicated rate cases brought by shippers under both the SAC and Revenue Adequacy Constraints,

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<sup>96</sup> See CSXT Reply at I-32. CSXT also advocates for the elimination of the Revenue Adequacy Constraint altogether, though it stipulates that “[t]he Board need not reach these issues” in this case. *Id.* at I-31.

<sup>97</sup> *Guidelines*, 1 I.C.C. 2d at 548. See also *Consol. Rail Corp.*, 812 F.2d at 1451.



ruling in some cases that relief should be awarded under the former test,<sup>98</sup> and in another that it would be granted under the latter.<sup>99</sup> Notably, in *CF Indus., Inc.*, the Board granted rate relief under the Revenue Adequacy Constraint despite the defendant's evidentiary assertion that the challenged rates were reasonable under SAC. *Id.*, 4 S.T.B. at 656-662.

CSXT does not attempt to dispute the governing precedents (realistically, it cannot), so much as it tries to ignore them, arguing that if its Campbell rates can be defended under the SAC Constraint, then any relief awarded under the Revenue Adequacy Constraint would give rise to an impermissible cross-subsidy.<sup>100</sup> CSXT's claim misstates the law in this area.

As the "logical first constraint" on a market dominant carrier's pricing,<sup>101</sup> the Revenue Adequacy Constraint applies before and independent of the SAC test. It would turn the entire theoretical predicate for CMP on its head if a methodological component that exists exclusively within the context of SAC was used to undermine the primary limitation on differential pricing represented by a different constraint. See IV-5-9, 32-37, *infra*. *Guidelines* makes clear that (a)

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<sup>98</sup> See *Bituminous Coal – Hiawatha UT to Moapa, NV*, 6 I.C.C. 2d 1, 7 (1989); *Ark. Power & Light Co., v. Burlington N. R.R., et al.*, 3 I.C.C. 2d 757, 782-783 (1987).

<sup>99</sup> *CF Indus., Inc. v. Koch Pipeline Co., L.P.*, 4 S.T.B. 637, 664 (2000) *aff'd sub nom. CF Industries, Inc. v. S.T.B.*, 255 F. 3d 816, 828 (D.C. Cir. 2001).

<sup>100</sup> CSXT Reply at I-33, citing *PPL Montana v. BNSF Ry.*, 6 S.T.B. 286 (2002) and *Otter Tail*. Neither of these cases involved claims raised under the Revenue Adequacy Constraint.

<sup>101</sup> *Guidelines*, 1 I.C.C. 2d at 535.

“CMP provides two approaches [Revenue Adequacy and SAC] for determining the revenue requirements of an efficient carrier;” (b) those requirements “can be calculated for the existing carrier by applying the revenue adequacy and management efficiency constraints;” (c) under either SAC or the Revenue Adequacy Constraint, “CMP will have defined the total amount of unattributable costs to which the shipper must contribute and focused on the traffic which can reasonably be expected to pay those costs;” (d) “[t]he result of this process is a rate structure which reflects long-run marginal costs, demand elasticity, and the differential pricing of unattributable costs--the same result that occurs under Ramsey pricing;” and (e) under the Revenue Adequacy Constraint, “the total unattributable costs of the existing system are subject to recovery via differential pricing.”<sup>102</sup> The Revenue Adequacy Constraint thus provides a top-down check against impermissible cross-subsidies.

In contrast, the rule against cross-subsidization cited by CSXT is exclusively a feature of the bottom-up SAC Constraint, as is clear from the Board’s standard summary of CMP:

CMP contains three main constraints on the extent to which a railroad may charge differentially higher rates on captive traffic. The revenue adequacy constraint is intended to ensure that a captive shipper will ‘not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting its current

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<sup>102</sup> *Id.* at 534 and n.35. Consumers is not required to invoke the management efficiency constraint, and has not done so.

and future service needs.’ Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d at 535-36. The management efficiency constraint is intended to protect captive shippers from paying for avoidable inefficiencies (whether short-run or long-run) that are shown to increase a railroad’s revenue need to a point where the shipper’s rate is affected. Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d at 537-42. *The SAC constraint is intended to protect a captive shipper from bearing costs of inefficiencies or from cross-subsidizing other traffic by paying more than the revenue needed to replicate rail service to a select subset of the carrier’s traffic base.*

*Sunbelt* at 5 (emphasis supplied).<sup>103</sup>

As Part IV, *infra*, and the Rebuttal Report of Dr. John Hennigan explain in detail, the Revenue Adequacy Constraint provides a Ramsey-efficient allocation of the attributable and unattributable costs of the defendant, as it actually exists. Real-world railroads such as CSXT routinely engage in the exercise of market power and internal cross-subsidization that causes one class of traffic (usually the captive traffic) to pay more so that another (usually competitive traffic) can pay less, and avoid bypass. That is the essence of differential pricing. The *Guidelines*’ Revenue Adequacy Constraint is intended to set the limit on such differential pricing,<sup>104</sup> and the prospect of a potential cross-subsidy plays no part in the determination, as a revenue adequate carrier is recovering its cost of capital on

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<sup>103</sup> The Board’s *PPL Montana* decision was a precursor. 6 S.T.B. at 291 (“The SAC test is intended to ensure that a shipper does not bear the costs of any facility from which it derives no benefit and that it does not otherwise cross-subsidize other traffic.”).

<sup>104</sup> *Guidelines*, 1 I.C.C. 2d at 535-536.

a system-wide basis and therefore is not entitled to any further differential pricing. *Guidelines* 1 I.C.C. 2d at 535-536.

Rate relief under the Revenue Adequacy Constraint is just as valid as that under SAC. Indeed, the Revenue Adequacy Constraint benefits from addressing real-world costs and real-world rates on a system-wide basis, as opposed to SAC, which entails the calculation of, *inter alia*, replacement costs, hypothetical construction and operations, future revenues and cross-over divisions of those revenues, future costs, the real cost of capital, and residual values, in order to determine the hypothetical revenue requirement, which is then allocated based on the system-average URCS costs of the real-world defendant. The Revenue Adequacy Constraint provides a less complicated implementation of Ramsey-pricing principles.

As noted, the SAC Constraint is a “bottom-up” test, where the focus is on a hypothetical, optimally efficient substitute for that portion of the defendant’s system that is used to provide the service to which the challenged rate applies. The Board’s cross-subsidy limits as developed in *PPL Montana* and *Otter Tail* apply solely in the context of this hypothetical substitute. As the Board stated in *PPL Montana*, “a basic purpose of the SAC test is that traffic not be subsidized by other traffic. Indeed, the purpose of the SAC test is to remove such cross-subsidies....” *Id.* 6 S.T.B. at 295, quoting *Arizona Electric Power Corp. v. B.N. and S.F. Ry. Co., et al.*, STB Docket 42058 (STB served December 31, 2001) at 6. CSXT’s attempt to elevate those limits to the status of a transcendent governor of

*all* aspects of CMP, including Revenue Adequacy, is without legal or theoretical support.<sup>105</sup>

CSXT’s second principal argument – that it cannot be found revenue adequate for purposes of the *Guidelines* and this case because it has not been found revenue adequate in the Board’s *Ex Parte No. 552* annual industry “snapshot” series – was rejected by the Board on June 15, 2015 when it denied CSXT’s Motion to Dismiss, which was *based on the same argument*. That Consumers can successfully pursue relief under the Revenue Adequacy Constraint using “other competent and probative evidence relative to the carrier’s revenue adequacy”<sup>106</sup> stands as the law of this case.

In Part IV, Consumers responds in detail to, and effectively rebuts each challenge offered by CSXT to the comprehensive evidence of the carrier’s revenue adequacy under 49 U.S.C. § 10704(a)(2) that Consumers presented on Opening. Likewise, Consumers shows that CSXT’s hyperbolic complaints about a “system-wide rate freeze” or “Nixon-era price controls” are distortions of the reality of the rate relief sought by Consumers under the Revenue Adequacy Constraint, relief that the clear weight of record evidence shows Consumers is entitled to receive.

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<sup>105</sup> See IV-32-37, *infra*.

<sup>106</sup> Decision served June 15, 2015 at 2.

**D. RATE RELIEF AND DAMAGES**

Based upon the evidence presented herein, and in Consumers' Opening Evidence, the Board should find that CSXT possesses market dominance over the transportation of coal from the BSNF interchange designated in Tariff CSXT-13952 to Campbell, in accordance with 49 U.S.C. §10707. The Board further should find that the rates set forth in Tariff CSXT-13952, as applied to Consumers' Campbell coal traffic, exceed maximum reasonable levels as determined under the SAC Constraint and the Revenue Adequacy Constraint of the *Coal Rate Guidelines*, and therefore are unlawful under 49 U.S.C. §10701(d).

**1. Prescription of Maximum Rates**

In accordance with the provisions of 49 U.S.C. §10704(a), Consumers is entitled to a Board order prescribing the maximum rates that lawfully may be charged by CSXT to transport coal to Campbell. The maximum rate should be the lower of the SAC rate and the Revenue Adequacy rate, subject to the 180% RVC jurisdictional threshold. For 2015, and through the first quarter of 2016, the maximum rates per ton for the predominant railcar type used in Campbell service<sup>107</sup> are as follows:

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<sup>107</sup> See Rebuttal Exhibit III-H-2.

<u>Quarter</u>	<u>SAC Maximum</u>	<u>Rev. Adequacy Maximum<sup>108</sup></u>	<u>Maximum Rate</u>
1Q15	\$10.22	{ }	\$10.22
2Q15	\$10.36	{ }	\$10.36
3Q15	\$10.29	{ }	\$10.29
4Q15	\$10.15	{ }	\$10.15
1Q16	\$11.51	{ }	\$11.51

The corresponding maximum reasonable rates under the SAC Constraint (expressed as RVC ratios) for the remainder of the DCF period are set forth below.

As noted *supra*, maximum rates over the same period under both the SAC Constraint and the Revenue Adequacy Constraint – and, thus, the maximum rates to be prescribed for application to Consumers’ Campbell coal traffic – must be determined quarterly following the Board’s publication of the RCAF-A for the subject quarter, starting with the Third Quarter of 2016.

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<sup>108</sup> As published by the Board, the changes in RCAF-A index values for 1Q2015 through 2Q2016 were (3.6%), (7.2%), (5.9%), (3.7%), (0.3%) and (3.3%) respectively. See *Quarterly Rail Cost Adjustment Factor*, Ex Parte No. 290 (Sub-No.8), (STB served December 17, 2014, March 20, 2015, June 18, 2015, September 18, 2015, December 18, 2015 and March 18, 2016). Over the full year, the RCAF-A experienced a net decline of 16.6%, so there is no change in the maximum Revenue Adequacy rate. In future quarters, the Revenue Adequacy rate would remain unchanged until and only to the extent that future increases in the RCAF-A fully offset the 16.6% net decline, as the same may be augmented by future declines in that index.

<u>Year</u>	<u>Maximum SAC RVC Ratio<sup>109</sup></u>
2016	419.9%
2017	310.6%
2018	325.4%
2019	327.3%
2020	302.3%
2021	298.8%
2022	280.3%
2023	282.0%
2024	252.4%

## 2. Award of Damages

Since January 1, 2015, Consumers has paid CSXT freight charges for coal transportation service to Campbell at tariff rates significantly higher than the maximum lawful rates summarized in the previous table. Pursuant to 49 U.S.C. §11704(b), upon the conclusion of this proceeding Consumers will be entitled to an award of damages in the principal amount of the difference between the charges that it actually paid from January 1, 2015 through the date of CSXT's compliance with the Board's prescription order, and recalculated charges for the same period based on the applicable maximum rates, together with interest from the first date of payment of the unlawful charges calculated using the U.S. Prime Rate as published in the *Wall Street Journal*.<sup>110</sup>

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<sup>109</sup> See Exhibit III-H-2.

<sup>110</sup> See *Ex Parte No. 715* at 34-35 and Appendix A.



Respectfully submitted,

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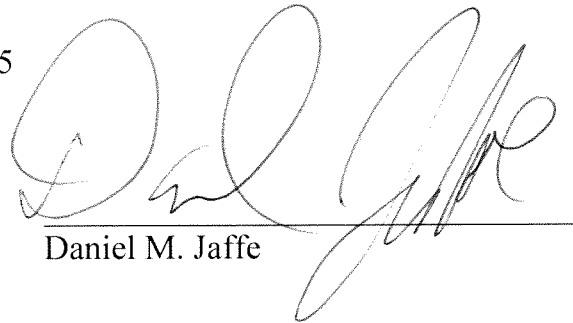
Dated: May 20, 2016

Attorneys & Practitioners

**CERTIFICATE OF SERVICE**

I hereby certify that this 20<sup>th</sup> day of May, 2016, I have caused copies of the Rebuttal Evidence of Complainant Consumers Energy Company to be served by hand upon counsel for Defendant CSX Transportation, Inc. as follows:

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## **II Market Dominance**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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<b>CONSUMERS ENERGY COMPANY</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. NOR 42142</b>
	)	
<b>CSX TRANSPORTATION, INC.</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

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**PART II**

**MARKET DOMINANCE**

The evidence establishes that the Board has jurisdiction to prescribe the maximum reasonable rates that CSXT can charge for common carrier coal transportation service from the Chicago interchange to the Campbell Station, which currently takes place under Tariff CSXT-13952. CSXT does not dispute that the challenged rate substantially exceeds the 180% jurisdictional RVC ratio prescribed by 49 U.S.C. § 10707(d)(1), and when one cuts through the hyperbole, misrepresentations and ungrounded speculation offered by CSXT in Part II of its Reply, the better evidence of record shows that Consumers cannot avail itself of an operationally and economically feasible modal alternative to CSXT rail service that would compel CSXT to maintain reasonable rates to Campbell.

## II. A. QUANTITATIVE EVIDENCE

CSXT concedes that the challenged rates exceed the 180% revenue/variable cost ratio threshold for quantitative market dominance prescribed by 49 U.S.C.

§ 10707(d)(1). CSXT Reply at II-A-1.<sup>1</sup>

### 1. Traffic and Operating Characteristics

The only point of dispute between the parties concerning the variable costs for the subject movement relates to the “loaded miles” component of the nine (9) traffic and operating characteristics used in the Board’s Phase III URCS model. As Consumers predicted,<sup>2</sup> CSXT advocates an adjustment to the URCS-prescribed convention that the number of miles that CSXT moves Consumers’ trains in the loaded direction is doubled to set the total round-trip miles used for the URCS variable cost calculation.<sup>3</sup>

CSXT’s proposed, movement-specific adjustment purportedly accounts for the interchange arrangement that CSXT has with BNSF Railway, whereunder each operates over a few miles of the other’s track in the loaded (BNSF) and empty (CSXT) directions.<sup>4</sup> CSXT argues that it is not seeking a movement-specific adjustment to URCS because it wants to add miles in the loaded direction (when BNSF handles the trains)

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<sup>1</sup> As was the case with its Opening Evidence, Consumers’ Rebuttal calculations of variable costs and other evidence presented in Part II-A are sponsored by L.E. Peabody & Associates, Inc. Vice President, Timothy D. Crowley.

<sup>2</sup> See Consumers Opening at II-5.

<sup>3</sup> See *Major Issues* at 58.

<sup>4</sup> See CSXT Reply at II-A-2-3.

rather than the empty direction (where the “extra” CSXT-operated miles actually are).<sup>5</sup> In reality, however, CSXT is only offering variants on arguments that parties have advanced in prior cases to no avail,<sup>6</sup> in collaterally attacking the Board’s rulings in *Major Issues*.<sup>7</sup> Every petitioner has claimed a valid reason for its proposed departure from unadjusted system average URCS costs using only the nine (9) designated inputs, and every petitioner has been turned away by the Board. There is no basis for CSXT to be treated any differently here.

CSXT insists that it “is *not* proposing an URCS adjustment to add empty movement miles”<sup>8</sup> because the six (6) miles in question are described as CSXT track miles over which BNSF – but not CSXT – handles the loaded Consumers train. However, it is not BNSF’s variable costs that are at issue here.<sup>9</sup> The miles that are “excluded” by the *Major Issues* rule against adjustments are the six (6) miles of BNSF track over which CSXT handles Consumers’ trains in the empty direction, because they

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<sup>5</sup> *Id.* at II-A-5.

<sup>6</sup> *See, e.g., Kansas City Power & Light Co.*, at 6.

<sup>7</sup> *Major Issues* at 60.

<sup>8</sup> *See* CSXT Reply at II-A-5 (emphasis in original).

<sup>9</sup> CSXT wrongly suggests that the relevant input is the number of CSXT-owned track miles that are used to transport loaded movements. *See* CSXT Reply at II-A-5. The correct input is the number of miles that *CSXT handles the train* in the loaded direction. *See* ICC, Uniform Rail Costing System, Phase III Movement Costing Program User’s Manual, October 1989, at 4.

exceed the number of miles that *CSXT* handles the trains in the loaded direction.<sup>10</sup> As the Board held in *Major Issues* when addressing this very issue:

While we recognize the carriers' desire to have the URCS calculation reflect more accurately the actual cost of moving the issue traffic, we find that such piecemeal adjustments would tend to bias the results in favor of the railroads. As discussed above, selective replacement of system-average statistics – which tend to benefit the railroads – without allowing for counterbalancing adjustments that benefit shippers – which often require information not maintained in sufficient detail or at all by the railroads – may bias the entire analysis, rendering the modified URCS output unreliable. Shippers note this potential for unfairness and bias in their reply.

*Major Issues* at 58 (footnotes omitted).

*CSXT* also argues that Consumers' ATC calculations for purposes of the SAC analysis reflect the same adjustment for the BNSF loaded move between 22<sup>nd</sup> Street and 71<sup>st</sup> Street that *CSXT* seeks for purposes of variable costs. *CSXT Reply* at II-A-5. This is incorrect. Variable costs for jurisdictional threshold purposes focus on the issue traffic. For ATC, in contrast, the focus is on non-issue traffic, and under *Major Issues* variable costs are based on the on-SARR and off-SARR segments. *Id.* at 20. The 22<sup>nd</sup> Street – 71<sup>st</sup> Street segment, which the CERR assumes the cost of building and maintaining, is part of the “on-SARR” route, so traffic that enters the CERR at 22<sup>nd</sup> Street

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<sup>10</sup> *CSXT* asserts that its proposed increase in the number of loaded miles would be “offset” by the exclusion of the six (6) miles that *CSXT* handles empty trains over BNSF's lines (*see CSXT Reply* at II-A-4), but that is not true. The net effect would still be to adjust the movement miles for URCS purposes upward by six (6), as it is the loaded miles that serve as the relevant URCS input.

has its on-SARR variable costs calculated from that point. If that procedure was not followed for ATC purposes, then CSXT would be credited with revenue that it did not earn, and the CERR would be denied any revenue allocation to cover that portion of its on-SARR costs. The Board always has acknowledged a difference between variable costs calculated for purposes of the jurisdictional threshold, and those determined under ATC, *inter alia*, because a SARR is not expected to operate in the same manner as the defendant railroad, and typically does not. Assuming *arguendo* that one could detect any theoretical inconsistency between the two models, however, it would be a consequence of the Board's *Major Issues* ruling,<sup>11</sup> and would be immaterial in this case since the maximum reasonable rates for CSXT service to Campbell under the *Guidelines* are well above 180% of variable costs in each year of the DCF period.

## 2. Variable Costs

As CSXT notes,<sup>12</sup> subsequent to Consumers' filing of its Opening Evidence the Board released its 2014 URCS. In its Rebuttal, Consumers accepts CSXT's update and recalculates variable costs using the Board's 2014 CSXT URCS. Tables II-A-1-5, below, update Consumers' previous calculations of variable costs using the Board's 2014 CSXT URCS. As updated to 1Q2016 levels, the relevant variable cost for the

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<sup>11</sup> If the Board decides to revisit its current ban on movement-specific adjustments to Phase III URCS costs for jurisdictional determinations, it always can do so in an appropriate, public notice-and-comment rulemaking proceeding.

<sup>12</sup> See CSXT Reply at II-A-6, n. 10.



transportation to which the challenged rate applies is \$2.74 per ton.<sup>13</sup> As of January 1, 2016, CSXT had increased the common carrier rate under Tariff CSXT-13952 applicable to Consumers' Campbell coal traffic to \$15.33 per ton.<sup>14</sup> The RVC ratio for that rate is 559%.<sup>15</sup>

Table II-A-1  
1Q 2015 URCS Phase III Unit Costs 1/

<u>Route</u>	<u>Consumers</u>	<u>CSXT</u>	<u>Consumers</u>
(1)	<u>Opening</u>	<u>Reply</u>	<u>Rebuttal</u>
(1)	(2)	(3)	(4)
1. Loaded Miles	164.0	170.0	164.0
2. Base Year URCS Dataset	Consumers 2014 URCS	STB 2014 URCS	STB 2014 URCS
3. Variable Costs Per Ton	\$3.04	\$3.13	\$3.04
4. Index to 1Q 2015	0.93673	0.93673	0.93673
5. Indexed Variable Cost	\$2.85	\$2.93	\$2.85
6. Rate per Ton	\$14.95	\$14.95	\$14.95
7. R/VC	525%	510%	525%

1/ See CSXT Rebuttal e-workpaper "Consumers Rebuttal VC\_JT.xlsx," tab "Tables for II-A Text."

<sup>13</sup> See Consumers Rebuttal e-workpaper "Consumers Rebuttal VC\_\_JT.xlsx." tab "1Q16," cell M33.

<sup>14</sup> See *id.*, tab "1Q16," cell M39. See also Consumers Rebuttal e-workpaper "Tariff CSXT-13952."

<sup>15</sup>  $\$15.33 \div \$2.74 = 5.5949$ .

Table II-A-2  
2Q 2015 URCS Phase III Unit Costs 1/

<u>Route</u>	<u>Consumers</u> <u>Opening</u>	<u>CSXT</u> <u>Reply</u>	<u>Consumers</u> <u>Rebuttal</u>
(1)	(2)	(3)	(4)
1. Loaded Miles	164.0	170.0	164.0
2. Base Year URCS Dataset	Consumers 2014 URCS	STB 2014 URCS	STB 2014 URCS
3. Variable Costs Per Ton	\$3.04	\$3.13	\$3.04
4. Index to 2Q 2015	0.94856	0.94856	0.94856
5. Indexed Variable Cost	\$2.89	\$2.97	\$2.88
6. Rate per Ton	\$14.95	\$14.95	\$14.95
7. R/VC	517%	503%	519%

1/ See CSXT Rebuttal e-workpaper "Consumers Rebuttal VC\_JT.xlsx," tab "Tables for II-A Text."

Table II-A-3  
3Q 2015 URCS Phase III Unit Costs 1/

<u>Route</u>	<u>Consumers</u> <u>Opening</u>	<u>CSXT</u> <u>Reply</u>	<u>Consumers</u> <u>Rebuttal</u>
(1)	(2)	(3)	(4)
1. Loaded Miles	164.0	170.0	164.0
2. Base Year URCS Dataset	Consumers 2014 URCS	STB 2014 URCS	STB 2014 URCS
3. Variable Costs Per Ton	\$3.04	\$3.13	\$3.04
4. Index to 3Q 2015	0.94269	0.94269	0.94269
5. Indexed Variable Cost	\$2.87	\$2.95	\$2.87
6. Rate per Ton	\$14.95	\$14.95	\$14.95
7. R/VC	521%	507%	521%

1/ See CSXT Rebuttal e-workpaper "Consumers Rebuttal VC\_JT.xlsx," tab "Tables for II-A Text."

Table II-A-4  
4Q 2015 URCS Phase III Unit Costs 1/

<u>Route</u> (1)	<u>Consumers</u> <u>Opening</u> (2)	<u>CSXT</u> <u>Reply</u> (3)	<u>Consumers</u> <u>Rebuttal</u> (4)
1. Loaded Miles	164.0	170.0	164.0
2. Base Year URCS Dataset	Consumers 2014 URCS	STB 2014 URCS	STB 2014 URCS
3. Variable Costs Per Ton	\$3.04	\$3.13	\$3.04
4. Index to 4Q 2015	0.92915	0.92915	0.92915
5. Indexed Variable Cost	\$2.83	\$2.91	\$2.82
6. Rate per Ton	\$15.07	\$15.07	\$15.07
7. R/VC	533%	518%	534%

1/ See CSXT Rebuttal e-workpaper "Consumers Rebuttal VC\_JT.xlsx," tab "Tables for II-A Text."

Table II-A-5  
1Q 2016 URCS Phase III Unit Costs 1/

<u>Route</u> (1)	<u>Consumers</u> <u>Opening</u> (2)	<u>CSXT</u> <u>Reply</u> (3)	<u>Consumers</u> <u>Rebuttal</u> (4)
1. Loaded Miles	164.0	170.0	164.0
2. Base Year URCS Dataset	Consumers 2014 URCS	STB 2014 URCS	STB 2014 URCS
3. Variable Costs Per Ton	\$3.04	\$3.13	\$3.04
4. Index to 1Q 2016	0.90092	0.90092	0.90092
5. Indexed Variable Cost	\$2.74	\$2.82	\$2.74
6. Rate per Ton	\$15.33	\$15.33	\$15.33
7. R/VC	559%	544%	559%

1/ See CSXT Rebuttal e-workpaper "Consumers Rebuttal VC\_JT.xlsx," tab "Tables for II-A Text."

## II. B. QUALITATIVE MARKET DOMINANCE

“Simply put, all it takes is a dock costing roughly \$2.87 per ton of delivered coal.”<sup>16</sup>

To hear CSXT tell the story, Consumers Energy Company – a public utility under the regulatory scrutiny of the Michigan Public Service Commission and bound by law to control costs and serve the interests of its ratepayers – sat idle for decades and refused to take advantage of readily available and inexpensive options to permanently maintain reasonable coal transportation rates to Campbell through effective competition; *i.e.*, choosing instead to spend millions of dollars on a proceeding before the Board, in an effort to secure a temporary prescription of rates averaging over 300% of CSXT’s system average variable costs.<sup>17</sup> Well.

As part of its Opening Evidence, Consumers demonstrated that despite several investigative efforts – the most recent of which took place in 2014 – it was never able to identify a feasible and economically supportable competitive transportation alternative to CSXT for the delivery of coal from the Chicago area to Campbell. Consultants retained by Consumers studied both direct and “indirect” hypothetical options,<sup>18</sup> but in each case there were operational, legal and/or economic impediments to their feasibility. Evaluating the collective work of its consultants in 2014, Consumers prepared internal economic summaries of the capital and operating costs associated with

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<sup>16</sup> See CSXT Reply at II-B-51.

<sup>17</sup> See III-H-4, *infra*.

<sup>18</sup> See Consumers Opening at II-16-32.

each “option,” which demonstrated that none represented effective alternatives to CSXT.<sup>19</sup> Consumers’ previous preliminary analyses were verified, updated and supplemented by its expert witness, Dr. Ralph Barbaro, who confirmed the lack of effective, competitive transportation alternatives to CSXT rail service to Campbell.<sup>20</sup>

In Reply, CSXT concedes that the only form of hypothetical competition that is relevant to the market dominance determination in this case is direct competition; *i.e.*, transportation between the Chicago area BNSF interchange or the KCBX vessel terminal, and the Campbell Station.<sup>21</sup> However, CSXT goes on to argue for an unprecedented ruling by the Board: a finding that CSXT does not possess market dominance over coal deliveries to Campbell, not because Consumers enjoys any *actual* alternative to CSXT service, but because Consumers allegedly *could create* such an alternative through massive and risky capital investments in two (2) projects that also would be subject to extensive federal and state permitting requirements and regulations: (1) a lake vessel movement from the KCBX South Terminal to an as-yet unbuilt coal unloading platform in Pigeon Lake, near the Campbell Station; or (2) a vessel move from

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<sup>19</sup> *Id.* at II-26-27, 31-32, 46-49. CSXT’s statement that “Consumers cannot cite a single contemporaneous document to support its claims” (CSXT Reply at II-B-27) is absolutely false. {

} *both* of which were produced to CSXT in discovery.

<sup>20</sup> *See* Consumers Opening at II-32-35, 51-52, and Exhibit II-1 (“Barbaro Report”) at 48-53, 66-69, 86-91, 114-120.

<sup>21</sup> *See* CSXT Reply at II-B-8. *See also* Consumers Opening at I-21-23.

KCBX to Consumers' now-shuttered Cobb Station near Muskegon, MI, for further transfer to the MSRR for delivery to Campbell over as-yet unbuilt new rail facilities.<sup>22</sup>

In all of the cases decided under the *Coal Rate Guidelines* since their adoption, the Board has never made a market dominance ruling in the nature of that sought by CSXT here. As shown in this Part II-B,<sup>23</sup> there is no merit to CSXT's claims, and the Board should confirm the carrier's market dominance at Campbell.

First, as Consumers showed on Opening, "effective competition" means considerably more than theoretical access to a hypothetical option. Under governing law, the alternative must pose a threat sufficient to compel a pricing response from the defendant railroad, and must be shown to discipline the railroad's rates at reasonable levels. Even with the unrealistically low capital and operating cost estimates offered by CSXT, its proffered alternatives only reflect per ton charges that are near or actually higher than the tariff rate *under challenge*, which at over 500% of variable costs cannot be presumed to be reasonable. *See FMC*, 4 S.T.B. at 718. Similarly, while CSXT refers repeatedly to {

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<sup>22</sup> *See* CSXT Reply at II-B-6.

<sup>23</sup> Facts related to actions taken by Consumers as described in this Part are verified by Brian D. Gallaway, Consumers' Executive Director of Fossil Fuel Supply. Mr. Gallaway's qualifications are detailed in Part V of Consumers' Opening Narrative. This Rebuttal Part II-B also is supported by the Rebuttal Report of Dr. Barbaro Rebuttal (Rebuttal Exhibit II-B-1), whose qualifications also are detailed in Opening Narrative Part V, and by the Verified Statement of Michael Petro and Paul Bovitz of Advisian Inc., a unit of WorleyParsons Resources & Energy (Rebuttal Exhibit II-B-2). Messrs. Petro and Bovitz's qualifications and experience are detailed in Part V of this Rebuttal.

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Second, while coal obviously does move on the Great Lakes generally, and was delivered by vessel to the Cobb Station (which was designed for vessel service and is now closed), there are significant geographic, physical, historical and regulatory differences between the circumstances at Cobb and those at Campbell that completely contradict CSXT's claims that the feasibility of water transport to Cobb "proves" its feasibility at Campbell. One key feature that the two (2) stations do have in common, however, is that each is captive: Campbell to rail and Cobb to water. As shown herein, rail service to Cobb was never considered a realistic alternative by Consumers, {

} CSXT's position that "ferocious" competition at Cobb provides a benchmark for evaluating competition at Campbell is a fallacy.

Third, as shown herein and in Dr. Barbaro's Rebuttal Report, neither the Direct Water nor the Cobb-Rail Routes advanced by CSXT are feasible alternatives that would pose an effective competitive threat to CSXT rail service. As unproven projects that would entail tens or even hundreds of millions of dollars in new capital investment by Consumers, prudence and Board precedent support the assumption that they would have to be able to replace CSXT service entirely, in order to *ensure* the benefits of actual competition. However, the undisputed seasonality of vessel transportation on Lake Michigan coupled with Consumers' longstanding contractual commitments {

} – commitments that cannot be ignored or assumed away – means that reliance on CSXT *cannot* be avoided, due to the lack of essential coal storage capacity at KCBX (another fact that CSXT does not dispute). Under these circumstances, neither the Direct Water nor the Cobb-Rail “option” is operationally viable.

Even if one assumes – as CSXT obviously does – that Consumers would only need to replace CSXT for a percentage of Campbell’s annual coal requirements, with CSXT continuing to deliver the balance, the better evidence shows that neither of CSXT’s proffered options is viable.<sup>24</sup> As Dr. Barbaro details, and as summarized herein, CSXT and its witnesses ignore or irrationally minimize numerous legal and regulatory obstacles both to a Pigeon Lake unloading facility and the Cobb-Rail “option,” including (but not limited to): (i) the virtual “taking” of Pigeon Lake and the complete disruption of its longstanding recreational use that would result from the Direct Water movement, which would render dock permitting unlikely; (ii) the failure of CSXT’s consultants’ Pigeon Lake platform design to comply { }; (iii) the lack of any evidence of sufficient available vessels of the size that CSXT’s consultants say is needed for the Pigeon Lake alternative; and (iv) the terms of MSRR’s lease from

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<sup>24</sup> CSXT’s Reply is predicated on the presumed diversion of 75% of Consumers’ Campbell requirements. However, as Dr. Barbaro shows, limitations on capacity at KCBX and errors in the overly optimistic assumptions by CSXT’s consultants make it more likely that the actual hypothetical diversion percentage { } which in turn means an even lesser likelihood that the “option” could discipline CSXT’s pricing, and an even higher rail rate premium cost for the portion of Campbell’s annual requirements that would remain wholly captive to CSXT. *See* Barbaro Rebuttal Report at 52-53.



CSXT, which {  
} alternative.

CSXT offers the opinions of a certain “Captain Hogan” on such crucial matters as the design of the Pigeon Lake dock facilities (CSXT Reply at II-B-7) and vessel availability (*id.*, at II-B-38). However, Mr. Hogan authored no report or statement, and submitted no workpapers or supporting data of any kind to allow for an evaluation of the opinions that are attributed to him. Under Board rules, therefore, those opinions are entitled to no weight. *FMC Wyoming*, 4 S.T.B. at 733. *See also AEPCO 2011* at 46.

CSXT also grossly understates the relevant capital and operating costs properly attributable to each offered alternative. While they are detailed *infra* and in Dr. Barbaro’s Rebuttal Report, some of the more notorious errors are: (i) omitting entirely the cost to both options of covering the premium that CSXT certainly would charge to transport lesser percentages of the Campbell coal volumes after losing the rest to an alternative mode, which the best evidence shows is *at least* { } per ton and in actuality would be as much as { } (ii) artificially reducing the KCBX terminal transfer charge by more than { } per ton based on an outdated contract that does not reflect current or even recent conditions; and (iii) omitting the vessel and rail demurrage costs that inevitably would result from CSXT’s consultants’ overly optimistic vessel operations assumptions. Corrected for demonstrable errors and omissions, a more accurate estimate of the per ton costs of CSXT’s “alternatives” confirms that they do not represent effective, competitive options:

	<u>CSXT</u>	<u>Corrected</u> <sup>25</sup>
Direct Water	{ }	{ }
Cobb-Rail	{ }	{ }

Fourth, CSXT seriously misrepresents both the nature and the results of Consumers’ previous internal reviews of potential transportation alternatives for Campbell. The studies that Consumers discussed on Opening were preliminary analyses that never offered conclusions regarding whether particular alternatives represented effective competition for CSXT. The consultants’ scope of work was limited to a first level review of operational feasibility, principally from an engineering standpoint. Neither was asked for or offered an opinion regarding economic feasibility, and each identified for further, detailed study a number of permitting and regulatory challenges that stood as potential obstacles to each project’s moving forward. This is confirmed herein by the Verified Statement of the authors of the 2014 WorleyParsons Report.<sup>26</sup> Dr. Barbaro’s Opening Report, which the WorleyParsons authors verify did not contradict their own limited analyses, updated the prior cost estimates and extended the analyses’ scope and detail, leading to confirmation of the conclusions reached by Consumers internally in 2014: that when all associated operating and capital costs are considered,

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<sup>25</sup> See Barbaro Rebuttal Report at Figures 1-1 and 1-3.

<sup>26</sup> See Petro and Bovitz V.S. at 25-28. This Verified Statement is submitted in direct response to two (2) false factual assertions made by CSXT on Reply that Consumers had no reason to anticipate: (1) that the WorleyParsons and Spicer reports actually concluded that vessel transportation represented an effective competitive alternative to rail; and (2) that Muskegon Lake and Pigeon Lake are virtually identical bodies of water.

none of the studied “options” represented a feasible, economically competitive alternative to CSXT rail service.

Fifth, as Consumers showed on Opening, application of the Board’s Limit Price Test further confirms the captivity of Campbell to CSXT. CSXT’s various objections to the use of this tool have been addressed and rejected by the Board in previous cases, and do not warrant an extended, repetitive response in this Rebuttal. However, as shown *infra*, if the Board chooses to apply the test in this case, there is no justification for CSXT’s results-oriented “short-haul” adjustment,<sup>27</sup> and CSXT’s “false positives” claim<sup>28</sup> is undermined by the fact that the Cobb Station never was an example of effective intermodal competition, as CSXT {  
} to make the significant investment needed to make Cobb accessible to rail service.

Finally, if the Board is looking for a point of comparison among Consumers’ facilities against which to gauge the effect of competition, CSXT’s pricing at Karn-Weadock is the proper standard. While CSXT attempts to avoid the obvious with a “some destinations are more competitive than others” feint, the CSXT pricing history at this undeniably competitive (because all serving modes regularly bid for the business) station demonstrates Campbell’s captivity: though the distance from Chicago to

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<sup>27</sup>*Id.* at 67-69.

<sup>28</sup> *See* CSXT Reply at II-B-62-64.

Essexville, MI is twice that from Chicago to Campbell, Karn-Weadock enjoyed rates from CSXT that were some { } than Campbell on a *nominal* basis.

1. **Market Dominance Is The Absence of *Effective Competition***

As the Board has held repeatedly, and with court approval, the core criterion of qualitative market dominance is not simply whether a transportation alternative (real or hypothetical) exists, but whether it is shown to have exerted pressure on the incumbent railroad “to perform up to standards and at reasonable prices, or lose desirable business.” *Mkt. Dominance Determinations & Consideration of Prod. Competition*, 365 I.C.C. 118, 129 (1981), *aff’d sub nom. W. Coal Traffic League v. United States*, 179 F. 2d 772 (5th Cir. 1983) (en banc). *See also DuPont*, at 17, citing *Ariz. Pub. Serv. Co. v. United States*, 742 F. 2d 664, 651 (D.C. Cir. 1984).

In addressing the question whether an alleged alternative is “sufficiently competitive...to bring market discipline to [a railroad’s] pricing,”<sup>29</sup> a particularly relevant consideration is the relationship between the price (or cost) of the erstwhile alternative and the rates set by the dominant railroad. If the cost to the shipper of accessing a potential alternative transporter is at a level that still allows the incumbent to price like a monopolist, effective competition does not exist.<sup>30</sup> As the Board held in *FMC*:

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<sup>29</sup> *West Tex. Utils. Co.*, 1 S.T.B. at 645 (quoting *Metro. Edison Co.*, 5 I.C.C. 2d at 410).

<sup>30</sup> *DuPont*, at 17.

The fact that [the railroad] matches prices set by alternatives with significantly higher costs, while maintaining a dominant market share, is not enough to demonstrate effective competition for the traffic at issue.

4 S.T.B. at 718. CSXT’s Reply presentation fails this test.

Viewed properly through the lens of a firm faced with a decision whether to risk tens or hundreds of millions of dollars in capital to create “effective” competition where it does not exist – which prudently has to consider only options that completely replace the incumbent – neither the CSXT Direct Water alternative nor its Cobb-Rail option are operationally feasible, *inter alia*, due to the unavailability of essential winter coal storage capacity at KCBX.<sup>31</sup>

If the Board nevertheless enters CSXT’s partial diversion scenario, and assumes away all the other obstacles to feasibility addressed in this Part (*e.g.*, dock permitting challenges, the MSRR lease terms {

} etc.), the cost estimates offered by CSXT for each of its “alternatives” are unrealistically low.<sup>32</sup> However, even accepting CSXT’s consultants’ deeply flawed calculations at *face value*, CSXT has posited alternatives with prices that, respectively, are just { } the challenged tariff rate, which itself is more than 500% of the variable cost of service. All CSXT has “shown” is that the only

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<sup>31</sup> See Consumers Opening at II-16-19.

<sup>32</sup> Correcting for only two (2) of the more obvious errors made by CSXT’s consultants – artificially discounting the terminal transfer costs at KCBX and omitting the *minimum* CSXT monopoly rate premium on the Campbell coal that still would have to move by rail – increases those costs by at least { } for each option.

potential alternatives to CSXT rail service to Campbell don't "prevent [CSXT] from charging rates above 500% of variable costs," which precedent holds is "not placing sufficient discipline on the carrier's behavior" to constitute effective competition.

*TPI* at 5. *See also M&G* at 4.

CSXT's Reply likewise fails to contradict Consumers' showing on Opening that notwithstanding the parties' periodic discussions of Consumers' potential investigation of possible transport "options" during negotiations over past contracts, CSXT never made any meaningful rate concessions in response to the prospect of losing the Campbell business to another carrier or mode.<sup>33</sup> While CSXT is fond of referencing {

}<sup>35</sup> None of the agreements that followed { }

And while CSXT indeed may have *considered* whether Consumers might pursue some of the actions discussed in negotiations, documents related to negotiations over the past

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<sup>33</sup> *See* Consumers Opening at II-55-56.

<sup>34</sup> *See* CSXT Reply at II-B-25.

<sup>35</sup> *See* e-workpaper { }

decade, and especially in 2014,<sup>36</sup> clearly show that the {  
} CSXT.<sup>37</sup>

The Board acknowledges the significant difference between statements made in the course of negotiations and concrete pricing actions taken by a railroad in response to genuine competition. As it explained in *FMC*, in the context of allegations of effective competition from a motor carrier transload operation:

Our conclusions here are not altered by statements made by FMC officials over the past five years – in rate negotiations with UP, in internal FMC memoranda, and in a verified statement submitted to us in the UP/SP merger proceeding – indicating that UP’s soda ash transportation is ‘competitive.’ Statements made to UP in the course of rate negotiations can only be regarded as posturing in aid of FMC’s negotiation position.

The internal memoranda (presumably prepared in support of those same negotiations) are not necessarily inconsistent with FMC’s position here. The transload alternative does impose an outer limit on the rate that UP can charge, although UP can exercise considerable market power before reaching that outer limit. In other words, there is a competitive constraint, even though there is not effective competition.

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<sup>36</sup> The law is clear that the most relevant time period for assessing market dominance is the period covered by the shipper’s complaint, which in this case is from January 1, 2015 forward. *Consol. Papers, Inc.*, 7 I.C.C. 2d at 345, 347.

<sup>37</sup> See {

}

4 S.T.B. at 718, citing *Ariz. Pub. Serv. Co.*, 742 F. 2d at 650-51 (footnote omitted). As Consumers showed on Opening and CSXT does not really contest with actual evidence, the same conclusions apply in this case. Given the many serious flaws in the merits of CSXT's market dominance claims, which are addressed in the remainder of this Part II-B, the Board's jurisdiction over the challenged rate is clear.

**2. There Is No Effective Competitive Replacement for CSXT Service**

Consumers' Opening Evidence established that (i) because winter conditions on Lake Michigan confine vessel transportation to nine (9) months each year; (ii) Consumers' { } and (iii) the KCBX Terminal at Chicago lacks the capacity to store coal over the winter, vessel transportation through KCBX could not represent an effective, competitive replacement for CSXT as the transporter of Campbell's annual coal requirements.<sup>38</sup>

CSXT does not dispute any of these facts, which means they now stand as the best evidence of record. *DuPont* at 108; *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub. No. 1) (STB served Sept. 5, 2007) at 92. Instead, CSXT argues that it is not necessary that the massive capital planning projects that its Direct Water and Cobb-Rail Routes contemplate must assume complete replacement of CSXT in order to produce "effective completion," and that Consumers simply should

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<sup>38</sup> Consumers Opening at II-16-19; Barbaro Report at 21-25, 35-36.



renegotiate { } to remove {

} delivered during the Lake Michigan shipping season, thereby eliminating the need for the non-existent storage at KCBX. CSXT Reply at II-B-29-33.

On the particular facts of this case, neither of CSXT's claims is valid, and the Board should conclude that there is no direct, effective transportation competition available for CSXT coal delivery service to Campbell.

**a. Full Replacement of CSXT Is Required to Justify the Necessary Investment**

Consumers' Opening Evidence analyzed the infeasibility – both operationally and economically – of several hypothetical “alternatives” to CSXT rail service for coal deliveries to Campbell, including approaches similar to the two (2) that CSXT's Reply Evidence claims represent “effective competition”: (1) a vessel movement from the KCBX Terminal at Chicago to a to-be-built unloading facility and conveyor in Pigeon Lake; and (2) a vessel movement from KCBX to Consumers' Cobb site, followed by a transfer to MSRR for delivery to Campbell over a to-be-built rail line constructed alongside CSXT's existing right-of-way.<sup>40</sup> Consistent with Consumers' own

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<sup>39</sup> See CSXT is silent on Consumers' coal supply arrangements, which impose similar obligations.

<sup>40</sup> See CSXT Reply at II-B-6. Because the lack of coal storage at KCBX disqualified that terminal as an option for full replacement of CSXT's rail service, Dr. Barbaro's engineering analysis considered vessel movements from the MERC dock at Superior, WI. See Barbaro Report at 70-92 and 92-120.

previous, internal studies of these hypothetical “options,”<sup>41</sup> its Opening Evidence demonstrated that neither represents an effective competitive alternative to CSXT for the transportation of Campbell’s annual coal requirements.<sup>42</sup>

In its Reply, CSXT argues that it is not necessary to consider whether effective competition would exist for *all* of Consumers’ annual coal shipments to Campbell. Invoking several prior Board and ICC decisions in cases where shippers actually enjoyed access to multiple transportation options, CSXT claims *in this case* that “Consumers does not need to be able to shift 100% of its rail volumes to alternative modes for these alternatives to be effective competitive options that preclude a finding of market dominance.”<sup>43</sup> Relying on the opinion of its witness Murphy,<sup>44</sup> CSXT claims that “a competitive alternative that handles 75% of Consumers’ coal needs is more than sufficient” to provide effective competition.<sup>45</sup> CSXT then uses this “75% solution” in its calculation of the capital and operating costs associated with its vessel and vessel-rail “alternatives.”<sup>46</sup>

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<sup>41</sup> *See, e.g.,* {

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<sup>42</sup> *See* Consumers Opening at II-16-34.

<sup>43</sup> CSXT Reply at II-B-14.

<sup>44</sup> CSXT Reply, Exhibit II-B-2 at 15-17.

<sup>45</sup> CSXT Reply at II-B-30.

<sup>46</sup> *See, e.g.,* CSXT Reply at II-B-42-50.

As Dr. Barbaro's Rebuttal Report shows, capacity constraints at KCBX and gross inefficiencies built into CSXT's vessel transportation plan effectively limit the hypothetical diversion percentage to less than { } of Campbell shipments.<sup>47</sup> This fact alone undermines the foundation of CSXT's theory. Moreover, even assuming a 75% replacement of CSXT service, the actual costs associated with its two (2) hypothetical options show that they do not represent legitimate, effective competitive alternatives to CSXT rail service.<sup>48</sup> But commercial and regulatory reality also must play roles in the market dominance determination. Under the circumstances of this case – where the issue is whether Consumers should be deemed compelled to expend as much as { } in capital to buy its way out of captivity at Campbell<sup>49</sup> – it is necessary to evaluate potential options based on a complete shift of Campbell coal volumes away from CSXT, which would be the only assurance of “effective competition.”

The compelling difference between the decisions relied upon by CSXT and this case is that in the prior proceedings, the complainant actually had existing and available transportation alternatives,<sup>50</sup> and the question before the agency was whether

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<sup>47</sup> Barbaro Rebuttal Report at 52-53.

<sup>48</sup> *Id.* at Figures 2-26 and 3-12.

<sup>49</sup> *Id.* at Figure 2-25.

<sup>50</sup> *See DuPont* at 17, 317 (motor carriage); *DuPont/CSXT* at 3 (barge); *FMC*, 4 S.T.B. at 712 (motor carriage); *Consol. Papers, Inc.*, 7 I.C.C. 2d at 337 (motor carriage); *Southwestern Railroad Car Parts Co. v. Missouri Pacific Railroad*, STB NOR 40073 (STB served Feb. 20, 1998) at 6 (geographic competition); *Salt River Project v. United States*, 762 F. 2d 1053, 1057 (D.C. Cir. 1985) (motor carriage); *Aluminum Association, Et. Al. v. Akron, Canton & Youngstown Railroad Co., Et Al.*, 367 I.C.C. 475, 481-83 (1983) (motor carriage).

these very real physical options offered effective competition for the defendant railroad. Where the Board made references to new “construction,” the facilities at issue were expansions of or additions to existing alternative transportation infrastructure, and the estimated cost of construction was modest.<sup>51</sup> In expressing the view in these cases that the ability to divert less than 100% of the issue traffic could represent effective competition, the Board did not purport to set down a “bright line” rule concerning how much diversion was “enough,” because the specific facts of each case have to be evaluated in determining whether a proposed alternative actually pressures the defendant “to perform up to standards and at reasonable prices....” *DuPont* at 17.

In stark contrast, this case presents circumstances in which there are *no existing* alternatives to CSXT rail service to Campbell. The issue presented is whether effective competition can be *created*, and if so, at what cost. Given the enormous capital investments that Consumers would have to make, a critical question is whether it would be reasonable to assume that something less than a 100% diversion capability can *ensure* reasonable rates for Campbell coal deliveries. CSXT’s witness Murphy expresses the view that 75% would be sufficient, but not only is his potential diversion assumption inconsistent with the evidence, neither he nor his sponsor is offering to finance the necessary construction in reliance on that opinion.<sup>52</sup> Consumers is the party that would

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<sup>51</sup> See *DuPont* at 317; *FMC*, 4 S.T.B. at 712.

<sup>52</sup> Witness Murphy concludes that CSXT would have “no incentive” to eschew offering a “competitive” rate for 100% of Consumers’ Campbell coal traffic and try to make up the profits lost on the diverted 75% through rate increases on the rail-captive remainder. CSXT Reply at II-B-30. However, this observation assumes that a vessel

be putting as much as { } in capital at risk, and it would be unreasonable and imprudent to assume that Consumers could roll the dice for less than a guarantee of full access to effective competition. Consistent with Consumers' actual, prior "real world" analyses of hypothetical alternatives, the market dominance assessment in this case should assume the need for complete avoidance of reliance on CSXT for Campbell coal deliveries. *Cf., West Tex. Utils. Co.*, 1 S.T.B. at 651.

The Board's evaluation of the "build-out option" claim at issue in *TMPA* supports this conclusion. In that case, the defendant (BNSF) argued that the complainant could create access to a second carrier (Union Pacific) by building a new, 13.5 mile rail line at an estimated cost of \$49 million. 6 S.T.B. at 584. The Board found the hypothetical alternative to be infeasible, because there was no evidence that Union Pacific would offer the shipper a rate savings (determined to be \$3.21 per ton) sufficient to amortize the necessary investment. *Id.* The necessary savings calculation in that case was based on the *full* annual coal shipment volume to the power plant, not an arbitrary and speculative lesser percentage.<sup>53</sup>

The proper approach to assessing the feasibility of CSXT's vessel and vessel-rail "options" is to evaluate their operational practicality and costs as if they were

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"option" is in place, and that CSXT is facing an actual, effectively competitive rival. It assumes away the *real* question here: the diversion capability that provides sufficient assurance of effective competition to justify a { } an investment that would be wasted if an overall reasonable cost for the transportation of Campbell's entire annual volume was not achieved.

<sup>53</sup> *TMPA*, 6 S.T.B. at 584 and n.11, citing Reply Evidence of BNSF Railway, January 15, 2002, Narrative at II-58 and Exhibit II. B-3.

required to be complete substitutes for the transportation currently provided by CSXT under the rates at issue in this proceeding.

**b. Consumers' Origin Rail Contract Requirements Cannot be Ignored**

Consumers' Opening Evidence presented the indisputable evidentiary fact that the terms of its {

} Coupled with the equally indisputable fact that Lake Michigan freezes and becomes unusable for about three (3) months each year, the contractual {

} means that if Consumers even was to attempt to arrange for vessel coal transportation to Campbell without continued reliance on CSXT, it would have to provide for the storage of between 1.2 and 1.5 million tons of coal at the KCBX Terminal each winter. *See* Consumers' Opening at II-17. As Consumers established, however, such storage capacity does not exist. *Id.* at II-16-18.<sup>54</sup>

In its Reply, CSXT does not challenge Consumers' evidence or dispute the {  
} Instead, CSXT argues that the Board should {

} as one of Consumers' contracts for vessel transportation to the

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<sup>54</sup> Consumers showed, and CSXT has not disputed, that it is not possible to store any coal at KCBX. Consumers Opening at II-7-18; Barbaro Report at 21-25.

Cobb Station did.<sup>55</sup> CSXT’s claim is echoed by its witness Murphy, who opines that he is {

} CSXT’s argument is meritless both as a matter of law and commercial reality,<sup>57</sup> and should be rejected.

Board precedent under the *Coal Rate Guidelines* clearly establishes that the terms of any actual contract that is relevant to a particular issue are to be taken as written, and applied as they are in the real world. *See, e.g., TMPA*, 7 S.T.B. at 820-21; *W. Tex. Utils. Co.*, 1 S.T.B. at 658. In that regard, the Board generally has rejected claims that contract terms should be ignored or set aside, or should be assumed to be subject to amendment or modification, in the absence of specific supporting evidence presented by the party advocating the amendment. *TMPA*, 7 S.T.B. at 820-21.<sup>58</sup> CSXT has offered no such evidence, and its argument {

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<sup>55</sup> *See* CSXT Reply at II-B-33 and n. 98.

<sup>56</sup> *See* CSXT Reply, Exhibit II-B-2, at 13.

<sup>57</sup> CSXT’s witness Murphy claims no legal expertise, and his statement of qualifications gives no indication that he has had any experience in actually negotiating utility coal transportation contracts, so his opinion on this issue should be given no independent weight.

<sup>58</sup> An important exception to this rule allows a SARR to step into the shoes of an incumbent railroad for a portion of what in the real world is a single-line movement governed by a contract. As the Board has noted, this is necessary in order to protect a SAC complainant’s ability to take full advantage of the broad “grouping” principle under the *Coal Rate Guidelines*. *TMPA*, 6 S.T.B. at 590.

CSXT also ignores the realities of rail coal transportation contracts. As the Board is well aware from testimony offered during public hearings examining the general state of competition in the rail industry, all four (4) major U.S. railroads largely have standardized their contract forms, and generally are unwilling to deviate from those preferred positions in negotiations.<sup>59</sup> The {

} serves a railroad’s interests in predictable traffic flows and overall system fluidity, and provisions { } as evidenced by the origin service contracts that preceded the current BNSF agreement, which have {

}<sup>60</sup> That they are “important” to the railroads also is confirmed by CSXT itself, which in the very same section of its Narrative { } and important

volume commitments” among the “normal consideration” included in a modern coal transportation contract. CSXT Reply at II-B-81-82 (emphasis supplied).<sup>61</sup>

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<sup>59</sup> See, e.g., *Competition in the Railroad Industry*, STB EP 705, Comments of the Western Coal Traffic League, April 12, 2011, V.S. Richards at 13-19; *The 25<sup>th</sup> Anniversary of the Staggers Rail Act of 1980*, STB EP 658, Statement of the Western Coal Traffic League, October 12, 2005 at 29, 33.

<sup>60</sup> See, e.g., Consumers Rebuttal e-workpapers “BNSF - C - 12112\_1998 - 2002.pdf,” at 12 (Section E); “BNSF 2010-2013 Rail Transportation.pdf,” at 2 (Section 9).

<sup>61</sup> That Consumers was party to a vessel transportation contract with American Steamship Company for shipments to Cobb (CSXT Reply at II-B-33, n. 98) that called for deliveries to be scheduled between April and the end of December is irrelevant. Vessels cannot operate on the Great Lakes in winter, so it is neither remarkable nor a sign of bargaining power for either party that a shipping contract would recognize this reality.



Consumers' legal obligation to {  
} is a contractual reality that must be respected. When combined with the undeniable fact that the resulting, essential coal storage capacity at KCBX Terminal does not exist, it firmly establishes that Consumers cannot entirely avoid reliance on CSXT rail service for the transportation of its annual Campbell coal requirements.<sup>62</sup> On the particular facts of this case, the proper conclusion is that neither of CSXT's proffered "options" can provide effective transportation competition, and that CSXT therefore enjoys qualitative market dominance over coal transportation to Campbell.

**3. CSXT's Direct Water Route Cannot Provide Effective Competition for Even a Share of Campbell's Requirements**

As shown, it would be contrary both to economic reality and prior Board precedent to assume that Consumers could assure itself of access to effective transportation competition by designing and investing the capital needed to construct a system that could not completely replace CSXT rail service to Campbell. Should the Board nevertheless entertain CSXT's "75% solution," however, the better evidence demonstrates that neither of the carrier's proposed options is feasible.

CSXT advances four (4) basic points in support of its claim that its Direct Water Route could provide effective competition for CSXT's all-rail service: (a) a vessel move to Campbell via Pigeon Lake is "a mirror image" of past vessel transportation to

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<sup>62</sup> As Consumers demonstrated on Opening, this is the case whether Campbell's annual needs are 4.8 million tons, 6 million tons, or any volume in between. *See* Consumers Opening at II-17.

the Cobb Station; (b) the Direct Water Route is operationally feasible; (c) all permits needed for construction of the Direct Water Route could be obtained without undue cost or delay; and (d) the cost of the Direct Water Route would be low enough to discipline CSXT's pricing and keep Campbell's rates reasonable.

None of these claims is borne out by the evidence.

**a. Pigeon Lake Is Not Muskegon Lake**

An articulated tug barge movement<sup>63</sup> from Chicago to a dock in Pigeon Lake would bear little resemblance to the large vessel moves that have been seen in Muskegon Lake for the past century, including the coal movements to Cobb, because the two (2) bodies of water are radically different.

As is detailed in the accompanying Verified Statement of Messrs. Petro and Bovitz, and further shown in Dr. Barbaro's Rebuttal Report, Muskegon Lake, where the Cobb site is located, encompasses an area of approximately 6.48 square miles and is open to Lake Michigan via a wide channel. Pigeon Lake, by contrast, covers a mere 225 acres (less than 0.4 square miles), and must be accessed by a narrow channel that requires jetties and regular dredging in order to remain clear for boat traffic.<sup>64</sup> At an average depth of 24 feet and a maximum of over 75 feet, Muskegon Lake is up to three times as

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<sup>63</sup> The type of vessel that CSXT's consultants propose to use for the Direct Water movement is discussed in detail *infra*, and in Dr. Barbaro's Rebuttal Report. This is a different vessel than those considered by Consumers' past internal evaluations and evaluated by Dr. Barbaro on Opening. Until CSXT submitted its Reply, Consumers had no reason to address the many shortcomings of attempting to use an articulated tug barge to transport coal to Campbell.

<sup>64</sup> See Petro and Bovitz V.S. at 30-31.

deep as Pigeon Lake at its *deepest* point, which is in the middle of the lake and not near the shore where vessel unloading would have to take place.<sup>65</sup> Muskegon Lake has decades of history with commercial vessel shipping in support of industries along its shoreline, while Pigeon Lake has seen only four (4) barge shipments of heavy specialty equipment over four (4) years, each of which was an occasion for road closures, special police and traffic controls, and extensive media coverage.<sup>66</sup> The rest of the time, Pigeon Lake's exclusive use has been recreational, with vacation homes, private docks, retreat host facilities and nature parks all located around its shoreline.<sup>67</sup>

In addition to the extensive geographic and physical nature differences between Muskegon and Pigeon Lakes, which obviously would adversely affect the initiation of commercial vessel traffic in the latter, the legal and regulatory environment that CSXT's Direct Water alternative would face is far more extensive and intrusive than the minimalist regime that prevailed when development of the Port of Muskegon began almost a century ago. The key regulatory and permitting obstacles, which were addressed in detail in Consumers' Opening Evidence,<sup>68</sup> are explained further in Dr. Barbaro's Rebuttal Report and in the Verified Statement of Messrs. Petro and

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<sup>65</sup> As discussed *infra*, CSXT's consultants have proposed a dock platform design that {  
Barbaro Rebuttal Report at 21.

<sup>66</sup> Articles reporting on these rare events were included in CSXT's Reply workpapers as "2011 Environmental Equipment Delivery," "2013 Barge Deliveries to Campbell" and "2011 Barge Deliveries to Campbell."

<sup>67</sup> See Petro and Bovitz V.S. at 34-39.

<sup>68</sup> See Consumers Opening at II-22-27; Barbaro Report at 53-56, 81.

Bovitz.<sup>69</sup> However, just some of the statutes and orders with which the CSXT Direct Water Route would have to contend that didn't even exist when Muskegon was developed are the following:

- Water Quality Act of 1965
- National Historical Preservation Act of 1966
- National Environmental Policy Act (1970)
- Clean Water Act
- Federal Water Pollution Control Act Amendments
- Great Lakes Water Quality Amendments of 1972
- Endangered Species Act (1973)
- Great Lakes Critical Programs Act (1990)
- Executive Order 12898 – Federal Actions to Address Environmental Justice

CSXT's assertion that a vessel movement of coal to Pigeon Lake would be a "mirror image of the transportation that Consumers used to the Cobb plant for many years" is a fantasy.

Another component of CSXT's market dominance theory as it relates to Cobb that falls into the realm of fantasy is the claim that vessel transportation of coal to the Cobb Station<sup>70</sup> over the years was so "robust" and effective a competitor that it

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<sup>69</sup> *See, e.g.*, Petro and Bovitz V.S. at 42-46.

<sup>70</sup> As Consumers explained on Opening, Cobb's coal-fired generating units have been retired, as part of a broad consent decree that settled lengthy environmental litigation with the U.S. Government. *See* Consumers Opening at I-7 and Exhibit I-2.

prevented CSXT from gaining any rail market share, even though tracks previously operated by CSXT (and now leased to MSRR) pass relatively near to the Cobb property. *See* CSXT Reply at I-4. The alleged availability of effective transportation competition for Cobb’s coal traffic, which CSXT insists is subject to “unassailable proof”<sup>71</sup> and invokes repeatedly in its Reply Narrative,<sup>72</sup> is key both to its theory of effective water transportation competition at Campbell, and its assault on the Board’s Limit Price Test.<sup>73</sup>

There is one major problem with CSXT’s picture of Cobb: it is a fake. The reality is that Cobb, like Campbell, always has been a captive plant – captive to vessel transportation – and this fact further undermines CSXT’s theses both as to Campbell and the usefulness of the Limit Price Test as an indicator of qualitative market dominance.

As described above, in Messrs. Petro and Bovitz’s Verified Statement, and in Dr. Barbaro’s Rebuttal Report, the natural Port of Muskegon has been an active commercial and industrial port facility since early in the 20<sup>th</sup> Century, handling vessels of all sizes (including the largest Class I vessels) carrying myriad commodities, including coal.<sup>74</sup> When the Cobb Station first was planned more than 60 years ago, the port had been operating for many years and the site was a logical one for Consumers’ predecessor. While CSXT notes that the rail lines that it leased to MSRR in 2005 are located relatively

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<sup>71</sup> *See* CSXT Reply at II-B-51.

<sup>72</sup> *See, e.g.*, CSXT Reply at I-1, I-7, I-13, II-B-1, II-B-8-9, II-B-13 and II-B-51-53.

<sup>73</sup> *Id.* at II-B-54.

<sup>74</sup> Petro and Bovitz V.S. at 31-32, 34-35.

near the Cobb property,<sup>75</sup> the modest coal volumes delivered annually to the plant<sup>76</sup> made it a poor candidate for the development of an alternative rail delivery system.

CSXT's Reply Narrative contains the following statement:

{

}

Consumers assumes that CSXT chose its words carefully, and that its reference to {  
} and not to any actual efforts with or proposals  
made to Consumers. This is significant, because in fact, {

} To the

contrary, CSXT's own internal documents {

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<sup>75</sup> *E.g.*, CSXT Reply at I-4.

<sup>76</sup> Cobb regularly consumed no more than {

}

<sup>77</sup> *See* CSXT Reply at II-B-53.

<sup>78</sup> *See* {

}

} on rail and moved to Great Lakes docks (such as Toledo) for further shipment to the plant.<sup>79</sup>

One possible reason for { } especially in recent years, may be the threat that a truly competitive rate offering for the rail delivery of 1.6 million tons or less of coal annually to Cobb from Chicago could pose for CSXT's ability to defend the exploitation of its monopoly over the 4.8 – 6 million tons moving every year to Campbell, some 25-30 miles south along the same rail line. As discussed *infra*, CSXT contorts logic in attempting to explain why setting rates to Campbell { } higher – on a nominal basis – than those to the genuinely competitive Karn-Weadock complex (which is twice as far from Chicago) is not indicative of market dominance over the Campbell traffic. It is possible that CSXT determined that the acrobatics needed to justify Campbell rates in excess of 400% of variable costs (in 2014) when significantly lower rates were in effect on lower volumes “just up the road” were simply impossible to perform.

Another plausible reason why CSXT never seriously considered Cobb as a candidate for rail deliveries concerns the costs associated with the conversion. While CSXT generally suggests that such a project would have been relatively easy and inexpensive,<sup>80</sup> in fact the cost always has been a major obstacle. To convert Cobb – which was sited in the 1940's as a vessel-served plant—to rail deliveries would require

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<sup>79</sup> See CSXT Reply { }

<sup>80</sup> See CSXT Reply at II-B-39.

considerably more than the installation of tracks linking the property to the CSXT/MSRR lines serving Muskegon. The receipt of trainloads of coal at Cobb also would entail the construction of staging and car storage tracks for incoming shipments,<sup>81</sup> and the installation of unit train/trainload unloading facilities. Consumers analyzed some of these costs in 1996, and {

} However, this

analysis looked only at the movement of very small volumes (about 350,000 tons per year), which impacts the quantities and costs for facilities such as track, and it did not include {

} Particularly for a 1.6 million ton

(maximum) facility where the erstwhile “competitor” showed no interest, conversion was not studied further and never was considered a realistic option.<sup>83</sup>

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<sup>81</sup> CSXT’s own consultants’ report shows that {

}

<sup>82</sup> See {  
}

<sup>83</sup> CSXT asserts that it {  
II-B-53), but its only support for this claim is a {

} (CSXT Reply at

}



CSXT’s claims in this litigation that coal transportation to Cobb has been the subject of “robust”<sup>84</sup> or “fierce”<sup>85</sup> competition are false. The *facts* are that {

}

pursue conversion. CSXT simply left Cobb to dominance by the water transport mode that it had been designed to use. The lack of any actual transportation competition at that station upends CSXT’s “tale of two Consumers coal plants”<sup>86</sup> myth, as well as its critique of the Board’s Limit Price Test.<sup>87</sup> It should be axiomatic that a destination {

} and that has never received a single carload of coal by rail, cannot serve as a benchmark for qualitative market dominance at another, exclusively rail-served destination, or as a “false positives” indication for a test designed solely to assess railroad market power.

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<sup>84</sup> See CSXT Reply at I-4.

<sup>85</sup> *Id.* at II-B-64.

<sup>86</sup> *Id.* at II-B-1.

<sup>87</sup> *Id.* at II-B-61-64.

**b. The Direct Water Alternative Is Not Operationally Feasible**

As Dr. Barbaro's Rebuttal Report explains, the plan proposed by CSXT's consultants to move 3.5 million tons of coal per year from KCBX to a new Pigeon Lake unloading platform using articulated tug barges is operationally infeasible.<sup>88</sup>

First, a detailed analysis of the capacity of the KCBX South Terminal<sup>89</sup> conducted by Dr. Barbaro shows that even if all permitting and regulatory obstacles are assumed away, the capacity available at KCBX to accommodate vessel shipments to Campbell similar to those contemplated by CSXT would not exceed 2.52 million tons per year, *if* three (3) suitable Class III vessels were available to be dedicated to the service. If only two (2) vessels could be secured, the maximum annual capacity is reduced further, to 2.35 million tons.<sup>90</sup> Factors contributing to these constraints include:

- Limits on direct-loading capacity and the lack of coal storage at KCBX;
- Commitments to other transloading customers;

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<sup>88</sup> CSXT's consultants, TranSystems, Inc., actually propose two (2) alternative plans for the Direct Water Route, designated as Alternative 1-A and Alternative 1-B. As Dr. Barbaro points out, however, Alternative 1-B's design essentially would require that coal be fed directly from the unloading platform into the Campbell Station boilers, a procedure that is inconsistent with prudent utility practice. Barbaro Rebuttal Report at 48-49. Consumers is under no obligation to re-design CSXT's fatally flawed Alternative 1-B in an effort to make it workable, so its focus here, and Dr. Barbaro's, is on CSXT's Alternative 1-A.

<sup>89</sup> The South Terminal is the only currently functioning facility for handling coal at KCBX.

<sup>90</sup> See Barbaro Rebuttal Report at 34.

- The difficulty of scheduling the arrival of BNSF origin coal trains to coincide with vessel availability;
- Limitations on railcar holding track capacity at KCBX; and
- TranSystems’ plan to “light load” 18,000 ton capacity vessels with one trainload of coal { } each.<sup>91</sup>

Second, while CSXT and its Captain Hogan simply assume the availability of vessel capacity,<sup>92</sup> Dr. Barbaro’s review of *actual data* shows that there are no 18,000 ton capacity articulated tug barges that meet TranSystems’ specifications currently available on the Great Lakes.<sup>93</sup> While there *may* be several Class III vessels meeting these specifications that are not committed to other customers,<sup>94</sup> CSXT has offered no evidence concerning the use of these vessels as part of its Alternative 1-A, including their impact on dredging requirements in Pigeon Lake, loading and unloading times and procedures, and their need for tug assistance.<sup>95</sup> As Dr. Barbaro observes, these and other

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<sup>91</sup> *Id.* at 29-35.

<sup>92</sup> *See* CSXT Reply at II-B-37-38. As noted *supra*, there are no studies, analyses or documents of any kind that have been presented by CSXT to verify or support the views attributed to Captain Hogan.

<sup>93</sup> Barbaro Rebuttal Report at 37-39.

<sup>94</sup> *Id.* at 39-42.

<sup>95</sup> CSXT did not account for tug operations or costs, specifically on the basis of its plan to utilize the non-existent articulated tug barges. *See* CSXT Reply at II-B-47.

factors associated with the use of Class III vessels would significantly increase the costs of Alternative 1-A as presented by CSXT.<sup>96</sup>

Third, CSXT's consultants posit an unloading scenario in which a tethered but unstabilized and undocked vessel unloads coal to a platform and conveyor 250 feet away, linked to shore. As Dr. Barbaro explains, *no* facility on the Great Lakes that handles coal does so without a dock to secure the vessel and prevent drifting with water currents and wind.<sup>97</sup> TranSystems' scheme would risk spillage, vessel and platform damage and shut-downs of the unloading process on a regular basis,<sup>98</sup> increasing costs significantly and dramatically reducing the practical efficiency of the entire Alternative 1-A system itself.

Finally, CSXT rests the alleged feasibility of its Direct Water alternative in large part on two (2), fabricated claims: the factually false assertion that a vessel operation in Pigeon Lake for Campbell would be the "mirror image" of previous vessel movements to the now-closed Cobb Station,<sup>99</sup> which is debunked *supra*;<sup>100</sup> and blatant misrepresentations of the results of work performed in the past by various consultants to

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<sup>96</sup> Barbaro Rebuttal Report at 59-62, 70-74.

<sup>97</sup> *Id.* at 45-48.

<sup>98</sup> TranSystems points to a gypsum unloading facility near Norfolk, VA as an example of its plan in action, but an aerial photograph of that facility shows that it *has a dock* to secure and stabilize vessels during unloading. Barbaro Rebuttal Report, Figure 2-12.

<sup>99</sup> *See* CSXT Reply at II-B-18.

<sup>100</sup> *See also* Petro and Bovitz V.S. at 28-46; Barbaro Rebuttal Report at 42-44.

Consumers. The latter includes recasting as a “study” a 1996 powerpoint<sup>101</sup> that {  
} <sup>102</sup> and repeated references to the 2014  
WorleyParsons and Spicer analyses discussed by Consumers on Opening<sup>103</sup> as  
endorsements of vessel transportation to Campbell as a “feasible option,”<sup>104</sup> when in fact  
they concluded no such thing. In their joint Verified Statement submitted with this  
Rebuttal, the authors of the 2014 WorleyParsons study specifically refute CSXT’s false  
descriptions of their work, and explain both the limits of their preliminary analyses and  
cost estimates, and the *absence* of any definitive conclusions regarding operational  
feasibility, regulatory approvals and permits, or total costs for what CSXT has proposed  
as its Direct Water Route.<sup>105</sup> They also dispel CSXT’s false assertion that Dr. Barbaro’s  
Opening Report in this case, which evaluated various vessel hypotheticals in detail and  
concluded that none represented an effective competitive alternative for CSXT,<sup>106</sup>  
somehow ignored or contradicted their work.<sup>107</sup>

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<sup>101</sup> See CSXT Reply at II-B-21.

<sup>102</sup> Consumers Opening at II-19-21.

<sup>103</sup> *Id.* at II-21-28.

<sup>104</sup> See, e.g., CSXT Reply at II-B-25, II-B-27.

<sup>105</sup> Petro and Bovitz V.S. at 15-18, 25-28.

<sup>106</sup> Barbaro Report at 3-7.

<sup>107</sup> Petro and Bovitz V.S. at 18-24.

The better evidence of record clearly demonstrates that CSXT’s Direct Water Route, as proposed by the carrier, is not operationally feasible.

**c.     **The Direct Water Route Would Face Daunting Permitting Obstacles****

On Opening, Consumers and its expert Dr. Barbaro catalogued the numerous and very difficult and expensive environmental permitting and other regulatory hurdles that would be faced – with no assured prospect of success – by any large coal facility development project in the modern era, much less one that would place a coal vessel unloading dock in a small, recreational body like Pigeon Lake.<sup>108</sup> In its Reply, CSXT (without presenting any evidence) dismisses the permitting barriers as part of “any potential new project,”<sup>109</sup> and essentially rests on its mischaracterization of Worley Parson’s 2014 work and the suggestion that TranSystems’ Pigeon Lake plan would have “even less environmental impact” than the hypothetical options previously examined (and discarded) by Consumers.<sup>110</sup>

In their Verified Statement, the WorleyParsons authors set the record straight regarding their study’s views on permitting – which clearly do not support CSXT’s attribution.<sup>111</sup> Turning specifically to the Direct Water plan proposed by

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<sup>108</sup> See Consumers Opening at II-21-26, II-42-45; Barbaro Report at 53-56.

<sup>109</sup> See CSXT Reply at II-B-37.

<sup>110</sup> *Id.* at II-B-36.

<sup>111</sup> Petro and Bovitz V.S. at 25-27.

TranSystems, however, it is equally clear that CSXT’s blithe dismissal of permitting obstacles is unfounded.

First, and most obviously, the mid-lake platform and hopper that  
TranSystems designed<sup>112</sup> { } As  
Dr. Barbaro explains,<sup>113</sup> {

} The mid-lake platform proposed by CSXT’s  
litigation consultants, in an effort to make their plan look more environmentally benign,  
{ }

Additionally, as Consumers showed in Opening<sup>115</sup> and Messrs. Petro and Bovitz outline in their Statement,<sup>116</sup> the structure that TranSystems proposes for Pigeon Lake would be subject to a number of different federal, state and even international environmental review and protection statutes and rules that did not exist when the coal dock at the Cobb site was constructed, all of which are basically ignored by CSXT. Prominent among these is Section 404 of the Clean Water Act, which mandates that any

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<sup>112</sup> See CSXT Reply, Exhibit II-B-1 at 7-10.

<sup>113</sup> Barbaro Rebuttal Report at 21.

<sup>114</sup> *Id.* at 21 and n.14.

<sup>115</sup> See, e.g., Consumers Opening at II-23-26; Barbaro Report at 80-81.

<sup>116</sup> Petro and Bovitz V.S. at 42-46.

facility project proposing to discharge dredged or fill materials into U.S. waters must secure a permit from the U.S. Army Corps of Engineers. Significantly, the published guidelines for Section 404(b) state that “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem....”<sup>117</sup> There obviously is a “practicable alternative” to the vessel unloading platform that TranSystems proposes for Pigeon Lake: the CSXT rail service on which Campbell currently depends. Clean Water Act Section 404 and the Army Corps guidelines would present a major hurdle to securing the necessary permits to build in Pigeon Lake, if they did not preclude issuance of a permit altogether. As Dr. Barbaro notes, the Army Corps just recently denied a CWA permit for the Gateway Pacific Terminal project in Washington State, citing local waterway use impacts.<sup>118</sup>

Yet another feature of the TranSystems plan that would raise red flags when it came to permitting and environmental impact is its proposal for dredging Pigeon Lake. As Messrs. Petro and Bovitz explain,<sup>119</sup> the flow of sediment into the lake coupled with the lack of commercial vessel activity has produced a sandy and near-pristine lake bottom, with extensive vegetation and a thriving underwater ecology. TranSystems proposes to dredge almost a *third* of the entire lake bottom area<sup>120</sup> in order to install its

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<sup>117</sup> See EPA Compliance with the Guidelines, 40 C.F.R. § 230.10(a).

<sup>118</sup> Barbaro Rebuttal Report at 45

<sup>119</sup> Petro and Bovitz V.S. at 29-33.

<sup>120</sup> *Id.* at 33-34.



unloading platform, and would have to continue with annual maintenance dredging to maintain required depths and keep the Pigeon Lake inlet open.<sup>121</sup> The introduction of regular commercial vessel traffic in turn would introduce toxic vessel discharge and other pollutants that both would despoil the existing lake bottom, and create the need for a disposal plan for dredging waste, which could not simply be left in the lake once it was contaminated.<sup>122</sup> The permitting challenges raised by this feature of the TranSystems plan are ignored by CSXT.

CSXT's consultant devotes a single paragraph to the issue of environmental impacts,<sup>123</sup> and does not discuss the permitting issues at all. CSXT's Narrative dedicates a few more words to the subjects,<sup>124</sup> but presents no "evidence" beyond a false representation of WorleyParsons' 2014 review.<sup>125</sup> The permitting and environmental impact obstacles to a vessel unloading facility in Pigeon Lake that Consumers raised on Opening effectively stand unchallenged by CSXT.

**d. CSXT Grossly Understates the Cost of Its Direct Water Alternative**

In a plainly results-oriented effort to show that vessel coal transportation to Campbell somehow could be accomplished at costs approximating the challenged CSXT

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<sup>121</sup> Barbaro Rebuttal Report at 68.

<sup>122</sup> Petro and Bovitz V.S. at 34.

<sup>123</sup> See CSXT Reply, Exhibit II-B-1 at 16.

<sup>124</sup> See CSXT Reply at II-B-36-37.

<sup>125</sup> Petro and Bovitz V.S. at 25-27.

rail rates, TranSystems assembled an incomplete capital and operating cost estimate that left out key components, and artificially discounted or simply underestimated most of those that were included. The omissions and underestimates are categorized in detail by Dr. Barbaro, and include the following:

- TranSystems omitted any type of dock facility to stabilize vessels during unloading in Pigeon Lake, understating capital costs by { }.<sup>126</sup>
- TranSystems underestimated the amount of dredging that would be required even for its own flawed mid-lake platform design, understating those capital costs { }.<sup>127</sup>
- TranSystems proposed a KCBX transloading fee of { } based on an expired 2010 contract rate adjusted for inflation.<sup>128</sup> As Dr. Barbaro shows, however, the correct fee { } recent *actual quotes* from KCBX and upon consideration of significantly higher operating costs at that terminal since 2010.<sup>129</sup>
- TranSystems *ignored* the virtual certainty of litigation over the extensive and complex permitting process that would apply to its proposed Pigeon Lake project, and assumed that all permitting and mitigation issues could be resolved in a matter of weeks at a cost of only { }. The 2014 WorleyParsons report, on which

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<sup>126</sup> Barbaro Rebuttal Report at 55, Figure 2-16.

<sup>127</sup> *Id.* at 59-62, Figure 16.

<sup>128</sup> *See* CSXT Reply at II-B-44.

<sup>129</sup> Barbaro Rebuttal Report at 63-65.

CSXT otherwise is quick to rely and frequently misrepresents, explained the likelihood of a protracted legal battle, concluding that total costs could be { } and that the process still could { }”<sup>130</sup>

- TranSystems underestimated the cost of vessel transportation from KCBX to Pigeon Lake by more than { }, by failing to apply all the terms of the 2015 American Steamships contract that was its reference point, and account for the fact that { } as each 18,000 ton vessel was loaded with an average of only one trainload of coal ({ } tons).<sup>131</sup>

- TranSystems understated or omitted operating costs at its Pigeon Lake platform, likely costs for BNSF locomotive detention due to vessel delays, and tug assist costs, generally because CSXT’s consultant failed to adjust its benchmark costs for volume, or neglected to correctly evaluate vessel transit time or account for the lack of available articulated tug barges.<sup>132</sup> Correcting these errors collectively adds at least { } to TranSystems’ operating cost estimates.<sup>133</sup>

Another key cost of the Direct Water Route (as well as the Cobb-Rail Route) that is completely ignored by CSXT and bears particular mention is the premium

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<sup>130</sup> *Id.* at 62-63.

<sup>131</sup> *Id.* at 65-68.

<sup>132</sup> *Id.* at 68-72.

<sup>133</sup> *Id.* at Figure 2-25.

that Consumers would have to pay for the transportation of coal that could *not* be shifted to vessel. CSXT’s response to Consumers’ { } in the context of its “75% solution” is the simple assertion that during the winter months, when the Great Lakes are closed to commercial vessel traffic, “trains from the PRB may be interchanged with CSXT for delivery to Campbell.”<sup>134</sup> As explained *supra* and in Dr. Barbaro’s Rebuttal Report, the assumption that KCBX could handle 75% of the Campbell shipments (3.5 million tons per year, according to CSXT) is unsupported by the facts, given the limits on KCBX’s annual throughput capacity and the fact that as much as two (2) million tons of that capacity is committed to other shippers.<sup>135</sup> As Dr. Barbaro demonstrates, the actual maximum capacity at KCBX for coal destined to Campbell would be between 2.35 and 2.52 million tons per year, depending on the number of vessels that could be dedicated to the service. Totally absent from CSXT’s presentation, however, is *any* mention of the rates that it would charge to transport that share of Consumers’ Campbell volumes that could not move by vessel, under circumstances where it had “lost” the remainder to an alternative mode. Its witness Murphy offers the opinion<sup>136</sup> that “CSXT would have no incentive to price above the competitive water alternative and risk losing the vast majority of the business, with the false hope of making

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<sup>134</sup> See CSXT Reply at II-B-33.

<sup>135</sup> Barbaro Rebuttal Report at 29-34.

<sup>136</sup> Witness Murphy’s observations are hypothetical. He has not professed any experience either in marketing or purchasing coal transportation service by rail.

up the lost profits during a few winter months.”<sup>137</sup> However, such speculation addresses the wrong question. From the standpoint of evaluating the effectiveness of a hypothetical vessel transportation alternative that *at most* would replace only 75% of Consumers’ coal needs, an important element of the overall cost of the alternative is the additional amount that Consumers would have to pay to transport the remainder of Campbell’s coal requirements via CSXT, if Consumers opted for vessel transportation during part of the year.

As CSXT acknowledges,<sup>138</sup> volume is a key consideration in the establishment of railroad rates for coal transportation. There is neither reason nor evidence to support an assumption that CSXT would not assess higher rates on 25% - 50% of Consumers’ traffic than it currently charges to transport 100% of Campbell’s annual coal requirements. Precedent confirms that a principal concern in any partial diversion scenario is the level of rates that the shipper would be exposed to for that portion of its traffic which cannot be diverted. *Ariz. Pub. Serv. Co.*, 742 F.3d at 654; *Ariz. Pub. Serv. Co. v. A. T. & S. F. Ry. Co.*, 2 S.T.B. 367, 377 n. 23 (1997) (“[I]f Arizona were to reduce its volume at Cholla to pressure Santa Fe to reduce rates, the utility would likely face higher rates on the remaining volume transported by the carrier”).

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<sup>137</sup> See CSXT Reply, Exhibit II-B-2 at 15.

<sup>138</sup> See CSXT Reply at II-B-82.

The only evidence of record that is relevant to that issue in this case was presented by Consumers on Opening, where Consumers referenced the {  
} that CSXT imposed on Consumers' Karn-Weadock traffic after most of it was diverted to another rail carrier and Consumers sought a common carrier rate for any coal shipments that might remain on CSXT. In response, CSXT established a rate (as of January 1, 2015) of \$14.95 per ton, { } higher than the rate in effect for the same movement immediately prior to the diversion. Particularly given the higher costs that CSXT would incur in dedicating train cars and locomotives to Campbell service for only part of a year,<sup>139</sup> it is reasonable to estimate that Consumers could expect at least a comparable increase in its current Campbell rate, for that portion of the station's annual requirements that would still "be interchanged with CSXT"<sup>140</sup> following a shift of the remainder of those requirements to the hypothetical vessel service. Indeed, this estimate is conservative, since CSXT would have the incentive to try to recover as much of the profits that it lost on the diverted volume as possible from the remaining tonnage, and under its theory there would be no rail market dominance at Campbell, and thus no potential regulatory constraint at all on CSXT's pricing. *See Burlington Northern, Et Al. – Merger – Santa Fe Pacific, Et Al.*, 10 I.C.C. 2d 661, 748 (1995) (a destination

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<sup>139</sup> Barbaro Rebuttal Report at 25-26.

<sup>140</sup> *See* CSXT Reply at II-B-33.

monopolist will “always have the incentive of profit maximization.”); citing *UP/MP/WP*, 366 I.C.C. at 538; *CSX Control*, 363 I.C.C. at 572-73.<sup>141</sup>

As Dr. Barbaro explains, a { } in the January 1, 2015 Campbell rate translates into a charge of { } than the full volume rail rate now in effect. Assuming, as CSXT proffers, that the vessel share could be 3.5 million tons and total shipments to Campbell equaled only 4.8 million tons (despite the fact that the average of CSXT’s coal forecast is { } tons per year),<sup>142</sup> recovery of the { } to the actual cost of the partial vessel “option.” If CSXT’s average forecast is used, the premium cost increases to { } And at the more realistic 2.35-2.52 million tons diversion potential that is a consequence of KCBX’s throughput limits and pre-existing commitments, the per ton vessel cost increase would be { }<sup>143</sup> depending on the number of dedicated vessels. These very predictable costs, which

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<sup>141</sup> Compare *FMC*, 4 S.T.B. at 714 (“We have been given no reason to believe, however, that UP is not now maximizing its returns (*to the extent permitted under constrained market pricing principles*) on its captive movement of other commodities.”) (Emphasis supplied).

<sup>142</sup> See CSXT Reply at III-A-18, Table III-A-1. As Consumers demonstrates in Part III-A of this Rebuttal, CSXT’s arguments for reducing the forecasted volumes for Campbell below the levels presented by Consumers on Opening (about { } per year, on average) are without merit. For purposes of calculating the CSXT rate premium on undiverted tons, however, Consumers uses CSXT’s figures solely to be conservative.

<sup>143</sup> Barbaro Rebuttal Report at 26.

CSXT ignores, are included in Dr. Barbaro’s corrected restatement of CSXT’s absurdly low estimate of the costs associated with its vessel “options.”<sup>144</sup>

As shown, when all of the necessary adjustments are made to TranSystems’ unrealistic and artificially understated capital and operating costs, the actual costs for the Direct Water Route are { } if three (3) vessels were dedicated to the service, and { } if only two (2) vessels could be secured.<sup>145</sup>

**4. CSXT’s Cobb-Rail Route  
Cannot Provide Effective Competition**

CSXT’s Cobb-Rail alternative, a variant of which Consumers examined in its Opening Evidence,<sup>146</sup> involves a seasonal (April to December) vessel movement from KCBX to the Cobb site, followed by a rail movement to Campbell via MSRR over to-be-built improvements to the existing track that it leases from CSXT. CSXT insists that such an arrangement is both operationally feasible for the handling of as much as 75% of Campbell’s annual coal requirements, and can be accessed at a total per ton cost that

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<sup>144</sup> See *id.* at Figure 2-26.

<sup>145</sup> These corrected costs are higher than the costs determined by Dr. Barbaro in his Opening Report for the Pigeon Lake “option” that he examined, because the indirect scenario he analyzed involved transloading coal through the more efficient and lower cost MERC dock near Superior, WI, and moving it in larger vessels. Compare Barbaro Report at 89-90.

<sup>146</sup> Because the need for { } and the lack of coal storage capacity at KCBX ruled out direct shipments from that terminal, Consumers reviewed the operational and economic infeasibility of moving coal by vessel from the MERC dock at Superior, WI to Cobb, for transfer to the MSRR. See Consumers Opening at II-28-32. As noted *supra*, CSXT acknowledges that this sort of potential “indirect” competition is not relevant to the market dominance determination in this case. CSXT Reply at II-B-8 and n. 14.



offers an effective competitive alternative to CSXT rail service.<sup>147</sup> Neither claim has validity.

a. **The Terms of MSRR's Lease Preclude Its Feasibility as a CSXT Competitor**

Significantly – and tellingly – CSXT's Reply makes no serious mention<sup>148</sup> of the 2005 Lease, whereunder CSXT granted MSRR rights to use the tracks from the Muskegon area south to Holland, MI, tracks which would be essential to any hypothetical coal movement by MSRR to Campbell. It is not difficult to understand the reason for this omission, because – {

}

First, as the TranSystems schematic of the proposed new rail line shows,<sup>150</sup> the project obviously would entail an {

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<sup>147</sup> See CSXT Reply at II-B-38-42, 48-51.

<sup>148</sup> CSXT only notes in passing that it leased this supposedly valuable, competitive link to Cobb to MSRR. *Id.* at II-B-62.

<sup>149</sup> See CSXT Reply, Exhibit II-B-1 at 83.

<sup>150</sup> *Id.*

<sup>151</sup> See {

}

} without Consumers having any control over or ownership interest in the subject assets.<sup>152</sup> No prudent electric utility subject to public regulation could undertake such a one-sided project.<sup>153</sup>

Second, as the TranSystems schematic shows and the accompanying text in the consultants' report confirms,<sup>154</sup> much of the new trackage and connecting facilities would be built on CSXT property subject to the Lease, and all of the fixtures would be permanent installations. However, {

}

Particularly given CSXT's complete silence concerning the Lease in this proceeding, it may be assumed that {

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<sup>152</sup> See Consumers Opening at II-30.

<sup>153</sup> CSXT obviously is aware of the Lease, and {

}

<sup>154</sup> See CSXT Reply, Exhibit II-B-1 at 21-26.

<sup>155</sup> *Land & Track Lease Agreement between CSXT & MSRR* (Sept. 9, 2005) at ¶ 15.3, e-workpaper CSX-CNSMR-HC-018965.

} in Campbell's

coal traffic.

Third, as Consumers explained on Opening, {

}<sup>156</sup> The TranSystems schematic

(Appendix 7) clearly shows portions of the hypothetical, new MSRR track as lying outside the 50 foot wide right-of-way. CSXT's consultants ignored the subject (and costs) of real estate acquisition by MSRR entirely,<sup>157</sup> so it is not clear how much of the necessary property is within the bounds of the leasehold. To the extent that required property falls inside these boundaries, however, {

}.  
}

Finally, on Opening Consumers presented evidence that the extensive commercial relationships between MSRR's parent company (Genesee & Wyoming) and CSXT, and the dependence of many members of the Genesee & Wyoming corporate family on CSXT for traffic and revenue, make it unlikely that MSRR would be a willing competitor with CSXT for coal destined for Campbell.<sup>158</sup> CSXT baldly asserts that there

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<sup>156</sup> See Consumers Opening at II-31.

<sup>157</sup> See, e.g., CSXT Reply, Exhibit II-B-1, Appendix 8.

<sup>158</sup> See Consumers Opening at II-31-32, Barbaro Report at 104-112.

“is zero reason to think that the Michigan Shore would not jump at the opportunity” to play for { } in revenue,<sup>159</sup> though it offers nothing in the way of evidence to support the assertion.<sup>160</sup> However, as Dr. Barbaro explains in his Rebuttal Report, even if one generously assumes that *half* of the stipulated estimated MSRR rate { } a substantial share of which is derived from interline and other commercial arrangements with CSXT.<sup>162</sup> There is no basis for assuming that MSRR’s parent would risk threatening those relationships by trying to deprive CSXT of revenues from the Campbell coal movement.

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<sup>159</sup> See CSXT Reply at II-B-41-42.

<sup>160</sup> CSXT dismisses as “nonsense” the fact that MSRR never has presented Consumers with a rate and service proposal for transportation service from Cobb to Campbell, presumptively claiming the reason was that MSRR never was asked by Consumers’ consultants. *Id.* at II-B-42. In fact, Consumers’ statement on Opening that { }

<sup>161</sup> As explained *supra*, the likely maximum volume that even hypothetically could be diverted from CSXT is between 2.35 and 2.52 million tons per year. At { }

<sup>162</sup> Barbaro Rebuttal Report at 83-84.

**b. CSXT Severely Underestimates the Cost of Its Cobb-Rail Route**

As detailed in Dr. Barbaro's Rebuttal Report, CSXT's consultant's estimates of the costs of its Cobb-Rail Route omit key components – such as the CSXT rail rate premium<sup>163</sup> and rail demurrage costs – that also are left out of the carrier's Direct Water estimates, and dramatically understates others. The latter include the actual cost to transload coal at KCBX and the lake vessel rate, which CSXT's consultants wrongly base on rates for 50,000 ton Class I vessels that cannot be used at KCBX.<sup>164</sup> Correcting these four (4) errors alone adds over { } to CSXT's claimed { } Cobb-Rail total cost.<sup>165</sup>

In addition to underestimating operating costs for the Cobb-Rail alternative, CSXT and its consultants significantly understate the capital costs associated with the new infrastructure that would be needed to accommodate a vessel-rail movement to the Cobb dock and over the MSRR (assuming *arguendo* that the provisions of the MSRR lease giving CSXT an effective veto over installation of that infrastructure did not exist). Specifically, these include:

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<sup>163</sup> Due to a slightly faster vessel time to Cobb, which allows for the delivery of more tons of coal each year, Dr. Barbaro calculated that the CSXT premium in the two (2) vessel scenario would be { } for the Cobb-Rail Route, as compared to \$9.66 per ton for the Direct Water Route. *Id.* at Figure 3-12.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 84-85 and Figure 3-12.

- CSXT did not include the costs for any new rail sidings and other trackage at the MSRR yard near Cobb, assuming instead that MSRR would dedicate its existing trackage to Consumers' traffic. However, MSRR's rail yard already is heavily utilized; installing sufficient additional trackage adds { } in capital costs.<sup>166</sup>

- CSXT included nothing for mobilization/demobilization, which is a standard component of any rail construction project.<sup>167</sup>

- CSXT did not include any costs to upgrade the coal conveyor at Cobb, which only was designed for the approximately 1,000,000 tons per year that moved to that station when it was operational. An additional { } is needed to increase the conveyor capacity to meet CSXT's specifications.<sup>168</sup>

- TranSystems' design only included a new 500-foot conveyor from the stockpile area to the rail loadout, when a 700-foot conveyor is needed. This correction adds about { } to the capital cost.<sup>169</sup>

- TranSystems understated the cost of a new rail loadout, because they did not account for modern controls, dust suppression, and other associated facilities. These add approximately { } to the total.<sup>170</sup>

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<sup>166</sup> Barbaro Rebuttal Report at 87-90.

<sup>167</sup> *Id.* at 87.

<sup>168</sup> *Id.* at 90.

<sup>169</sup> *Id.*

- TranSystems did not include any mobile equipment to operate the coal yard. As Dr. Barbaro explains, the dozers, loaders and other equipment (along with spare parts) needed for the operation are estimated to cost { }<sup>171</sup>

- TranSystems improperly omitted the 6% Michigan sales tax.<sup>172</sup>

- CSXT included no costs for environmental permitting, mitigation or likely litigation, either for the new facilities at Cobb or for the new rail construction to connect to the private trackage at Campbell. While perhaps not as onerous as the costs associated with environmental impact reviews, permitting and litigation in connection with constructing a coal hopper, conveyor and related facilities in the middle of Pigeon Lake, the Cobb-related costs still would be significant, totaling about { } for both “ends” of the project.<sup>173</sup>

- While TranSystems acknowledged that MSRR would have to acquire land and rights-of-way, no costs were included in their calculations. Dr. Barbaro conservatively estimates { }, based on the 2014 WorleyParsons Report.<sup>174</sup>

- CSXT’s consultants improperly calculated capital costs per ton, making the same errors with respect to the Cobb Rail alternative that they did in their examination of the Direct Water Route.<sup>175</sup>

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<sup>170</sup> *Id.* at 91.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 91-92.

<sup>174</sup> *Id.* at 92.

As corrected and restated in Dr. Barbaro’s Rebuttal Report, the actual capital cost of the infrastructure needed for the Cobb-Rail plan that TranSystems designed for CSXT is { } as claimed by the railroad.<sup>176</sup> When the corrected capital costs are amortized and considered together with the actual operating costs for the Cobb-Rail Route, the totals – over { } – are more than { } than CSXT’s claimed { }, and some { } than the challenged tariff rate.<sup>177</sup> The Cobb-Rail Route plainly does not represent an effective competitive alternative to CSXT for coal delivery service to Campbell.

**5. Application of the Limit Price Test Confirms CSXT’s Market Dominance at Campbell**

CSXT devotes almost thirty (30) pages of its Reply to attacking the Board’s Limit Price Test,<sup>178</sup> starting with the condescending comment that “CSXT has long been *telling the Board* that this approach lacks any economic validity.”<sup>179</sup> It is not hard to understand why: as Consumers showed on Opening, application of the test in this case easily confirms CSXT’s market dominance over the Campbell coal traffic.<sup>180</sup> However, CSXT’s challenges either have been thoroughly considered and rejected by the Board

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<sup>175</sup> *Id.* at 96-98.

<sup>176</sup> *Id.* at Figure 3-11.

<sup>177</sup> *Id.* at Figure 3-12.

<sup>178</sup> *See* CSXT Reply at II-B-53-81.

<sup>179</sup> *Id.* at II-B-54 (emphasis supplied).

<sup>180</sup> *See* Consumers Opening at II-53-54.



previously, or are predicated on results-oriented “adjustments” to the test, or distortions of reality (such as that respecting the historic transportation of coal to Cobb) that have no merit when it comes to assessing CSXT’s market power over Campbell.

**a.     The Board Already Has Rejected  
CSXT’s “Legality Challenge”**

CSXT acknowledges<sup>181</sup> that the Board has ruled previously that the Limit Price Test can be used without the kind of prior, formal notice-and-comment rulemaking generally utilized for legislative rules. As the Board explained in *TPI*, the test is a further refinement of the existing qualitative guidelines for determining market dominance, introducing a measure of objectivity into what still remains a fact-specific adjudicatory inquiry. *TPI* at 22.<sup>182</sup> Such a refinement to the market dominance guidelines also is analogous to features of the Board’s current application of the SAC constraint under the *Coal Rate Guidelines* that were adopted – often at the railroads’ behest or with their endorsements – in individual adjudications. Examples include the internal cross-subsidy tests<sup>183</sup> and the guidelines governing the SARR proponent’s ability to re-route traffic to maximize densities for SAC purposes.<sup>184</sup>

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<sup>181</sup> See CSXT Reply at II-B-55-56.

<sup>182</sup> As the Board noted, price-to-cost ratios long have been recognized as valid elements of the “flexible” rules for addressing market dominance from an evidentiary standpoint. *Id.*, citing *Market Dominance Determinations*, 365 I.C.C. at 122, 123. See also *Ariz. Pub. Serv. Co.*, 2 S.T.B. at 378.

<sup>183</sup> *Otter Tail Power Co. v. BNSF Railway Co.*, STB NOR 42071 (STB served Jan. 27, 2006); *PPL Montana v. BNSF Railway Co.*, 6 S.T.B. 752 (2003).

<sup>184</sup> See *TMPA*, 6 S.T.B. at 591-95.

Likewise, the Board in *TPI* disposed of the argument (repeated by CSXT here)<sup>185</sup> that 49 U.S.C. § 10706 (d)(2) – which by its terms only precludes drawing a presumption regarding market dominance from the relationship of the RVC ratio for the *challenged rate* to the 180% threshold – prohibits the use of *any* type of price-cost ratio for *any* purpose related to market dominance. *See TPI* at 22-24. While CSXT insults the Board with a charge that drawing distinctions between the RVC ratio for the challenged rate and the price-cost ratio applicable to an allegedly competitive alternative “is a shell game,”<sup>186</sup> the distinction in fact reflects a very meaningful difference. The RSAM benchmark is a useful tool for assessing the degree to which a particular rail rate reflects differential pricing: the higher the rate in relation to the average needed to maintain revenue adequacy, the greater the degree of differential pricing being exercised by the carrier and, by necessary implication, the more demand inelastic is the traffic subject to the rate.<sup>187</sup> By indicating the point on the price-cost curve where the railroad could no longer increase its rate without risking traffic diversion to the potential competitor, the

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<sup>185</sup> *See* CSXT Reply at II-B-57-61.

<sup>186</sup> *Id.* at II-B-61.

<sup>187</sup> *See Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 124 (2d Cir. 1993). CSXT offers to distinguish *Mr. Sprout* on the grounds that the court “never hinted at or endorsed” R/VC ratios above 180% as indicators of market dominance. CSXT Reply at II-B-60. But this misses the point. The *Mr. Sprout* court was examining qualitative market power, using low R/VC ratios as indicators that the traffic at issue benefitted from competition sufficient to obviate the need for regulation through revocation of an existing exemption. *See* 8 F.3d at 123. Where, as here, the issue also is a qualitative assessment of market power under circumstances where the parties have stipulated that the 180% R/VC threshold for *quantitative* market dominance has been crossed, *Mr. Sprout* supports the Board’s Limit Price Test.

Limit Price Test provides a gauge of (i) whether the subject traffic can be priced by the railroad as captive traffic; and (ii) if so, how much differential pricing (as measured against RSAM) the railroad can exert, which is a valid measure of the extent of the traffic's dependency on the carrier.

**b. CSXT's "False Positives" and "Short Haul Adjustment" Claims Are Without Merit**

In arguing that the Limit Price Test applied to this case would be "irrational," CSXT fashions two (2) basic claims: (i) that the test produces a "false positive" because the cost of vessel service to the supposedly competitive Cobb Station would allow a hypothetical rail rate with an RVC ratio higher than CSXT's RSAM;<sup>188</sup> and (ii) that as a system average calculation, RSAM is not a valid benchmark for this case without "adjustments" for the length of haul between Chicago and Campbell.<sup>189</sup> Neither bears up under scrutiny.

CSXT's "false positives" assertion depends entirely on a false notion: that the Cobb Station enjoyed "effective" transportation competition between the vessel and rail modes in the years prior to its retirement. As shown *supra*, {

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CSXT's Table II-B-9 posits costs for vessel transportation that never faced an intermodal challenge, and CSXT then uses those numbers to infer an entirely imaginary railroad rate

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<sup>188</sup> CSXT Reply at II-B-62-64.

<sup>189</sup> *Id.* at II-B-67-72.

that it would measure against the Limit Price Test. The Board’s test only has been applied against verified prices for transportation service that posed an actual, potentially effective alternative to an existing rail movement. CSXT proposes to evaluate it using costs for a non-competitive, defunct water transportation movement, and a hypothetical railroad “alternative” that the { }. Its aim is obvious, as is the lack of merit to its argument.

The same holds true with respect to CSXT’s criticism that the Limit Price Test should be adjusted for length of haul.<sup>190</sup>

First, CSXT’s claim that use of the average RSAM to benchmark the degree to which a particular movement appears to be rail captive “is bound to bias the results against short-haul movements”<sup>191</sup> is an echo of its argument in *TPI* that a broad measure like RSAM cannot aid in the market dominance determination because it does not sufficiently recognize that some traffic must be priced above the average.<sup>192</sup> The Board rejected this claim:

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<sup>190</sup> *Id.* at 67-72.

<sup>191</sup> *Id.* at II-B-67.

<sup>192</sup> *TPI*, CSX Transportation, Inc.’s Petition for Reconsideration, June 20, 2013, V.S. Willig at 7-8.

Using RSAM as one component of the limit price approach is not inconsistent with differential pricing, given that it is the limit price R/VC ratio (rather than the actual R/VC ratio) that is compared to RSAM. Thus, carriers are free to employ differential pricing by charging rates above or below RSAM as long as there are alternatives that are priced low enough to exert competitive pressure.

*TPI*, STB served December 19, 2013 at 11. Consistent with this principle, in the three (3) cases where the Limit Price Test was used to aid the market dominance determination, the Board considered dozens of actual routings that were identified as sources of potential competition for the subject rail service, without making any distance adjustments prior to application of the test. The distance ranges were wide: 95-1,335 miles in *M&G*; 24-1,266 miles in *DuPont*; and 143-1,541 miles in *TPI*.<sup>193</sup> In each case, the defendant's average RSAM as determined by the Board served as the benchmark.

Second, the various “adjustments” that CSXT proposes are untethered to the purposes of RSAM or to its role in the Limit Price Test, and appear designed solely to justify a “write-up” of CSXT's RSAM (currently 265%<sup>194</sup>) to levels that would make artificially understated cost estimates for its Direct Water and Cobb-Rail alternatives seem competitive.<sup>195</sup> For example, CSXT calculates what it claims is its “average

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<sup>193</sup> See Rebuttal Exhibit II-B-3.

<sup>194</sup> See *Simplified Standards for Rail Rate Cases – 2014 RSAM and R/VC > 180 Calculations*, STB Ex Parte No. 689 (Sub-No.7) (STB served Feb. 26, 2016) at 3.

<sup>195</sup> Without acknowledging it, CSXT starts off by changing the weighting convention used by the Board in developing the annual RSAM ratios from the relationship of aggregate revenues to aggregate variable costs, to weighting based on total

markup” on potentially captive traffic where the route is fewer than 300 miles long, at 397% of variable costs.<sup>196</sup> The RSAM benchmark would tell us that CSXT appears to be exercising a considerable degree of differential pricing (on average) on its captive short-haul traffic. CSXT, however, proposes to revise the benchmark altogether, to create an artificial “short-haul RSAM” that resets the starting point for measuring market power from 265% to 397%, which CSXT raises to 429% by applying the 1.08 RSAM markup developed by the Board to apply to CSXT’s *entire system*. CSXT then offers up two (2) other alternative numbers tricks: a revision of the 1.08 factor to 1.25 based solely on an AAR witness’ contested claim in Ex Parte No. 722 that “competitive firms will earn at least 25% more than their cost of capital;”<sup>197</sup> and an even more generous write-up (to 1.60) based on a “replacement cost” approach that CSXT acknowledges is not related to CSXT’s own assets.<sup>198</sup> As executed by CSXT, these maneuvers produce R/VC ratios of 497% and 636%, respectively.<sup>199</sup> Obviously, if one inflates the CSXT RSAM high enough, then virtually any physically possible “alternative” could be made to appear cost

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carloads. CSXT also purports to present a “RSAM” that reflects only one (1) year’s traffic, when the Board’s rules clearly prescribe a four (4) year average and CSXT was in possession of ten (10) years of data, based on its waybill sample request to the Board. *See* July 8, 2015 letter from Raymond A. Atkins to William F. Huneke, e-workpaper “Huneke Letter July 2015.pdf.”

<sup>196</sup> *See* CSXT Reply at II-B-68.

<sup>197</sup> *Railroad Revenue Adequacy*, STB Ex Parte No. 722, Comments of the Association of American Railroads, Sept. 5, 2014, V.S. Brinner, Exhibit 2.

<sup>198</sup> *See* CSXT Reply at II-B-71.

<sup>199</sup> *Id.* at II-B-70, 72.

competitive, as “at some point even a monopolist could price its services so high that patently ridiculous transportation alternatives would eventually serve to constrain rates.” *TPI* at 16, citing *Ariz. Pub. Serv.*, 742 F. 2d at 651.<sup>200</sup> In essence, that is CSXT’s ploy here, and it should be rejected by the Board. The Limit Price Test looks to a carrier’s system average RSAM as a benchmark to measure the degree to which a shipper’s traffic may be captive, by assessing the extent to which the defendant carrier can and does differentially price that traffic. The reference point is the limit price ratio: the RVC produced by the price of a potentially feasible alternative and the variable cost of the service provided by the railroad. As shown in this Part II-B, the limit price ratios applicable to the costs of CSXT’s proposed Direct Water and Cobb-Rail alternatives – properly measured – are at least { }, respectively (at corresponding 1Q15 levels), far in excess of CSXT’s 265% RSAM ratio.<sup>201</sup> Assuming *arguendo* that these “alternatives” could be operationally feasible (which Consumers has shown they are not), application of the Limit Price Test confirms that they do not represent effective competition for CSXT rail service to Campbell.

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<sup>200</sup> It bears noting that if CSXT’s understated per ton costs for the Direct Water { } and Cobb-Rail { } alternatives are adjusted *solely* for CSXT’s failure to recognize the lowest estimated rail rate premium for winter shipments and use of the wrong KCBX transfer fee, as explained *supra* (which adds { } per ton to each Route), the resulting costs – { } and { } per ton, respectively – reflect RVC ratios ( { } at the corresponding 1Q15 levels) higher than even the super-inflated ratios that CSXT’s RSAM “adjustments” produce. See Table II-A-1, *supra*.

<sup>201</sup> See Barbaro Rebuttal Report at Figures 2-26 and 3-12, and Table II-A-1, *supra*.

6. **Properly Analogous Rate Comparisons**  
**Confirm CSXT's Market Dominance at Campbell**

CSXT invites the Board to consider a rate comparison of sorts, as part of the market dominance analysis. For CSXT, this involves comparing vessel costs to Cobb, after an arbitrary write-up,<sup>202</sup> to CSXT's cost estimates for its Direct Water and Cobb-Rail alternatives, and ultimately to the challenged rate. Asserting that all fall within a comparable range, CSXT concludes that its rate to Campbell indeed has been constrained by effective competition.<sup>203</sup> However, each element of CSXT's syllogism is undermined by the facts and the law. As shown by Dr. Barbaro,<sup>204</sup> more rational estimates of the costs of CSXT's "alternatives" show the per ton equivalents to be dramatically higher than both the estimated vessel-captive costs at Cobb ( { } ) by CSXT's calculation<sup>205</sup>), and the challenged rate. Moreover, the notion that "effective

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<sup>202</sup> CSXT takes actual reported Cobb vessel costs ( { } ) and adds { } on the grounds that if a third party operated the dock it would fold a capital recovery charge into its rate. CSXT Reply at II-B-80 and Exhibit II-B-2 at 20. However, the obvious reality is that a third party *didn't* operate the Cobb dock, and its invested capital was recovered long ago. CSXT's results-oriented write-up has no merit.

<sup>203</sup> See CSXT Reply at II-B-80-81. CSXT again refers to its witness Murphy for the claim that "there are no unique features of the Campbell plant that make water deliveries impractical and uneconomic." *Id.*, Exhibit II-B-2 at 14. However, CSXT's witness acknowledges that he conducted no independent analysis of the physical, operational or economic challenges associated with vessel transportation to Campbell, and that he relied "on CSXT and its experts for the specifics" on which his opinion is based. *Id.* at 12. Witness Murphy's opinion, then, is undermined by the same evidence presented herein and by Consumers on Opening, that shows the infeasibility of vessel transportation of coal to Campbell.

<sup>204</sup> See Barbaro Rebuttal Report at Figures 2-26 and 3-12.

<sup>205</sup> See CSXT Reply at II-B-79.



competition” can be established simply by showing that the price of a hypothetical alternative is close to the challenged rate (which is not even the case here), has been rejected by the Board:

[T]he mere fact that a rail carrier prices its services right at the threshold where, if slightly higher, it might begin to lose traffic to an alternative does not indicate whether that alternative is constraining rates effectively.

*M&G* at 13. *See also TPI* at 17.

Far more probative on the issue of CSXT’s market dominance are two (2) other, different rate comparisons with respect to coal movements that are subject to effective transportation competition: the Campbell origin coal movement from the mines in the Powder River Basin to the Chicago interchange; and the rail transportation of coal from Chicago to Consumers’ Karn-Weadock complex near Essexville, MI.

As the Board is well aware, BNSF and Union Pacific both provide coal transportation service between the PRB mines and major Midwestern interchanges, including Chicago. As Consumers noted on Opening, BNSF has been and currently is the carrier that successfully competed for the origin portion of the overall Campbell coal movement.<sup>206</sup> At the time that CSXT established the initial Tariff 13952 rate of \$14.95 per ton for deliveries from Chicago to Campbell, the BNSF origin rate (including a fuel surcharge) { } Both legs of the journey from the PRB to Campbell

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<sup>206</sup> *See* Consumers Opening at I-1, n. 1.

<sup>207</sup> *See* { }

involve unit train shipments, using railcars supplied by Consumers at no additional cost to the railroads. The average one way distance via BNSF from the PRB to the Chicago interchange is approximately 1145 miles, while the CSXT route from Chicago to Campbell is only 164 miles in length.<sup>208</sup> Thus, while CSXT's service comprises only 12.5% of the total coal movement, at the time this case began the CSXT delivery rate at issue comprised { } of Consumers' total transportation charge. The only way that a railroad with a 12.5% share of a coal movement can command { } for that movement is through the exercise of market dominance.

Similarly, Consumers showed on Opening that even before CSXT established the rate that initiated this case,<sup>209</sup> CSXT was charging Consumers some { } more on a *nominal* basis for service from Chicago to Campbell than it was for transportation from the same interchange<sup>210</sup> to Karn-Weadock, an admittedly competitive station over twice as far from Chicago.<sup>211</sup> On Reply, CSXT attempts to explain the disparity away by arguing, alternatively, that (i) "short haul movements have notoriously higher rates, on a per mile basis than larger-haul movements;" and (ii) Karn-Weadock's

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<sup>208</sup> See Consumers Opening at II-10.

<sup>209</sup> As discussed *supra*, after Consumers awarded its regular Karn-Weadock volumes to another railroad, CSXT retaliated by setting a tariff rate on any remaining tons at a level { } than its previous Karn-Weadock price, and equal to the Campbell rate at issue.

<sup>210</sup> The Karn-Weadock trains traversed the same lines in the Chicago area that CSXT claims help justify its monopolistic pricing for Campbell. See CSXT Reply at II-B-65.

<sup>211</sup> See Consumers Opening at II-55-57.

multiple-carrier and modal options produce measurably more competition than the “two-options” scenarios that CSXT hypothesizes for Campbell.<sup>212</sup> The problem with the first point is that the Karn-Weadock move is only about 400 miles, and the rate to this competitive plant still was { } than the Campbell rate on a *nominal* basis. The operative difference is the lack of competition at Campbell, not the length of haul. As for CSXT’s second argument, it is contradicted by the Board’s several rulings in merger proceedings – which CSXT supported – that so long as shippers have access to two (2) competitive options, they suffer little adverse economic or other effects of increased market concentration resulting from the loss of a third alternative.<sup>213</sup> Neither the merger decisions nor the Board’s market dominance jurisprudence inquire into whether “some movements are more competitive than others;”<sup>214</sup> either a shipper benefits from effective competition, or it does not. For Consumers at Campbell, the evidence demonstrates that CSXT enjoys market dominance.

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<sup>212</sup> See CSXT Reply at II-B-82-83.

<sup>213</sup> See *Union Pacific Corp., Et Al. – Control and Merger – Southern Pacific Railway Corp., Et Al.*, 1 S.T.B. 233, 369 (concerns over a loss of competition in 3-2 markets were “greatly overstated”), 387 (agency merger policy focused “on preserving two-railroad competition, not on preserving three-railroad competition”) (1996); *Burlington Northern Et Al. – Merger – Santa Fe Pacific, Et Al.*, 10 I.C.C. 2d 661, 745 (1995) (conditions will not be imposed on merger if shipper does not show that the transaction “will make it captive where it was not captive before.”). See also *CSX Corp. Et Al. – Control – Conrail, Inc., Et Al.*, 3 S.T.B. 196, 231 (1998) (commenting on the applicants’ plan to avoid “whenever possible” situations where shipper options are reduced from two to one only).

<sup>214</sup> Cf., George Orwell, “Animal Farm,” 1947, p. 134 (Signet Classics ed. 1996).



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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<b>CONSUMERS ENERGY COMPANY</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. NOR 42142</b>
	)	
<b>CSX TRANSPORTATION, INC.</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

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**PART III**

**STAND-ALONE COST**

**III. A. STAND-ALONE TRAFFIC GROUP**

As designed by Consumers, consistent with the *Guidelines*<sup>7</sup> governing standards, the CERR replicates a portion of the existing CSXT system between a point near 22<sup>nd</sup> Street in Chicago, IL and the Campbell Station near West Olive, MI, consisting of 160.52 route-miles of CERR-constructed track and 73.83 route-miles that the CERR would operate over pursuant to trackage rights granted by other carriers.<sup>1</sup> In its Reply, CSXT generally accepts the scope and configuration of the CERR.<sup>2</sup>

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<sup>1</sup> Consumers Opening at III-A-1-2.

<sup>2</sup> CSXT Reply at III-B-1.

Neither the Board's directions in *General Procedures for Presenting Evidence in Stand-Alone Rate Cases*<sup>3</sup> nor its July 15, 2015 specific Procedural Order in this case includes a presentation category denoted "Pejorative Claptrap." Therefore, in this Part III-A of its Rebuttal, Consumers will skip the insulting and occasionally amusing rhetoric that peppers CSXT's Reply, and respond directly to the Defendant's substantive challenges to Consumers' Opening Evidence with respect to the traffic and revenues of the hypothetical CERR.

**1. CERR Traffic Group**

CSXT objects to Consumers' selection practices regarding the merchandise traffic moving over the CERR system, arguing in essence that a complaining shipper's SARR must transport *all* of the rail traffic of any third-party shipper that it elects to serve, if that traffic moves over lines replicated by the SARR in the real world. By not following this "all or nothing" approach, CSXT asserts that Consumers' Opening "blazes new ground" and utilizes a "novel approach" for selecting the merchandise traffic to be served by the CERR. *Id.* at III-A-1; *see also id.* at III-A-10.

Consistent with the goals of maximizing efficiency and minimizing costs, Consumers limited the class of merchandise traffic that would be handled by the CERR to traffic that entered the CERR in intact trains, and would move intact over the CERR to the point of exit without any intermediate switching. The

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<sup>3</sup> STB Ex Parte No. 347 (Sub-No. 3) (STB served March 12, 2001).

CERR traffic group also does not include certain types of traffic, such as Toxic by Inhalation (“TIH”) shipments. In objecting to Consumers’ selections, CSXT complains that the CERR would be required to “somehow identify and divert to its lines – on a real time basis – only merchandise trains that require no switching in Chicago and then only those merchandise trains that are not carrying any TIH shipments.” *Id.* at III-A-2. CSXT then argues that the CERR cannot elect to participate only in a subset of the rail traffic of a given shipper, and instead must transport either all or none of that shipper’s freight:

[Consumers] would shun traffic *from the same customer* to the same destination if it is delivered by a connecting carrier on a train that required any switching within the congested Chicago gateway.

*Id.* (emphasis in original).

In the point of fact, there is nothing “novel” about Consumers’ traffic group selection, as it is fully consistent with the broad flexibility accorded shipper complainants under the *Guidelines*, and with applicable precedent.

The only “authority” referenced by CSXT in support of its theory is an artificially semantic reading of the *Coal Rate Guidelines*, which CSXT says only allow a complainant to “group traffic ‘from other shippers’ by reference ‘to existing customer lists.’” CSXT claims that “[i]mplicit” in these guidelines is the principle that “when traffic from another shipper is selected (to enjoy greater economies of density), then the SARR must serve *all* of that customer’s needs, warts and all.” *Id.* at III-A-10 (emphasis in original). CSXT insists that the

*Guidelines* mandate an “all-or-nothing” approach to the inclusion of a given third-party shipper’s traffic in a SARR traffic group:

If 90% of [a shipper’s] traffic can be handled easily, while the other 10% requires more attention and infrastructure investment, it would be grossly improper to permit the SARR to minimize the expense of serving that individual customer by providing only the simple service, and refusing the more expensive. If permitted, the Board would be placing the SAC test on a perilous path where complainants carve up the demands of individual customers into those the hypothetical SARR wishes to serve and those it would abandon.

*Id.*

CSXT’s traffic selection objections are without merit, and should be rejected.

First, CSXT’s argument completely mischaracterizes the nature of the grouping principles articulated in the *Coal Rate Guidelines*. CSXT seizes upon references to “shippers” and “customer lists” in the *Guidelines* as a basis for imposing a narrow, “all-or-nothing” restriction upon complaining shippers. *See, e.g.*, CSXT Reply at III-A-7 (SAC is used to compute the rate a competitor would need to charge to serve a “captive shipper *or a group of shippers*”) (quoting *Guidelines*, 1 I.C.C.2d at 528) (emphasis in CSXT Reply); *id.* (“The ICC made it clear that ‘[t]he ability to group traffic *of different shippers* is essential to [the] theory of contestability.’”) (quoting *Guidelines*, 1 I.C.C.2d at 544) (emphasis in CSXT Reply); *id.* The actual overriding theme of the *Guidelines*’ “grouping”



principle is exactly the opposite, and emphasizes the broad flexibility to be afforded complaining shippers when designing their stand-alone systems:

The parties *will have broad flexibility* to develop the least costly, most efficient plant. The plant should be designed to minimize construction (or acquisition) and operating costs and/or maximize the carriage of profitable traffic. In selecting the route of a SAC railroad, for instance, an overriding factor may be the effort to lower costs by taking advantage of economies of density. *Generally, a stand-alone railroad would attempt to fully utilize plant capacity, adding other profitable traffic in order to reduce the average cost of operation.*

*Coal Rate Guidelines*, 1 I.C.C.2d at 543 (emphasis added). The *Guidelines*' broad flexibility in the grouping of traffic is "essential" to the theory of contestability:

The ability to group traffic of different shippers is *essential* to the theory of contestability. It allows the captive shipper to identify areas where production economies define an efficient subsystem or alternative system whose traffic is divertible to a hypothetical competitor. *Without grouping, SAC would not be a very useful test*, since the captive shipper would be deprived of the benefits of any inherent production economics. The railroads and shippers agree on the propriety of grouping to develop a SAC model, but they disagree on what traffic should be included in a stand-alone system.

*We see no need for any restrictions on the traffic that may potentially be included in a stand-alone group.*

*Id.* at 544 (emphasis added).

Nothing in the *Guidelines* purports to limit a complainant to a choice between including all of a given shipper's traffic in the stand-alone group, or none of it. Indeed, as the decisions implementing the *Guidelines* make clear, the plain

focus of “grouping” is “traffic,” not “shippers.” *See, e.g., TMPA*, 6 S.T.B. at 586 (“[t]he traffic group includes the complainant’s traffic (the issue traffic) and *other traffic* designated by the complainant (the nonissue traffic).”) (emphasis added); *West Tex. Utils. Co.*, 1 S.T.B. at 657 (“[T]he complaining shipper *can select any subset of available traffic* to determine the least cost at which that subset of traffic could be served independently of other traffic.”) (emphasis added). CSXT’s restrictive “all-or-nothing” theory is not supported by the *Guidelines*.

CSXT’s position regarding the supposed constraints on a shipper’s grouping flexibility also is contradicted by arguments that CSXT itself previously advanced in the Board’s *Ex Parte No. 715* proceeding. In Reply Comments in that proceeding addressing the question whether Average Total Cost (“ATC”) should be modified to account for low-rated movements in a SARR’s traffic group, CSXT argued against any modification in the shippers’ favor specifically because of the wide latitude that complaining shippers enjoy under the *Guidelines* in selecting traffic: “Given that complainants have the sole power to select traffic and designate on-SARR and off-SARR points to maximize density, the Board’s concern that low-rated traffic selected by the complainant might not cover the incumbent’s URCS variable cost is misplaced and wholly unnecessary.”<sup>4</sup>

Emphasizing the wide discretion afforded to complaining shippers, CSXT added

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<sup>4</sup> *Rate Regulation Reforms*, Ex Parte No. 715, Joint Reply Comments of CSX Transportation, Inc. and Norfolk Southern Ry. (filed December 7, 2012) at 23.

that a complainant selects traffic in its “sole and informed discretion,” and that the complainant “is allowed to select traffic in a manner that most advantages it under the ATC methodology.”<sup>5</sup> Consumers agrees.

Second, CSXT’s argument is undermined by specific traffic selection decisions made by complainants in actual cases, with Board approval. CSXT seeks to create the impression that, in the long history of stand-alone rate cases, no complaining shipper ever has elected to transport only a portion of a given third-party shipper’s rail traffic. *See, e.g.*, CSXT Reply at III-A-1 (Consumers “blazes new ground in its novel approach”); *id.* at III-A-10 (“[T]he Board has never been exposed to this kind of traffic selection procedure . . .”). CSXT offers no evidence in support of this argument, and none exists. To the contrary, although the details of SAC case traffic selection decisions are not public, there is ample public evidence to support the conclusion that few if any of the prior SAC complainants (or prior SAC decisions) ever abided by CSXT’s novel “all-or-nothing” rule.

For example, many prior proceedings before the Board wherein the SAC Constraint was applied involved issue movements of coal by rail (or third-party shipper movements of coal by rail) to electric-generating stations. In virtually all of these cases, the approved traffic group excluded certain, seemingly less desirable traffic of those same shippers that moved over the same lines

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<sup>5</sup> *Id.*

replicated by the SARR: the limestone traffic that electric utilities typically move by rail to their generating stations. Electric utility companies utilize limestone at their generating facilities as part of the “scrubbing” process to minimize sulfur emissions, and this limestone very often is transported by the same railroad that hauls the utility’s coal. For example, a July 2014 article in *Progressive Railroading* refers to the “weekly” or even “daily” rail transportation of limestone to the many electric generating stations owned by American Electric Power:

American Electric Power (AEP) also counts Class I's amount the six railroads that deliver coal to about 15 of its plants. . . .

For the past 10 years, the utility also has used railroads and its rail infrastructure to take delivery of lime and limestone at plants for scrubbing and emission controls work. Although the lime and limestone arrives daily, or weekly in some cases, the volumes don’t come anywhere close to coal volumes, says Hume.

Jeff Stagl, *“Mines, utilities bolster rail infrastructure to keep power plants fueled,”*

*Progressive Railroading* (July 2014) (Consumers Rebuttal e-workpaper

“*Progressive Railroading.pdf*”); *see also* Ramesh Malhotra and Robert L. Major,

*“Electric Utility Plant Flue-Gas Desulfurization: A Potential New Market for*

*Lime, Limestone, and Other Carbonate Materials,”* Illinois State Geological

Survey (June 1974), at 2, 6-10 (identifying the volumes of limestone required for

desulfurization in electric generating plants and noting that Duquesne Light had

installed a 400-MW capacity scrubber system in 1974 and that Louisville Gas &

Electric was scheduled to do so in 1980) (Consumers Rebuttal e-workpaper “Desulfurization.pdf”).

The Board has issued a number of decisions in “coal only” SAC cases where the complainants’ traffic groups included efficient unit coal train movements, but excluded the smaller limestone shipments made by the same utilities. *See, e.g., WFA II* at 11 (“WFA’s modified traffic group includes 24 power plants that procure coal from the PRB coal fields.”); *TMPA*, 6 S.T.B. at 588 (“TMPA assumed that the GCRR would transport coal moving in unit-train service from PRB mine origins to electric utilities at 76 destinations.”); *WPL*, 5 S.T.B. at 967 (“The EWRR traffic group consists of coal shipments destined to 38 coal-burning electric generating facilities, including WPL’s Edgewater facility.”); *West Tex. Utils. Co.*, 1 S.T.B. at 657 (“In this case, the traffic selected by WTU for its hypothetical SARR . . . is limited to the coal traffic of 11 selected power plants . . .”). None of the Board’s decisions includes any suggestion that the complaining shippers violated SAC rules by declining to include the non-coal traffic tendered by unit train coal shipper members of the SARR’s selected traffic group. When viewed in light of this long-standing precedent, it is evident that it is CSXT’s “all-or-nothing” argument – and not Consumers’ third-party traffic selection – that “blazes new ground” and represents a “novel approach.”

Third, CSXT’s argument misstates the relationship between SARR traffic and traffic that is left out of the SARR group, wrongly arguing that the CERR would need to engage in some type of “real time” sorting of the trains that

approach its system. *See, e.g.*, CSXT Reply at III-A-6-7 (CSXT “harbors serious doubts that the [traffic] selection criteria can be administered on a real-time basis as Consumers assumes.”); *see also id.* at III-A-1-2 (Consumers “assumes that the hypothetical railroad would be able to somehow identify and divert to its lines – on a real time basis – only merchandise trains that require no switching in Chicago and then only those merchandise trains that are not carrying any TIH shipments.”).

Significantly, SAC theory does not require a complaining shipper to account for (or otherwise even to recognize) traffic of the defendant carrier that it elects not to include on its system. The SARR is purely a theoretical construct; it models actual operations, but does not actually conduct them. Customer interactions are not part of the modeling process, nor realistically could they be, as the SARR obviously does not really exist. The complainant is entitled to assume that the traffic that it elects not to include in the SARR group continues to move over the lines of the defendant carrier in the same manner as it does in the real world, while the selected traffic – and only the selected traffic – is assumed to move over the lines that the SARR has replicated, in a sort of “parallel universe” of rail service. The Board has never required a complaining shipper to address the real-time sorting of traffic as between SARR and “non-SARR” shipments moving via the defendant over the defendant’s replicated lines. Similarly, as noted above with respect to limestone movements to coal-fired electric generating facilities, the Board has never required a complaining shipper’s SARR to prove that it could

distinguish – in “real time” or otherwise – between selected shipments and excluded shipments arriving at an interchange point on its system.<sup>6</sup>

Fourth, CSXT’s argument miscasts the nature of the obligations that the SARR owes to its customer group, wrongly faulting Consumers that “[n]o real world customer would contract with a railroad” on terms that allowed for the movement of only a portion of its traffic. CSXT Reply at III-A-8; *see also id.* at III-A-8-9 (“What would the contract between the customer and the CERR look like for such erratic service? Would it provide that ‘CERR will handle customer’s shipment unless those shipments require too much work?’”) There is no requirement under SAC theory that the SARR proponent demonstrate an ability to persuade individual shippers to volunteer as members of the SARR’s traffic group. To the contrary, a complainant is entitled to select *any* traffic from the defendant’s traffic base, and can presume its inclusion in the group so long as the SARR demonstrates the capability to transport *that traffic* in a manner comparable or superior to the service provided by the defendant.<sup>7</sup> Even here, however, the Board recognizes that the obligation must be understood to have limits.

For example, a given shipper may contract with the defendant carrier to provide single-line rail service. A complaining shipper, however, does not

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<sup>6</sup> CSXT complains that Consumers’ approach “carves up” Consumers’ own shipments of bad-ordered cars. *See* CSXT Reply at III-A-9. This argument, and its many flaws, are addressed in Part III-C.

<sup>7</sup> *TMPA*, 6 S.T.B. at 591.

violate SAC principles by inserting its SARR into a bridge carrier position in the subject movement, thus converting the real-world, single-line contract traffic into an interline movement via the SARR.<sup>8</sup> Similarly, a complaining shipper cannot be obligated to fulfill the literal volume commitment of a given rail transportation contract solely through its SARR since the defendant carrier exists in the “parallel universe” to carry whatever traffic the SARR elects to exclude from its traffic group. Accordingly, it is improper to attempt to evaluate compliance with the terms of a transportation contract without considering the incumbent carrier’s participation in that service.

Fifth, CSXT’s argument regarding supposed gaming of the ATC revenue allocation misstates the nature of ATC. *See* CSXT Reply at III-A-2 (“Consumer’s grouping approach undermines the essence of the ATC revenue allocation, which distributes revenues over the residual incumbent assuming that all necessary services required to move each shipment will be performed on a pro-rata basis over the incumbent’s system.”). ATC does not assume that “all necessary services” will be performed on a “pro-rata” basis. ATC relies upon the variable costing assumptions of the URCS system, which assigns additional costs to origin, destination, and interchange segments to reflect the additional terminal and switching work performed by carriers in such situations. The relative weight of the costs assigned to the origin, destination, and interchange segments of

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<sup>8</sup> *See TMPA*, 6 S.T.B. at 590.



interline traffic varies based upon the nature of the traffic transported (as between carload, multicar, and trainload traffic). Accordingly, there is no basis for CSXT’s “pro-rata” services assumption and its related objection to Consumers’ traffic selection. Furthermore, the ATC formula also considers fixed costs. As a result, the costs associated with services performed on high-density segments are allocated differently than the costs associated with the same services performed on low-density segments.

Sixth, the traffic data provided by CSXT in discovery was missing key data that would have been required for Consumers to identify and replicate the Chicago yard operations and potentially support the inclusion of other CSXT traffic. Specifically, CSXT produced a file titled “Yard Matrix.xlsx” in discovery<sup>9</sup> that indicated { } yard jobs operated annually in Chicago’s Barr and Clearing Yards combined.<sup>10</sup> However, CSXT car event data included events for only { } annual yard trains in Chicago<sup>11</sup> Therefore, only roughly { } percent of Chicago yard train activity was recorded in the provided car event data.<sup>12</sup> Similarly, CSXT train movement data included events for only { }

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<sup>9</sup> Consumers Opening e-workpaper “Yard Matrix\_Consumers Open.xlsx,” tab “NOTES.”

<sup>10</sup> *Id.* at tab “Matrix,” cell O5 and at tab “Cover,” cell A8.

<sup>11</sup> Consumers Opening e-workpaper “Yard Shipments by Train OnSARR Events.xlsx,” tab “Train Summary,” cells S3 + T3 + U3 ({ } yard trains with car events reported at both Barr and Clearing + { } yard trains with car events reported Barr only + { } yard trains with car events reported at Clearing only.)

annual yard trains in Chicago,<sup>13</sup> or roughly { } percent.<sup>14</sup> Consumers had no ability to even identify more than half of the carload traffic CSXT claims it failed to include, much less model its operations.

Following its threshold – and unmeritorious – criticism of Consumers’ traffic group selection, CSXT states that it “otherwise accepts [Consumers’] proposed traffic group, with three exceptions.”<sup>15</sup> Specifically, CSXT proposes to remove: (1) select trains carrying petroleum coke (“petcoke”); (2) trains traversing the CERR between Calumet Park and Curtis; and (3) select carloads moving under the same waybill as carloads that traverse the SARR. Each of CSXT’s exclusions is discussed below.

**a. Petroleum Coke**

CSXT removed select K300-series<sup>16</sup> trains carrying petcoke from its Reply traffic group. However, CSXT’s justification for removing the trains and the petcoke traffic moving on them does not stand up to critical review, so Consumers retains the trains and traffic in its Rebuttal analysis.

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<sup>12</sup> { } Chicago yard trains included in CSXT car event data ÷ { } yard trains reported in CSXT yard matrix table = { }.

<sup>13</sup> Consumers Opening e-workpaper “OnSARR Y train jobs.xlsx,” tab “O Stn Codes,” cells H1 + K1 ( { } yard trains with events reported Barr + { } yard trains with events reported at Clearing.)

<sup>14</sup> { } Chicago yard trains included in CSXT train sheets data ÷ { } yard trains reported in CSXT yard matrix table = { }.

<sup>15</sup> CSXT Reply at III-A-11.

<sup>16</sup> K310-313, K370-371.

CSXT's removal of K300-series trains is based on blatant misrepresentations of its train data, and its Reply contains a narrative description of the movement of K300-series trains that CSXT supports with data that it knows to be erroneous. During the discovery phase of this proceeding, CSXT produced traffic data for this group of trains that CSXT represented as reliable, and that Consumers therefore used in developing its Opening Evidence. In its Reply, CSXT alleged that the very same data contained errors which, if corrected, justified the removal of the K300-Series trains from the CERR traffic group. However, CSXT failed to reveal a *second data error* that, if accounted for, shows that the traffic and associated revenues in fact do belong in the traffic group. Moreover, CSXT not only failed to disclose the second data error, it actually relied on the faulty data to support its false description of the way the trains are allegedly handled in the "real world".

As is the case with every proceeding under the *Guidelines*, CSXT controls the traffic data here, and it has a duty to produce it in a straightforward and accurate manner. Its failure to do so completely undermines its challenge to Consumers' inclusion of the petcoke trains in the CERR traffic group.

Consumers' methodology for defining train routes from historical data was thoroughly explained in its Opening Evidence in Section III-C-2.b., "Developing Base Year and Peak Week Train Data."<sup>17</sup> Consumers relied on train

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<sup>17</sup> Consumers Opening at III-C-39-61.

sheet data produced by CSXT to identify train routes because CSXT had stated that, “[f]or purposes of this case, reliable information about the routing of particular Consumers trains through the Chicago terminal is available in the train sheet data.”<sup>18</sup> CSXT accepted Consumers’ methodology, confirming in its March 21, 2016 Reply to Consumers’ Petition for a Technical Conference that “[b]ecause CSXT accepted Consumers’ configuration of the CERR, CSXT did not address this [train list development] argument in detail.”<sup>19</sup>

Consumers included K300-series trains carrying petcoke that terminated or originated in Chicago’s Barr Yard, according to the CSXT train sheet data produced in discovery, and, in most cases, the waybill data. On Reply, CSXT challenged this approach, and described the movement of the subject trains as follows:

Consumers includes hundreds of petroleum coke trains that in the real world do not traverse any of the lines replicated by the SARR... The K300-series trains that Consumers assumes traverse the Barr Subdivision—coke trains going to/from East Chicago (K310-313, K370-371)—do not move on the line replicated by the CERR beyond the Curtis interchange tracks. The inbound (*i.e.*, westbound) trains actually arrive at Curtis, and immediately leave the CERR lines at Pine Junction to stay on the east side of Chicago. They do not, as Consumers proposes, move on the Barr

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<sup>18</sup> July 1, 2015 letter from Matthew J. Warren to Kelvin J. Dowd at page 3 of 5, included in Consumers’ Rebuttal e-workpapers as “2015 07 01 MJW to Dowd Re CSX Traffic Data and Operating Information.pdf.”

<sup>19</sup> CSXT’s March 21, 2016 Reply to Consumers’ Petition for a Technical Conference at Exhibit 1, page 5, lines 87-97.

Subdivision. Based on CSXT train sheet data produced to Consumers in discovery, all but one of the 107 inbound trains report Curtis and Pine Junction, but stay on the Lake Subdivision, rather than turning left onto the Barr Subdivision.<sup>20</sup>

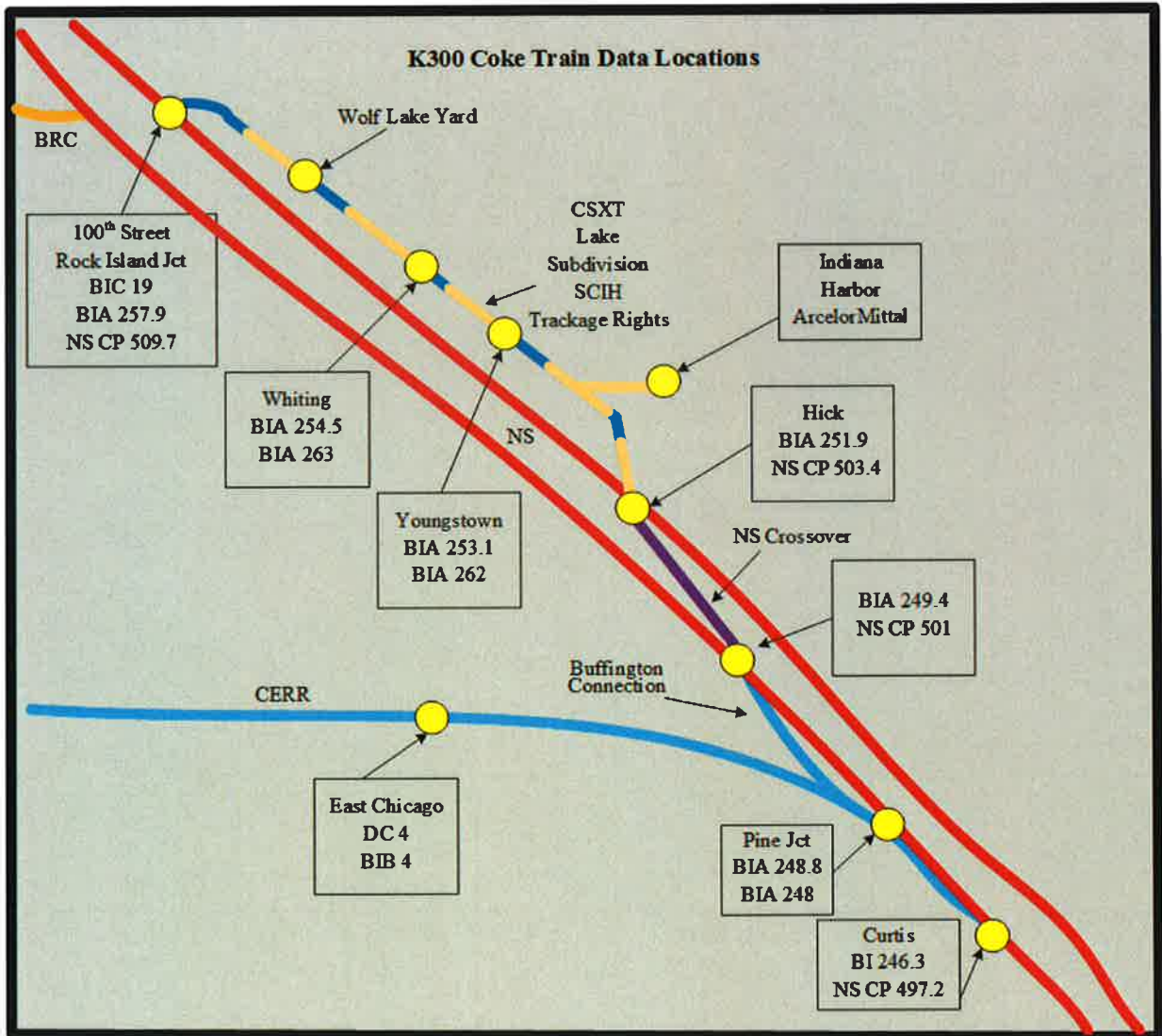
Each of the underlined phrases in the foregoing statement is false, facts which emerged only after Consumers undertook a laborious, comprehensive review of CSXT's Reply workpapers and other materials produced in discovery. Consumers could not have known that additional review was necessary without being told that the train sheet data contained errors, information that CSXT withheld through the discovery process and only revealed in its Reply. CSXT's incomplete supporting analysis, the relevant information that it failed to disclose, and its use of erroneous data to support its Reply position are detailed below. The CERR, CSXT, NS, and the South Chicago & Indiana Harbor Railroad ("SCIH"), line segments discussed in the following sections are shown in Figure III-A-1<sup>21</sup>:

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<sup>20</sup> CSXT Reply at III-A-11 (emphasis added, footnote omitted).

<sup>21</sup> Source: Consumers Rebuttal e-workpapers, "Figure III-A-1.vsd" and "Buffington-NS-SCIH (Lake).pdf."

Figure III-A-1



The train sheet root records produced in discovery identify the origin and destination for a given train moving over a segment of CSXT’s network (e.g., Train X999 moved from Station A to Station Z). Train sheet data for an example K311 train is shown in Table III-A-1 below. This train will be used to illustrate both the defects in the data produced by CSXT, and CSXT’s failure to properly disclose the data errors.

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As shown in Table III-A-1 above, train K311 had {

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<sup>22</sup> As shown in Table III-A-1 above, this particular train had six (6) train sheet records in the train sheet database, but only four (4) of them had underlying train event data associated with them. This was a common problem with the train data produced by CSXT, and Consumers' procedures properly included only the Train Sheet records with associated train events in its train routing methodology.

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For each valid train sheet root record, there are several related train event records that contain information on the intermediate stations the train traversed between its train sheet origin and destination (e.g., Stations B through Y). Train event data records also contain timestamps associated with the times “reported across signals”<sup>23</sup> at the intermediate operating stations that each train passed en route. When combined, the train sheet origin (Station A) and destination (Station Z), and the intermediate event locations (Stations B through Y) provide the complete route for a given train segment.

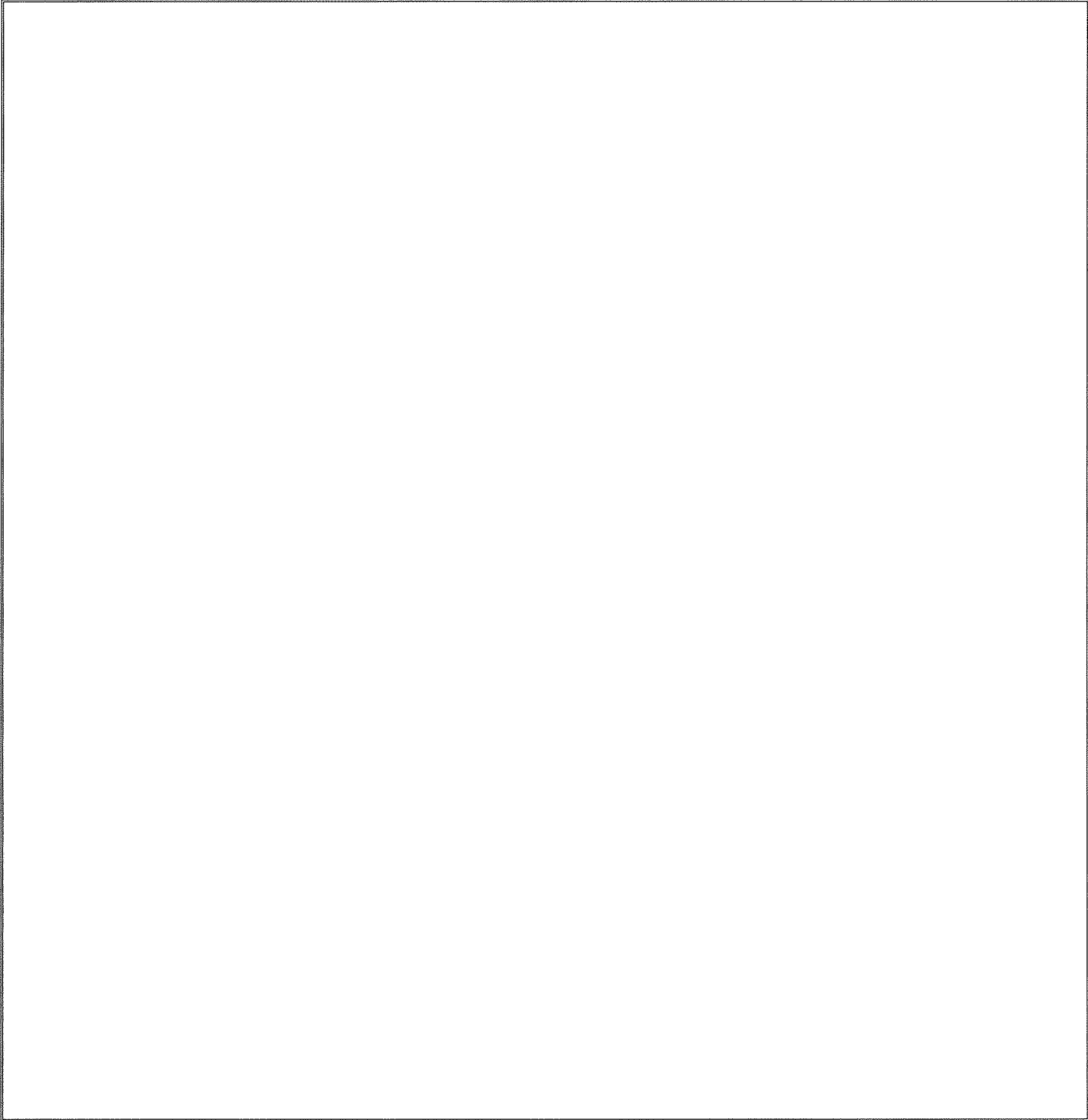
Table III-A-2 below shows combined train data for the last segment of the example K311 train.

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<sup>23</sup> July 1, 2015 letter from Matthew J. Warren to Kelvin J. Dowd at page 2 of 5, included in Consumers’ Rebuttal e-workpapers as “2015 07 01 MJW to Dowd Re CSX Traffic Data and Operating Information.pdf.”





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24 { }  
25 { }  
26 { }  
}

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CSXT's statements quoted in the excerpt above are notable both for the language they include and for what they don't. {

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<sup>27</sup> Consumers Rebuttal e-workpaper "Consumers Route File with Flagged Links 08152015.xlsx," tab "CERR Route," range A105:L107.

} CSXT admits that

Consumers was correct to rely on the terminal data included in the train sheets for other trains, just not for this particular group of trains:

While Consumers may be correct about some of the other eastbound trains discussed at Consumers Opening III-C-26 (*e.g.*, the L091 train), the same assertion that these coke trains are “similar anomalies” is not supported by the train sheet records produced to Consumers in discovery.<sup>28</sup>

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<sup>28</sup> CSXT Reply at III-A-11-12 n.9.

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<sup>29</sup> {

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<sup>30</sup> July 1, 2015 letter from Matthew J. Warren to Kelvin J. Dowd at page 2 of 5, included in Consumers' Rebuttal e-workpapers as "2015 07 01 MJW to Dowd Re CSX Traffic Data and Operating Information.pdf."

<sup>31</sup> CSXT Reply e-workpaper "CERR K300 Coke Trains.xlsx," tab "train detail," columns G through X.

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<sup>32</sup> CSXT Reply e-workpaper “CERR K300 Coke Trains.xlsx,” tab “train detail,” noted with an “x” in Column A and highlighted yellow.

<sup>33</sup> CSXT Reply e-workpaper “Examining\_CERR\_TrainRoutings.xlsx,” tab “Intro,” cell A5.

<sup>34</sup> CSXT Reply e-workpaper “Examining\_CERR\_TrainRoutings.xlsx,” tab “SQL,” cell A50.

<sup>35</sup> CSXT Reply e-workpaper “Examining\_CERR\_TrainRoutings.xlsx,” tab “Summary\_OnSARR\_Curtis\_LastOS,” row 1480, columns H, K, N, Q, and T.

<sup>36</sup> CSXT Reply e-workpaper “Examining\_CERR\_TrainRoutings.xlsx,” tab

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In order to further clarify that the petcoke trains in question do in fact move over the CERR, Consumers examined data related to CSXT's movements over the NS track that parallels the Lake Subdivision and is included in the CERR network through trackage rights, the same way that the track is accessed by CSXT. {

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"Summary\_OnSARR\_Curtis\_LastOS," row 1480, columns F, G, and H.

<sup>37</sup> July 1, 2015 letter from Matthew J. Warren to Kelvin J. Dowd at page 2 of 5, included in Consumers' Rebuttal e-workpapers as "2015 07 01 MJW to Dowd Re CSX Traffic Data and Operating Information.pdf."

<sup>38</sup> *Id.*, page 3 of 5.

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<sup>39</sup> See Consumers Rebuttal e-workpaper “Rebuttal-JFA Invoices\_K300 series Comparison.xlsx,” tabs “K311” and “K312.”

<sup>40</sup> See Consumers Rebuttal e-workpaper “Rebuttal-JFA Invoices\_K300 series Comparison.xlsx,” tabs “K311” and “K312,” columns N through Y. {

}

<sup>41</sup> Publicly available NS timetables indicate that NS milepost CD501 is the location where CSXT’s Fort Wayne line connects with the NS. {



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Based on the results of its analysis of (pre-base year) 2013 train data, Consumers reviewed the corresponding waybill data for the K300-series trains, along with the contract governing the movement of the trains. The waybill data for this traffic include some inconsistencies. {

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<sup>42</sup> Discovery produced to Consumers on July 24, 2015 and August 7, 2015 in Response to RFP #56. Consumers Opening/Rebuttal e-workpapers: “NS675\_90092742.pdf,” “NS675\_90084109.pdf,” and “NS675\_90078429.pdf.”

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<sup>44</sup> {

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<sup>45</sup> {

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<sup>46</sup> Consumers Rebuttal e-workpaper, “Analysis of Base Year Coke Trains Removed in Reply V03 20160405.xlsx,” tab “K311 Car Waybills,” column AK.

<sup>47</sup> Consumers Rebuttal e-workpaper, “Analysis of Base Year Coke Trains Removed in Reply V03 20160405.xlsx,” tab “K311 Car Waybills,” column AC.

<sup>48</sup> Consumers Rebuttal e-workpaper, “Analysis of Base Year Coke Trains Removed in Reply V03 20160405.xlsx,” tab “K311 Car Waybills,” columns X, Y.

<sup>49</sup> {

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<sup>50</sup> JFA Invoices for NS675, Consumers Opening/Rebuttal e-workpapers: “NS675\_90092742.pdf,” “NS675\_90084109.pdf,” and “NS675\_90078429.pdf.” (Produced in Discovery to Consumers on July 24, 2015 and August 7, 2015 in Response to RFP #56.)

<sup>51</sup> {

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<sup>52</sup> Consumers Rebuttal e-workpaper “Contract CSXT 85377.pdf.” (Produced in Discovery to Consumers on September 3, 2015 in Response to RFP #15.)

<sup>53</sup> In 2002, International Steel Group (“ISG”) purchased the assets of Acme Steel including Indiana Harbor West. In 2005, ISG, ISPAT International and LNM Holdings merged to create Mittal Steel USA. In 2007, Mittal Steel completed the merger with Arcelor, creating ArcelorMittal. *See* <http://usa.arcelormittal.com/globalassets/arcelormittal-usa/publications-reports/2013factbook.pdf>, pages 12-13 included in Consumers’ Rebuttal e-workpapers as “2014-arcelormittalusa-factbook.pdf.”

<sup>54</sup> Consumers Rebuttal e-workpaper, “Contract CSXT 85377.pdf,” page 1.

<sup>55</sup> Mittal Steel acquired control of ISG Railroads from the International

The SCIH Tariff<sup>56</sup> indicates that CSXT and SCIH interchange at South Chicago Yard (100<sup>th</sup> Street), which is consistent with the waybill data.

Based upon the foregoing, Consumers rejects CSXT's removal of the K300-series trains, and continues to include this traffic in the CERR traffic group (along with the associated revenues and operating expenses). {

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Steel Group Inc., in *Mittal Steel N.V. - Acquisition of Control Exemption - ISG Railways Inc. - ISG South Chicago & Indiana Harbor Railway Co., and ISG Cleveland Works Railway Co.*, STB Finance Docket No. 34650 (STB served May 3, 2005).

<sup>56</sup> Consumers Rebuttal e-workpaper, "SCIH 8000.pdf," page 2.

<sup>57</sup> {

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Consumers submits that there are only two (2) plausible operating scenarios for the petcoke trains. {

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<sup>58</sup> {

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<sup>59</sup> Consumers Rebuttal e-workpaper, “Contract CSXT 85377.pdf,” page 1.

}

The second plausible scenario {

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The only scenario that is totally unsupported by the data is the one  
CSXT offers, wherein the trains {

}

On Rebuttal, Consumers continues to include the petcoke trains and  
traffic as it did on Opening, terminating/originating them at Barr Yard. {

} only Consumers' Opening

Evidence operations are supported by the data in the record.

**b. Calumet Park-Curtis Trains**

On Opening, Consumers showed that on average, the CERR would provide faster service than CSXT historically provided for trains moving less than 10 miles<sup>60</sup> between Calumet Park and Curtis. On Reply, CSXT argues that Consumers' comparison was flawed, and CSXT makes several adjustments to the analysis. CSXT concludes based on its recast comparison that on average, the CERR would provide slower service than CSXT historically provided over this segment and that the traffic "must be dropped because the CERR is providing inferior service."<sup>61</sup>

CSXT defines CERR service as "inferior" because its calculation of average CERR transit times exceeds its calculation of average historical CSXT transit times for corresponding trains by 7 minutes and 55 seconds in the westbound direction<sup>62</sup> and 7 minutes and 22 seconds in the eastbound direction.<sup>63</sup> CSXT's justification for removing trains and the traffic moving on them do not

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<sup>60</sup> Consumers Opening e-workpaper "CERR Route Miles Opening.xlsx," tab "CERR Miles," Cells R101:R145.

<sup>61</sup> CSXT Reply at III-A-13.

<sup>62</sup> CSXT Reply e-workpaper "RTC CSXT Actual Calumet Park.xlsx," tab "time comparison," row 11.

<sup>63</sup> CSXT Reply e-workpaper "RTC CSXT Actual Calumet Park.xlsx," tab "time comparison," cell D36 × D39 = 7 minutes and 22 seconds.

stand up to critical review. Accordingly, Consumers retains these trains and traffic in its Rebuttal analysis.

CSXT's removal of the traffic from the CERR traffic group is wrong for several reasons. First, CSXT's use of averages to define the CERR's service level as "inferior" ignores several key metrics. {

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Second, CSXT's analysis of the transit time increase is placed completely out of context. CSXT evaluates the average increase as a percentage of the average historical transit time for the 9.9-mile segment between Calumet Park and Curtis. When placed in the context of the entire historical CSXT movement, with average transit times well over a day in length, 8 additional minutes of transit time is *de minimis*.

Third, and in a related vein, even with CSXT's adjustments, the average CERR transit time would be significantly faster than CSXT's but for the



requirement that Consumers arbitrarily assign 30 minutes “dwell time” at Curtis, to reflect the imaginary interchange that takes place between the CERR and CSXT. If one makes the entirely reasonable real-world assumption that an interchange of this nature could be executed, on average, within 20 minutes, for example, the minor transit time differential on which CSXT bases its entire argument for exclusion of the traffic disappears completely.

CSXT’s critique of Consumers’ transit time comparison is separated into two (2) sections based on the directional running of the trains. Each group of trains is addressed separately below.

**i. Westbound Trains**

CSXT alleges that Consumers used “the wrong timestamp from the CSXT timesheets” for trains moving westbound between Curtis and Calumet Park during the peak week.<sup>64</sup> This issue affects only one of the four (4) trains in the comparison. Specifically, the transit time for historical train {

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This discrepancy was a result of Consumers’ SARR station normalization process during the development of the CERR train list, in which certain anomalies in the CSXT data were corrected so that On-SARR and Off-SARR stations were aligned with the CERR/CSXT interchange locations for each

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<sup>64</sup> CSXT Reply at III-A-12.

train. As described in detail in Consumers’ Opening Narrative at Section III-C-2.b., which CSXT did not contest,<sup>65</sup> the adjustments were required because CSXT’s train events are sometimes recorded differently for multiple trains that physically travel in the same manner over the CSXT network.<sup>66</sup> The normalized On-SARR and Off-SARR locations (Curtis and Calumet Park) were used in the parties’ RTC models,<sup>67</sup> but the timestamp for the Off-SARR station was not adjusted for this one train in Consumers’ comparison. CSXT replaces the Harvey Junction timestamp with the Calumet Park timestamp for this train in its restated Reply comparison.<sup>68</sup>

When this change is made, CSXT restates the average historical transit time for the four (4) trains as {

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<sup>65</sup> CSXT’s March 21, 2016 Reply to Consumers’ Petition for a Technical Conference at Exhibit 1, page 5, lines 87-97: “Because CSXT accepted Consumers’ configuration of the CERR, CSXT did not address this argument in detail.”

<sup>66</sup> Consumers Rebuttal e-workpaper “TransitTimes\_TrainDelay\_Rebuttal.xlsx,” tab “Calumet – Curtis Transits,” columns P and Q.

<sup>67</sup> {

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<sup>68</sup> CSXT Reply e-workpaper “RTC CSXT Actual Calumet Park.xlsx,” tab “time comparison,” cell B13.

<sup>69</sup> CSXT Reply e-workpaper “RTC CSXT Actual Calumet Park.xlsx,” tab “time comparison,” cell J11.

}<sup>71</sup> CSXT concludes that all of the CERR trains traversing this route must be dropped because the CERR's service is "inferior" on average.

First, CSXT's 15 percent metric is out of context. {

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<sup>70</sup> CSXT Reply e-workpaper "RTC CSXT Actual Calumet Park.xlsx," tab "time comparison," cell D11.

<sup>71</sup> CSXT Reply e-workpaper "RTC CSXT Actual Calumet Park.xlsx," tab "time comparison," cell D12.

<sup>72</sup> Consumers Rebuttal e-workpaper "TransitTimes\_TrainDelay\_Rebuttal.xlsx," tab "CalumetCurtisTrainSummary," cell M31.

<sup>73</sup> Consumers Rebuttal e-workpaper "TransitTimes\_TrainDelay\_Rebuttal.xlsx," tab "CalumetCurtisTrainSummary," cell U31.

<sup>74</sup> Consumers Rebuttal e-workpaper "TransitTimes\_TrainDelay\_Rebuttal.xlsx," tab "CalumetCurtisTrainSummary," cell M12.

}<sup>75</sup> And as noted above, the differential would disappear entirely (or swing in the CERR’s favor) if the mandated 30-minute “dwell time” addition at Curtis was adjusted to a more realistic average interchange time for what amounts to a hand-off of trains.

Second, review of the historical and RTC data for these four (4) trains individually shows that {

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<sup>75</sup> { }

<sup>76</sup> CSXT Reply e-workpaper “RTC CSXT Actual Calumet Park.xlsx,” tab “time comparison,” cells J7:J8.

<sup>77</sup> { }

<sup>78</sup> CSXT Reply e-workpaper “RTC CSXT Actual Calumet Park.xlsx,” tab “time comparison,” cells D8:D9.

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CSXT's removal of the traffic is results driven, and contradicts the real-world relationship between Curtis-Calumet Park transit time and CSXT's ability to retain traffic. Delays occur in the Chicago area. {

}<sup>80</sup> The traffic should

remain part of the CERR group as well.

**ii. Eastbound Trains**

CSXT makes three (3) adjustments to Consumers' Opening transit time comparison for eastbound Calumet Park-Curtis CERR trains. Specifically, CSXT altered the mix of trains included in the comparison, CSXT added average delay incurred by CSXT historical trains to the RTC transit times, and CSXT removed an historical train with a long transit time (what CSXT calls an "outlier") from the comparison.

CSXT alleges that Consumers used "a different mix of CSXT trains than the trains in the RTC model."<sup>81</sup> This is partially true. First, Consumers included three (3) trains that moved in the peak period, but not the peak week, in

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<sup>79</sup> CSXT Reply e-workpaper "RTC CSXT Actual Calumet Park.xlsx," tab "time comparison," cells J8:J9.

<sup>80</sup> Consumers Rebuttal e-workpaper "TransitTimes\_TrainDelay\_Rebuttal.xlsx," tab "Calumet – Curtis Transits," cell AQ34.

<sup>81</sup> CSXT Reply at III-A-13.

its comparison.<sup>82</sup> These trains were included in both the historical and RTC train lists. CSXT removed these trains from its comparison. Consumers accepts this adjustment. Second, Consumers included three (3) trains that were modeled between Calumet Park and Curtis in RTC in the list of historical trains included in the comparison for the Dolton-Curtis segment. This occurred due to the On-SARR station normalization process discussed above regarding the westbound trains. CSXT added these trains to its comparison. Consumers accepts this adjustment. As CSXT concedes, even after these adjustments are made, the CERR transit time “was 1.5 percent faster”<sup>83</sup> than historical CSXT times.

CSXT alleges that Consumers’ RTC model transit times do not reflect delays that their historical counterparts incurred “at the grade crossings at Republic and State Line.”<sup>84</sup> CSXT states that the comparison can be corrected in one of two ways:

[I]f Consumers is going to compare the CERR transit times to the historical CSXT transit times, it must either model the crossing delays or remove the delays from the CSXT transit times.<sup>85</sup>

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<sup>82</sup> Consumers Rebuttal e-workpaper “TransitTimes\_TrainDelay\_Rebuttal.xlsx,” tab “Calumet – Curtis Transits.”

<sup>83</sup> CSXT Reply at III-A-13.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

CSXT then claims, “[w]hen doing the latter, the RTC trains actually run 13% slower than the CSXT trains.”<sup>86</sup> However, CSXT did not “do the latter.” Specifically, CSXT did not “remove the delays from the CSXT transit times.” Rather, CSXT developed an average per-train at-grade crossing delay for the historical trains in the comparison, and then added that amount of delay to Consumers’ average RTC transit time.<sup>87</sup> The problems with this procedure are numerous. First, historical delay is specific to a particular train and the traffic it encountered at the moment it traversed the CSXT system. Delay incurred in the RTC model is specific to a different particular train and the different traffic it encountered at a different moment as it traversed the CERR. Absent extraordinary coincidence, a train modeled in RTC would not be “at the grade crossings at Republic and State Line”<sup>88</sup> at the same time as its historical counterpart. If one could make such an assumption, there would be no reason to conduct the RTC model at all, as one could assume the peak trains precisely mirrored the historical trains at every point on the time and space continuum. The fact is, RTC trains encounter different traffic and incur delays separate (and different in duration) from their historical counterparts. Therefore, historical delays incurred at specific locations cannot be assigned to RTC trains bearing the same symbol and date.

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<sup>86</sup> *Id.* at III-A-14.

<sup>87</sup> CSXT Reply e-workpaper “RTC CSXT Actual Calumet Park.xlsx,” tab “time comparison,” cell D38.

<sup>88</sup> CSXT Reply at III-A-14.

Second, rather than recognizing that some trains incur significant delay while others incur none, CSXT’s addition of average delay minutes to the simulated trains defeats the purpose of the RTC analysis, which models each train and the traffic it encounters along its route to determine transit time.

Third, CSXT’s method fails to acknowledge that different types of trains are given different priority, and higher priority trains are less likely to incur delays than lower priority trains. CSXT developed its average delay as follows:

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}<sup>91</sup>

There are three (3) types of eastbound trains moving from Calumet Park to Curtis in the peak week: {

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<sup>89</sup>CSXT Reply e-workpaper “RTC CSXT Actual Calumet Park.xlsx,” tab “time comparison,” column Q.

<sup>90</sup> CSXT Reply e-workpaper “RTC CSXT Actual Calumet Park.xlsx,” tab “time comparison,” cell Q36.

<sup>91</sup> CSXT Reply e-workpaper “RTC CSXT Actual Calumet Park.xlsx,” tab “time comparison,” cell Q38.



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If CSXT's comparison is separated by train priority group, the average RTC transit time {

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<sup>92</sup> CSXT Reply e-workpaper "RTC CSXT Actual Calumet Park.xlsx," tab "time comparison," cells Q24:Q25.

<sup>93</sup> CSXT Reply e-workpaper "RTC CSXT Actual Calumet Park.xlsx," tab "time comparison," cells Q28:Q29 and Q32.

<sup>94</sup> CSXT Reply e-workpaper "RTC CSXT Actual Calumet Park.xlsx," tab "time comparison," rows 20:27.

<sup>95</sup> { }

<sup>96</sup> { }

}<sup>99</sup> CSXT’s suggestion that this level of increase in end-to-end transit time would be unacceptable to shippers is absurd.

Fourth, CSXT added delay for select trains based on the wrong subset of delay table entries included in the CSXT train data.<sup>100</sup> {

} For the trains moving between Calumet Park and Curtis, CSXT

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<sup>97</sup> Consumers Rebuttal e-workpaper “TransitTimes\_TrainDelay\_Rebuttal.xlsx,” tab “CalumetCurtisTrainSummary,” cell M30.

<sup>98</sup> Consumers Rebuttal e-workpaper “TransitTimes\_TrainDelay\_Rebuttal.xlsx,” tab “CalumetCurtisTrainSummary,” cell U30.

<sup>99</sup> { }

<sup>100</sup> This analysis is included in CSXT Reply e-workpaper “Trainsheet Delays for RTC\_RR Crossings.xlsx,” which is supported by its related workpaper “Delay\_Data\_CERR\_Trains.xlsx.”

<sup>101</sup> CSXT Reply e-workpaper “Trainsheet Delays for RTC\_RR Crossings.xlsx” tab “Filtered,” column AB.

<sup>102</sup> *Id.*, column AC.

<sup>103</sup> *Id.*, column Y.

assumed all {

}<sup>104</sup>

{

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<sup>104</sup> *Id.*, tab “input to CSXT Reply RTC,” cells B1 and L4.

<sup>105</sup> CSXT Reply e-workpaper “Delay\_Data\_CERR\_Trains.xlsx” tab “Dataset,” filter column AA for “10.”

<sup>106</sup> *Id.*, column AB.

<sup>107</sup> *Id.*, column X.

<sup>108</sup> *Id.*, level “Filtered,” cell B2.

<sup>109</sup> CSXT Reply e-workpaper “Trainsheet Delays for RTC\_RR Crossings.xlsx,” tab “Filtered,” cell C3: Source: CSXT TM Trainsheets, Reply e-workpaper “Delay\_Data\_CERR\_Trains.xlsx,” tab “Filtered.”

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Notably, in another delay analysis submitted by CSXT on Reply,  
CSXT assumed that {

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<sup>110</sup> CSXT Reply e-workpaper “Delay\_Data\_CERR\_Trains.xlsx,” tab “Dataset,” filter Column AA for “10” and view column P.

<sup>111</sup> CSXT Reply e-workpaper “Delay\_Data\_CERR\_Trains.xlsx,” tab “Dataset,” filter Column AA for “10” and view columns A-B. {

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<sup>112</sup> CSXT Reply at III-C-60, and CSXT’s Reply e-workpaper “Trainsheet Delays for RTC\_22ndOffSARR.xlsx,” which is supported by its related workpaper “Delay\_Data\_CERR\_Trains.xlsx.”

<sup>113</sup> CSXT Reply e-workpaper “Delay\_Data\_CERR\_Trains.xlsx,” tab “Dataset,” filter Column AA for “HO.”

<sup>114</sup> *Id.*, Column AB.

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CSXT’s Reply argument is based on the premise that {

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CSXT’s “final problem with Consumers’ transit-time calculations is that the CSXT transit times for the eastbound trains are skewed by an outlier.”<sup>117</sup> Consumers proposes to remove the outlier, which “experienced an atypical delay of 2:44 hours at Pine Junction”<sup>118</sup> from its comparison. CSXT’s argument for removing one of the trains that is used to develop average transit times undermines its entire argument, which uses average times as its foundation. It also conflicts with CSXT’s position that all historical delays (even “atypical” ones) must be reflected in the RTC model on the CERR side of the comparison.

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<sup>115</sup> *Id.*, Column X.

<sup>116</sup> CSXT Reply e-workpaper “Trainsheet Delays for RTC\_22ndOffSARR.xlsx,” tab “delay records,” cells B2 (“Enroute Train Delays to Westbound CERR Peak Period Trains Traveling Off-SARR onto BNSF or UP near 22nd Street”) and B3: (Source: CSXT TM Trainsheets, Reply e-workpaper “Delay\_Data\_CERR\_Trains.xlsx,” worksheet “Filtered.”)

<sup>117</sup> CSXT Reply at III-A-14.

<sup>118</sup> *Id.*

However, this particular train is quite instructive on the lack of merit in CSXT's entire transit time theory. {

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### **iii. Service Reliability**

As discussed above, CSXT made some minor alterations to the timestamps and stations used in its Reply restatement of Consumers' Opening transit time comparison. Consumers generally accepts these changes on Rebuttal, but CSXT misrepresents their impact as it relates to the quality of "service" that

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<sup>119</sup> Consumers Rebuttal e-workpaper "TransitTimes\_TrainDelay\_Rebuttal.xlsx," tab "CalumetCurtisTrainSummary," cell M33.

<sup>120</sup> Consumers Rebuttal e-workpaper "TransitTimes\_TrainDelay\_Rebuttal.xlsx," tab "CalumetCurtisTrainSummary," cell M20.

CSXT provided to the CERR shippers in the historical base period. CSXT removed traffic moving on CERR trains between Calumet Park, IL and Curtis, IN because the CERR transit times, on average, are very slightly slower across this segment of track, claiming that the CERR service was therefore inferior to the historical CSXT service. As noted above, a *de minimis* difference that is dwarfed by the arbitrary 30-minute “dwell time” additive does not equate to inferior service. Complainants may include traffic in the SARR traffic group so long as the SARR “would meet the shipper’s transportation needs.”<sup>121</sup> In truth, the CERR provides service that is superior to CSXT from a shipper’s point of view.

CSXT’s argument that the CERR failed to meet CSXT’s historical service standard is based on a narrow definition of service level that contradicts the definition it uses to gauge its performance in the normal course of business. In fact, when addressing its stockholders and customers, reliability – not transit time – is the core metric that CSXT cites.<sup>122</sup>

A review of the CSXT historical and RTC times for the 20 trains in the comparison illustrates why CSXT’s real-world use of reliability to measure performance levels makes more sense than its made-for-litigation reliance on

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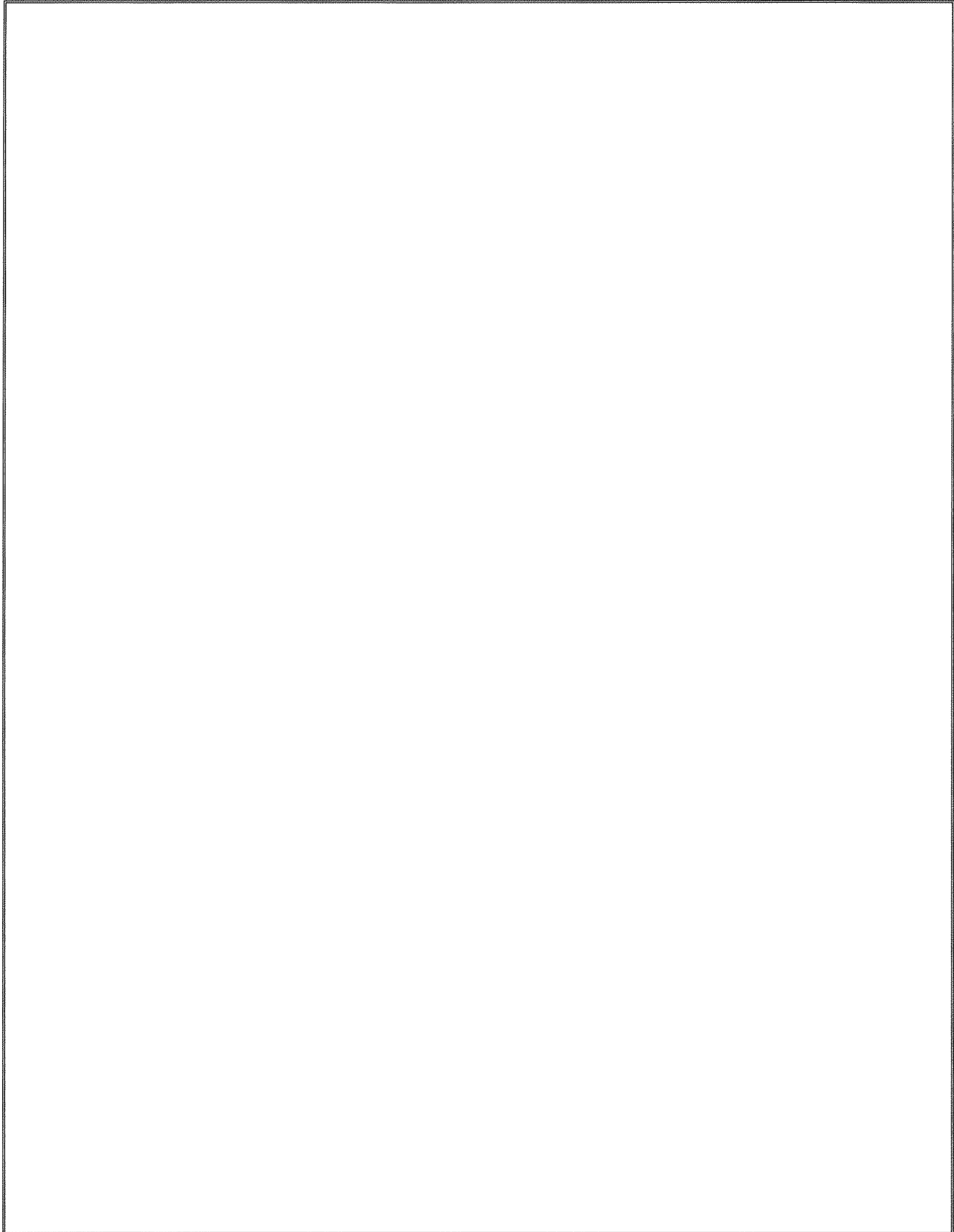
<sup>121</sup> *TMPA*, 6 S.T.B. at 595.

<sup>122</sup> See Consumers Rebuttal e-workpaper “CSXT Service Update Oct.2, 2015.pdf,” page 5. CSX measures this reliability through the “span” of on-time originations (OTO) on the scheduled train network versus the plan.

average times. Table III-A-3 below shows the transit times for the 20 trains on each railroad.

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CSXT concludes that it historically provided a superior level of service because of the CERR's slightly longer average transit time. {

}<sup>123</sup> However, in the real world, shippers evaluate service levels in a more nuanced way. Average transit times only provide one characteristic of the rail service provided; namely, identifying the central mean tendency of the service. Average transit times do not reflect the dispersion characteristics of the service. The amount of dispersion as indicated by the standard deviation identifies how far from the average the service can be expected to vary. The lower the standard deviation, the more reliably and consistently the railroad is in meeting its average transit time, and its shippers' expectations.

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}<sup>124</sup> On the whole, {

} but the uncertainty provided by CSXT's historical operations has real implications for a shipper's bottom line: reliability of its service. The CERR moves its trains between Calumet Park and

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<sup>123</sup> {

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<sup>124</sup> {

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Curtis in essentially the same amount of time as CSXT, but does so on a much more reliable, consistent basis.

**c. Waybill Selection**

In its Reply, CSXT points to certain traffic included in the CERR traffic group based on the waybills associated with traffic carried by CERR trains, and argues that the traffic instead should be identified based on individual shipments moving on the CERR trains.<sup>125</sup> CSXT states that because not all traffic on the same waybill moves on the same train, Consumers’ approach overstated the amount of traffic actually carried by the CERR.

Consumers reviewed CSXT’s related workpapers, and agrees that a small percentage of the carloads identified in its Opening traffic group were not carried on CERR trains.<sup>126</sup> However, this does not mean that all split-waybill railcars that Consumers included in its Opening Evidence have to be removed from the CERR traffic group. As CSXT notes, railcars moving on the same waybill can be separated from each other and move on different trains.<sup>127</sup> In some cases, this means that one railcar on a waybill will move on a CERR train while another railcar on the same waybill will move on a non-CERR train. However,

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<sup>125</sup> CSXT Reply at III-A-15 to III-A-16.

<sup>126</sup> {

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*Compare* Consumers Opening e-workpaper “2014 - 1Q 2015 Car And Container Waybills.xlsx,” to Consumers Rebuttal e-workpaper “2014 - 1Q 2015 Car And Container Waybills\_Rebuttal.xlsx.”

<sup>127</sup> CSXT Reply at III-A-15.

there are many instances where two (2) railcars moving on the same waybill will move on two (2) different CERR trains. Consumers has identified { } non-issue traffic carloads that moved on different CERR trains in 2014 than the trains with which they were identified in Consumers' Opening Evidence.<sup>128</sup> Therefore, Consumers has retained these movements in its Rebuttal traffic group, and adjusted the movements' On-SARR and Off-SARR locations to reflect the actual CERR trains on which they moved.

2. **Volumes (Historical and Projected)**

a. **Coal Traffic to Campbell**

CSXT begins its Reply to Consumers' evidence concerning coal volumes to Campbell over the 2015-2024 period with a scurrilous and unfounded charge that Consumers is attempting to "mislead" the Board by not relying on coal volumes that were reflected in a filing made by Consumers in September 2015 in a state utility rate proceeding before the Michigan Public Service Commission, or producing this data to CSXT.<sup>129</sup> As CSXT knows full well, both parties *agreed in writing* that with a few exceptions not relevant here, neither would be required to

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<sup>128</sup> See Consumers Rebuttal e-workpaper "2014 - 1Q 2015 Car And Container Waybills\_Rebuttal.xlsx," tab "2014 Carload," Column B. These movements are identified with a "Rebuttal" indicator in Column B. Because these carloads moved on different trains than identified in Consumers' Opening workpapers, and therefore may have different on- and off-SARR locations than indicated in Consumers' Opening workpapers, the number of Rebuttal carload records increased from its Opening workpapers.

<sup>129</sup> CSXT Reply at III-A-6.

produce any data or documents that were created after December 31, 2014.<sup>130</sup> This stipulation was fully consistent with standard practice before the Board, which allows parties to set temporal limits on data to be used so that they can prepare and present evidence based on a common set of parameters.<sup>131</sup> Also, as CSXT is equally aware, the forecast model data submitted to the MPSC was influenced in large measure by eight (8) months of Consumers' experience paying the CSXT rates at issue in this proceeding, rates that have a negative impact on the level at which Campbell is dispatched by the Mid-Continent Independent System Operator, the entity that controls generation dispatch within the region that includes Consumers' service territory.<sup>132</sup> Through its self-righteous objection, CSXT seeks to put its thumb on the SAC scale by defending its unreasonable tariff

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<sup>130</sup> Consumers Rebuttal e-workpapers "April 7, 2015 Ltr. from K. Dowd to M. Warren.pdf" and "April 9, 2015 Ltr. from M. Warren to K. Dowd.pdf."

<sup>131</sup> The Board's own approach to using updated forecasts of various types also reflects this concept. See, e.g., *WFA 2007* at 28; *AEP Tex. N. Co. v. BNSF Ry. Co.*, STB NOR 41191 (Sub-No. 1) (STB served Sept. 10, 2007) at 32 n.57. This differs from the treatment accorded to known, published metrics and data sources, such as the reported railroad industry cost of capital or the Board's annually published URCS data, where the most recent available iteration commonly is used.

<sup>132</sup> See CSXT Reply e-workpaper "Consumers\_Application\_2015 09 30.pdf" at 38-41 (Jim K. Chilson Direct Test. at 6-9) ("the Company plans to use common carrier (i.e. tariff) rates for rail transportation for western coal from Chicago to the Campbell plant and for transportation of eastern coal to both the Campbell and Karn plants.").

rate using a consumption estimate<sup>133</sup> that reflects coal volumes depressed by that very rate. *That* is what the Board should not condone.

The Campbell coal volumes advanced by CSXT on Reply also are flawed because they are based on an apples-and-oranges mix of different computer models. Consumers' Opening forecasted volumes for Campbell were generated principally using the Ventyx Strategist model, which is employed by Consumers as a resource planning tool that provides coal use forecasts many years into the future, including through the end of the rate prescription period applicable in this case. The Strategist model forecast covered the years 2017 through 2024. For 2015 and 2016 *only*, Consumers used the output from the PROMOD model, which is an hourly unit commitment and production dispatch model used to assess near-term operations and generating unit reliability.<sup>134</sup>

In its September 2015 filing before the MPSC, Consumers used PROMOD because of its hourly dispatch features, which more closely track the retail utility rate profile, and to have a consistent baseline for the annual updating of costs, fuel prices, electric demand and other calculations that go into the MPSC rate review process. Because of the “granularity” of the PROMOD analysis, and

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<sup>133</sup> Another reason why it makes good sense to set a limit such as that agreed to by the parties here is that the output of models such as the one used by Consumers can change (in either direction) with each run, depending upon the status of the many variables that go into the model.

<sup>134</sup> See Consumers Rebuttal e-workpaper “Utility Information Request\_Docket No. E015.RP-13-53.pdf” for a summary comparison of the two (2) models.

the large number of different dispatch-related variables that must be assumed,<sup>135</sup> a typical PROMOD run covers the months remaining in the then-current year and the twelve (12) subsequent months. Consumers’ Opening Evidence respected this limitation, and then properly relied on the Strategist model – which is favored for long-term planning – for the remainder of the 2015-2024 time period.<sup>136</sup> The rate schedules at issue before the MPSC, however, encompassed five (5) years, so for purposes of that proceeding (and the September 2015 filing) Consumers ran the PROMOD model out over five (5) years in a single iteration. This provided the full array of output data needed for the agency rate evaluation process, but carried an increased risk of inaccuracy over time with respect to an output such as forecasted coal volumes, given the large number of variables that have to be assumed in order to run PROMOD.<sup>137</sup>

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} – CSXT’s

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<sup>135</sup> These include projected system loads, weather, unit heat rates, maintenance schedules, random unit outage rates, fuel costs, and purchased and interchanged power availability and costs. *See* CSXT Reply e-workpaper “Consumers\_Application\_2015\_09\_30.pdf” at 134 (Sara T. Walz Direct Test. at 4).

<sup>136</sup> It should be noted that Consumers typically uses Strategist in all of its filings before the MPSC where long term forecasts (greater than five (5) years) are required.

<sup>137</sup> This portion of Consumers’ Rebuttal Narrative is sponsored and verified by Consumers’ Mr. Gallaway.

<sup>138</sup> CSXT Reply at III-A-18 and Table III-A-1.

approach improperly relies on a mix of the two (2) models that ensures inaccurate results. CSXT did not use the September 2015 PROMOD run through 2020 (as unreliable as its volume projections after 2016 may be compared to Strategist) then switch to the Strategist forecast for the remaining four (4) years of the DCF period. Instead, it applied the *rate of change* from the Strategist model to the nominal volumes reflected in the last year of the PROMOD model run. The rate of change is not a program input in Strategist; it simply is an observed feature of the outputs. The measured change between 2020 and 2021, therefore, is a function of Strategist’s 2020 forecasted volume. As applied to a 2020 PROMOD value, it is an arbitrary figure that produces skewed and inaccurate volumes for 2021 and following years, just as PROMOD’s short-term design and typical use renders suspect the volumes that it “projects” more than one year out from the year following its run date.<sup>139</sup>

CSXT wrongly suggests that it is combining “older” and “newer” forecasts.<sup>140</sup> In fact, it is mixing models with very different structures and purposes, only one of which – Strategist – is used to project coal volumes over the longer term, which inevitably leads to unreliable results. This is confirmed in Table III-A-4, below, which shows the results of a Strategist model run for Campbell conducted in the same month as the MPSC filing relied upon by CSXT,

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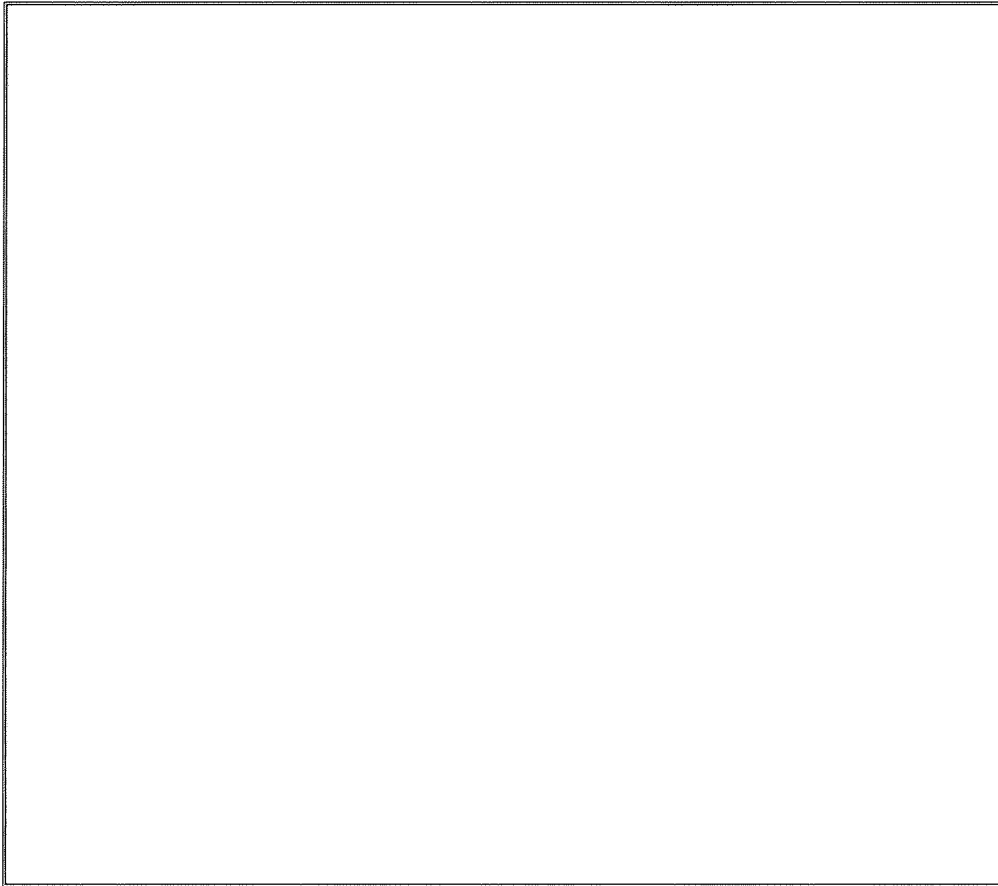
<sup>139</sup> *Id.* at III-A-17.

<sup>140</sup> *Id.*



as compared with Consumers' Opening volumes and the lower volumes proposed by CSXT.

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} The lower figures advocated by CSXT are not attributable to a

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“newer” forecast; they are a result of misapplication of a model that is not relied upon for longer-term projections.

CSXT next argues that the Campbell coal forecast should be impacted by declining coal consumption elsewhere in the country and on the CSXT system.<sup>142</sup> However, the national trend in coal-fired electric generation is not in issue here; the relevant question concerns projected coal consumption at the *Campbell Station*, and the better evidence of record (Consumers’ own internal long-term forecast) establishes that {

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<sup>142</sup> CSXT Reply at III-A-18-19.

<sup>143</sup> {

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Finally, CSXT claims a “right to review the Board’s final analysis” of SAC in this case and present a “means of addressing what should happen” if future coal shipments to Campbell do not match the projections used in the SAC analysis.<sup>144</sup> It is not at all clear what CSXT has in mind, but it *is* clear that the “right” the carrier would have in the event of a material change in relevant circumstances is the same as any other litigant in a maximum rate proceeding: the right to petition the Board under 49 U.S.C. § 722 (c) to reopen the matter after conclusively demonstrating that the applicable statutory standards have been met.

As the Board held in *Major Issues*:

We do not intend...to change our longstanding policy that we will not reopen a SAC case to address short-term, year-to-year fluctuations that do not undermine the long-term projections relied upon in a SAC case. While we recognize that...there inevitably will be changes to forecasts and projections, we will be vigilant in ensuring that the standard we put in place today does not become a mechanism for serial reopening based on updated figures.

*Id.* at 72 (citations omitted).<sup>145</sup> There is no legal basis for CSXT to claim entitlement to any other type of post-decision adjustment to a Campbell rate prescription.

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<sup>144</sup> CSXT Reply at III-A-20.

<sup>145</sup> The Board also observed that it would be considerably less likely that the standards of 49 U.S.C. § 722(c) could be met in a SAC case, given that the analysis and rate prescription period now only covers ten (10) years. *Id.* at 75.

**b. General Freight and Non-Issue Coal Traffic**

Consumers' Opening general freight volumes and non-issue coal volumes for the CERR in 2015 through 2024 were calculated by adjusting the 2014 and 1Q2015 traffic volumes produced by CSXT in discovery.<sup>146</sup> Specifically, the CERR carload traffic volume for 1Q2015 was based on actual CSXT traffic data, while 2Q2015 was based on actual 1Q2015 CERR volume forecasted to 2Q2015 levels using the change in CSXT system-wide coal and merchandise traffic volumes as reported in quarterly Securities and Exchange Commission ("SEC") filings. Consumers developed 3Q2015 and 4Q2015 traffic volumes by adjusting 3Q2014 and 4Q2014 CSXT traffic data to 3Q2015 and 4Q2015 levels based on actual and forecasted traffic included in CSXT's financial reports and internal traffic forecasts. The aggregation of this actual and forecasted data produces the 2015 CERR carload traffic volume. Consumers developed the CERR carload traffic volumes for the 2016-2019 time period from the forecasted change in traffic volumes shown in CSXT's internal forecast provided in discovery, while the 2020 to 2024 traffic volumes were adjusted by the compounded average growth rates ("CAGR") derived from CSXT's internal traffic forecast.

On Reply, CSXT accepted Consumers' development of 1Q2015 and 2Q2015 traffic volumes and the 2016 to 2019 traffic volumes, but challenges

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<sup>146</sup> Consumers Opening at III-A-6.

Consumers' forecasts used to create 3Q2015 and 4Q2015 volumes and 2020 to 2024 volumes.<sup>147</sup> For the 3Q2015 and 4Q2015 volumes, CSXT urges the use of actual traffic volumes reported in CSXT's filings with the SEC, which were not available in time for Consumers' Opening Evidence filing. For the 2020 to 2024 volumes, CSXT asserts that government forecasts should be used instead of the CAGR reflected in CSXT's internal forecast of 2015-2019 traffic volumes.

Consumers addresses each of these points below.

**i. 3Q2015 and 4Q2015 Traffic**

Consumers developed its 3Q2015 and 4Q2015 traffic volumes by indexing actual 3Q2014 and 4Q2014 traffic produced in discovery, using adjustment factors developed by comparing CSXT's actual traffic reported in its 2014 SEC Form 10-K to CSXT's forecasted 2015 traffic included in its internal traffic forecast produced in discovery.<sup>148</sup> Consumers relied upon the most current CSXT data available at the time.

On Reply, CSXT claims that Consumers' approach is "flawed" because CSXT's actual 3Q2015 and 4Q2015 traffic data are now available in its 2015 SEC Forms 10-Q and 10-K, and that the use of actual volume data is superior to relying upon the forecasted data provided in discovery.<sup>149</sup> CSXT also

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<sup>147</sup> CSXT Reply at III-A-20.

<sup>148</sup> Consumers Opening e-workpaper "2015\_CSXT Volume Growth Forecast.xlsx."

<sup>149</sup> CSXT Reply at III-A-21.

claims that the SEC 10-Q and 10-K data are presented on a more disaggregated business unit level than the general merchandise, coal and intermodal group levels used by Consumers.<sup>150</sup>

On Rebuttal, Consumers generally accepts CSXT's Reply approach. However, CSXT's claim that Consumers' Opening Evidence was "flawed" is gratuitous and unfounded. Consumers filed its Opening Evidence in this proceeding on November 2, 2015, only 19 days after CSX filed its 3Q2015 SEC Form 10-K, which effectively meant that the 10-K data was unavailable. Consumers' Opening Evidence also was submitted 100 days *before* CSXT filed its 2016 SEC Form 10-K that contained the 4Q2015 traffic volumes. Consumers used the most current data available at the time; there was no "flaw" in its Opening approach.

**ii. 2020 to 2024 Traffic Volumes**

For the years beyond 2019, when CSXT's internal traffic forecast ended, Consumers' Opening Evidence utilized a CAGR based approach to develop traffic volumes for the years 2020 through 2024.<sup>151</sup> Consumers developed the CAGR for the traffic included in CSXT's 2015 to 2019 internal forecast, and applied the calculated growth rate on a lane and commodity-specific basis.

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<sup>150</sup> *Id.*

<sup>151</sup> Consumers Opening at III-A-7.

On Reply, CSXT challenged the use of a CAGR, claiming that “extending those forecasts beyond the period developed by CSXT, instead of using published government forecasts, is inappropriate.”<sup>152</sup> CSXT instead utilized an Energy Information Administration (“EIA”) Annual Energy Outlook (“AEO”) forecast to project non-issue coal and merchandise traffic volumes for the years 2020-2024.

CSXT offers two (2) different reasons for its departure from Consumers’ approach. {

}<sup>153</sup> Second, CSXT alleges broadly that the Board prefers using internal, course of business forecasts where available and reliable, but then turns to published government forecasts after the end of the internally produced forecast.<sup>154</sup>

On Rebuttal, Consumers continues to utilize a CAGR approach developed from CSXT’s internal forecast to forecast growth in non-issue coal and merchandise traffic volumes for the period from 2020-2024. Consumers’ approach is superior to that promoted by CSXT, for at least the following four (4) reasons.

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<sup>152</sup> CSXT Reply at III-A-22.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at III-A-22-23.

First, the use of a CAGR approach to forecast traffic beyond the end of an internal forecast is supported by long STB precedent. The Board accepted a CAGR approach to forecasting in *FMC*, *DuPont* and *Sunbelt*,<sup>155</sup> consistently finding that the multi-year CAGR methodology, which combines both actual and forecasted data for the specific traffic type at issue, mitigates single-year “spikes” and produces a more measured and reliable trend.<sup>156</sup>

Second, {

} Forecasts are

by their very nature the best estimates of the future available at the time they are prepared. While they cannot anticipate all major setbacks that could occur, they are just as likely to understate the effect of major opportunities that may arise in the future.<sup>157</sup> The benefit of a CAGR based approach is that the potential highs and lows over the forecast horizon are reflected in the CAGR.

Third, CSXT’s use of EIA AEO data to forecast non-issue coal and merchandise traffic is unprecedented, and prone to manipulation. CSXT uses the annual rate of change in an EIA AEO forecast of Industrial Sector Macroeconomic Indicators for the non-manufacturing sector and the manufacturing sector to create growth rates for all 2-digit Standard Transportation Commodity Code (“STCC”)

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<sup>155</sup> *FMC*, 4 S.T.B. at 730; *DuPont* at 261; *Sunbelt* at 173.

<sup>156</sup> *Sunbelt* at 173.

<sup>157</sup> *FMC*, 4 S.T.B. at 731.



shipments, except transportation equipment (STCC 37), which is based on the EIA AEO forecast of Light-Duty Vehicle Sales By Technology Type. Because neither of these EIA AEO forecasts are presented at a 2-digit STCC level, CSXT attempted to create a link between the forecast categories included in the EIA AEO forecasts and the 2-digit STCC for CSXT traffic. CSXT did this based on a tenuous linkage between 3-digit North American Industry Classification System (“NAICS”) codes to 2-digit STCC codes. The Board has never endorsed such an approach, and the reasons are fairly obvious. A trended analysis that relies on CSXT’s own actual data and traffic forecasts is superior to and more accurate than a CSXT-modified version of a measure designed for other purposes.

Fourth, the EIA industrial-level forecast CSXT relied upon for the 2020-2024 time period does not measure either generic growth in rail volumes or the specific growth in CSXT rail volumes. They are general economic forecasts of the U.S. economy, useful for some purposes but unrelated to CSXT’s traffic mix. The Board long has shown a preference for using more specific information in developing forecasted traffic volumes. In *McCarty Farms*, for example, the Board indicated that it favored the use of the railroad’s system-wide forecast in developing SARR future traffic volumes over a general industry-wide forecast.<sup>158</sup> The EIA forecasts that CSXT advocates for use with this segment of the CERR traffic group are economy-wide forecasts that are no way specific to the traffic

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<sup>158</sup> *McCarty Farms*, 2 S.T.B. at 474.

moving over the CERR. The better and more accurate course is to rely on the CAGR approach used by Consumers.

On Rebuttal, Consumers continues to utilize the CAGR to forecast growth in volumes over the 2019-2024 time period.

**c. Intermodal Traffic**

Consumers' Opening intermodal traffic forecasts were developed in the same general manner as Consumers' general freight and non-issue coal traffic forecasts. CERR intermodal traffic volume for 1Q2015 was based on actual CSXT traffic data, while 2Q2015 was based on actual 1Q2015 CERR intermodal traffic volume forecasted to 2Q2015 levels based on the change in CSXT system-wide intermodal traffic as reported in quarterly SEC filings. Consumers developed 3Q2015 and 4Q2015 traffic volumes by adjusting 3Q2014 and 4Q2014 CSXT traffic data based on actual and forecasted traffic included in CSXT's financial reports and internal traffic forecast. The aggregation of this actual and forecasted data produced the 2015 CERR intermodal traffic volume. The CERR intermodal traffic volumes for the 2016-2019 time period were based on the forecasted change in traffic volumes shown in CSXT's internal intermodal forecast provided in discovery, while the 2020 to 2024 traffic volumes were adjusted by the CAGR developed from CSXT's internal intermodal traffic forecast.

As it did with Consumers' non-issue coal and general freight traffic, CSXT accepted Consumers' development of 1Q2015 and 2Q2015 intermodal

traffic volumes and the 2016 to 2019 intermodal traffic volumes on Reply, but challenged Consumers' forecast for 3Q2015 and 4Q2015 and 2020 to 2024 traffic volumes.<sup>159</sup> {

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For the same reasons detailed above with respect to the general freight and non-issue coal traffic, Consumers rejects CSXT's intermodal forecast adjustments, with one exception. On Rebuttal, Consumers forecasts intermodal traffic for 3Q2015 and 4Q2015 using the same methodology that it uses for non-issue coal and general freight for the 3Q2015 and 4Q2015 time period. Specifically, Consumers utilizes the 2014 and 2015 SEC Form 10-Q data to forecast 3Q2015 and 4Q2015 CERR intermodal volumes.

**d. Crude Oil**

Consumers' Opening Evidence included crude oil as part of its general freight traffic, and treated this traffic no differently than any other commodity moving over the CERR.<sup>161</sup> On Reply, CSXT attempts to spin the

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<sup>159</sup> CSXT Reply at III-A-23.

<sup>160</sup> CSXT Reply at III-A-24 n.30.

<sup>161</sup> Consumers Opening e-workpaper "CERR Car Traffic Forecast.xlsx," tab "CAR\_Forecast," Columns (AE) to (AI).

recent decline in crude oil shipments as reasons to treat crude oil traffic separately from all other CERR merchandise traffic. CSXT argues that the recent decline in crude oil shipments is so anomalous that it justifies substitution of an allegedly updated internal traffic forecast, which CSXT provides for the first time in its Reply, for its internal forecast produced to Consumers in discovery. CSXT uses this new made-for-litigation forecast to project future crude oil shipments only.<sup>162</sup>

The Board should reject CSXT's use of its new internal traffic forecast for crude oil shipments. The Board historically has rejected non-public forecasts introduced by the railroads in their Reply presentations. As the Board stated in *Duke/NS*, "forecasts that were prepared in the ordinary course of business before litigation arose are preferable to projections developed to further the litigating position of the parties."<sup>163</sup> CSXT's purportedly new crude oil forecast falls squarely in this category, particularly since CSXT provided no information concerning the forecast beyond a single spreadsheet in its Reply evidence.<sup>164</sup>

Moreover, even if the new forecast used by CSXT was not prepared solely for purposes of this case, it would be improper to mix it with the forecast that CSXT provided to Consumers in discovery. Forecasts are customarily based upon underlying assumptions that drive the forecasted values. While one assumption may lead to a decline in forecasted traffic for one commodity group,

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<sup>162</sup> CSXT Reply at III-A-25 to 26.

<sup>163</sup> *Duke/NS*, 7 S.T.B. at 144. *See also TMPA*, 6 S.T.B. at 603.

<sup>164</sup> CSXT Reply e-workpaper "Updated CSXT Internal Forecast.xlsx."

the same assumption may lead to an increase in traffic for a different commodity group.<sup>165</sup> CSXT's selective use of two (2) different internal forecasts for different sets of traffic that were made with two (2) different assumptions creates an inconsistency that cannot be reconciled.<sup>166</sup>

CSXT attempts to justify its change by citing to the Board's decision in *Duke/NS* to update the EIA's Central Appalachian coal production forecasts used in that proceeding after the closing of the record in the case.<sup>167</sup> However, the Board's action in the *Duke/NS* case is not comparable to the action taken by CSXT in its Reply in this case. In its *Duke/NS* reconsideration decision, the Board elected to substitute one independently produced, policy neutral, public forecast for an updated version of the same forecast. In contrast, CSXT is proposing to substitute a forecast for a single commodity from its own internal traffic forecast. Unlike the EIA forecasts, which are produced with extensive backup and support,<sup>168</sup> there is no way to verify the assumptions and underpinnings of the forecast offered by CSXT.

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<sup>165</sup> *FMC*, 4 S.T.B. at 731, "[m]oreover, while UP's forecasts cannot anticipate all major setbacks that could occur, neither can they anticipate all major marketing opportunities that may arise."

<sup>166</sup> *TMPA*, 6 S.T.B. at 603; *Xcel I*, 7 S.T.B. at 639 discussing the need to use internally consistent forecasts.

<sup>167</sup> CSXT Reply at III-A-26.

<sup>168</sup> *Duke/NS*, 7 S.T.B. at 145.

For the reasons discussed above, Consumers continue to rely upon CSXT's internal traffic forecast provided in discovery to project future CERR crude oil volumes.

**3. Revenues (Historical and Projected)**

**a. Historical**

Consumers based its Opening historical revenues on the traffic and revenue data supplied by CSXT in discovery.<sup>169</sup>

On Reply, CSXT accepts the approach used by Consumers in developing historical revenues, but noted one error in Consumers' workpapers that justifies a modification of revenues for purposes of this Rebuttal.<sup>170</sup> In developing the average revenues per car for the base year, Consumers divided historic 3Q2014 and 4Q2014 revenues by forecasted 3Q2015 and 4Q2015 carloads, respectively. Consumers should have divided 3Q2014 and 4Q2014 revenues by the historic 3Q2014 and 4Q2014 carloads, respectively. Consumers made a corresponding error in dividing historic 1Q2015 revenues by the forecasted 2Q2015 carloads, instead of dividing the 1Q2015 revenues by 1Q2105 carloads, to develop the average 1Q2015 revenues per carload. Consumers has adjusted its Rebuttal carload calculations and workpapers accordingly.<sup>171</sup>

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<sup>169</sup> Consumers Opening e-workpapers "CERR Car Traffic Forecast.xlsx," and "CERR Container Traffic Forecast.xlsx."

<sup>170</sup> CSXT Reply at III-A-27.

<sup>171</sup> Consumers Rebuttal e-workpaper "CERR Car Traffic Forecast-Rebuttal.xlsx," tab "CAR\_1Q2Q2015," Column (AS), and tab "CAR\_Forecast,"

**b. Projected Revenues**

As described in Consumers' Opening Evidence, the procedures used to forecast CERR revenues over the DCF period through December 31, 2024 were tailored to each particular category of traffic, utilizing the most specific and accurate data made available by CSXT in discovery, and/or public sources approved by and relied upon by the Board in previous cases.<sup>172</sup> On Reply, CSXT accepted Consumers' procedures to forecast CERR revenues with the single exception of fuel surcharge revenues. Consumers addresses CSXT's criticism in Section III-A-3-c below.

On Rebuttal, Consumers continues to rely on the procedures utilized in its Opening Evidence to forecast revenues, but with one adjustment. Since the filing of Consumers' Opening Evidence, the AAR has published updated values for the Rail Cost Adjustment Factor, All-Inclusive Less Fuel and Railroad Cost Recovery Indices, and IHS Economics has published updated forecasts of these same indices. CSXT updated the actual and forecasted indices in its Reply Discounted Cash Flow ("DCF") model, but did not update the same indices in its Reply revenue forecast models.<sup>173</sup> To maintain consistency between its Rebuttal

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Column (BN).

<sup>172</sup> Consumers Opening at III-A-25-27.

<sup>173</sup> CSXT Reply at III-G-11, "Consumers used actual AAR cost indices and Global Insight's (IHS Economics) October 2015 RCAF forecasts to calculate annual inflation forecasts. CSXT does not dispute Consumers' road property asset and operating expense DCF inflation indices derived from these sources and,

revenue forecasts and its DCF model, Consumers has updated the actual and forecasted indices in both its Rebuttal forecast and DCF models.<sup>174</sup>

The Board's 2001 decision in *General Procedures* directed that evidence of stand-alone system revenues be grouped under four (4) specific headings: (a) single-line; (b) divisions – existing interchanges; (c) divisions – cross-over traffic (*i.e.*, new interchanges with the residual CSXT); and (d) other. Consumers' Rebuttal presentation in this Part III-A-3 is organized accordingly.

**i. Single-Line**

As explained in Consumers' Opening Evidence, all of the CERR traffic is received from or delivered to other railroads, including the issue Consumers traffic.<sup>175</sup> Therefore, the CERR does not handle any single-line traffic. CSXT implicitly accepts this position in its Reply by not identifying any single-line movements in its Reply traffic group.<sup>176</sup>

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consistent with Board precedent, updates those indices in circumstances where new actual index forecast values have been available. CSXT Reply inflation forecasts for the CERR are based on Global Insight's January 2016 forecasts." [footnotes omitted].

<sup>174</sup> Consumers Rebuttal e-workpapers "CERR Car Traffic Forecast\_Rebuttal.xlsx," "CERR Container Traffic Forecast\_Rebuttal.xlsx," and "Exhibit III-H-1\_Rebuttal.xlsx."

<sup>175</sup> See Consumers Opening at III-A-9.

<sup>176</sup> See CSXT Reply e-workpapers "CERR Car Traffic Forecast\_Reply.xls," and "CERR Container Traffic Forecast\_Reply.xlsx."



## **ii. Divisions – Existing Interchanges**

Consistent with Board precedent,<sup>177</sup> the CERR's revenue or revenue division earned on traffic interchanged with other carriers when the CERR completely replaces CSXT equals the revenues earned by CSXT from that same traffic. Since the issue Consumers coal traffic is the only CERR traffic moving within this category, its revenues are calculated based on the rates and fuel surcharge established in Tariff CSXT-13952,<sup>178</sup> adjusted as described *infra*. CSXT implicitly accepts this position in its Reply by not identifying any CERR movements in its Reply traffic group, other than the issue traffic movements, where the CERR completely replaces CSXT.<sup>179</sup>

## **iii. Divisions – Cross-Over Traffic**

Cross-over traffic refers to traffic that the CERR interchanges with the residual CSXT at one or more new, hypothetical interchange points. All non-issue CERR traffic moves as cross-over traffic. As Consumers noted in its Opening Evidence, and CSXT confirms in its Reply, the inclusion of cross-over traffic in the design of a SARR is a long-established and judicially-affirmed

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<sup>177</sup> See, e.g., *FMC*, 4 S.T.B. at 725.

<sup>178</sup> See Original Complaint, Exhibit A.

<sup>179</sup> See CSXT Reply e-workpapers “CERR Car Traffic Forecast\_Reply.xls,” and “CERR Container Traffic Forecast\_Reply.xlsx.”

simplification convention that is essential to making the SAC Constraint a workable and accessible regulatory remedy for many captive rail shippers.<sup>180</sup>

In its Opening Evidence, Consumers applied the ATC division methodology adopted by the Board in *Ex Parte No. 715*.<sup>181</sup> Under ATC as adopted in *Ex Parte No. 715*, total revenues from each segment of a cross-over movement (that is, the share of the movement handled by the SARR and the share handled by the residual defendant) are allocated in proportion to the average total cost of the on-SARR segment compared to the off-SARR segment, subject to a failsafe: if the revenue allocation to either the on-SARR or the off-SARR segment is insufficient to cover the variable cost of service for that segment as calculated under URCS, the revenue allocation is increased to equal 100 percent of the variable costs for the segment not covering its variable cost.<sup>182</sup>

Consumers applied ATC as described in *Ex Parte No. 715* in allocating cross-over traffic revenue between the CERR and the residual CSXT. Using CSXT's 2014 URCS variable and fixed costs, and the density and miles of each segment, Consumers calculated CSXT's average total cost per segment for

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<sup>180</sup> See Consumers Opening at III-A-10-11 and CSXT Reply at III-A-28.

<sup>181</sup> See Consumers Opening at III-A-11.

<sup>182</sup> *Ex Parte No. 715* at 30. If the total revenue from the full movement is less than total variable costs under URCS, then revenue is allocated to the on-SARR and off-SARR segments to maintain the existing RVC ratio on each segment. *Id.*, n.90.

movements in 2014, the last full calendar year of traffic and density data provided by CSXT.

In its Reply, CSXT challenges Consumers' use of the Board's *Ex Parte No. 715* ATC methodology, claiming that Consumers seeks to "bias" its revenue allocations in three (3) different ways by allegedly seeking revenue for services the CERR does not provide.<sup>183</sup> First, CSXT asserts that the CERR's transportation of single and multiple-carload movements in intact trainloads (as the CERR would receive them) over-compensates the CERR for terminal and switching services that it does not provide. Second, CSXT claims that Consumers is seeking revenues for empty cross-over traffic movements where the movements do not actually traverse the CERR system. Third, CSXT claims that Consumers overstates the revenues for intermodal traffic that the CERR originates or terminates at CSX Intermodal Terminal's ("CSXIT") 59<sup>th</sup> Street Yard in the same fashion that CSXT originates and terminates traffic at the terminal. CSXT also claims that Consumers made certain technical errors in its revenue division calculations that overstate (and in some cases understate) the CERR's revenues.<sup>184</sup>

Contrary to CSXT's often over-heated rhetoric, Consumers' application of the Board and judicially approved ATC methodology does not bias the CERR's allocated revenues. It is CSXT that seeks to bias the revenue

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<sup>183</sup> See CSXT Reply at III-A-32.

<sup>184</sup> See CSXT Reply at III-A-51 to 54.

allocation process by making unapproved movement specific adjustments to the Phase III variable costs used in the ATC revenue allocation process. CSXT also seeks to divert revenue from the CERR that CSXT retains in the real world for providing the same services as the CERR. Finally, most of the alleged technical errors that CSXT claims Consumer made in its division calculations are not errors at all, but result directly from CSXT's decision to produce an unrequested special study of traffic densities that CSXT claims provided more accurate results than its normal course of business density data. Consumers addresses each of these issues below.

**(a) Divisions on Merchandise Traffic are Not Biased**

CSXT devotes a major portion of its Reply to the claim that Consumers allegedly biased its merchandise traffic revenue divisions by selecting only traffic that moves in intact trains in overhead service while on the CERR.

CSXT claims that:

All of the costs of handling that kind of traffic (meaning the costs of originating, terminating, gathering and blocking the individual cars into a single train heading in the same direction) would be borne by the residual railroad.<sup>185</sup>

CSXT misstates the facts. First, in many cases the residual CSXT does not incur any originating, gathering or terminating costs on the CERR merchandise traffic, because the CERR receives trains intact from carriers other

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<sup>185</sup> See CSXT Reply at III-A-33.

than CSXT. Second, even where the CERR does originate or terminate traffic after it has been handled by CSXT, the Board's ATC methodology fairly compensates the residual incumbent for any originating or terminating services through its use of unadjusted Phase III URCS variable costs in the ATC revenue divisions calculation.

**(1) The Residual CSXT Does Not Incur All of the Originating, Terminating or Gathering Costs Claimed by CSXT**

CSXT's claim that the residual CSXT absorbs all of the originating, terminating and/or gathering costs of handling carload and multiple carload merchandise traffic is incorrect.<sup>186</sup> In its Opening Evidence, Consumers explained in detail the foundations of the CERR operating plan, including the locations and the manners in which it receives traffic from the residual CSXT and other rail carriers with which the CERR interchanges.<sup>187</sup> The CERR interchanges merchandise and intermodal traffic with five (5) different railroads, including the residual CSXT, BNSF, UP, IHB and BRC. In those instances where the CERR receives or delivers carload merchandise traffic with carriers other than the residual CSXT, the CERR steps directly into the shoes of CSXT, and receives or delivers the trains intact and pre-blocked just as CSXT does. This means for this traffic, which constitutes { } percent of the carload and intermodal traffic

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<sup>186</sup> See CSXT Reply at III-A-33.

<sup>187</sup> See Consumers Open at III-C-8.

received or delivered by the CERR, CSXT expends no time originating, terminating, gathering or blocking railcars into complete trains in the area covered by the CERR.<sup>188</sup> The CERR is simply handling this traffic in the same manner in which the real world CSXT moves it.

**(2) The Board's ATC Methodology  
Compensates the Residual Incumbent  
for Originating and Terminating  
SARR Traffic on Cross-Over  
Movements**

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In those instances where the CSXT does originate and/or terminate the merchandise traffic carried on the CERR, the Board's ATC methodology more than compensates the residual CSXT for any work that it performs. The ATC methodology explicitly allocates revenues to the railroad that originates and/or terminates the traffic carried by the SARR through the use of unadjusted Phase III URCS variable costs in the ATC calculation. The Board's URCS Phase III model includes specific costs for movements originated and/or terminated by the railroad, including carload and clerical costs and terminal costs.<sup>189</sup> If the residual CSXT

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<sup>188</sup> See Consumers Rebuttal e-workpaper "Merchandise Traffic Interchange Ratio.xlsx." Consumers was able to identify this traffic through its ATC divisions analysis. Where the CERR interchanges traffic with a railroad other than the residual CSXT, it retains interchange related costs in the URCS Phase III costs used in the ATC revenue divisions. When the CERR interchanges with the residual CSXT, it removes the interchange related URCS Phase III costs pursuant to the Board's ATC procedures. Consumers was able to determine that { } of its merchandise and intermodal traffic was interchanged with carriers other than the residual CSXT. This traffic excludes unit trains, which by definition incur no switching.

<sup>189</sup> See the Board's Railroad Costs Program User's Manual at 8.

originates or terminates traffic, it is compensated for these operations by its higher Phase III URCS variable costs, which increases the average total costs for the residual incumbent compared to the SARR, and thus increases the residual incumbent's share of revenues.

Nor does the ATC approach understate the costs to originate or terminate traffic. ATC originally was conceived as a means by which the incumbent's revenues could be divided to reflect the *incumbent's* costs along discreet segments and operations of an end-to-end movement, and ensure that revenue allocations followed those costs. Prior to the STB's introduction of the ATC methodology, cross-over traffic revenues were allocated using the modified mileage-block prorate ("MMP"), and later the modified straight-mileage prorate ("MSP") approaches. Under both methodologies, the railroad originating or terminating the traffic (either the SARR or the residual incumbent) was awarded an additional mileage credit for performing those operations. In several decided cases using the MMP/MSP methodology, SARRs presented before the STB included traffic where the SARR would originate a shipment and move it a few dozen miles to interchange with the residual incumbent. The railroads argued – and the STB ultimately agreed – that SARRs were overcompensated for merely originating the movement and then handing off to the residual incumbent, who was undercompensated for the line-haul portion of the movement. The STB

introduced the ATC methodology in part to ensure that terminal and line-haul costs would be properly reflected in the revenue divisions.<sup>190</sup>

CSXT now claims that where significant traffic is originated and terminated by the residual incumbent and moved by the SARR in line-haul service, the ATC revenue division formula overcompensates SARRs for performing the line-haul operations, while the residual incumbent is undercompensated for the terminal operations it “is left to” perform. However, CSXT offers no empirical proof of its claim, which flies in the face of a key purpose of the railroad-endorsed ATC methodology. Under the previous pre-ATC model, the STB believed that originating/terminating carriers (whether the SARR or residual incumbent) were *over*-compensated for performing terminal operations, so it changed the model to ensure that terminal and line-haul costs were properly weighted.

Also noteworthy is the irony that CSXT took the complete opposite position on the level of compensation for overhead movements in the *TPI* case. In *TPI*, the shipper included internal cross-over movements in which the SARR would originate and terminate the traffic and the incumbent CSXT would carry traffic on an overhead bridge basis. When designated as the bridge carrier in that

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<sup>190</sup> See *Major Issues* at 26, “[u]sing the URCS variable and fixed costs for the carrier, and the density and miles of each segment, parties can calculate the railroad’s average total cost per segment of a move. The revenues from each portion of the movement would then be allocated in proportion to the average total cost of the movement on and off-SARR.”



proceeding, CSXT alleged that the ATC process *under*-compensated it for the intact trainload movements operated in bridge service over the residual CSXT.<sup>191</sup>

CSXT's position on ATC revenue allocations for overhead or bridge trainload movements appears to be driven purely by its role in litigation. In *TPI*, CSXT argued that the ATC division process understated the revenues allocated to overhead bridge traffic operating over the residual CSXT. In the instant proceeding, the same CSXT argues that the same ATC division approach overstates the CERR revenues on the same type of overhead bridge traffic. CSXT cannot have it both ways.

**(3) The ATC Methodology Does Not Over-Compensate the CERR for Switching it Does Not Perform**

CSXT argues that there is no meaningful difference between the trainload service that the CERR provides for its merchandise traffic and the unit train movements included in the CERR traffic group.<sup>192</sup> What CSXT effectively is asserting is that if a SARR moves traffic in overhead trainload service, it is not performing any intra-train or inter-train ("I&I") switching, and should not be credited with costs attributable to such switching in its ATC calculation. Implicit in this position is that it is acceptable to assume that the residual incumbent performs I&I switching every 200 miles, based on the URCS system average, on

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<sup>191</sup> See *TPI*, Reply Evidence of CSX Transportation, Inc., July 21, 2014 at III-A-35 (Public Version).

<sup>192</sup> See CSXT Reply at III-A-34.

the traffic over the off-SARR portions of the same movements, while simultaneously assuming that the SARR does not incur the same costs when it moves the same type of traffic over the same distance.

Regardless of the inconsistency in CSXT's logic, the fact is that the exclusion of I&I costs has no real impact on the ATC divisions regardless of the type of movement involved. This is because using the URCS Phase III model to estimate variable costs ensures that the incumbent's costs for all types of traffic are properly and adequately reflected in the ATC formula. This was illustrated in the evidence submitted in the *Ex Parte No. 715* proceeding, where ATC revenue divisions were developed for eight hypothetical cross-over movements, including single-car and multiple carload shipments.<sup>193</sup> The evidence showed that the inclusion of I&I costs had no appreciable impact on the revenue divisions for less than unit train shipments. In other words, the CERR is not over-compensated for I&I switching in the ATC revenue divisions.

**(4) CSXT's Movement Specific  
Adjustments to Merchandise  
Traffic are Unjustified**

CSXT promotes a number of what it considers "corrections" in the Board-approved ATC process to eliminate the alleged biases in Consumers'

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<sup>193</sup> See the Verified Statement of Thomas D. Crowley and Daniel L. Fapp on behalf of Western Coal Traffic League, Concerned Captive Coal Shippers, American Public Power Association, the National Rural Electric Cooperative Association, Western Fuels Association, Inc., and Basin Electric Power Cooperative, Inc., October 23, 2012 at 43 to 45.

CERR revenue allocations for single and multiple carload merchandise traffic described above. It bases these so-called corrections on its claim that the calculation of variable costs for ATC purposes should mirror the characteristics of the services provided by the SARR, and not that provided by the incumbent railroad.<sup>194</sup> CSXT's proposal includes making movement-specific adjustments to the URCS Phase III variable costs for the SARR portion of the movement, adjusting the fixed costs for the SARR portion of the movement by removing fixed costs associated with switching services, and adjusting how the on-SARR and off-SARR variable costs are calculated.

In truth, CSXT is not offering to correct errors in the ATC methodology. It simply is arguing for results-oriented changes to the execution of ATC in this case. The Board should reject CSXT's proposed changes. On a fundamental level, CSXT's stated reasons for making these adjustments, *e.g.*, that the SARR variable and fixed costs must mirror those of the SARR's operations, is fundamentally at odds with the entire predicate for the ATC methodology. Additionally, the Board has continuously rejected the type of movement-specific adjustments that CSXT advocates in its treatment of the SARR portion of fixed and variable costs. Finally, from a theoretical stand-point, the adjustments proposed by CSXT make no logical sense.

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<sup>194</sup> See CSXT Reply at III-A-34.

(i) **ATC Divisions are Based on the Incumbent's Operations, Not the SARR's Operations**

CSXT's basis for making adjustments to the variable and fixed costs used to develop the CERR portion of the cross-over revenues lies in its assertion that the method of calculating the costs for revenues attributable to the CERR should match the characteristics of the CERR's operations.<sup>195</sup> CSXT's fundamental assumption is wrong. As the Board has repeatedly noted, revenue divisions are intended to allocate the incumbent's revenues to discrete segments of the incumbent's end-to-end movements based on the relative costs of the *incumbent's* operations over those segments, and are not intended to allocate revenues based on the SARR's operations. The centrality of this principle is reflected, *inter alia*, in the fact that the stand-alone replacement for the incumbent does not even have to be another railroad. With its fundamental assumption undermined, CSXT's argument falls apart.

In *Major Issues*, railroads and shippers offered comments that the STB carefully considered in its development and implementation of the ATC formula. One of the issues left unclear from the STB's discussions in *Major Issues* was how traffic densities used in the ATC calculation would be determined.<sup>196</sup> The STB subsequently resolved the issue in *WFA II*, when it held

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<sup>195</sup> See CSXT Reply at III-A-34.

<sup>196</sup> See *Major Issues* at 34. The STB stated that system average fixed cost should be combined with the actual route miles and "traffic tons" of a segment in

that the proper approach is to use the actual densities of the incumbent railroad, and not traffic densities based on the SARR's traffic. The STB noted that it was appropriate to use the incumbent's densities in the formula because revenue allocation has nothing to do with the SARR's operations, but rather with the incumbent railroad's relative costs of service over the relevant segments of its network. Moreover, the unadjusted URCS Phase III costs used in the ATC formula reflect the incumbent's operations, and it would be inherently inconsistent to combine variable costs based on the incumbent's cost of operations with average fixed costs based on the SARR's operations.

CSXT's attempt to align the SARR's operations with the ATC revenue divisions also is inconsistent with the fact that the stand-alone replacement for the incumbent railroad need not even be another railroad. The ICC stated in *Coal Rate Guidelines* that the stand-alone replacement does not need to be another railroad, but any other (theoretically) feasible alternative.<sup>197</sup> The STB affirmed this bedrock position in *WFA II*, indicating "...under SAC the hypothetical competitor to BNSF does not even need to be a railroad at all."<sup>198</sup>

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question, but never states whether the "traffic tons" are for the SARR or the incumbent carrier.

<sup>197</sup> See *Coal Rate Guidelines*, 1 I.C.C. 2d at 543.

<sup>198</sup> See *WFA II* at 14.

**(ii) CSXT's Changes are Movement-Specific Adjustments Not Allowed in ATC Calculations**

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CSXT asserts that it modified the variable and fixed cost components of the ATC revenue allocation for the CERR's carload merchandise traffic to eliminate an alleged bias in the CERR's revenue divisions. To this end, CSXT made three (3) specific adjustments to the fixed and variable cost used to develop the CERR portion of the revenue divisions. First, instead of developing the unadjusted Phase III URCS variable costs using the actual movement size (single-car or multiple car) included on the shipment waybill, CSXT developed the Phase III variable costs assuming all movements were trainload size movements.<sup>199</sup> Second, instead of using the default trainload empty-loaded ratio used when costing trainload movements, CSXT substituted the empty-loaded ratio based on what it characterized as the actual movement type.<sup>200</sup> Third, CSXT made movement specific adjustments to the fixed cost component of the ATC calculation.<sup>201</sup>

Each one of CSXT's adjustments must be rejected, based on the simple and central fact that the Board's ATC methodology does not allow for movement specific adjustments to the URCS costs used to develop revenue divisions. In *Major Issues*, the Board found that "the use of movement specific-

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<sup>199</sup> See CSXT Reply at III-A-34.

<sup>200</sup> See CSXT Reply at III-A-35.

<sup>201</sup> See CSXT Reply at III-A-36 to 37.

adjustments is inordinately complex, time consuming, and expensive, and does not necessarily result in more reliable results than using the URCS system averages.”<sup>202</sup> The Board further warned that “selective replacement of system-average statistics ... may bias the entire analysis, rendering the modified URCS output unreliable.”<sup>203</sup> CSXT’s focus on isolated aspects of the SARR and/or the residual incumbent segments constitutes exactly the sort of selective adjustment that was the subject of the Board’s warning in *Major Issues*. Far from removing bias in revenue allocations, CSXT’s selected movement specific adjustments introduces bias in its favor, which was the basis of the Board’s preclusion of the same type of adjustments in *Major Issues*.

Even if the movement-specific adjustments were allowed, which they are not, the adjustments CSXT made to the fixed cost component of the single and multiple car movements are flawed, for at least (3) three reasons.

First, fixed costs are, by definition, costs incurred by the railroad as a whole. While URCS makes a mathematical distribution of fixed costs in the D1 through D8 tables, the user cannot pick and choose which fixed costs are applicable to any movement. Separating out fixed cost by component, *i.e.*, identifying the amounts in tables D2 and D4, is nonsensical. No fixed cost (or constant cost) allocation methodology ever utilized by the ICC/STB for

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<sup>202</sup> See *Major Issues* at 60.

<sup>203</sup> *Id.* at 58.

ratemaking has separated fixed costs into separate components. In URCS Phase III, which is utilized in calculating ATC revenue divisions, line 697 shows the constant cost markup ratio. The value is one number for each individual URCS and is applied to ALL movements. For example, URCS and the STB do not calculate a separate markup ratio for railroad-owned or shipper-owned cars.

CSXT's proposed approach contradicts these basic principles.

Second, CSXT proposes to exclude fixed costs related to tables D2 and D4 in the URCS because the SARR does not incur switching. However, this calculation fails to recognize that the variabilities in tables D2 and D4 of URCS are also tied to other parts of URCS, namely the D1 and D3 tables that deal with the running portion of a movement. A review of Table D2, lines 114 through 154, Column (1) shows that the variability percentage is based on URCS regression numbers 2 and 9. Similarly, a review of Part D4, lines 103 through 156, Column (1) shows that the variability percentages are based on regressions 2 and 6. These regressions are based on costs for both running and switching accounts. CSXT cannot eliminate the fixed costs for D2 and D4 without adjusting the variability percentages applicable to the running accounts, which would involve a recalculation of the entire URCS. Furthermore, road return, which is applicable to both D1 and D2, is based on the standard factor of 50 percent. In order to eliminate the switching fixed costs, CSXT (or the STB) would be required to re-evaluate the 50 percent variability which was determined considering both running and switching costs.



Third, both Consumers and CSXT have included switch locomotives on the CERR. The costs for the switch locomotives for ATC are considered as part of D2 and D4. CSXT cannot include the costs for switch locomotives in the CERR operating expenses and then exclude that item from the ATC division calculations.

**(b) CSXT's Movement Specific  
Adjustments to Unit Train  
Traffic Have No Merit**

As shown in its Opening Evidence, Consumers developed revenue divisions using the Board mandated ATC divisions process, including the use of unadjusted Phase III URCS variable costs to develop the on-SARR and off-SARR portions of CERR traffic movements.<sup>204</sup> The Board's URCS Phase III model assigns an empty/loaded ratio of 100 percent to all unit train movements, and Consumers used this unadjusted factor when developing its URCS Phase III variable costs for its ATC calculations.<sup>205</sup>

In its Reply, CSXT states that the use of a 100 percent empty/loaded ratio creates a bias in the ATC divisions because not all empty unit train

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<sup>204</sup> See Consumers Opening at III-A-13.

<sup>205</sup> The empty/loaded ratio, also called the empty/return ratio, reflects the amount of empty car movement before spotting for another shipment, which results from the loaded shipment distance. The two ratio extremes for the empty/loaded ratio are: 1.0 that implies no empty return mileage and 2.0, which implies a 100 percent empty return of the freight car. See the STB Railroad Cost Program User's Manual at page 21.

movements return over the same route as the loaded movements.<sup>206</sup> In the real world, for example, CSXT avoids sending low-priority empty unit trains through the Chicago gateway. CSXT asserts that using the URCS Phase III default ratio overstates the CERR revenues because the CERR is implicitly paid for work it did not perform, namely the movement of empty unit trains back over its system. To remedy this alleged bias, CSXT changed the empty/loaded ratio on unit train movements from 100 percent to 85 percent to reflect what it claims is the empty/return ratio experienced by unit trains operating over the CERR route.

The Board must reject CSXT's empty/loaded ratio adjustment because CSXT improperly interprets the empty/loaded ratio it adjusted. Implicit in CSXT's methodology is the assumption that even though the on-SARR empty return ratio is less than the 100 percent utilized in Phase III costing of unit trains, the empty return ratio for off-SARR is still 100 percent. The fact is that unit trains do not always return empty to the same origin or interchange point. This is well known, and has been discussed by the Board in the specific context of railroad proposals to "adjust" for it.<sup>207</sup> {

} Before CSXT can apply a movement specific empty return ratio for

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<sup>206</sup> See CSXT Reply at III-A-38-39.

<sup>207</sup> See *Major Issues* at 58. See also Part II-A-2-5, *supra*.

<sup>208</sup> CSXT Reply e-workpaper "2014 CSXT URCS Empty Load Ratios.xlsx," tab "E2P1," cell F28.

the on-SARR movement, CSXT would have to calculate the empty return ratios for the off-SARR trains, so that both sides of the ATC revenue division are calculated in a like manner.

CSXT's proposed movement specific adjustment, like the adjustments rejected by the Board in *Major Issues*, inevitably would lead to further adjustments both in this case and in future cases. For example, the CERR operates differently than CSXT does over the existing CSXT lines that the CERR replicates, and the CERR lines contain different track structure. Other traffic or cost inputs that will vary for the on-SARR and off-SARR movements would include:

1. Number of locomotives on the train;
2. Number of cars (or total weight) of the train;
3. Crew wages;
4. Road property investment; and
5. Maintenance of road property and equipment.

It is this very reason of ever-escalating adjustments that the Board in *Major Issues* chose to rely on URCS Phase III system average costs instead of allowing parties to make ad-hoc changes to the URCS variable costs.

CSXT also makes the absurd assertion that its change is appropriate because it is not a movement-specific adjustment to the URCS variable costs, but rather it is a CERR system-wide adjustment applied to all unit train movements.<sup>209</sup> In *Major Issues*, The Board defined "movement-specific adjustment" as the use of

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<sup>209</sup> See CSXT Reply at III-A-40-41.

a figure different than an URCS system-average figure in the development of variable costs.<sup>210</sup> In this instance, CSXT advocates the replacement of the URCS system-average empty/loaded ratio with an empty/return ratio allegedly reflective of only the unit train traffic in the CERR traffic group. CSXT's proposed change is a clear example of a movement-specific adjustment.

Indeed, CSXT itself has called this type of change a "movement-specific" adjustment in a prior STB proceeding. In its *Ex Parte No. 715* notice of proposed rulemaking, the Board requested comments on proposed limitations to the use of cross-over traffic in SAC cases.<sup>211</sup> In commenting on the proposed cross-over traffic limitations, CSXT stated that the issue was not with cross-over traffic, *per se*, but with allocating revenues to account for the unique attributes and characteristics of each particular SARR:<sup>212</sup>

Thus, if the Board were able to adjust its revenue allocation method to account for the unique attributes and characteristics of each particular SARR, the use of crossover traffic would not necessarily need to be limited in the manner that the Board has proposed, either by limiting the use of crossover traffic to (1) movements originating or terminating on the SARR or (2) trainload movements. In particular, to address the distortions about which the Board is concerned would require movement-specific adjustments to URCS.<sup>213</sup>

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<sup>210</sup> See *Major Issues* at 22.

<sup>211</sup> See *Ex Parte No. 715* at 16 to 17.

<sup>212</sup> See Opening Comments of CSX Transportation Inc. and Norfolk Southern Railway Company, *Ex Parte No. 715*, October 23, 2013 at 17-18.

<sup>213</sup> *Id.* at 18.

The adjustments that CSXT now proposes to make to the empty/loaded ratio are the same adjustments that CSXT called “movement-specific” adjustments in its *Ex Parte No. 715* comments.

**(c) CSXT’s Treatment of Traffic Originating or Terminating at the 59<sup>th</sup> Street Intermodal Facility is Incorrect**

Consumers’ operating experts developed the CERR operating plan to provide the same or better levels of service as that provided by CSXT for traffic included in the CERR traffic group.<sup>214</sup> This includes intermodal traffic originating, terminating or moving through the 59<sup>th</sup> Street Intermodal facility owned and operated by CSXIT. Specifically, as CSXT does in its real world operations, the CERR originates and terminates some intermodal trains at CSXIT’s 59th St. Intermodal terminal, but the trains are handled at the terminal by CSXIT, a separate and distinct entity from CSXT.<sup>215</sup> For traffic that CSXT receives or delivers to the 59<sup>th</sup> Street Intermodal facility and is not terminated at the facility, the CERR interchanges with CSXT. Consumers accounted for the

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<sup>214</sup> See Consumers Opening at III-C-78, “[t]his comparison illustrates that all of the cross-over traffic transit times are superior to the CSXT historic transit time over the same route.”

<sup>215</sup> See Consumers Opening at III-C-8.

difference in traffic originating/terminating or received/delivered in its development of ATC revenue divisions.<sup>216</sup>

CSXT claims in its Reply that Consumers is “playing games” with intermodal traffic that originates or terminates at CSXIT’s 59<sup>th</sup> Street Intermodal terminal by taking revenues for originating or terminating intermodal traffic that CSXT originates or terminates at the 59<sup>th</sup> Street Intermodal terminal, but not performing the work associated with originating or terminating the traffic.<sup>217</sup> CSXT asserts that it is CSXIT that is actually originating or terminating the traffic, and not the CERR because it is CSXIT that is actually building the trains. Additionally, CSXT claims that the lift fees that the CERR pays CSXIT for building the trains are substantially below the actual costs incurred by CSXIT, and that Consumers has not included any of the investment and operating costs incurred by CSXIT to build, maintain and operate the 59th Street Terminal.<sup>218</sup>

CSXT’s claims that Consumers is “playing games” with traffic originating or terminating at the 59th Street Intermodal terminal are groundless. The CERR originates or terminates traffic at the 59th Street Intermodal terminal in the same fashion as CSXT originates or terminates traffic at the facility, and therefore is entitled to the same revenues that CSXT receives. This is not changed

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<sup>216</sup> See Consumers Opening workpaper “CERR Divisions.xlsx,” tab “Containers,” columns BP and BQ.

<sup>217</sup> See CSXT Reply at page III-A-42.

<sup>218</sup> See CSXT Reply at III-A-44.

by the fact that the 59th Street Terminal is owned by a separate company controlled by CSXT's corporate parent, CSX Inc. Consumers discusses CSXT's Reply claims about operating and investment costs for the 59<sup>th</sup> Street Terminal in Parts III-C, III-D and III-F, *infra*, and explains how Consumers accounted for all relevant operating costs and investment. Consumers addresses CSXT's false claim that there is no effective difference between CSXT and CSXIT, below.

Shippers must account for all the services provided by the defendant railroad for the transportation of issue traffic, and any non-issue traffic included in the stand-alone traffic group. This requirement, however, applies only to services provided by the defendant railroad, and not to services provided by a third-party company, even if the third-party company is a corporate affiliate of the defendant.

The Board addressed this issue in its *DuPont* decision. In that proceeding, DuPont proposed using trackage rights over four (4) different short line or switching railroads affiliated with the defendant NS.<sup>219</sup> Two (2) of these railroads, the BRC and Terminal Railroad Association of St. Louis ("TRRA"), were indirect subsidiaries of NS. The other two (2) railroads, the Conrail Shared Asset Areas ("SAA") and the IHB, were indirect subsidiaries of Norfolk Southern Corporation ("NSC"), the parent company of NS. NS argued that DuPont could not use trackage rights over the facilities of any four (4) of the railroads because the trackage rights fees paid by the DuPont SARR would not cover the full cost of

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<sup>219</sup> See *DuPont* at 47.

ownership in the four (4) short lines. Instead, NS argued that DuPont had to pay for the replacement costs of these facilities proportional to NS' ownership in each of the railroads.<sup>220</sup>

The Board held that DuPont was required to account for the proportional construction costs of the BRC and TRRA, since these companies were indirect subsidiaries of the defendant NS, but *not* the costs of the SAA or IHB, since these companies were owned by NSC.<sup>221</sup> The Board noted that NSC elected to set up its ownership interests in SAA and IHB as separate legal entities from its primary railroad subsidiary, and that data used in SAC presentations must reflect the underlying corporate structure of NS and NSC. Because the SAA and IHB were not owned by NS, but instead were owned by NSC, the Board found that DuPont need not account for the construction costs and operations of these facilities beyond the trackage rights payment paid by NS to each of them.

The issue of corporate structure is germane in this case because like the SAA and IHB in *DuPont*, CSXIT is not owned by the defendant CSXT but by its corporate parent, CSX Inc. This fact is confirmed by CSX Inc.'s SEC Form 10-K and by CSXT's Annual Report Form R-1.

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<sup>220</sup> *Id.* at 48.

<sup>221</sup> *Id.* at 48-49.



CSX Inc. identifies CSXT as its primary subsidiary, but states that several other companies are subsidiaries of CSX Inc. As indicated in CSX's 2015 Form 10-K:

In addition to CSXT, the Company's (CSX's) subsidiaries include CSX Intermodal Terminals, Inc. ("CSX Intermodal Terminals"), Total Distribution Services, Inc. ("TDSI"), Transflo Terminal Services, Inc. ("Transflo"), CSX Technology, Inc. ("CSX Technology") and other subsidiaries. CSX Intermodal Terminals owns and operates a system of intermodal terminals, predominantly in the eastern United States and also performs drayage services (the pickup and delivery of intermodal shipments) for certain customers and trucking dispatch operations.<sup>222</sup>

As the foregoing shows, CSXIT is a subsidiary of CSX Inc., and is not a subsidiary of CSXT. This fact is further confirmed by CSX Inc.'s website, which includes a list of primary subsidiaries and identifies each as a separate and distinct company.

CSX Corporation is the parent company of several direct and indirect wholly-owned subsidiaries, including: CSX Intermodal Terminals, Inc.; CSX Real Property, Inc.; CSX Technology, Inc.; CSX Transportation, Inc.; Total Distribution Services, Inc. and TRANSFLO Corporation. Each subsidiary is a separate and distinct company.<sup>223</sup>

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<sup>222</sup> See CSX Inc. 2015 SEC Form 10-K at 4. A copy of CSX's 10-K is found in Consumers Rebuttal e-workpapers at "CSX 2015 10-K.pdf."

<sup>223</sup> See CSX Inc. corporate website accessed on April 25, 2016 at <https://www.csx.com/index.cfm/about-the-site/corporate-structure/>.

CSXT's lack of any ownership interest in CSXIT is further confirmed by its exclusion from the companies consolidated into CSXT's Form R-1, and its exclusion from Schedule 310A.<sup>224</sup>

Like the operations of the SAA and IBH in the *DuPont* case, CSXT's relationship to CSXIT is nothing more than a customer/supplier relationship. As shown in Parts III-D and III-F *infra*, Consumers has accounted for all the necessary costs due to CSXIT for the services that it provides, and therefore is entitled to the same origination or termination revenues received by CSXT for traffic the CERR originates or terminates at the 59<sup>th</sup> Street Intermodal facility.

**(d) Other Adjustments to ATC  
Revenue Divisions**

CSXT asserts that it made two (2) sets of technical adjustments to Consumers' ATC revenue division calculations. First, CSXT updated the 2014 URCS used in the ATC revenue division allocation process to the Board's recently released 2014 CSXT URCS.<sup>225</sup> As Consumers noted in its Opening Evidence, the STB had not yet released its 2014 CSXT URCS at the time of Consumers' filing, so Consumers developed the CSXT 2014 URCS variable costs using an URCS model based upon the STB's programs and procedures.<sup>226</sup> Since the Board has

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<sup>224</sup> See CSXT Annual Report Form R-1.

<sup>225</sup> See CSXT Reply at III-A-51.

<sup>226</sup> See Consumers Opening at III-A-12.

now released its 2014 CSXT URCS, Consumers has updated its ATC revenue divisions to use the Board's 2014 CSXT URCS.

Second, CSXT claims it found errors in the fixed cost allocation affecting the ATC revenue divisions.<sup>227</sup> In actuality, however, most of the alleged errors claimed by CSXT are the result of Consumers' reliance upon CSXT's own special study of density on the CSXT system. Consumers noted in its Opening Evidence that the route densities for each movement included in the CERR traffic group, both on-SARR and off-SARR, were developed using density data produced in discovery.<sup>228</sup> CSXT initially provided gross tonnage density statistics that CSXT stated it developed in the normal course of its business. However, in a later data production, CSXT stated that use of the gross tonnage data initially provided could lead to overstatements of gross tonnages on individual segments, because the tons may reflect traffic that traverses only a small portion of the segment and not the full segment, especially around terminal areas.<sup>229</sup> Given the alleged limitations of the gross tonnage density data, CSXT represented that it had performed its own special study to develop net tonnage statistics for each segment. Since CSXT held out its special study as more accurate than its normal course of business density data, Consumers relied upon CSXT's study for density statistics.

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<sup>227</sup> See CSXT Reply at III-A-51.

<sup>228</sup> See Consumers Opening at III-A-19 and 20.

<sup>229</sup> See the June 12, 2015 letter from Hanna M. Chouest to Kelvin J. Dowd included as Consumers Opening e-workpaper "June 12, 2015 Discovery Production.pdf." at 1 and 2.

CSXT now appears to have had second thoughts, and seeks to characterize any problems with its special study as “errors” committed by Consumers. CSXT cannot proffer a special study to Consumers as a reliable database, and then jettison the study when it does not like the results. Consumers addresses CSXT’s claims below.

(1) **Alleged Inaccurate Density Figures**

CSXT argues that Consumers made two (2) errors related to the traffic densities included in its special study. First, CSXT claims that Consumers understated the traffic densities between MP DC 15.0 and 15.35 in Chicago, which led to an overstatement of on-CERR allocated fixed costs.<sup>230</sup> CSXT claims that this error is due to a “simplification in the routing algorithm used by CSXT to transform the CSXT car event data into segment densities produced to Consumers in discovery.”<sup>231</sup>

Second, CSXT asserts that Consumers’ off-SARR fixed costs are overstated because certain movements over the residual CSXT use a small portion of a long, low-density segment between MP CGE 0 and CGE 47.1 that has high fixed costs per ton.<sup>232</sup> CSXT claims that it fixed this alleged error by eliminating all the off-SARR fixed costs associated with this segment.

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<sup>230</sup> See CSXT Reply at III-A-51-52.

<sup>231</sup> *Id.* at III-A-51.

<sup>232</sup> *Id.* at III-A-53-54.

CSXT's assertion that Consumers erred in developing the fixed costs for these segments is incorrect. Consumers calculated the fixed costs associated with the two (2) line segments that CSXT now takes issue with in the same fashion that it calculated the fixed cost for every other segment included in CSXT's special study, which CSXT accepted.<sup>233</sup> It is simply not true that Consumers made an error in these calculations.

What CSXT really is objecting to is the results produced by its own special study. CSXT held out to Consumers, and thus to the Board, that its normal course of business density data should not be used because it could overstate segment traffic densities.<sup>234</sup> CSXT therefore produced, on its own initiative, a special study of traffic densities based on car event data that would eliminate the problems that CSXT had identified in its normal course of business density data.

One suspects, of course, that CSXT overrode its normal course of business data because it was concerned that using that data would be too favorable to Consumers. But whatever the reason, CSXT cannot reject its own business records in favor of a special study, and then turn around and distance itself from its

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<sup>233</sup> *Compare* Consumers Opening e-workpaper "2014 Fixed Costs For ATC (Final).xlsx," tab "2014\_Density," cells R336, R337 and R764, which include the fixed cost calculations for the line segments in question, to every other fixed cost calculation in Column (R) of the same worksheet.

<sup>234</sup> *See* the June 12, 2015 letter from Hanna M. Chouest to Kelvin J. Dowd included as Consumers Opening e-workpaper "June 12, 2015 Discovery Production.pdf." at 1 and 2.

own study when it does not like the results.<sup>235</sup> CSXT undertook its special density study and presented the results as more accurate and reliable than its course of business data. It is only after Consumers applied the results of CSXT's special density study that the railroad claimed it also produces inaccurate results.

Consumers continues to rely upon CSXT's special study of densities for the two (2) line segments at issue in its Rebuttal Evidence.<sup>236</sup>

**(2) Consumers Did Not Overstate the Length of the Campbell Plant Segment**

CSXT claims that Consumers' fixed cost calculations overstate the length of the line segment leading to the Campbell plant.<sup>237</sup> Specifically, CSXT argues that Consumers' traffic only operates over 9.4 miles of the 37-mile segment included in CSXT's special study of traffic densities. The CSXT special density study, which is based on CSXT network link information included in CSXT's car movement data, identifies the specific segment as CGC24.33\_CGC61.41, which is between MP CGD 24.33 and CGC 61.41 on the Grand Rapids Subdivision.

Because CERR traffic only operates over a portion of the segment, CSXT

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<sup>235</sup> See *Texas Municipal Power Agency v. Burlington Northern and Santa Fe Railway Company*, 7 S.T.B. 803, 813 (2004).

<sup>236</sup> CSXT also asserts that it accounted for the impact of the low density on the CGE 0 and CGE 47.1 line segment by removing the fixed costs for this segment from its calculations; however, a review of CSXT's Reply workpapers shows that CSXT continued to include the fixed costs in its calculations. See CSXT Reply e-workpaper "aOffSarrFixedCosts\_Upload.xlsx," tab "aOffSarrFixedCosts," cells I1855 and I2868.

<sup>237</sup> See CSXT Reply at III-A-53.

unilaterally decided to split the link into two (2), which reduces the average fixed cost of traffic moving over the segments.<sup>238</sup>

CSXT's proposed change to its special study is wrong for several reasons. First, CSXT's proposed change is just another case of seller's remorse, where CSXT is attempting to distance itself from the results of its own special density study. Consumers did not define the length of the segments included in CSXT's special study. CSXT did.<sup>239</sup> CSXT found that it did not like the results of its special study once Consumers applied them, and is now attempting to change the results after the fact.

Second, Consumers' fixed cost calculations already take into consideration that traffic moving to and from the Campbell plant only moves over a portion of the line segment. Consumers developed the average fixed cost per ton for each on-SARR line segment identified in CSXT's special density study by prorating the segment's average fixed cost per ton by the portion of the CERR miles moving over that segment. {

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<sup>238</sup> This occurs because the Board's ATC methodology calculates a system average fixed cost per mile, and then applies this fixed cost to segments along the incumbent railroad's route. Reducing the length of each segment reduces the allocated fixed cost to that segment, which, holding all else constant, reduces the average fixed cost per ton for traffic moving over the line segment.

<sup>239</sup> See Consumers Opening e-workpaper "2014 Fixed Costs for ATC (Final).xlsx," tab "2014\_Density," row 763. This worksheet came directly from CSXT's special density study provided in discovery.

}<sup>240</sup> CSXT should

be familiar with this methodology, since it is the same methodology that CSXT used to allocate SARR revenues over segments in which the SARR only moved part of the way in the *TPI* case.<sup>241</sup>

Again, CSXT should not be allowed to distance itself from its own special study just because the results of its use do not favor CSXT. Additionally, CSXT's proposed adjustment is unnecessary because Consumers' approach already accounts for the CERR operating over only a portion of the line segment. Consumers continues to use the correct methodology that it used in its Opening Evidence.

### (3) Bi-Directional Density Segments

CSXT claims that Consumers' fixed cost segmentation file includes two (2) records each for 17 segments, reporting separately by direction the eastbound and westbound densities. However, in its fixed cost calculations, CSXT notes that Consumers only used the density in one direction.<sup>242</sup>

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<sup>240</sup> See Consumers Opening e-workpaper "2014 Fixed Costs for ATC (Final).xlsx," tab "On-SARR Miles and Fixed Cost," cells N72, N253 and U46. This adjustment only impacts the non-issue traffic moving to the Campbell Plant since the CERR receives 100 percent of the issue traffic moving to the station.

<sup>241</sup> See *TPI* Reply Evidence of CSX Transportation Inc., July 21, 2014 at III-A-41-43 (Public Version).

<sup>242</sup> See CSXT Reply at III-A-52 to 53.



Consumers reviewed CSXT's claim and agrees that 17 of the 1,674 segments included in CSXT's special study report eastbound and westbound densities. Consumers incorporated CSXT's adjustment into its Rebuttal fixed cost calculations.<sup>243</sup>

In reviewing CSXT's Reply fixed cost calculations, Consumers also found that CSXT's calculations developed incorrect costs on three (3) of the 17 bi-directional segments identified by CSXT. CSXT's error occurred because CSXT transposed the milepost in the segment name on three (3) of the segments. CSXT's special density study identified density segments by the beginning and ending milepost for each segment. In three (3) cases however, CSXT used the same origin and destination milepost identifiers on these bi-directional segments twice.<sup>244</sup> This lead to a miscalculation of the bi-directional densities moving over these segments and incorrect fixed costs. Consumers corrected CSXT's error in its Rebuttal fixed cost calculations.<sup>245</sup>

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<sup>243</sup> See Consumers Rebuttal e-workpaper "2014 Fixed Costs For ATC (Rebuttal).xlsx," tab "2014\_Density," Columns (H) and (I).

<sup>244</sup> See CSXT Reply e-workpaper "2014 Fixed Costs For ATC (Final)\_Reply.xlsx," tab "2014\_Density," cells B398, B919 and B1411.

<sup>245</sup> See Consumers Rebuttal e-workpaper "2014 Fixed Costs For ATC (Rebuttal).xlsx," tab "2014\_Density," cells B398, B919 and B1411.

**(4) Buffington Connection Traffic Densities**

CSXT recategorized 0.6 miles on the Buffington Connection from trackage rights miles to a CERR owned segment.<sup>246</sup> Because of this, CSXT adjusted the fixed costs calculations to account for traffic moving over a CERR owned line-segment instead of over NS via trackage rights.

As Consumers discusses in Section III-B-1-c, it accepts the change from trackage rights to CERR ownership for the 0.6 miles of track, and adjusted its fixed cost workpapers to reflect this change.<sup>247</sup>

**(5) 22<sup>nd</sup> Street to Curtis Fixed Costs**

In calculating the fixed costs for the traffic moving from 22<sup>nd</sup> Street to Curtis via the BRC route, Consumers failed to prorate the segment miles over which the CERR would operate. This led to overstatement on the CERR miles and fixed costs on CERR movements moving between 22<sup>nd</sup> Street and Curtis via the BRC.<sup>248</sup> Consumers corrected this proration in its Rebuttal fixed cost calculation.<sup>249</sup>

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<sup>246</sup> See CSXT Reply at III-A-54.

<sup>247</sup> See Consumers Rebuttal e-workpaper “2014 Fixed Costs For ATC (Rebuttal).xlsx,” tab “On-SARR Miles and Fixed Cost,” cells S14, S15, S59 and S60.

<sup>248</sup> See CSXT Reply at III-A-53.

<sup>249</sup> See Consumers Rebuttal e-workpaper “2014 Fixed Costs For ATC (Rebuttal).xlsx,” tab “On-SARR Miles and Fixed Cost,” cell R10.

**(6) Other Errors in CSXT  
Reply Fixed Costs**

In addition to the errors made by CSXT discussed above, CSXT also erred in calculating the average CSXT fixed costs per mile by using off-SARR CERR miles instead of total CSXT system miles in its Reply Evidence.

In its Opening Evidence, Consumers developed the CSXT average fixed cost per mile by dividing the total CSXT URCS fixed costs by the CSXT system miles included in the CSXT special density study.<sup>250</sup> It did this because Consumers found that the route miles included in CSXT's special study were significantly different than the route miles reported in CSXT's 2014 Annual Report. Since CSXT's net tonnage statistics were developed based on the miles included in the net density table, Consumers used the route miles included in the CSXT density data to develop the fixed cost per mile, to maintain a consistent approach to the cost calculation.<sup>251</sup>

In its Reply workpapers, CSXT also used the mileages included in its special density study to develop the CSXT system average fixed cost per mile, but included only off-CERR miles in its calculation.<sup>252</sup> This leads to an understatement of CSXT network miles and an overstatement in average fixed

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<sup>250</sup> See Consumers Opening e-workpaper "2014 Fixed Costs for ATC (Final).xlsx," tab "CSXT 2014 Fixed Costs," cell G63.

<sup>251</sup> See Consumers Opening at III-A-21.

<sup>252</sup> See CSXT Reply e-workpaper "2014 Fixed Costs For ATC (Final)\_Reply.xlsx," tab "CSXT 2014 Fixed Costs," cell G63.

cost per mile. Since the vast majority of the CSXT system miles are off-SARR miles to the CERR traffic, the overstated fixed costs would tend to overstate the off-SARR miles on each movement, and bias the ATC revenue divisions. Consumers rejects CSXT's adjustment and continues to rely upon its Opening Evidence fixed cost calculation methodology.<sup>253</sup>

**c. Fuel Surcharge Revenue**

In its Opening Evidence, Consumers based the CERR's fuel surcharge revenues on CSXT's contractual and published fuel surcharge mechanisms applicable to the selected traffic group.<sup>254</sup> For traffic handled by the CERR that moves under contract with CSXT during the base year, Consumers calculated fuel surcharge revenue in accordance with the terms of each contact, and allocated the revenue to the CERR depending upon the surcharge methodology specified in the contract.

Subsequent to the base year, and for all traffic subject to an HDF-based fuel surcharge, Consumers applied the EIA forecast of HDF prices set forth in the most recently available editions of EIA's Short-Term Energy Outlook ("STEO") and Early Release AEO. Where a contract specified a fuel surcharge based on West Texas Intermediate Crude Oil ("WTI") prices, Consumers used the WTI price forecasts in the EIA STEO and AEO. Following contract expirations

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<sup>253</sup> See Consumers Opening e-workpaper "2014 Fixed Costs for ATC (Rebuttal).xlsx," tab "CSXT 2014 Fixed Costs," cell G63.

<sup>254</sup> See Consumers Opening at III-A-27-31.

and through 2024, Consumers assumed that traffic would become subject to CSXT's HDF-based mileage or percent-of-rate surcharges, depending on the commodity. Consumers' approach is consistent with Board precedent both before and after the decision in *Major Issues*.<sup>255</sup>

CSXT generally accepted Consumers' Opening fuel surcharge approach, but then made three (3) changes to Consumers' fuel surcharge calculations. First, CSXT changed Consumers' Opening methodology for calculating the fuel surcharges on traffic moving during the third and fourth quarters of 2015. Second, CSXT argued that Consumers should have applied a different tariff when calculating fuel surcharges for certain merchandise traffic. Third, CSXT updated the fuel surcharge forecast using more recent EIA forecasts. Consumers addresses each of CSXT's changes below.

**i. Third and Fourth Quarter 2015 Fuel Surcharges**

CSXT challenged Consumers' approach of using third and fourth quarter 2014 fuel surcharge revenues together with third and fourth quarter 2015 forecasted carloads to calculate third and fourth quarter 2015 CERR fuel surcharge revenues, arguing that this incorrectly assumed that the same fuel surcharges collected by CSXT in 2014 also would be collected in 2015.<sup>256</sup> Instead, CSXT

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<sup>255</sup> See, e.g., *Sunbelt* at 6; *West Tex. Utils. Co.*, 1 S.T.B. at 674-676.

<sup>256</sup> See CSXT Reply at III-A-54-55.

developed third and fourth quarter 2015 fuel surcharges based on what it alleged were the actual parameters of the tariffs governing each movement.

CSXT's Reply approach should be rejected, because it selectively updates only one portion of the CERR's revenues while not updating the other revenue component. In data produced to Consumers in discovery, CSXT separated its revenues into two (2) general categories: net line-haul revenues and fuel surcharge revenues.<sup>257</sup> Consumers' Opening revenue forecast methodology developed both third and fourth quarter 2015 net line-haul revenues and fuel surcharge revenues by calculating the third and fourth quarter 2014 line haul and fuel surcharge revenues, and adjusting the 2014 values by the expected growth in volumes between 2014 and 2015.<sup>258</sup> This approach aligns the economic factors underlying the line-haul revenues and fuel surcharge revenues in accordance with the Board's preference for maintaining consistency between the various inputs to SARR traffic and revenue forecasts.<sup>259</sup> CSXT accepted Consumers' approach for purposes of determining 2015 net line-haul revenues, but proposes a different methodology for fuel surcharge revenues, thereby giving rise to an improper data

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<sup>257</sup> See Consumers Opening e-workpaper "2014 - 1Q 2015 Car And Container Waybills.xlsx," tab "2014 Carload," Columns AT to BA. Net line-haul revenues are calculated by adjusting gross line-haul revenues by other revenue adjustments including, but not limited to, customer switch revenues, demurrage revenues, contract refunds and overcharge claims.

<sup>258</sup> See Consumers Opening e-workpapers "CERR Car Traffic Forecast.xlsx," tab "CAR\_Forecast," and "CERR Container Traffic Forecast.xlsx," tab "CONT\_Forecast."

<sup>259</sup> See *TMPA*, 6 S.T.B. at 603; *Xcel I*, 7 S.T.B. at 639.

inconsistency. Inasmuch as the line-haul revenues are the predominant component, to avoid this inconsistency Consumers continues to rely upon its Opening approach on Rebuttal.

**ii. Incorrect Tariff**

As noted, Consumers' Opening Evidence calculated fuel surcharge revenue in accordance with the terms and conditions of each contract or tariff applicable to a particular shipment.<sup>260</sup> In some cases, Consumers relied on CSXT Tariff 8661, which provided for a fuel surcharge with a strike price of \$1.999 per gallon, and governed movements that occurred prior to 2015.<sup>261</sup> In other cases, Consumers used CSXT Tariff 8662, which provided for a fuel surcharge with a strike price of \$3.749 per gallon for movements that commenced beginning in 2015.<sup>262</sup> After the expiration of a contract or tariff, Consumers intended to utilize the terms of either Tariff 8661 or Tariff 8662, as applicable, to calculate the fuel surcharge revenues for the forecasted time period. This methodology is consistent with past proceedings before the Board.<sup>263</sup>

On Reply, CSXT argued that Consumers incorrectly calculated fuel surcharge revenue after the expiration of a contract or tariff wherever it utilized

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<sup>260</sup> See Consumers Opening at III-A-28.

<sup>261</sup> See Consumers Opening e-workpaper "CERR\_TRAFFIC\_CONTRACTS\_RATEADJ\_FSC.xlsx," tab "CSXT\_FSC," cells C12 to M12.

<sup>262</sup> See Consumers Opening e-workpaper "CERR\_TRAFFIC\_CONTRACTS\_RATEADJ\_FSC.xlsx," tab "CSXT\_FSC," cells C47 to M47.

<sup>263</sup> See *AEPCO 2011* at 27-28.

the terms of Tariff 8661, and not Tariff 8662.<sup>264</sup> CSXT claimed that Consumers should have used the terms of Tariff 8662 to calculate the fuel surcharge amount for the forecasted time periods on all traffic, after the expiration of a contract or tariff.

Consumers agrees that for approximately two (2) percent of merchandise shipments, it incorrectly applied the terms of Tariff 8661 to traffic that commenced moving after the start of 2015, in calculating fuel surcharge revenues after the expiration of the tariff.<sup>265</sup> However, CSXT's objection to the application of the Tariff 8661 methodology to *any* merchandise traffic after the expiration of a contract or tariff and its insistence on applying of Tariff 8662, with its \$3.749 per gallon strike price, to all expiring contracts and tariffs governing the shipment of merchandise traffic in the CERR traffic group is not valid. The application of the Tariff 8662 fuel surcharge to shipments moving under freight rates that were developed prior to January 1, 2015 is improper.

CSXT's methodology creates a disconnect between the base rate component and the fuel surcharge component of the revenues for all affected shipments. In the real world, when railroads apply new fuel surcharge programs with an updated fuel strike price, they make corresponding adjustments to the base rates on current traffic, to ensure that the total revenues collected remain the same

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<sup>264</sup> See CSXT Reply at III-A-55.

<sup>265</sup> See Consumers Rebuttal e-workpaper "CERR Car Traffic Forecast – Rebuttal," tab "CAR\_Forecast," Column (AK).



before and after the update (i.e., the update is supposed to be revenue neutral). When the fuel strike price is increased (as in Tariff 8662), less revenue is collected via fuel surcharges at all fuel price levels, and so the base rates are increased accordingly to incorporate the pre-update fuel surcharge.<sup>266</sup> The CERR's line-haul revenues were not increased in this manner on January 1, 2015 in Consumers' Opening Evidence, and CSXT's Reply does not implement a base revenue increase for all shipments that were previously subject to Tariff 8661, in order to maintain revenue neutrality. As such, its fuel surcharge adjustment must be rejected.

On Rebuttal, Consumers revises its forecast of fuel surcharge revenues for the merchandise shipments that should have been governed by Tariff 8662, to utilize the Tariff 8662 methodology and strike price of \$3.749 per gallon after the expiration of the contract or tariff. For all pre-2015 shipments, however, Consumers continues to utilize the Tariff 8661 methodology and \$1.999 strike price to calculate forecasted fuel surcharge amounts after the expiration of the relevant contract or tariff.

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<sup>266</sup> See, for example, the USDA Agricultural Marketing Service discussion of BNSF's rebasing of its fuel surcharge in 2010 due to higher base transportation rates paid by shippers. <https://www.ams.usda.gov/sites/default/files/media/08-05-10.pdf>.

**iii. Updated EIA Forecast**

CSXT stated that it updated Consumers' fuel surcharge forecast based on a more recent EIA fuel price forecast.<sup>267</sup> Since CSXT filed its Reply, yet another, more recent EIA fuel price forecast was issued.<sup>268</sup> Consumers updated its Rebuttal fuel surcharges to reflect this more recent forecast.

**d. Results**

Table III-A-5 below compares the aggregate annual CERR revenues calculated on Opening, Reply, and Rebuttal.

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<sup>267</sup> See CSXT Reply at III-A-55.

<sup>268</sup> See Consumers Rebuttal e-workpaper "CERR\_TRAFFIC\_CONTRACTS\_RATEADJ\_FSC – Rebuttal.xlsx," tab "CSXT\_FSC."

**Table III-A-5  
COMPARISON OF CERR REVENUES**

<u>Year</u>	<u>Consumers Opening 1/</u>	<u>CSXT Reply 2/</u>	<u>Consumers Rebuttal 3/</u>	<u>Rebuttal less Reply 4/</u>
(1)	(2)	(3)	(4)	(5)
2015	\$139,420,104	\$109,400,637	\$139,628,736	\$30,228,099
2016	\$124,301,738	\$92,512,553	\$121,592,139	\$29,079,587
2017	\$157,697,963	\$109,547,375	\$155,739,878	\$46,192,502
2018	\$158,736,857	\$105,260,911	\$156,446,662	\$51,185,751
2019	\$164,015,897	\$109,595,518	\$161,400,726	\$51,805,208
2020	\$179,653,610	\$118,871,182	\$176,952,127	\$58,080,945
2021	\$186,273,795	\$120,610,726	\$183,545,475	\$62,934,749
2022	\$200,881,860	\$128,915,755	\$197,592,151	\$68,676,396
2023	\$202,646,215	\$124,810,157	\$198,740,607	\$73,930,450
2024	\$223,757,130	\$138,045,664	\$219,400,189	\$81,354,526
<b>Totals</b>	<b>\$1,737,385,169</b>	<b>\$1,157,570,478</b>	<b>\$1,711,038,691</b>	<b>\$553,468,213</b>
<p>1/ CSXT Reply e-workpaper "III-A Summary Tables.xlsx," tab "Revenue Summary," Column D x 1,000,000.</p> <p>2/ CSXT Reply e-workpaper "III-A Summary Tables.xlsx," tab "Revenue Summary," Column E x 1,000,000.</p> <p>3/ Consumers Rebuttal e-workpaper "Summary of CERR Traffic Volumes and Revenues_Rebuttal.xlsx," tab "Summary," column N.</p> <p>4/ Column (4) - Column (3).</p>				

As shown in table III-A-5 above, Consumers' CERR Rebuttal revenues equal \$1.711 billion over the 10-year analysis period.

**III-B Stand-Alone  
Railroad System**

### III. B. STAND-ALONE RAILROAD SYSTEM

Consumers designed the CERR to serve the Consumers Energy unit coal train traffic that BNSF originates in the Wyoming Powder River Basin and that CSXT moves from an interchange with BNSF in Chicago, IL to Consumers' Campbell plant located at West Olive, MI.<sup>1</sup> The facilities also serve additional traffic as selected in Consumers' Opening presentation and those same facilities are preserved on Rebuttal to serve the slightly reduced traffic group reflected in Part III-A. This portion of Consumers' Rebuttal Evidence is sponsored by Messrs. Orrison, Holmstrom and Stone, the same witnesses that sponsored Consumers' Opening Evidence.

As noted in the witness qualifications, Mr. Orrison has over 39 years of experience in the railroad industry, including many years of experience in senior management positions with CSXT and BNSF, including Vice President – Network Planning for CSXT and Assistant Vice President – Service Design & Performance for BNSF. Mr. Orrison also served as Division Superintendent—Detroit Division General Manager; this Division included certain of the lines in Michigan and Indiana being replicated by the CERR.

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<sup>1</sup> The issue traffic uses two routes. The most common route used by the issue traffic is 71<sup>st</sup> St. (where the BNSF interchanges the loaded train)-Belt Railway segment-NS trackage rights to Porter-West Olive. The other route is 71<sup>st</sup> St.-Blue Island-Curtis-NS trackage rights to Porter-West Olive. *See* Consumers Opening Exhibit III-A-1 for a visual representation of each route.

Mr. Holmstrom spent his entire 42-year railroad career working in the Chicago area for CN and its predecessor railroads. Mr. Holmstrom was CN's most senior operations manager in the Chicago area, and he served as CN's representative to the Chicago Transportation Coordination Office.

Mr. Stone is a Professional Engineer with extensive experience in railroad construction and design. Complete details of his qualifications are included in Part V.

CSXT accepts most of the CERR configuration posited by Consumers. However, there are several points of disagreement, which are addressed below.

**1. Route and Mileage**

The CERR's Opening constructed route covered 168.65 route miles,<sup>2</sup> including 160.52 route miles<sup>3</sup> of track being constructed by the CERR, and 8.13 route miles<sup>4</sup> of BRC track where the CERR is contributing 25% of the current estimated construction costs required to replicate the existing facilities as a one-fourth owner of that carrier.<sup>5</sup> The CERR operates via trackage rights or reciprocal

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<sup>2</sup> See Consumers Opening e-workpaper "CERR Route Miles Opening.xlsx," tab "Summary," cell R38.

<sup>3</sup> See Consumers Opening e-workpaper "CERR Route Miles Opening.xlsx," tab "Summary," cell R18.

<sup>4</sup> See Consumers Opening e-workpaper "CERR Route Miles Opening.xlsx," tab "Summary," cell R19.

<sup>5</sup> See CSXT 2014 R-1 Schedule 310, Line 3.

agreement with other carriers over 73.83 route miles<sup>6</sup> (including the 8.13 miles of BRC track, where the CERR pays certain fees for its use).<sup>7</sup> The CERR traverses parts of Illinois, Indiana and Michigan.

CSXT has largely accepted the constructed route miles posited by Consumers, but it has proposed several exceptions discussed herein. For the reasons described herein, on Rebuttal, Consumers has accepted only one of these changes, which results in the addition of 0.6 route miles to the CERR.<sup>8</sup>

**a. Main Line**

CSXT accepts Consumers' development of the CERR's main line route miles with one exception. CSXT argues that Consumers must include part of the road property investment costs associated with IHB's Blue Island Yard and adjacent track facilities where Consumers uses trackage rights to access those facilities.<sup>9</sup> Confusingly, CSXT did not include such costs because it improperly excluded the traffic based on transit time results derived from its problematic

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<sup>6</sup> See e-workpaper "CERR Route Miles Opening.xlsx," tab "Summary," cell P33.

<sup>7</sup> The primary trackage segment utilized by the issue traffic is the NS trackage rights segment from Rock Island Jct. to Porter. Likewise, the issue traffic, by reciprocal agreement, returns empty trains to BNSF's Cicero Yard. Details of the trackage rights fees are discussed in Part III-D-9.

<sup>8</sup> See e-workpaper "CERR Route Miles Rebuttal.xlsx," tab "Summary," cell R17.

<sup>9</sup> CSXT Reply at III-B-1-2, III-B-13-21.

Reply RTC Model run.<sup>10</sup> In addition, organizationally, CSXT chose to discuss the IHB investment issues in both Section III-B-1-b (Branch Lines) and III-B-4 (Joint Facilities). Thus, Consumers addresses this issue in detail below, but notes here that it rejects CSXT's additional investment requirements.

**b. Branch Lines**

The parties agree that the CERR has no branch lines.<sup>11</sup> The parties also agree on the CERR's investment in the BRC's existing facilities. However, CSXT argues that the portion of track between Blue Island Yard and Calumet Park, over which Consumers assumed the CERR would use existing CSXT trackage rights, also requires that the CERR assume 21.42% of the road property investment costs for the existing facilities before the CERR can use the several miles of mainline and yard track. CSXT bases this road property investment requirement on its alleged 21.42% ownership interest in the IHB. As explained below in Section III-B-4, CSXT has no valid basis for the additional investment.<sup>12</sup>

**c. Interchange Points**

On Opening, Consumers provided the following table describing the interchange points of the CERR and a general description of such interchanges.

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<sup>10</sup> See Consumers Rebuttal Part III-A-1-b. CSXT did, however, calculate the costs of the IHB facilities. CSXT Reply at III-B-2.

<sup>11</sup> CSXT Reply at III-B-2.

<sup>12</sup> As noted above, CSXT did not actually include the costs for this facility due to its untenable position that the traffic transiting the Calumet Park to Curtis segment did not meet or exceed CSXT's historical transit times over this route. CSXT Reply at III-B-2.



Additional details of the interchange locations and proposed operations were also included in Consumers' Opening Evidence in Part III-C-1-a.

<b>REBUTTAL TABLE III-B-1 CERR INTERCHANGE POINTS</b>		
<b>Interchange Point</b>	<b>Railroad(s)</b>	<b>Description</b>
22 <sup>nd</sup> St./71 <sup>st</sup> St. Area	BNSF	<p>BNSF delivers trains to the CERR's 71<sup>st</sup> St. interchange tracks (including the mainline if necessary) via the "hole in the fence connection" at 22<sup>nd</sup> St. to the CERR. In the reverse direction, the CERR delivers trains to BNSF's Cicero Yard located 3.3 miles west of 22<sup>nd</sup> Street. CSXT and BNSF use the same procedure in the real world.</p> <p>In addition to traffic coming to and from Cicero, the CERR also delivers trains to BNSF's Corwith Yard located to the west of the CERR. The Corwith Yard is accessed via a turnout located just to the south of the "hole in the fence." This location is marked as MP 27.4 on Page 1 of Exhibit III-B-1.</p>
Ogden Jct./71 <sup>st</sup> St.	UP	<p>UP delivers trains originating at Proviso or the Global 1 intermodal facility to the CERR's 71<sup>st</sup> St. interchange tracks via UP track and the CERR connection to UP. CSXT and UP use the same procedure in the real world. Trains bound for Proviso or Global 1 are delivered to those locations by CERR crews. The connection is also used for a few trains to move from CP's Bensenville Yard to 71<sup>st</sup> Street.</p>
Blue Island, IL Connection with the IHB	IHB/CSXT	<p>Trains bound to or from the Blue Island connection with the IHB and/or CSXT are interchanged on the CERR's Barr Yard interchange tracks located just to the east of the interlocking (these tracks are also used for train inspections if necessary).</p>
Dolton, IL	CSXT	<p>The CERR interchanges with the residual CSXT at Dolton. From Dolton and moving south, CSXT uses the UP's Villa Grove Subdivision under a joint ownership agreement. These trains include southbound traffic headed to Woodland Jct. where they return to the CSXT-owned Woodland Subdivision. In the northbound direction, trains interchanged from CSXT to the CERR at Dolton move west and north to 22<sup>nd</sup> St. and the 59<sup>th</sup> St. intermodal facility as well as east to Curtis, IN or Holland, MI.</p> <p>All trains moving to/from Dolton are interchanged on the CERR's interchange track located south of the</p>

		CERR's east-west main line and south of the IHB lines that parallel the CERR's main line. However, trains coming north from UP's Villa Grove Subdivision and heading east to Curtis, IN over the CERR are interchanged on the CERR to the east of Dolton.
Curtis, IN	CSXT	The CERR interchanges with the residual CSXT at Curtis. The traffic interchanged at this location includes eastbound and westbound traffic moving over the Barr Subdivision through Willow Creek, IN and on to points east. The CERR also interchanges traffic moving over the BRC and the NS trackage rights segment from Rock Island that moves via Willow Creek. The interchange occurs on CERR interchange tracks located to the west of the turnout connecting to the residual CSXT.
Holland, MI (Waverly)	CSXT	The CERR interchanges trains with the residual CSXT at Holland, MI. The traffic interchanged at this location includes merchandise traffic moving to and from Grand Rapids, MI and several trains of Eastern coal bound for the Campbell plant which also move via Grand Rapids. The interchange occurs on CERR track located just to the south of the turnout connecting to the residual CSXT.

CSXT proposes changes to the configuration of three of the interchange locations: Dolton, Curtis and Pine. Consumers accepts CSXT's modification to the Pine Junction interchange. Specifically, CSXT notes that in order for interchange trains moving east or west from the Curtis Interchange to reach the NS's Lake Subdivision, the CERR must build the 0.6 miles of connecting track, the so-called Buffington Connection.<sup>13</sup> CSXT indicates that this track is owned by CSXT and not NS. Consumers agrees and has added the 0.6 miles of track on Rebuttal.<sup>14</sup>

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<sup>13</sup> CSXT Reply at III-B-6.

<sup>14</sup> See Consumers Rebuttal e-workpaper "CERR Route Miles Rebuttal.xlsx," tab "Summary," cell R17.

Consumers rejects CSXT's modification to the Dolton Interchange.

When describing the operation of the Dolton Interchange on Opening, Consumers explained, in Part III-C-1-v, that CSXT and UP each owned 50 percent of the facilities that lie to the south of the CSXT east-west mainline between Barr Yard and Curtis. CSXT agrees with Consumers' ownership description. However, CSXT then ignores how Consumers opted to build the interchange using a Board-approved SAC design. As Consumers explained on Opening:

The existing facilities between Dolton Jct. and Woodland Jct. are part of a double track joint facility dispatched and maintained by UPRR with costs split between CSXT and UP. However, as the CERR is not handling any of the UP traffic portion of this system, Consumers has treated this segment in the same manner that coal shippers typically treat the Joint Line in the Powder River Basin of Wyoming (*i.e.*, it has assumed away the other carrier). *See, e.g., AEPCO 2002* at 7 (explaining how the shipper replaces one carrier, but can use other trackage rights arrangements). There, BNSF and UP jointly own approximately 100 miles of track that serve a cluster of mines, including the Black Thunder Mine and Antelope Mine. However, in stand-alone cases, the shipper builds the necessary facilities to handle the traffic and then the other railroad and the residual incumbent are assumed to exist in a "parallel world," except when accessing third-party track such as mine leads. *Id.* The CERR is doing the same here by assuming that the UP exists in a parallel world and by constructing only the facilities it requires.

CSXT has no response to Consumers' theoretical approach. Rather, CSXT simply ignores this point and argues instead that the CERR's operations would not be well served by building through the existing facilities given the UP's

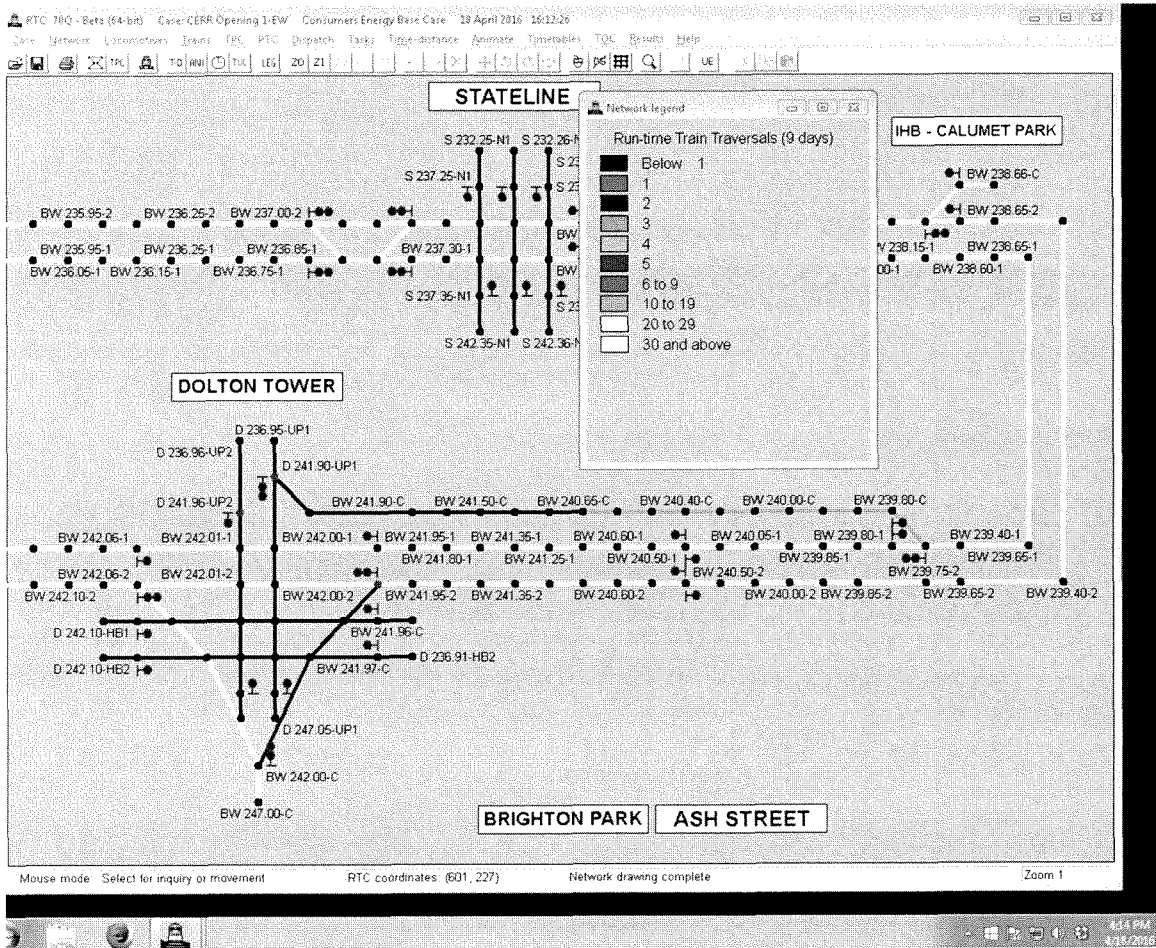
traffic and the presence of a yard facility. Thus, CSXT posits a “new” track that goes around the existing facilities. This “new facility” is unnecessary as the CERR is permitted to build whatever facilities it needs on the existing alignment.

As CSXT has no response to Consumers’ permissible configuration – other than to say there is another way to build the track – Consumers has continued to utilize its opening configuration of the Dolton Interchange.

CSXT proposes a further modification for the Dolton Interchange area near Cottage Grove Avenue. At this location, trains moving to/from Curtis and the UP’s Villa Grove Subdivision are interchanged between the CERR and residual CSXT on an interchange track located north and adjacent to the two mainline tracks running between Barr Yard and Curtis. CSXT argues that the configuration of the interchange will cause trains to be parked for 30 minutes, thereby blocking Cottage Grove Avenue and disrupting vehicular traffic. CSXT proposes to build a new, \$3.4 million highway overpass to alleviate this supposed concern. CSXT’s proposed modification is not required.

On Opening, Consumers’ operating experts were well aware of the potential for a CERR train to block the Cottage Grove at-grade crossing. Thus, the operating plan, reflected in Consumers’ RTC modeling, purposely positioned the interchange trains so that they would *not* block the crossing at Cottage Grove. Indeed, none of the 17 Curtis – Dolton-East (UP-Villa Sub) trains blocked the Cottage Grove Street grade crossing. The RTC Model results demonstrate this

point. In the below results diagram, the trains did not park west of the BW240.6 (northern track of the three tracks).



Consumers even avoided the crossing to its operational detriment. Specifically, if a train was longer than the distance on the interchange track between Cottage Grove St. and the switch at which it connects to #1 Main track, Consumers' experts even allowed the train to foul the main thereby taking a performance penalty for the system. In the modeling period, five (5) of the 17 interchange trains traversing the location exceeded the length of the interchange track between Cottage Grove Street and the #1 Main (7,656 feet).

Based on the foregoing, Consumers has not made any adjustments to the Cottage Grove Street-area interchange operations nor has it added a highway overpass.

**d. Route Mileage**

The parties generally agree on the constructed route mileage as shown in Rebuttal Table III-B-2. The parties disagree on the trackage rights operating miles owing to CSXT's contention that Consumers must drop the Calumet Park to Curtis traffic. As Consumers has rejected CSXT's arguments on this point, it has retained its Opening trackage rights operating miles.<sup>15</sup>

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<sup>15</sup> See Consumers Rebuttal e-workpaper "CERR Route Miles Rebuttal.xlsx," tab "Summary," cell P34.

<b>REBUTTAL TABLE III-B-2 CERR LINE SEGMENTS AND ROUTE MILEAGE</b>				
	<b>Opening</b>	<b>Reply</b>	<b>Rebuttal</b>	<b>Difference (Reply v. Rebuttal)</b>
<b>Fully Owned Main Line Miles</b>				
22 <sup>nd</sup> St/Ogden Jct. to Curtis	32.70	32.70	32.70	0.00
Porter to West Olive	122.20	122.20	122.20	0.00
<b>Fully Owned Interchange Miles</b>				
Dolton Interchange Track	3.24	3.24	3.24	0.00
Campbell Plant Lead Track	2.38	2.38	2.38	0.00
Buffington Connection	0.00	0.60	0.60	0.60
<i>Subtotal (Fully Owned)</i>	<i>160.52</i>	<i>161.12</i>	<i>161.12</i>	<i>0.00</i>
<b>Partially Owned Main Line Miles</b>				
BRC (75 <sup>th</sup> St. to Rock Island Jct.)	8.13	8.13	8.13	0.00
<i>Subtotal (Partially Owned)</i>	<i>8.13</i>	<i>8.13</i>	<i>8.13</i>	<i>0.00</i>
<b>Total CERR Constructed Route Miles</b>	<b>168.65</b>	<b>169.25</b>	<b>169.25</b>	<b>0.60</b>
<b>Trackage Rights Operating Miles</b>				
(NS) Rock Island Jct. to Curtis/Pine Jct.	12.50	12.50	12.50	0.00
(NS) Curtis/Pine Jct. to Porter, IN	12.60	12.60	12.60	0.00
(BNSF) 22 <sup>nd</sup> St. to Cicero	3.30	3.30	3.30	0.00
(UP) Ogden Jct. to Proviso/Global 2	12.40	12.40	12.40	0.00
(BNSF) Brighton Park to Corwith	3.50	3.50	3.50	0.00
(IHB) Calumet Park to IHB Blue Island Yard	6.40	0.00	6.40	-6.40
(UP) Ogden Jct. to Global 1	0.40	0.40	0.40	0.00
(UP/CP) Ogden Jct. to Bensenville	14.60	14.60	14.60	0.00
<i>Subtotal (Trackage Rights)</i>	<i>65.70</i>	<i>59.30</i>	<i>65.70</i>	<i>-6.40</i>
<b>Total CERR Operating Miles</b>	<b>234.35</b>	<b>228.55</b>	<b>234.95</b>	<b>-5.80</b>

## 2. Track Miles and Weight of Track

On Opening, Consumers developed the CERR's track and yard configurations to reflect the CERR's peak-year traffic volumes and flows, the trains that will move over the CERR system in the peak week of the peak traffic year, the CERR operating plan developed by Consumers' expert operating witnesses, Messrs. Orrison and Holmstrom, and a simulation of the CERR's peak-period operations executed by Consumers' witnesses Messrs. McLaughlin and Schuchmann using the Rail Traffic Controller ("RTC"). In total, the CERR included 233.38 constructed track miles. On Rebuttal, Consumers has accepted the addition of the Buffington Connection thereby adding 0.6 miles of track for a total of 233.98 track miles.

CSXT's Reply proposes to increase the total track by either 2.74 track miles or 15.74 track miles. It is difficult to discern because CSXT's text at page III-B-8 indicates the 15.74 track miles (when all of the items listed are added up) when compared to Consumers' Opening track miles. On the other hand, CSXT's Reply Table III-B-2 only includes an increase of 2.74 miles (a difference of 13.0 miles).<sup>16</sup> Ostensibly, the difference stems from CSXT's supposed calculation of the route miles on the BRC (8.13 miles) and IHB (6.4 miles) that CSXT claims the CERR would partially own versus its final calculation where it

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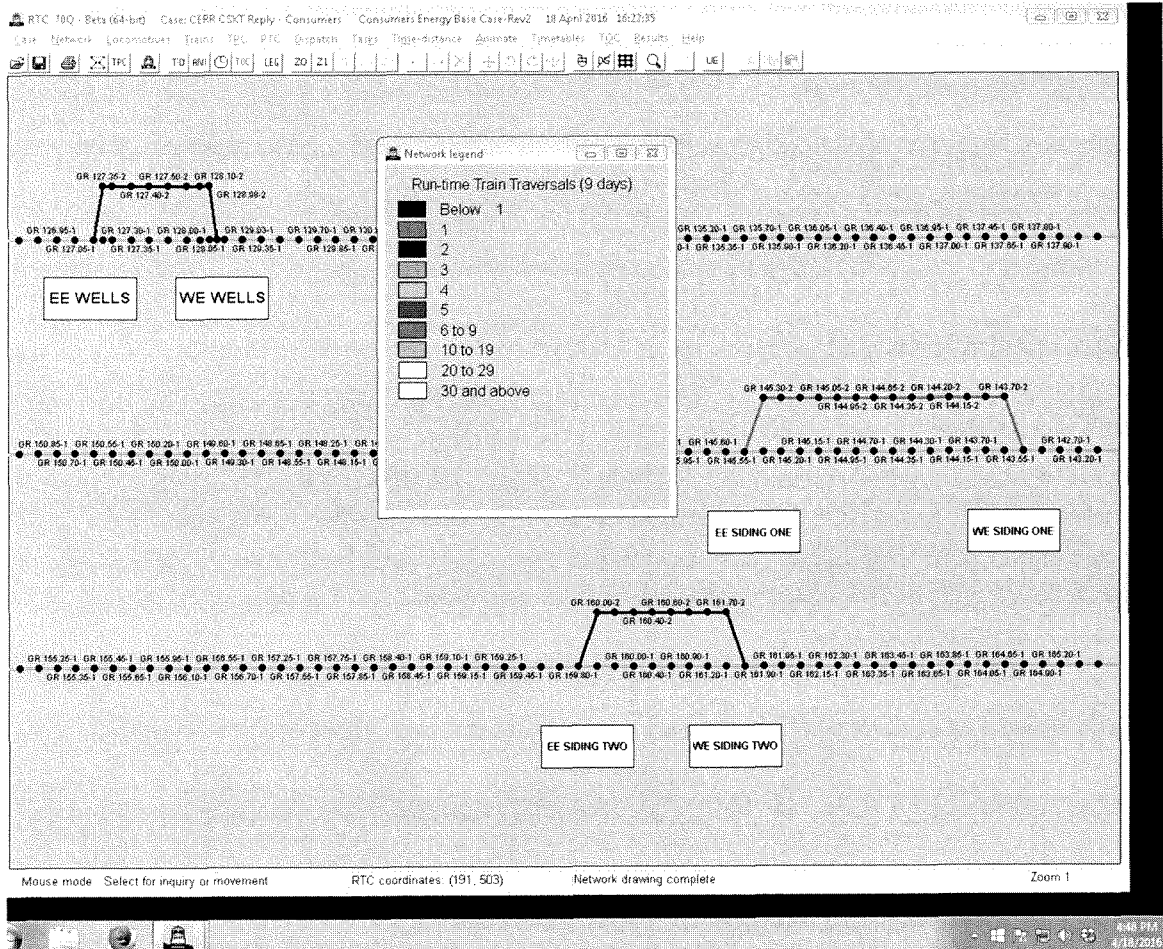
<sup>16</sup> CSXT's Reply position is further complicated by additional inconsistencies in its mileage calculations in this section. For example, on page III-B-9 of its Reply, CSXT states that the CERR would have 10.86 miles of interchange track, however, page III-B-10, CSXT's Table III-B-2, indicates 10.66 miles of interchange track.



did not include the IHB track miles because CSXT believes that the Calumet Park to Curtis traffic should be eliminated. However, that is a total of 14.53 miles which does not match the 13.0 mile difference. Regardless, with the exception of the Buffington Connection, none of the additional track posited by CSXT is necessary.

First, CSXT proposes to add a siding near the Consumers plant, ostensibly to hold trains waiting to enter the plant. CSXT further suggests that its justified in adding this track because it mentioned its use of this track in response to a discovery request from Consumers. CSXT's addition of this siding is unwarranted.

Consumers developed the CERR's siding requirements on the Porter to West Olive segment through means of the RTC Model and the long experience in this territory of its expert witness, Mr. Orrison, who served as the Division Superintendent for CSXT overseeing this rail line. The RTC Model demonstrated that even in the peak week of the peak year, the CERR did not require any additional siding to handle the traffic moving to and from the Consumers plant. CSXT ignores this fact, but CSXT also ignores that even though it added this siding in its RTC Model, it too was never used by the Consumers' trains, as shown by the RTC Model results in the graphic below.



Even if the additional siding had been used in CSXT's RTC Model, Consumers already demonstrated that service to the Campbell was more than adequate without the additional siding. As such, Consumers has not included this siding on Rebuttal.

Second, CSXT also added a 750-foot bad ordered car track in the Barr Yard. This unnecessary addition is addressed below.

Third, CSXT added the Buffington Connection, which Consumers accepts.

<b>REBUTTAL TABLE III-B-3 CERR CONSTRUCTED TRACK MILES</b>	
	<b>Miles</b>
Main line track – Single first main track <sup>1/</sup>	169.25
– Other main track <sup>2/</sup>	41.38
Total main line track	210.03
Interchange Tracks	10.66
Setout tracks and helper tracks	2.00
Yard tracks <sup>3/</sup>	11.29
<b>Total track miles</b>	<b>233.98</b>
<p><sup>1/</sup> Single first main track miles equal total constructed route miles, including the lead track to the Consumers Plant and the Dolton Interchange track. This also includes 8.13 route miles of the BRC and the Buffington Connection.</p> <p><sup>2/</sup> Equals total miles for constructed second main tracks/passing sidings, including the BRC segment.</p> <p><sup>3/</sup> Includes all tracks in the Barr Yard.</p> <p>Source: Rebuttal e-workpaper “2015 Ballast &amp; subballast Worksheet_Rebuttal.xlsx,” tab “Rail Type By Subdivision,” column L.</p>	

**a. Main Lines**

The parties agree on the mainline tracks except for the addition of the siding on the Porter to West Olive segments, which Consumers has rejected as described above.

The parties agree on the type and weight of rail for all segments, except for certain curves in the Chicago area. As explained in Section III-F-3, Consumers rejects CSXT’s inclusion of premium rail in the applicable curves.

**b. Branch Lines**

The CERR has no branch lines.

**c. Passing Sidings**

The CERR's passing sidings are considered part of its main tracks and are addressed above.

**d. Other Tracks**

The parties agree on the track miles and weight of track for other track, including set-out and helper tracks.

**3. Yards**

**a. Locations and Purpose**

The parties agree on the configuration of the CERR's Barr Yard and purpose, except that CSXT adds a 750-foot storage track to accommodate bad ordered Consumers cars that it believes are delivered to Barr Yard. As explained, in Section C of the Introduction to Part III-C, CSXT's argument concerning such bad ordered cars is fundamentally flawed. Moreover, Consumers' experts already provided space on the various yard tracks for bad ordered car storage because the CERR conducts inspections of certain westbound trains in the Yard, which CSXT accepted.

**b. Miles and Weight of Yard Track**

The parties agree on the miles and weight of yard track, except that CSXT adds a 750-foot bad ordered track. As explained above and in Section C of the Introduction to Part III-C, there is no need for this additional track.

#### 4. Other

##### a. Joint Facilities

The CERR trackage rights route miles include several joint facilities, as detailed in Opening Table III-B-1. On Reply, CSXT agrees with the CERR's arrangements for all but one of the joint facilities: the IHB facilities in and near the Blue Island Yard. For the reasons explained below, CSXT's arguments with respect to the IHB facilities have already been rejected by the Board. In any event, CSXT's rehash of the same failed position that NS took in *DuPont* does not warrant a modification to the Board's prior approach.

On Opening, Consumers' operating plan assumed that the CERR would use trackage rights to access the IHB's Blue Island Yard and adjacent track, including the connection to the CERR's mainline at Calumet Park, to allow for the flow of trains between Calumet Park and Curtis. These trains are originating or terminating at the Blue Island Yard, just as in the real world.

CSXT has a trackage rights agreement that covers the use of this track (IHB 101X). This agreement was included in Consumers' Opening electronic workpapers<sup>17</sup> and the cost of such trackage rights were accounted for in the CERR's operating expenses.<sup>18</sup> Consumers did not include any road property investment for this joint facility because CSXT does not own this facility. Indeed,

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<sup>17</sup> See Consumers Opening e-workpaper "JFA Part 2 of 4 (CSX-CNSMR-HC-28110 to 29506).pdf."

<sup>18</sup> See Consumers Opening e-workpaper Open\_ConsumersJointFacCharges2014.xlsx," tab "IHB101X."

unlike the BRC, where the CERR did include investment costs and which is listed in CSXT R-1, Schedule 310, the IHB does not appear in CSXT's R-1, Schedule 310. As CSXT itself points out, CSX Corporation, and *not* CSXT, owns a partial share of the IHB.<sup>19</sup>

Notwithstanding that CSXT does not own any portion of the IHB, CSXT argues on Reply that the CERR must include road property investment costs equivalent to 21.42% (CSX Corporation's ownership interest in the economic and voting interests of the IHB via Conrail) of the existing facilities utilized by the CERR. In support of its argument, CSXT suggests that the *DuPont* decision specifically requires that the SARR cover the same proportional share of such facilities owned by the *incumbent railroad* when it chooses to share those facilities.<sup>20</sup> This point is true, but of course, CSXT does not own 21.42% of the IHB, CSX Corp. does, albeit indirectly. That distinction is critical because, as CSXT itself acknowledges, the Board specifically rejected forcing the SARR to incur such investment costs in circumstances identical to those presented here (*i.e.*, NS Corporation owned a portion of the IHB and NS Rail did not). The *DuPont* Decision stated that:

[T]he Board will not require DuPont to account for the construction costs of the . . . IHB because these partially owned facilities are subsidiaries of NSC and not of NS. In this instance, the Board notes that NSC elected to set up its ownership interests in . . . IHB as

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<sup>19</sup> CSXT Reply at III-B-19

<sup>20</sup> CSXT Reply at III-B-14.

separate legal entities from its railroad subsidiary, and NS has to present a valid argument for ignoring this structure. . . . In this case, as DuPont notes, SAA and IHB are not listed NS's R-1 data. As a result, the Board will accept DuPont's use of trackage rights and associated payments to account for its use of these lines. The Board realized that partially owned facilities are a common corporate entity structure that allows multiple railroads to own and operate joint facilities. However, the burden is on the railroad to demonstrate the relationship of the joint facility entity and the costs and revenues realized by the railroad as a result of that relationship. With respect to the SAA and IHB, NS failed to meet this burden.<sup>21</sup>

The Board's decision clearly established that CSXT has the burden of proof to demonstrate that the CERR should incur the investment costs. CSXT has not met that burden. Nevertheless, CSXT advances the same arguments previously raised by NS and rejected by the Board in *DuPont*. Each of CSXT's arguments is addressed below.

**i. Consumers Must Account For a Share of the IHB's Construction Costs If The CERR Is To Use CSXT's Operating Rights on the IHB**<sup>22</sup>

CSXT argues that CSX Corporation has a 21.42% ownership interest in the IHB that it acquired as a result of its joint acquisition of *Conrail* in 1999.<sup>23</sup> CSXT's operating rights over the IHB are, in CSXT's opinion, "part and parcel of the ownership interest that CSXT (or its parent CSX Corporation) holds in those

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<sup>21</sup> *DuPont* at 48-49

<sup>22</sup> CSXT's argumentative heading is reused for the processing convenience of the Board. Consumers does not agree with CSXT's assertions for the reasons described herein.

<sup>23</sup> CSXT Reply at III-B-17.

railroads.”<sup>24</sup> CSXT then suggests that CSX Corporation’s indirect ownership in the IHB elevates CSXT from a trackage rights user to that of an owner, and that the CERR must therefore pay a share of the road property investment costs of the IHB facilities it uses.<sup>25</sup>

In *DuPont*, NS raised precisely the same argument. Indeed, NS stated that “NS’s operating rights on the IHB are a function of its ownership interest. The IHB operating rights that DuPont claims that the DRR would use are rights that NS acquired in the Conrail transaction by succession to Conrail’s interests.”<sup>26</sup>

On Rebuttal in *DuPont*, the complainant pointed out several pertinent facts, all of which are the same in this case:

1. NS Rail did not own any part of the IHB.<sup>27</sup> Here, CSXT admits that it does not own any assets of the IHB.<sup>28</sup>
2. NS Corporation did not own the assets of the IHB.<sup>29</sup> Instead, NS Corporation only owned 58% of the economic and 50% of the voting interest

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<sup>24</sup> CSXT Reply at III-B-13.

<sup>25</sup> CSXT Reply at III-B-13-14.

<sup>26</sup> See Reply Evidence of Norfolk Southern Railway, *DuPont*, at III-F-311 (filed Nov. 30, 2012; see also NS Petition for Reconsideration, *DuPont*, at 6 (filed Nov. 24, 2014)).

<sup>27</sup> See Rebuttal Evidence of E.I. DuPont De Numours and Co., *DuPont*, at III-F-149 (filed April 15, 2013) (“DuPont Rebuttal”).

<sup>28</sup> CSXT Reply at III-B-13.

<sup>29</sup> DuPont Rebuttal III-F-150.



in Conrail, Inc.<sup>30</sup> In turn, Conrail continues to own 51% of the IHB.<sup>31</sup> Here, the same is true except that CSX Corporation has a lesser interest in the joint shareholder arrangement of the IHB than NS.

CSXT has not provided any new evidence or otherwise distinguished its arguments from those NS made and lost. The Board was well aware of these arguments and rejected them, holding that:

In this instance, the Board notes that NSC elected to set up its ownership interests in . . . IHB as [a] separate legal entit[y] from its railroad subsidiary, and NS has to present a valid argument for ignoring this structure. . . . In this case, as DuPont notes, SAA and IHB are not listed in NS's R-1 data. As a result, the Board will accept DuPont's use of trackage rights and associated payments to account for its use of these lines.<sup>32</sup>

CSXT also ignores the long history that CSXT and its predecessors have with the IHB's facilities utilized by the CERR. The CSXT and IHB have a history of cooperating in this area dating back over 100 years. The acquisition of Conrail and its attendant interests in the IHB did not usher in a new era whereby CSXT, for the first time, gained access to the IHB. Instead, the Conrail acquisition simply continued CSXT's long-standing access to this facility.

CSXT also ignores that it was never a part owner of the IHB's Blue Island facilities used by the CERR, just as it is not today. A review of the joint facility agreements covering this area, and provided as an electronic workpaper in

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at III-F-51.

<sup>32</sup> *DuPont* at 48-49.

Consumers' Opening Evidence,<sup>33</sup> establishes that CSXT and IHB have long been accessing each other's facilities. The Conrail acquisition did not significantly modify the basic elements of the arrangement – presumably at CSX Corporation's election.

In contrast, CSXT *is* a joint owner with the IHB of the facilities located immediately west of Blue Island and extending to McCook, IL. There CSXT provides capital contributions and other services.<sup>34</sup> The contrast is plain and CSXT provides no evidence that CSX Corporation's indirect ownership makes CSXT's operating rights over this segment “part and parcel” of the ownership structure. Indeed, the arrangement suggests just the opposite.

Finally, CSXT does not suggest that the IHB's costs, currently or prior to the acquisition by NS Corporation and CSX Corporation of Conrail, are not met by the fees that CSXT and other carriers pay to utilize the facility. Nor does CSXT suggest that it is compensating CSX Corporation or Conrail separately for other costs associated with the IHB's Blue Island facilities.

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<sup>33</sup> See Consumers Opening e-workpaper “JFA Part 2 of 4 (CSX-CNSMR-HC-28110 to 29506).pdf”

<sup>34</sup> *Id.* at CSX-CNSMR-HC-028814-898.

ii. **Assuming That a SARR Can Use “Trackage Rights” Over Joint Facilities Without Replicating CSXT’s Ownership Interest Violates SAC Principles and Board Precedent.**<sup>35</sup>

As with the previous section, CSXT raises the same argument that NS raised in *DuPont*; namely, that the CERR’s use of the IHB facilities, as proposed by Consumers, is impermissible under stand-alone cost theory and prior Board precedent. Again, CSXT has not raised any new arguments that distinguish this situation from *DuPont*, and equally important, CSXT has not carried its burden of proof.

CSXT has not accurately described the Board precedent and SAC theory it cites, at least as it applies to this case. Specifically, CSXT relies on *PEPCO* and *DuPont*,<sup>36</sup> wherein the Board rejected efforts by the complainants to utilize trackage rights over track *owned* by one of the defendant railroads because SAC theory requires the replication of the full stand-alone costs. Again, there is no dispute on the thrust of those cases, but CSXT does not own any portion of the

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<sup>35</sup> CSXT’s argumentative heading is reused for the processing convenience of the Board. Consumers does not agree with CSXT’s assertions for the reasons described herein.

<sup>36</sup> Consumers notes that CSXT also relies on *AEPCO 2011* at 8-11 for the proposition that the SARR cannot use the “the existing facilities of one of the two defendants and account for the costs of those facilities by paying a trackage rights fee.” CSXT Reply at III-B-16. That decision does not address the problem described by CSXT. Instead, it focuses on the use of a single SARR to challenge rates from New Mexico and the PRB at the same, which the Board concluded was permissible. Thus, the precedent is irrelevant to this dispute.

IHB. Instead, CSXT is a trackage rights tenant and the CERR can therefore use those rights on the same basis. Thus, the cases cited by CSXT are inapposite.

CSXT suggests, just as NS did in *DuPont*, that the fact that the IHB does not appear in its R-1, Schedule 310 asset ownership list is irrelevant and, therefore, that the *DuPont* decision was somehow flawed. In fact, CSXT goes so far as to suggest that there is no meaningful distinction between CSX Corporation and CSXT. CSXT's arguments are without merit and strain credulity.

The Board clearly considered and rejected CSXT's argument that the R-1 data is not determinative of ownership interests of the railroad versus its non-railroad corporate parent or another third-party such as Conrail. Indeed, the Board specifically noted in *DuPont* that NS had made the conscious decision to "set up ownership interest in . . . IHB as a separate legal entity from its railroad subsidiary." CSX Corporation made exactly the same decision in its corporate structure, and CSXT has not provided any evidence that distinguishes this situation from the one the Board expressly rejected in *DuPont*.

CSXT's further argument that there is no meaningful distinction between CSX Corporation and CSXT is not credible, and it suggests that CSXT is selectively blurring the lines between the entities when it would steadfastly refuse to do so in other circumstances.

For example, CSX Corporation sought, and was granted, a dismissal as a defendant in a lawsuit filed in the United States District Court for the Eastern

District of Louisiana.<sup>37</sup> There the plaintiff sought damages against, *inter alia*, CSX Corporation and CSXT, sustained as a “result of Hurricane Katrina and the failure of the levees which resulted in catastrophic flooding in the Greater New Orleans Metropolitan area.” In its Motion, CSX Corporation sought to be dismissed as defendant on the basis of lack of personal jurisdiction even though CSXT has extensive operations in the state.

CSX Corporation established to the court’s satisfaction that it does not “operate as a railroad, [and] has never operated as a railroad.”<sup>38</sup> CSX Corporation also established that had never been authorized to do business in the states, never had an office there, never had an employee working there, and never had any assets there (even though CSXT does).<sup>39</sup> The judge granted the dismissal determining that personal jurisdiction was lacking.<sup>40</sup>

If CSX Corporation and CSXT are as indistinguishable as CSXT presently suggests, CSX Corporation would not have sought, nor been granted, dismissal from the District Court case. The distinctions between CSX Corporation and CSXT are obviously important and significant and CSXT should not be permitted to selectively blur those distinctions as a means of saddling the CERR with road property investment costs that CSXT itself never incurred.

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<sup>37</sup> *Pere Marquette Hotel Partners, LLC v. United States, et. al*, No. 09-5921, 2010 WL 559112 (E.D. La. Feb. 10, 2010).

<sup>38</sup> *Id.* at \*2.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at \*2-3.

**iii. Because the CERR Only Can Step Into CSXT's Shoes on the Same Terms Applicable to CSXT, It Cannot Use CSXT Operating Rights on the IHB Without Replicating CSXT's Ownership Interests in Those Facilities.**<sup>41</sup>

CSXT's third argument is largely duplicative of the arguments it raised in the previous two headings. CSXT complains that the CERR cannot step into CSXT's shoes without reflecting CSXT's ownership interest. CSXT further argues, however, that the CERR's fees to the IHB do not include an interest rental component, which CSXT claims it would pay to a non-owner.

Once again, as noted above, CSXT does not own any portion of the IHB; it is a trackage rights tenant. Thus, what CSXT pays in trackage rights fees is obviously reflective of what a non-affiliate railroad would pay. If a rental interest component were necessary to make all of the IHB owners whole, then CSXT, as a non-owner, would be paying it.

Moreover, the fact that CSX Corporation indirectly acquired a portion of the IHB does not suddenly give a non-owner affiliate of the indirect owner a discount on the trackage rights fee it pays. After all, how are Conrail and CP (the joint owners of the IHB) to recoup their operating costs, capital costs, interest rental component, etc. if the non-owner railroads operating over the facility are getting a break on the fees? Indeed, CSXT points out that it has to pay CSX Corporation for other services, such as technology and administrative

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<sup>41</sup> CSXT's argumentative heading is reused for the processing convenience of the Board. Consumers does not agree with CSXT's assertions for the reasons described herein.

activities; this begs the question: why does CSXT now posit that the fees it is paying indirectly to CSX Corporation via the IHB do not cover all such costs? CSXT's argument is, therefore, illogical *and* inconsistent.

CSXT also offers a cleverly worded suggestion that the current fees are not adequate because IHB has no reason to charge its owners a rental fee, but it provides no actual support for its assertion that CSXT's payments are insufficient. And, of course, CSXT is not an owner of the IHB. Thus, it is reasonable to presume that CSXT is paying such a rental fee; otherwise the real owners might not be adequately compensated. In other words, CSXT has failed to carry its burden of proof regarding the "relationship of the joint facility entity and the costs and revenues realized by the railroad as a result of that relationship."

**iv. The Fact That The Partial Ownership Interest In IHB Is Held By CSX Rather Than CSXT Is Irrelevant to Whether Consumers Must Account for the Full Stand-Alone Costs of Operations Over the IHB.**<sup>42</sup>

In its fourth subheading, CSXT again rehashes its arguments: (i) that there is no "relevance to the fact that the IHB (as a CSX-owned facility) does not appear in Schedule 310 of CSXT's R-1 as a CSXT-owned facility;" (ii) that CSXT enjoys preferred terms for its payments to IHB due to CSX Corporation's indirect ownership interest in the IHB; and (iii) that somehow the full costs of serving the

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<sup>42</sup> CSXT's argumentative heading is recycled for the processing convenience of the Board. Consumers does not agree with CSXT's assertions for the reasons described herein.

CERR's traffic will not be accounted for if the CERR does not include road property investments for the IHB facilities.

As explained above in detail:

1. CSX Corporation does not directly own the assets of the IHB, but instead has interests in the economics and voting interest of Conrail, but Conrail still owns the assets of the IHB.

2. CSXT does not own a portion of the IHB.

3. CSXT operating rights are not part and parcel of CSX Corporation's acquisition of Conrail.

4. CSXT is a trackage rights tenant.

5. CSXT and CSX Corporation are not indistinguishable.

5. The Board has already considered and rejected CSXT's argument that the ownership data included in Schedule 310 is irrelevant.

6. CSXT has not established that it enjoys preferential trackage rights fees over the IHB, even though Conrail, CP and indirectly NS and CSX Corporation presumably expect to earn a reasonable rate of return on the IHB properties. Further, CSXT has not provided any evidence that it incurs additional interest rental payments to any of these other entities, including CSX Corporation.

7. The CERR stepping into CSXT's shoes on the same terms as CSXT is not inconsistent with SAC theory or Board precedent.



**b. Signal/Communications System**

The parties agree on Consumers' proposed signal and communications system.

**c. Turnouts, FEDs and AEI Scanners**

The parties agree on turnout sizes, FED and AEI location scanners.

**d. RTC Model Simulation of CERR Configuration**

RTC Model simulations are addressed in Part III-C.



### III. C. STAND-ALONE RAILROAD OPERATING PLAN

On Opening, the CERR's operating plan was designed to provide for all of the needs of the traffic being handled by the CERR. The CERR's operating plan included all of the particulars about the CERR's operations, including how trains would move over the CERR's system, locomotive consists, train lengths, crew requirements, interchanges, inspections and operations at the Consumers plant.

The CERR's operating plan was developed principally by Consumers' Witnesses John Orrison and Robert Holmstrom. The plan was tested in the RTC Model, and Consumers demonstrated that the performance of the CERR during the peak week of the peak year of traffic being handled by the CERR met and/or exceeded the performance of CSXT. Indeed, the CERR outperformed the real-world CSXT by a considerable margin.<sup>1</sup>

As Consumers described in detail in its Opening, its operating witnesses have over 80 years of combined railroad operating experience, particularly in and around Chicago and Michigan. Briefly summarized, Mr. Orrison served, *inter alia*, as CSXT's Vice President – Network Planning, Vice President – Service Design, General Manager Field Operations Development, and Division Superintendent – Detroit Division, where he oversaw the portion of the lines that the CERR is replicating between Porter and West Olive, as well as many

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<sup>1</sup> See Rebuttal Table III-C-7 below.

other lines in Michigan, Ohio and Ontario, Canada. Mr. Orrison also served as CSXT's primary operating plan witness in the Conrail acquisition proceeding.<sup>2</sup>

Mr. Orrison also served as Vice President – Network Planning, for CSXT, and during that time he was elected Co-Chairman of the AAR's Special Committee Chicago Planning Group charged with analyzing and improving operations in Chicago. He was then appointed Chairman Corridor Development team, which identified and outlined plans for major Chicago corridors that were eventually integrated into the larger Chicago CREATE Program. Mr. Orrison was also involved in the establishment of the CTCO.

As Vice President – Service Design, Mr. Orrison developed and managed the CSXT train profiles, freight car blocks and freight car disposition rules, including most of the train profiles of the trains handled by the CERR. In addition, Mr. Orrison, as the expert witness for CSXT's Operating Plan for the Acquisition of Conrail, outlined CSXT's Intermodal plans for routes between Chicago and New York City, including the development of an intermodal facility at 59<sup>th</sup> Street in Chicago, IL.

As Division Superintendent – Detroit Division, Mr. Orrison oversaw all of the transportation operations for CSXT routes in Michigan, Ohio and

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<sup>2</sup> *CSX Corp. & CSX Transp., Inc., Norfolk S. Corp. and Norfolk S. Ry – Control & Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp.*, STB FD No. 33388.

Ontario, Canada. As noted above, he was responsible for the CSXT line between Porter and West Olive, which the CERR replicates.

Mr. Orrison also worked for BNSF Railway, where he served as Assistant Vice President – Service Design & Performance. In that role, he directed BNSF's Merchandise Service Design & Performance Team. This team was responsible for the development of train plans for over 500 daily trains and 700 local jobs assigned to weekly switching of all customers operating over BNSF's 32,000-mile network in 28 states and two provinces of Canada. He also directed the Velocity Program designed to improve car transit times and trains speeds. This program, which ran from 4Q 2005 to 4Q 2010, ultimately improved velocity by 30 percent over five years.

Mr. Holmstrom's Chicago-related experience is unmatched in this proceeding. Indeed, Mr. Holmstrom's spend his entire 42-year railroad career in Chicago. His experience includes holding the most senior position in the area for CN. Mr. Holmstrom was responsible for training all of the engineers and conductors on the rules and physical layouts of all the lines and rail yards where CN operated in Chicago. This position required an extensive and detailed understanding of all Chicago-area railroad operations.

Mr. Holmstrom's duties also extended beyond CN operations. Mr. Holmstrom was part of an inter-railroad team tasked with developing a single regional operating guide for Chicago. This group assembled the first edition of the Chicago Operating Rules Association Guidebook. To develop this publication,

Mr. Holmstrom reviewed and checked the accuracy of the rail operations descriptions and maps for the entire rail infrastructure within a 45-mile radius of Midway Airport.

In 1999, when CN acquired the Illinois Central, Mr. Holmstrom was selected by CN's Executive Vice President Operations to serve as CN's Superintendent-level representative to the CTCO where he performed many functions that were detailed in Consumers' Opening.

In contrast, CSXT's primary operating witness, Mr. John Gibson, has no direct experience in day-to-day railroad operations. Indeed, Mr. Gibson's statement of qualifications makes it clear that he has never held an on-the-ground operating position at any railroad. Mr. Gibson, who worked with Mr. Orrison for several years, certainly has experience in planning for operations on a broad basis, but he does not even suggest that he is an expert on Chicago or Michigan rail operations. Such expertise is critical here as the CERR is operating within very specific parameters and in a territory where specific knowledge of the area is vital. This lack of Chicago-area and Michigan experience is consequential and evident in this case because much of CSXT's Reply operating evidence is predicated on outdated notions of Chicago operations and misunderstandings of the current environment. As a result, Mr. Gibson posits conditions in Chicago that do not necessarily exist for CSXT or the CERR, and he also posits supposed deficiencies in the CERR's operating plan that do not exist.

Notwithstanding Mr. Gibson's experience in planning, CSXT's complaints about the CERR's operating plan largely ignore or dismiss the fact that the CERR is handling only 54% of the trains that CSXT operated during the base year. This disconnect also creates a strange scenario in which CSXT's rhetoric about the flaws in Consumers' operating plan is then contradicted by its own Reply RTC Model results. Indeed, as explained below, CSXT's criticisms of Consumers' operating plan would suggest that once CSXT "fixed" Consumers' errors, its RTC results would show radically different results from those reached by Consumers. Instead, almost hidden near the end of CSXT's Reply operating plan evidence is Reply Table III-C-12, Comparison of Train Transit Times, which demonstrates that CSXT's complaints, fixes and modifications to the operating plan had almost no impact on the results and are virtually indistinguishable from Consumers' results. That CSXT has ignored the significant difference in trains handled by the CERR and CSXT sits at the roots of the improvement that the CERR has demonstrated and which CSXT has largely replicated through its own RTC modeling. To be sure, CSXT attempts to paint a picture that its RTC results are drastically different from Consumers' Opening, but as explained in Part III-A-1-b and below, the results differ by only a few minutes in most cases, a *de minimis* amount in actual time and from a railroad operating perspective according to Messrs. Orrison and Holmstrom – even when considering high priority intermodal trains. In other words, even CSXT's Reply demonstrates that Consumers'

operating experts, with their vast experience in this territory, and understanding of real world operations, got it right.

### *REBUTTAL INTRODUCTION*<sup>3</sup>

CSXT largely accepts the parameters of Consumers' operating plan. But instead of acknowledging this point, CSXT devotes its Introduction to "flaws" that it claims it has identified in Consumers' operating plan. CSXT's rhetoric boils down to only three primary complaints:<sup>4</sup> (i) Consumers underestimates delays in Chicago; (ii) some Consumers trains, when growth cars are added to them, are too long; and (iii) Consumers should have accounted for a few allegedly bad-ordered cars containing Consumers' coal. As explained herein, CSXT's complaints are without merit.

#### **A. Consumers Accounted for Delays Attributable to the CERR Traffic Group and Its Operating Plan Specifically Accounted for the Realities of Chicago Operations**

CSXT suggests that Consumers has ignored delays; that the CERR inexplicably moves through Chicago faster than CSXT trains in the real world;

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<sup>3</sup> CSXT inserted a new section, "Introduction," with three subsections in its Reply. As CSXT devoted 44 pages to this Introduction section, rather than placing its arguments under the appropriate headings within the existing structure that Consumers used on Opening. CSXT then rehashed, in summary form, the arguments raised in its Introduction section throughout the already established sections that follow. As CSXT's Introduction section is so large, Consumers has decided, for ease of processing, to respond to CSXT's Introduction with this Rebuttal Introduction and appropriate subheadings.

<sup>4</sup> CSXT also complains that the CERR has no crew changes. As explained in Part III-C-2-xii, CSXT is simply wrong and mischaracterizes Consumers' evidence.



that fewer trains could not possibly account for the efficiency of the CERR; and, in essence, that Consumers somehow is trying to dupe the Board into believing that a stand-alone railroad could operate in Chicago and still be efficient.<sup>5</sup> CSXT carefully ignores its own RTC results throughout the 20 pages in which it chastises Consumers on this point. Instead, CSXT focuses on Consumers' supposed faults, CSXT's supposed corrections, and the expected dire consequences that CSXT's revisions would cause. Almost without exception, CSXT's arguments are without merit and all of these complaints contradict CSXT's own RTC results.

**Operating in Chicago.** CSXT argues that Chicago is a busy terminal and that traffic congestion, capacity constraints and weather conditions result in service delays that the CERR somehow ignores.<sup>6</sup> CSXT cites general statistics about total volumes of traffic through Chicago and other well-known issues about the terminal to suggest the difficulty of operating in Chicago.<sup>7</sup> Consumers' operating experts recognized and considered the challenges of operating in Chicago. Indeed, Mr. Holmstrom has spent his entire career dealing with the particular issues that Chicago presents, and Mr. Orrison is also intimately familiar with CSXT's specific challenges in Chicago and how they affect operations in the terminal and beyond. That such care was taken is evident. For example, Mr. Orrison and Mr. Holmstrom provided for extensive daily closures of

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<sup>5</sup> CSXT Reply at III-C-7-27.

<sup>6</sup> CSXT Reply at III-C-7.

<sup>7</sup> CSXT Reply at III-C-2.

the crossing diamond at 75<sup>th</sup> St. where Metra trains, as well as NS and other carriers, cross the CERR line. CSXT accepted those closures, tacitly acknowledging that Consumers' operating witnesses are well-versed in the intricacies of operating in Chicago.

CSXT also largely ignores that Chicago rail operations have been transformed in recent years. As Consumers' operating experts explain below, CSXT effectively suggests that day-to-day operations are almost unbearable. But CSXT's description depicts rail operations of the 1980's and 1990's right up to the mid-2000's, and it ignores the many operational and infrastructure improvements that have inured to the benefit of the railroads operating in the terminal.

**Historical Perspective.** Messrs. Holmstrom and Orrison explain that operating in Chicago prior to the mid-2000's was problematic. There were numerous and frequent backups that brought the terminal to a near halt. The railroads had no coordinated recovery plans and each carrier was operating on its own terms. The carriers had no insight into what other carriers were doing in the terminal (*i.e.*, trains handled daily, cars processed in hump operations or number of passenger trains on their lines). Simply put, there was no sharing of information of any kind. This problem was further exacerbated by the sheer number of carriers operating through the terminal in recent times, up to 25 carriers at various periods.

As a result of the siloed atmosphere, all of the various carriers were running their own operations, which usually included scheduled and unscheduled

trains arriving and departing daily. Naturally, some trains operated on time, others were behind schedule, and some simply had no schedule and no preset plan for movement through the terminal. With each carrier focusing only on its own operations (and sometimes on the plan of its interline partner for a particular train), the Chicago terminal was essentially a huge maze of trains and cars coming from or going somewhere, and trains were effectively just moving or stopped everywhere with no coordination or game plan in place to improve the terminal overall. Thus, the largest rail terminal in North America was dysfunctional. These problems were well known inside and outside of the industry. That legacy is still in the minds of many, including CSXT's operating witness and the Blue Ribbon Commission that CSXT cites frequently.

**A Challenging Time Sparks Change.** The time period from the fall of 1998 through the winter of 1999 was one of the very worst periods in Chicago terminal train operations. The entire terminal struggled for throughput and this period was far worse than the troubles encountered in 2014. Traffic was backed up across many states as a result. Mr. Holmstrom worked a minimum of 14 hours every day for a period of 207 straight days from August 1998 until spring of 1999. By late spring of 1999, train operations returned to normal, but normal was far from optimal.

Then came even more difficulties. On June 1, 1999, Conrail was split. As the Board was aware, there were many operational challenges that occurred with this transaction. On July 1, 1999, CN purchased the Illinois Central.

All of these upheavals disrupted the terminal. The Class I carriers were all aware that the Chicago terminal was still problematic notwithstanding the reduction in carriers operating therein. Top executives were being pressured by regulators, legislators, and local officials to improve conditions.

The pressure being felt by railroads in Chicago conveniently dovetailed with an initiative, the Chicago Planning Group (“CPG”), that was begun in the spring of 1996 after a tough winter season. The move to form the CPG was spurred by the Class I railroads’ need to respond to growing customer complaints, as well as a concern that lack of oversight by the Chicago carriers would lead the STB to directing oversight measures, as it eventually did after the UP/SP merger of 1997.

The CPG, of which Mr. Orrison was a founding representative, reported directly to the AAR’s Safety and Operations Management Committee. The CPG developed a Strengths, Weakness, Opportunities, and Threats analysis; set up the Infrastructure Committee; and hi-railed every foot of railroad in Chicago with representatives from each railroad’s engineering department to evaluate, rate and rank each and every interlocking with respect to condition, capability and recommended modernization. One implicit goal was to eliminate all manned interlockings and to automate the dispatch of trains moving through Chicago.

The CPG set up monitoring points outside of Chicago on every railroad to document the time and date an inbound through train was entering Chicagoland to monitor the total elapsed transit time of the train until it departed

Chicagoland. In the beginning, the transit time of trains, moving from say BNSF to CSXT, was measured in days versus hours (per schedule).

The CPG also documented the number of hand-offs that occurred for a train trying to move through Chicago (for example, a single train crew would encounter 8 to 14 hand-offs from foreign RR dispatchers and manned towers to gain permission for movement authority over tracks and Interlockings).

The CPG led the efforts for the AAR from June 1996 - 2000 then handed over the initiative to CTCO in 2000. Unfortunately, it took almost two years for the AAR members' Chief Operating Officer leadership to approve the CTCO because certain railroads argued over location, co-location, non-co-location and rank-level of CTCO representatives (saying CTCO was redundant to their existing organizations). One underlying problem is that railroad COOs regarded Chicagoland as the end-point of their networks versus the mid-point of the national network. Regardless, following many complaints and pressure from political quarters, the CTCO initiated its operations in January 2000.

**The CTCO Transforms Chicago.** January 2000 ushered in a new era for Chicago's train operations. The CTCO started as a nine-member team, which was quickly joined by a Metra representative. The CTCO maintains its offices in the Metra train dispatching building in the heart of Chicago passenger operations. The representatives in the CTCO generally had dispatcher screen-level visibility of many of the Class I carrier mainline operations. Each CTCO member was at least a superintendent level operating officer, and all had extensive

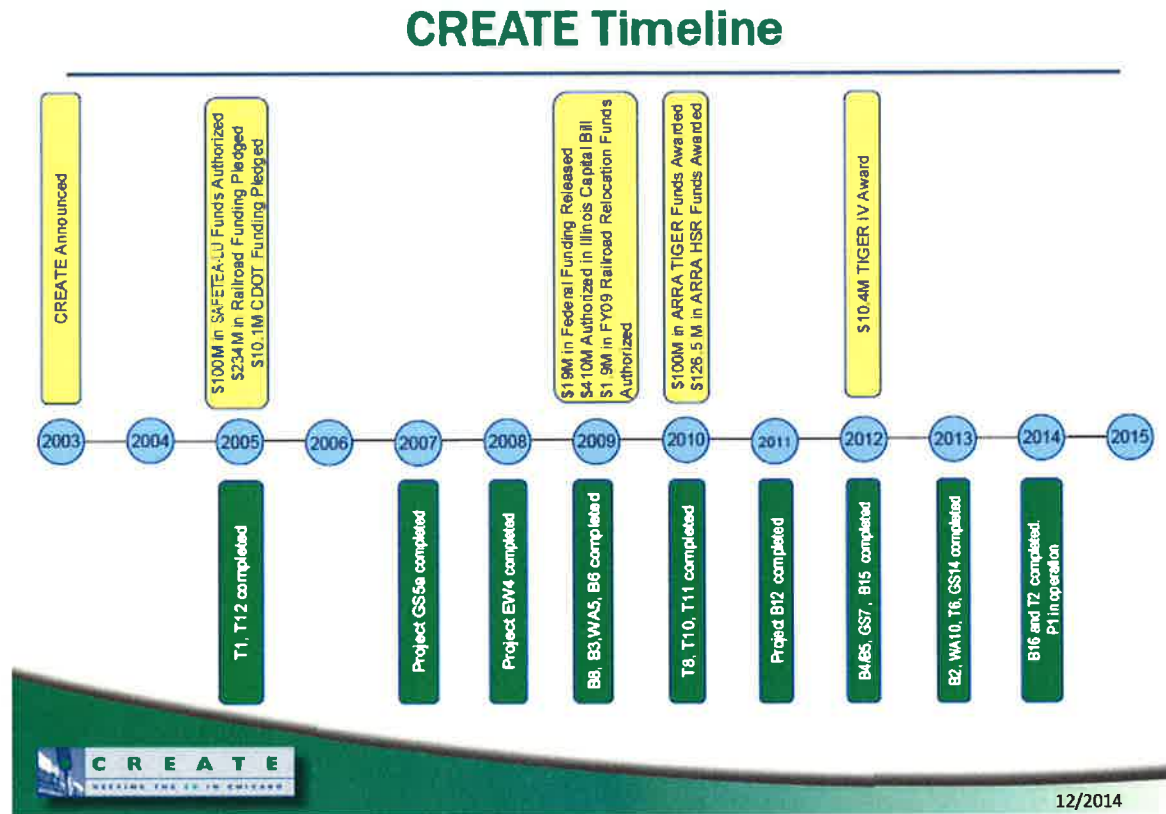
on-the-ground experience, as one would expect of senior operating personnel in Chicago. In other words, this group, then and now, works deep in the trenches of rail operations, and understand the challenges in Chicago.

With the CTCO in place, for the very first time, Chicago had a team fully devoted to making changes. The members set aside their home road's singular needs and put on neutral hats working for the good of all Chicago rail operations. Not long after forming, the CTCO had a vision of what it was going to take to move rail traffic faster and smoother, including how to handle irregular operations.

The improvements implemented by the CTCO included process improvements and technology upgrades. And there were many. For example, the CTCO: (i) developed computerized monitoring of trains moving into Chicagoland through an automated dispatcher line-up report; (ii) started scheduled shift-change conference calls and a morning call to review the planned and unplanned train movements, as well as track and signal outage; and (iii) developed alternative routes for each railroad to move trains through Chicago on each other's routes.

The CTCO also realized that infrastructure changes and additions were needed if the Chicago terminal was going to improve even further. The CTCO helped develop aspects the multi-billion-dollar infrastructure improvement plan that was later known as CREATE, which was announced on June 16, 2003 by

then-Mayor Daley.<sup>8</sup> These process and infrastructure improvements have been implemented, more or less, nonstop from mid-2000 through 2015, as seen in the chart below.<sup>9</sup>



CREATE is now on slow track as funding has dried up. Indeed, Blue Ribbon Commission, so often cited by CSXT, represents a renewed attempt to garner interest in the unfinished projects. Nevertheless, the projects listed above resulted in a string of critical improvements as shown in the list below:

<sup>8</sup> See <http://www.createprogram.org/about.htm>.

<sup>9</sup> See [http://www.createprogram.org/linked\\_files/timeline\\_final.pdf](http://www.createprogram.org/linked_files/timeline_final.pdf).

<b>Proj. No.</b>	<b>Project Name</b>	<b>Location</b>	<b>Key Benefit†</b>
<b><u>B1</u></b>	CP double & IHB connection	Franklin Park	Reduces delays to commuter and freight trains and to motorists at nearby at-grade crossings.
<b><u>B2</u></b>	Proviso 3rd Main	Bellwood/Berkeley/Elmhurst/Melrose Park	Adds capacity for commuter and freight trains and increases pedestrian safety at stations.
<b><u>B3</u></b>	Melrose connection	Bellwood	Adds capacity into and out of a major freight rail yard, and reduces delays on an adjacent freight railroad.
<b><u>B4*</u></b>	TCS LaGrange to CP Hill	LaGrange/LaGrange Park/McCook	Adds capacity and reduces delays for freight trains, and reduces delay to motorists at nearby at-grade crossings.
<b><u>B5*</u></b>	TCS LaGrange to CP Hill	Bellwood/Broadview/Melrose Park	Adds capacity and reduces delays for freight trains, and reduces delay to motorists at nearby at-grade crossings.
<b><u>B6</u></b>	McCook	McCook	Increases speed and capacity for freight trains, and reduces delay to intercity passenger trains.
<b><u>B8</u></b>	TCS Argo to Canal	Bedford Park/Bridgeview/Summit	Increases freight train speed and reduces delay to intercity passenger trains where their paths cross.
<b><u>B9**</u></b>	Argo	Chicago/Bedford Park/Bridgeview/Summit	Greatly increases freight train capacity and allows more evenly distributed train traffic throughout the regional rail network.
<b><u>B12</u></b>	CP Francisco	Alsip/Blue Island	Adds capacity and reduces delays for freight trains through a major corridor.
<b><u>B15</u></b>	TCS Blue Island	Blue Island/Dolton/Riverdale	Increases speed and capacity for freight trains, and reduces delay to intercity passenger trains where their paths cross.
<b><u>B16</u></b>	Thornton Jct	South Holland	Creates a track connection that allows more evenly distributed freight train traffic throughout the regional rail network



<b>Proj. No.</b>	<b>Project Name</b>	<b>Location</b>	<b>Key Benefit†</b>
<a href="#"><b>EW1**</b></a>	Argo	Chicago/ Bedford Park/ Bridgeview/Summit	Greatly increases freight train capacity and allows more evenly distributed train traffic throughout the regional rail network.
<a href="#"><b>EW2***</b></a>	80th Street	Chicago	Greatly increases freight and commuter train speed and capacity by removing the most severe rail bottleneck in the region; eliminates 9,000 annual passenger hours of delay for commuters.
<a href="#"><b>EW3</b></a>	Pullman Jct	Chicago	Adds capacity and reduces delay for freight trains through a major corridor.
<a href="#"><b>EW4</b></a>	CP 509	Chicago	Increases freight train speeds and capacity through a connection, reducing main line delays.
<a href="#"><b>GS1</b></a>	63rd St/Harlem Ave	Chicago	Eliminates grade crossing, reducing congestion and improving safety for 17,600 vehicles (1,100 of which are delayed) and 192 CTA/Pace buses per day. This is a "911 Critical Crossing."
<a href="#"><b>GS2</b></a>	Central Ave/54th St	Chicago	Eliminates grade crossing, reducing congestion and improving safety for 23,200 vehicles (700 of which are delayed) per day. This is a "911 Critical Crossing."
<a href="#"><b>GS3a</b></a>	Morgan St/Pershing Road	Chicago	Reduces traffic delays by either eliminating a grade crossing or installing dynamic signage to direct motorists to use alternative routes when the crossing is blocked.
<a href="#"><b>GS4</b></a>	Central Ave	Chicago Ridge/ Oak Lawn	Eliminates grade crossing, reducing congestion and improving safety for 20,000 vehicles (2,500 of which are delayed) per day.
<a href="#"><b>GS5a</b></a>	Grand Ave	Franklin Park	Eliminates a grade crossing, reducing congestion and improving safety for motorists and pedestrians.

<b>Proj. No.</b>	<b>Project Name</b>	<b>Location</b>	<b>Key Benefit†</b>
<a href="#"><b>GS6</b></a>	25th Ave	Melrose Park/ Bellwood	Eliminates grade crossing, reducing congestion and improving safety for 21,000 vehicles (5,000 of which are delayed) and 38 Pace buses per day.
<a href="#"><b>GS7</b></a>	Belmont Rd	Downers Grove	Eliminates grade crossing adjacent to a commuter train station, reducing congestion and improving safety for 20,000 vehicles (3,500 of which are delayed) per day.
<a href="#"><b>GS8a</b></a>	5th Ave	Maywood	Eliminates grade crossing, reducing congestion and improving safety for 6,600 vehicles (1,000 of which are delayed) and 66 Pace buses per day.
<a href="#"><b>GS9</b></a>	Archer Ave/Kenton Ave	Chicago	Eliminates grade crossing, reducing congestion and improving safety for 18,000 vehicles (2,600 of which are delayed) and 259 CTA buses per day. This is a "911 Critical Crossing."
<a href="#"><b>GS10</b></a>	47th St/East Ave	LaGrange/ McCook	Eliminates two grade crossings, reducing congestion and improving safety for 12,000 vehicles (2,200 of which are delayed) per day.
<a href="#"><b>GS11</b></a>	Columbus Ave/Maplewood Ave	Chicago	Eliminates grade crossing, reducing congestion and improving safety for 8,200 vehicles (1,200 of which are delayed) per day. This is a "911 Critical Crossing."
<a href="#"><b>GS12</b></a>	1st Ave	Maywood	Eliminates grade crossing, reducing congestion and improving safety for 29,000 vehicles (4,000 of which are delayed) per day.
<a href="#"><b>GS13</b></a>	31st St	LaGrange Park	Eliminates grade crossing, reducing congestion and improving safety for 18,000 vehicles (2,400 of which are delayed) per day.

<b>Proj. No.</b>	<b>Project Name</b>	<b>Location</b>	<b>Key Benefit†</b>
<a href="#"><u>GS14</u></a>	71st St	Bridgeview	Eliminates a grade crossing in a major industrial area adjacent to a 20,000-seat multipurpose stadium near the entrance to a major rail yard complex (which requires slow train movements and lengthy gate down times).
<a href="#"><u>GS15a</u></a>	130th St/Torrence Ave	Chicago	Eliminates two grade crossings adjacent to a major assembly plant, reducing congestion and improving safety for 32,000 vehicles per day. This is a "911 Critical Crossing."
<a href="#"><u>GS16</u></a>	Irving Park Rd	Bensenville	Eliminates grade crossing, reducing congestion and improving safety for 37,000 vehicles (6,400 of which are delayed) and 31 Pace buses per day.
<a href="#"><u>GS17</u></a>	Western Ave	Blue Island	Eliminates grade crossing, reducing congestion and improving safety for 9,000 vehicles (1,700 of which are delayed) and 80 Pace buses per day.
<a href="#"><u>GS18</u></a>	Harlem Ave	Berwyn /Riverside	Eliminates grade crossing, reducing congestion and improving safety for 32,000 vehicles (6,300 of which are delayed) and 139 Pace buses per day.
<a href="#"><u>GS19***</u></a>	71st St/Bell Ave	Chicago	Eliminates a grade crossing, reducing congestion and improving safety for motorists and pedestrians.
<a href="#"><u>GS20</u></a>	87th St/Rockwell St	Chicago/ Evergreen Park	Eliminates grade crossing, reducing congestion and improving safety for 32,000 vehicles (3,000 of which are delayed) and 193 CTA buses per day.
<a href="#"><u>GS21a</u></a>	95th St/Eggleston Ave	Chicago	Eliminates grade crossing, reducing congestion and improving safety for 27,500 vehicles (3,800 of which are delayed) and 885 CTA/Pace buses per day. This is a "911 Critical Crossing."

<b>Proj. No.</b>	<b>Project Name</b>	<b>Location</b>	<b>Key Benefit†</b>
<a href="#"><u>GS22</u></a>	115th St	Alsip	Eliminates grade crossing, reducing congestion and improving safety for 13,600 vehicles (2,800 of which are delayed) per day.
<a href="#"><u>GS23a</u></a>	Cottage Grove	Dolton	Eliminates grade crossing, reducing congestion and improving safety for 15,300 vehicles (1,700 of which are delayed) per day.
<a href="#"><u>GS24</u></a>	Maple Ave	Brookfield	Eliminates grade crossing, reducing congestion and improving safety for 12,000 vehicles (2,500 of which are delayed) per day.
<a href="#"><u>GS25</u></a>	Roosevelt Road	West Chicago	Eliminates grade crossing, reducing congestion and improving safety for 21,000 vehicles (3,800 of which are delayed) per day.
<b>Proj. No.</b>	<b>Project Name</b>	<b>Location</b>	<b>Key Benefit†</b>
<a href="#"><u>P1</u></a>	63rd & State	Chicago	Removes conflict point between commuter, passenger, and freight trains, eliminating 7,500 annual passenger hours of delay for commuters and Amtrak's most severe delay point in the Midwest; also increases commuter track capacity for future service (see project P2).
<a href="#"><u>P2***</u></a>	74th Street	Chicago	Frees up space for increased intercity passenger rail trains at Chicago Union Station by shifting a growing commuter rail line to another downtown terminal that has spare capacity, eliminating 18,500 annual passenger hours of delay for commuters and increasing speed and capacity for all trains.
<a href="#"><u>P3***</u></a>	75th Street	Chicago	Takes a growing commuter rail route out of the path of freight trains, eliminating 5,000 annual passenger hours of delay for commuters.
<a href="#"><u>P4</u></a>	Grand Crossing	Chicago	Provides a more direct routing for passenger trains from the south, shaving 10-15 minutes off of train schedules relative to current routing.

<b>Proj. No.</b>	<b>Project Name</b>	<b>Location</b>	<b>Key Benefit†</b>
<a href="#"><u>P5</u></a>	Brighton Park	Chicago	Removes conflict point between commuter, passenger, and freight trains, eliminating 4,500 annual passenger hours of delay for commuters and even greater delays for passenger trains.
<a href="#"><u>P6</u></a>	Canal	Summit	Removes conflict point between commuter, passenger, and freight trains, eliminating 3,000 annual passenger hours of delay for commuters and even greater delays for passenger trains.
<a href="#"><u>P7</u></a>	Chicago Ridge	Chicago Ridge	Removes conflict point between commuter and freight trains, eliminating 6,000 annual passenger hours of delay for commuters.
<b>Proj. No.</b>	<b>Project Name</b>	<b>Location</b>	<b>Key Benefit†</b>
<a href="#"><u>WA1</u></a>	Ogden Jct.	Chicago	Increases freight and commuter train speed and capacity by modernizing train control system; reduces delays for commuter trains.
<a href="#"><u>WA2</u></a>	TCS Blue Island Sub	Chicago	Adds capacity, increases speed, and reduces delays for freight trains.
<a href="#"><u>WA3</u></a>	Ashland Ave. & CJ Mains	Chicago	Adds capacity, increases speed, and reduces delays for freight trains.
<a href="#"><u>WA4</u></a>	BNSF Horseshoe	Chicago	Provides new connection between major freight yards and main line tracks, adding capacity and reducing delays.
<a href="#"><u>WA5</u></a>	Corwith Tower	Chicago	Increases freight train speed, reliability, and capacity at the eastern terminal of the busiest transcontinental intermodal corridor in the U.S.
<a href="#"><u>WA7</u></a>	Brighton Park	Chicago	Provides new connection between freight train routes, adding capacity and reducing delays.
<a href="#"><u>WA10</u></a>	Blue Island Jct.	Blue Island	Improves a track connection that allows more evenly distributed freight train traffic throughout the regional rail network
<a href="#"><u>WA11</u></a>	Dolton Interlocking	Chicago /Dolton/Riverdale	Increases freight train speed and reduces delay at a point where multiple train paths cross.

	<b>Project Name</b>	<b>Location</b>	<b>Key Benefit†</b>
	<a href="#">Common Operational Picture</a>	Chicago and suburbs (Chicago Terminal District)	Allows dispatchers to identify congestion and reroute trains in real time, improving operations for all 1,300 daily freight, commuter, and passenger trains in the region.
	<a href="#">Viaduct Improvement Program</a>	Chicago (various locations)	Improved roadways, sidewalks, and curbs under railroad viaducts to enhance safety and security for motorists, bicyclists, and pedestrians.
	<a href="#">Grade Crossing Safety Program</a>	Suburbs (various locations)	Improves motorist and pedestrian safety at grade crossings where a grade separation is infeasible or not currently planned.
<b><u>T1-</u></b> <b><u>T12</u></b>	Towers	Various	Increases reliability of train operations at key crossings throughout the region, reducing commuter, passenger, and freight train delays.
Source: <a href="http://www.createprogram.org/projects.htm">http://www.createprogram.org/projects.htm</a> .			

As noted above, Mr. Orrison was active in organizing improvements in Chicago before the CTCO. In 1996, Mr. Orrison was co-chairman of the CPG and CSXT's representative appointed by EVP Ron Conway - former President of Conrail in 1996. He led and directed the infrastructure committee Spring-Summer 1996 to produce the "Red Book," which outlined the critical corridors and planned grouping of projects to gain the greatest level of benefits, as shown in the eventual CREATE map.<sup>10</sup>

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<sup>10</sup> See [http://www.createprogram.org/linked\\_files/ProjectMap\\_print.pdf](http://www.createprogram.org/linked_files/ProjectMap_print.pdf).



Mr. Orrison was also on the selection committee that interviewed five different engineering and consulting companies to select the winning company to develop the RTC model for Chicago. The AAR purchased the completed model and hired a new full time employee to operate the model generating baseline analysis of train delay minutes for all of the identified critical corridors and then generating what-if analyses to determine if the critical corridors

were fixed, and to determine the train delay minute savings generated from the projects.

Even before that, in the 1980's, while working for the Norfolk Southern Railway, Mr. Orrison walked the 75<sup>th</sup> Street interlocking area studying the possible grade separation of Metra using a flyover at Ashland and 75<sup>th</sup> Street. However, the north-south CSXT interlocking was listed as a lower priority project in the 1996 Red Book due to the lower frequency of north/south trains; the ability to fleet two trains side-by-side when crossing the NS/Metra east/west track and the costly engineering estimate to completely separate Metra/NS/CSXT Operations (\$400-700 million in 1996 and now in excess of \$1 billion).

As noted, Messrs. Orrison and Holmstrom are extremely well versed in Chicago operations and they flatly disagree with CSXT's dated argument that Chicago is too complex and hard to understand and that a stand-alone railroad, in effect, could not work in this terminal.

CSXT also ignores that changes in traffic mix, traffic flows and other requirements also previously necessitated changes in Chicago. For example, many former switching yards were converted to intermodal and automotive facilities. CSXT, along with the other Class I railroads, identified its ability to block large volumes of traffic to bypass the former process of interchanging all off-line traffic to the nearest carrier interchange junction point or yard. For example, in the CSXT Operating Plan for the acquisition of Conrail, CSXT identified through blocks for BNSF interchange traffic bound to Northtown, MN,



Galesburg, IL and Pasco, WA. Reciprocal blocking was provided by BNSF for Willard, OH, Selkirk, NY and Cumberland, MD. The Interchange Service Agreements that are in place today were originally developed in 1996 using CSXT's Operation Research modeling of the AAR 1% Waybill sample and 100% CSXT/Conrail Waybill samples. The Service Design teams within each of the Class I railroads have constantly reviewed shipment databases to identify and implement operational plans that eliminate the need for switching and intermediate handlings of traffic within Chicagoland and to reduce each carrier's cost of operations in and around Chicago. These changes pushed freight switching and train building to other locations outside of the Chicago terminal, including CSXT's expansion of Willard Yard in Willard, OH to develop westbound blocking for BNSF and UP, and NS's modernization of Elkhart, IN to build bypass Chicago trains for BNSF and UP.

**Today's Chicago Operations.** The processes in place today, honed over many years by the CTCO and driven by changes such as moving train-building away from the terminal, provide for the orderly movement of rail traffic. Visibility of what is on hand and what is coming from all directions is no longer a mystery. All of the railroads have access to each other's train line-up information in the form of an electronic computer screen providing, by train ID, the expected estimate time of arrival (ETA), train consist, locomotive consist, crew hours on duty and other important information. Most of the train dispatch offices utilize live views of the other carriers' mainline operations and have dedicated telephone

lines between the offices to ensure prompt and efficient communications. To be sure, the winter of 2014 was difficult, but the underlying factors, such as constant snow storms around the nation, disrupted schedules all over the nation, not just in Chicago, but, of course, all roads lead to Chicago, so much attention was placed there. That said, no railroad will ever spend all of the money that would be needed to completely achieve the three R's of strategic planning for railway networks: Robust, Resilient and Redundant. Specifically, weather affects resiliency and, by definition, weather is recoverable, not preventable. However, Mr. Holmstrom and Mr. Orrison emphasize that the fundamentals of operations in Chicago were otherwise on a good footing during this period, but CP and BNSF, in particular, were deeply affected by network failures that occurred outside of Chicago (*e.g.*, North Dakota), which were exacerbated by inadequate infrastructure to support traffic inputs (*e.g.*, Sand) and outputs (*e.g.*, unit oil trains). Indeed, Mr. Orrison was the AVP Service design for BNSF between 2005-2011 and was involved in the planning for CBR unit trains and the design of customer facilities. The planning group recommended the expansion of facilities in Minot and Williston, double tracking, and taking back the Yellowstone Valley Railroad, but senior management did not decide to make the investment until service issues began arising in 2013-2014.

**CSXT's Distorted Description of Chicago Operations and the CERR Territory.** CSXT's Reply would lead the uninformed reader to believe that every day of every week of every year is a huge struggle in the terminal.

However, that simply is not true and it does not reflect the operations in the terminal today. For example, on page I-22 of CSXT's Reply, CSXT attempts to startle the Board into thinking that the 75<sup>th</sup> Street interlocking is almost impassable because four carriers operate 90 trains a day. But Consumers' operating witnesses immediately identified this point as a red herring. In their direct experience, fluidity has never been better in this corridor. Specifically, the BRC's late general manager made this corridor surprisingly fluid, given the traffic volume. He held carriers accountable to adhere to their operating schedules and kept passenger trains flowing. To be sure, as the Blue Ribbon commission cited by CSXT noted, there is still work to be done at that interlocking – if the funding is ever made available – but the challenges at this interlocking are old news. The carriers have adapted to and improved this interlocking already.

CSXT's distortions and/or simple lack of knowledge about the particulars in this area are also manifest. In the same paragraph discussing the 75<sup>th</sup> Street interlocking, CSXT mentions the 80<sup>th</sup> Street Interlocking at Forest Hill junction. CSXT is confused here as these two are separate locations which are located 2.5 miles from one another.

In the same paragraph, CSXT describes how a train can take 15 to 20 minutes to traverse two miles, but this is a red herring as well. Simply put, 15 minutes to cover two miles in this area is often acceptable on some of the routes because the physical plant will not permit anything faster. For example, the straight route on BRC is rated at a 25 MPH maximum, but there are long sweeping

curves and long gradual dips on the tracks, which, by design, are undercut to allow double-stack container train clearance – Metra’s Rock Island Line passes over and there are streets below. So while the configuration is not ideal, CSXT’s portrayal of the area is incorrect, and, of course, CSXT selects the tricky operating points and suggests that they are typical of normal operations.

Likewise, CSXT suggests that the CERR somehow flies through the heart of Chicago.<sup>11</sup> Again, CSXT distorts the circumstances here. The CSXT route being replicated by the CERR is not in the heart of downtown Chicago or nestled among the skyscrapers. In reality the route is 12 miles southeast of downtown Chicago, touching up against the northwest Indiana state line at Hammond, Indiana. This is as far south and east as one can go within the Chicago city limits.

CSXT also suggests that Consumers has ignored that the NS trackage rights route used by some CERR trains is the most congested area in Chicago, and it implies that Consumers has somehow glossed over this point. Admittedly, this route handles a large number of trains. However, fluidity is the key, not the total number of trains. In Mr. Holmstrom’s extensive experience with trains in this corridor, NS is highly efficient. The NS train dispatchers are top-notch. In addition, CSXT fails to mention that NS’s fluidity was recently enhanced by the completion of the costliest of the CREATE infrastructure

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<sup>11</sup> CSXT Reply at I-23.

improvement projects. This project, known as P1, was completed in 2014. This project grade-separated the high density Metra Rock Island Line from the high density NS Chicago Line. NS previously halted freight traffic for seven (7) hours to accommodate morning and evening rush hours, along with all day service. NS is now in a position to move freight and intermodal traffic over this corridor without scheduled delays.

But far more important to this case, Consumers did not model this segment in its RTC Model because it had no access to the traffic records for this segment. Instead, it relied on CSXT's data addressing the time it takes for the historical-period CSXT trains to traverse the segment – warts and all. Significantly, the CSXT *accepted* the transit times and methodology used by Consumers.<sup>12</sup> Thus, CSXT has no basis for complaining.

CSXT also ignores that the CERR is largely immune (except at the 75<sup>th</sup> Street Interlocking) from the impact of Metra trains. Metra passenger operations often have exclusive access to the mainline tracks of all the Class I carriers for a few hours in the morning and early evening. The one exception is CSXT. It does not have a single Metra train on its main tracks. Thus, all the other

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<sup>12</sup> CSXT Reply at III-C-67.

freight in the terminal more or less stands still for roughly six hours per day.<sup>13</sup>

Yet, CSXT carefully ignores that it and the CERR are spared such problems.

Similarly, Amtrak comes to Chicago from all the cardinal compass points. Indeed, Amtrak trains are spotted on each carrier's routes throughout the day from dawn till midnight, and of course, freight must make way for passenger operations. But CSXT is again spared such inconvenience. CSXT has only one pair of Amtrak trains that runs on their low density Monon Subdivision (not replicated here), which extends from Chicago to Indianapolis. Moreover, the ridership on the route has dropped so low that the train consists of one locomotive and one passenger car, which will hardly impede operations.

CSXT also suggests that it often takes 30 hours to transit the terminal.<sup>14</sup> CSXT's distortion here is troublesome. While such a statistic may be true for a boxcar switched at the BRC with a 20-hour dwell time, CSXT does not suggest, nor is it the case, that this statistic is true for the trains being handled by the CERR. From 1996-1999, the Chicago Planning Group set up measurements of a "corral" around Chicago to measure the On-Signal (OS) time of trains moving into Chicago on any line to moving out of Chicago on any line – given the condition of Chicago and the many manned towers – 30 hours was about right. But now that towers are automated and controlled remotely from dispatchers'

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<sup>13</sup> The CERR does experience interference at the 75<sup>th</sup> Street interlocking when Metra trains have a block of time in the morning and evening. Consumers accounted for this curfew and CSXT accepted Consumers' evidence on this point.

<sup>14</sup> CSXT Reply at III-C-4-5.

desks, the protocol for railroads in Chicago is to move trains as quickly as possible. Indeed, even during Metra rush hours, a 30-hour figure would be an extreme outlier.

On the other hand, there is a very logical explanation as to why some freight cars take 30 or more hours traveling through Chicago. Mr. Holmstrom provides one example. Trains arrive at Clearing Yard 24/7/365, and those cars are bound for other carriers' trains. BRC attempts to, as a matter of policy, inspect and hump all cars into classification tracks within eight (8) hours of arrival. Cars placed on classification tracks are pulled to the departure yard tracks six (6) hours before the train's scheduled departure time. Consider how this works in practice. Train XYZ from BNSF arrives at Clearing Yard at 6:00 a.m. and is completely switched by 2:00 p.m. Now, one car on that train is destined for Waycross, GA on the CSXT, but that classification track is only pulled to the departure yard once a day at 10:00 a.m. for a 4:00 p.m. departure, then a freight car destined for Waycross, which is switched as early as 10:15, will not be pulled down to the departure yard until the following day. Thus, by design, the car may sit at Clearing Yard for 34 hours before departing, and that, of course, does not include the actual transit through Chicago.

To demonstrate that the 30-hour figure does not apply here, Mr. Holmstrom uses an example of a West Olive train. Assume that BNSF is operating the train near Chicago, but during a Metra rush hour period, thereby inhibiting movement. BNSF would hold the loaded train west of Chicago at

Aurora, IL, which is about 37 miles from the 22nd street connection with the CERR. Once the train is moving, BNSF's maximum speed is 45 mph until reaching the entrance to its main track No. 4, where it drops to 35 mph. Thus, there is roughly an hour running time once the train departs Aurora. Mr. Holmstrom then generously assumes one (1) hour to travel the six (6) miles from Cicero to 71<sup>st</sup> Street. Mr. Holmstrom then adds 3½ hours of dwell at 71<sup>st</sup> Street because CSXT has a reputation of waiting until a train arrives at a hand off location before a crew is ordered; even then there is no guarantee the crew is ordered upon the train's arrival; and finally the crew must perform the brake test and depart. By comparison, the CERR is planning for, and CSXT has accepted, a much shorter interchange time of 30 minutes, reflecting improved efficiencies. Once the train departs 71<sup>st</sup> Street, it could reach Dolton in less than one hour. Alternatively, if the route is across the BRC to Rock Island junction, the running time may be 15 minutes longer than to Dolton, but even if it were several hours longer it would still not approach 30 hours. A few minutes after passing Dolton, the train crosses the Illinois-Indiana state line and exits the terminal area. Thus, in total, even allowing for generous holds and slow transits, the West Olive trains can reach Indiana in less than 10 hours – and that 10-hour figure includes other possible delays and issues not specified by Mr. Holmstrom above.

In Chicago, all coal trains and unit trains in general, regardless of the identity of the receiving carrier, are included in a 2-day forecast of expected trains with regular updates on the ETA for those trains. A properly coordinated handoff



would allow for a transit time of less than seven (7) hours from Aurora to the Dolton Interlocking.

Mr. Holmstrom was involved in a study of coal train dwell time in Chicago. It was this study that revealed the delays in crew calling for West Olive trains parked at 71<sup>st</sup> Street. Despite this identification, Mr. Holmstrom's CSXT counterpart at the CTCO said that CSXT would not change their West Olive coal train crewing plan.

CSXT suggests that even a minor service disruption can cause a cascade of delays on train movements in the Chicago. Likewise, CSXT suggests, based on a quote from a United Parcel representative, that a "lone train stopped in Chicago" can result in held trains as far away as Los Angeles or Baltimore. Both of these points, again, signal antiquated theories of Chicago, as well as factually improbable scenarios.

Today, the railroads in the terminal have set up rapid responder MOW trucks and the addition of double track has made it easier to handle irregular operations. Through the efforts of the CTCO, the railroads have developed a universal line-up of train operations that maps out all of the carriers' annual maintenance plans for ties, rail and surfacing, as well as signal cutovers and testing. In addition, the carriers all have agreements to allow operations via foreign line routes when broken rails or other outages might be in place for a time. Thus, one event rarely cascades through Chicago.

One train held in Chicago does not hold up trains in Los Angeles and Baltimore. Mr. Orrison, who has worked for both CSXT and BNSF, points out that there is more capacity on the railroad networks than ever before and that the United Parcel employee experience displays a lack of knowledge. In fact, BNSF's Los Angeles corridor is, in many ways, worse than Chicago. For example, BNSF often moves intact container trains' flat cars (without the containers) eastward out of Los Angeles due to limited capacity within Los Angeles area. These trains usually operate eastward to Belen, NM and then return to Los Angeles. The trains are so common they even have a nickname: Condor trains.

As the above demonstrates, the CERR is operating in a complicated terminal, but its operations are relatively simply vis-à-vis many of the other carriers in the territory. Ultimately, despite all of CSXT's complaints, CSXT and Consumers agree on the core elements of the CERR's operation and vary only slightly in their RTC model results.

**CSXT Largely Ignores the Impact of the CERR's Reduced Train Counts.** CSXT suggests that the CERR's improved transit times, versus historical CSXT transit times, cannot be explained by the difference in traffic volumes.<sup>15</sup> This assertion is surprising, given Mr. Gibson's planning experience. Consumers' witness Mr. Orrison, who has designed many operating plans, evaluated capacity for countless corridors, managed divisions of the CSXT, and

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<sup>15</sup> CSXT Reply at III-C-9.

was instrumental in the very group that spurred the many CREATE projects undertaken in the last 15 years, is well aware how transit times are strongly influenced by volume and types of trains operated. Here, Consumers is handling 54% of the trains that CSXT operates in this territory, and it is moving these trains over a system that has almost all of the same mainline track infrastructure that CSXT has in place today. Additionally, as explained below, CSXT's throughput in this territory is inefficient because it is trying to push more trains through the area than the infrastructure permits to operate fluidly. Not surprisingly, CSXT has been expanding its options through Chicago to alleviate this situation. In addition, the CERR's traffic is roughly 50% unit trains. As the Board is aware, unit trains are the most efficient trains from an operational perspective. The balance are intermodal trains coming from and to the 59<sup>th</sup> Street Intermodal facility – again no switching. Likewise, the merchandise trains are handled intact, but the CERR does inspect certain trains in Barr Yard.

A reduction of 46% of the trains being handled on the CERR's territory can easily explain the improvements in speed seen in the RTC model versus historic periods, especially when those trains are not local trains and do not require extensive switching. Moreover, the CERR has more than enough capacity. Indeed, the CERR has invested in double track most of the way from its 22<sup>nd</sup> Street terminus all the way to Curtis.

In addition to the more efficient trains, traffic reductions can have major impacts on speed. For example, BNSF's weekly car loadings for 2Q16 (to

date) are off from the same time in 2015 by approximately 22%. At the same time, average train speed system-wide has increased by 22%, and with few exceptions, the BNSF system is not already capacity restrained so improvement opportunities may be limited. The RTC model put forth by Consumers *and* CSXT plainly show that efficiency improvements are readily available when trains are reduced, operations are simplified, and capacity is maintained.

CSXT ignores that Class I railroads also are operating longer trains which result in fewer total train movements. From a dispatching perspective, infrastructure capacity is measured by train-dispatch time capacity or the time that a dispatcher must allow both ahead and behind the actual train being dispatched. Thus, short trains take up almost the same amount of dispatching capacity as long trains but, by reducing the number of train events, using longer trains results in greater infrastructure dispatching capacity without the need to expand the existing infrastructure (except receiving and departing tracks or certain sidings)

**CSXT Inefficiencies in this Territory.** CSXT also suggests that the CERR's superior performance to the real world CSXT is dubious because Consumers did not specifically identify any inefficiencies in CSXT's operations. CSXT's argument is irrelevant. The complainant is not required to laundry list the incumbent's inefficiencies or describe how the SARR has corrected or improved on the incumbent's operation. The SARR's operating plan is judged on its own merits.

Notwithstanding the fact that Consumers is under no obligation to list the deficiencies of CSXT's Chicago operations, Consumers' expert, Mr. Holmstrom, offers one such example. Prior to acquiring the CN Elsdon Subdivision, which occurred in 2013 but was not fully integrated in day-to-day operations until 2015 (after the historical base period of 2014), CSXT had a daily transfer freight train (100 cars) between Barr and Clearing yard, but it had no direct head-end route. CSXT would depart Barr Yard headed towards 59th Street. CSXT would then pull the train into the track reserved for West Olive coal trains. Once the train was clear of 71<sup>st</sup> Street, CSXT would cut away the power, run around the train, move the end-of-train device to the opposite end and conduct a brake test. This operation took roughly 90 minutes to perform, and CSXT handled it the same way in the reverse move. Thus, CSXT would block the track used by coal trains for three or more hours per day. Moreover, CSXT made the round trip with one crew, and of course they would sometimes expire under the hours of service rules. Mr. Holmstrom observed one incident, while working in the CTCO, where West Olive coal trains were refused by CSXT because they did not have a track to accept the train. The root cause was the fact that the transfer train from Clearing Yard going back to Barr Yard had expired. Amazingly, CSXT's operations/dispatchers permitted the train to sit for *four days* at that location. Mr. Holmstrom was the CTCO officer who was on the conference desk that week, and he documented that train daily on the CTCO scorecard train delay report. This

inefficiency is not incurred by the CERR – CSXT’s acquisition of the Elsdon Subdivision also created a better route.

Inefficiencies in CSXT’s operations have prompted other carriers to end certain relationships with CSXT. For example, the 1990’s, CP was looking for a faster route across the top of the Great Lakes. CP contracted with the CSXT to handle 10 trains daily between Detroit, MI and Bensenville, IL (CP’s Chicago Yard location). These trains traversed CSXT’s Grand Rapids and Barr Subdivisions. CP’s performance requirements were not met, and CP ended the program in 2006. CP elected to use NS instead, which involved using NS’s Chicago Line, which the West Olive trains use and which CSXT takes pains to criticize as “congested.”

**CSXT’s Complaints Concerning the Specific Delays Selected by Consumers Operating Witnesses, the Locations of Those Delays, and the Application of Those Delays Are Without Merit.**

After its lengthy criticisms regarding the troubles with Chicago, CSXT finally reaches the key point of its first argument of its Introduction: in its opinion, Consumers did not include enough delays. CSXT purports to fix this problem. As already noted, despite CSXT’s “fix,” CSXT’s RTC Model ran to completion with transit times very similar and sometimes faster than those developed by Consumers on Opening. Thus, CSXT’s extensive bluster is largely inconsequential. That said, CSXT’s additional delays are not warranted and its arguments are incorrect.

Specifically, CSXT complains that: (i) Consumers modeled delay events to occur at locations other than where the events occurred in the real-world; (ii) Consumers did not select enough foreign line delays; (iii) delayed trains are not held short at the interlocking, but instead are delayed at Barr Yard or elsewhere; (iv) Consumers did not model the delays and outages at the proper location and time; (v) Consumers did not model delays exiting the CERR system when heading towards BNSF or UP at 22<sup>nd</sup> Street, Ogden Junction, or Brighton Park. As explained below, CSXT's specific arguments are without merit.

**Delay Event Locations.** Consumers' explanation of the process by which it applied the foreign line delay data provided by CSXT in discovery, detailed below, illustrates that CSXT's Reply ignores the fact that there often are two locations associated with a train delay: (i) the location at which the cause of the delay occurs and (ii) the location at which the train dispatcher decides to hold a train as a result of the delay. Real-world railroad dispatchers consider many factors, such as the priority of the train to be delayed and its proximity to highway grade crossings, railroad crossings at-grade, including diamonds before deciding the location at which a delayed train will be held. The locations at which Consumers assigned trains to be delayed in its RTC model reflect this real-world understanding of train operations.

**Additional Foreign Line Delays.** In response to a discovery request, CSXT provided an Excel file titled "Foreign Line Delays.xlsx." This file, by its very title, purported to contain the foreign line delays incurred by CSXT

during various periods, including the period covered by Consumers' RTC Model. When producing this document, CSXT did not suggest that there was another source of data for such delays that was more reliable or complete. On Reply, CSXT suggests for the first time that a separate data table included in the Train Sheet database held a cache of foreign line delays that superseded and/or expanded the "Foreign Line Delays.xlsx" worksheet, which Consumers irresponsibly ignored in developing its Opening evidence. Indeed, CSXT suggests that the Train Sheets delay records include 203 "enroute train delays," lasting 15 minutes or more, that occurred on CERR trains near interlockings and that these entries prove that CERR trains were delayed by a foreign line moving through the crossing and that Consumers' failure to model them resulted in a gross underestimation of the total number of foreign line delays that the CERR would incur.<sup>16</sup> CSXT then selected some of those delays to add to its Reply RTC Model. CSXT's argument is built on a totally unproven premise and its attempts to impeach its own data are impermissible.

First, it is well-established that a complainant may reasonably rely on data produced by the defendant railroad and that the defendant railroad is generally not permitted to impeach its own data.<sup>17</sup> Here, CSXT produced a file purporting to represent foreign line delays. Consumers relied on that file to

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<sup>16</sup> CSXT Reply at III-C-12-13.

<sup>17</sup> See, e.g., *AEPCO 2011* at 103 ("the parties are entitled to reasonably rely on evidence the other side supplied in discovery"); *WFA I* at 74.



determine foreign line delays. CSXT now suggest that “enroute train delays” coming from the Train Sheet data also represent foreign line delays – if coincidentally the delay occurred near an interlocking. As discussed at Section III-A-1.b.ii., all delays included in CSXT’s Reply analysis are associated with an “OH” entry in the “REASON CODE” field of the Train Sheet delay table data.<sup>18</sup> The code “OH” events are accompanied by “ENROUTE TRAIN DELAY” in the “REMARKS” field,<sup>19</sup> and are not clearly attributed to any specific issue or event. But CSXT assumed all “ENROUTE TRAIN DELAY[s]” reported between Calumet Park and Curtis were all attributable to trains being held at foreign crossings.<sup>20</sup> However, there are also several delays associated with other entries in the “REASON CODE” field of the Train Sheet delay table, including “10,”<sup>21</sup> which are accompanied by “IHB CROSS TRAFFIC” in the “REMARKS” field.<sup>22</sup> These delays are attributed specifically to instances where a train was being held due to a conflict at a foreign line crossing. The “IHB CROSS TRAFFIC” delays recorded in the CSXT data are typically only a few minutes in duration, and there are far fewer of them than there are “OH” delays. Specifically, there were 11 crossing delay records recorded at Pine Junction, State Line, and Calumet Tower;

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<sup>18</sup> CSXT Reply e-workpaper “Trainsheet Delays for RTC\_RR Crossings.xlsx,” tab “Filtered,” column AB.

<sup>19</sup> *Id.*, Column Y.

<sup>20</sup> *Id.*, tab “input to CSXT Reply RTC,” cells B1 and L4.

<sup>21</sup> CSXT Reply e-workpaper “Delay\_Data\_CERR\_Trains.xlsx,” tab “Dataset,” filter Column AA for “10.”

<sup>22</sup> *Id.*, Column X.

10 with 1 minute of delay and one with 28 minutes of delay.<sup>23</sup> CSXT ignored these events in favor of the vague “ENROUTE TRAIN DELAYS” in its analysis of foreign line delays.

CSXT’s repudiation of its own data is impermissible and Consumers did not err by relying on the clearly marked data produced by CSXT.

Second, CSXT has not provided any evidence to corroborate its argument that an enroute delay shown on the Train Sheets is equivalent to a foreign line delay. Surely, CSXT could have matched up its supposed enroute crossing delays with those from the foreign line delay spreadsheet, but it did not. CSXT did not provide any decoder or other evidence to suggest that the enroute delay designation in its Train Sheets is meant to be treated as a foreign line delay when, coincidentally, the delay occurs near an interlocking. Thus, CSXT has no data-related basis for its inclusion of such delays – especially since the RTC Model, by design, will force enroute delays when such operations are required.

CSXT also ignores that enroute delays could easily occur near an interlocking for reasons unrelated to a foreign line delay. For example, a train could be held near an interlocking while a train in front of it is performing switching operations or setting out a bad order car. But naturally, a good dispatcher would not stop the train so as to foul the interlocking. Thus, the train could have sat for 20 minutes without any interference from a foreign line. In

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<sup>23</sup> CSXT Reply e-workpaper “Delay\_Data\_CERR\_Trains.xlsx,” tab “Dataset,” filter Column AA for “10” and view column P.

other words, just because a train stops here or there or cannot proceed due to an enroute delay, does not mean that it is caused by a foreign line delay. Moreover, the Train Sheet data does contain some references to other carrier operations for entries not identified by CSXT. In other words, the hold event could easily have been recorded under a different code – just like those found in the foreign line delay spreadsheet. Finally, CSXT does not suggest that its standard practice is to record foreign line delays as enroute delays. Indeed, CSXT did not provide any evidence that enroute delays are the equivalent of foreign delays or that its dispatchers and train crews regularly mis-record such data. Moreover, if CSXT had believed that enroute delays are tantamount to foreign line delays in certain circumstances, Consumers expects that CSXT would have made such a point during discovery – as it did with the reliability of car movement data versus train movement data.<sup>24</sup>

CSXT also complains that Consumers did not select enough foreign line delays from the foreign line delay spreadsheet. CSXT ignores that its foreign delay spreadsheet is not particularly detailed or clear. Specifically, the data does not contain train symbols or train IDs to which the delays applied,<sup>25</sup> which CSXT

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<sup>24</sup> See July 1, 2015 letter from Matthew J. Warren to Kelvin J. Dowd, included in Consumers’ Rebuttal e-workpapers as “2015 07 01 MJW to Dowd Re CSX Traffic Data and Operating Information.pdf.”

<sup>25</sup> Consumers Opening e-workpaper “Foreign Line Delays WORK.xlsx,” tab “Base 2014,” entire sheet.

admitted in Reply,<sup>26</sup> so Consumers had to randomly select the trains to which it applied the delays. Second, the data does not contain the times at which each delay began and ended. Instead, only the date and duration of each delay was provided. Consequently, Consumers' experts had to assign each delay to a train within the date on which the delay occurred, as long as the train would operate through the delay location and in the appropriate direction.

There were still more flaws in the data. After selecting the delays that occurred in the RTC modeling period, Consumers' operating witnesses attempted to identify the delay locations which fell within the CERR network<sup>27</sup> by researching the CSXT timetables provided in discovery, and the CSXT network locations data table produced in discovery, which is housed in Consumers' Opening and Rebuttal e-workpaper "Consumers Route File\_with Flagged Links 08152015.xlsx," to match the Delay Milepost from the CSXT record with a location name and CSXT subdivision name.<sup>28</sup>

The resulting analysis illustrates that a milepost reported by CSXT for a given foreign line delay, in the Delay Milepost field, does not usually

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<sup>26</sup> CSXT Reply at III-C-17.

<sup>27</sup> Consumers Opening e-workpaper "Foreign Line Delays WORK.xlsx," tab "Peak Week 2014 Subs," Column E, "On CERR? (RLBA)."

<sup>28</sup> Consumers Opening e-workpaper "Foreign Line Delays WORK.xlsx," tab "Peak Week 2014 Subs," Column C, "Delay Milepost," Column G, "Milepost Name Confirmed in LEPA Route File (RLBA)" and "Subdivision Associated with Delay Milepost (RLBA)."

represent the same location reported by CSXT in the City field.<sup>29</sup> This is the case in 38 of the 42 foreign line delays identified during the Peak Week.<sup>30</sup> Further, there are four Delay Mileposts at which CSXT has associated a single Delay Milepost with multiple, different City locations.<sup>31</sup> These four Delay Mileposts are associated with 39 delays.

The same general patterns hold true among the 22 foreign line delays<sup>32</sup> which Consumers *randomly*<sup>33</sup> selected for entry into Consumers' RTC simulation, based upon the ratio (54%) of the number of trains projected to be operated by CERR during 2014 to the number of trains actually operated by CSXT, over the same territory, during 2014. While CSXT takes issue with the

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<sup>29</sup> Consumers Opening e-workpaper "Foreign Line Delays WORK.xlsx," tab "Peak Foreign Delays for RTC." Compare the locations reported by CSXT in Column E, "City," with those identified by Mr. McLaughlin's research in Column D, "Milepost Name Confirmed in LEPA Route File (RLBA)." For example, the four "City" locations in cells F9:F15 should be compared with the "Milepost Name Confirmed in LEPA Route File (RLBA)" locations in cell D8.

<sup>30</sup> Consumers Opening e-workpaper "Foreign Line Delays WORK.xlsx," tab "Peak Foreign Delays for RTC." All delays except those in rows 31 – 33 and 48, reflect the milepost reported in "Delay Milepost" not representing the same location as reported in the "City" field.

<sup>31</sup> Consumers Opening e-workpaper "Foreign Line Delays WORK.xlsx," tab "Peak Foreign Delays for RTC," column B "Delay Mileposts" (DC 10, DC 014, DD 2 and DCQ 25).

<sup>32</sup> Consumers Opening e-workpaper "Foreign Line Delays WORK.xlsx," tab "Peak Forgn Delays for RTC 54pct," cells A6:T28.

<sup>33</sup> CSXT suggests that is unclear how the delays were selected. Consumers simply used a random selection process.

reduction from 42 to 22 foreign line delays, Consumers reasonably assumed that the relationship between delays and volume would be proportionate.<sup>34</sup>

CSXT asserts on Reply that Consumers' RTC experts modeled delay events to occur at locations other than where those events occurred in the real world."<sup>35</sup> As noted above, Consumers' operating witnesses' point out that there often are two locations involved in the explanation of a delay to a particular train: (i) the location of the event which causes the train to be delayed; and (ii) the location at which a train is held (delayed) as a result of the delay event. This reality was overlooked in CSXT's Reply.

Several factors enter into the determination of the location at which a train dispatcher would decide to hold a train: expected duration of the delay; priority of the train being delayed; its length relative to the locations of nearby infrastructure such as public highway grade crossings, foreign railroad diamonds, passing sidings or crossovers; and the flow of other trains that are expected to arrive in the area of the delay. Consequently, the location at which a train incurs a delay often is different from the location at which the cause of the delay occurs. The two locations can be so close geographically as to effectively be the same location, or the two locations can be a mile or several miles apart. This

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<sup>34</sup> Without the presence of a train, there can be no delay, therefore a reduction in the number of trains operated over a given territory should result in a proportionate reduction in the number of delays within that same territory.

<sup>35</sup> CSXT Reply at III-C-10.

understanding of real-world railroading guided Consumers' approach to selecting the locations at which the 22 CERR trains would be delayed.

Mr. McLaughlin and Mr. Orrison applied their understanding of real-world railroad delay reporting to interpret the CSXT foreign line delay data, particularly the Delay Milepost, State, City and Delay Reason Description fields. Each value in the Delay Milepost field was interpreted to represent the location at which the delay event (cause of the train delay) occurred because Mr. McLaughlin's research indicated that these mileposts correspond to connection interlockings (Pine Junction and Harvey Junction), yards (Barr Yard and 59<sup>th</sup> Street) and diamonds (Dolton) on CSXT<sup>36</sup> at which trains operated by foreign railroads (IHB, NS, UP, *etc.*) could logically cause the delay event reported by CSXT in the Delay Reason Description field. CSXT's Reply addresses only delays caused by foreign railroads at diamonds and ignored connection interlockings and yards.<sup>37</sup>

Given that the location name indicated by the Delay Milepost does not consistently correspond with the location name reported in the State and City fields by CSXT, and the State and City fields do not clearly indicate their roles in

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<sup>36</sup> Consumers Opening e-workpaper "Foreign Line Delays WORK.xlsx," tab "Peak Foreign Delays for RTC," Column D, "Milepost Name Confirmed in LEPA Route File (RLBA)."

<sup>37</sup> CSXT "Primary" RTC Simulation, CERR CSXT Reply – Consumers PERMIT File, "Description" field contains three diamond interlockings added by CSXT: "Diamond Crossing Cal Tower," "Diamond Crossing State Line" and "Diamond Crossing Dolton."

describing a delay, each location described by the combination of the State and City fields was interpreted to represent the next location, beyond the Delay Milepost, at which an activity associated with the train's operation, such as a termination point, crew change location or relay location, was reported.

The position of the Delay Milepost location relative to the location reported in the City and State fields was employed by Mr. McLaughlin to determine the direction of travel of the train that was delayed. Each foreign line delay was then assigned to a randomly selected train traveling in the appropriate direction<sup>38</sup> on the date reported in the Delay Occurred Date.

As discussed above, several factors enter into the location at which a real-world train dispatcher would decide to hold a train, including the priority of the train being delayed and its length relative to the locations of nearby infrastructure such as public highway grade crossings, foreign railroad diamonds, passing sidings or crossovers. Mr. McLaughlin and Mr. Orrison considered such factors when selecting the location<sup>39</sup> at which each train would be held (delayed) as a result of a foreign line delay.

From the above, it is clear that instead of changing the delay locations of trains, as asserted by CSXT, Consumers' experts had to determine the

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<sup>38</sup> Consumers Opening e-workpaper "Foreign Line Delays WORK.xlsx," tab "Peak Foreign Delays for RTC," Column J, "Apply in RTC to..."

<sup>39</sup> Consumers Opening e-workpaper "Foreign Line Delays WORK.xlsx," tab "Peak Forgn Delays for RTC 54pct," Column G, "Apply at RTC Node" and Column H, "Node Location."



location at which each train was held because it was not provided in the CSXT data. In doing so, they applied a real-world understanding of delay reporting and analysis. Had CSXT's foreign line delay data identified the location at which each train was held, Mr. McLaughlin would have entered it into Consumers' RTC simulation.

CSXT also posits that specific train delays locations were misapplied for two (2) trains in Consumers' RTC simulation, relative to the direction in which the trains were traveling (*i.e.*, eastbound vs. westbound).<sup>40</sup> Mr. McLaughlin reviewed the two cases cited by CSXT and the balance of the delays and he found eight (8) trains, including the two cited by CSXT, in which the delay locations were misapplied.<sup>41</sup> The errors have been corrected in Consumers' Rebuttal RTC simulation by re-allocating four of the delays (Record Numbers 17, 18, 28 and 32)<sup>42</sup> to four trains to which delays of an incorrect direction had been applied. The remaining four delays (Record Numbers 16, 28, 31 and 37),<sup>43</sup> were removed from

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<sup>40</sup> CSXT Reply at III-C-19-20 (refer to trains Z1-CURC59A07 and OE-CURC22A15).

<sup>41</sup> Consumers Rebuttal e-workpaper "Foreign Line Delays WORK RTC 54pct.xlsx," tab "Peak Forgn Delays for RTC 54pct," see new work in cells S6:U28, in which the errors and corrective action are identified. Train symbols highlighted in red under Column B, "Seed Train Matched to Random Number" are impacted by the errors and corrective action.

<sup>42</sup> Consumers Rebuttal e-workpaper "Foreign Line Delays WORK RTC 54pct.xlsx," tab "Peak Forgn Delays for RTC 54pct," Column A, "Record Number for Selecting 54% of the records."

<sup>43</sup> Consumers Rebuttal e-workpaper "Foreign Line Delays WORK RTC 54pct.xlsx," tab "Peak Forgn Delays for RTC 54pct," Column A, "Record Number

the trains to which they were applied in Consumers' Opening RTC simulation and then applied to four new trains, of appropriate direction, randomly selected from the Consumers RTC train file.

CSXT also complains that certain trains were held at Barr Yard instead of near the Dolton Tower or Stateline.<sup>44</sup> This is another red herring argument. Of course a dispatcher would hold the train at Barr Yard rather than run it straight up to the interlocking. Dolton is only 3,432 feet from the east end of Barr Yard and Stateline is not much further. There is no reason to move the train less than a mile to just stop it, and contrary to CSXT's assertions, dispatchers today have knowledge of foreign line train movements and they can even enter into chat sessions with the other dispatchers.

CSXT also suggests that an outage on the Barr Yard mainline track would somehow halt the movement of trains because trains would never use the adjacent yard tracks unless it was equipped with a dedicated "runaround" track.<sup>45</sup> Once again, CSXT's witnesses expose their obvious lack of on-the-ground experience. Mr. Orrison and Mr. Holmstrom have handled such situations many times and in their direct experience if a main track is blocked by a train or by a broken rail, dispatchers and yardmasters would route a train through a yard track, and it happens all the time in the real-world. Moreover, any open track in a yard is

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for Selecting 54% of the records" and Column U, "Re-Apply Delays That Were Incorrectly Applied."

<sup>44</sup> CSXT Reply at III-C-16.

<sup>45</sup> CSXT Reply at III-C-22-23.

considered a potential runaround track. For example, CSXT's Hamlet, NC departure yard has a track labeled and call "The Run Around Track" – on a daily basis, CSXT uses the track like any other track to build trains. In turn, the crews then use any open track as a route to run locomotives around the trains being built in the yard. Each through track in any yard can be utilized as an escape route to move locomotives and cars around the yard, except possibly a hump yard lead.

CSXT also asserts that Consumers erred in its application of outage delays in one instance in which a broken rail outage at MP DC 23.01<sup>46</sup> (BRC Connection) was applied only to one train (Z1-CURC59A04) but not applied to two other trains (OL-C22CURA03 and OE-CURC22A04) that would have operated over the same track segment proximate in time to the first train.<sup>47</sup> Consumers accepts CSXT's modification and applies the same amount of outage delay (69 minutes) to OL-C22CURA03 and OE-CURC22A04 in its rebuttal RTC model as was applied to Z1-CURC59A04.<sup>48</sup>

However, as with its approach to foreign line delays, in this instance CSXT confuses the location at which a train is held (delayed) with the location at which the cause of the delay occurs. Consumers has not posited "that the broken

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<sup>46</sup> CSXT cites the "engineering" milepost 23.01, instead of the Transportation Dept. milepost, which is MP DC 25 and is the basis upon which Consumers applied this outage delay in its RTC model.

<sup>47</sup> CSXT Reply at III-C-21.

<sup>48</sup> Consumers Rebuttal e-workpaper "Outages 10-21 FILTERED WORK Rebuttal.xlsx, tab "peak\_week\_filtered JWM WORK," rows 23 -24.

rail occurs at Barr Yard”<sup>49</sup> in applying the delay to Z1-CURC59A04. Consumers understands that the cause of the delay is a broken rail at MP DC 25. It has then exercised the same judgement as would a real-world dispatcher and held the trains at locations (Barr Yard vicinity in the cases of Z1-CURC59A04 and OE-CURC22A04 and 71<sup>st</sup> St in the case of OL-C22-CURA03) given that the delay cause occurs on small segment of single-track territory.

### **Additional Delays Near 22<sup>nd</sup> Street are Unsupported**

As with its foreign line crossing delay analysis discussed above, CSXT’s Reply analysis of delay data related to trains approaching BNSF and UP interchange locations is unsupported.

CSXT assumed that all “OH” delays identified as “ENROUTE TRAIN DELAY[s]” were attributable to trains being “held outside of a foreign carrier’s rail line or yard... until the foreign carrier is ready to accept the train,”<sup>50</sup> when they were reported near 22<sup>nd</sup> Street. In those instances, CSXT ignored several other delays associated with other entries in the “REASON CODE” field, including “HO,”<sup>51</sup> which are accompanied by “HELD OUT OF TERMINAL” in the “REMARKS” field.<sup>52</sup> These delays are clearly attributed specifically to

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<sup>49</sup> CSXT Reply at III-C-22.

<sup>50</sup> CSXT Reply at III-C-60, and CSXT’s workpaper “Trainsheet Delays for RTC\_22ndOffSARR.xlsx,” which is supported by its related e-workpaper “Delay\_Data\_CERR\_Trains.xlsx.”

<sup>51</sup> CSXT Reply e-workpaper “Delay\_Data\_CERR\_Trains.xlsx,” tab “Dataset,” filter Column AA for “HO.”

<sup>52</sup> *Id.*, Column X.

instances where a train was being held out of a terminal. CSXT ignored these events in its analysis in favor of the “ENROUTE TRAIN DELAY” events.<sup>53</sup>

CSXT’s Reply argument is based on the premise that “ENROUTE TRAIN DELAY” always indicates a foreign line crossing delay when it occurs between Calumet Park and Curtis, but that it always indicates a delay awaiting access to BNSF/UP lines when it occurs near 22<sup>nd</sup> Street or Ogden Junction.

CSXT appears to be unsure of the number of trains to which it assigned hold-out delays. Its Reply narrative indicates 56 trains were assigned such delays in its Reply RTC model,<sup>54</sup> but its workpaper indicates such delays were to be assigned to only 36 trains.<sup>55</sup>

#### **Application of Certain Delays to Additional Trains**

Consumers’ approach to foreign line delays was reasonable and well supported, particularly in light of the complications found with the foreign line delay data presented by CSXT. Moreover, Consumers has demonstrated that CSXT’s assumptions concerning specific enroute delays are indefensible. Finally, Consumers illustrated that CSXT’s rhetoric about the Chicago terminal does not

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<sup>53</sup> CSXT Reply e-workpaper “Trainsheet Delays for RTC\_22ndOffSARR.xlsx,” tab “delay records,” cells B2 (“Enroute Train Delays to Westbound CERR Peak Period Trains Traveling Off-SARR onto BNSF or UP near 22nd Street”) and B3 (“Source: CSXT TM Trainsheets, Reply e-workpaper “Delay\_Data\_CERR\_Trains.xlsx,” tab “Filtered”).

<sup>54</sup> CSXT Reply at III-C-61.

<sup>55</sup> CSXT Reply e-workpaper “Trainsheet Delays for RTC\_22ndOffSARR,” tab “input to CSXT Reply RTC,” Column P “Delay for RTC.”

represent the real-world of Chicago today. Moreover, Consumers' expert witnesses are the only experts with real-world Chicago experience, and they offer the superior view of operations in the terminal. As such, Consumers has not altered its operating plan or its RTC modeling approach to include the additional delays proffered by CSXT. The transit time results for Consumers' Rebuttal are shown in Rebuttal Table III-C-7 below.

**B. Consumers' Operating Plan Accounts for All Trains Required to Handle the CERR's Peak Year Traffic**

CSXT's claim that Consumers' operating plan fails to account for the additional trains required to transport the CERR's peak year traffic volumes is false. Consumers' operating plan relies on reasonable assumptions regarding peak year train consists and train counts. In its Reply narrative, CSXT mischaracterizes Consumers' operating plan and train list development methodology, but CSXT conveniently omits that it adopted many elements of Consumers' methodology in its Reply workpapers. However, CSXT also developed and applied several unsound procedures, which naturally overstate the number of trains and carloads allegedly required to move the CERR's peak period volumes. CSXT's overstated train and car statistics result in artificially inflated operating expenses as well.

**Consumers' Growth Projections Are Not Overstated.** CSXT's attack on Consumers' evidence begins with a claim that Consumers' growth projections are overstated.<sup>56</sup> As discussed at Part III-A-2, CSXT's position is

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<sup>56</sup> See CSXT Reply at III-C-27 and III-C-29.

based on a series of unfounded assertions and misstatement of the facts in the case. Except for a minor adjustment to its forecast of third and fourth quarter 2015 projected carload and container volumes, Consumers retains its Opening traffic volume forecast procedures and results in Rebuttal. Consumers updated its peak period train list to reflect the volume changes resulting from its Rebuttal Forecast.<sup>57</sup>

**Trends in Merchandise Train Operations.** CSXT's Figure III-C-5 at page III-C-28 shows that CERR merchandise trains will expand in consist size, but will not significantly increase in number, over the 10-year SAC analysis period. CSXT concludes that this is somehow "incredible" and "inconsistent with the realities of real-world railroading."<sup>58</sup> However, CSXT's incredulity concerning Consumers' CERR train list is directly contradicted by public statements made by CSXT regarding its current and future operations. For example: CSXT's Vice President of Service Design, Frank Lonegro, recently stated that:

Lengthening trains is on the productivity-boosting agenda... the railroad is striving to maximize the number of cars on trains to reduce the overall number of trains in operations.<sup>59</sup>

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<sup>57</sup> Consumers Rebuttal e-workpaper "CERR BASE YEAR TRAIN LIST DEVELOPMENT vF Rebuttal.xlsx," tab "Cerr Trn Stats," column BS, and tab "Cerr Peak Trains" columns BY-CS.

<sup>58</sup> See CSXT Reply at III-C-27.

<sup>59</sup> See Consumers Rebuttal e-workpaper "Rail Insider-CSX - A railroad in pursuit of optimum performance.pdf" at 4.

In addition, CSXT's 3Q15 Form 10-Q states:

The Company expects to build upon [its] service performance while driving continued service gains and productivity savings. Productivity gains will result from the Company's continued focus on increasing train length, improving employee efficiency and improving network fluidity.<sup>60</sup>

CSXT's CEO, Michael Ward, is on record stating the following:

"Everybody has been pushing toward longer trains because that is one of the ways to get efficiency."<sup>61</sup>

Consumers' model and assumptions are in fact credible, reasonable, and clearly reflect real-world railroading trends. If anything, Consumers' operating plan conservatively overstates the number of trains required to move peak year traffic because it does not incorporate efficiency improvement initiatives that are being implemented by CSXT in the present. For example:

CSX reconfigured a portion of the manifest train network — involving about 100 merchandise trains — to boost service reliability, improve asset utilization and enhance efficiency. In late March [2015], some trains that previously operated seven days a week with set departure and arrival times began to run six days a week and depart a yard four hours later each day, making train starts 28 hours apart instead of 24 hours. **The idea is to move seven days' worth of freight in six trains over six days to free up the locos and crews for other work on the seventh day.** Managers

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<sup>60</sup> See Consumers Rebuttal e-workpaper "CSX 10-Q for 3Q2015.pdf" at 31 (emphasis added).

<sup>61</sup> See Consumers Rebuttal e-workpaper "Sit Tight at Crossing as Coal Trains Double to 2 Miles Long - Bloomberg.pdf" at 2.



continue to assess results to determine if the initiative should be implemented elsewhere.<sup>62</sup>

Likewise, *Trains Magazine* just ran, in the June 2016 issue, two articles discussing CSXT's move to longer trains.<sup>63</sup>

In other words, CSXT's claim that increases in merchandise train length will not be achievable ten (10) years in the future is belied by its aggressive pursuit of that very efficiency improvement in the present.

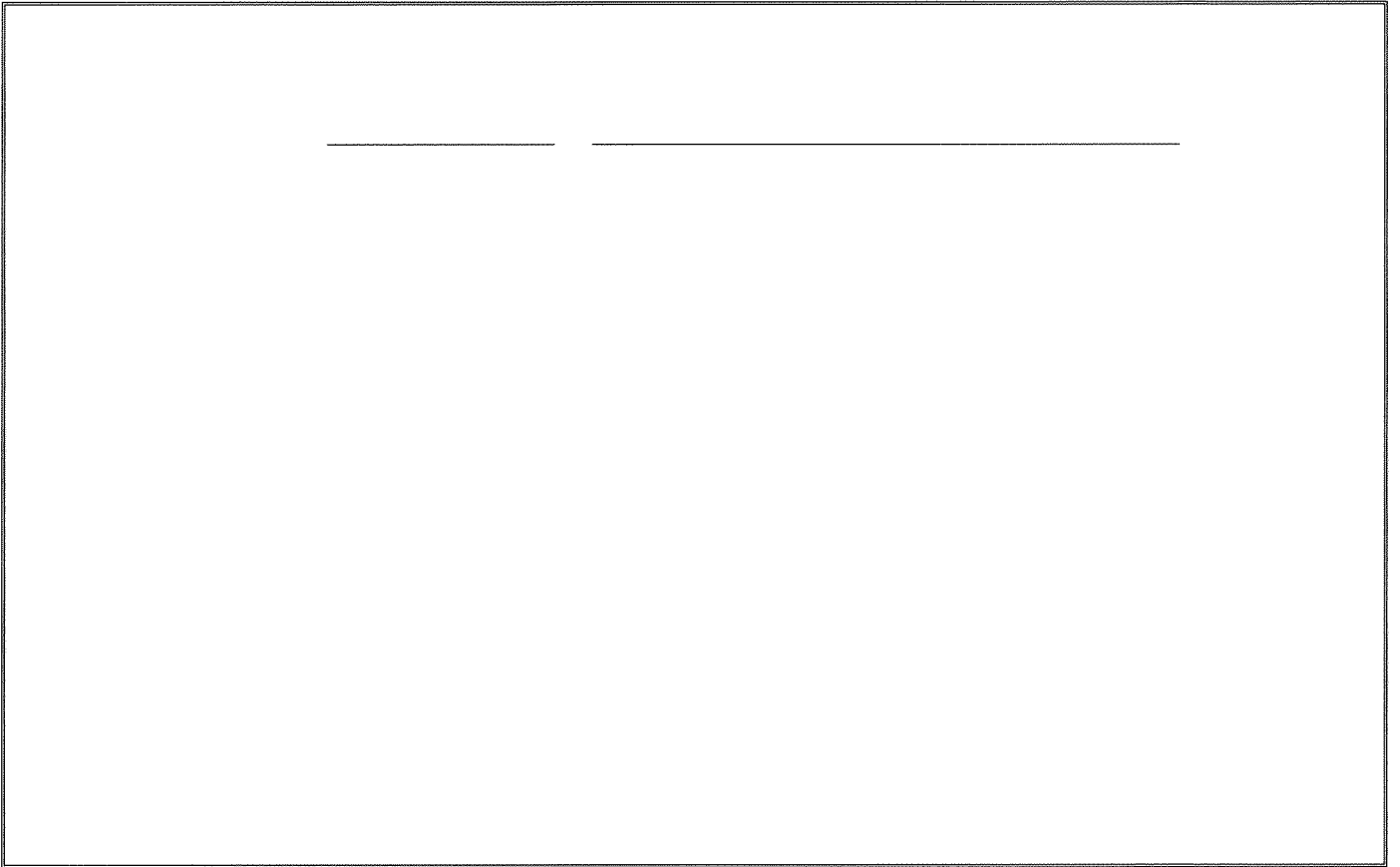
Furthermore, CSXT's Figure III-C-5 is conspicuously devoid of projected train length data. Rebuttal Table III-C-1 below expands CSXT's table to include this key data item.

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<sup>62</sup> See Consumers Rebuttal e-workpaper "Rail Insider-CSX\_ A railroad in pursuit of optimum performance.pdf" at 3 (emphasis added).

<sup>63</sup> See Consumers Rebuttal e-workpaper "Trains July 2016 articles.pdf."



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As shown above, Consumers’ projected manifest train lengths are reasonable and consistent with the realities of real-world railroading.

Additionally, Consumers’ average peak year train lengths are well below the Interline Service Agreement (“ISA”) train lengths (discussed in more detail in Section B of the Introduction below) for 12 of the 15 train symbols, and for the other three (3), both Consumers and CSXT use peak train lengths that modestly exceed the ISA train length, as shown in lines 4, 11, and 13, Column (8).

CSXT then continues its illogical argument that trains running on regular schedules could not be able to accommodate longer consists in ten (10) years by making the same argument in opposition to Consumers’ CERR peak year

intermodal trains. As with merchandise trains, CSXT is attempting to deny the CERR the productivity gains that it – and all other Class I railroads – are actively pursuing and implementing.

CSXT claims that the CERR cannot control the length of trains delivered to the CERR by connecting carriers, which is true. However, CSXT’s model relies on the questionable presumption that connecting carriers’ operations will not change between 2014 and 2024. The notion that connecting Class I carriers will not achieve greater productivity through increased train length – particularly for merchandise and intermodal traffic – is counter to industry trends and statements made by railroad executives.

In 2007, BNSF began experimenting with an intermodal 10,000-foot train between Southern California, Clovis, N.M., and Chicago. Since then, the railroad has operated more than 800 extended length trains to gain further economies of scale and accommodate more intermodal customers' freight. The longer units now typically run from Southern California or San Bernardino to Chicago.<sup>64</sup>

When discussing the efficiency gains achieved from these longer intermodal trains bound for Chicago, Bob Gomez, BNSF’s Director of Operations at Belen Yard in New Mexico, said: “The 10,000 foot units take 2.5 trains out of the mix per week, which saves \$30,000 a week in crew labor.”<sup>65</sup>

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<sup>64</sup> See Consumers Rebuttal e-workpaper “On the Road \_ Belen, New Mexico\_ The Land of Enchantment and 10,000-foot Trains - Inbound Logistics.pdf” at 4.

<sup>65</sup> *Id.*

Moreover, the Chicago Metropolitan Agency for Planning reported that, “[a]ssuming future economic growth, rail companies foresee the length of trains increasing from 125 cars to 175 cars”<sup>66</sup>

Contrary to CSXT’s claims, the railroads’ intent to operate ever-longer trains through Chicago is well documented. The CERR, as the “least cost, most efficient railroad” is entitled to benefit from industry-wide productivity gains.

**Interline Service Agreements.** CSXT devotes several pages of its narrative to describing the nature and terms of bilateral ISAs between CSXT and connecting carriers in an attempt to suggest that Consumers’ development of maximum peak year CERR train sizes is somehow contrary to those agreements. Specifically, CSXT claims that Consumers’ reliance on maximum historical train lengths to determine maximum peak year train lengths would result in the violation of ISA terms.<sup>67</sup> CSXT’s argument is a meritless red herring. Indeed, in much the same way CSXT exaggerated the issues with train delays, its ISA argument is belied by its own evidence and the actual practices used by the CSXT and its interchange partners.

Before turning to the specific changes CSXT made on Reply, Consumers notes that Mr. Orrison was directly involved in the negotiation of

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<sup>66</sup> See Consumers Rebuttal e-workpaper “CMAP.illinois.gov Ch.7 train size increase.pdf” at 4.

<sup>67</sup> See CSXT Reply at III-C-34.

many of the ISAs (or their predecessor ISAs) during his time at CSXT, and he flatly denies that the ISA train sizes are were ever meant as a hard and fast limit – and obviously CSXT does not consider them to be so either because, as explained below, many of these trains regularly run with lengths far in excess of the supposed limits. In reality, the ISA agreements and real-world practices have evolved and will continue to evolve to favor longer train lengths, including by the time that the peak year train sizes will be observed. The ISA agreements are, at best, loosely defined arrangements between two railroads that outline particulars such as interchange location, interchange time or range of time, run-through power, blocking of the interchange train and train lengths.

All Class I railroads and many shortline railroads have developed ISAs and have representatives assigned to attend meetings on either a quarterly, bi-annual or annual basis to review and adjust the ISA to reflect real-world practices. Over the last several decades, Class I railroads have been testing and designing longer train lengths. Longer trains have been facilitated by the introduction of newer, higher horsepower, higher performance locomotives. Additionally, longer trains result in lower railroad crew costs. For example, the combination of two BNSF merchandise trains from Barstow, CA to Kansas City, MO and to Galesburg, IL resulted in a 1% savings of all merchandise crews in 2008-2009, an effort that Mr. Orrison led while servings as Assistant Vice President Service Design at BNSF.

Mr. Orrison also notes that the long-term network strategies being pursued by most Class I railroads are to reconfigure network sidings to 9,000 and 10,000 lengths, as described above, and to configure locations of even longer paired or double track segments to allow for “moving meets.” Indeed, Mr. Orrison recalls that one of the last efforts led by CSXT’s witness, Mr. Gibson, while at CSXT, was to develop new 10,000 foot sidings for the CSXT corridors between Chicago, Nashville, Birmingham, Waycross and Florida. Likewise, BNSF and UPRR are developing their networks of the future around the design and construction of 10,000-foot sidings. CP has already implemented the strategy along with CN.

Turning now to the specifics of CSXT’s alleged complaints, despite CSXT’s suggestion of a vast array of flaws in Consumers trains sizes, CSXT adopted Consumers’ maximum peak year train lengths – based on historical maximum train lengths – **for all but two (396 out of 398) train symbols.**<sup>68</sup> In Rebuttal, Consumers accepts and adopts CSXT’s adjusted maximum train length for these two train symbols.<sup>69</sup>

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<sup>68</sup> See CSXT Reply e-workpaper “Peak Period Trains.xlsx,” tab “Ref\_MaxSize,” cell F4. As shown in this e-workpaper, the parties’ maximum peak year train lengths are identical for 396 out of 398 train symbols handled by the CERR. The only two (2) exceptions are train symbols Q388 (cell F327) and Q391 (cell F329).

<sup>69</sup> See Consumers’ Rebuttal e-workpaper “CERR BASE YEAR TRAIN LIST DEVELOPMENT vF Rebuttal.xlsx,” tab “Cerr Trn Stats,” range BL375:BN377 (changes are highlighted in orange).

In a footnote, CSXT cites two examples of what it claims are problems with Consumers' approach. First, CSXT claims:

Consumers compounded [its] error by basing its assumed maximum length for certain train symbols on Base Year trains that represent clear 'outliers.' For example, Consumers identified a single Base Year Q388 train that operated at 11,419 feet, 3,419 feet (or 43%) longer than the 8,000-foot length prescribed by CSXT's ISA with BRC. Because that train also exceeded the CERR's self-imposed limit of 1.9 miles, Consumers applied a maximum length of 10,028 feet to the CERR's Q388 trains. However, in the real world, *only two of the 107 Q388 trains that CSXT operated during the Base Year exceeded 10,000 feet in length.*<sup>70</sup>

Train Q388 is one of the two trains for which CSXT changed Consumers' maximum train length in its Reply evidence. However, even CSXT did not use the 8,000 foot ISA train length as its maximum train length for Q388 trains. Instead, CSXT imposed a limit of 8,769 feet for Q388 trains.<sup>71</sup> Consumers accepts this change and limits Q388 trains to 8,769 feet in its Rebuttal evidence.<sup>72</sup> This change has no impact on Consumers' peak train list.

Second, CSXT states:

Likewise, Consumers culled from the event data one Q383 train that operated at 8,726 feet, 1,726 feet (or

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<sup>70</sup> CSXT Reply at III-C-33 n.64.

<sup>71</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Ref\_MaxSize," cell J327. See also CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Trains\_Pk\_Pd," cell AP273.

<sup>72</sup> See Consumers Rebuttal e-workpaper "CERR BASE YEAR TRAIN LIST DEVELOPMENT vF Rebuttal.xlsx," tab "Cerr Trn Stats," cell BN375 (change is highlighted in orange).

25%) longer than the 7,000-foot limit prescribed by the ISA between CSXT and BNSF.... Based on that single movement, Consumers applied a limit of 8,726 feet in determining the length of the Q383 trains, resulting in five of the seven Q383 trains (71%) in Consumers' RTC Model exceeding the ISA-prescribed limit.<sup>73</sup>

What CSXT failed to disclose was that four (4) of the seven (7) peak period Q383 trains (57%) exceeded the ISA train length (which is obviously not a limit) in the **base year**.<sup>74</sup> Furthermore, despite CSXT's criticism, CSXT adopted Consumers' maximum train size of 8,726 feet for Q383 trains in its own workpapers.<sup>75</sup> As a result, the same five (5) of the seven (7) Q383 trains (71%) in CSXT's RTC Model exceed the ISA train length as in Consumers' Opening Model.<sup>76</sup> Rebuttal Table III-C-2 below shows the seven base year peak period Q383 trains, the ISA train length, the historical train symbol maximum train length, the historical train length, the Consumers Opening RTC peak period train length, and the CSXT Reply peak period train length.

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<sup>73</sup> CSXT Reply at III-C-33 n.64.

<sup>74</sup> See Consumers Rebuttal e-workpaper "Peak Period Trains\_Rebuttal.xlsx," tab "Trains\_Pk\_Pd" column P.

<sup>75</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Ref\_MaxSize," cell J325.

<sup>76</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Trains\_Pk\_Period": Compare cell AW262 (RTC train length) to cell AR262 (ISA train length).



**REBUTTAL TABLE III-C-2  
COMPARISON OF ISA, BASE YEAR HISTORICAL,  
AND PEAK YEAR RTC TRAIN LENGTHS FOR TRAIN Q383**

<u>Train ID</u> (1)	<u>Train Suffix</u> (2)	<u>ISA Train Length<sup>1/</sup></u> (3)	<u>Base Year Maximum Train Length<sup>2/</sup></u> (4)	<u>Base Year Train Length<sup>3/</sup></u> (4)	<u>Consumers Peak Year Train Length<sup>4/</sup></u> (5)	<u>CSXT Peak Year Train Length<sup>5/</sup></u> (5)
1. Q383	20140323	7,000	8,726	<b>7,637</b>	<b>8,568</b>	<b>7,637</b>
2. Q383	20140324	7,000	8,726	<b>7,113</b>	<b>8,610</b>	<b>7,113</b>
3. Q383	20140325	7,000	8,726	3,873	5,435	4,772
4. Q383	20140327	7,000	8,726	<b>7,246</b>	<b>8,620</b>	<b>7,246</b>
5. Q383	20140328	7,000	8,726	3,216	4,857	3,962
6. Q383	20140330	7,000	8,726	<b>7,862</b>	<b>8,680</b>	<b>7,862</b>
7. Q383	20140331	7,000	8,726	6,964	<b>8,532</b>	<b>8,580</b>

<sup>1/</sup> CSXT Reply workpaper “Peak Period Trains.xlsx,” tab “Trains\_Pk\_Period,” range AR262:AR268.  
<sup>2/</sup> CSXT Reply workpaper “Peak Period Trains.xlsx,” tab “Trains\_Pk\_Period,” Range AP262:AP268.  
<sup>3/</sup> CSXT Reply workpaper “Peak Period Trains.xlsx,” tab “Trains\_Pk\_Period,” range O262:O268.  
<sup>4/</sup> Consumers Opening e-workpaper “CERR BASE YEAR TRAIN LIST DEVELOPMENT vF.xlsx,” tab “Cerr Peak Trains,” range CA263:CA269.  
<sup>5/</sup> CSXT Reply workpaper “Peak Period Trains.xlsx,” tab “Trains\_Pk\_Period,” range O262:O268.

As shown above, CSXT’s peak period treatment of the March 31 edition of train Q383 shows that CSXT used the same maximum train length as Consumers in developing peak trains. Specifically, the base year length of train Q383 20140331 was 6,964 feet,<sup>77</sup> which is less than the ISA length of 7,000 feet.<sup>78</sup> CSXT projected that in order to accommodate peak year volume growth, the corresponding peak year train would need to be 8,580 feet long.<sup>79</sup> CSXT’s workpapers compared its projected peak year length requirement for that train to

<sup>77</sup> See CSXT Reply e-workpaper “Peak Period Trains.xlsx,” tab “Trains\_Pk\_Pd,” cell O268.

<sup>78</sup> See CSXT Reply e-workpaper “Peak Period Trains.xlsx,” tab “Trains\_Pk\_Pd,” cell AR268.

<sup>79</sup> See CSXT Reply e-workpaper “Peak Period Trains.xlsx,” tab “Trains\_Pk\_Pd,” cell AQ268.

the historical base year maximum of 8,726 feet<sup>80</sup> for that train to determine whether a growth train would be required in the peak year. CSXT determined that no growth train was required<sup>81</sup> and operated a peak year train 8,580 feet long,<sup>82</sup> which is 1,580 feet longer than the ISA length of 7,000 feet. In fact, CSXT's methodology uses the greater of the historical maximum or the ISA length as the maximum peak year train length.<sup>83</sup>

Oddly, after pages of arguing that Consumers failed to adhere to ISA maximum train lengths in developing its peak year train consists, CSXT states:

CSXT allowed trains to grow to the longest train (other than the "outlier" train lengths discussed above) that operated under the applicable train symbol during the base year. For example, the CSXT data indicate that virtually all of the Q388 trains that exceeded the 8,000-foot limit set forth in the CSXT-BRC ISA during the Base Year were between 8,000 and 8,800 feet in length. CSXT applied the high end of that range (8,800 feet) to determine the maximum length of trains that were allowed to grow beyond the 8,000-foot limit.<sup>84</sup>

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<sup>80</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Trains\_Pk\_Pd," cell AP268.

<sup>81</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Trains\_Pk\_Pd," cell AS268.

<sup>82</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Trains\_Pk\_Pd," cell AX268.

<sup>83</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Trains\_Pk\_Pd," cell AS268. The logic in CSXT's algorithm is as follows: IF not unit THEN ==> IF not dropped THEN ==> IF projected length > max length THEN ==> if projected length > ISA length THEN growth = 1.

<sup>84</sup> CSXT Reply at III-C-38.

Therefore, despite CSXT's many pages of argument, both parties' evidence use the same maximum peak period train lengths based on historical trains (with adjustments to trains Q388 and Q391), and neither party limits peak period trains to ISA-specified train lengths.

Because CSXT accepted and applied the historical maximum lengths Consumers' used in Opening, its ISA train length argument is moot. However, CSXT's argument contains many inaccuracies that must be corrected as they suggest, incorrectly, that Consumers' operating plan is fatally flawed. For example, CSXT claims that the ISAs "specify, among other things, the maximum length of trains that are handled on an interline basis through the Chicago terminal area."<sup>85</sup> This statement is simply not supported by the evidence of record.

CSXT's characterization of the "Length" field shown on the Train Plan Addendum to each ISA as the maximum length of trains governed by the relevant ISAs is factually incorrect and contradicted by the plain language of the cited documents. The word "maximum" does not appear as a qualifier in the "Length" field in the provided ISAs.<sup>86</sup> In reality, the "Length" field is an estimate of the train consist to be expected at interchange locations at the time the ISA was made. RailInc, the developer of the industry standard "ISA Repository," defines the "feet" field shown on the Train Plan Addendum as the "Estimated feet of the

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<sup>85</sup> CSXT Reply at III-C-30.

<sup>86</sup> See Consumers Rebuttal e-workpaper "Interline Service Agreements (CSX-CNSMR-HC-25271 to 25493.pdf.)"

shipment” and further indicates that this field is optional.<sup>87</sup> Counter to CSXT’s claims, this field does not represent a maximum size limit. Nor is it even necessary information to include in an ISA. This reality is proven by CSXT’s train movement data, which demonstrates that the train lengths listed in the ISAs are exceeded by the railroads in the normal course of business. In fact, CSXT and its interline partners exceeded the ISA train lengths for 55% of the merchandise and intermodal train symbols governed by ISAs during the base year.<sup>88</sup>

CSXT concedes that it “and its Chicago interchange partners do occasionally operate trains that exceed the lengths prescribed by their ISAs.”<sup>89</sup> CSXT offers several reasons for train length variation, including: (1) operating longer trains during recovery periods following a storm or other service disruption; (2) train length expansion “during periods of unusually high traffic volume;” and (3) doubling up a train operating under one train symbol or adding cars to a train operating under a different symbol if a scheduled train is cancelled or delayed. CSXT states that the decision to operate long trains “is predicated on decisions made by railroad personnel in response to current operating conditions.”<sup>90</sup>

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<sup>87</sup> See Consumers Rebuttal e-workpaper “ISARepository\_UG.pdf,” p. 12.

<sup>88</sup> See Rebuttal e-workpaper “Peak Period Trains\_Rebuttal.xlsx,” tab “ISA\_Length”.

<sup>89</sup> CSXT Reply at III-C-32.

<sup>90</sup> *Id.*

CSXT's long-train exception examples are certainly reasonable, but CSXT's own data makes clear that longer trains are the norm not the exception. Indeed, Mr. Orrison was responsible for creating many of the ISA still in use today, and he never intended the lengths therein to be caps. Moreover, CSXT is moving ahead with much longer trains, but it does not suggest that a wholesale revision to the ISA would be necessary. Finally, traffic requirements and infrastructure restrictions are the real catalyst for train lengths, not a general parameter found in an ISA.

Consumers also notes that there is no better example of a period of "unusually high traffic volume" that would require operational responses than the peak period of the peak year. Therefore, CSXT's apples-to-oranges comparison of 6% of merchandise trains<sup>91</sup> CSXT interchanged with other carriers in the Chicago terminal area in the **base year** that exceeded the ISA train lengths to 33% of merchandise trains<sup>92</sup> in Consumers' **peak week** RTC Model that exceeded ISA train lengths is irrelevant. In fact, CSXT has inadvertently admitted the fallacy of this argument by exceeding the "prescribed ISA lengths" in 23% of its own peak period Merchandise trains.<sup>93</sup>

**Consumers' Peak Period CERR Trains.** Throughout its narrative, CSXT mischaracterizes, misconstrues, and misstates Consumers' train list

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<sup>91</sup> CSXT Reply at III-C-32.  $100\% - 94\% = 6\%$ .

<sup>92</sup> CSXT Reply at III-C-34.

<sup>93</sup> See Rebuttal e-workpaper "CERR Base Year Trains\_Rebuttal.xlsx," tab "Train\_Lengths".

development procedures. For example, in describing Consumers’ methodology for developing peak year train consists, CSXT first correctly observed that Consumers “assume[d] that the maximum train sizes for each unique train ID . . . will not exceed *the 2014 historical maximum train size recorded in the provided event data.*”<sup>94</sup> However, CSXT then restates this correct statement into one that is incorrect and misleading:

In other words, Consumers’ train service plan is premised on the notion that CSXT and other connecting carriers would expand *every* Peak Year train delivered to CERR to the Base Year maximum length before operating *any* additional “growth” trains. That premise is utterly inconsistent with the realities of real-world rail operations in the Chicago area.<sup>95</sup>

CSXT’s attempt to restate Consumers’ narrative in “other words” changes the meaning of Consumers’ plain language. Consumers explained that no peak year train would exceed the length of the longest train of that symbol that moved during the base year. CSXT’s rewording claims that Consumers “expand[ed] every peak year train . . . to the maximum length.” This is not true.

Consumers’ treatment of intermodal train {        } illustrates CSXT’s spurious claims. Train {        } is a regularly scheduled intermodal train that moves traffic from Chicago 59<sup>th</sup> Street intermodal yard to Atlanta, GA. The

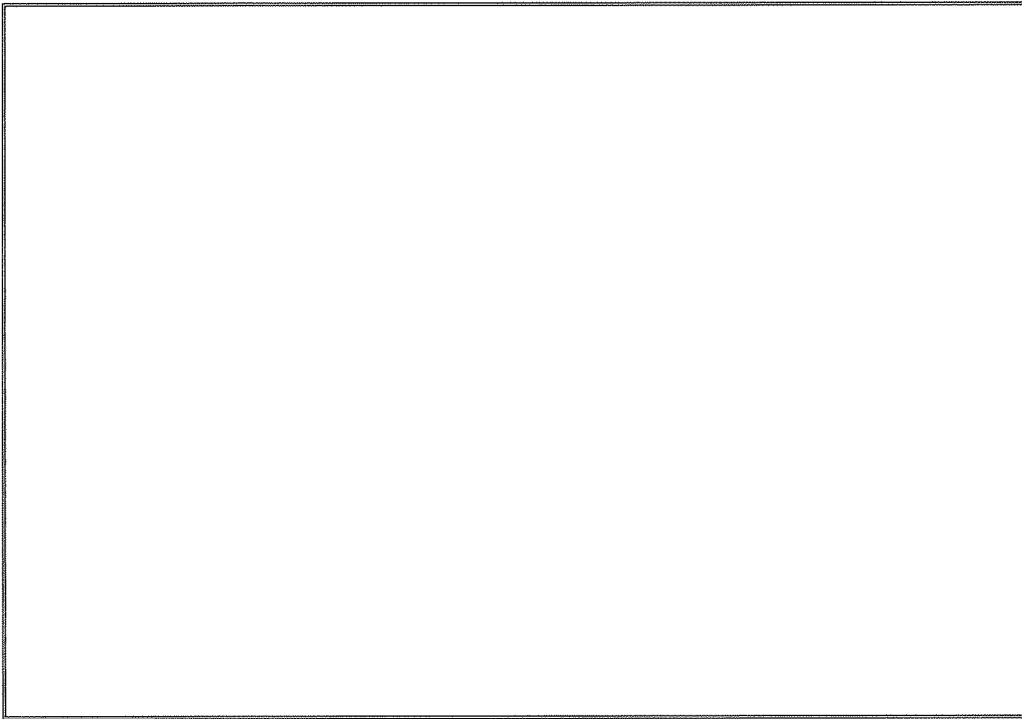
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<sup>94</sup> CSXT Reply at III-C-29 (quoting Consumers Opening, emphasis in original).

<sup>95</sup> CSXT Reply at III-C-29 (emphasis in original).

longest historical { } base year train was { } feet long.<sup>96</sup> In the nine-day peak period of the base year, CSXT operated seven { } trains with unique consists. Consumers added growth cars to the seven corresponding peak year trains, but did not expand them all to the maximum length. Rebuttal Table III-C-3 below shows the base year car counts, Consumers' train-specific peak year car counts, and Consumers' train-specific peak year train lengths for these seven trains.

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As shown in Rebuttal Table III-C-3 above, peak year { } train consists were developed by adding cars to their base year consists and capping

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<sup>96</sup> See Consumers Opening e-workpaper "CERR BASE YEAR TRAIN LIST DEVELOPMENT vF.xlsx," tab "Cerr Trn Stats," cell BN327.

them if the maximum length was reached, they were not simply assumed to be uniform at the maximum length. Indeed, while Consumers determined that individual { } trains could grow to the historical maximum of { } feet<sup>97</sup> if needed on a given day, two of Consumers' peak year { } trains remained below that threshold, with one ( { }) remaining 15% below the maximum based on projected daily demand.<sup>98</sup>

Consumers simply did not increase all peak year trains to the historical maximum size. Yet, CSXT claims that Consumers did just that:

Consumers assumed that CSXT, BNSF, UP, BRC, and IHB would all disregard the terms of their ISAs and build trains delivered to CERR to the length of the absolute longest train that operated in the Base Year.<sup>99</sup>

CSXT's statement mischaracterizes Consumers' approach and results. Consumers Rebuttal e-workpaper "Train Sizes CSXT vs Consumers.xlsx," tab "Peak Period Comp," cells E122, I122, and I124 contains a list of all CERR train symbols, the maximum train length used by both parties in this case, and the average base and peak year train lengths in Consumers' analysis. As shown in the e-workpaper, only 39 of the 321 (12%) trains in Consumers' Peak Period Opening evidence were expanded to the maximum threshold. Conversely, 282 of Consumers' Peak Period trains (88%) remain under the maximum length

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<sup>97</sup> See Consumers Opening e-workpaper "CERR BASE YEAR TRAIN LIST DEVELOPMENT vF.xlsx," tab "Cerr Trn Stats," cell BN327.

<sup>98</sup> {  
}

<sup>99</sup> CSXT Reply at III-C-33.



threshold. As such, Consumers' evidence flatly contradicts CSXT's claims that all CERR trains are running at maximum size.

**Daily and Seasonal Volume.** CSXT erroneously claims that Consumers' train list model fails to account for daily and seasonal volume fluctuations. Specifically, CSXT states:

[I]n developing its 'growth' train estimates, Consumers assigned additional cars to Base Year trains without regard to when such movements would occur.

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Consumers' analysis disregarded entirely the ebb and flow of Base Year traffic, as reflected by changes in train sizes during the course of the year. Instead, Consumers added a "growth" train only when its projected growth traffic "could not be accommodated by *trains of that symbol with excess capacity in the base year.*" In other words, Consumers treated additional Peak Year volumes as fungible cars that could be assigned to any train on any date throughout the Peak Year. Based on that assumption, Consumers did not add a "growth" train for a particular train symbol unless every Base Year train operating under that merchandise symbol reached the maximum length that was achieved by few real world trains-and in many cases *one* train-throughout the year.<sup>100</sup>

These claims are also incorrect. Here again, CSXT's attempt to describe Consumers' methodologies in "other words" results in CSXT misrepresenting what Consumers' operating witnesses actually did in developing growth trains.

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<sup>100</sup> CSXT Reply at III-C-34-35 (footnote omitted).

As shown in the train { } and Q383 examples above, Consumers' methodology retained both the daily and seasonal variation reflected in the base year train data. Specifically, Consumers first developed peak year train consists by adding growth carloads to the historical consists of the corresponding base year trains that moved on the same calendar date in the base year. In doing so, Consumers explicitly retained the operational lumpiness on a day-to-day basis. As shown in Tables III-C-2 and III-C-3 above, each peak year { } and Q383 train (and each other CERR train) has a unique carload consist reflecting historical daily swings in volume demand.

When Consumers determined additional growth trains would be required, it added them to the peak period train list based on the historically observed peaking factor. For example, Consumers determined that projected peak year volumes would require the addition of { } growth trains.<sup>101</sup> Next, Consumers developed a historical peaking factor ({ })<sup>102</sup> based on the number of daily trains operating during the peak nine-day modeling period ({ })<sup>103</sup> relative to the number of daily trains operating during the full base year

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<sup>101</sup> Consumers Opening e-workpaper "CERR BASE YEAR TRAIN LIST DEVELOPMENT vF.xlsx," tab "Cerr Trn Stats," cell BU327.

<sup>102</sup> Consumers Opening e-workpaper "CERR BASE YEAR TRAIN LIST DEVELOPMENT vF.xlsx," tab "Cerr Trn Stats," cell CD10 and level "LineHaul Peak Calc," cell N4.

<sup>103</sup> Consumers Opening e-workpaper "CERR BASE YEAR TRAIN LIST DEVELOPMENT vF.xlsx," tab "LineHaul Peak Calc," cell N3.

{ }<sup>104</sup> Because more trains operated in the nine-day peak modeling period than in an average nine-day period in the base year, Consumers applied the observed historical peak period distribution to determine that { } growth trains would need to operate in the peak modeling period of the peak year.<sup>105</sup> If Consumers had not accounted for seasonality, it would only have added { } growth trains during the peak modeling period.<sup>106</sup> Consumers rounded up its seasonally adjusted { } peak period growth trains and added three (3) full growth trains to its peak period train list.<sup>107</sup>

CSXT also mischaracterizes Consumers’ treatment of train Q393.

Pursuant to the ISA between CSXT and BRC, the maximum length of Train Q393 is 8,000 feet. Consumers assumed that the Q393 trains could grow to 8,811 feet (or 144 cars) in the Peak Year, providing a total of 1,205 available “car slots” on the 36 existing Base Year Q393 trains. Based on Consumers’ growth projection of {{ }} for merchandise traffic, the

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<sup>104</sup> Consumers Opening e-workpaper “CERR BASE YEAR TRAIN LIST DEVELOPMENT vF.xlsx,” tab “LineHaul Peak Calc,” cell N2.

<sup>105</sup> Consumers Opening e-workpaper “CERR BASE YEAR TRAIN LIST DEVELOPMENT vF.xlsx,” tab “Cerr Trn Stats,” cell CD327. { } growth trains ÷ 365 days in the year x 9 days in the modeling period x { } peaking factor = { } peak modeling period growth trains.

<sup>106</sup> {  
}

<sup>107</sup> See Consumers Opening e-workpaper “CERR BASE YEAR TRAIN LIST DEVELOPMENT vF.xlsx,” tab “Cerr Peak Trains” range BP325:CH327. Consumers’ growth trains were assumed to be a uniform { } cars and { } feet. Notably, CSXT also assumed its growth trains would be uniform in length. For example, CSXT added four { } growth trains in its peak period train list, all of which were assumed to move { } cars. See CSXT Reply e-workpaper “Peak Period Trains.xlsx,” tab “RTC\_Add\_Elim” range I142:I145.

CERR would be required to handle a total of {{ }} additional ‘growth’ cars on Q393 trains in the Peak Year. Consumers distributed those {{ }} cars among the available slots on the 36 Base Year Q393 trains without regard to the days upon which that additional traffic might be tendered for shipment.<sup>108</sup>

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Consumers’ methodology ignores the impact of seasonality and economic trends on customer shipment patterns, and results in train lengths that are divorced from market realities.<sup>109</sup>

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*That assumption flies in the face of the reality that fluctuations in rail traffic over the course of a year are driven by changes in customer demand, not railroad operating convenience.*<sup>110</sup>

First, the longest Q393 train in the base year was 150 cars and 8,835 feet.<sup>111</sup> Therefore, Consumers’ procedures ensure that no peak year train exceeds that limit. CSXT adopted and applied the historical maximum length of 8,835 feet – not the ISA train length of 8,000 feet – to its own train list development model.<sup>112</sup> Second, as with trains Q383 and { } in the examples shown above, individual Q393 trains (and all other trains) were grown based on the daily and

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<sup>108</sup> CSXT Reply at III-C-35-36 (footnotes omitted).

<sup>109</sup> CSXT Reply at III-C-36 (footnotes omitted).

<sup>110</sup> CSXT Reply at III-C-37 (emphasis in original).

<sup>111</sup> See Consumers Opening e-workpaper “CERR BASE YEAR TRAIN LIST DEVELOPMENT vF.xlsx,” tab “Cerr Trn Stats,” cells BL378 & BN378.

<sup>112</sup> See CSXT Reply e-workpaper “Peak Period Trains.xlsx,” tab “Trains\_Pk\_Pd,” cell AP279 and level “Ref\_MaxSize,” cell J330.

seasonal demand observed in the base year train statistics. Specifically, one Q393 train operated during the peak period of the base year. That particular Q393 train operated with { } carloads,<sup>113</sup> which was below the base year average of { } cars.<sup>114</sup> For the corresponding peak year train, Consumers assumed it would operate with { } cars,<sup>115</sup> which is below the peak year average of { } cars.<sup>116</sup> Therefore, the relative seasonal demand observed in the historical base year was preserved in the peak period. Contrary to CSXT's assertions, Consumers did not smooth out seasonal volume fluctuations.

**CSXT's Flawed Reply Growth Train Methodology Significantly Overstates Train and Car Requirement and Resulting Operating Expenses.**

CSXT claims that Consumers' train development methodology "resulted in an understatement of the number of 'growth' trains required to accommodate the CERR's Peak Year traffic volumes."<sup>117</sup> CSXT then states that it "corrected" Consumers' alleged flaws as follows:

CSXT established maximum lengths for CERR Peak Year trains based upon the real-world practices of the railroads serving Chicago. CSXT began by assigning

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<sup>113</sup> See Consumers Opening e-workpaper "CERR BASE YEAR TRAIN LIST DEVELOPMENT vF.xlsx," tab "Cerr Peak Trains," cell BA280.

<sup>114</sup> See Consumers Opening e-workpaper "CERR BASE YEAR TRAIN LIST DEVELOPMENT vF.xlsx," tab "Cerr Trn Stats," cell R378.

<sup>115</sup> Source: Consumers Opening e-workpaper "CERR BASE YEAR TRAIN LIST DEVELOPMENT vF.xlsx," tab "Cerr Peak Trains," cell BI280.

<sup>116</sup> Source: Consumers Opening e-workpaper "CERR BASE YEAR TRAIN LIST DEVELOPMENT vF.xlsx," tab "Cerr Trn Stats," cell BW378.

<sup>117</sup> CSXT Reply at III-C-38.

Peak Year cars to Base Year trains by applying CSXT's adjusted Peak Year growth factors ({{ }} for merchandise traffic and {{ }} for intermodal traffic) uniformly across all Base Year merchandise trains. Specifically, CSXT increased the number of cars on each merchandise train on its Reply RTC Model train list by {{ }}, and the number of units on each intermodal train by {{ }}.

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For each train symbol and date, if the resulting train length exceeded the maximum length for that train symbol, CSXT added an “extra” train operating under that symbol on that date.<sup>118</sup>

CSXT’s growth train model contains two critical flaws which render its entire analysis invalid. First, rather than developing a peak year operating plan, CSXT developed 365 separate peak day operating plans, and then combined the results of the 365 individual daily plans to develop its operating statistics. CSXT’s treatment of train Q383 exemplifies the problem with this logic.

Specifically, CSXT’s methodology applied its { } growth factor<sup>119</sup> to the { } to project that the peak period counterpart to historical Train { } would need to be { } feet in length.<sup>121</sup> CSXT’s maximum train length for

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<sup>118</sup> CSXT Reply at III-C-38-39.

<sup>119</sup> See CSXT Reply e-workpaper “Peak Period Trains.xlsx,” tab “Trains\_Pk\_Pd,” cell AN263.

<sup>120</sup> See CSXT Reply e-workpaper “Peak Period Trains.xlsx,” tab “Trains\_Pk\_Pd,” cell O263.

<sup>121</sup> See CSXT Reply e-workpaper “Peak Period Trains.xlsx,” tab “Trains\_Pk\_Pd,” cell AQ263.

Q383 trains is { } feet, which represents the greater of the maximum historical length ({ } feet)<sup>122</sup> and the governing ISA length (7,000 feet).<sup>123</sup> Therefore, CSXT determined that the peak period train would exceed its maximum length by { } feet.<sup>124</sup> { }<sup>125</sup> {

}

Meanwhile, on the very next day, CSXT projected that the peak period counterpart to train { } would need to be { } feet long.<sup>126</sup> This is { } feet shorter<sup>127</sup> than train Q383's maximum permissible length of 8,726 feet.<sup>128</sup> This train obviously has sufficient available capacity to deliver the prior day's excess volume of less than one carload on the very next calendar day. However, rather than holding one carload from train {

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<sup>122</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Trains\_Pk\_Pd," cell AP263.

<sup>123</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Trains\_Pk\_Pd," cell AR263.

<sup>124</sup> { }

<sup>125</sup> Historical train Q383 20140324 was 7,113 feet long and moved 144 cars. (7,113 feet ÷ 114 cars = 62.4 feet per car).

<sup>126</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Trains\_Pk\_Pd," cell AQ264.

<sup>127</sup> { }

<sup>128</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Trains\_Pk\_Pd," cell AP264.

} to move on train { }, CSXT’s plan inexplicably calls for two Q383 trains to operate on March 24, 2024.<sup>129</sup> CSXT’s model obviously imposes unnecessary and unrealistic operational inefficiencies on the CERR. Moreover, because train Q383 is interlined with BNSF, CSXT assumes BNSF will also incur the additional operating expenses associated with this inefficient operation.

CSXT’s model is predicated on the false premise that the stand-alone railroad, and its interline partners, and all connecting railroads, would be required to clear its entire inventory of traffic every day, and that the prior and subsequent days’ operations are completely unrelated to the current day. This approach again does not reflect “real-world” railroad operating practices.

Second, although CSXT adds growth trains based on its specific daily projected volume requirements for a given train symbol, CSXT completely abandons its projected daily volume once a growth train is “triggered.” In every instance in which CSXT determines a growth train will be required, CSXT operates two trains with combined car load statistics that far exceed CSXT’s own determination of the daily volume requirement.

Train { } from the above example exemplifies the impact of CSXT’s critical flaw in growth train additions. Specifically, CSXT

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<sup>129</sup> See CSXT Reply e-workpaper “Peak Period Trains.xlsx,” tab “Trains\_Pk\_Pd,” cell AS263.



projects the need for { }<sup>130</sup> of train Q383 capacity on March 24, 2024. Based on the base year counterpart, this equates to { } carloads.<sup>131</sup> As described above, because this requirement exceeds the maximum train Q383 train length by { } feet, CSXT interprets this as a need to operate two Q383 trains on March 24 of the peak year. The first train CSXT operates on March 24 is { } cars and { } feet<sup>132</sup> in length, precisely mirroring the base year counterpart's consist.<sup>133</sup> The differential between CSXT's projected volume requirement of { } feet ({ } cars) and CSXT's first train consist of { } feet ({ } cars) is { } feet ({ } cars). However, rather than operate a second { } foot ({ } car) train, CSXT operates a second "growth" train that is { } feet ({ } cars) in length.<sup>134</sup> This "growth" train consist mirrors the average base year consist for train symbol Q383.<sup>135</sup>

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<sup>130</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Trains\_Pk\_Pd," cell AQ263.

<sup>131</sup> { }

<sup>132</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Trains\_Pk\_Pd," cell AW263.

<sup>133</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Trains\_Pk\_Pd," cell O263.

<sup>134</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Trains\_Pk\_Pd," cell BD263.

<sup>135</sup> See CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "RTC\_Add\_Elim" at range I124:K124.

CSXT's two Q383 peak year March 24 trains have a combined length of { } feet<sup>136</sup> and { } cars.<sup>137</sup> This exceeds CSXT's projected volume requirement by { } feet<sup>138</sup> ({ } cars).<sup>139</sup> CSXT does not explain, or even acknowledge, its operation of two trains with combined lengths that exceed CSXT's calculated daily train length requirement by { }%.<sup>140</sup>

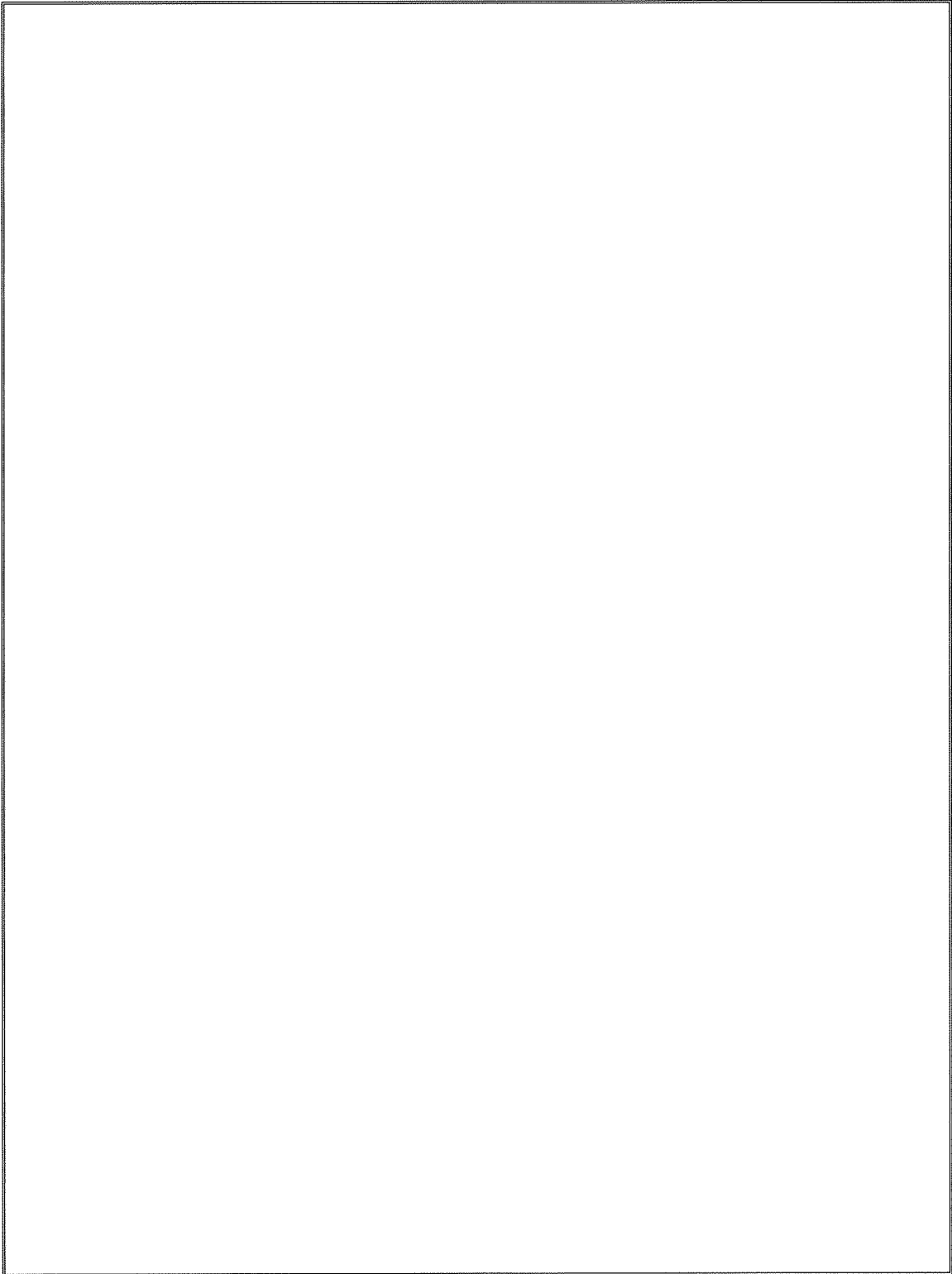
Applying CSXT's erroneous model to all peak period trains results in a { }% overstatement of CSXT's projected volume requirement for its { } "growth trains" as demonstrated in Rebuttal Table III-C-4 below.<sup>141</sup>

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136 { }  
137 { }  
138 { }  
139 { }  
140 { }

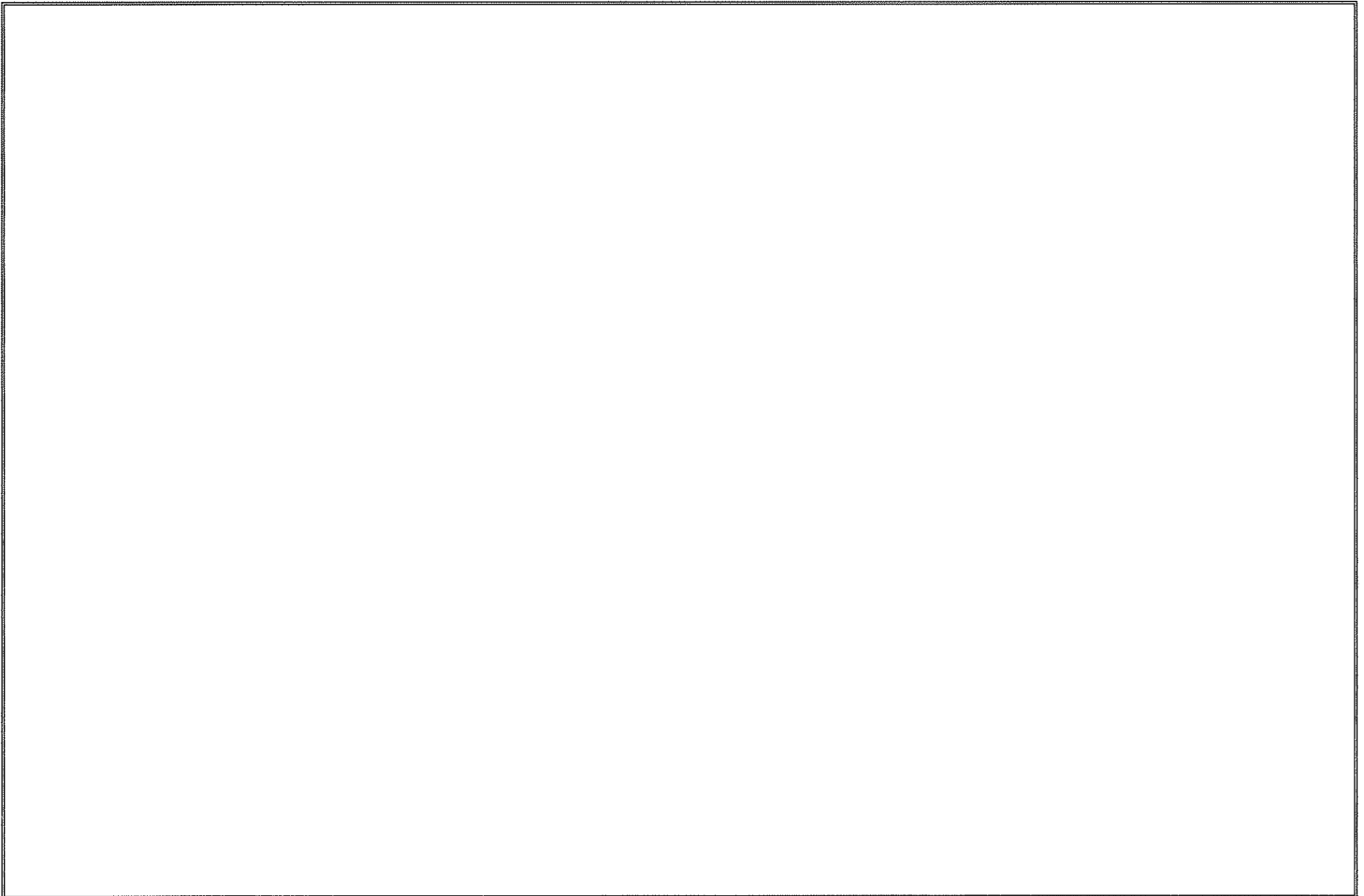
<sup>141</sup> See Consumers Rebuttal e-workpaper "Peak Period Trains\_Restated.xlsx," tab "CSXT Growth Train Summary."



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This additional unnecessary volume serves no purpose other than to reduce the efficiency of the CERR and increase operating costs. Moreover, this additional volume has no basis in actual traffic growth, and the CERR gains no revenue benefits. In addition, by using base year average statistics as a surrogate for peak period growth trains, CSXT failed to reflect daily and seasonal volume fluctuations – the very thing CSXT accuses Consumers of ignoring.

Rebuttal Table III-C-5 below shows the tremendous inefficiency resulting from CSXT’s peak period train development methodology as applied to train Q383. {



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Column (3) of Rebuttal Table III-C-5 shows that over the course of the peak period, CSXT projects that both the CERR and BNSF – with whom train Q383 is interlined – would have the capacity to move { } feet of train Q383 consist without adding any growth trains. Column (4) shows that CSXT projects that BNSF and the CERR would need to move { } feet of volume on train Q383. Therefore, CSXT projects that train Q383 will have { } feet of excess capacity (Column (5) total) during the peak period without adding a single growth train. Yet, CSXT’s operating plan calls for the addition of four growth trains to move this traffic.

CSXT’s model, which bases CERR operations on 365 individual daily operating plans rather than a single comprehensive operating plan, would preclude the CERR operations department from making rational operating decisions based on available capacity. CSXT presumes that both the CERR and BNSF would somehow fail to consider the two Q383 trains operating with pointless excess capacity on March 25<sup>th</sup> and March 27<sup>th</sup> in their train building and dispatching operations on the surrounding days. Mr. Orrison and Mr. Holmstrom find such an unlikely scenario completely at odds with how real world railroads are operated. Any rational real world railroad would recognize that it had sufficient capacity on its seven (7) scheduled peak period trains, and it would not need to operate any “growth” trains, to move all of the projected Q383 traffic. In

other words, Consumers' operating plan plainly represents the best supported and rational approach to the growth of traffic.

Furthermore, Column (8) shows that over the course of the peak period, CSXT's operating plan would require BNSF and the CERR to move { } feet of train Q383 consist. However, as Column (4) shows, CSXT projects the need for both the CERR and BNSF to move only { } feet of volume on train Q383 during the peak period. Therefore, CSXT's operating plan requires the CERR to incur costs associated with moving { } feet (Column (9) total) of phantom Q383 consist for which it would receive no revenues (nor would the BNSF for that matter).

CSXT proclaims its model to be superior for the following reason:

CSXT's approach reflects the premise that customer shipment patterns during the Peak Year would, in all likelihood, be similar to those that CSXT experienced during the Base Year. **Absent any evidence to the contrary**, that premise is realistic--indeed it is far more credible than Consumers' assumption that the timing of "growth" shipments would precisely match the capacity available on existing CERR trains.<sup>142</sup>

The problem with CSXT's claim is that its own evidence contradicts its position that its model reflects shipping patterns observed in the base year. To identify the need for a growth train, CSXT relies on its projection of daily required volumes, which it derives based on shipping patterns experienced during the base year. However, the growth trains CSXT added have consists that reflect average

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<sup>142</sup> CSXT Reply at III-C-39-40 (emphasis added).

base year train statistics. By adding this average consist to the consist of the corresponding daily historical train, CSXT expressly discarded its projection of daily required volumes that was used to trigger the growth train. As a result, CSXT grossly overstates CERR volumes on each day it claims a growth train is required and vastly overstates operating expenses.

It is CSXT's insistence that the CERR operating personnel would fail to utilize excess capacity on the days prior and subsequent to the days on which CSXT projects *de minimis* averages that lacks credibility. All five (5) of the Q383 merchandise trains CSXT added in the peak week were completely unnecessary, and CSXT dramatically overstates the number of intermodal growth trains required to move its projected peak week traffic. CSXT's model is illogical, results driven, and diametrically opposed to the premise of an efficient stand-alone railroad.

**C. Consumers' Operating Plan Provides for the Delivery of All Issue Coal Cars to the Consumers Plant**

CSXT argues that one of the three *major* flaws in Consumers' operating plan is that it failed to separately provide for the transportation of a few bad-ordered Consumers' coal cars to the Campbell Plant. Not only has no railroad ever argued that the a SARR operating plan must separately track and transport such a trivial number of cars, but if such a standard were applied, it suggests that the SAC process is broken beyond all repair because no operating plan could possibly be devised that would cover every random occurrence to a car being

transported *off* the SARR and its subsequent impact on the SARR. Yet, that is precisely what CSXT is proposing (*i.e.*, the cars are bad-ordered on the BNSF and the CERR must guess exactly how these random events will be handled).

Consumers urges the Board to reject such an untenable position as a matter of policy, lest the already daunting SAC process become a hopeless one.

CSXT's argument on this point is even more absurd because CSXT readily acknowledges that Consumers would have had no idea about this issue because the "CSXT data produced in discovery did not make clear how bad-ordered cars arriving at Clearing Yard were delivered to Barr Yard."<sup>143</sup>

Moreover, CSXT provided a written explanation of how Consumers' traffic moves to the plant, including bad-ordered cars on the Grand Rapids Subdivision, and it never mentioned this alleged movement of cars to Clearing Yard by BNSF or the local CSXT move from Clearing Yard to Barr Yard.<sup>144</sup> CSXT ignores that these cars were not necessarily bad-ordered at all and that it has offered no proof they were bad-ordered. Likewise, CSXT does not even offer any evidence that BNSF handles Campbell-bound bad-ordered cars in the manner CSXT describes.

Instead, it simply makes a bald-face assertion that BNSF delivers these supposedly bad-ordered cars to the BRC's Clearing Yard. But this assertion is belied by real-world experience and common sense. Finally, and most frustratingly, CSXT has

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<sup>143</sup> CSXT Reply at III-C-43 n.82.

<sup>144</sup> See Consumers Opening e-workpaper "Consumers INT 3 & 4 Response (CSX-CNSMR-C-19328 to 19336).pdf."



claimed that only 82 cars out of 41,288 cars (two tenths of one percent) moving to the Campbell plant in the base year are even at issue.<sup>145</sup> Thus, CSXT has sent Consumers on a chase for data over a trivial number of cars, especially compared to the over 40,000 cars moving to the Campbell plant each year.

Mr. Orrison, who has extensive experience with Consumers trains on the lines being replicated, as well BNSF operations, is dubious of CSXT's unsupported claims. Specifically, as an Assistant Vice President at BNSF, he witnessed an extensive program by BNSF Coal Operations to always return bad order, loaded coal cars back to the next loaded train for the consignee of the bad-ordered car. This return to the next loaded train occurs at major yard or crew changes points. Thus, trains taking the southern route from the Powder River Basin pick up bad-ordered cars at Alliance, NE; Aurora, NE; Lincoln, NE; Ottumwa, IA; Burlington, IA; and Galesburg, IL. Trains coming from the PRB on the northern route pick up bad order cars at Glendive, MT; Mandan, ND; Fargo, ND; St. Paul, MN; LaCrosse, WI. CSXT has not suggested that BNSF has changed this policy. Thus there is no reason to assume now, without any proof on CSXT's part, that the BNSF is delivering these cars to Clearing Yard for furtherance to the CSXT's Barr Yard via a local train. Indeed, such an operation is highly inefficient and directly contradictory to Mr. Orrison's real-world experience.

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<sup>145</sup> See Consumers Rebuttal e-workpaper "2014 - 1Q 2015 Car And Container Waybills\_Rebuttal.xlsx," tab "2014 Carload," column (D).

Mr. Orrison also points out that CSXT may have opted to remove such cars at 71<sup>st</sup> Street, if it concluded that further repairs were necessary, and then placed those cars on the daily train from Clearing Yard to Barr Yard that also stopped at 71<sup>st</sup> Street as Mr. Holmstrom explained above. But again, CSXT has no proof that these cars got to Barr Yard or even Clearing Yard in the manner it claims they did, nor does CSXT have any proof the cars were bad-ordered. Thus, CSXT is simply claiming its purported operation occurred, and yet it is strongly criticizing Consumers' for failing to account for such cars.

In order to provide additional insight into CSXT's manifest error on this point, it is necessary to delve into the details of CSXT's approach to identifying and handling these alleged bad-ordered cars.

On Reply, CSXT describes the handling of issue carloads that are bad-ordered on BNSF rail lines for the first time.<sup>146</sup> The operation requires, in CSXT's view, five steps:

- Step 1: BNSF delivers bad-ordered carloads to BRC's Clearing Yard in Chicago;
- Step 2: CSXT transfers the cars from BRC's Clearing Yard to CSXT's Barr Yard on Chicago yard trains Y130 and Y132;
- Step 3: CSXT places the cars on a merchandise train (usually Q326) and moves them from Barr Yard to Grand Rapids, MI;
- Step 4: CSXT places the cars on a second merchandise train (usually Q327) and moves them from Grand Rapids to Holland, MI; and

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<sup>146</sup> CSXT Reply at III-C-41.

- Step 5: CSXT places the cars on an unidentified local train and moves them from Holland to West Olive, MI.

On Reply, CSXT presents a list of 82 carloads it claims were bad-ordered on BNSF lines, but notably omits an explanation of how it was able to determine which cars were bad-ordered. CSXT simply proclaims that “the Car Event data that CSXT produced in discovery indicate that, during the Base Year, one out of five Consumers’ loaded coal trains was required to set out a bad-ordered car.”<sup>147</sup>

As noted above, there is nothing in the Car Event data to indicate that those cars were bad-ordered. The Car Event data as summarized by CSXT on Reply merely shows that these carloads were at some point switched on to one of four specific train profiles preselected by CSXT. This circumstance alone is insufficient evidence to prove that these particular cars were bad-ordered. Indeed, CSXT is aware that bad-order cars cannot be identified using Car Event data alone. As confirmed by statements CSXT made regarding its traffic data in discovery: “Car Event data do not detail . . . specific customer services required.”<sup>148</sup>

Second, CSXT’s provided event data does not show the complete movement of the 82 carloads identified by CSXT as bad-order cars on Reply. In a

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<sup>147</sup> CSXT Reply III-C-40-41.

<sup>148</sup> See July 1, 2015 letter from Matthew J. Warren to Kelvin J. Dowd at page 2 of 5, included in Consumers’ Rebuttal workpapers as “2015 07 01 MJW to Dowd Re CSX Traffic Data and Operating Information.pdf.”

footnote, described above, CSXT admits that Consumers could not possibly have determined its newly described bad-order shipment operation from the provided data. The lack of data is further confirmed by statements CSXT made regarding its traffic data in discovery: “[t]here may be limited or no detail for certain local and yard trains in the Car Event data.”<sup>149</sup> In addition, CSXT data produced in discovery did not make clear that bad-ordered cars were delivered to BRC’s Clearing Yard by BNSF. “Car Event data do not detail . . . connecting carrier information.”<sup>150</sup>

As a result, Consumers had no way of identifying, tracking, or evaluating two of the five operational steps CSXT now claims it uses to deliver bad-ordered issue carloads to West Olive from the materials provided by CSXT in discovery.

Third, a review of the Car Event data reveals major holes in CSXT’s claims regarding the purported operations for handling bad-order cars. On Opening, Consumers developed a workpaper containing a list of “Y” trains compiled from aggregated CSXT car event data.<sup>151</sup> This list contains a summary of all carloads reporting movements on yard trains in and between Clearing and Barr yards, including the Y130 and Y132 Yard trains CSXT identifies on Reply as the trains carrying bad-order issue cars from Clearing Yard to Barr Yard. This

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *See* Consumers Opening e-workpaper “Yard Shipments by Train OnSARR Events.xlsx.”

workpaper identifies { } Y trains which pick up or set out cars at both Clearing and Barr Yard during the base year.<sup>152</sup> As shown, the provided data indicates that { } Y130 yard trains moved cars between Clearing and Barr yards, but { } Y132 trains performed that service during the base year.<sup>153</sup> Additionally, the vast majority of the carload movement reported in the car event data on train Y130 occurred in the westward direction.<sup>154</sup> Specifically, the car event data shows that train Y130 originated { } cuts containing { } cars in Barr Yard, and it terminated { } cuts containing { } carloads in Clearing Yard.<sup>155</sup> Conversely, train Y130 originated only { } cuts containing { } cars in Clearing Yard, and it terminated { } cuts containing just { } carloads in Barr Yard.<sup>156</sup> Therefore, according to the provided car event data, Train Y130 set out

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<sup>152</sup> *Id.*, tab “Train Summary,” cell S3 and tab “Symbol Summary,” cell S3.

<sup>153</sup> *Id.*, tab “Symbol Summary,” cells S30 and S32.

<sup>154</sup> As documented in Consumers’ Opening e-workpapers, the Train Profiles data provided by CSXT in discovery also confirm that CSXT’s Y130 train’s operating plan calls for the movement of a block of cars from Barr Yard to Clearing Yard, not from Clearing Yard to Barr Yard. *See* Consumers Opening/Rebuttal e-workpaper “P3 Blocks Orig or Term at BARR.xlsx,” tab “Blocks O T at Barr” rows 540-541, Columns V, I, and K. Station “DD 2” (Column (I)) = Barr Yard, and Station “DC 27” (Column (K)) = Clearing Yard.

<sup>155</sup> *See* Consumers Opening e-workpaper “Yard Shipments by Train OnSARR Events.xlsx,” tab “Symbol Summary,” cells E30, K30, I30, and O30 respectively. The count of cuts and carloads do not precisely mirror one another at Barr and Clearing because some of the cuts were handled entirely within a single yard, usually Clearing.

<sup>156</sup> *Id.*, tab “Symbol Summary,” cells F30, L30, H30, and N30 respectively. As above, the count of cuts and carloads do not precisely mirror one another at Barr and Clearing because some of the cuts were handled entirely within a single yard, usually Clearing.

only { } total cars in Barr during the entire base year. However, of the 82 bad-ordered issue cars identified by CSXT in Reply, *not a single one* reported movement from Clearing to Barr on train Y130 or on train Y132, according to the provided car event data.<sup>157</sup> Despite CSXT’s claims that trains Y130 and Y132 typically move these bad-order cars, the data shows a different tale: that only 53 cars were moved to Barr during the base year and *none* of them were the bad-ordered cars identified by CSXT.

Fourth, CSXT’s methodology skips over the logical starting point for evaluation of these shipments – the delivery to Clearing Yard by BNSF and movement from Clearing to Barr on CSXT’s yard trains. Therefore, in order to identify the cars it claims were bad-order cars, CSXT began its analysis by querying the Car Event data to identify issue traffic loaded onto Merchandise road trains with the profiles Q324, Q326, S324 or S326.<sup>158</sup> CSXT was only able to develop this methodology because it claims to know that those four train profiles are used in the *third operational step* CSXT uses to deliver bad-ordered cars to West Olive during the normal course of business. However, neither the Board, nor Consumers, would know which Merchandise trains normally carry bad-ordered cars from Barr Yard to Grand Rapids.

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<sup>157</sup> See CSXT Reply e-workpaper “BadOrdered Carloads in NonUnit Trains.xlsx,” tab “Dataset\_Access,” column E.

<sup>158</sup> See CSXT Reply e-workpaper “IssueTraffic\_CarEventData.accdb,” query “Trains\_BadOrders.”

Moreover, the further movement of the 82 cars identified by CSXT rarely matches CSXT’s description of the operations in its Reply narrative. For example, CSXT’s Car Event data for Shipment Key { },<sup>159</sup> which CSXT identified as a bad-order shipment on Reply, indicates that the car left Chicago on eastbound merchandise train { } and traveled through { }.<sup>160</sup> At { }, it was cut onto westbound merchandise train { } and transported back to { },<sup>161</sup> where it was placed on local train { } and moved to { }.<sup>162</sup> At { }, it was placed on eastbound merchandise train { } and moved back to { }.<sup>163</sup> After the carload arrived at { } for the second time, it was placed on westbound local train { } and delivered to West Olive.<sup>164</sup>

This peculiar movement of the car may be explained by further statements CSXT made regarding the data it provided in discovery. Specifically, CSXT stated that, “in some cases the routes identified in car event data do not perfectly correspond to the actual path of traffic,” and “[s]uch cases of routings

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<sup>159</sup> See CSXT Reply e-workpaper “BadOrdered Carloads in NonUnit Trains.xlsx,” tab “Dataset\_Access,” column C (Shipment Key), rows 2-73.

<sup>160</sup> *Id.*, columns E (Train ID), F (Train Suffix) and AG (city), rows 2-24.

<sup>161</sup> *Id.*, rows 25-38, 40.

<sup>162</sup> *Id.*, rows 39, 41-46.

<sup>163</sup> *Id.*, rows 47-58, 60.

<sup>164</sup> *Id.*, rows 59, 61-66.

that differ from the actual path of movement” occur because CSXT’s Car Event data “necessarily must make routing assumptions where multiple routes exist between reporting locations.”<sup>165</sup>

Thus, as noted above, CSXT’s allegation that Consumers failed to adequately account for the movement of bad-ordered issue carloads rings hollow in light of the fact that the traffic data provided by CSXT in discovery, by CSXT’s own admission, did not record significant portions on the movement of those shipments, and even where it did record movement, the recorded route may differ from the actual route. CSXT simply asks that its new claims be accepted without proper support.

CSXT’s Reply bad-ordered car operations are also unnecessary, overstated and incorrectly modeled. As a threshold matter, even if CSXT’s evidence were adequately supported (which it is not), Mr. Orrison has already explained that BNSF’s policy is to place bad-ordered cars on a subsequent West Olive train on BNSF’s own network between the PRB and Cicero, IL. Instead, CSXT asserts that the CERR must “provide for one CERR coal unit train per week to make an intermediate stop at Barr Yard (after being received from BNSF at 71<sup>st</sup>

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<sup>165</sup> See July 1, 2015 letter from Matthew J. Warren to Kelvin J. Dowd at pages 2-3 of 5, included in Consumers’ Rebuttal e-workpapers as “2015 07 01 MJW to Dowd Re CSX Traffic Data and Operating Information.pdf.”



Street) so that bad-ordered cars can be added to the train prior to movement to West Olive.”<sup>166</sup>

However, CSXT’s RTC modeling of its proposed operation is at odds with its stated plan. First, CSXT provided for two CERR coal trains, not one, to make an intermediate stop at Barr Yard during the peak week.

Specifically, CSXT’s model requires both train { } (RTC train ID CL-C22WOLB02) and train { } (RTC train ID CL-C22WOLN01) to dwell in Barr Yard for the placement of bad-ordered cars.<sup>167</sup> CSXT stops the first train on the first day of the peak week and the second train on the last day of the peak week.

Second, CSXT improperly and unnecessarily rerouted train { } from the Belt Route via Barr in order to place bad-ordered carloads on that train when train { } was moving through Barr later in the peak week. The two bad-order cars should have been switched onto N910 20140329 rather than rerouting train { }.

The majority of Consumers’ loaded coal trains are routed like train { } eastward over the Belt Route at 75<sup>th</sup> Street ( { } in the Peak Period of the base year), while some are routed south at that junction over the CSXT line and through BARR yard ( { } in the Peak Period of the base

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<sup>166</sup> CSXT Reply at III-C-43.

<sup>167</sup> See CSXT Reply e-workpaper “CERR CSXT Reply – Consumers.zip.”

year).<sup>168</sup> The CERR operating expenses associated with CSXT’s rerouted train { } reflect the actual historical route, and therefore account for the joint facilities payments made to NS and the BRC.<sup>169</sup> However, CSXT reroutes the train via Barr, which creates a disconnect between the joint facility agreement payments and operating expenses for this shipment. Because CSXT has improperly rerouted train { } off of the BRC and NS lines, and because it has unnecessarily modeled two trains during the peak week for this operation, Consumers rejects CSXT’s operations as modeled for train { }.

Although CSXT did not reroute train { }, CSXT failed to demonstrate that Consumers could reasonably have determined this operation is necessary from the data and explanatory materials CSXT provided in discovery. Consumers therefore rejects the changes applied to train { } as modeled in CSXT’s Reply RTC simulation to accommodate bad-order car switching in Barr Yard.

Given that CSXT’s evidence is inadequately supported by data and operational information CSXT provided in discovery, and given CSXT’s

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<sup>168</sup> See Consumers’ Rebuttal e-workpaper “CERR BASE YEAR TRAIN LIST DEVELOPMENT vF Rebuttal.xlsx,” tab “Cerr Peak Trains” rows 136-141, columns CB (identifies Consumers trains) and BV (identifies trains traversing NS/BRC via trackage rights).

<sup>169</sup> See CSXT Reply e-workpaper “CERR Base Year Trains.xlsx,” tab “Trains,” cell AM4653 = 160.46 miles. This should be 162.33 miles like similarly routed train { }, see cell AM4834.

unforgivable tardiness in presenting this novel theory, Consumers has not adjusted its Rebuttal RTC model to reflect the transportation of these unexplained cars.

**1. General Parameters**

Briefly summarized, the CERR's operating plan is designed to handle trains operating between Ogden Jct./22<sup>nd</sup> St. in Chicago, IL and West Olive, MI. The CERR serves one local customer destination, Consumers' Campbell plant located at West Olive, MI. The CERR also serves CSXIT's 59<sup>th</sup> St. Intermodal facility, located adjacent to the CERR tracks and several miles south of the CERR's northern terminus at 22<sup>nd</sup> Street. The system has nine (9) interchange locations. The CERR has no branch lines. The CERR includes a 2.38-mile<sup>170</sup> lead track to reach the Consumers facility.

CSXT largely accepts the CERR's general parameters, except to the extent that it has issues with other elements of Consumers' Opening evidence (*i.e.*, configuration of interchanges (Part III-B), an additional siding near the Campbell plant (Part III-B), traffic selection (Part III-A), and removing certain Calumet Park traffic).

CSXT also suggests that the CERR insertion into Chicago, with the traffic selected, is "conceptually suspect."<sup>171</sup> CSXT suggests that the insertion of new interchange points and related dwell times (forced on the shipper by the

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<sup>170</sup> See Consumers Opening e-workpaper "CERR Route Miles Opening.xlsx," tab "Summary," cell R14.

<sup>171</sup> CSXT Reply at III-C-44.

Board), would “exacerbate” the challenges faced by dispatchers, and that it would be the “epitome of *inefficiency*.”<sup>172</sup> CSXT’s argument is nonsensical. The complaining shipper has no choice but to “insert” itself into the operations in a given area. The Board is well-aware that a stand-alone railroad is naturally burdened in some respects that are unavoidable, but it is not a genuinely separate carrier. Indeed, the Board has largely rejected this notion by virtue of its adoption of ATC rather than market-based revenue divisions and its view that the SARR is essentially just a miniature version of the incumbent railroad. Under CSXT’s argument, no matter how well a SARR performed vis-à-vis the incumbent, it could never succeed. Such a position is untenable and inconsistent with past cases and the key purposes of the *Coal Rate Guidelines*.

Mr. Orrison also observes that the CERR’s traffic selection, interchange points, operating plan and train dwells do not exacerbate the challenges faced by dispatchers in moving trains through the network nor does the addition of a “new” carrier into the Chicago region represent an epitome of inefficiency. The design of the CERR network and selection of traffic took into full consideration of the complexities of the Chicago region. Moreover, the CERR improves the operations and infrastructure therein by, for example, two new interchange tracks between MP 25.5 and MP 23.0 to provide additional network capacity within the Chicago region to receive and convey trains of the traffic

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<sup>172</sup> *Id.*

selected by the CERR. These interchange tracks also provide buffer capacity in the new CERR network to account for the level of diamond crossing activity that occurs on a daily basis at 75<sup>th</sup> Street Interlocking. Likewise, from Pine Junction to MP 246.3 Curtis Junction, the new CERR designed and constructed 2.50 miles of double main track and 7.86 miles of interchange tracks providing for up to six (6) train buffer network capacity between Pine Junction and Curtis Junction.

The new CERR does not increase the number of trains operating through Chicago – it actually moves the same number of selected trains over a newly built network, and it does it faster than the real-world CSXT. Thus, CSXT’s spurious comments are inapposite.

**a. Traffic Flow and Interchange Points**

CSXT accepts most of the Consumers’ traffic flow and interchange point evidence.<sup>173</sup> However, CSXT rehashes its proposed modifications to the interchange points at Dolton, Curtis and Pine Junction.<sup>174</sup> As explained in Part III-B, Consumers has rejected the modifications at Dolton and Curtis, and accepted the inclusion of the 0.6 mile Buffington Connection at Pine Junction.

**b. Track and Yard Facilities**

CSXT agrees with almost all of the track and yard facilities proposed by Consumers on Opening.<sup>175</sup> CSXT adds an additional siding near the Campbell

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<sup>173</sup> *Id.* at III-C-46.

<sup>174</sup> *Id.* at III-C-46-47.

<sup>175</sup> *Id.* at III-C-47.

plant and an additional bad-ordered track in the Barr Yard for the Consumers coal cars it alleges were bad-ordered and delivered to Barr Yard.<sup>176</sup> Consumers rejects these additions.

Consumers' and CSXT's own RTC models both indicate there is no need for the additional siding near the plant. Indeed, in Part III-B, Consumers demonstrated that even though CSXT put this additional track in its Reply RTC Model, the trains did not use it. Moreover, Consumers has demonstrated through its Opening and Rebuttal RTC Model runs that Consumers' trains can operate efficiently between Porter and West Olive using the two sidings that Consumers provided on Opening and Rebuttal. Thus, there is no need for the additional siding.

CSXT also proposes to install air supply facilities for its additional sidings and possibly other sidings.<sup>177</sup> Air is not required. Consumers is not including the additional siding. Moreover, the other two sidings between Porter and West Olive specified by Consumers, and accepted by CSXT, do not block any public grade crossings. Thus, there is no need for the installation of air, especially since, unlike CSXT in the real-world, Consumers' operating plan does not call for the removal of the road locomotives when stopping a train on a siding (a practice observed by Mr. Orrison and Mr. Holmstrom during the inspection trip of the territory in July 2015). Mr. Orrison also determined that the installation of air by

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at III-C-48.

CSXT on certain real-world sidings between Porter and West Olive demonstrates clear and correctable inefficiencies in CSXT's operation – these facilities were apparently added after Mr. Orrison's tenure as General Manager of the territory. Mr. Orrison also observes that coal train car brakes are automatically in a “brake is on” mode when there is no air on the train. CSXT has installed air at a siding to keep the “brakes pumped off” leaving a charged train, which can be a danger to the public if someone “bottles the air” and releases the hand brakes. The result is a run-away trains and potential vehicle collision or derailment.

**c. Trains and Equipment**

**i. Train Sizes**

CSXT accepts Consumers' Opening approach to train sizes, except CSXT argues again for a slight modification to train sizes to its alleged inclusion of bad-ordered Consumers coal cars on certain West Olive-bound loaded trains. As explained above, CSXT's changes are unsupported and its alleged fix (*i.e.*, rerouting Consumers' trains through Barr Yard rather than the placing the cars on a Consumers train already moving through Barr Yard) is illogical.<sup>178</sup> Thus, Consumers has made no adjustment to its Rebuttal train sizes.

CSXT also mentions in passing its adjustments to growth trains due to its incorrect interpretation of CSXT's ISAs with other carriers. As explained above, CSXT's growth train adjustments are flawed, its interpretation of the ISAs is incorrect, and CSXT's rhetoric belies the fact that it only made adjustments to

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<sup>178</sup> See CSXT Reply e-workpaper “CERR CSXT Reply - Consumers.zip.”

two train symbols.<sup>179</sup> Except as described above, Consumers has maintained its Opening train sizes and growth trains.

**ii. Locomotives**

**(a) Road Locomotives**

On Opening, Consumers determined that the CERR requires a total of 12 locomotives to transport its trains moving in the first year of operations, including spares.<sup>180</sup> In addition, all of the CERR's interline trains move in run-through service. This means that the locomotives generally are not removed from a train by either railroad at the interchange point, but stay with the train. Run-through power is used routinely by all Class I railroads (including CSXT) for interline unit and other trainload movements. Run-through power is a regular feature of SAC cases. *See, e.g., Xcel I* at 24.

As Consumers explained on Opening, under the run-through concept, the number of locomotives that each railroad provides for a particular joint movement is allocated on the basis of the amount of time the locomotives spend on each railroad as a percentage of total movement time, adjusted for any differences in locomotive horsepower (*i.e.*, horsepower hours). Each railroad provides the required number of locomotives, which are put into a pool for the specific movements in question. The CERR's road locomotive requirements take

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<sup>179</sup> *See* CSXT Reply e-workpaper "Peak Period Trains.xlsx," tab "Ref\_MaxSize," cell F4 and range F327:H329.

<sup>180</sup> *See* e-workpaper "CERR Operating Statistics Open.xlsx," tab "Summary," cell K41.



into account the need to equalize the locomotive power used in run-through service for interline trains, and an appropriate spare margin and peaking factor were applied as well.

In Consumers' RTC model, all CERR trains have two locomotives. If trains received by the CERR in interchange have additional locomotives, the configuration is not changed when the trains enter the CERR system. To the extent such trains contain more than two locomotives, the horsepower equivalent in ES44-AC locomotives is assumed since CSXT's train movement records do not show the locomotive types that were actually on the Base Year trains. However, all locomotives over and above two are isolated with throttles in the idle position while on the CERR since no more than two locomotives are needed to move most of the CERR's trains.

CSXT accepts Consumers' approach to run-through locomotives. However, CSXT erroneously argues that Consumers must also incur the costs associated with extra units that are not needed or used on the CERR, which are included on trains delivered by the CERR's interchange partners.<sup>181</sup> In other words, CSXT accepts that these units are not needed and can be idled, but argues that the CERR must still pay for them. Consumers rejects this approach.

The CERR does not need these locomotives, and could remove them from the trains when received in interchange, but this would be pointlessly

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<sup>181</sup> CSXT Reply at III-C-50-52.

inefficient. Moreover, CSXT ignores that the interchange partner could also remove these locomotives if they were vital to maintaining locomotive balance or for other operational needs. Moreover, the extra locomotives are often on such trains for a reason that has nothing to do with the requirements of operating the train over the CERR segments (*e.g.*, to address potential imbalances in train movements). Thus, the CERR may be aiding the locomotive needs of its interchange partners, but it is not charging for this service. In other words, the interchange partners have no expectation of compensation; it is inconsistent with the actual requirements to move these trains, for which the CERR should not be forced to incur such costs; and since the records provide no data as to locomotive type, it is not practical to calculate the particular time-related costs for such locomotives. Thus, on Rebuttal, Consumers has not included these additional costs.

The count of road locomotives for the peak year includes a spare margin and a peaking factor, consistent with prior STB decisions (*e.g.*, *Sunbelt* at 35). The spare margin and peaking factor for the ES44-AC locomotives were calculated as described below.

**(b) Yard and Helper Locomotives**

On Opening, Consumers included one SD40 locomotive to handle the limited work required in the Barr Yard and to assist with certain work trains from time-to-time. CSXT adds a second SD40 yard locomotives arguing that the single locomotive cannot: (i) switch out bad-ordered cars; (ii) transfer cars to the

car shop; (iii) perform occasional switching in the yard; and (iv) power a work train from time to time.<sup>182</sup> In CSXT's view, the CERR's locomotive would need a companion because it might break down; it cannot handle all of this work; and another locomotive would surely be needed to switch the alleged Consumers bad-ordered cars into Consumers' trains.<sup>183</sup> CSXT's additional SD40 for the Barr Yard is unnecessary.

CSXT's witnesses plainly do not understand how yard operations, as posited by the CERR, will work. For example, in many cases it is easier and more efficient to use road locomotives to switch out bad-ordered cars. The yard locomotive can certainly assist in this function, but it is not vital. The yard locomotive's principal work is moving those bad-ordered cars to and from the car shop. Moreover, there is no general switching work in Barr Yard, and Consumers has rejected the addition of such work for the alleged bad-ordered Consumers cars. Mr. Orrison also points out that CSXT's witnesses, due to their lack of on-the-ground experience, may not be aware that 75-80% of all bad-ordered cars can be repaired in-train and without the need for movement to a car shop. Moreover, even if the locomotive were unavailable for a day or two, the CERR would not grind to a halt because car repairs are generally not instantaneous and it may be some time before any given car is returned to a train. CSXT also ignores that the SD40 is located in a yard with a locomotive repair shop. Thus, general running

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<sup>182</sup> *Id.* at III-C-52-54.

<sup>183</sup> *Id.*

repairs are easily accomplished on-site. On the off chance a locomotive would need to be taken off-site, all of the major shops have units that can be used on a temporary basis. Thus, Consumers has not added an additional SD40 for the Barr Yard.

CSXT also adds two additional SD40 locomotives as helper locomotives to aid the Consumers trains up the grade at Saugatuck Hill near the Campbell plant.<sup>184</sup> As explained below, these units can be handled as run-through locomotives or dedicated locomotive. In either case, the CERR essentially needs dedicated units. Therefore, Consumers has added two dedicated units.

CSXT also drops a footnote in this section where it quietly proclaims the need for a wildly expensive and outdated turntable in the Barr Yard.<sup>185</sup> CSXT's argument is muddled and largely incomprehensible, but it appears that CSXT is arguing that Consumers' alleged unusual traffic selection process put it in a position where it will have little or no notice of when trains will arrive in Barr Yard for interchange, which as explained in above is nonsense, and that somehow having a turntable will make it faster to turn yard locomotives thereby reducing interruptions to mainline operations. CSXT's arguments are irrational.

First, the CERR will know what trains it is handling since it has regular insight to such trains, just as the other carriers do in Chicago. Thus, CSXT's argument on this point is a smokescreen. Second, the CERR already has

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<sup>184</sup> *Id.* at III-C-54.

<sup>185</sup> *Id.* at III-C-54 n.97.

a wye track to make such turns if needed, and the turntable is, therefore, unnecessary. Third, no freight railroad installs turntables today. In Mr. Orrison's experience, the last time CSXT installed a turntable was at Clifton Forge in the 1990's, and that was only because it was not possible to construct a feasible wye track. Moreover, throughout the 1980's and 1990's, CSXT retired or removed most of its turntables in favor of wye tracks. For these reasons, Consumers has not added a turntable on Rebuttal.

**iii. Spare Margin**

On Opening, Consumers calculated a spare margin of { } for ES44AC locomotives and { } for SD40 locomotives. These figures were derived from locomotive utilization data provided by CSXT in discovery.<sup>186</sup> The spare margin calculations in Opening are based on a three-year average by locomotive type of Out-of-Service time divided by the sum of Available time, Out-of-Service time, Stored time and Unknown time. In Reply, CSXT claimed that Consumers' calculations for spare margins included the following three (3) flaws: (1) Consumers included Out-of-Service time in the total locomotive time used as the denominator of the calculation; (2) Consumers included Unknown time in the total locomotive-time denominator; and (3) Consumers failed to include Fallout and Repair time.<sup>187</sup>

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<sup>186</sup> See Consumers Opening e-workpaper "Locomotive Utilization\_Opening.xlsx," which is based on CSXT discovery document "Locomotive Utilization.xlsx."

<sup>187</sup> CSXT Reply at III-D-20.

In its Reply workpapers, CSXT used Fallout and Repair times in the numerator of the spare margin calculation instead of using Out-of-Service time, which Consumers used in Opening. After an examination of CSXT's Reply evidence, Consumers agrees to exclude Out-of-Service time and Unknown time from the denominator of the spare margin calculations. However, CSXT's claim that Consumers should include Fallout and Repair time in the numerator of the spare margin calculation instead of Out-of-Service time is incorrect. Fallout and Repair times have been identified by CSXT as "Specific Time Loss Breakouts" and are not part of CSXT's definition of Total Known time. CSXT defines Total Known time as the sum of Available time, Out-of-Service time, Offline time and Stored time.<sup>188</sup> Also, CSXT defined Fallout time as:

Time spent from locomotive failure until it is "shopped" at a repair location. It will typically overlap - to some degree - with Out of Service (shop) time. Therefore it will overlap with both Available Time and Out of Service Time.<sup>189</sup>

CSXT defined Repair time as:

Time spent from "shopping" until assigned to next train. It will typically overlap - to some degree - with Out of Service (shop) time. Therefore it will overlap with both Available Time and Out of Service Time.<sup>190</sup>

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<sup>188</sup> See CSXT discovery document "Locomotive Utilization.xlsx," tab "Data," columns E through I (included as a Rebuttal e-workpaper).

<sup>189</sup> See CSXT discovery document "Locomotive Utilization.xlsx," tab "Data Dictionary," cell B15 (included as a Rebuttal e-workpaper).

<sup>190</sup> See CSXT discovery document "Locomotive Utilization.xlsx," tab "Data Dictionary," cell B17 (included as a Rebuttal e-workpaper).

Based on CSXT’s own definitions, both Fallout time and Repair time overlap Available time and Out-of-Service time, and as a result, should not be included in the spare margin calculation in place of Out-of-Service time. CSXT’s use of Fallout and Repair time in the numerator of the spare margin calculation results in some Available time being included in what should be “unavailable” time. Out-of-Service time is the correct way to reflect unavailable time in the spare margin calculation.

On Rebuttal, with the modification noted above, Consumers calculates spare margins by dividing Out-of-Service time by the sum of Available time and Stored time. The resulting calculation produces spare margins of {        } for ES44AC locomotives and {        } for SD40 locomotives.<sup>191</sup>

**iv.     Peaking Factor**

In its Reply, CSXT claims that Consumers incorrectly based the calculation of its peaking factor on a 9-day peak period and not a 7-day peak week as has been done in previous cases.<sup>192</sup> Consumers agrees that use of a 7-day peak week is the correct methodology for calculating the peaking factor. As a result, on Rebuttal Consumers calculates the peaking factor by dividing the daily average locomotives for the peak week by the daily average locomotives for the peak year.

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<sup>191</sup> See Consumers Rebuttal e-workpaper “Locomotive Utilization\_Rebuttal.xlsx,” tab “Sheet1.”

<sup>192</sup> See CSXT Reply at III-C-55.

The result, which includes Consumers' revisions to peak period trains described above, is a peaking factor of 1.226.<sup>193</sup>

**d. Railcars**

CSXT accepts Consumers' approach to the development data concerning car ownership and car types.<sup>194</sup> CSXT restates Consumers' car-related counts and figures to reflect its RTC Model analysis. Again, CSXT suggests that Consumers' RTC Model is fatally flawed and should be rejected in favor of CSXT's supposedly "correct" parameters.<sup>195</sup> Consumers has rejected most of CSXT's modifications to the RTC Model, for the reasons explained herein, and it has utilized its Rebuttal RTC Model statistics to develop car counts and costs as described in Part III-D-2.

**2. Service Efficiency and Capacity**

As explained on Opening, the CERR is designed to meet the transportation needs of the traffic that it is handling. *Sunbelt* at 12. Specifically, the CERR provides unit train, intermodal, and merchandise service using the same train configurations and routes that the CSXT uses in the real world. As the Board stated in *Sunbelt* at 12:

[A SARR's] operating plan must be able to meet the transportation needs of the traffic to be served, [but] it need not match the existing practices of

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<sup>193</sup> See Consumers Rebuttal e-workpaper "CERR BASE YEAR TRAIN LIST DEVELOPMENT vF Rebuttal.xlsx," tab "Cerr Trn Stats," cell BW2.

<sup>194</sup> CSXT Reply at III-C-56.

<sup>195</sup> *Id.* at III-C-56-57.



the defendant railroad, as the objective of the SAC test is to determine what it would cost to provide the service with optimal efficiency. The assumptions used in the SAC analysis, including the operating plan, nonetheless must be realistic, *i.e.*, consistent with the underlying realities of real-world transportation.

Despite CSXT's many protestations, CSXT has not, in fact, made radical changes to Consumers' Opening RTC evidence as evidenced by CSXT's own RTC results. Likewise, CSXT's specious suggestions that the transit times for CERR trains are unrealistic is again belied by CSXT's own RTC results. As such, Consumers has largely retained its Opening RTC model. The minor modifications discussed herein are largely inconsequential and vary little from Consumers' Opening evidence.

Consumers notes that CSXT did not provide specific responses to Consumers' Opening evidence under parts of this subsection, including the following subsections:

- a. **Procedure Used to Determine the CERR's Configuration and Capacity**
- b. **Developing Base Year and Peak Week Train Data**
  - i. **Consumers' Reasonable Use of CSXT Provided Traffic Data to Develop Train Lists and Operating Evidence**
    - (a) **Train List Overview**
    - (b) **Analysis of Combined Waybill, Car Shipment and Car Event Data**
    - (c) **Analysis of Train Sheet Data**

CSXT did not specifically take issue with or address this section of Consumers Opening evidence. However, CSXT did argue that Consumers should have used this Train Sheet data to divine additional foreign road delays during the peak week. As explained above, CSXT's arguments on this point are without merit.

- (d) **Compiled Train List**
- (e) **Final Adjustments**
  - (i) **On-SARR and Off-SARR Junctions**
  - (ii) **Consist Data**
  - (iii) **Loading and Unloading (Consumers Eastern Coal Trains)**
  - (iv) **Trains Carrying Consumers' Issue Traffic**
- c. **Peak Week Train List Final Development Process**

CSXT did not specifically take issue with or address this section of Consumers' Opening evidence. However, CSXT did argue that Consumers'

Opening growth train development violated ISA terms and was unrealistic in its assumptions that train length would grow over time. As discussed in the Introduction above, CSXT's arguments are inconsistent with its own operations; inconsistent with CSXT's plan for future operations; inconsistent with the purpose of the ISA; and overblown because CSXT only made adjustments to train lengths for trains covered by two train symbols.

CSXT's silence concerning the above headings, which covered 28 pages of Consumers' Opening evidence, is telling. That evidence described Consumers' process for analyzing, selecting and perfecting a train list for analysis in the RTC Model, which is a daunting task. The fact that CSXT has almost no criticisms on the myriad of steps of the analyses it took to develop the train list, including all of the operating plan parameters that underlie the development, indicates, once again, that Consumers' operating witnesses got it right.

Finally, Consumers notes that as a result of the updates to the traffic volumes, particularly the use of actual 2015 volumes rather projected 2015 volumes, the peak period train list was modified slightly. Specifically, the 2015 volume update rippled through all subsequent years of the traffic forecast model, resulting in updated peak year volumes.<sup>196</sup> This resulted in changes to the volume

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<sup>196</sup> See Consumers Rebuttal e-workpaper "Train Forecast table\_09202015 v7 with TRN Idx\_Rebuttal.xlsx," tab "Growth Calc," columns A-N.

indices Consumers used to develop CERR peak-year train requirements.<sup>197</sup>

Applying the updated indices to the base year train list<sup>198</sup> resulted in the removal of four (4) peak period growth trains,<sup>199</sup> and it resulted in slight modifications to the peak period consists for 123 of the remaining trains.<sup>200</sup>

**d. Operating Inputs to the RTC Model<sup>201</sup>**

On Opening, the following elements of the CERR’s operating plan for the CERR were inputted into the RTC Model for purposes of simulating the CERR’s peak-period operations, ensuring the sufficiency of the infrastructure, and developing train transit times:

<b>REBUTTAL TABLE III-C-6 RTC MODEL INPUTS AND DESCRIPTIONS</b>	
<b>RTC Model Input</b>	<b>Description</b>
Road Locomotives	Each train operates with two ES44-AC locomotives while on the CERR unless operational requirements differ as explained below.
Train Weight and Size	The forecasted actual size and trailing weight for each train carrying traffic in

<sup>197</sup> See Consumers Rebuttal e-workpaper “Train Forecast table\_09202015 v7 with TRN Idx\_Rebuttal.xlsx,” tab “Sheet1,” column H.

<sup>198</sup> See Consumers Rebuttal e-workpaper “CERR BASE YEAR TRAIN LIST DEVELOPMENT vF Rebuttal.xlsx,” tab “Cerr Trn Stats,” column BS. See also tab “Rebuttal Notes,” range B8:C16.

<sup>199</sup> See Consumers Rebuttal e-workpaper “CERR BASE YEAR TRAIN LIST DEVELOPMENT vF Rebuttal.xlsx,” tab “Cerr Peak Trains,” cell CW4.

<sup>200</sup> See Consumers Rebuttal e-workpaper “CERR BASE YEAR TRAIN LIST DEVELOPMENT vF Rebuttal.xlsx,” tab “Cerr Peak Trains,” cell CU4 and columns CQ-CS.

<sup>201</sup> CSXT change the designation of this heading from “d” to a higher level “3”. Consumers has retained its Opening organization.

	the CERR traffic group in the peak week is used. Growth trains replicate trains that moved in the base year with consist adjustments to accommodate growth.
Maximum Train Speeds	The maximum track speed on the CERR is 40 MPH.
Dwell time at on-SARR interchange points	Each train interchanged on-SARR will dwell for 30 minutes.
Dwell time for 1,000 and 1,500 mile train inspections and fueling.	Each train requiring such an inspection, as explained below, is allotted 1:45 for such service.
Helper service	30 minutes is allotted for connecting the helper locomotives. No time was allotted for disconnecting the helpers because CERR has assumed it will employ “Helper Link” technology so helpers can be cutoff “on-the-fly.”
Time to depart 59 <sup>th</sup> St. Intermodal facility.	30 minutes are allotted for the train crew to perform a set and release of the brakes and depart the terminal.
Dwell time at the Campbell plant	Average historical dwell time is 47 hours.
Time Allowed for Traversing Trackage Rights Segments	{ } from 75 <sup>th</sup> St. (BRC) to Porter via the NS; { } from Porter to 75 <sup>th</sup> St. (BRC) via the NS; { } from Curtis to Porter via the NS; { } from Porter to Curtis via the NS.
Time for foreign road delays	Crossing diamond delays were input in the RTC Model as described below.
Time for random outages	Random outages were input into the RTC Model as described below.
Crew change times	There are no crew changes required on the CERR.
Track inspection and program maintenance windows	As explained below, no separate time has been allotted for these activities.

As discussed below, CSXT has largely accepted the RTC inputs that Consumers used on Opening (notwithstanding foreign road delays, which are addressed in detail above). However, Consumers has accepted several modifications as discussed below.

**i. Road Locomotive Consists**

CSXT accepts Consumers' use of two ES44AC locomotives to move the CERR trains.<sup>202</sup> CSXT also accepts that additional locomotive received in interchange would be idled while operating on the CERR.<sup>203</sup>

**ii. Train Size and Weight**

CSXT accepts Consumers' Opening train size and weights for historical trains being replicated.<sup>204</sup> As discussed in detail above, CSXT does not agree with Consumers' assumptions concerning growth trains. For the reasons Consumers details above, CSXT's arguments concerning growth trains are without merit. Consumers continues to use the same approach to growth trains on Rebuttal.

**iii. Maximum Train Speeds**

CSXT accepts Consumers' Opening maximum track speed of 40 MPH.<sup>205</sup> However, CSXT again complains that Consumers' RTC results are unrealistic and that CSXT's more accurately represent conditions in Chicago.

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<sup>202</sup> CSXT Reply at III-C-58.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at III-C-58-59.

<sup>205</sup> *Id.* at III-C-59.

However, as already explained, the parties' RTC results are almost indistinguishable. This is true again in Rebuttal as shown in Table III-C-7 below.

**iv. On-SARR Interchange Dwell Times**

On Opening, Mr. Orrison and Mr. Holmstrom allotted 30 minutes of dwell time at each of the CERR's on-SARR interchange locations. CSXT accepts the 30-minute interchange time.<sup>206</sup> However, CSXT argues that Consumers ignored certain foreign line delays transiting to BNSF's Corwith and Cicero Yards, as well as the UP connection at Ogden Junction. As explained above in the Introduction, CSXT's argument concerning these alleged foreign line delays is unsupported. Indeed, these alleged foreign line delays are simply enroute delays that occurred, without explanation and without any suggestion that they were a foreign line delay, in the general vicinity of the BNSF and UP connection points. As a result, Consumers has made no changes to its Rebuttal RTC Model to accommodate these unproven alleged foreign line delays.

**v. Dwell Times for 1,000 or 1,500 Mile Inspections**

On Opening, Mr. Orrison and Mr. Holmstrom allotted 1 hour and 45 minutes for 1,000 and 1,500 mile inspections, as well as fueling, that are performed on certain trains at Barr Yard. CSXT accepts Consumers' approach.<sup>207</sup>

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<sup>206</sup> *Id.* at III-C-60.

<sup>207</sup> *Id.* at III-C-61-62.

**vi. Helper Service**

As described on Opening, helper service is provided in the loaded direction for the issue traffic on Saugatuck Hill, which is located on the Grand Rapids Subdivision starting at MP CG 37.4 and continuing to MP 32.3. Specifically, Mr. Orrison and Mr. Holmstrom allotted 30 minutes for connecting the helper locomotives, and once the hill is crested, the helpers are disconnected using a standard Helper Engine Automated device while moving, which is the procedure used in the RTC Model. The helpers then return light back to the helper pocket track. CSXT accepted Consumers' helper procedure.<sup>208</sup>

CSXT, however, repeats its argument that the CERR should lease two dedicated SD40 locomotives to act as helpers.<sup>209</sup> As explained above, Consumers accepted the dedicated helpers versus providing such helpers through a run-through lease agreement.

**vii. Time to Depart CSXIT's 59<sup>th</sup> St. Intermodal Facility**

On Opening, Consumers did not model the 59<sup>th</sup> Street Intermodal facility in the RTC Model because the facility is separately operated by CSXIT. However, Mr. Orrison and Mr. Holmstrom did allot 30 minutes of crew time for the purpose of originating these trains. Thus, the crews are already on the clock when the train enters the RTC Model thereby ensuring that the proper crew

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<sup>208</sup> *Id.* at III-C-62.

<sup>209</sup> *Id.*



statistics are collected. As explained on Opening, this approach is very conservative because, in Mr. Holmstrom's experience, the road crews typically do not attach the power for such trains. Instead, this is handled by a contractor who also performs the brake test. The road crew members usually just board the train, perform a set and release the brakes and then depart.

On Reply, CSXT agrees with the 30 minutes of crew time allocated by Consumers for both originating and terminating a train at CSXIT's 59<sup>th</sup> Street Intermodal facility. However, CSXT points out that Consumers only counted the crew time, but it did not count the additional locomotive and cars hours associated with the 30 minute "interchange" time.<sup>210</sup>

Consumers agrees that this time should have been included, but inadvertently omitted this time when developing its operating statistics. To correct this omission, Consumers has included 30 minutes of train dwell time at CSXIT's 59<sup>th</sup> Street Intermodal terminal, in addition to the 30 minutes of crew time.

**viii. Dwell Time at Campbell**

On Opening, Consumers encountered some difficulties linking inbound and outbound Consumers coal trains. Thus, Consumers opted to use a dwell time of just over 50 hours – after examining the records kept in the ordinary course of business by Consumers – to model the inbound and outbound operations. CSXT takes issue with this approach.

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<sup>210</sup> *Id.* at III-C-63.

First, CSXT complains that, despite the average dwell time applied to the trains, Consumers' trains simply disappear in the model and that it would take at least 30 minutes to spot a train or pull a train.<sup>211</sup> Second, CSXT complains that Consumers did not link the trains, which CSXT claims it has done.<sup>212</sup>

Consumers linked the same four pairs of loaded/empty trains (as identified by train symbol) in its Rebuttal RTC model as CSXT entered in its Reply RTC model.<sup>213</sup> Consumers entered the same minimum dwell times at the Campbell Plant and delta days as entered by CSXT. This left six inbound loaded trains and one outbound empty train in Consumers' train list which were not linked.

As explained in Part III-D-1, when calculating locomotive requirements, CSXT did not rely on the RTC Model for dwell time at the Consumers plant. Instead, it used a figure of 19 hours. Consumers accepts this modification as explained in the same section.

**ix. Time Allowed for Traversing Trackage Rights Segments**

As explained on Opening, a majority of the issue traffic and some additional trains use the BRC facility between 75<sup>th</sup> St. and Rock Island Jct. and NS

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<sup>211</sup> *Id.* at III-C-65-66.

<sup>212</sup> *Id.* at III-C-66.

<sup>213</sup> Consumers Rebuttal WP, "Leaders Seeds 10-14 Crosswalk – w RTC Symbol Lookup – Rebuttal Update 2016 04-21 WORK.xlsx, tab "Leaders & Seeds 10-14 CROSS", Rows 21, 22, 24, 25, 30,31, 207 and 208. Note that the linked pairs of trains appear twice. Once with the loaded train and once with the empty train.

trackage rights from Rock Island to Porter (the connection to the Grand Rapids Subdivision). Consumers' RTC Modeling experts developed average transit times for the peak week trains in the RTC Model by reviewing similar data for the peak week in the base year.<sup>214</sup> CSXT accepts the transit times for CERR traversing these segments.<sup>215</sup>

**x. Time for Foreign Road Delays**

CSXT accepts the 75<sup>th</sup> Street Interlocking curfews, to accommodate Metra trains that Consumers' operating witnesses designated and which were applied in the RTC Model by Consumers.<sup>216</sup> CSXT also accepted Consumers' methodology for handling interference from Metra train operations.<sup>217</sup>

As discussed in extensive detail above, CSXT does not agree with Consumers' development of foreign line delays. As such, CSXT's RTC Model includes an additional 77 foreign line delays. As explained above, CSXT's criticism of foreign line delays is without merit, and Consumers has not added these delays to Rebuttal RTC Model.

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<sup>214</sup> See e-workpaper "Peak Period Base Year Train List With TrainsAllEvents LE.xlsx," tab "Train Transit Summary."

<sup>215</sup> CSXT Reply at III-C-67.

<sup>216</sup> *Id.* at III-C-68.

<sup>217</sup> *Id.*

**xi. Time for Random Outages**

CSXT accepts Consumers' evidence concerning random outages and their application to the RTC Model.<sup>218</sup>

**xii. Crew-Change Locations/Times**

As explained on Opening, the CERR has no on-SARR crew change points. The trains that are handled by CERR are all moved from their on-SARR to off-SARR point using one crew.

CSXT does not take issue with the crew districts. Instead, CSXT wrongly suggests the assumptions that Consumers is using are not credible because any number of events could occur that would require a "crew change."<sup>219</sup> CSXT is mixing concepts here.

None of the CERR trains requires a scheduled crew change at a scheduled point. This is completely different from the "recrew" argument that CSXT is making. In other words, if the CERR were taking a train 1,000 miles, the CERR operating plan would include predetermined crew change points. CSXT, on the other hand, is talking about a crew going dead under the hours of service law and having to be replaced enroute (*i.e.*, a recrew). Thus, the parties are talking past each other.

Notwithstanding the strange nomenclature, Consumers flatly disagrees with CSXT's absurd proposal, on Reply, that 16% of the Consumers

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<sup>218</sup> *Id.* at III-C-69.

<sup>219</sup> *Id.*

crews, operating in the Chicago terminal (not all the way to Campbell), need to be relieved.<sup>220</sup> Specifically, CSXT complains that Consumers' RTC workpapers show that nine percent of the CERR's trains through Chicago take more than four hours from departure to arrival and that four percent have run times exceeding four hours.<sup>221</sup> Thus, by CSXT's reckoning, 25% of the crews will be into their fifth hour when they arrive at their first destination.<sup>222</sup> CSXT then makes the unexplained leap that trains moving the other direction would not be available or that many would need to be repositioned.<sup>223</sup>

CSXT offers no proof of these claims. CSXT's assumptions are also fatally flawed. As demonstrated in the average transit times shown in Rebuttal Table III-C-7, many of the transits through the area are not even two hours long. So if a train crew were on a five-hour move from 71<sup>st</sup> Street to Curtis, that same crew could take a shorter reverse trip to Blue Island or Dolton. Any dispatchers or crew callers worth their salt could easily avoid the need for re crews. Moreover, because most of these moves are of short duration, the dispatcher and crew caller will already have insight into how trains are moving across the system, thereby reducing the likelihood of a re crew.

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<sup>220</sup> *Id.* at III-C-70.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

Consumers also demonstrated on Opening, and CSXT does not contest this point on Reply, that there is generally a balance in directional running from the various interchange points.<sup>224</sup> Thus, the crews are statistical likely to pick up reverse runs without incident. Moreover, CSXT ignores that one crew may move make several moves in a day, not just two moves, but Consumers necessarily had to use a simplifying device in determining the number of crews. Indeed, it is likely that Consumers' Opening calculation of crew requirements was overstated. In addition to the above, Consumers further addresses the recrew issue in Part III-D-3-a-ii. Rebuttal Table III-D-2, in particular, demonstrates the feasibility of the CERR crews making at least two moves per day.

On Rebuttal, Consumers did find that two West Olive-bound trains required recrew because the change in Campbell plant operations (*i.e.*, linking the empties and adding several additional empties) necessitated a wait on a siding for two trains, which thereby required a recrew due to the delay while waiting for a passing train that was now moving at a time that was different from that used on Opening.

**xiii. Track Inspections and Maintenance Windows**

CSXT agrees with Consumers on how track inspections would be conducted.<sup>225</sup> Likewise, CSXT agrees that no maintenance windows are required during the peak period.<sup>226</sup>

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<sup>224</sup> See Consumers Opening Table III-C-4.

<sup>225</sup> CSXT Reply at III-C-72.

e. **Results of the RTC Model Simulation**

As noted above, CSXT repeatedly attempts to convince the Board that its RTC Model is vastly superior to Consumers' Opening RTC Model and that somehow there are major differences between the parties when the transit times are compared. Further CSXT continues to insist in this section that, since so many delays were ignored by both parties, if they had been included, the CERR's transit times would be almost identical to the historical CSXT transit times. As explained multiple times by Consumers, CSXT's complaints are simply not valid. The significant difference in trains being handled by the CERR; the types of trains being handled; and the simplified operations account for the major differences between CSXT's real-world data and those of the Consumers' and CSXT's RTC Models. Even with the extra delays added by CSXT, the differences are negligible. To be sure, CSXT suggests that the differences are as great as 34% between Reply and Opening, but that one example covers Dolton to 59<sup>th</sup> St. where CSXT added 30 minutes of dwell, and even then the difference was only 29 minutes. In other cases, CSXT's Reply transit times were *shorter* than Consumers' transit times.

On Rebuttal, Consumers' transit times have increased slightly or largely stayed the same as on Opening – except for those moving to and from CSXIT's 59<sup>th</sup> Street Intermodal facility, where 30 minutes of dwell time was

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<sup>226</sup> *Id.*

added. As shown in Rebuttal Table III-C-7, the CERR's transit times for crossover traffic remain superior to the historical CSXT times.

<b>REBUTTAL TABLE III-C-7 COMPARISON OF TRAIN TRANSIT TIMES</b>					
<b>On-SARR Station</b>	<b>Off-SARR Station</b>	<b>Historical Peak Period Trains (HH:MM:SS)</b>	<b>OPENING RTC (HH:MM:SS)</b>	<b>CSXT REPLY RTC (HH:MM:SS)</b>	<b>CERR REBUTTAL RTC (HH:MM:SS)</b>
22ND ST-71ST ST, IL	CURTIS, IN	{ }	2:56:20	3:22:00	3:05:35
CALUMET PARK CP, IL	CURTIS, IN	{ }	0:57:48		0:57:45
CHICAGO 59TH ST, IL	CURTIS, IN	{ }	1:55:54	2:17:00	2:26:46
CHICAGO 59TH ST, IL	DOLTON, IL	{ }	1:34:04	1:46:00	2:04:34
CHICAGO - BARR, IL	CURTIS, IN	{ }	1:42:14	1:48:00	1:41:54
CURTIS, IN	22ND ST, IL	{ }	3:17:26	3:19:00	3:21:16
CURTIS, IN	BRIGHTON PARK		2:38:45	2:38:00	2:51:41
CURTIS, IN	OGDEN JCT.		3:48:54	4:02:00	4:03:57
CURTIS, IN	BLUE ISL IHB CONN, IL	{ }	3:06:00	2:50:00	3:05:43
CURTIS, IN	CALUMET PARK CP, IL	{ }	0:59:55		0:59:40
CURTIS, IN	CHICAGO 59TH ST, IL	{ }	2:14:05	2:52:00	2:46:00
CURTIS, IN	CHICAGO - BARR, IL	{ }	1:45:04		1:45:07
CURTIS, IN	DOLTON, IL	{ }	1:30:55	1:36:00	1:30:29
DOLTON, IL (South)	OGDEN JCT.	{ }	3:34:39	3:26:00	3:38:24
DOLTON, IL (South)	CHICAGO 59TH ST, IL	{ }	1:22:35	1:51:00	2:01:07
DOLTON, IL (East)	CURTIS, IN	{ }	1:36:29	1:34:00	1:36:28
DOLTON, IL (South)	CURTIS, IN		1:49:47	1:41:00	1:48:31

Thus, the CERR has met the operational needs of its customers.

Moreover, Consumers has demonstrated that it has presented the best evidence of record and its operating plan, resulting RTC Model, operating statistics and operating costs should be accepted.



**3. Other**

**a. Crew Districts**

CSXT accepts the CERR's crew districts as proposed by Consumers on Opening.<sup>227</sup> CSXT, however, argues again that the CERR should incur additional recrew costs.<sup>228</sup> As explained above, CSXT recrew percentages are not credible and lack any credible basis or proof. Consumers has, therefore, rejected CSXT's additive.

**b. Other Crew Assignments**

Consumers' operating witnesses assigned a switching crew located at Barr Yard. The crew aids in the setting out of bad-order cars, the movement of such cars to the car shop if necessary, the inspection of trains and cars as necessary, and the movement of locomotives to and from the locomotive shop as needed. One person is on duty 24 hours a day for such services (12 hour shifts, 2 shifts per day). Each shift is 12 hours. In Part III-D, CSXT added an additional 24/7 crew member that would be available at Barr Yard.<sup>229</sup> For the reasons explained in Part III-D, Consumers has rejected this additional crew member.

CSXT accepts Consumers' helper crewing plan.<sup>230</sup>

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<sup>227</sup> *Id.* at III-C-77.

<sup>228</sup> *Id.* at III-C-78.

<sup>229</sup> *Id.* at III-D-44.

<sup>230</sup> *Id.* at III-C-79.

**c. 1,000/1,500 Mile Inspections**

CSXT accepts Consumers' plan for 1,000 and 1,500-mile inspections at West Olive and the Barr Yard.<sup>231</sup>

**d. Rerouted Traffic**

The CERR internally rerouted certain intermodal trains originating at the 59<sup>th</sup> Street Intermodal facility over the CERR rather via the BRC and UP's Villa Grove Subdivision. CSXT accepts this reroute.<sup>232</sup>

**e. Fueling of Locomotives**

CSXT accepts Consumers' plan for fueling of locomotives at Barr Yard and West Olive.<sup>233</sup>

**f. Train Control and Communications**

CSXT accepts Consumers' plan for train control and communications in the territory, including the fact that PTC is not required on this system, except to the extent CERR will need certain PTC-enabled equipment when operating as run-through equipment on other railroads.<sup>234</sup>

**g. Traffic Growth and Train Consists**

As discussed at length above, the CERR's RTC Model incorporates growth traffic into the peak period train list by adding cars to existing consists (up to the maximum train length for that type) or by adding growth trains as necessary.

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at III-C-80.

<sup>234</sup> *Id.*

CSXT disagrees with this approach. As explained above in the Introduction, CSXT's arguments are without merit. Consumers continues to use its Opening approach for growth trains and the addition of cars on trains.

**h. Miscellaneous Aspects of the Operating Plan**

CSXT had no response to this section.

**PUBLIC VERSION**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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CONSUMERS ENERGY COMPANY	)	
	)	
	)	
Complainant,	)	
v.	)	Docket No. NOR 42142
	)	
CSX TRANSPORTATION, INC.	)	
	)	
	)	
Defendant.	)	

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**REBUTTAL EVIDENCE OF COMPLAINANT**

**NARRATIVE**

**(Volume 2 of 2)**

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## ACRONYMS

The following acronyms are used:

AAR	Association of American Railroads
AEI	Automatic Equipment Identifier
AEO	2015 Annual Energy Outlook Update Forecast
AII-LF	All-Inclusive Less Fuel Index, published by AAR
AMTO	Assistant Manager of Train Operations
ATC	Average Total Cost
ATF	Across-the-Fence
BNSF	BNSF Railway Company
BRC	Belt Railway Company of Chicago
CAPM	Capital Asset Pricing Model
CERR	Consumers Energy Railroad
CMM	Coal Marketing Module
CMP	Constrained Market Pricing
CN	Canadian National Railway
COC	Cost of Capital
COD	Cost of Debt
COE	Cost of Equity
CP	Canadian Pacific Railway
CSXIT	CSX Intermodal Terminals, Inc.
CSXT	Defendant CSX Transportation, Inc.
CTC	Centralized Traffic Control
CWR	Continuous Welded Rail
DCF	Discounted Cash Flow
DOT	Department of Transportation
DP	Distributed Power Configuration
DTL	Direct To Locomotive
EIA	Energy Information Administration
EPA	Environmental Protection Agency
ERM	Environmental Resources Management
FAS-PAS	Fail-Safe Audible Signal—Power Activated Switch
FED	Failed/Dragging Equipment Detector
FRA	Federal Railroad Administration
GAAP	Generally Accepted Accounting Principles
GTM	Gross Ton-Mile
GWR	Gross Weight on Rail
HDF	On-Highway Diesel Fuel Index
IHB	Indiana Harbor Belt Railroad
MERC	Midwest Energy Resources Company
MGT	Million Gross Tons

MISO	Mid-Continent Independent System Operator
MLO	Manager of Locomotive Operations
MMM	Maximum Markup Methodology
MOW	Maintenance of Way
MRP	Market Risk Premium
MSDCF	Multi-Stage Discounted Cash Flow
MSRR	Michigan Shore Railroad
MTO	Manager of Train Operations
NS	Norfolk Southern Railway Company
PPI	Producer Price Index
PRB	Powder River Basin
PTC	Positive Train Control
RCAF-A	Rail Cost Adjustment Factor, adjusted for productivity
RCAF-U	Rail Cost Adjustment Factor, unadjusted for productivity
ROI	Return On Net Investment
ROW	Right of Way
R/VC	Revenue-to-Variable Cost
RSIA	Rail Safety and Improvement Act of 2008
RTC	Rail Traffic Controller Model
S&P	Standard & Poor's
SAC	Stand-Alone Cost
SARR	Stand-Alone Railroad
STEO	Short-Term Energy Outlook
T&E	Train & Engine
UP	Union Pacific Railroad Company
URCS	Uniform Railroad Costing System
WCTL	Western Coal Traffic League

## CASE GLOSSARY

The following short form case citations are used:

<i>AEPCO 2002</i>	<i>Ariz. Elec. Power Coop., Inc. v. BNSF Ry. &amp; Union Pacific R.R.</i> , Docket No. 42058 (STB served Aug. 20, 2002)
<i>AEPCO 2011</i>	<i>Ariz. Elec. Power Coop., Inc. v. BNSF Ry. &amp; Union Pacific R.R.</i> , STB Docket No. 42113 (STB served Nov. 22, 2011)
<i>AEP Texas</i>	<i>AEP Tex. N. Co. v. BNSF Ry.</i> , Docket No. 41191 (Sub-No. 1) (STB served Sept. 10, 2007)
<i>APS</i>	<i>Ariz. Pub. Serv. Co. and Pacificorp. v. The Atchison, Topeka &amp; Santa Fe Ry.</i> , 2 S.T.B. 367 (1997)
<i>Cargill</i>	<i>Cargill, Inc. v. BNSF Railway</i> , STB Docket No. 42120 (STB served Aug. 12, 2013)
<i>Coal Rate Guidelines or Guidelines</i>	<i>Coal Rate Guidelines, Nationwide</i> , 1 I.C.C.2d 520 (1985), <i>aff'd sub nom. Consolidated Rail Corp. v. United States</i> , 812 F.2d 1444 (3d Cir. 1987)
<i>Coal Trading</i>	<i>Coal Trading Corp. v. The Baltimore &amp; Ohio R.R.</i> , 6 I.C.C.2d 361 (1990)
<i>CP&amp;L</i>	<i>Carolina Power &amp; Light Co. v. Norfolk S. Ry.</i> , 7 S.T.B. 235 (2003)
<i>Duke/CSXT</i>	<i>Duke Energy Corp. v. CSX Transp. Inc.</i> , 7 S.T.B. 402 (2004)
<i>Duke/NS</i>	<i>Duke Energy Corp. v. Norfolk S. Ry.</i> , 7 S.T.B. 89 (2003)
<i>DuPont/NS</i>	<i>E.I. DuPont De Numours and Co. v. Norfolk S. Ry.</i> , Docket No. 42125 (STB served March 24, 2014, updated Oct. 3, 2014)
<i>Ex Parte No. 664</i>	<i>Petition of the Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model In Determining the Railroad Industry's Cost of Equity Capital</i> , Ex Parte No. 664 (Sub-No. 2) (pending)

<i>Ex Parte No. 715</i>	<i>Rate Regulation Reforms</i> , Ex Parte No. 715 (STB served July 18, 2013)
<i>Ex Parte No. 722</i>	<i>Railroad Revenue Adequacy</i> , Ex Parte No. 722 (pending)
<i>FMC</i>	<i>FMC Wyo. Corp. v. Union Pac. R.R.</i> , 4 S.T.B. 699 (2000)
<i>IPA</i>	<i>Intermountain Power Agency v. Union Pac. R.R.</i> , STB Docket No. 42136 (Complaint filed May 30, 2012)
<i>KCP&amp;L</i>	<i>Kansas City Power &amp; Light Co. v. Union Pac. R.R.</i> , STB Docket No. 42095 (STB served May 19, 2008)
<i>Major Issues</i>	<i>Major Issues in Rail Rate Cases</i> , Ex Parte No. 657 (Sub-No. 1) (STB served Oct. 30, 2006)
<i>M&amp;G</i>	<i>M&amp;G Polymers USA, LLC v. CSX Transp., Inc.</i> , NOR 42123 (STB served Sept. 27, 2012, updated Dec. 7, 2012)
<i>Nevada Power II</i>	<i>Bituminous Coal - Hiawatha, Utah to Moapa, Nevada</i> , 10 I.C.C.2d 259 (1994)
<i>OG&amp;E</i>	<i>Oklahoma Gas &amp; Electric Co. v. Union Pac. R.R.</i> , Docket No. 42111 (STB served July 24, 2009)
<i>Otter Tail</i>	<i>Otter Tail Power Co. v. BNSF Ry.</i> , Docket No. 42071 (STB served Jan. 27, 2006)
<i>Sunbelt</i>	<i>Sunbelt Chlor Alkali Partnership v. Norfolk S. Ry.</i> , Docket No. 42130 (STB served June 20, 2014)
<i>TMPA</i>	<i>Texas Mun. Power Agency v. Burlington N. and Santa Fe Ry.</i> , 6 S.T.B. 573 (2003)
<i>TPI</i>	<i>Total Petrochemicals &amp; Refining USA, Inc. v. CSX Transp., Inc.</i> , Docket No. 42121 (Complaint filed May 3, 2010)
<i>WFA I</i>	<i>Western Fuels Ass'n, Inc. &amp; Basin Electric Power Coop. v. BNSF Ry.</i> , STB Docket No. 42088 (STB served Sept. 10, 2007)
<i>WFA II</i>	<i>Western Fuels Ass'n, Inc. &amp; Basin Electric Power Coop. v. BNSF Ry.</i> , Docket No. 42088 (STB served Feb. 18, 2009)



- WPL*                      *Wisconsin Power & Light Co. v. Union Pac. R.R.*, 5 S.T.B. 955 (2001)
- WTU*                      *West Tex. Utils. Co. v. Burlington N. R.R.*, 1 S.T.B. 638 (1996), *aff'd sub nom. Burlington N. R.R. v. STB*, 114 F.3d 206 (D.C. Cir. 1997)
- Xcel I*                     *Public Service Co. of Colorado d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 589 (2004)
- Xcel II*                    *Public Serv. Co. of Colorado d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry.*, Docket No. 42057 (STB served Jan. 19, 2005)

### **III-D Operating Expenses**

### III. D. OPERATING EXPENSES

On Opening, Consumers provided for the necessary staffing and operating expenses to support the operations of the CERR. The functions covered included annual operating expenses for equipment, personnel, information technology, maintenance-of-way (“MOW”), taxes, insurance, and loss and damage, together with the development of the related service units and costs.

The expert witnesses responsible for the evidence in Consumers’ Opening and again in its Rebuttal, include John Orrison and Robert Holmstrom (Operating and General & Administrative (“G&A”) personnel and their equipment needs, and the CERR’s outsourcing plan), Joseph Kruzich (IT requirements and costs), Lee Meadows (MOW plan, personnel and costs), and Brian Despard (the balance of Part III-D including, *inter alia*, locomotive and freight car requirements, personnel compensation, outsourcing costs, equipment lease rates and operating unit costs, taxes, loss and damage costs, travel expenses, and insurance costs). On Reply, CSXT raised several operational issues that relate to locomotive counts. As such, Mr. Orrison and Mr. Holmstrom, Consumers’ operating experts, also co-sponsor Consumers’ Rebuttal on those matters.

In contrast, CSXT’s Reply evidence on the operational needs affecting locomotive requirements is not sponsored by any witness with a railroad operations background. Likewise, CSXT’s train crew and non-train operating personnel is not sponsored by any witness with railroad operational experience, let alone railroad operational staffing experience.

CSXT also takes positions on Reply that the Board is all too familiar with from other railroads in SAC cases. First, CSXT assumes that virtually all employees must be saddled with three or more layers of management. No matter the function, CSXT adds more supervisors. As explained, herein, the additional management, with one exception, is just fattening the staff without providing for increased functionality. Second, CSXT continues to rehash arguments that the Board has already settled multiple times, such as the number of shifts that a train crew can work. Third, CSXT suggests, just as it did with the operating plan, that the sum of CSXT's criticisms suggest that Consumers' evidence is fatally flawed. Again, CSXT's broad argument is without merit, as are most the changes posited herein.

Consumers' Rebuttal costs reflect minor adjustments to its Opening costs which stem from changes to its RTC Model, as well as several issues that CSXT raised on Reply, as discussed below. Consumers' calculation of the Rebuttal annual operating expenses for 2015, in the CERR's first year of operations, are shown in Rebuttal Table III-D-1 below.

<b>REBUTTAL TABLE III-D-1 CERR 2015 OPERATING EXPENSES (\$ Millions)</b>				
	<b>Opening</b>	<b>Reply</b>	<b>Rebuttal</b>	<b>Difference (Rebuttal v. Reply)</b>
Locomotive Lease	{ }	{ }	{ }	{ }
Locomotive Maintenance	{ }	{ }	{ }	{ }
Locomotive Operations	{ }	{ }	{ }	{ }
Railcar Lease	\$5.0	\$4.7	\$5.1	\$0.4
Materials & Supply Operating	\$0.6	\$0.7	\$0.6	-\$0.1
Train, Engine and Yard Personnel	\$7.1	\$9.0	\$7.2	-\$1.8
Non-Train Operating Personnel	\$5.0	\$6.9	\$5.1	-\$1.8
General & Administrative	\$6.9	\$11.2	\$7.0	-\$4.2
Loss & Damage	{ }	{ }	{ }	{ }
Ad Valorem Tax	{ }	\$1.2	\$2.0	\$0.8
Maintenance-of-Way	\$8.6	\$13.2	\$8.8	-\$4.4
Insurance	\$2.0	\$2.4	\$2.1	-\$0.3
Startup and Training	\$2.7	\$3.3	\$2.7	-\$0.6
Joint Facilities	\$1.5	\$4.4	\$1.8	-\$2.6
Intermodal Lift	{ }	{ }	{ }	{ }
<b>Total*</b>	<b>\$54.3</b>	<b>\$66.3</b>	<b>\$56.8</b>	<b>-\$9.5</b>

\* Total may differ slightly from the sum of the individual items due to rounding.

The source of the numbers in Rebuttal Table III-D-1 is Consumers Rebuttal e-workpaper “CERR Operating Expense\_Rebuttal.xlsx,” tab “DCF Transfer.”

**1. Locomotives**

On Opening, Consumers determined that the CERR would require 12 locomotives.<sup>1</sup> Consumers’ calculation of road locomotive requirements was

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<sup>1</sup> See Consumers Opening at III-D-7.

based on the CERR's Operating plan and its RTC Model results. On Reply, CSXT increases Consumers' Opening road locomotive calculation of 12 to 18.<sup>2</sup> CSXT's revised calculation is accompanied by yet another long explanation of the supposed flaws in Consumers' operating plan. Specifically, CSXT complains:

1. The CERR did not account for certain foreign line delays.<sup>3</sup>

As explained in Part A of the Introduction to Part III-C, CSXT's additional "foreign line" delays are unsupported and inconsistent with CSXT's own records.

2. The CERR did not account for hold times before entering the BNSF or UP track near the Cicero, Corwith or Proviso Yards.<sup>4</sup> As explained, in Part A of the Introduction to Part III-C, CSXT's supposed hold times are unsupported and CSXT provided no proof that the enroute delays were caused by the BNSF or UP.

CSXT also rehashes, over 18 pages, a number of other arguments it raised in Part III-C, including its incorrect argument that Consumers did not account for run-through locomotives included on trains, but not required for operations on the CERR.<sup>5</sup> As explained in Part III-C-2-a, CSXT's arguments in favor of counting these locomotives in the run-through calculation are inconsistent with: (i) CSXT's acceptance of the approach used by Consumers on Opening for

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<sup>2</sup> See CSXT Reply at Table III-D-5.

<sup>3</sup> *Id.* at III-D-5.

<sup>4</sup> *Id.* at III-D-6.

<sup>5</sup> *Id.* at III-D-13-16.

locomotive consist requirements; (ii) with the fact that the locomotives are placed on the train for the convenience of the connecting carriers, and the CERR is transporting those locomotives without compensation; and (iii) with the fact that interchange partners have no expectation of compensation.

Below, Consumers addresses the other various arguments that CSXT makes for increasing locomotives in the order in which they were presented in CSXT's Reply Evidence.

Locomotive Time at 59<sup>th</sup> Street Intermodal Facility. As explained in Part III-C-2-d-vii, on Opening, Consumers included 30 minutes of crew time to originate/terminate shipments at CSXT's 59<sup>th</sup> Street Intermodal facility. Consumers also agreed with CSXT that the 30 minutes should include locomotive time as well as crew time. Consumers has made the necessary adjustment in its Rebuttal RTC model and in the corresponding operating expenses.

Locomotive Time as West Olive. On Opening, Consumers inadvertently excluded the time that locomotives might dwell at the Consumers Plant. Specifically, the locomotives do not stay with the train at the plant. Rather, as Consumers explained on Opening, the locomotives are removed from the train, fueled on-site, and then placed on a different, outgoing empty train.<sup>6</sup> CSXT

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<sup>6</sup> See Consumers Opening at III-C-71.

allocated 19 hours for the locomotive dwell time at the plant on Reply.<sup>7</sup>

Consumers accepts and incorporates CSXT's calculation on Rebuttal.

Helper Locomotives. CSXT proposes that the CERR lease two SD40 locomotives as dedicated helpers for the Saugatuck Hill helper district rather than use the run-through power agreement with BNSF.<sup>8</sup> As explained in Part III-C-d-vii, the helper locomotives are already covered by the run-through agreement. Indeed, CSXT does not even suggest that it has dedicated helpers for this movement. Mr. Orrison and Mr. Holmstrom personally observed the operations in this area and noted that there were no CSXT locomotives in this area but BNSF helper locomotives waiting at the plant. However, CSXT correctly points out that Consumers understated the costs for the additional units under the run-through agreement, because the units do not leave the CERR. Consumers has corrected the calculation on Rebuttal by adding the cost of two dedicated SD40 helper locomotives as CSXT did on Reply.<sup>9</sup>

Yard Engines. CSXT rehashes its operating plan argument that the CERR requires two yard locomotives.<sup>10</sup> As explained in Part III-C-1-c-ii-(b), the additional yard locomotive is not required.

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<sup>7</sup> See CSXT Reply at III-D-8-9.

<sup>8</sup> See CSXT Reply at III-D-10-12.

<sup>9</sup> See Consumers Rebuttal e-workpaper "CERR Operating Statistics\_Rebuttal.xlsx," cell K32.

<sup>10</sup> See CSXT Reply at III-D-16.



Peaking Factor. As explained, in Part III-C-1-c-iv, Consumers has accepted CSXT’s minor modification to the calculation of the peaking factor.

Spare Margin. CSXT expounds on its arguments from Part III-C concerning the calculation of the CERR’s spare margin.<sup>11</sup> Consumers addresses CSXT’s Part III-C and Part III-D spare margin arguments in Part III-C-1-c-iii of this Rebuttal. Briefly summarized, Consumers agrees that certain elements of CSXT’s Reply calculation are correct, but CSXT’s inclusion of fallout and repair time in the numerator of the spare margin calculation is incorrect. Thus, with Consumers’ properly revised calculation, the CERR’s Rebuttal locomotive spare margin calculation is { } for ES44AC locomotives and { } for SD40 locomotives.<sup>12</sup>

Based on Consumers’ revised RTC model and the adjustments described herein, Consumers has determined on Rebuttal that the CERR requires 15 ES44AC locomotives, one SD40 yard locomotive, and two SD 40 helper locomotives.<sup>13</sup>

**a. Locomotive Leasing**

As explained on Opening, the CERR leases all of its locomotives. However, CSXT did not provide any lease costs for the CERR’s primary road

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<sup>11</sup> *Id.* at III-D-19.

<sup>12</sup> *See* Consumers Rebuttal e-workpaper “Locomotive Utilization\_Rebuttal.xlsx,” tab “sheet 1,” cells AU20 and AU37.

<sup>13</sup> *See* Consumers Rebuttal e-workpaper “CERR Operating Statistics\_Rebuttal.xlsx,” cells K28, K31 and K32.

locomotive, the ES44-AC. Thus, to determine the costs associated with the ES44-AC road locomotives, Consumers' experts used an annual lease cost of { }, which was based on public information available from the *AEPCO*<sup>14</sup> case and indexed accordingly.<sup>15</sup> The Board accepted the same locomotive lease cost development procedure in *Sunbelt*, where it held that “[b]ecause Sunbelt chose to acquire its locomotives through lease and because NS was unable to provide any current leases [in] discovery, it was reasonable for Sunbelt to rely on a recent Board decision that included lease costs for that particular locomotive type.” *Id.* at 36.

On Reply, CSXT argues that the CERR could not obtain the sort of favorable lease terms that the BNSF or UP received for ES44AC locomotives.<sup>16</sup> However, CSXT ultimately accepts the base lease costs.<sup>17</sup> CSXT then complains that Consumers selected the wrong index to bring the base costs forward from 2009. Specifically, CSXT argues that Consumers should not have used the AAR's Equipment Rents index for Eastern railroads, but instead it should have used the AAR's Equipment Rents index for Western railroads because the base lease costs were derived from Western carrier costs.<sup>18</sup>

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<sup>14</sup> See *AEPCO* at 40-41.

<sup>15</sup> See Consumers Opening e-workpaper “ES44AC Loco Lease Cost.xlsx.”

<sup>16</sup> See CSXT Reply at III-D-24.

<sup>17</sup> *Id.* at III-D-25.

<sup>18</sup> *Id.*

The fact that the *AEPCO* case involved Western railroads has nothing to do with how Consumers inflates what should be considered a market-based lease rate. However, the fact that this *Consumers* case involves an Eastern railroad should affect how Consumers inflates market-based lease rates. On Reply, CSXT simply has picked the index that leads to a higher lease rate. Because the *AEPCO* lease rate reflects a market lease rate for ES44AC's at a given point in time, the index used for inflating CERR locomotive lease costs should be consistent with indexes used to inflate other CERR costs, which are AAR indexes for the Eastern region.<sup>19</sup> Consumers continues to use the AAR's Equipment Rents index for Eastern railroads to adjust *AEPCO* lease rates to current levels.

The parties agree on the annual lease cost for an SD40 locomotive.<sup>20</sup> Of course, the parties disagree on the total number of SD40 locomotives that the CERR requires. Consumers, as explained above and in Part III-C, continues to specify one SD40 locomotive.

Consumers' revised locomotive count of 15 ES44AC locomotives includes the application of its revised spare margin. Consumers' experts also applied a peaking factor of 1.226, which is described in Part III-C-1-c-iv above.

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<sup>19</sup> See Consumers Opening e-workpaper "Exhibit III-H-1.xlsm," tab "Inputs," cell G30 which determines the regional indexes used in the CERR DCF model.

<sup>20</sup> See CSXT Reply at III-D-25.

See Rebuttal e-workpaper “CERR Operating Statistics\_Rebuttal.xlsx,” tab “Summary,” cell K28. Consumers’ experts also applied a peaking factor of 1.226, which is described in Part III-C-1-c-iv above. Application of these annual lease amounts results in a total locomotive lease expense of { } million for 2015.

**b. Maintenance**

On Opening, Consumers developed annual maintenance costs of { } per ES44AC locomotives and \$104,358 per SD40 locomotives.<sup>21</sup> On Reply, CSXT restates these annual costs to { } per ES44AC locomotive and { } per SD40 locomotive.<sup>22</sup> The differences between Consumers’ and CSXT’s locomotive maintenance costs are discussed below by locomotive type.

**i. ES44AC Maintenance**

Consumers developed Opening ES44AC maintenance costs from actual costs paid by CSXT to { } pursuant to their locomotive maintenance agreement. Consumers specifically relied on the daily maintenance rate of { } for ES44AC locomotives as found in { }.<sup>23</sup>

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<sup>21</sup> See Consumers Opening at III-D-10.

<sup>22</sup> See CSXT Reply e-workpaper “CERR Operating Expense\_Reply.xlsx,” tab “Summary,” cell D78 times 365 days for ES44AC locomotives and cell D71 for SD40 locomotives.

<sup>23</sup> See Consumers Opening e-workpaper { }, tab “Billing Summary,” cell D34 plus cell D43.

CSXT claims that Consumers excluded several components of ES44AC locomotive maintenance cost under its agreement {

}.<sup>24</sup>

{

}. With the additions discussed above, the daily rate per ES44AC locomotive becomes { } for an annual cost of { } per locomotive ({ } x 365 days).<sup>25</sup>

The CERR’s locomotives are inspected and maintained at the CERR’s Barr Yard, where the CERR has provided a locomotive maintenance facility to be used by its locomotive maintenance contractor.<sup>26</sup> CERR road locomotives requiring inspection or maintenance are removed from trains that are stopped at Barr Yard for 1,000 or 1,500-mile inspections, but only as necessary (*i.e.*, the locomotive is due for FRA-required periodic inspection or a locomotive is in need of more extensive servicing). The CERR is not the primary servicing

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<sup>24</sup> See CSXT Reply e-workpaper { } page 16 and CSXT Reply e-workpaper { } tab “Billing Summary,” cell E38.

<sup>25</sup> See Consumers Rebuttal e-workpaper “Locomotive Maintenance\_Rebuttal.xlsx,” tab “Rebuttal LocoMaint,” cell B16.

<sup>26</sup> This facility is shown on page 7 of Consumers Rebuttal Exhibit III-B-1. It is described in more detail in Part III-F-7.

center for foreign locomotives in any event as those locomotives traverse less than 50 miles on the CERR. Regardless, if a swap of locomotives is required, freshly serviced units are placed on the train rather than waiting for the current units to be serviced. The switch crew at Barr Yard shuttles the locomotive to and from the locomotive shop.

**ii. SD40 Maintenance**

On Opening, Consumers relied on CSXT's 2014 system average locomotive maintenance expense for CERR's SD40 helper locomotive. Relying on CSXT 2014 R-1 Schedule 410 expenses, Consumers arrived at a SD40 maintenance rate of \$1.99 per gross ton-mile.<sup>27</sup> CSXT noted on Reply that Consumers' calculation of SD40 locomotive expenses excluded expenses for fringe benefits.<sup>28</sup> Consumers agrees that fringe benefits should be included in the SD40 maintenance expenses for the SD40 locomotive. After including fringe benefits in the SD40 locomotive expense, Consumers' Rebuttal rate becomes \$2.13 per gross ton-mile.<sup>29</sup> This revised maintenance rate per gross ton-mile results in an annual maintenance cost per SD40 locomotive of \$111,876.<sup>30</sup>

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<sup>27</sup> See Consumers Opening e-workpaper "CERR Operating Expense\_Open.xlsx," tab "Summary," cell E79.

<sup>28</sup> See CSXT Reply at III-D-29.

<sup>29</sup> See Consumers Rebuttal e-workpaper "Locomotive Maintenance\_Rebuttal.xlsx," tab "Rebuttal LocoMaint," cell B38.

<sup>30</sup> Consumers Rebuttal e-workpaper "CERR Operating Expense\_Rebuttal.xlsx," tab "Summary," cell D71.

c. **Locomotive Servicing**

i. **Fuel Cost**

CSXT accepts Consumers' cost per gallon of {        }.<sup>31</sup>

ii. **Fuel Consumption**

On Opening, Consumers relied on information provided by CSXT in discovery to develop fuel consumption requirements for ES44AC locomotives.<sup>32</sup> In doing so, Consumers used CSXT's system average fuel consumption for ES44AC locomotives. CSXT takes exception to Consumers' use of a system average consumption rate and suggests that Consumers instead should have tailored the consumption rate to reflect each train type's share of unit-miles for CERR trains and not the total unit-miles of all CSXT trains.<sup>33</sup>

Consumers disagrees that it should develop system average consumption rates for ES44AC locomotives by train type, which would then be applied to CERR locomotives by train type. Developing fuel consumption by train type (and commodity) would be affected disproportionately by the varying terrains (and commodity) across the CSXT system. As can be seen from CSXT's workpapers, gallons per LUM for coal unit trains is 3.27 while gallons per LUM

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<sup>31</sup> See CSXT Reply at III-D-30.

<sup>32</sup> See Consumers Opening e-workpaper "ERAD\_2014\_Open.xlsx," tab "Pivot – Fuel Consumption," cell F14.

<sup>33</sup> See CSXT Reply at III-D-31.

for all other trains is 2.50.<sup>34</sup> Coal unit trains on CSXT's system are disproportionately affected by grades in the Appalachian Mountains and foothills. The terrain across the CERR on the other hand is relatively flat. CSXT's approach for calculating and applying fuel consumption rates magnifies the impact that the terrain-affected consumption rates for coal unit trains across CSXT's system has on CERR fuel consumption. For this reason, Consumers maintains the use of CSXT system average ES44AC fuel consumption rates on Rebuttal.

**iii. Sanding and Other Functions**

On Reply, CSXT agrees with the approach used by Consumers to calculate locomotive servicing costs, except that CSXT includes its Reply fringe benefits ratio in its cost calculations.<sup>35</sup> As discussed elsewhere, Consumers continues to rely on the fringe benefits ratio it developed on Opening.

**2. Railcars**

**a. Leasing**

CSXT accepts, with one modification, Consumers' Opening methodology for determining rail car leasing costs based on CSXT's 2014 R-1 Annual Report data.<sup>36</sup> CSXT's argues that Consumers' spread the payments of car-hire across the system thereby diluting the unit costs that Consumers applied

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<sup>34</sup> See CSXT Reply e-workpaper "ERAD 2014\_Reply.xlsx," tab "Rates."

<sup>35</sup> See CSXT Reply at III-D-31.

<sup>36</sup> See CSXT Reply at III-D-33.



the CERR's foreign cars.<sup>37</sup> To address this issue, CSXT calculates the percentage of foreign cars-miles by car type based for cars traversing Illinois, Indiana and Michigan.<sup>38</sup> Because CSXT did not provide system-wide foreign car statistics in discovery and because Consumers developed car costs on a system-wide basis, Consumers did not make a percentage of foreign car adjustment on Opening to car-miles and car hours used to calculate foreign car unit costs. CSXT's approach to addressing this issue inappropriately applies the traffic mix in Illinois, Indiana and Michigan to system-wide costs to arrive at unit costs for the cars on the CERR. Because CSXT did not provide statistics on foreign cars in discovery, there is no way to know how the traffic mix in Illinois, Indiana and Michigan compares to CSXT's system-wide traffic.

On Rebuttal, Consumers maintains the system-wide approach, albeit without an adjustment to the hours and car-miles used to calculate foreign car unit costs.

**b. Maintenance**

CSXT accepted Consumers' methodology for determining repair expenses for coal and general freight railcars that must be borne by the CERR.<sup>39</sup> The parties differ on the total costs due to the differences in the parties'

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<sup>37</sup> *Id.*

<sup>38</sup> See CSXT Reply e-workpaper "Miles\_by\_CarType.xlsx," tab "Summary."

<sup>39</sup> See CSXT Reply at III-D-33.

calculations of car requirements. *See* Consumers Rebuttal e-workpapers “Car Repair User\_2014.xlsx,” cell G20 for URCS repair cost per car-mile and “CERR Car Costs\_Rebuttal.xlsx,” tab “Coal Cars” cell M36 for coal private car-miles and tab “General Freight” cell N26 for general freight private car-miles.

**i. Private Car Allowance**

CSXT accepted Consumers’ methodology for determining private car allowances.<sup>40</sup> The parties differ on the total costs due to the differences in the parties’ calculations of car requirements. *See* Consumers Rebuttal e-workpaper “CERR Car Costs\_Rebuttal.xls,” tab “Private Cars.”

**3. Operating Personnel**

As noted on Opening, the CERR is a small SARR. Indeed, compared to the *TPI*, *DuPont*, and even the *Sunbelt* SARRs, the CERR is very modest in size and scope. It is a non-unionized Class II rail carrier with less than \$140 million in 2015 revenues.<sup>41</sup> Half of the CERR’s operations consist of unit trains, and the balance of the trains are handled intact. Moreover, the CERR has only one local customer (Consumers) and one locally served facility (59<sup>th</sup> St. Intermodal terminal). Simply put, the CERR does not require Class I-style staffing.

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<sup>40</sup> *Id.* at III-D-34.

<sup>41</sup> *See* Consumers Opening e-workpaper “Summary of CERR Traffic Volumes and Revenues.xlsx,” tab “Summary\_Vol\_Rev,” cell N10.

Not surprisingly, CSXT has decided, on Reply, to overstaff the SARR. As mentioned above, this is routine for defendant railroads in such cases. Moreover, CSXT goes to new lengths here. For example, CSXT recrews 58% of the West Olive-bound trains, even though its own RTC Modeling found no need for such recrews.<sup>42</sup> Unsatisfied with that result, CSXT just ignores its own modeling results and opts to increase crews. CSXT's approach essentially posits that the Board's long-standing approval of the RTC Model is without merit. CSXT's unwarranted attack must be rejected. Likewise, as explained below, CSXT's other arguments to increase crews are without merit.

**a. Operating**

**i. Staffing Requirements**

As explained on Opening, the CERR's operating personnel include train crews as well as other operating employees, including the senior management staff based at the railroad's West Olive headquarters and line supervisory and other field employees in the Transportation and Engineering/Mechanical departments.<sup>43</sup> Consumers' Witnesses Mr. Orrison and Mr. Holmstrom developed the CERR staffing plan. Extensive descriptions of their operating experience were included in Consumers Opening evidence in Parts III-C, III-D and V.

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<sup>42</sup> See CSXT Reply at III-D-39-40.

<sup>43</sup> See Consumers Opening at III-D-20-30.

As noted above, CSXT’s operating personnel staffing is not sponsored by any witness with experience staffing the operations of a railroad. Consumers’ witnesses nevertheless respond to the specious criticisms leveled by CSXT’s consultants.

**ii. Train/Switch Crew Personnel**

On Opening, Consumers determined that it required 52 train and engine (“T&E”) crew members to perform its train operations.<sup>44</sup> This count, which includes switch crews based at Barr Yard and helper crews based at West Olive, was based on the number of trains moving over the various parts of the CERR system during the base year (indexed to reflect first-year traffic levels), and the crew districts/assignments, switch crew assignment, and helper crew assignment developed by Mr. Orrison and Mr. Holmstrom as described in Part III-C-3-a of Consumers Opening Evidence. The RTC Model simulation was used to confirm that most train crews operating in these crew districts could complete each tour of duty within 12 hours, as required by federal law.

Consumers’ experts also reviewed the delay report generated by the RTC modeling to determine the need for recrews. The RTC delay report indicated no expiring crews, thus, recrewing was not required on the CERR. *See* Consumers Opening e-workpaper “CERR Opening.DELAY.” On Rebuttal, two West Olive-bound crews did expire and were recrewed as necessary.

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<sup>44</sup> *See* Consumers Opening at III-D-20.

CSXT determined that the CERR required 68 T&E personnel.<sup>45</sup>

CSXT posits four reasons why Consumers' T&E personnel count is understated. For the reasons explained below, Consumers rejects each addition. Consumers notes that its Rebuttal train crew requirements did increase slightly to 53 T&E employees.

Turn Crews. CSXT largely repeats the arguments it made in Part III-C of its Reply Evidence, namely that the Chicago crews would require regular relief crews because 25% of the crews could not handle two train movements per day in turn service.<sup>46</sup> Each argument underlying its 25% recrew rate is addressed below.

CSXT argues that some crews must reach their hours of service limit when operating turn service in Chicago.<sup>47</sup> CSXT discusses, once again, that the terminal is busy; other carriers cannot wait for CERR crews to arrive on another train or by taxi; and that check-in time and preparation would eat up even more time.<sup>48</sup> CSXT then argues that its review of its RTC Model shows that 23% of westbound CERR trains operating in Chicago took four hours or more to travel between On-SARR and Off-SARR points and that another 16% took three to four

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<sup>45</sup> See CSXT Reply at Table III-D-8.

<sup>46</sup> *Id.* at III-D-38.

<sup>47</sup> *Id.* at III-D-35-36.

<sup>48</sup> *Id.*

hours to travel their route.<sup>49</sup> Thus, by its estimate, with other time added, 39% of crews that operate westbound train would be into their fifth hour by the time they arrive at an interchange ready to receive their next assignment and one quarter of such crew will be in their sixth hour before they can board the second train.<sup>50</sup> Based on this analysis, CSXT decided to recrew 25% of the turn crew trains.<sup>51</sup>

CSXT's arguments are fatally flawed. CSXT's analysis is driven by a mathematical approach, not an operating plan approach. CSXT's arguments are also flawed because they largely assume that one crew starting from the most distant points, such as 22<sup>nd</sup> Street or 59<sup>th</sup> Street are destined to return to those points. To be sure, CSXT acknowledges that such crews could take a different, shorter second turn, but CSXT does not bother to make such an analysis. CSXT also fails to consider that one crew could handle up to four trips a day over most of the shorter moves (*i.e.*, Curtis to Dolton).

CSXT's math-driven approach belies the lack of operating experience of its witnesses. Mr. Orrison and Mr. Holmstrom are well aware of the operating need of the CERR and the challenges in the Chicago area. They were also aware of train flows and balance in setting up the CERR's approach to handling trains in Chicago. Based on the results of CSXT's own modeling, the average transit times for the three O-D pairs with the most trains in the base year

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<sup>49</sup> *Id.* at III-D-38.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at III-D-38-39.

(Curtis to 22<sup>nd</sup> Street, 71<sup>st</sup> to Curtis, and 59<sup>th</sup> Street to Curtis) are all less than 3:30 (3:19, 3:22 and 2:17, respectively).<sup>52</sup> Likewise, even if some trains took longer, as CSXT posits, by definition some took less thereby making a turn move even easier. CSXT mentions, but does not fully consider, that trains moving from Curtis to Dolton, Barr Yard, and Blue Island can all be handled in less than 2 hours on average. Thus, one crew coming on at 71<sup>st</sup> and moving to Curtis can easily handle a move back to 22<sup>nd</sup> Street. But even if that were not possible for some reason, that crew could handle a move to Barr, Blue Island or Dolton. Moreover, as Consumers showed in its Opening Tables III-C-3 and III-C-4, there is near parity in westbound and eastbound movements. Thus, there is ample opportunity for reverse moves as eastbound/westbound trains are arriving, on average, at a rate of one train every 1.83 hours. Even if a crew had to be taxied occasionally to another terminal (*i.e.*, from Curtis to Dolton, all of the terminals are in close proximity to each other).

CSXT also provides no crewing credits for the times that the CERR crews could make more than two movements in a day. For example, one crew could make three moves from, for example, Curtis to Dolton, Dolton to Curtis, and Curtis to Dolton. Both CSXT and Consumers showed in their RTC Models that the average time between locations was about 1:36 minutes (including 30 minutes

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<sup>52</sup> CSXT Reply at Figure III-C-12.

for interchange).<sup>53</sup> Thus, the total transit time is only 4:48 minutes on average for three moves. This would allow, conservatively, 5½ hours to wait for trains, receive instruction or be taxied to another location. If the train dispatchers and incoming train line up worked, four such turns could be completed in one shift. To be conservative, Consumers assumed that each crew would only make two turns a day.

To further demonstrate that crews in the Chicago area operating trains traveling less than 50 miles can handle two trains per shift, Consumers analyzed RTC statistics for the peak period. Specifically, Consumers builds up total time needed by crews to handle two trains per shift. The total time per shift includes average transit times per day times two to reflect two trains as well as three (3) taxi trips of one hour each, two hours to come on duty and off duty, and one hour for interchanging. The results of Consumers analysis are shown in Rebuttal Table III-D-2 below.

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<sup>53</sup> *Id.*; see also Rebuttal Table III-C-7.



**Rebuttal Table III-D-2  
Total Crew Times for Chicago Area Crews**

<b><u>Train Suffix</u></b> (1)	<b><u>Average Miles Per Train</u></b> (2)	<b><u>Transit 2 Trains</u></b> (3)	<b>Hours Per Crew</b>			<b><u>Total</u></b> (7)
			<b><u>Taxi</u></b> (4)	<b><u>On/Off Duty</u></b> (5)	<b><u>I/C</u></b> (6)	
20140323	27.0	5.3	3.0	2.0	1.0	11.3
20140324	25.7	5.1	3.0	2.0	1.0	11.1
20140325	24.5	4.9	3.0	2.0	1.0	10.9
20140326	26.2	5.2	3.0	2.0	1.0	11.2
20140327	25.2	4.9	3.0	2.0	1.0	10.9
20140328	27.7	5.6	3.0	2.0	1.0	11.6
20140329	25.8	5.2	3.0	2.0	1.0	11.2
20140330	26.2	5.2	3.0	2.0	1.0	11.2
20140331	23.6	4.7	3.0	2.0	1.0	10.7

Source: Consumers Rebuttal e-workpaper "Crews Handling 2 Trains\_Rebuttal.xlsx."

As can be seen in Column (7) in Rebuttal Table III-D-2 above, on no days does the total time for crews exceed 12 hours. Thus, crews during the peak period are able to handle two trains per shift. This analysis also includes the conservative assumptions that each crew would require three (3) one-hour taxi rides to shuttle between stations for each shift, each crew would require two hours to come on duty and off duty for each shift, and that each crew would spend one hour per shift at interchanges.

Consumers has, thus, retained its Opening approach to turn crew requirements.<sup>54</sup>

West Olive Recrews.

CSXT complains that the CERR has no recrews for West Olive-bound trains.<sup>55</sup> CSXT suggests that the RTC Model is no longer valid for determining the operations of a SARR and that the Board must resort to CSXT's alleged real-world problems serving the plant.<sup>56</sup> Evidently, CSXT was not satisfied with its RTC Modeling as it attacks its own results at every turn (*i.e.*, trains would have to wait all over Chicago, trains have to wait all over the Grand Rapids Subdivision), but can find no way to make its own RTC Model match its verbiage. Hereto is another example, CSXT complains that the train crews are regularly held on the various sidings on the Grand Rapids Subdivision and that somehow the CERR is subject to the same problems.<sup>57</sup>

CSXT's arguments are without merit. First, the RTC Model is the proper tool for determining the feasibility of the SARR's infrastructure and its

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<sup>54</sup> CSXT also argues, in passing, that the CERR cannot assume that every interchange will take place in 30 minutes. CSXT's accepted the 30 minutes for interchange that Consumers assumed on Opening. CSXT cannot then repudiate it for its problematic recrew argument. Regardless, CSXT again ignores that the 30 minutes is conservative in that step-off, step-on crew changes are commonplace in the terminal. Indeed, Mr. Orrison and Mr. Holmstrom note that this practice is particularly common with high priority trains.

<sup>55</sup> See CSXT Reply at III-D-39.

<sup>56</sup> *Id.* at III-D-39-40.

<sup>57</sup> *Id.* at III-D-40.

operating statistics. Second, the SAC analysis is not an analysis of CSXT's inefficiencies. Indeed, such an analysis would fall under the management efficiency constraint of the *Coal Rate Guidelines* standards. The CERR is under no obligation to duplicate the inefficiencies incurred by CSXT anywhere such inefficiencies are avoidable. Moreover, merely holding on a siding does not mean that a recrew was required. Indeed, CSXT made no such calculation of actual, real-world recrews that resulted from its alleged analysis of holds. Thus, CSXT has no basis in the RTC Model or in the data it developed to determine that 58% of the West Olive-bound trains required a recrew.

On Rebuttal, as explained in Part III-C, Consumers' RTC Model did require two trains to be held long enough on a Grand Rapids Subdivision siding to require a recrew. Thus, Consumers' Rebuttal T&E crew requirements were updated accordingly.

Total CERR Crews Required During Peak Period/Hours of Service Rules.

CSXT claims that Consumers did not provide for sufficient T&E crews to handle train flows during the peak period.<sup>58</sup> CSXT remedied this perceived shortcoming by developing a peaking factor it said was needed to ensure enough crew personnel were available to handle peak period trains. CSXT developed a peaking factor for its Reply crew personnel that increased crew

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<sup>58</sup> See CSXT Reply at III-D-40.

personnel count by 18 percent.<sup>59</sup> To demonstrate its claim that the CERR crews need to be adjusted by a peaking factor, CSXT developed what amounts to a puzzle called “Crew Starts in Hindsight (Omniscient Railroad).”<sup>60</sup> In this puzzle, CSXT identified crew personnel needed during the peak period and attempted to “staff” the need using arbitrary groups of T&E personnel. For some unexplained reason, CSXT required “Group 1” personnel to work six (6) consecutive shifts.<sup>61</sup> With this requirement in place, CSXT attempted to “solve” its puzzle by matching crew groupings by day to crew needs by day. CSXT then inexplicably summed the maximum daily personnel count for each group across the peak period to arrive at what it claims is the true number of T&E personnel in the peak period. This arbitrary approach results in the claimed need for 58 peak period T&E personnel on Reply instead of 49 crew personnel calculated by CSXT using trains statistics.<sup>62</sup> CSXT took the ratio of 58 “needed” T&E personnel to 49 base year personnel (*i.e.*, 1.184) and applied it to first year crew requirements. This peaking

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<sup>59</sup> See CSXT Reply at III-D-44.

<sup>60</sup> See CSXT Reply e-workpaper “CERR Base Year Trains.xlsx,” tab “Crew\_Peaking,” cells AH35:AT50.

<sup>61</sup> See CSXT Reply e-workpaper “CERR Base Year Trains.xlsx,” tab “Crew\_Peaking,” cells AJ40:AJ45.

<sup>62</sup> CSXT Reply e-workpaper “CERR Base Year Trains.xlsx,” tab “Crew\_Peaking,” cell AU47 compared to cell AV53.

factor of 1.184 is then applied by CSXT to the first year personnel requirement of 51 to arrive at total road crew requirement of 61 people.<sup>63</sup>

CSXT also applied this peaking factor approach to Consumers' Opening crew needs, saying that Consumers should have included 50 crew personnel for the base year rather than 42.<sup>64</sup> This would have resulted in a peaking factor of 1.19 according to CSXT.<sup>65</sup>

CSXT's approach to calculating a crew peaking factor is flawed. First, CSXT's inability to match peak period T&E needs to personnel "groupings" on a daily basis is curious. Had CSXT tried harder it could have easily solved the puzzle in a number of different configurations without violating Hours of Service Rules it referred to on Reply at III-D-42. To demonstrate this, Consumers has developed a "puzzle" solution based on its Rebuttal peak period trains.<sup>66</sup>

CSXT's second flaw included in its crew peaking factor is the use of maximum daily crew requirements by crew group. As stated above, CSXT never defines what a group is and why CSXT sized them the way it did. But one thing is clear; taking the maximum count by group across the entire peak period, then

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<sup>63</sup> See CSXT Reply e-workpaper "CERR Operating Statistics\_Reply.xlsx," cell S28.

<sup>64</sup> See CSXT Reply at III-D-43.

<sup>65</sup> See CSXT Reply e-workpaper "CERR Base Year Trains.xlsx," tab "Crew\_Peaking," cell P50.

<sup>66</sup> See Consumers Reply e-workpaper "Base Unit Merch Trains v6\_Statistics\_Rebuttal.xlsx," tab "Crew Peaking."

summing the group maximums, as CSXT did, over inflates what the peak need would be.<sup>67</sup>

The peak need is clear; it is the single day that requires the most crew members to handle that day's trains. This peak day crew requirement needs to be staffed without violating any of the Hours of Service rules referred to by CSXT in its Reply at III-D-42. In CSXT's Reply calculation, this peak crew requirement is 54 people to handle trains on March 30, 2014, not the 58 people determined by adding all the group maximums across the peak week.<sup>68</sup> In CSXT's replication of Consumers' Opening peak crew requirement, the peak requirement is 45, or the number of crew members needed on March 30, 2014.<sup>69</sup> Thus the peak crew requirement is not 50 as claimed by CSXT. Consumers included 47 crew personnel in its Opening operating costs, so no adjustment by way of a crew peaking factor should be required to ensure enough crew personnel are available to meet the crew requirements in the peak period of 45. Even though the 47 crew personnel figure reflects base year personnel counts indexed to first year levels, it

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<sup>67</sup> See CSXT Reply e-workpaper "CERR Base Year Trains.xlsx," tab "Crew\_Peaking," cell AU47.

<sup>68</sup> See CSXT Reply e-workpaper "CERR Base Year Trains.xlsx," tab "Crew\_Peaking," cell AI45 compared to cell AU47.

<sup>69</sup> See CSXT Reply e-workpaper "CERR Base Year Trains.xlsx," tab "Crew\_Peaking," cell C45. CSXT incorrectly calculates this figure by rounding crew counts up to the nearest whole number, then multiplying by 2 to arrive at personnel. The proper method is to multiply crew counts by 2, then round up to the nearest whole number.

is the proper measure for determining if peak day crew needs are satisfied since the peak day crew needs should not be influenced by annual traffic indexing.

Because CSXT fails to adequately describe and efficiently solve its solution satisfying peak crew requirements and because CSXT failed to properly identify the peak crew requirement, CSXT's crew peaking factor should be rejected.

Yard Crews. On Opening, Consumers provided for three personnel to be assigned to yard crew duty.<sup>70</sup> CSXT argues for a fourth yard crew member.<sup>71</sup> An additional yard crew assignment is unnecessary. The yard crew is a light duty crew as the Barr Yard is primarily used for refueling and inspection of only a small number of trains per year. The CERR is only inspecting 47 trains during the peak period. Most of those trains will not require any assistance from the yard crew member. Moreover, CSXT fails to consider that there are multiple managers capable of pitching in if needed or a road crew could even help while waiting for another assignment. In other words, CSXT's addition of a fourth crew is an unnecessary nicety for the resources restrained CERR.

**(a) Compensation**

On Reply, CSXT explains how T&E employee compensation should be lower to reflect fewer shifts per crew member per year on Reply versus

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<sup>70</sup> See Consumers Opening e-workpaper "CERR Operating Statistics\_Open.xlsx," cell S33.

<sup>71</sup> See CSXT Reply at III-D-44.

Opening.<sup>72</sup> However, CSXT uses the same number of shifts per crew member per year that Consumers used on Opening: 270 shift per year.<sup>73</sup> Consumers continues to use Opening compensation amounts for T&E employees that reflect 270 shift per year.

**(b) Fringe Benefits**

Fringe benefits are addressed below in Part III-D-3-a-iv-(a).

**(c) Taxi and Hotel Expense**

On Opening, Consumers calculated overnight and taxi costs separately for crews operating beyond the Chicago area and crews operating within the Chicago area.<sup>74</sup> CSXT agrees with Consumers overnight and taxi costs for crews operating beyond the Chicago area.<sup>75</sup> However, CSXT disagrees with Consumers' taxi expenses for crews operating within the Chicago area and suggests that Consumers expenses be arbitrarily doubled.<sup>76</sup> To support this position, CSXT states that CSXT averaged more than { } million annually on taxis to transport crews in the Chicago terminal over the 2012 through 2014 time period, and CSXT therefore claims that doubling Consumers' Chicago area taxi

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<sup>72</sup> See CSXT Reply at III-D-45.

<sup>73</sup> See CSXT Reply e-workpaper "CERR Base Year Trains.xlsx," tab "Trains," cells AP10306 through AP10310 all use 270 shift per year.

<sup>74</sup> See Consumers Opening e-workpaper "CERR Operating Expense\_Opening.xlsx," tab "Summary," cells D22 and D23.

<sup>75</sup> See CSXT Reply e-workpaper "CERR Operating Expense\_Reply.xlsx," tab "Summary," cell D22.

<sup>76</sup> See CSXT Reply at III-D-50.



expenses is quite conservative.<sup>77</sup> CSXT provides no support for the items included in its { } million figure as it relates to underlying CSXT T&E crew counts or movement of trains operated by crew included in the costs. Given the size of the number though, it appears CSXT did not make a proper apples-to-apples comparison or that CSXT is highly inefficient in how it has spent money on taxis.

CSXT never critiques Consumers' approach to developing Chicago area taxi costs, which results in 2.75 taxi trips per crew per shift for crews operating within the Chicago area.<sup>78</sup> CSXT never addresses the reasonableness of CERR's conservative assumption that most Chicago-area crews will take three taxi trips per shift. Given that CSXT never critiques Consumers' development of taxi counts and costs or supports its own position for doubling Consumers' taxi costs, Consumers' taxi expenses for Chicago-area crews are reasonable and Consumer maintains its Opening position on Rebuttal.

**iii. Non-Train Operating Personnel**

On Opening, Consumers' expert witnesses Mr. Orrison and Mr. Holmstrom provided for 37 non-train operating personnel that more than meet the

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<sup>77</sup> See CSXT Reply at III-D-49-50.

<sup>78</sup> See Consumers Opening e-workpaper "Base Unit Merch Train v6\_Statistics\_Opening.xlsx," tab "Taxi and Overnight," average of cells V5, V6, V9 and V11 through V23.

requirements for the CERR's needs.<sup>79</sup> As explained on Opening, this staffing level reflects the volume of trains being handled by the CERR, the types of trains handled, and the other activities that the CERR requires.<sup>80</sup> This staffing level is comparable, in part, to other SARRs with similar volumes of traffic (*e.g.*, *WFA* and *IPA*, as proposed by the parties to that case). However, the staffing for the CERR was developed from the ground-up by Mr. Orrison and Mr. Holmstrom to reflect the particular territory the CERR traverses, the variations in traffic flows between the 22<sup>nd</sup> St. to Curtis segment and the Porter to West Olive segment, and the need for more operating personnel to coordinate activities between the CERR and other railroads in Chicago.

As is typical for such cases, CSXT increase the non-train operating personnel. Indeed, as reflected in Rebuttal Table III-D-3, CSXT proposes to add 13 positions to the staff. As explained below, the additional positions are not needed and Consumers continues to use its Opening staffing for non-train operating personnel.

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<sup>79</sup> Consumers Opening at Table III-D-3.

<sup>80</sup> *Id.* at III-D-22-23.

<b>REBUTTAL TABLE III-D-3 CERR NON-TRAIN OPERATING PERSONNEL</b>				
<b>Position</b>	<b>Opening</b>	<b>Reply</b>	<b>Rebuttal</b>	<b>Difference (Reply v. Rebuttal)</b>
Vice President – Operations	1	1	1	0
Director of Operations Control	1	1	1	0
Managers of Train Operations	3	4	3	(1)
Assistant Managers of Train Operations	3	4	3	(1)
Manager of Locomotive Operations	1	1	1	0
Assistant Manager of Locomotive Operations	0	1	0	(1)
Dispatch Crew, Dispatch and Data Control	0	1	0	(1)
Manager of Crew and Dispatch	0	5	0	(5)
Crew Callers	5	5	5	0
Dispatchers	9	9	9	0
Manager of Operating Rules, Safety & Training	1	1	1	0
Manager of Customer Service and Support	0	1	0	(1)
Customer Service Managers	2	2	2	0
Chief Engineer	1	1	1	0
Manager of Mechanical Operations	1	1	1	0
Equipment Inspectors	9	12	10	(2)
<b>Total</b>	<b>37</b>	<b>50</b>	<b>38</b>	<b>(12)</b>

**(a) Headquarters Transportation Management**

On Opening, Consumers provided for the following positions:

1. Vice President-Operations (department head).
2. The Director of Operations Control (supervises all train operations and the CERR’s field operating managers, crew callers and dispatchers).
3. Manager of Operating Rules, Safety & Training (interfaces with the FRA in matters pertaining to rules and operating practice, and is

responsible for the CERR's operating timetable, operating rules, operating bulletins, and related instructions).

4. Two customer service managers (monitor train locations, maintain contact with the CERR's operating personnel and interchange partners, and answer customers' questions concerning the locations of specific trains on the CERR system).

5. Dispatchers (9) that handle the two dispatching desks 24/7/365.

Consumers provided detailed explanations of all of the functions of these positions and how those personnel would meet the requirements of the CERR's operational and customer service needs.

CSXT accepts the VP Operations, Director of Operational Control, and the Manager of Operating Rules, Safety, and Training.<sup>81</sup> CSXT also accepts the dispatcher and customer service manager positions and the count of personnel for those positions.<sup>82</sup>

CSXT does, however, add seven brand new positions and a new subdivision and reporting structure entitled Dispatch & Data Control. Specifically, CSXT adds a Director Crew, Dispatch and Data Control, five Managers – Crew and Dispatch, and Manager Customer Service and Support.

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<sup>81</sup> See CSXT Reply at Table III-D-10.

<sup>82</sup> *Id.*

CSXT's additions are simply fluff add-on "managerial" positions whose functions are already covered by the staff specified by Consumers' experts on Opening.

CSXT argues that a Director Crew, Dispatch and Data Control is needed to "bring focus, direction and management to this team."<sup>83</sup> CSXT's argument is unpersuasive. The dispatching and customer service functions are already covered by the CERR's Director of Operations Control. A point CSXT never even acknowledges. Moreover, CSXT has not specified any actual work that this position will perform or why the dispatchers require another director over them. As such, Consumers' experts reject this addition.

CSXT then argues the CERR needs another 24/7 position, Manager – Crew and Dispatch.<sup>84</sup> CSXT rests its support for this position on its incorrect assumption that the CERR's train selection process means that the CERR will have no idea, in advance, what trains it will be handling. As Mr. Orrison and Mr. Holmstrom have already explained, every carrier has insight into the trains it is handling. It is no different than any other group of trains, and the CTCO is well aware of where trains are destined. Moreover, 75% of all the trains that the CERR handles are unit trains and intermodal trains (*i.e.*, there are no random TIH worries – even if such an argument had any validity). Thus, there is no reason for another 24/7 management layer above the dispatchers.

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<sup>83</sup> *Id.* at III-D-58.

<sup>84</sup> *Id.* at III-D-58-59.

Likewise, CSXT's assertions that this position has to design a new service plan every shift is absurd. All of the trains handled by the CERR have a known operation plans, which are reflected in the train symbols and these plans are designed and managed by the Director of Operations Control and the Vice President – Operations. These plans are also dictated in large part by the CERR's interchange partners thereby further reducing the need for a new service plan every shift.

CSXT also suggests this position has to manage crew assignments, especially turn crew assignments.<sup>85</sup> This is again unnecessary. Crew calling is already automated and the CERR's Manager or Train Operations are responsible for overseeing crews in the field and assuring that assignments are properly handed out during the shift (along with the crew caller system). Without the extra positions posited by CSXT, there is even less need for a Director position over the dispatchers and customer service managers.

CSXT also proposes that the CERR add a Manager over the Customer Service Managers. In other words, the managers need a manager. CSXT suggests that the primary function of this person will be to oversee the two Customer Service Managers. CSXT also proposes that the person interact with others in the operating and other departments of the CERR. CSXT also suggest

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<sup>85</sup> *Id.* at III-D-60-61.

that the person should be involved in claims management, even though the Law and Administration Department is already handling this function.

There is no need to add a manager over the managers. The dispatching and customer service functions have up to four employees working at any time. CSXT never suggests these positions are not capable of performing the work that they do. The CERR is not a large railroad with many layers of management, and this is another example where the manager serves no function beyond adding unnecessary Class I-style bloat.

Moreover, CSXT ignores the description of the Customer Service Managers' duties, all of which its new manager duplicates. Specifically, on Opening, Mr. Orrison and Mr. Holmstrom specified that the Customer Service Managers monitor train locations, maintain contact with the CERR's operating personnel and interchange partners, and answer customers' questions concerning the locations of specific trains on the CERR system.<sup>86</sup> Their reasoning behind this staffing is that CERR serves only one local industry (Consumers) and one local facility (59<sup>th</sup> St. Intermodal terminal). It typically handles approximately 30 trains per day. There is only one primary route on the system and one secondary trackage rights route. Moreover, half of the trains are unit trains and the remaining trains move intact over the CERR. The vast majority of the trains move less than 40 miles on the CERR. Accordingly, the CERR does not need 24/7 coverage of

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<sup>86</sup> Consumers Opening at III-D-25-26.

the customer service function. CSXT does not dispute these points. It just adds an unneeded manager and an unneeded director over these two positions.

**(b) Field Transportation Management**

On Opening, Consumers' witnesses included three Managers of Train Operations ("MTO"), three Assistant Managers of Train Operations ("AMTO") and one Manager of Locomotive Operations ("MLO").<sup>87</sup> These positions, which report to the Director-Operations Control, are the equivalent of the Trainmaster and Road Foreman of Engines positions on a Class I railroad.

Consumers' stationed the MTO's at the CERR's Barr Yard. This is a 24/7 position with 12-hour shifts. As is customary for such positions, three employees are needed to staff it. Likewise, Consumers provided for three AMTO's. CSXT accepts the roles of these position, but simply adds a fourth MTO and AMTO as, essentially, a relief crew.<sup>88</sup> CSXT's expansion is unwarranted. Consumers has used the standard staffing for such positions. Moreover, CSXT ignores that both positions do not have to be on duty at the same time and the six positions can cross-support each other during vacations and sick days. These positions are also backed up by the Director of Operations Control and the Vice President – Operations. Such staffing is typical of small railroads and even Class I railroads. For example, when Mr. Orrison was head of the

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<sup>87</sup> *Id.* at III-D-26-28.

<sup>88</sup> *See* CSXT Reply at III-D-55.



Detroit Division, he would temporarily assign his Assistant Superintendent (located in the superintendent's office in Livonia, MI to Dayton, OH and Lima, OH to provide oversight to the field trainmaster position when the trainmaster was sick or on vacation. Likewise, Mr. Orrison has worked with the commuter rail system in Boston where the management regularly place the Assistant COO into field assignments covering for the Road Forman Engines ("RFE") while the RFE was temporarily assigned to training engineers and operating trains as needed.

CSXT also accepts Consumers' Manager of Locomotive Operations.<sup>89</sup> However, without any explanation, CSXT adds an Assistant Manager of Locomotive Operations. CSXT suggest that this position could also aid in inspecting locomotives at West Olive,<sup>90</sup> but CSXT does not suggest that this function is not adequately covered by the equipment inspectors.

Consumers rejects the addition of the Assistant Manager of Locomotive Operations. The CERR only has 53 train crew employees. Thus, the MCO can easily performs FRA-mandated testing and observation of engineers in train handling, efficiency testing, and provide other assistance as needed.

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

(c) **Engineering and Mechanical Management**

CSXT accepts Consumers' staffing for the Chief Engineer and the Manager of Mechanical Operations.<sup>91</sup> CSXT, does, however, add three additional equipment inspectors. These additional inspectors are not required.

The Barr Yard inspects, on average, 6-7 trains a day (during the peak period of the peak year). *See* Consumers Opening Part III-C-3-c. As explained on Opening, this relatively small volume does not necessitate a large force vis-à-vis the CSXT's staff at Barr Yard where many trains receive an initial terminal inspection and many cars are inspected during classification and blocking. Mr. Orrison and Mr. Holmstrom did assign two Equipment Inspectors for each inspection. Given the number of inspections to be performed, the CERR has one two-person crew of Equipment Inspectors stationed at Barr Yard on a 24/7 basis. However, the CERR also has one two-person crew available on an on-call basis at Barr Yard. The one-person switch crew can also assist in train inspections as can the MTO and the ATMO on duty. Consumers' witnesses also intended for the MLO to assist as needed as well. The parties agree that one inspector is needed at West Olive.<sup>92</sup>

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<sup>91</sup> *Id.* at III-D-56.

<sup>92</sup> *Id.* at III-D-57.

However, Consumers erred in its description of the assignments. Specifically, Consumers intended to station nine inspectors at Barr Yard and one inspector at West Olive for a total of 10 inspectors.

CSXT proposes 11 inspectors for Barr Yard but acknowledges that 9 people are required to cover the assignments.<sup>93</sup> As such, Consumers has used only 9 positions at Barr Yard on Rebuttal.

**iv. Operating Personnel Compensation**

CSXT accepts Consumers' proposed approach of using data from CSXT's Wage Forms A and B to calculate salaries for the CERR's operating personnel.<sup>94</sup> However, CSXT uses its fringe benefits ratio as described below.

**(a) Fringe Benefits**

On Opening, Consumers developed a fringe benefits ratio of 37.6 percent based on the average fringe benefits ratio for all Class I railroad employees in the United States in 2014.<sup>95</sup> CSXT claimed this approach is flawed because Consumers uses a nationwide average rather than an average tailored to the railroads operating in the same region as the CERR and that Consumers uses a one-year snapshot, not a multi-year average.<sup>96</sup> CSXT suggests that the fringe benefits ratio should be developed based on an average for 2012 through 2014 of

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<sup>93</sup> *Id.*

<sup>94</sup> See CSXT Reply e-workpaper "CERR Operating Expense\_Reply.xlsx," tab "Operating-G&A," cells E6 through E33.

<sup>95</sup> See Consumers Opening e-workpaper "CERR Fringe Benefits.xlsx."

<sup>96</sup> See CSXT Reply at III-D-46.

all Class I carriers except KCS. CSXT says KCS does not have a physical presence in Chicago remotely comparable to the other Class I railroads. CSXT's fringe benefits ratio developed on Reply equals 41.6 percent.

Consumers disagrees that a 2012 through 2014 average is appropriate for calculating fringe benefits. This is because fringe benefits expenses for Class I railroads, as a percentage of total salary and wage expenses, have consistently declined from 2012 through 2014, indicating a trend toward more efficient management of fringe benefits expenses by all Class I railroads. Table III-D-4 below shows annual fringe benefits ratios for all Class I carriers for the 2012 through 2014 time period.

<b>REBUTTAL TABLE III-D-4</b>			
<b><u>SUMMARY OF CLASS I CARRIER FRINGE BENEFITS RATIOS</u></b>			
<b><u>Carrier</u></b>	<b><u>2012</u></b>	<b><u>2013</u></b>	<b><u>2014</u></b>
(1)	(2)	(3)	(4)
1. BNSF	38.9%	38.0%	35.1%
2. CN GTW	35.7%	39.5%	36.0%
3. CP SOO	42.8%	39.3%	32.8%
4. CSXT	52.5%	45.0%	43.0%
5. KCS	36.2%	32.5%	33.0%
6. NS	48.6%	46.9%	41.6%
7. UP	45.1%	45.5%	41.8%
8. Average	42.8%	40.9%	37.6%

Source: Consumers Rebuttal e-workpaper "Support for Rebuttal Fringe Benefits Table.xlsx."

As demonstrated Rebuttal Table III-D-4, the average fringe benefits ratio has declined each year between 2012 and 2014 (Line 8). In fact, CSXT's fringe benefits ratios, although the most inefficient of all Class I carriers, have declined nearly 18 percent from 2012 to 2014 (Line 4). Of the 14 individual year-over-year changes in Table III-D-4, only one shows a significant increase (CN in 2013, Line 2, Column (3)). Clearly all Class I carriers have realized efficiencies in fringe benefits costs between the 2012 through 2014 time period. For this reason, the average 2014 fringe benefits ratio is the appropriate ratio to estimate CERR fringe benefits for 2015 and beyond.

The inclusion of KCS in the average for fringe benefits is entirely appropriate, despite CSXT's claim that the KCS does not have the same physical presence in Chicago as the other Class I railroads. The vast majority of fringe benefits for Class I carriers are for employees that work nowhere near Chicago. In fact, the location of KCS's Kansas City headquarters is closer to Chicago than the headquarters for any other Class I carrier. CSXT is obviously attempting to remove KCS from the fringe benefits calculation because KCS has the lowest fringe benefits ratios of any Class I carrier and is closer in size to the CERR than any other Class I railroad.

Consumers' approach to average 2014 ratios for all Class I carriers is in fact conservative since this approach includes inefficient ratios rather than focusing on only the most efficient ratios. For these reasons, Consumers

maintains the fringe benefits ratio of 37.6 percent used on Opening to calculate Rebuttal fringe benefits expenses.

v. **Transportation Management System Costs**

CSXT did not address this subsection.

vi. **CERR Operating Materials & Supplies**

CSXT inserted this section in its Reply. Consumers addresses these issues under the appropriate G&A subsection as it did on Opening.

b. **General and Administrative**

i. **Introduction and Summary**

Consumers based its General and Administrative (“G&A”) staffing evidence upon the extensive experience of its Witnesses John Orrison, Robert Holmstrom, and Joseph Kruzich (with regard to IT).<sup>97</sup>

As noted in Consumers’ Opening evidence, Messrs. Orrison and Holmstrom have extensive experience in railroad management and railroad operations in the particular geographic area traversed by the CERR. *See* Consumers Opening at III-D-2-5. Most notably, Mr. Orrison served as CSX’s Vice President of Network Planning, Vice President – Service Design, General Manager Field Operations Development, and Division Superintendent – Detroit Division, where he oversaw the portion of the lines that the CERR is replicating

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<sup>97</sup> Witness Brian Despard sponsored Consumers’ Opening evidence regarding, *inter alia*, the CERR’s associated G&A expenses. Mr. Despard has 25 years of experience analyzing economic and marketing issues related to transportation and energy. *See* Consumers Opening at III-D-5-6.

between Porter and West Olive. *Id.* at III-D-3. While serving as CSXT's Vice President – Network Planning, Mr. Orrison also was appointed the Co-Chairman of the Association of American Railroads' Chicago Planning Group, which was charged with improving passenger and freight train operations within and around the Chicago area network. *Id.*

Similarly, Mr. Holmstrom has substantial relevant experience in the Chicago area. Specifically, Mr. Holmstrom has spent more than forty years working in the railroad industry, exclusively in Chicago, IL. *Id.* at III-D-4. Mr. Holmstrom worked for CN for many years, and held CN's most senior position in the Chicago area; *i.e.*, CN's Assistant Superintendent Operations for Chicago. *Id.*

With regard to staffing and equipment for the information technology function, Consumers relied upon the expertise of Mr. Joseph Kruzich. Mr. Kruzich has more than 40 years of experience in railroad accounting, executive administration, and information technology, ultimately serving as KCS's Vice President Telecommunications and Chief Information Officer. *Id.* at III-D-5.

In its Opening evidence, Consumers first presented benchmarking statistics to show that its G&A staffing and expense estimates were demonstrably conservative under Board precedent. In particular, Consumers presented statistics based upon the same SARR revenue measures that CSXT itself had advocated in prior evidence before the Board to confirm that the CERR's G&A staffing and expenditures per dollar of SARR revenue were vastly higher than had been common in prior SAC cases. *Id.* at III-D-35-42.

For example, the average G&A staffing per \$10 million in SARR revenue for the cases that CSXT had identified in its prior evidence was 1.43 members, but Consumers proposed a G&A staff level of 2.22 members per \$10 million in SARR revenue. *Id.* at III-D-36. Similarly, the average G&A expense as a percentage of SARR revenue for the cases that CSXT had identified was 3.1% whereas Consumers proposed a G&A expense level (*i.e.*, \$6.9 million) equating to 4.95% of the CERR's \$139.4 million revenues. *Id.* at III-D-40. Significantly, Consumers' 3.1% G&A expense percentage does not reflect the \$3.6 million that the CERR will spend for its RMI expense. *Id.* at III-D-41. Had Consumers included that RMI expense in its calculation (as has been the case in prior SAC proceedings), Consumers' proposed G&A expense would have constituted 7.5% of total CERR revenues, a figure substantially in excess of the G&A expense percentage for any of the prior SAC cases that CSXT had identified. *Id.*

In its Reply evidence, CSXT proposes to add substantial staffing and expense to the CERR G&A budget. In particular, CSXT adds a total of 25 employees to the CERR's 28-member staff for a total G&A staff of 53. CSXT's proposed staffing increases, by department, are as follows:



<b>REBUTTAL TABLE III-D-5</b>			
<b>CSXT Proposed Staffing Increases</b>			
<b>Department</b>	<b>Consumers Opening</b>	<b>CSXT Reply</b>	<b>Difference</b>
Executive	2	3	1
Marketing	5	9	4
Finance & Accounting	8	12	4
Law & Administrative	7	20	13
IT	6	9	3
<i>Total</i>	28	53	25

Notably, CSXT’s Reply narrative includes an erroneous summary table (Table III-D-19) that miscalculates the total number of G&A staff members that CSXT’s Reply actually proposes. *See* CSXT Reply at III-D-99 (wrongly claiming that CSXT proposed a G&A staff of 50 members and a difference of 22 members relating to Consumers’ Opening evidence). In any event, CSXT’s 53-member staffing proposal would constitute an 89% increase to the CERR’s G&A staff level as proposed by Consumers.

In terms of expenses, CSXT would add { } to the CERR’s Opening \$6.9 million G&A expense level.<sup>98</sup> Of that increment, approximately { } relates to higher compensation (*i.e.*, more employees/higher pay for certain positions), approximately { } relates to CSXT’s higher fringe benefit ratio, and the approximate { } balance relates to non-compensation issues such as outsourcing or equipment.

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<sup>98</sup> CSXT’s summary Opening Expense Table { }, claiming a \$4.3 million difference in G&A expense. *See* CSXT Reply at III-D-4.

In attempting to justify these substantial additions, CSXT seeks to downplay the benchmarking comparisons that Consumers provided on Opening. CSXT acknowledges that “top-down benchmarking can be a useful tool,” but nevertheless contends that Consumers has applied its benchmarking results in an improper manner. *See Reply at III-D-69-70.* CSXT also seeks to minimize its own prior benchmarking evidence by claiming that “oftentimes benchmarking to CSXT was done to err on the side of being conservative.” *Id.* at III-D-70.

Contrary to CSXT’s suggestion, Consumers use of benchmarking is entirely proper. Consumers does not contend that the CERR is identical to any prior SARR, but instead, Consumers seeks to demonstrate (both through benchmarking measures and through the experience of its various expert witnesses) just how far CSXT’s evidence strays from the historic standard of SAC cases involving SARR carriers of differing sizes and complexities.

For example, CSXT previously advocated the use of a revenue-based benchmark for gauging the reasonableness of a SARR’s marketing staff. *See Consumers Opening at III-D-49* (quoting CSXT TPI Reply at III-D-108 and III-D-114). Yet in the present case, CSXT insists that the CERR requires a nine-member marketing staff for a railroad with only \$139.4 million in revenues (based on Consumers’ Opening evidence) or only \$109.4 million in revenues (based on CSXT’s Reply evidence). In *Sunbelt*, however, the STB found that nine marketing staff members were sufficient for a SARR with \$362 million in revenues. *See Sunbelt at 52-53* (accepting NS’s proposal of a 9-member SBRR

marketing staff); *id.* at 181 (calculating SARR revenues). There is no basis for claiming that this benchmark improperly compares “apples and oranges.” *Cf.* CSXT Reply at III-D-69.<sup>99</sup> To the contrary, this comparison shows that CSXT’s Reply evidence in the present case substantially overstates the staffing needs of the CERR.

Similarly, CSXT argued in its *TPI* Reply evidence that employee-to-revenue ratios were a “particularly relevant means” to judge accounting staff levels “because most accounting tasks are a function on the amount of a railroad’s incoming revenue and the amount of its corresponding expenses.” *See* Consumers Opening at III-D-54-55 (quoting CSXT *TPI* Reply at III-D-121 n.274). In the present case, however, CSXT has proposed a Finance & Accounting Department staff of 12 individuals for a SARR that CSXT contends will have only \$109.4 million in first-year revenues. *See* CSXT Reply at III-D-80-86. That proposal yields a revenue-to-staff ratio of \$9.1 million per staff member, whereas in *TPI*, CSXT proposed a Finance & Accounting Department with a revenue-to-staff ratio of \$26.76 million per staff member. *See* Consumers Opening at III-D-55. In other

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<sup>99</sup> Like CSXT’s marketing arguments in the present case, NS’s marketing staff arguments in *Sunbelt* emphasized the need for extra staffing to deal with Rule 11 traffic for which the SBRR would have “an obligation to negotiate and publish rates.” *See Sunbelt* at 53; *accord* CSXT Reply at III-D-76-77 (“For Rule 11 traffic . . . the CERR will be responsible for managing the customers and rate making process . . .”). Accordingly, there is no substantive difference in the marketing work to be performed by the two SARRs with regard to Rule 11 traffic. Instead, the principal difference is that SARR revenues in *Sunbelt* were approximately three times as high as in the present case.

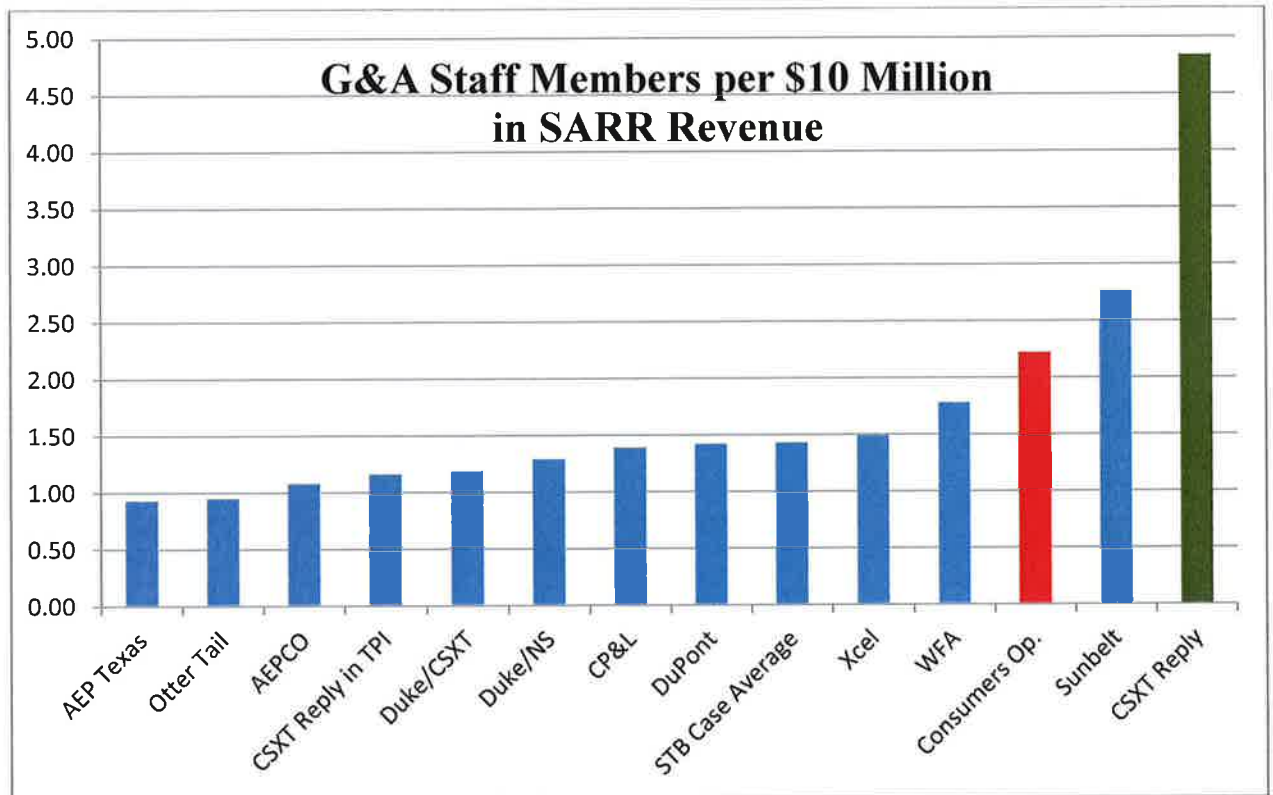
words, CSXT's proposal for the CERR's Finance & Accounting Department would require approximately *three times* the staffing per dollar of SARR revenue than CSXT itself had advocated in its prior evidence. Again, this tremendous disparity in a specific staffing level that CSXT regards as being appropriate for a revenue-based benchmarking demonstrates the unreasonableness of CSXT's complaints about Consumers' evidence.

As a means of confirming the excessive nature of CSXT's G&A Reply evidence in the aggregate, Consumers has updated the tables that it presented on Opening. In that regard, Rebuttal Tables III-D-6 and III-D-7 below show that CSXT's proposed G&A staffing for the CERR would yield a figure of 4.84 G&A staff members per \$10 million in CERR revenue, which is substantially higher than the corresponding ratio in any of the cited cases (and more than three times higher than the STB average in the cases that CSXT had identified):

**REBUTTAL TABLE III-D-6  
BOARD-APPROVED STAFFING IN PAST 10 SAC CASES**

<b>Case</b>	<b>G&amp;A Staff</b>	<b>Revenue (in millions)</b>	<b>G&amp;A Staff Per \$10M Revenue</b>
<i>Duke/NS</i>	63	\$487.1	1.29
<i>CP&amp;L</i>	63	\$453.7	1.39
<i>Duke/CSXT</i>	59	\$496.8	1.19
<i>Xcel</i>	51	\$341.5	1.49
<i>Otter Tail</i>	55	\$581.7	0.95
<i>AEP Texas</i>	66	\$711.0	0.93
<i>WFA</i>	39	\$218.4	1.78
<i>AEPCO</i>	225	\$2,075.8	1.08
<i>DuPont</i>	820	\$5,768.4	1.42
<i>Sunbelt</i>	100	\$362.4	2.76
<b>Average</b>	—	—	<b>1.43</b>
CSXT Reply in TPI	754	\$6,475.2	1.16
<b>Consumers Opening</b>	<b>31</b>	<b>\$139.4</b>	<b>2.22</b>
<b>CSXT Reply</b>	<b>53</b>	<b>\$109.4</b>	<b>4.84</b>

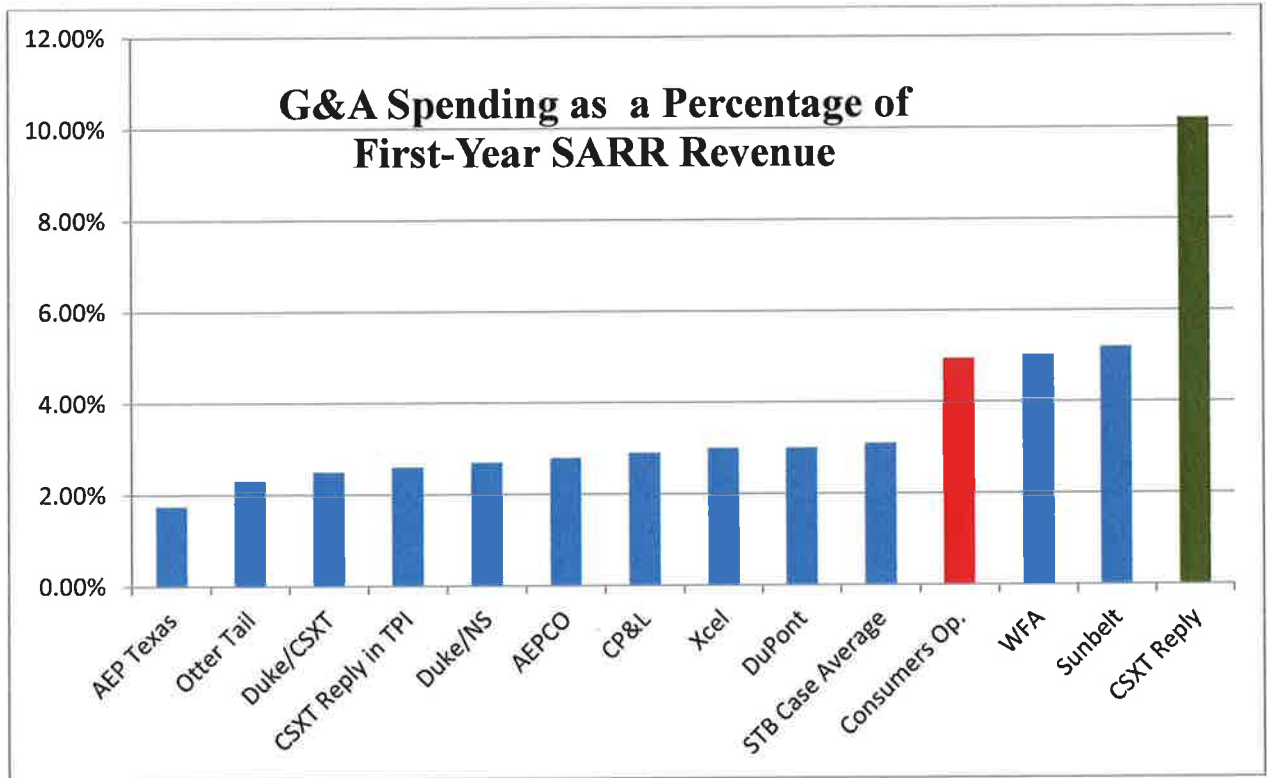
**REBUTTAL TABLE III-D-7**



Similarly, CSXT’s G&A evidence would yield a “G&A spending as a percentage of SARR revenue” figure that dwarfs the figures previously accepted by the Board. As shown in Tables III-D-8 and III-D-9 below, CSXT argues that the CERR’s G&A expenditures should be more than three times higher (as a share of total first-year SARR revenue) than the average figure in the prior STB cases that CSXT identified in *TPI*:

<b>REBUTTAL TABLE III-D-8</b>			
<b>BOARD-APPROVED G&amp;A SPENDING IN PAST 10 SAC CASES</b>			
<b>Case</b>	<b>G&amp;A Spending (in millions)</b>	<b>Revenue (in millions)</b>	<b>G&amp;A Spending as Percentage of Revenue</b>
<i>Duke/NS</i>	\$13.0	\$487.1	2.7%
<i>CP&amp;L</i>	\$13.0	\$453.7	2.9%
<i>Duke/CSXT</i>	\$12.6	\$496.8	2.5%
<i>Xcel</i>	\$10.4	\$341.5	3.0%
<i>Otter Tail</i>	\$13.3	\$581.7	2.3%
<i>AEP Texas</i>	\$12.5	\$711.0	1.75%
<i>WFA</i>	\$11.0	\$218.4	5.0%
<i>AEPCO</i>	\$58.3	\$2,075.8	2.8%
<i>DuPont</i>	\$171.7	\$5,768.4	3%
<i>Sunbelt</i>	\$18.9	\$362.4	5.2%
<b>Average</b>	–	–	<b>3.1%</b>
CSXT Reply in <i>TPI</i>	\$166.5	\$6,475.2	2.6%
<b>CERR Opening</b>	<b>\$6.9</b>	<b>\$139.4</b>	<b>4.95%</b>
<b>CSXT Reply</b>	<b>\$11.2</b>	<b>\$109.4</b>	<b>10.2%</b>

**REBUTTAL TABLE III-D-9**



The following Rebuttal Table III-D-10 compares the parties' G&A staffing evidence, including the Opening, Reply, and Rebuttal staffing levels:

<b>REBUTTAL TABLE III-D-10 Total G&amp;A Staff Comparison</b>				
<b>Position</b>	<b>Consumers Opening</b>	<b>CSXT Reply</b>	<b>Consumers Rebuttal</b>	<b>Difference</b>
President and CEO	1	1	1	0
Administrative Assistants	1	1	1	0
Manager of Communications	0	1	0	1
Director of Marketing	1	1	1	0
Marketing Manager	4	4	4	0
Manager Marketing Services	0	1	0	1
Market Manager	0	2	0	2
Manager Accounts	0	1	0	1
Vice President-Finance and Accounting	1	1	1	0
Administrative Assistant	1	1	1	0
Treasurer	1	1	1	0
Cash Manager	0	1	0	1
Controller	1	1	1	0
Assistant Controller/Manager Revenue	1	1	1	0
Manager Disbursements	0	1	0	1
Revenue Accounting Managers	2	2	2	0
Director Planning and Support	0	1	0	1
Manager of Budgets/Purchasing	1	1	1	0
Manager Tax and Financial Reporting	0	1	0	1
Vice President-Law and Administration	1	1	1	0
General Attorney	1	1	1	0
Director-Human Resources	1	1	1	0
Manager Human Resources	0	1	0	1
Chief of Security/Police	1	1	1	0
Assistant Chief	0	1	1	0
Security Agents	3	11	3	8
Director Asset Protection	0	1	0	1
Manager Environmental Control	0	1	0	1
Administrative Assistant/Claims Specialist	0	1	0	1
Director-Information Technology	1	1	1	0
IT Specialists	5	8	5	3
<b>Total</b>	<b>28</b>	<b>53*</b>	<b>29</b>	<b>24</b>
<p>* As noted above, CSXT's Table III-D-19 misstates the number of G&amp;A staff members that CSXT actually proposed, and misstates the total difference in the parties' G&amp;A staffing. See CSXT Reply at III-D-99.</p>				



**ii. Staffing Requirements**

CSXT's proposed G&A staffing is bloated and improper. With the exception of adding an Assistant Police Chief to its Chicago area police force, Consumers declines to accept any of CSXT's proposed staffing additions or modifications. As Consumers describes in greater detail below, CSXT's evidence repeatedly errs by assuming that the senior-most staff member responsible for a given function will be incapable of actually performing substantive work. For example, CSXT assumes that the CERR's President will be unable to handle communications, and likewise assumes that the CERR's Vice President of Finance & Accounting will be unable to perform long-term investment planning. CSXT also assumes that redundant employees are required within different CERR departments, assuming for example, that the CERR's Marketing staff would not perform the function of "customer contact" and therefore would require the assistance of duplicative Customer Service staffing within the Marketing group itself, even though the CERR's Operating personnel already include a Customer Service staff and even though the existing Marketing staff will communicate with the CERR's customers.

Separately, CSXT also seeks to create duplicative managers and/or to create new management positions to oversee unnecessary employees. For example, CSXT proposes to staff the CERR with both a Police Chief and a Director of Asset Protection, and CSXT proposes to add a new "Manager Revenue" position to assist the Controller even though Consumers already had

proposed that the CERR staff include an Assistant Controller. Moreover, CSXT proposes to add a Director Planning and Support to oversee an unnecessary Manager Tax & Financial Reporting.

Consumers addresses each of CSXT's various staffing arguments in turn.

**(a) Executive Department/Board of Directors**

Consumers proposed an Executive Department comprised of a President/CEO, and Administrative Assistant, and a Board of Directors that includes three independent representatives drawn from the CERR's customer group and lenders. In its Opening Evidence, Consumers explained that the CERR's department heads (*i.e.*, the Vice President of Operations, the Vice President of Finance and Accounting, and its Vice President of Law and Administration) would report to the President. *See* Consumers Opening at III-D-46.

In its Reply, CSXT proposes three modifications to this Executive Department and Board of Directors structure.

First, CSXT acknowledges that Consumers correctly identified the "daily oversight" and "external relations" functions of the Executive Department, but CSXT argues that "it is not realistic to think a company with over \$100 million in revenue could be run by a single President and a shared Administrative Assistant to handle all of these functions." CSXT Reply at III-D-72. On the basis of this observation, CSXT proposes that "Marketing and Information Technology

have direct reports to the CERR’s President.” *Id.* at III-D-73. CSXT recites that these two functions are “mission critical” and that customers of the CERR will “want to know that their Marketing contact has a direct line to the President.” *Id.* CSXT adds that {

} and CSXT comments that that Information Technology “requires the direct engagement of the President.” *Id.*

CSXT’s argument is mistaken for a number of reasons. Most notably, while CSXT claims that Consumers’ evidence is not “realistic” because the President’s responsibilities for direct oversight would be too great, CSXT’s proposed solution to that perceived problem is to impose even greater direct oversight responsibilities upon the President. CSXT’s recommended solution therefore is illogical and improper. Moreover, contrary to CSXT’s suggestion, Consumers has not proposed that the CERR’s President and Administrative Assistant would “handle all of these [oversight and external relations] functions.” *Id.* at III-D-72. Instead, the CERR’s three Vice Presidents (Operations, Finance, and Law/Administration) each would report to the President and each would oversee a department of the railroad. The Director of Marketing and the Director of Information Technology each would report to a separate Vice President, thus ensuring an appropriate level of supervision for each function without creating an excessive number of direct reports for the President. Modifying the CERR structure to create additional direct reports to the President (as CSXT suggests) would contradict the very goal that CSXT claims is essential.

In addition, CSXT's anecdotal claim that customers will "want to know that their Marketing contact has a direct line to the President" (see CSXT Reply at III-D-73) lacks any support. CSXT has not performed any survey of the CERR's customers to gauge their preferences as to the lines of supervision available to their Marketing contacts. While CSXT claims that {

}, CSXT fails to identify a single prior SAC case addressing this question in CSXT's favor.<sup>100</sup>

CSXT's Reply evidence also fails to identify any example of a Class II rail carrier (either real-world or SAC) in which the head of Information Technology reports directly to the President. In that regard, {

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<sup>100</sup> CSXT's electronic workpapers regarding the {

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Second, CSXT insists that the CERR Executive Department should include a Communications Manager to assist the President with “all of the various communications functions the President must carry out in addition to the operational oversight of the railroad.” *Id.* at III-D-73-74. CSXT contends that this individual would be required to deal with the CERR’s social media presence on Facebook, Twitter, or LinkedIn, and adds that managing these platforms and managing community, government, and investor communications is even more important “in an intense media environment like Chicago.” *Id.* at III-D-74.

Importantly, however, CSXT reports that only seven of the sixteen Class II carriers that it identified as having websites also have a separate social media presence on Facebook, Twitter, or LinkedIn. *Id.* Stated differently, more than half of the Class II railroads that CSXT identified do not have the social media presence that CSXT contends is part of the communication demand on a “21st century railroad.” *Id.* Even this statistic may be tilted in CSXT’s favor insofar as CSXT does not indicate whether it identified any additional Class II railroads without their own websites. Accordingly, it is evident that this social

media “function” is not essential for the operation of a least-cost, most efficient stand-alone rail carrier that is the size of the CERR.

In addition, CSXT has not identified any real-world rail carrier (let alone a real-world carrier of a comparable size to the CERR) whose staff includes a Communications Manager. Instead, CSXT simply claims anecdotally that such an individual is necessary. Finally, to the extent that the CERR concludes that it is essential to initiate a presence on LinkedIn, Facebook, or Twitter, the Executive Department’s Administrative Assistant can create such accounts. For the foregoing reasons, Consumers declines to adopt CSXT’s proposed Communications Manager as part of the CERR’s staff.

Third, CSXT proposes that the CERR compensate the members of the CERR’s Board of Directors. *See* CSXT Reply at III-D-75 and III-D100-101. CSXT reaches this result in an indirect manner. CSXT first insists that outside directors selected from amongst the CERR’s customer group and lenders could not adequately perform the necessary oversight and guidance if “none are (sic) truly independent.” CSXT Reply at III-D-75. Next, CSXT proposes that the three outside directors therefore should be independent. *Id.* Finally, CSXT explains that “independent directors cannot be expected to serve for free.” *Id.* Significantly, however, the logic of CSXT’s argument fails at its first step because CSXT does not present any basis for its inference that directors chosen from amongst the CERR’s customers and lenders would not be independent.

In fact, contrary to CSXT’s argument, it is reasonable to conclude that representatives of CSXT’s customer and lender groups would be more – rather than less – vigilant and independent in overseeing the CERR’s management. Such a conclusion is far more reasonable than CSXT’s assumption that three individuals with no interest in the CERR’s management whatsoever (other than in continuing to be paid \$10,000 each per year by that same management) would exercise greater independent oversight.

CSXT’s Reply also fails to address the precedent cited by Consumers in which the Board routinely has accepted the assumption that SARR directors would serve without compensation. *See* Consumers Opening at III-D-47-48 (and cases cited therein).

**(b) Marketing**

On Opening, Consumers proposed a marketing staff of five individuals, including a Director of Marketing and four separate Marketing Managers. *See id.* at III-D-48. The Director of Marketing reports to the Vice President of Operations. *Id.*

As part of its Opening presentation, Consumers provided “benchmark” comparisons regarding the Marketing function on the basis of SARR revenue. Significantly, Consumers explained that CSXT itself had argued in favor of scaling the Marketing staff in the *TPI* case on the basis of SARR revenues. *See* Consumers Opening at III-D-49 (citing CSXT *TPI* Reply at III-D-108 (“Mr. Brown’s general approach was to use CSXT’s staffing as a benchmark for the

[marketing] staffing that the TPIRR would need, after making adjustments for TPIRR's relative revenues . . . ."); *id.* (citing CSXT TPI Reply at III-D-114 ("Mr. Brown has reviewed the real world CSXT staffing and concluded that the most conservative approach is to scale TPIRR's general freight marketing staff to CSXT based on revenue.")). Since a railroad's Marketing staff is responsible for a function that is directly tied to revenues, Consumers' use of total SARR revenues per Marketing staff member as a metric is entirely reasonable and appropriate.

In any event, on the basis of that same revenue-scaling benchmark, CSXT had argued in *TPI* that a single Marketing staff member was needed for each \$30.1 million in SARR revenue. *Id.* Applying that same standard to the CERR Opening revenues yields a CERR Marketing staff of approximately 4.6 individuals, or slightly fewer staff Marketing members than the five that Consumers had proposed.

Likewise, as noted above, Consumers explained on Opening that the Board's *Sunbelt* decision included a SARR Marketing staff of nine individuals for a railroad with a full \$362 million in revenues and with a complex set of traffic including a substantial volume of carload traffic. *See* Consumers Opening at III-D-50-51. This *Sunbelt* staffing levels equates to one Marketing staff member for every \$40.2 million in SARR revenue. Applying that ratio to the CERR's first-year revenues yields a Marketing staff of only about 3.5 employees.

In its Reply Evidence in the instant case, however, CSXT ignores these Marketing benchmarks, other than its introductory "But so what?" response



to the subject of benchmarking generally. *See* CSXT Reply at III-D-69; *but see id.* (in which CSXT acknowledges that “benchmarking can be a useful tool”). These benchmarking comparisons, however, are crucial to understanding the unreasonableness of CSXT’s Reply.

CSXT proposed that the CERR’s Marketing staff should include a total of nine individuals despite the fact that CSXT contends that the CERR’s annual revenues should amount to only \$109.4 million. The resulting revenue-to-Marketing staff ratio (that CSXT itself relied upon as a benchmark in the *TPI* case) represents a substantial departure from past STB practice. In particular, CSXT’s Reply in the instant case suggests that the Board should deem the CERR’s Marketing staff capable of handling only \$12.2 million in revenues per individual (*i.e.*, \$109.4 million divided by 9 = \$12.2 million per staff member). There is no basis for imposing this substantial staffing penalty upon the CERR. To reiterate, CSXT itself submitted evidence in *TPI* indicating that a Marketing staff member could be responsible for nearly two and one-half times as much revenue (*i.e.*, \$30.1 million per staff member) and the Board found in *Sunbelt* that a Marketing staff member could be responsible for more than three times as much revenue (*i.e.*, \$40.2 million per staff member).

There is nothing about the CERR’s Marketing function that makes it *substantially* more onerous on a revenue-per-staff member basis than the Marketing function in either *TPI* or *Sunbelt*. Despite all of CSXT’s various efforts to claim that Consumers has failed to dedicate sufficient staffing to the Marketing

function (*e.g.*, Rule 11 issues, the need to create additional rates quickly, the need for customer contact), these functions are standard Marketing functions that the CERR's staff will be capable of handling to the same extent as the *TPI* staff or the *Sunbelt* staff. CSXT's claim that the CERR Marketing staff should have only 30% to 40% of the business-handling "capacity" of the Marketing staffs in these two prior cases is manifestly improper.<sup>101</sup>

CSXT's arguments regarding individual members of the CERR Marketing staff are likewise improper and should be rejected.

First, CSXT argues that the CERR staff should include a Market Manager to account for the volume of traffic that is Rule 11 at Chicago. *See* CSXT Reply at III-D-76-78. CSXT claims that the need to quote Rule 11 rates will impose a burden on the CERR's existing staff. Again, however, CSXT has provided no basis for concluding that this workload in any way will exceed the workload for individual Marketing staff members in *TPI* or *Sunbelt*, let alone exceed that workload by the substantial margin that CSXT assumes. Notably, when describing the Rule 11 marketing burden, CSXT admits that "because of the extreme short haul on the CERR, it may be reasonable to assume that the residual CSXT will initiate most of the marketing work." *Id.* at III-D-77. On the basis of this acknowledgement, CSXT simply argues that "the CERR will still have to

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<sup>101</sup> *Sunbelt*: \$12.2 million/\$40.2 million = 30.3%; CSXT *TPI* Reply: \$12.2 million/\$30.1 million = 40.5%.

review all of the residual CSXT's rate proposals and approve them." *Id.* CSXT has provided no evidence to demonstrate that Consumers' robust staffing proposals for the Marketing function is insufficient to "review" CSXT's rate proposals and "approve" them.

Second, CSXT argues that "implicit" in Consumers' evidence is the presumption that other railroads will handle marketing responsibilities for overhead traffic. *See* CSXT Reply at III-D-77. On the basis of this claim, CSXT insists that the Board previously has rejected this supposed Consumers' argument and CSXT adds a second Market Manager "to address the inevitable need that residual CSXT and CERR will have to quickly create additional rates in response to changes in traffic." *Id.* at III-D-77 (citing *AEPCO 2011*); *id.* at III-D-78.<sup>102</sup> Significantly, however, CSXT can only claim that this argument is "implicit" in Consumers' Opening evidence because Consumers never actually raised such an argument. Accordingly, CSXT's objection appears to be a situation in which CSXT seeks to rely upon favorable Board precedent on a marketing matter and – having failed to find a violation of that precedent in Consumers' evidence – CSXT is reduced to inferring that the theory must be "implicit" in Consumers' case. There is no basis for CSXT's assumption.

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<sup>102</sup> CSXT adds that the "traffic selection criteria" employed by Consumers will "result in far greater churn." *Id.* at III-D-78; *see also id.* ("CERR will need to quickly recognize when existing CSXT contracts and rate authorities will need to be amended to include an interline rate with CERR.").

CSXT's "greater churn" argument is likewise unavailing. For the reasons set forth in Consumers' Part III-A Rebuttal, CSXT is wrong to claim that Consumers' traffic selection is in any way improper or would require additional effort on the CERR's part to distinguish between CERR traffic and "parallel universe" traffic. Likewise, CSXT is wrong to argue that additional Marketing staff will be necessary to amend contracts to reflect CERR's involvement in interline service. There is no basis in stand-alone theory for requiring a SARR to incur additional expenses in order to modify single-line rail contracts to reflect the insertion of the SARR as a bridge carrier.

Third, CSXT alleges that "Consumers has failed to include the major marketing responsibility of customer contact," and on that basis, CSXT proposes that the CERR staff include a Manager-Accounts. *See* CSXT Reply at III-D-78-79. CSXT acknowledges that Consumers has included customer service staff in its Operations department, but CSXT insists that the role of customer contact from the Marketing staff is of a different nature than customer service, and "involves communications regarding rates, rules, accessorial charges, and maintenance programs that might alter service." *Id.* at III-D-79.

CSXT's argument is incorrect insofar as it seeks to duplicate the functions of the CERR's existing Marketing staff. CSXT claims that the CERR's customers "will require some attention" (*id.*), but that is precisely the function that the CERR's existing Marketing staff will perform. There is no basis for CSXT's illogical assumption that Marketing staff will not devote attention to customers.

Fourth, CSXT proposes to add a Manager of Marketing Services whose responsibility will be to coordinate “ancillary functions” such as service design, interline agreements, forecasting, and customer service within Marketing. *See* CSXT Reply at III-D-79. CSXT also claims that this additional person is needed in order to communicate with the Manager Communications that CSXT proposes to add to the CERR’s Executive Department. *Id.* In other words, CSXT insists that one new position is required to communicate with another unnecessary new position that CSXT creates.

CSXT’s Reply evidence does not provide any legitimate basis for requiring the addition of a Manager of Marketing Services. In particular, CSXT does not provide any basis for its assumption that non-Marketing functions with the CERR organization will require coordination with Marketing, and even if such coordination were required, CSXT does not provide any basis for its assumption that the CERR’s existing Marketing staff would be insufficient to perform that work. Again, Consumers has provided a robust Marketing staff on the basis of CSXT’s own revenue-per-staff member metric. There is no basis for alleging that such a robust staff would be incapable of performing any routine Marketing tasks, even to the extent those tasks may involve communication with non-Marketing personnel in the small office environment of the CERR.

(c) **Finance and Accounting Department**

On Opening, Consumers proposed a Finance and Accounting Department consisting of eight employees, to be headed by the Vice President-

Finance & Accounting. *See* Consumers Opening at III-D-54-60. The staff for this department included a Treasurer, a Controller, an Assistant Controller, two Revenue Accounting Managers, a Manager of Budgets and Purchasing, and an Administrative Assistant. *Id.* at III-D-54.

(i) **Revenue Scaling**

Consumers also recounted on Opening that CSXT previously had emphasized the value of a revenue-based scaling metric to gauge the reasonableness of Finance and Accounting staff. Specifically, CSXT had argued in its *TPI* Reply evidence with respect to staffing for the Finance and Accounting function that “[e]mployee-to-revenue ratios are a *particularly relevant* means to judge accounting staff levels, because most accounting tasks are a function of the amount of a railroad’s incoming revenue and the amount of its corresponding expenses.” *Id.* at III-D-54-55 (quoting CSXT *TPI* Reply at III-D-121 n.274) (emphasis added).

Under CSXT’s proposed metric in the *TPI* case, Finance and Accounting staffing should equate to one employee for every \$26.76 million in SARR revenue. *Id.* at III-D-55. Consumers’ Opening evidence regarding the CERR’s Finance and Accounting staff yielded a much more conservative ratio of one employee for every \$17.4 million in SARR revenue (*i.e.*, \$139.4 million divided by 8 staff members = \$17.4 million per Fin. & Acct. staff member). In fact, as Consumers explained on Opening, Consumers had proposed a staffing level for the CERR’s Finance and Accounting Department that was more than fifty

percent higher than the level associated with CSXT's own staffing metric from the *TPI* case. *Id.*

CSXT's Reply evidence in the instant case represents a substantial and inappropriate departure from the very metric that CSXT advocated as being "particularly relevant" for judging accounting staff levels. In particular, CSXT's proposed 12-member staffing level for the CERR's Finance and Accounting Department yields a revenue-per-staff member figure of only \$9.1 million using CSXT's CERR revenue determination (*i.e.*, \$109.4 million divided by 12 staff members = \$9.1 million per staff member).

CSXT therefore contends that the CERR requires approximately three times as many Finance and Accounting personnel *per dollar of SARR revenue* than CSXT argued would be necessary for the SARR in the *TPI* case (*i.e.*, \$26.2 million divided by \$9.1 million = 2.9). Stated differently, CSXT contends that each CERR staff member would be capable of handling only one-third of the Finance and Accounting responsibilities of one of CSXT's TPIRR staff members. There is no basis whatsoever for this substantial disparity regarding a function that CSXT itself contends is subject to revenue-based scaling. Accordingly, the Board should reject CSXT's Reply evidence regarding the Finance and Accounting function in its entirety as unreasonable and inappropriate.

**(ii) Specific CSXT Proposals**

CSXT's Reply evidence advocates the addition of five new Finance and Accounting staff members. Specifically, CSXT urges the Board to add a Cash

Manager, a Manager Revenue, a Manager Disbursements, and Director of Planning & Support, and a Manager Tax & Financial Reporting. CSXT's evidence includes certain errors and omissions in this regard, however.

- CSXT's Reply narrative never explains that CSXT proposes to add a "Manager Revenue" position to the CERR staff. Instead, this position appears only in the table at page III-D-99 of CSXT's Reply and in CSXT's electronic workpapers.
- CSXT's Reply excludes the Assistant Controller that Consumers had proposed on Opening, but CSXT never explains or even acknowledges this exclusion.<sup>103</sup>

Accordingly, CSXT's Reply proposes a net increase of four employees to the CERR's Finance and Accounting staff.

Consumers addresses each of CSXT's various arguments in turn. Consumers emphasizes, however, that each of CSXT's references to CERR staffing being too "slim," "glaring[ly] deficien[t]," "overly ambitious," etc., pertain to a Finance and Accounting Department that is 50% more robust than the staffing level that CSXT itself proposed in *TPI*. Effectively, the question the Board faces is whether a fully staffed Department of eight individuals can handle two-thirds of the Finance and Accounting work that CSXT contended in *TPI* that those same individual should be able to handle. Consumers respectfully submits that the answer to this question is an unequivocal "yes."

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<sup>103</sup> It may be the case that CSXT simply intended to re-cast the CERR's Assistant Controller position as a Manager Revenue position ({ }), but CSXT's narrative is not explicit in this regard.



First, CSXT argues that the CERR should include a Cash Manager to support the work of the Treasurer. *See* CSXT Reply at III-D-82. According to CSXT, this individual would “assist with day-to-day responsibilities such as credit checks, short-term cash management, and monitoring bank accounts.” *Id.* CSXT adds that the inclusion of this Cash Manager would allow the Treasurer to “focus on long-term functions such as investment planning and overall cash flow.” *Id.*

Significantly, however, CSXT’s arguments in this regard ignore the distinction in Consumers’ staffing evidence between the Vice President – Finance & Accounting and the Treasurer. Under Consumers’ proposal, the Treasurer would handle short-term cash management, leaving the Vice President available to handle more of the strategic finance issues the CERR will face. As Consumers explained, the Vice President is “responsible for overseeing the finance and accounting functions of the railroad.” *See* Consumers Opening at III-D-56. CSXT’s approach effectively would strip the Treasurer position of its principal responsibility over short-term cash management in order to justify the inclusion of an additional staff member and would push strategic responsibility down from the Vice President to the Treasurer. There is no basis for assuming that the Treasurer cannot perform the tasks included within that role and no basis for seeking to transfer the Vice President’s long-term investment planning role to the Treasurer. Accordingly, Consumers declines to add a Cash Manager to its CERR staffing.

Second, CSXT argues that the Controller’s office requires additional support in the form of a Manager of Disbursements. In particular, CSXT proposes

to include its Manager of Disbursements to assist the CERR's Controller with respect to accounts payable and payroll. *See* CSXT Reply at III-D-83 ("CSXT proposes a Manager of Disbursements to handle all accounts payable functions, payroll responsibilities, and any required reporting.").

CSXT, however, ignores the fact that Consumers included an Assistant Controller in its CERR staffing as well as two Revenue Accounting Managers (and a Manager of Budgets and Purchasing). CSXT claims that Consumers provided "little explanation" as to which members of the Controller's office would fulfill the accounts payable and payroll responsibilities (CSXT Reply at III-D-83), but cannot legitimately remove an Assistant Controller from the CERR staffing that Consumers had proposed without a word of explanation and then credibly claim that Consumers has not adequately explained the individual responsibilities of its own CERR staff members.

CSXT's argument also ignores the fact that Consumers provided for the outsourcing of the payroll function on the same basis as accepted by the Board in *DuPont*. *See* Consumers Opening e-workpaper "CERR G&A Outsourcing\_Open.xlsx," tab "Outside Services," cell C5 (citing *DuPont* at 98 and NS Reply in *DuPont* at III-D-68).

In any event, Consumers explained the staffing of the CERR's Controller function on Opening, and explained the functions that the Controller's office would perform. In this regard, CSXT acknowledges that in Consumers' evidence, the Controller's office is "assigned responsibility for accounts payable

and payroll.” CSXT has not provided any basis for including an additional Manager of Disbursements, particularly insofar as Consumers’ existing staff level goes well beyond the “staffing-per-\$10 million of SARR revenue” and “G&A expense-per-\$10 million of SARR revenue” metrics that CSXT itself previously advocated as being “particularly relevant.”

Third, as noted above, CSXT’s electronic workpapers include costs associated with a so-called “Manager Revenue” but, other than the summary table on CSXT’s Reply page III-D-99, CSXT’s Reply narrative never mentions this position or the functions for which it would be responsible. Accordingly, there is no basis for adding a “Manager Revenue” position to the CERR staff.<sup>104</sup>

Fourth, CSXT proposes to add two new employees to handle the same basic responsibilities as the CERR’s existing Controller staff. In that regard, Consumers explained on Opening that “members of the CERR Controller function staff will interact with outside audit and tax personnel and will prepare the data and documentation needed by the outside audit firm.” *See* Consumers Opening at III-D-59. Consumers added that the CERR will have minimal financial reporting

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<sup>104</sup> In a related matter, CSXT’s Reply narrative claims that the Controller will “need to be vigilant” because of Consumers’ traffic selection criteria, but CSXT never specifically argues that an additional employee would be required for this purpose. *See* CSXT Reply at III-D-83. In any event, CSXT’s is wrong to argue that there is a need to expend resources to determine which traffic the CERR will handle and which traffic CSXT will continue to handle on a “parallel universe” basis. As noted in Part III-A of this Rebuttal, STB precedent does not require a complaining shipper to engage in this sort of real-time monitoring.

requirements because of its small size, and that it will use financial accounting software to track all of its physical assets and asset replacements. *Id.*

On Reply, CSXT proposes to add a Director of Planning and Support and a Manager of Tax and Financial Reporting to the CERR Finance and Accounting Staff. *See* CSXT Reply at III-D-84.<sup>105</sup> CSXT fails to identify any specific need for these two additional employees other than simply commenting that they are needed to “address the volume of responsibility” supposedly held by the Manager of Budgets and Purchasing, and commenting that the CERR would have “management and data collection responsibilities” even though it will use an outside vendor for all required tax return preparation. *Id.* at III-D-84-85.

CSXT has not provided any legitimate basis for the conclusion that these two additional Controller staff employees will be necessary to assist the outside vendor with its tax work or to assist the balance of the Controller group staff in supervising the outside vendors handling the CERR’s tax and audit work.<sup>106</sup>

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<sup>105</sup> CSXT suggests on Reply that “Consumers lists several functions that will *presumably* be this Manager’s responsibility, such as audit management, tax, and financial reporting.” CSXT Reply at III-D-84 (emphasis added). Consumers’ Opening evidence, however, did not propose this narrow assignment of responsibility, instead indicating that the listed responsibilities would be shared by the entire Controller group (and the outside vendors). *See* Consumers Opening at III-D-59.

<sup>106</sup> CSXT’s narrative takes issue with Consumers’ estimate of the cost of the outsourced tax function {

**(d) Law and Administration Department**

On Opening, Consumers proposed a Law and Administration Department consisting of a Vice President – Law & Administration, a General Attorney, the Security Chief, the Director of Human Resources, the Director of Information Technology, three Security Agents and five IT Specialists. *See* Consumers Opening at III-D-60-61. CSXT raises arguments to a several different aspects of this Department and to its related outsourcing.

**(i) Legal/Outside Counsel**

As an initial matter, CSXT accepted Consumers’ proposed in-house legal staffing (*i.e.*, a Vice President Law & Administration and a General Attorney) and accepted that the CERR could “outsource the remainder of its legal expenses.” CSXT Reply at III-D-86.

With regard to the outsourcing of a portion of its legal work, Consumers followed standard SAC case practice. Consumers based the CERR’s total legal expense upon a published measure of total corporate legal spend as a percentage of company revenues. *See* Consumers Opening at III-D-62-63. In particular, Consumers utilized the 0.5% of revenue figure published for companies of the CERR’s size (even though the CERR is not a public company and would not incur legal expenses associated with many of the securities- and disclosure-related issues that public companies must address). *Id.* at III-D-63. In any event,

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using that 0.5% metric, Consumers calculated a total CERR legal spend, and then subtracted the CERR's internal legal spend from that total to yield an outside counsel estimate. *See id.* at III-D-63-65 & Consumers Opening e-workpaper "CERR G&A Outsourcing\_Open.xlsx," tab "Legal Spend."

In its Reply, CSXT accepts the "general framework" of Consumers' outside counsel estimate. *See CSXT Reply* at III-D-86. CSXT, however, takes issue with Consumers' calculation of the CERR's total internal legal spend, arguing that the compensation of the CERR's Vice President of Law & Administration should not be included in full because "that individual will have administrative responsibilities apart from legal work." *Id.* at III-D-87. CSXT therefore purports to "assign[] half of the cost of the position to the legal spending figure and half to the nonlegal G&A staffing budget" to account for the Vice President's "split" responsibilities. *Id.* CSXT's argument is mistaken and its 50% reduction is arbitrary and improper.

In terms of job functions, Consumers explained on Opening that the Vice President – Law and Administration "functions as General Counsel for the CERR." *See Consumers Opening* at III-D-60. Along with the General Attorney, the CERR's Vice President – Law and Administration "will perform the majority of the CERR's annual legal work including the administration of litigation and claims, real estate issues, and contract matters." *Id.* at III-D-61. While the Vice President will oversee a department that includes IT, security, and human

resources functions, it is evident that as the CERR's General Counsel, the Vice President will devote a substantial amount of time to legal work.

Moreover, CSXT's attempt to impose a strict limit on supposedly acceptable internal legal expenses directly contradicts the published study from which Consumers drew its legal expense metric. In particular, Consumers based its 0.5% revenue metric upon a 2012 Law Department Metrics Benchmarking Study by Corporate Counsel and ALM Legal Intelligence, which reports total legal expenses as a share of company revenue. *See Consumers Opening at III-D-62-63 (citing Consumers Opening e-workpaper "ALM.pdf").* Significantly, the ALM study applied an extremely broad definition of internal legal expenses when developing its revenue metric, including not only in-house attorney compensation, but also including expenses associated with technology, occupancy, and an allocation of general corporate overhead: "This survey also looks separately at internal and external legal expense. Internal legal expense is reported as a total number, and it is also broken down into the following component parts: *compensation, contract attorneys, occupancy, technology expense, and general corporate overhead allocated to the law department.*" *Consumers Opening e-workpaper "ALM.pdf," at 24 (emphasis added).*

Consumers' approach to determining total internal legal spend on Opening was extremely conservative as compared with the ALM study from which Consumers derived its 0.5% revenue metric. Consumers' calculation included only the Vice President and General Attorney's: (1) base compensation;

(2) fringe benefits; (3) travel expense; (4) desks; and (5) computers. *See* Consumers Opening e-workpaper “CERR G&A Outsourcing\_Open.xlsx,” tab “Legal Spend,” columns D and E. Consumers’ internal legal spend calculation did not include any allocated share of the cost of the West Olive, MI headquarters, any allocated share of the CERR’s administrative assistants, or any allocated share of the CERR’s various other corporate overhead expenses (*e.g.*, the share of the CERR’s IT staff expense incurred to support legal activities, the share of the CERR President’s expense associated with overseeing the CERR’s legal activities, etc.).

In addition, it is reasonable to conclude that any corporate General Counsel is likely to devote at least some time, and perhaps substantial time, to department management, rather than simply performing legal research, writing briefs, etc. There is no basis for CSXT to suggest that the ALM percent of revenue metric assumes that senior corporate attorneys solely perform such strictly legal work. In fact, the ALM study explicitly confirms that a substantial share of the responding companies’ “top legal officer positions” (*i.e.*, 64.6%) also included the “additional title and responsibilities of a Corporate Secretary.” *See* Consumers Opening e-workpaper “ALM.pdf,” at 22. CSXT’s complaint that Consumers improperly included the full compensation of the CERR’s Vice President of Law & Administration therefore is inconsistent with the ALM study itself.



Even beyond CSXT's theoretical error, CSXT's actual cost calculations in this regard are replete with errors and inconsistencies, thus rendering CSXT's evidence on this point inadequate and improper:

First, CSXT purports to include 50% of the cost of the position of the CERR's Vice President of Law & Administration in its internal legal cost calculation. CSXT, however, includes *none* of the cost of this position. While CSXT's spreadsheet includes the figure 50% under the "VP" heading, the balance of the "VP" column does not include any cell entries whatsoever. *See* CSXT Reply e-workpaper "CERR G&A Outsourcing\_Reply.xlsx," tab "Legal Spend," cells D6 through D13 (including zero dollars for the VP salary, benefits, travel, desk, computer, and supplies). This error led to a substantial overstatement in CSXT's calculation of the CERR's outside legal expenses.

Second, CSXT's electronic workpaper misstates the salary, benefits, and travel expenses for the General Attorney. *See* CSXT Reply e-workpaper "CERR G&A Outsourcing\_Reply.xlsx," tab "Legal Spend," cells E8 through E10.<sup>107</sup>

Third, CSXT's electronic workpaper applies the "0.5% of revenue" metric to the \$139.4 million in CERR revenues calculated by Consumers on

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<sup>107</sup> CSXT actually appears to have included 100% of the Vice President's compensation and benefits in its calculation (albeit under the wrong column and heading) but to have included 0% of the General Attorney's compensation and benefits.

Opening, not to the \$109.4 million in CERR revenues that CSXT calculated in Part III-A of its Reply. Compare CSXT Reply e-workpaper “CERR G&A Outsourcing\_Reply.xlsx,” tab “Legal Spend,” cell F23 and CSXT Reply at III-A-56. Consumers certainly agrees that CSXT’s \$109.4 million revenue estimate is flawed, but it is inconsistent and improper for CSXT to advance that figure for CERR revenue purposes while accepting Consumers’ \$139.4 million revenue figure for purposes of calculating the CERR’s total legal spend. The net effect of CSXT’s inconsistency in this regard – even ignoring all of CSXT’s other mistakes – is to increase CSXT’s calculation of the total CERR legal spend by 27.4% (*i.e.*,  $\$139.4/\$109.4 = 1.274$ ).

Stated differently, Consumers calculated a total CERR legal spend of \$697,101 on Opening, which is 0.5% of \$139,420,104. See Consumers Opening at III-D-63. CSXT used that same \$697,101 figure for its calculation of total outside legal spend (*see* CSXT Reply e-workpaper CERR G&A Outsourcing\_Reply.xlsx,” tab “Legal Spend,” cell F23), but if CSXT had utilized its own Part III-A estimate of the CERR’s first-year revenues (*i.e.*, \$109.4 million), CSXT would have calculated a CERR total legal spend of \$547,003, approximately \$150,000 less than CSXT actually calculated. This CSXT total legal spend overstatement directly overstates CSXT’s assumed outside counsel expense for the CERR on a dollar-for-dollar basis.

If CSXT actually had performed the outside legal spend calculation in the manner claimed in CSXT’s Reply narrative and using CSXT’s own CERR

revenue estimate, CSXT would have developed a CERR outside counsel expense on the order of { } rather than the much higher { } figure that appears in CSXT's Reply spreadsheets. {

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In light of the many errors in CSXT's Reply evidence, and in light of the reasonable and conservative approach that Consumers utilized to develop the CERR's outside counsel expense, the Board should accept Consumers' calculation as the best evidence of record with regard to the determination of the CERR's internal legal spend. Finally, Consumers notes that it has updated its total legal spend calculation and its associated outside legal spend calculation to reflect the CERR's updated Rebuttal first-year revenues of \$139.6 million.<sup>108</sup> Consumers therefore calculates outside legal expenses for the CERR of { },<sup>109</sup> a slight increase from Consumers' Opening figure of { }.

**(ii) Human Resources**

On Opening, Consumers proposed substantial outsourcing of the human resources and training functions, to be supplemented by a small in-house

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<sup>108</sup> In addition, Consumers makes two minor adjustments in this regard. First, Consumers uses annual capitalized computer costs (consistent with CSXT's Reply approach). Second, Consumers corrects its cost of Supplies from Opening. The net impact of these two adjustments is approximately { }.

<sup>109</sup> See Consumers Rebuttal e-workpaper "CERR G&A Outsourcing\_Rebuttal.xlsx," tab "Legal Spend," cell F19.

human resources staff whose primary responsibility is to “interface with the outside contractor and assure that the CERR has a pool of employees that enables it to engage in ongoing operations.” Consumers Opening at III-D-65. In that regard, Consumers proposed that the CERR would staff this function with a Director of Human Resources in order to “manage training, recruiting, compliance, compensation and benefits, employee relations and training since most of these functions will be outsourced. *Id.* at III-D-65-66.

Consumers also explained that its electronic spreadsheets included its outsourcing costs for the human resources and training functions (*see* Consumers Opening e-workpaper “CERR Operating Expense\_Open.xlsx,” tab “Training”), and that the CERR’s staff also would include two additional individuals, *i.e.*, the Manager of Operating Rules, Safety, and Training (Non-Train Operating Staff) and the Engineer of Programs, Budgets, Safety and Training (MOW Staff) whose responsibilities would include “interacting with the outside training vendor and with the Director of Human Resources.” *Id.* at III-D-66.

On Reply, CSXT contends that it is necessary to add a second Human Resources position to the CERR’s G&A staff; namely, a Manager of Human Resources. *See* CSXT Reply at III-D-90. According to CSXT, Consumers’ proposed outsourcing “only reflects costs for start-up expenses such as recruitment and training,” and the CERR staff therefore would remain responsible for several different HR functions. *Id.* at III-D-88. These functions, CSXT argues, are too extensive for a single individual to perform.

In fact, however, CSXT's list of internal HR functions includes: (i) functions the CERR will outsource; (ii) functions that fall within the ability of the Director of Human Resources to perform; and/or (iii) functions that are to be performed by other CERR staff members. *Id.* at III-D-88-89 (listing CERR HR functions). Specifically, the functions of "ensuring compliance with federal immigration law" and "ensuring compliance with . . . federal and state laws and regulations" will be performed by the outside vendor as part of the fundamental purpose of the recruitment and hiring outsource service. The function of "setting compensation and benefits" would be performed by the various departmental supervisors throughout the CERR staff as part of their normal functions. Conversely, the functions of interacting with outside vendors, investigating complaints, and administering discipline are all within the primary function and ability of the CERR's existing Director of Human Resources. *See Consumers Opening at III-D-65.*<sup>110</sup>

Finally, CSXT asserts that Consumers' intended outsourcing amounts to \$117,041 per year and CSXT objects that \$40,000 per year (for all functions other than the training of Conductors and Engineers) would be an insufficient budget for HR outsourcing. *See CSXT Reply at III-D-89.* Other than

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<sup>110</sup> CSXT also refers to the supposed HR function of "[a]pproving employees returning to work after injuries . . . ." CSXT Reply at III-D-89. To the extent that this requires any internal CERR HR staff work, the CERR's Director of Human Resources will have the ability to perform that work.

commenting that “[t]his is not sufficient” (*id.*), however, CSXT does not identify a reasonable annual budget for these additional functions. In fact, the \$40,000 in outsourced HR expenses per year that CSXT references for non-crew employees is sufficient. On Opening, CERR non-crew employees equaled 106.<sup>111</sup> Applying the CERR attrition rate of { } percent to this count results in non-crew turnover of { } individuals on average.<sup>112</sup> CSXT has no basis for claiming \$40,000 is insufficient to support the recruitment and training needs of this small number of individuals.

Consumers respectfully submits that CSXT has not provided adequate justification to require the addition of a full time staff member (with the associated salary and fringe benefit expenses) simply because CSXT comments without support that Consumers’ outsourcing budget for HR functions unrelated to the training of either Engineers or Conductors is “not sufficient.”

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<sup>111</sup> See Consumers Opening e-workpaper “CERR Operating Expense\_Opening.xlsx,” tab “Training,” cell E10 minus cells E3 and E4.

<sup>112</sup> For attrition rate, see Consumers Opening e-workpaper “CERR Operating Expense\_Opening.xlsx,” tab “DCF Transfer,” cell C42.

(iii) Security/Police<sup>113</sup>

On Opening, Consumers proposed a security staff for the CERR that would include a Chief of Security and three Security Agents (one for each state), who would “interact with local police departments in the area traversed by the CERR’s small system.” *See* Consumers Opening at III-D-70. Consumers explained that the Indiana agent would have the ability provide assistance, as needed, “from Chicago to the western Michigan area as well.” *Id.* Likewise, Consumers indicated that the Chief of Security would oversee the work of the three Security Agents and “again given the small overall size of the CERR system as compared with prior SARR systems – will be able to provide additional security coverage throughout the entire CERR route.” *Id.* In addition, Consumers provided for front-desk security for its West Olive, Michigan headquarters on a 24-7 basis through an outsourcing arrangement. *Id.* at III-D-72 (citing Consumers Opening e-workpaper “CERR Outsourcing\_Open.xlsx,” tab “Outside Services,” cell C10 (identifying the CERR’s outsourcing costs for this headquarters security function)).

On Reply, CSXT accepts Consumers’ evidence that “one Police Agent in Michigan and one Police Agent in Indiana is adequate.” CSXT Reply at

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<sup>113</sup> CSXT draws a distinction in its Reply evidence between security and police: “Security protects the integrity of the yard by controlling access and patrolling. The police protect trains, lading in trains, and employees, with major priority being the protection of trains.” CSXT Reply at III-D-92 n.210. As described below, CSXT argues that both additional police and additional security are required in Chicago.

III-D-95. Moreover, CSXT's accepts Consumers' proposed security arrangement and expense for the CERR's West Olive, Michigan headquarters. *See id.* at III-D-94. CSXT, however, proposes substantial increases to the CERR's staffing, both with respect to railroad police and railroad security. *See id.* at III-D-94-95. In particular, CSXT proposes to add a Director of Asset Protection, an Assistant Chief of Police, and eight additional Security Agents (*i.e.*, police) in Chicago alone. *Id.* In addition, CSXT proposes to implement an outsourced security function at the Barr Yard on the same financial basis as Consumers' West Olive headquarters security. *Id.* at III-D-94. Other than accepting CSXT's proposed Assistant Chief in Chicago, Consumers declines to modify its existing police and security staff. As described in detail below, CSXT's proposed changes are excessive, unsupported, and improper.

In its Reply, CSXT argues that the "security responsibility" for the CERR will be significant because "[t]he CERR will have one large facility in Chicago at Barr Yard and will also have several major interchange tracks where trains could be stopped for long periods of time and will need to be protected." CSXT Reply at III-D-90-91. CSXT states that Chicago has more crime than "suburban Porter" (*id.* at III-D-91), and CSXT adds that "[s]elected CSXT police statistics for 2015 for Chicago also justify the need for appropriate police and security staffing." *Id.*

CSXT's only source for its Chicago police information is a workpaper entitled "CSXT Police Statistics Email.jpg." *Id.* at III-D-91 n. 208.



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} While Consumers does not dispute that crime occurs in Chicago (and that high levels of crime occur in certain areas of Chicago), CSXT’s “evidence” on this point {

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In any event, CSXT next argues that “every real-world railroad in Chicago (including BNSF, UP, NS, IHB, and CSXT) has a 24/7 police presence at their *major* yards.” See CSXT Reply at III-D-91 (emphasis added). Specifically, CSXT contends that the railroads operating in Chicago include a widely divergent number of police officers: CSXT (20); UP (20); NS (42); BNSF (20); CN (9); IHB (8). See CSXT Reply at III-D-92 (Table III-D-16).

The first point to note regarding CSXT’s Table III-D-16 claim regarding railroad police is that it pertains to the real-world carriers’ “major”

yards, yet CSXT does not offer any clear guidance as to which real-world yards include a police presence and which do not. Stated differently, CSXT does not offer any guidance as to which yards CSXT regards as being “major” yards. Most importantly, however, CSXT again supports its Chicago police statistics by relying exclusively on {

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Nevertheless, a detailed review of the actual text of {

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<sup>114</sup> The CERR utilizes CSXI's 59th Street Intermodal facility, but the CERR already pays a substantial fee to "CSX Terminals" for security at 59th Street. *See* CSXT Reply at III-A-45 (Table III-A-3) (listing "Terminals – Security" at CSX Terminals' 59th Street Intermodal Terminal as an expense already included by Consumers on Opening).

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comparison of the IHB police staff with the CSXT's proposed CERR staff is even more telling on the basis of the relative size of the carrier's yard operations. In this regard, the IHB's website indicates that the IHB is the "largest switch carrier in the U.S. with 54 miles of mainline track . . . and 266 miles of additional yard and siding track." See Consumers Rebuttal e-workpaper "IHB Summary.pdf" (emphasis added), also available at [http://www.ihbrr.com/about\\_us](http://www.ihbrr.com/about_us).

The IHB's Chicago area yards include the Blue Island Yard (its "primary yard"), which is a "44 class[ification] track hump yard" at Riverdale, IL. *Id.* The extensive Blue Island Yard is located between 127th Street and 146th Street south of Chicago. The IHB's other "major" yards include the Gibson Yard in Hammond, IN, "which only classifies cars of new autos," and the Michigan Avenue Yard in East Chicago. *Id.* The IHB "interchanges daily with 16 other rail

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<sup>115</sup> To reiterate, CSXT's Reply insists that the "major priority" for railroad police is the protection of trains, rather than the integrity of a yard. See CSXT Reply at III-D-92 n.210.

carriers in Chicago.” *Id.* The IHB’s other classification yards in the Chicago area include the Argo Yard, the Lake Front Yard, and the Norpaul Yard.<sup>116</sup>

As Consumers explained on Opening, there are substantial differences between the CERR and the IHB. *See* Consumers Opening at III-B-3 (“As explained by Messrs. Orrison and Holmstrom, the CERR is not a terminal railroad such as the Belt Railway Company of Chicago (‘BRC’) or the Indiana Harbor Belt (‘IHB’) that operates extensive networks in and around Chicago, including large classification yards such as Clearing Yard or the Blue Island Yard.”). Unlike the IHB’s 266 miles of yard and siding track, the CERR system includes a total of only 11.29 miles of yard track at Barr Yard, which is the CERR’s only yard. *Id.* at III-B-15. Accordingly, the IHB’s reported 266 miles of yard and siding track are 23.6 times longer than the CERR’s Barr Yard track (*i.e.*, 266 miles divided by 11.29 miles = 23.6). Despite this substantial disparity in the mileage of yard tracks (and despite the disparity in the total number of yard locations), however, CSXT insists on Reply that the CERR must have a *larger* Chicago police force than the IHB maintains.<sup>117</sup> There is no basis for CSXT’s extreme police staffing overstatement in this regard.

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<sup>116</sup> *See* <http://www.ihbrr.com/maps>.

<sup>117</sup> CSXT’s proposed police staffing for the CERR’s Chicago operations also exceeds the nine (9)-member CN police staffing level that CSXT {  
}. *Cf.* CSXT Reply at III-D-92.

As noted above, however, Consumers has elected to add CSXT's proposed Assistant Police Chief in Chicago (*see* CSXT Reply at III-D-95) to remove any potential doubt as to the ability of the CERR police force to perform its required functions (as compared with the IHB police staff on which CSXT relies). This additional individual will help to protect the trains and personnel at Barr Yard. With this Assistant Police Chief as part of the police staff, the CERR's police staffing level will substantially exceed the IHB's police level on a per yard or per yard track-mile basis. Specifically, the three-member CERR police staff – including the CERR's Police Chief, Assistant Police Chief, and Illinois police Agent (even excluding the help available from the CERR's Indiana police Agent) – would amount to approximately 3.76 yard track-miles per police Agent. By comparison, the IHB's reported police staffing level amounts to 33.25 yard/siding track-miles per police Agent. Consumers' proposed Chicago police staffing therefore is approximately ten times more robust than the Chicago police staffing of the IHB. Consumers' proposed police staffing therefore is reasonable and appropriate on the basis of CSXT's own claims.

This same IHB comparison demonstrates that there is absolutely no basis whatsoever for requiring the CERR staff to include the vastly excessive police agent force proposed by CSXT. That 11-member proposed Chicago force (*i.e.*, the Police Chief, the Assistant Police Chief, and 9 police agents dedicated to Chicago alone) would represent approximately thirty-two (32) times the police force that the IHB employs in the Chicago area on a per yard-track mile basis. In

particular, the CSXT proposal would amount to only 1.03 yard-track miles per staff member. On a per mile basis, that staffing is thirty-two (32) times more extensive than the IHB's 33.25 yard/siding track-miles per police Agent.<sup>118</sup>

With respect to the separate subject of yard security, CSXT's arguments likewise are unavailing. As noted above, CSXT proposes to add security at the Barr Yard on the same 24-7 basis as reflected in Consumer's Opening evidence with respect to outsourced security at the CERR's West Olive, Michigan headquarters. *See* CSXT Reply at III-D-94. Consumers' expert witnesses Mr. Orrison and Mr. Holmstrom are familiar with the Barr Yard and each visited this yard on July 6, 2015 during Consumers' tour of CSXT's Chicago operations for purposes of this proceeding. Messrs. Orrison and Holmstrom each observed during their visit that the Barr Yard does not include any fencing or any controlled access point for a security operation. Consistent with this observation, CSXT never claims on Reply that such controlled access exists at Barr Yard. Moreover, as noted above, CSXT never argues – {

} – that CSXT incurs any security expenses whatsoever at the real-world Barr Yard. Accordingly, there is no basis for requiring the CERR to incur a security expense at Barr Yard.

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<sup>118</sup> Mr. Orrison and Mr. Holmstrom note based upon their extensive experience in Chicago that the location of the IHB's LaGrange yard is much more dangerous than the location of the CERR's Barr Yard, and that the extensive automotive operations at the IHB's Gibson Yard are substantially more likely to be the targets of criminal activity than the CERR's Barr Yard operations.

**(iv) Director of Asset Protection**

In its Reply evidence, CSXT proposes that the CERR Law & Administration Department add a “Director of Asset Protection.” *See* CSXT Reply at III-D-94. According to CSXT, this individual “will be responsible for overseeing police, security, and environmental functions at the CERR” and “will have oversight of outsourced security contracts.” *Id.* There is no need to include this extra staff member.

CSXT’s proposed inclusion of this individual represents an effort to include an extra layer of supervision for superfluous staff members (*i.e.*, eight additional unnecessary police officers, an unnecessary Manager of Environmental Control, and an unnecessary security outsource operation at Barr Yard). The CERR’s existing Chief of Security will oversee the CERR’s police and security functions. This individual will be assisted by an Assistant Police Chief in Chicago, and will work under the supervision of the CERR’s Vice President Law & Administration. Notably, CSXT does not make any effort to explain the relative levels of responsibility and reporting as between the CERR’s Chief of Police and CSXT’s proposed Director of Asset Protection position.<sup>119</sup>

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<sup>119</sup> CSXT includes an Organizational Chart for the CERR’s Law & Administration Department in its electronic workpapers that shows the Director of Asset Protection supervising the Chief of Police {

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Moreover, the CERR's MOW Engineer will oversee the railroad's environmental responsibilities. Accordingly, there is no need to include a redundant Director of Asset Protection in the CERR's G&A staffing.

(v) **Environmental**

CSXT also argues that the CERR staff must include a Manager of Environmental Control. *See* CSXT Reply at III-D-93-95. CSXT states that such an individual will be “available for any hazardous material or other releases” and will “assist with necessary industrial hygiene functions such as obtaining necessary pollution discharge permits, providing necessary training for environmental regulatory compliance, and disposing of waste.” *Id.* at III-D-94-95. CSXT also proposes a \$10,000 budget for permit fees and contractor/consultant costs for environmental matters. *Id.* at III-D-95 n.219.

Although CSXT acknowledges that the CERR does not handle any TIH traffic, CSXT contends that the presence of lesser hazards in the CERR's traffic mix warrants a finding that additional responsibilities will exist. *See* CSXT Reply at III-D-93. Consumers, however, already has addressed these responsibilities through its existing staff. In particular, Consumers explained on Opening that the CERR's legal staff “would be available to address any environmental issues . . . .” Consumers Opening at III-D-61. In addition, Consumers provided for the MOW Engineer to “deal[] with other MOW administrative matters involving environmental [matters].” *See id.* at III-D-110.

Consumers also explained in its Opening MOW evidence that derailments were less likely to occur on the CERR than on a Class I railroad such as CSXT “because the CSXT begins operations in 2015 over a brand-new track structure that includes CWR on all of its main tracks.” *Id.* at III-D-124; *see also id.* (“The CERR is providing protective drip pans at the location where locomotives are fueled at its Barr Yard locomotive facility” to ensure that “oil emissions from idling locomotives are contained.”). Finally, Consumers reported that CSXT had not provided any information in discovery on the cost of environmental clean-ups.<sup>120</sup>

In light of the CERR’s existing staffing and expenses for addressing environmental matters, and in light of the nature of the CERR’s traffic mix, Consumers declines to add the additional Manager of Environmental Control that CSXT has proposed.

(vi) **Administrative Assistant/Claims**

On Reply, CSXT proposes that the CERR staff should include an additional Administrative Assistant whose functions also could include managing the claims processing responsibility and providing administrative support for the Law & Administration Department as a whole. *See* CSXT Reply at III-D-87-88;

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<sup>120</sup> CSXT correctly notes (*see* Reply at III-D-94 n.215) that Consumers workpapers inadvertently excluded the \$10,000 clean-up costs that Consumers had identified in its Opening narrative at III-D-124. Consumers has added this cost in its Rebuttal workpapers. *See* Consumers Rebuttal e-workpaper “Rebuttal CERR MOW Costs.xlsx,” tab “Annual MOW Expenses,” cell G25.

*see also id.* at III-D-87 (stating that CSXT’s proposed CERR police force would investigate and process claims).

Consumers declines to add this Administrative Assistant/Claims position to the CERR staff. As an initial matter, CSXT has not provided any basis for concluding that an additional Administrative Assistant is needed. Moreover, with respect to the subject of claims, Consumers explained on Opening that its Vice President of Law & Administration and its General Attorney would perform the majority of the CERR’s annual legal work “including the administration of litigation and claims . . . .” Consumers Opening at III-D-61.

Consumers added that the CERR’s in-house attorneys will provide assistance in investigating claims. Moreover, Consumers explained that the “Chief of Security will be available to provide on the ground support for initial claims investigation” (*id.* at III-D-61 & n.35) and Consumers also applied a mileage-based benchmarking metric from CSXT’s *TPI* evidence to demonstrate that the total claims staffing requirement for the CERR (even under CSXT’s own evidence) would be 0.348 claims agents. *See id.* at III-D-61-62.

In light of CSXT’s reliance on the CERR police Agents to assist with the claims function, and in light of the very low claims staffing requirement based upon CSXT’s *TPI* benchmark, Consumers submits that the existing CERR staff members – plus the new Assistant Chief of Police – will be adequate to handle the claims function.

(vii) **Information Technology**

On Opening, Consumers' IT witness, Mr. Joseph Kruzich, a former CIO of Kansas City Southern, provided a six-person IT department. While CSXT accepts the basic structure of IPA's IT department, it nevertheless proposes to increase the total personnel by three positions. CSXT's additional positions are unwarranted.

Before turning to the individual staffing decisions, Mr. Kruzich notes that computer technology today is very user-friendly, automated, and self-sufficient. User interfaces have removed the need for large numbers of IT personnel, and manufacturers' customer service diminishes the need for in-house development and maintenance personnel. Moreover, historically, CSXT, just like other Class I railroads, developed much of its own software and equipment as an integrated control strategy, which required more people, because very little tracking, modeling, dispatch, and finance software were available. However, the market for railroad-related applications has changed. Today there is an abundance of rail software programs and applications available to smaller railroads like the CERR. Thus, the CERR does not need anything remotely approaching the level of IT staffing that CSXT does for development of its own software.<sup>121</sup>

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<sup>121</sup> See Pat Foran, *How information technology helps connect the strategic dots at Union Pacific Railroad*, Progressive Railroading (June 2013), [http://www.progressiverailroading.com/union\\_pacific/article/How-information-technology-helps-connect-the-strategic-dots-at-Union-Pacific--36415](http://www.progressiverailroading.com/union_pacific/article/How-information-technology-helps-connect-the-strategic-dots-at-Union-Pacific--36415).

Mr. Kruzich also notes that as KCS's CIO, he employed close to 50 IT personnel that were able to handle all IT functions *in-house*; in other words, there was no outsourcing, such as RMI. KCS is a large railroad covering thousands of miles. The KCS also had a complicated mainframe and other systems that the IRR does not need. Moreover, the systems being managed were far more primitive than today's software and systems. In other words, Mr. Kruzich is well aware of functions that an IT staff would have to cover and how those requirements scale to a smaller railroad. A small railroad with a relatively straightforward operation does not require a large IT staff.

On Opening, the CERR provided one programmer who is responsible for maintaining and upgrading the crew calling, accounting, human resources and dispatchers systems. This employee helps manage the crew calling, dispatching and accounting systems, and also is responsible for developing a corporate information website. The programmer is also responsible for developing any necessary system integration between RMI, accounting, dispatching and other systems.<sup>122</sup> CSXT suggests that most companies would employ a commercial program such as SAP or Oracle as a backend platform. Reply at III.D-44. Without such a system, CSXT argues that a third programmer is needed "in order to develop the additional system enhancements necessary to

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<sup>122</sup> See Consumers Opening at III-D-69-70.

integrate the inputs and outputs of the various stand-alone systems.” *Id.* UP’s arguments are without merit.

CSXT proposes one additional programmer specialists to oversee three primary functions: Crew Management, Dispatching, and Oracle Systems.<sup>123</sup> The one programmer specialist proposed on Opening by Mr. Kruzich was responsible for maintaining and upgrading these systems. This was more than adequate since the interface cost for the Crew Calling, Dispatching and Oracle Systems was included in the Capital Cost “Implementation and Training Cost” provided on Opening.<sup>124</sup> Given the size of the CERR, the one programmer provided on Opening is sufficient staffing to provide support for these functions. This staffing level is comparable to what Mr. Kruzich had when Vice President Computer Operations at KCS in the late 1990’s. For example, Mr. Kruzich had one IT programmer assigned to Dispatching but that staffer had a significant amount of time to assist with other program projects unrelated to Dispatching.

On Opening, Consumers provided for one full time IT support specialist. The IT support specialist helps users with basic computer problems and provides support to specialized IT functions that are overseen by other support personnel such as the Lead RMI technician. The basic IT support function is staffed for normal business hours when most of the G&A staff are in the

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<sup>123</sup> See CSXT Reply at III-D-97.

<sup>124</sup> See Consumers Opening e-workpaper “CERR - Capital Budget (2).xls,” tab “Sheet1,” rows 12,15, and 17.

headquarters office (*i.e.*, an accounts payable clerk having trouble with Microsoft Word would call the IT support specialist). For after-hours assistance, Mr. Kruzich specified that the CERR's existing IT staff would be on-call – a simple rotation would suffice given that there are six staff members. The senior IT staff can easily assist on a variety of computer issues, as the gateway to such positions usually starts with basic IT support experience.

CSXT proposes to add an additional support specialist located in Chicago based on its theory that Chicago is an independent operating arm of the CERR.<sup>125</sup> This addition is unnecessary. Indeed, Mr. Kruzich strongly disagrees that one IT Help desk be assigned to Barr Yard. This would set up a situation where there is not sufficient work load to support the position at that location. In addition, in today's IT environment, it is commonplace and expected that most IT assistance will be performed remotely by the IT department using standard programs to log into employee computers.

CSXT also throws in two additional, unexplained help desk staffers.<sup>126</sup> These additions are unnecessary because the CERR is a very small railroad compared to the KCS where Mr. Kruzich used one Help Desk position during regular business hours and during off business-hours calls would be directly routed to the on-call technician as described on Opening.

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<sup>125</sup> See CSXT Reply at III-D-97-98.

<sup>126</sup> *Id.* at III-D-98.

Mr. Kruzich does agree with CSXT that the CERR would benefit from adding the RMI Technician and Programmer/Development employees to the help desk team. This would provide a more efficient group that could assist each other in all the assigned activities.

**iii. Compensation**

Consumers already had addressed each compensation-related dispute between the parties; namely, the fringe benefit ratio and outside director compensation.

**iv. Materials, Supplies and Equipment**

On Opening, Consumers provided for materials, supplies and equipment to support operating personnel (other than maintenance of way personnel) and general and administrative personnel. Materials, supplies and equipment used by these personnel include motor vehicles (automobiles), office furniture, supplies and equipment, building utilities, personal safety equipment, end of trains devices, motorized carts, tools and car part inventories. Costs for this equipment have been included in the calculation of the CERR's annual operating expenses.

CSXT generally agrees with the approach used by Consumers on Opening, but it adds more supplies and vehicles to accommodate its inflated staff figures.

Vehicles. On Opening, the CERR leased a pool of fifteen (15) Ford F150s to support the four members of the Security staff who regularly function in



the field (*i.e.*, the Chief of Security and the three Security Agents) and to support the eleven members of the non-train operating staff who will need the ability to drive to different points along the CERR system (*i.e.*, the Vice President – Operations, the Chief Engineer, the Director of Operations Control, the three Managers of Train Operations, the three Assistant Managers of Train Operations, the Manager of Locomotive Operations, and the Manager of Mechanical Operations).<sup>127</sup> See Consumers Opening e-workpaper “CERR Materials and Supplies\_Open.xlsx,” tab “Automobiles,” cell E3 (identifying the CERR’s non-MOW vehicle lease expenses).<sup>128</sup>

On Reply, CSXT suggests that 15 shared vehicles are inefficient because the railroad has facilities in different locations.<sup>129</sup> Likewise, CSXT argues that 7 more vehicles are needed – primarily for its oversized security group.<sup>130</sup> CSXT also argues that some employees only need cars.<sup>131</sup>

CSXT’s proposal is not logical. First, the CERR, as staffed by Mr. Orrison and Mr. Holmstrom, only requires 15 fleet vehicles. Second, by having one standardized truck that can accommodate multiple passengers, the CERR is ready to move people and even small equipment across the CERR in any weather

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<sup>127</sup> See Consumers Opening at III-D-76.

<sup>128</sup> These vehicles also will be available for use by the CERR’s headquarters G&A staff.

<sup>129</sup> See CSXT Reply at III-D-64-65.

<sup>130</sup> *Id.* at III-D-65.

<sup>131</sup> *Id.*

conditions. These trucks can also traverse troublesome terrain that a car could not manage. As such, Consumers has continued to retain its fleet of 15 F150s on Rebuttal.

Office Supplies. CSXT adds additional desks for its additional employees, which additions Consumers has largely rejected. CSXT also includes three extra desks for the dispatchers and crew callers to perform non-crew calling and dispatching work.<sup>132</sup> While the costs of three additional desks is minimal, Consumers has rejected these additions because any dispatching or crew calling set-up can easily include additional facilities for car tracing, email, etc. Indeed, Mr. Orrison has personally observed such set-ups. Indeed, in his experience, all dispatcher and crew calling desks that he has seen at CSXT and BNSF have multiple computer monitors that allow the dispatcher or crew caller access into the core railroad operating systems such as train location, consists, car tracing, crew on-duty information, along with the ability to log into an email account and to send and receive instant message and even text messages of voicemails. Likewise, in Mr. Orrison's opinion, it would be inefficient to bifurcate the working environments.

Utilities. CSXT accepts the methodology used to derive utility costs for its buildings.<sup>133</sup> However, CSXT increases the costs to reflect its count of

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<sup>132</sup> See CSXT Reply at III-D-65.

<sup>133</sup> *Id.* at III-D-65-66.

buildings, including a second “headquarters” at Barr Yard.<sup>134</sup> As Consumers rejects CSXT additional staffing, its operating plan, and its second headquarters, Consumers continues to use its Opening costs for utilities.

Personal Safety Equipment. CSXT accepts Consumers’ costs for personal safety equipment, but it expands the pool of employees receiving such equipment to include operating department management employees.<sup>135</sup> Consumers accepts these additions, except to the extent that Consumers does not accept the additional positions proposed by CSXT.

End of Train Units. CSXT accepts Consumers’ Opening unit costs for EOTs, but adjusts its count for its proposed count of locomotives.<sup>136</sup> Consumers has revised its costs to reflect its Rebuttal locomotive count.

Travel Budgets. CSXT accepts the unit cost per traveler proposed by Consumers on Opening.<sup>137</sup> CSXT proposes to expand the budget to include the Manager – Operating Rules, Safety and Training, the Manager of Locomotive Operations, and its new Manager – Customer Service. Consumers accepts the expansion of the travel budget to the Manager – Operating Rules and the MLO. As Consumers has rejected the new Manager – Customer Service position, it has excluded travel expenses as well.

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at III-D-66.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at III-D-67.

Car Inspector Equipment. On Opening, Consumers provided for four inspector carts to be located at Barr Yard.<sup>138</sup> CSXT accepts this proposal but proposes that a fifth cart be provided at West Olive.<sup>139</sup> This addition is unnecessary. The car inspector at West Olive is not under a time pressure to complete the inspection of an empty train and there are no paved roads for the cart. A walking inspection would only take about 2.5 hours. As such, Consumers continues to use four carts on Rebuttal.

CSXT accepts Consumers' cost per inspector cart but claims that Consumers improperly excluded gasoline costs for inspector carts.<sup>140</sup> Contrary to CSXT's claim, however, Consumers did include fuel costs for carts. Consumers identified the total cost per inspector carts as \$4,625 on Opening.<sup>141</sup> This total cost reflects \$3,579 per cart for payment and \$1,046 per cart for gasoline.<sup>142</sup> Because CSXT accepts Consumers' per cart cost of \$4,625, it double-counts gasoline costs for inspectors' carts.<sup>143</sup> Consumers rejects CSXT's double counting of inspector cart gasoline costs and continues to use it cost of \$4,625 per cart on Rebuttal.

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<sup>138</sup> See Consumers Opening at III-D-77.

<sup>139</sup> See CSXT Reply at III-D-67.

<sup>140</sup> *Id.*

<sup>141</sup> See Consumers Opening e-workpaper "CERR Operating Expense\_Open.xlsx," tab "Summary," cell G196.

<sup>142</sup> See Consumers Opening e-workpaper "CERR Materials and Supplies\_Open.xlsx," tab "Insp Tools Cart," cell D56.

<sup>143</sup> See CSXT Reply e-workpaper "CERR Operating Expense\_Reply," tab "Summary," cell G196.

v. **Other**

(a) **IT Systems**

On Opening, Mr. Kruzich, developed the CERR's IT system requirements based on the operating plan and G&A requirements. CSXT largely accepts Mr. Kruzich's approach to IT systems, but it does adjust certain costs. CSXT specific adjustments are discussed below.

Total Computer System and Accessories. CSXT increased its computer equipment cost to provide equipment for its proposed workforce.<sup>144</sup> As the CERR is only adding one G&A position on Rebuttal, Mr. Kruzich has rejected CSXT's additional systems, but he has added one additional computer set-up on Rebuttal.

General Accounting (Oracle). On Opening, Mr. Kruzich proposed to use the Oracle Solutions package for its general accounting system.<sup>145</sup> The system offers fully automated solutions to support the complete Financial Control and Reporting process from establishing and managing controls, creating and interfacing transactions from operations sources, transforming ledger balance to account for enterprise allocations and re-measurement to consolidating and reporting results.<sup>146</sup>

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<sup>144</sup> See CSXT Reply at III-D-103.

<sup>145</sup> Consumers Opening at III-D-81.

<sup>146</sup> See Consumers Opening e-workpaper "CERR - Capital Budget (2).xls."

On Reply, CSXT proposes to add Oracle modules such as Asset Tracking, Inventory Management and Project Procurement.<sup>147</sup> While these modules can be justified for a Class I Railroad like the CSXT, they are overkill for a very small Railroad like the CERR because, unlike a Class I railroad, the CERR has few assets that require regular tracking; its inventory of materials is not extensive; and it is not involved in projects that require specialized procurement packages. Therefore, these additional modules are rejected.

On Rebuttal, Mr. Kruzich identified an error in Consumers' IT operating budget where the Treasury module did not allow for the Oracle minimum of 4 users. Mr. Kruzich has corrected this in the CERR Rebuttal IT operating budget, which increases the amount by \$19,002.<sup>148</sup>

T-1 Lines for RMI. On Opening, Mr. Kruzich included a cost for a T-1 line for communications between the CERR and the RMI host computers.<sup>149</sup> CSXT proposes a back-up T-1 line,<sup>150</sup> which Mr. Kruzich accepts. However, without explanation, CSXT proposes a different cost for the backup T-1 line even though it accepted Mr. Kruzich's cost for the primary T-1 line. This departure is

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<sup>147</sup> See CSXT Reply at III-D-103.

<sup>148</sup> See Consumers Rebuttal e-workpaper "CERR – Operating Budget-Rebuttal.xls" row 28.

<sup>149</sup> See Consumers Opening e-workpaper "CERR - Operating Budget (2).xls," tab "Sheet1" row 45.

<sup>150</sup> See CSXT Reply at III-D-103-104.

unnecessarily duplicative, and Mr. Kruzich has applied his Opening T-1 line cost to both lines.

Oracle Implementation Costs. On Opening, Mr. Kruzich used a vendor's estimated costs for implementing the HR and Accounting modules of the Oracle Software. These costs were \$10,000 and \$37,985, respectively.<sup>151</sup> CSXT argues these figures are too low and that it received an estimate of \$2.125 million to implement this system.<sup>152</sup> Perhaps recognizing that its quote represents a preposterous implementation costs for the CERR, CSXT then argues that it will accept the \$10,000 figure for the HR module, and then it proposes to use the four times software implementation cost approved by the Board in *DuPont*.<sup>153</sup> CSXT offers no proof why the four times software implementation cost would apply to this case. The *DuPont* system was colossal and replicated a huge swath of the NS system. It is not surprising that the implementation costs would swell vis-à-vis the cost of the software itself. The CERR is a much simpler railroad and CSXT's alternative costs are not applicable here. Thus, Mr. Kruzich has retained his Opening implementation cost for the Accounting and HR modules.

**(b) Other Out-Sourced Functions**

On Reply, CSXT identifies four (4) changes made to Consumers' Opening other out-sourced expenses. CSXT modifies Consumers' Opening

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<sup>151</sup> See CSXT Reply at III-D-104.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

expenses for outside legal expenses, financial audit expenses, building security expenses and hazardous material cleanup expenses.

As discussed above in Section III-D-3-d-i, CSXT incorrectly calculates outside legal expenses and, as a result, Consumers continues with its Opening approach for the calculation of Rebuttal outside legal expenses.

On Opening, Consumers developed outsourced financial audit expenses by applying CSXT's actual cost as a percentage of revenues over a three-year period to CERR revenues.<sup>154</sup> CSXT claimed that Consumers' approach to calculating financial audit costs reflects CSXT economies of scale that could not be realized by CERR. CSXT instead uses an approximation of P&W's audit costs, or \$120,000. Consumers' use of CSXT's real-world costs over a three-year period is consistent with the approach accepted by the Board in *Sunbelt*. Specifically, the Board stated in *Sunbelt*;

[T]hey [the parties] disagree as to the cost of outsourcing financial auditing. NS argues that 0.06% of revenue is an appropriate benchmark, as that figure is the average audit fee for private companies with between \$100 million and \$499 million in revenue as determined by the Financial Executive Research Foundation. Sunbelt contends that this figure results in overstated costs, and instead uses 0.0257% of revenue, which it derived by calculating the percent of revenue that NS spent on audit fees for the years 2009 through 2011. Sunbelt's use of NS's real-world costs over a three-year period is preferable to the average cost of private companies generally over a one-year period.

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<sup>154</sup> See Consumers Opening e-workpaper "CERR External Audit.xlsx."



We will accept Sunbelt's evidence as the best evidence of record.<sup>155</sup>

Consumers' approach to developing outsourced financial auditing costs is consistent with the approach accepted by the Board for *Sunbelt*, which like Consumers, involved a small SARR. Consumers continues to use CSXT's actual cost as a percentage of revenues over a three-year period, applied to CERR revenues, to calculate outsourced financial audit costs.

On Reply, CSXT builds office space in Chicago for a headquarters support building.<sup>156</sup> CSXT adds security expenses for this building in outsourced services. The security expenses added by CSXT for the Chicago facility match the West Olive headquarters security expenses used by Consumers on Opening and accepted by CSXT on Reply. Because Consumers is not building the Chicago headquarters support building on Rebuttal, it excludes the security expenses for the Chicago building from its Rebuttal outsourced expenses.

CSXT includes \$10,000 in hazardous materials cleanup expenses within its other out-sourced expenses, claiming Consumers excluded these expenses on Opening.<sup>157</sup> Since these expenses are attributable to maintenance of

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<sup>155</sup> *Sunbelt* at 6.

<sup>156</sup> See CSXT Reply at III-F-123.

<sup>157</sup> See CSXT Reply workpaper "CERR G&A Outsourcing\_Reply.xlsx," tab "Outside Services," cell A23.

way activity, Consumers includes the \$10,000 for hazardous materials expenses within its maintenance of way costs.<sup>158</sup>

**(c) Start-Up and Training Costs**

On Opening, Consumers used 2012 through 2014 CSXT data provided in discovery to develop a CERR attrition rate of { } percent. This rate was applied to first year startup and training costs to calculate annual recruitment and training costs.<sup>159</sup> On Reply, CSXT claims Consumers' calculation of the CERR attrition rate and resulting ongoing recruitment and training costs are flawed for two reasons. First, CSXT claims that Consumers' use of terminated employees to calculate the attrition rate should also have included CSXT's percentage of deceased and retired employees. Second, CSXT claims that Consumers should have calculated attrition rates by job category rather than on a system-wide basis.<sup>160</sup>

Regarding the types of employees included in the development of attrition rates, the use of retired employees to calculate attrition for the new CERR is improper. It is unreasonable to assume that the newly established CERR will have significant retirement in its first 10 years of operation. For this reason, Consumers rejects the use of retired employees in its calculation of CERR attrition

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<sup>158</sup> See Consumers Rebuttal e-workpaper "Rebuttal CERR MOW Costs.xlsx," tab "Annual MOW Expenses," cell G25.

<sup>159</sup> See Consumers Opening at III-D-89.

<sup>160</sup> See CSXT Reply at III-D-106.

rates. Likewise, reflecting CSXT's percentage of deceased employees is inappropriate for the CERR. Based on CSXT's own analysis, deceased employees averaged { } percent of all employees over the 2012 through 2014 time period.<sup>161</sup> This percentage would certainly be lower for the CERR given the pool of newly hired employees that would require physicals for onboarding. Even if the CERR's rate was half of CSXT's 0.2 percent rate, it would amount to { } of an employee ({ } times total CERR employees of 161), or not enough to even be included in the CERR attrition rate.

Regarding the use of attrition rates by job category rather than on a system-wide basis, Consumers agrees to calculate attrition rates by job category.

Consumers' Rebuttal attrition rate based on terminated employees by job category results in on-going recruitment and training costs of \$138,198 annually.

**(d) Travel Expense**

CSXT agreed with Consumers' inclusion of travel costs for all CERR employees at the Director level and higher and accepts the proposed benchmark.<sup>162</sup>

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<sup>161</sup> See CSXT Reply e-workpaper "CSXT 2012-2014 Attrition.xlsx," tab "Summary," average of cells D3 through D17.

<sup>162</sup> See CSXT Reply at III-D-106.

**4. Maintenance-of-Way**

On Opening, the MOW plan for the CERR was developed by R. Lee Meadows, Jr., P.E. Mr. Meadows brings considerable hands-on experience with railroad MOW activities, having served in Norfolk Southern Railway's Engineering Department for 33 years including service as Inspector, Assistant to Regional Engineer-Projects, Division Engineer Construction and Maintenance, General Division Engineer, and Division Engineer. He is also an FRA-qualified track inspector.<sup>163</sup>

As explained below, on Mr. Rebuttal, Mr. Meadows has retained the same staffing and equipment for the MOW department. CSXT's Reply evidence proposes to expand the MOW staff by 18 (2 office positions, 9 track positions, and 7 signals positions).<sup>164</sup> As explained in detail below, CSXT's additional staffing is unwarranted.

**a. General Approach to Developing the MOW Plan**

Mr. Meadows's MOW plan includes a field staff sufficient to perform day-to-day inspection and maintenance activities, supported by a managerial/office engineering staff that reports to the CERR's Chief Engineer. As explained on Opening, Mr. Meadows provided a field organization and supervisory/support staff appropriate to each needed maintenance function given

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<sup>163</sup> Mr. Meadows's detailed Statement of Qualifications is set forth in Consumers Opening Part V.

<sup>164</sup> See CSXT Reply at Table III-D-28.

the railroad's geographic scope, terrain, traffic volume and gross tonnages by line segment.<sup>165</sup>

CSXT's Reply purports to identify the major "flaw" in Consumers' MOW plan, namely that Consumers somehow failed to identify and address the difference in needs between its so-called urban segment (Chicago) and its Rural Segment (Porter to West Olive).<sup>166</sup> CSXT even presents a table that claims to illustrate these differences.<sup>167</sup> However, not only is the table incorrect in some cases, but these were all known factors in the staffing selected by Mr. Meadows. Of course, CSXT supposedly solves the alleged deficiencies in Consumers plan by proposing more personnel than are needed.

Mr. Meadows was well aware of the differences between the CERR's facilities between 22<sup>nd</sup> Street/Ogden Jct. and Curtis and those between Porter and West Olive. Just because he did not label his segments "Urban" and "Rural" does not mean his plan was deficient. For example, on Opening, Consumers stated that:

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<sup>165</sup> Mr. Meadows's development of CERR's field MOW staff is guided by the principle that an efficient, least-cost SARR does not require unionized employees and does not face the same constraints as Class I railroads in terms of the level of supervision required and ability to cross-train. This enables field MOW employees to be utilized in a more versatile manner, such that an employee can perform more than one function where consistent with the level of specialization needed.

<sup>166</sup> See CSXT Reply at III-D-107-114.

<sup>167</sup> See CSXT Reply at Table III-D-108.

*The sharing of the district between 22<sup>nd</sup> St./Ogden Jct. and Michigan/Indiana State Line with two crews reflects the practicalities of operating in this territory. Specifically, the area between Barr Yard and Curtis is double track with multiple crossovers, a significant number of interchange tracks, and diamond crossings. And while, as the senior railroad, the CERR is not responsible for maintaining the diamond crossings, the overall movement of trains through the area, as well on the Blue Island Subdivision, requires some (albeit minimal) down time. Thus, having two crews in the area enables a quick response to multiple problems. In addition, the sharing arrangement allows for the second crew to assist the first crew as needed or tend to other tasks near 22<sup>nd</sup> St. or near Porter, etc. In addition, the positioning of the two crews reduces travel times when Chicago traffic might be a factor.*

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The CERR has one Track Supervisor district, reflecting its relatively small size – 160.52 constructed route miles and 215 constructed track miles (including yards and set-out tracks), requiring maintenance.

The Track Supervisor does cover more territory than the Board has accepted in recent cases. However, *the segment between Porter and West Olive, while relatively long (124 route miles) is a light density segment that does not require the addition of a second Track Supervisor.* In addition, there are only 128.5 track miles in the segment, not including set-out tracks. Thus, Mr. Meadows has assigned an Assistant Track Supervisor to cover that territory on a day-to-day basis with input from the Track Supervisor.

The Track Supervisor is assisted by three Assistant Track Supervisors. Two Assistant Track Supervisors are primarily responsible for conducting scheduled routine and special track inspections in accordance with all applicable FRA regulations and are trained and certified by the CERR. *One Assistant*

*Track Supervisor is primarily responsible for the territory between West Olive and Porter and the second Assistant Track Supervisor is primarily responsible for the territory between Ogden Jct./22<sup>nd</sup> St. and Curtis.*<sup>168</sup>

As for CSXT's Table III-D-24, Mr. Meadows was aware of all of this information and such data is readily reflected in his MOW workpapers and the diagram of the CERR (Opening Exhibit III-B-1). The chart is also problematic in a critical respect. Specifically, CSXT describes the average gross tons per mile per year as 55.7 MGT. However, that is deceptive. Most of this territory is double track. Thus, the average gross tons per *track* per year is less than 30 MGT.

Likewise, the track miles per route mile figure of 2.5 shown in the table appears to include the Barr Yard tracks and all of the interchange tracks.<sup>169</sup> Thus, based on Reply Table III-D-25, the 2.5 figure appears to reflect 86.5 miles of track rather than the all-important mainline track figure of 60.95 miles. Similarly, the switches per route mile calculation is based on 57 switches, but this includes all lesser used hand-thrown switches, including all of the many switches in the Barr Yard. When adjusted to exclude lesser-used, non-time sensitive, hand-thrown switches and the Barr Yard switches, there are only 39 mainline switches (including mainline connected switches in the Barr Yard).

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<sup>168</sup> See Consumers Opening at III-D-99, III-D-97-98.

<sup>169</sup> Mr. Meadows recognized that the yard and interchange tracks require maintenance, but the yard tracks are lightly used and the interchange tracks are traversed at slow train speeds thereby reducing wear on the track.

CSXT also suggests that its so-called “Urban Segment” has “unusually high[er] maintenance needs per mile” than the “needs of SARR’s operating in relatively unpopulated areas.”<sup>170</sup> This is nonsensical. The Powder River Basin is a rural area. The maintenance needs of the Joint Line facility there easily outstrip the needs of the CERR or the real-world CSXT over the lines replicated by the CERR.

CSXT also complains that the MOW crews must travel through city streets at low speeds and that somehow the crews will be less productive on a per-mile basis than the rural lines.<sup>171</sup> Again, this argument is nonsensical. The two crews posited by Consumers are located in Barr Yard which is a central point on the CERR. Thus, they are generally driving less than 20 miles to any point on the line. Moreover, even in the heart of rush hour, these crews are unlikely to face more than a one-hour drive. By comparison, the lower density segment is nearly four times as long. CSXT’s argument is even more puzzling because CSXT provides for two basic maintenance crews in Chicago and both are located at Barr Yard. In other words, CSXT has the exact same crew set-up as Consumers does in its all-important “urban” area, but it just adds another crew to its “rural” area.

CSXT concludes its introductory portion of its MOW plan by suggesting again that Consumers failed to consider the differences between the

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<sup>170</sup> See CSXT Reply at III-D-113.

<sup>171</sup> *Id.*



two major segments of the CERR.<sup>172</sup> As explained above, CSXT's bluster is flatly incorrect.

**b. MOW Personnel**

The CERR's MOW personnel (employee) requirements are summarized in Rebuttal Table III-D-11 below.

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<sup>172</sup> *Id.* at III-D-114.

<b>REBUTTAL TABLE III-D-11 CERR MAINTENANCE-OF-WAY PERSONNEL</b>				
<b>Position</b>	<b>Opening</b>	<b>Reply</b>	<b>Rebuttal</b>	<b>Difference (Reply v. Rebuttal)</b>
<b>HQ Office/Supervisory</b>				
Track Engineer	1	1	1	0
Communications & Signals Engineer	1	1	1	0
Bridge Engineer/Inspector	1	1	1	0
Public Projects Engineer	0	1	0	1
Engineer of Programs, Budgets, Safety & Training	1	1	1	0
Administrative Assistant	0	1	0	1
Subtotal	4	6	4	2
<b>Field</b>				
Track Supervisor	1	2	1	1
Assistant Track Supervisor	3	2	3	(1)
Track Crew Foremen	3	4	3	1
Track Crew Members	6	12	6	6
Roadway Machine Operators	5	6	5	1
Welders/Helpers/Grinders	2	4	2	2
Roadway Equipment Mechanic	1	1	1	0
Smoothing Crew Foreman	1	1	1	0
Smoothing Crew Member/Machine Operator	2	2	2	0
C&S Supervisor/Inspector/Technician	1	1	1	0
Signal Maintainers	7	12	7	5
Signal Inspector	0	1	0	1
Communications Technician	1	1	1	0
Communications Maintainer	1	1	1	0
B&B Machine Operator	1	1	1	0
B&B Foreman	1	1	1	0
B&B Carpenter/Helper & Water Service	1	1	1	0
Subtotal	37	53	37	16
<b>Total</b>	<b>41</b>	<b>59</b>	<b>41</b>	<b>18</b>

Consumers' Opening MOW personnel shown in Rebuttal Table III-D-11 equate to 3.92 route miles per employee and 5.27 mainline track miles per employee. See Consumers Rebuttal e-workpaper "Rebuttal CERR MOW

Costs.xlsx,” tab “MOW Staff Salaries,” cells G47, G50. CSXT complains that this ratio is not acceptable vis-à-vis past cases decided by the Board.<sup>173</sup> CSXT’s Reply Table III-D-29 purports to demonstrate the deficiencies of Consumers’ MOW staffing plan by comparing it with that of *WFA*, *AEP Texas*, *Otter Tail*, *Xcel*, *Sunbelt*, as well as CSXT’s Reply. However, CSXT’s comparison is misleading as explained below.

CSXT makes much of the comparison between the Chicago area facilities and the Porter to West Olive facilities, but it fails to take that into account when comparing the ratios proposed by Consumers to those of other cases. Specifically, under Mr. Meadows’ carefully considered plan, the Chicago-area track is being serviced or supervised by 33 of the 41 employees in the MOW department. Thus, on a per mainline track mile basis (60.95 track miles), Consumers has 1.85 MOW staff per track mile. Even using all of the track miles, including yard tracks (86.5 track miles), in the Chicago area, Consumers has 2.62 MOW staff per track mile. Thus, as shown in Rebuttal Table III-D-12 below demonstrates, Mr. Meadows has provided far more staff in the CERR’s maintenance critical area than that provided in any of the SAC cases (where such extreme difference did not exist) listed by CSXT.

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<sup>173</sup> *Id.* at III-D-116.

<b>REBUTTAL TABLE III-D-12 COMPARISON OF MOW STAFF</b>						
	<i>WFA</i>	<i>AEP Texas</i>	<i>Otter Tail</i>	<i>Xcel</i>	<i>Sunbelt</i>	Consumers (Chicago)
MOW Staff	97	452	437	166	185	33
Track Miles	391	1664	1485	553	714	86.5
Track Miles-to- MOW Staff	4.0	3.7	3.4	3.3	3.9	<b>2.62</b>

Thus, Mr. Meadows has taken considerable care to ensure that the facilities serving the vast majority of the traffic has far more MOW staff than in other cases. Consider, for example, the *WFA* case. There the complainant was replicating one of the most traffic dense locations in the entire United States, where the SARR was carrying over 100 MGT a year. However, that density allowed for a lower track miles-to-MOW staff ratio. Here, in the most traffic dense segment of the CERR (which is still far less than the *WFA* SARR), Mr. Meadows has provided for 54% more staff per track mile than the *WFA* SARR.

Consumers specifically noted, as described above, that the Porter to West Olive segment would not require the same degree of MOW staffing given that it is only handling 8 MGT annually and the segment has only two sidings. To be sure, it has many signalized grade crossings, but Mr. Meadows assigned three signal maintainers to the area. Thus, Mr. Meadows provided seven MOW staff to serve this segment directly. The core MOW staff is supported by one of the basic maintenance crews out of Barr Yard and other field personnel as necessary. That is more than sufficient given the very modest needs of the segment. As noted below, CSXT has contradicted much of its verbiage about the needs in Chicago by adding another maintenance crew to the Porter to West Olive segment, while

retaining Consumers' two maintenance crews in Chicago. Regardless, Mr. Meadows has not altered his staffing approach as described in more details below.

**c. MOW Organization by Function**

As Consumers explained on Opening, the CERR's field MOW organization is dictated by the railroad's geographic scope (route miles), track miles and peak-year traffic volume measured by the gross tons traversing each line segment.<sup>174</sup> In addition, the distances that field forces must travel to cover their assigned territory are considered. The general office MOW staff (which reports to the Chief Engineer) is structured to provide adequate supervisory and administrative support to the field forces, as well as to prepare the annual MOW budget and supervise contractors in their performance of MOW work.

**i. Headquarters Location**

Before addressing particular departments, CSXT complains that having the MOW office staff located with the rest of the CERR's senior management and administrative staff would be inefficient because it would be too far from the busiest maintenance areas.<sup>175</sup> Thus, CSXT proposes to move the MOW management staff to Barr Yard.<sup>176</sup> CSXT's argument is without merit.

The supervisory staff is not field staff. They do not need to be located in Barr Yard to do their jobs. Moreover, these supervisory personnel also

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<sup>174</sup> See Consumers Opening at III-D-95-96.

<sup>175</sup> See CSXT Reply at III-D-116-117.

<sup>176</sup> *Id.*

have to be readily available to other departments because the MOW function must tightly integrate with operational needs. Having the MOW management located at Barr Yard would unnecessarily complicate the coordination between departments. Further, CSXT does not suggest that its senior MOW management are all located proximate to the key areas being maintained. Indeed, CSXT's headquarters is located hundreds of miles from critical CSXT service areas such as Chicago and New Jersey.

CSXT also proposes to add two positions to the headquarters staff: a Public Projects Engineer and an administrative assistant. CSXT proposes that the Public Projects Engineer would be needed in order to handle issues such as highway grade separation negotiations, utility projects and right-of-way projects.<sup>177</sup> CSXT notes that this position was accepted in *Sunbelt*. Consumers rejects the inclusion of this position.

As both noted by Mr. Meadows and CSXT, the majority of route miles on the CERR are contained in the lightly used Porter to West Olive portion of the railroad. Thus, there is practical limit to the number of public projects that would require the attention of the CERR's engineers. Moreover, the *Sunbelt* case is a poor comparison. There the SARR consisted of 714 track miles and MOW personnel totaling 185, more than three times larger than either the 216 track miles and 41 MOW personnel presented in Consumers Opening, or the 59 MOW

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<sup>177</sup> *Id.* at III-D-117-118.

personnel in CSXT's Reply. *Sunbelt* becomes an even more inappropriate comparison when considering that, by CSXT's own suggestion, most projects requiring a Public Project Engineer would be contained in the urbanized 22<sup>nd</sup> Street to Curtis portion of the CERR, which only constitutes a fraction of the total track miles, but the bulk of the personnel to cover such issues. On a railroad the scale of the CERR, Mr. Meadows has determined that any project requiring interaction with government agencies and/or other entities could be handled effectively by a combination of the Chief Engineer, Track Engineer and Bridge Engineer as appropriate.

Consumers also rejects CSXT's inclusion of an administrative assistant in the MOW department. The CERR is small railroad and, like all small railroads, many employees would be cross-trained to handle tasks from multiple departments. Likewise, senior employees would be expected to take on more administrative responsibilities than their counterparts at larger organizations typically would. Such would be the case with G&A Department Administrative personnel and the General Office Staff. Senior General Office Staff members would be responsible for more administrative tasks than in a larger organization, particularly the Chief Engineer. G&A Department Administrative personnel based at the West Olive Headquarters would be called on as required, communicating with employees based at Barr Yard via telephone, email and other commonplace business applications. Moreover, CSXT's inclusion of the administrative assistant is premised on its notion that the MOW management staff

must be located in Barr Yard not in West Olive. Once again, CSXT's relocation is unnecessary, as discussed above, and its attendant additional costs for an assistant should also be rejected.

**ii. Track Department**

On Opening, Mr. Meadows provided a 25-person track department. CSXT disagrees in part with Consumers' staffing arguing, as it does in all other phases of this Part III-D, that the CERR needs more staff. As explained below, CSXT misconstrues part of Consumers' staffing; presents illogical new staffing; and simply adds bloat to a department that is already staffed-up, in the most challenging portions of the railroad, with more staff than any SAC case cited by CSXT. Thus, Mr. Meadows rejects the additional staff proposed by CSXT.

As shown in Rebuttal Table III-D-11, CSXT adds one track supervisor, deletes one assistant track supervisor, adds one track foreman, six track crew members, one roadway machine operator, and two welders. These additions add 10 Track Department staff. As Mr. Meadows explains, the CSXT's additions are unwarranted. Below, Consumers addresses the areas of disagreement.

Track Supervisor and Assistant Track Supervisors. Despite a lengthy, but incorrect, discussion by CSXT asserting again that Mr. Meadows did not consider the differences between the 22<sup>nd</sup> Street to Curtis and Porter to West Olive segment, CSXT then selectively ignores that distinction when developing its



count of Track Supervisors and Assistant Track Supervisors.<sup>178</sup> Despite the fact that both CERR and CSXT agree that the 22<sup>nd</sup> Street to Curtis section of the CERR would require significantly more labor and maintenance efforts than the longer, but low density segment from Porter to West Olive, CSXT assigns a single Track Supervisor and a single Assistant Track Supervisor to both sections.<sup>179</sup> CSXT justifies the addition of a second Track Supervisor by citing past SAC cases, such as *Sunbelt*, effectively rejecting the notion that a Track Supervisor could be responsible for 200 miles of territory.<sup>180</sup> However, those cases are significantly different in that there were no longer light density segments. Thus, the addition of a second Track Supervisor to oversee the lightly used Porter to West Olive segment would be excessive and wasteful. Additionally, CSXT's plan allots 50% of the track supervisors to the lightly used "rural" Porter to West Olive segment, potentially placing unnecessary and excessive strain on the two supervisors in Barr, should multiple track related issues occur simultaneously.

Conversely, the plan advanced by Mr. Meadows of a single Track Supervisor that will spend most of the time working in Chicago and three Assistant Track Supervisors (with two located at Barr Yard) appropriately accounts for the unique characteristics of both portions of the railroad. Thus, Consumers' plan allows for three supervisory level track personnel to handle

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<sup>178</sup> *Id.* at III-D-120-123.

<sup>179</sup> *Id.* at III-D-122.

<sup>180</sup> *Id.* at III-D-121.

Chicago, but it also provides flexibility for the Porter to West Olive segment. The Track Supervisor would prioritize the daily activities across the entire railroad, maximizing manpower usage and operations safety in the process. Instructions pertaining to the 22<sup>nd</sup> Street to Curtis segment would be handled by the primary Assistant Track Supervisor for Chicago or his backup. Instructions pertaining to the lightly used Porter to West Olive segment would be the responsibility of the second Assistant Track Supervisor, based in Grand Junction. The third Assistant Track Supervisor would also work directly with the Track Supervisor in addressing issues on an as-needed basis. Ultimately, this arrangement best addresses the unique requirements of the CERR.

Track Crews. On Opening, Mr. Meadows provided for three track crews consisting of a foreman and two track workers. Each track crew includes a road equipment operator that acts as the fourth person of the basic track crew. As explained on Opening, Mr. Meadows also provided two additional roaming roadway equipment operators. CSXT takes issue with Consumers' staffing, arguing that the Board only accepts crews of four people and the roadway equipment could not possibly count as the fourth person because the backhoe is always working it would not make sense or even be dangerous to be moving to and from the equipment.<sup>181</sup> CSXT therefore posits that Consumers has no fourth crew member and must explain why, contrary to precedent, that its staffing should

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<sup>181</sup> *Id.* at III-D-123-124.

be accepted.<sup>182</sup> CSXT's argument in favor of more crew members is incorrect, and it also ignores that the basic maintenance staff is support by welders, smoothing gangs, and other personnel.

In *IPA*, the complainant proposed the same approach to basic crew staffing<sup>183</sup> and the railroad agreed with the use of a basic gang with three track crew members and a fourth member that also operates the roadway equipment.<sup>184</sup> Moreover, the CERR is already heavily staffed in the critical areas of operation. Thus, there is no need to add more crew members without an attendant reduction in other machine operators or welders or smoothing gangs.

CSXT also chooses to pay lip service to cross-training, but immediately rejects it in the most useful of situations to the CERR.<sup>185</sup> Indeed, CSXT fails to acknowledge that smaller railroads like the CERR must cross train employees to complete a number of tasks. While Consumers agrees that the backhoe is an important and versatile part of track maintenance, the fact is that not all maintenance tasks require the use of the backhoe. It would be excessive and unrealistic to expect that the backhoe operator would not assist the rest of the track

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<sup>182</sup> *Id.*

<sup>183</sup> See Opening Evidence of Complainant Intermountain Power Agency, *IPA*, at III-D-76 (filed on Dec. 12, 2012 in 42136).

<sup>184</sup> See Reply Evidence of UP, *IPA*, at III-D.63 (filed on Apr. 12, 2013)

<sup>185</sup> See CSXT Reply at III-D-111 (“Mr. Hughes’ analysis was . . . guided by the principle that an efficient, least-cost SARR does not require unionized employees and does not face the same constraints as Class I railroads in terms of the level of supervision required and ability to cross-train.”).

crew to conduct maintenance after completing tasks requiring the backhoe, or if the day's work did not require the use of the backhoe at all (commonplace in smaller organization like the CERR). In addition to being cross-trained in other maintenance activities, the backhoe operator would receive adequate and regular training, and be required to wear appropriate personal protective equipment to successfully mitigate the risk of injury when mounting or dismounting the machine in the course of maintenance activities.

CSXT also proposes to add an additional track crew supposedly because it is carefully examining the two distinct segments of the CERR. However, much like CSXT's track supervisor plan, the additional crew does not enhance the MOW requirements of the CERR. Specifically, CSXT adds another crew to the Porter to West Olive segment.<sup>186</sup> This addition is particularly puzzling as CSXT's endlessly repeated message is that the 22<sup>nd</sup> Street to Curtis segment is the segment that requires more resources. Mr. Meadows again rejects this addition as the Porter to West Olive segment simply does not require that much maintenance as it has only 8 MGT per year and two sidings.

Roadway Machine Operators. CSXT has added one additional roadway operator to work directly with the fourth track crew in its Reply.<sup>187</sup> As

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<sup>186</sup> *Id.* at III-D-125.

<sup>187</sup> *Id.* at III-D-126.

Consumers is not adding the fourth crew, it has not added the fourth roadway machine operator on Rebuttal.

Welder/Helper/Grinders. On Opening, Consumers included one two-person welding crew. This crew would assist across the system and be based in Barr Yard. CSXT adds a second crew because it adds a second track supervisor.<sup>188</sup> It then uses that addition to argue that the Board has supported a welding crew per supervisor. CSXT then suggests that the crew has to cover 83 switches, including 57 between 22<sup>nd</sup> Street and Curtis as justification for another crew. As already explained above, CSXT's count of switches is misleading because there only 39 mainline switches. Moreover, CSXT has not suggested that no other crews can handle simple welding work. Regardless, the critical territory for such work is covered by the crew that Mr. Meadows already provided. Further, given the small number of switches between Porter and West Olive, a full second crew is unnecessary.

The parties agree on the roadway equipment and smoothing crew staffing.

### iii. Communications & Signals Department

On Opening, Consumers provided for a staff of 11 to maintain the signals and communications system. On Reply, CSXT adds six positions.<sup>189</sup>

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at Table III-D-32.

CSXT's reasons for the additions are threefold. First, CSXT claims that the three signal maintainers assigned by Consumers to the Porter to West Olive segment are insufficient because safety of grade crossings may be threatened.<sup>190</sup> Second, CSXT claims to have performed a special study of how many AAR signal units are actually being maintained by a single maintainer in different environments.<sup>191</sup> Third, CSXT adds a signal inspector to perform certain complicated tests that must be performed periodically.<sup>192</sup> As explained below, CSXT's additions are not adequately supported, and CSXT ignores or misconstrues Consumers' evidence.

On Opening, Consumers included three signal maintainers to cover the Porter to West Olive segment. This segment included 145 protected at-grade crossings.<sup>193</sup> These crossings accounted for a large portion AAR Signal Units calculated by Consumers on Opening.<sup>194</sup> Consumers explained that it had selected a slightly higher signal unit count per maintainer than recent cases because this segment is a relatively low density segment.<sup>195</sup> Thus, if an error occurred, the

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<sup>190</sup> *Id.* at III-D-128-129.

<sup>191</sup> *Id.* at III-D-129-130.

<sup>192</sup> *Id.* at III-D-131-132.

<sup>193</sup> *See* Consumers Opening at III-D-106.

<sup>194</sup> *See* Consumers Opening e-workpaper "CERR Opening C-S Costs.xlsx," tab "Crossing Counts," cells A197 and A198 for counts and tab "AREMA-AAR," cells G35 and G38 for AAR Signal Units.

<sup>195</sup> *See* Consumers Opening at III-D-106-107.

CERR could tolerate a slightly longer disruption if needed. Consumers noted that CSXT has procedures in place for such occurrences.

CSXT twists Consumers' proposal by suggesting that the CERR would not attempt to quickly fix the repair, that Consumers did not model such an incident in the RTC Model, and that Consumers would somehow let the crossing signals degrade, thereby threatening local communities.<sup>196</sup> CSXT's distortions are not realistic and are purposely misleading and inflammatory.

Consumers is not suggesting that maintenance forces would purposely allow active grade crossing protection along on the Porter to West Olive segment to degrade to the point of failure, as CSXT has suggested. Rather, Consumers argues that given the fact that the Porter to West Olive portion features so few trains traversals, that temporary outages of active grade crossing warning equipment would not significantly impact the CERR's operations or the safety of the communities. Indeed, those crossings would not be in any particular danger because the railroad had procedures to ensure the safety of crossing in such circumstances. Thus, it would be impractical and ineffective to overstaff the small railroad with excess signal maintainers, as CSXT has proposed, assigned to that segment of the CERR. Mr. Meadows emphasizes that in the event that a warning device failed, the CERR would dispatch a signal maintainer in a timely fashion to address the issue. Prior to any signal failure, the CERR would implement all

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<sup>196</sup> See CSXT Reply at III-D-128-129.

appropriate operating rules to ensure that safe operations are maintained in the interim period before a maintainer could arrive and resolve the issue.

All widely-accepted operating standards, including CSXT, have detailed rules to address the action of passing through a grade crossing with failed crossing equipment. These standards closely mimic the procedure proposed by CERR thereby demonstrating an industry-wide acceptance that the activity can be done safely and without any risk to the public or the communities adjacent to the affected railroad.

Mr. Meadows also emphasizes that the three signal maintainers are responsible for less than 50 crossings per person. Moreover, the MOW presentations on signals in SAC cases have become mired in nearly incomprehensible explanations of AAR Signal Units. Interestingly, not one defendant railroad has ever suggested that it assigns signal maintainers on this basis or described a policy that suggested X Signal Units = 1 Signal Maintainer. Mr. Meadows applied his many years of experience in deciding to use 3 signal maintainers in this segment, and he focused more on the work to be done rather than the amorphous AAR Signal Unit. Regardless, the Board has not opined on this question on such a low density segment and Consumers submits its approach is reasonable in light of the traffic and maintenance needs on the segment.

CSXT also increases the count of signal maintainers by reducing the number of AAR Signal Units per maintainer from those Consumers used on



Opening to those that CSXT's expert says he studied and determined.<sup>197</sup> CSXT's purported study must be rejected. A review of the Reply Narrative suggests that CSXT's expert compared an "urban" signal maintainer workload and distances to travel with those of a signal maintainer on a longer, lighter density, "rural" segment. However, a review of the workpaper cited by CSXT reveals a study devoid of any details or proof of the alleged AAR Signal Units per maintainer.<sup>198</sup> The flaws are manifest. The purported study does not provide: (i) the carrier(s); (ii) the territory being covered by the two maintainers; (iii) the types and counts of signals/crossings maintained that person; or (iv) details of how the AAR signal unit counts in either territory counts were determined. In other words, the alleged study is useless.

Based on its flawed study, CSXT expands the signal maintainers by 4 from Consumers Opening by using its unsupported 903 AAR Signal Units per maintainer in "urban" areas and 999 AAR Signal Units per maintainer in the "rural" segment. Compounding its errors, CSXT adds a 12<sup>th</sup> maintainer as a "relief" maintainer – as if the other 11 maintainers plus their managers could not cover this work.

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<sup>197</sup> *Id.* at III-D-129-130.

<sup>198</sup> *See* CSXT Reply e-workpaper "Signal Maintainer Capacity Study.pdf."

In light of CSXT's distortions and its unsupported AAR Signal Units per maintainer "study," Consumers has retained its Opening signal maintainer count of 7.

CSXT also adds a Signal Inspector. CSXT notes that this position is responsible for certain work and tests that could not be performed by a signal maintainer.<sup>199</sup> This additional position is not required because Consumers already provided for someone to handle this work – a point that CSXT missed or ignored.

Specifically, Consumers stated that:

The CERR's C&S Supervisor is also the lead signal technician and inspector – covering the few repairs beyond the standard signal maintainer, such as advanced troubleshooting and maintenance on electronic signal equipment. The C&S Supervisor also performs two-year, four-year and ten-year FRA mandated tests with the assistance of a Signal Maintainer. As these tests are infrequent and the total number of signals on the CERR is relatively small, the C&S Supervisor can handle these duties. However, to the extent that troubleshooting duties may interfere with such testing or the C&S Supervisor requires additional assistance, the C&S Engineer can assist with such inspections/tests.

CSXT never disputed this element of Consumers' evidence and it accepted Consumers approach to the management personnel for signals. As such, Consumers has not added CSXT's repetitive position on Rebuttal.

The parties agree on the balance of the C&S staffing.

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<sup>199</sup> See CSXT Reply at III-D-131.

**iv. Bridge & Building Department**

The parties agree on the staffing of the bridge and building department.<sup>200</sup>

**v. Misc. Administrative/Support Personnel**

The parties agree on one Engineer of Programs, Budgets, Safety & Training.<sup>201</sup>

**d. Compensation of MOW Employees**

The parties agree on the base salaries for MOW employees.<sup>202</sup> The parties' differences in staffing and fringe benefits naturally created a difference.

**e. Non-Program MOW Work Performed by Contractors**

CSXT generally accepts the approach used by Consumers on Opening. However, CSXT did make several minor modifications. These are addressed separately below.

**i. Planned Contract Maintenance**

Track Geometry Testing. The parties agree on the costs for track geometry testing.<sup>203</sup>

Ultrasonic Rail Testing. The parties agree on the costs for ultrasonic rail testing and joint bar inspections.<sup>204</sup>

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<sup>200</sup> *Id.* at III-D-132.

<sup>201</sup> *Id.* at Table III-D-28.

<sup>202</sup> *Id.* at III-D-132.

<sup>203</sup> *Id.*

Rail Grinding. The parties agree on the costs for mainline rail grinding. CSXT has, however, added { } of additional grinding costs for switches and grade crossings.<sup>205</sup> Consumers accepts this minor addition.

Shoulder Ballast Cleaning. Consistent with the Board's decision in *Sunbelt*, on Opening, Consumers has not included any contract maintenance for shoulder ballast cleaning. *Id.* at 93-94. CSXT did not address this approach. Consumers has not modified its approach on Rebuttal

Yard Cleaning. The parties agree on the costs for yard cleaning.<sup>206</sup>

Vegetation Control. The parties agree on the costs for vegetation control.<sup>207</sup>

Crossing Repaving. The parties agree on the costs for crossing repaving.<sup>208</sup>

Equipment Maintenance. The parties agree on methodology for calculating vehicle and equipment maintenance and fuel costs, and the asset life for vehicles.<sup>209</sup> The parties disagree on the useful life for track equipment. On Opening, Consumers assumed a 20-year useful life and CSXT is arguing for 10-

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at III-D-132-133.

<sup>206</sup> *Id.* at III-D-133.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at III-D-133.

years.<sup>210</sup> CSXT posits that 10 years is more realistic because the Bureau of Economic Research set the depreciable life for construction equipment at 8-10 years, and track equipment is similar to construction equipment.<sup>211</sup>

Consumers disagrees with CSXT's assertion that the useful life of track equipment should be set at 10 years. The Bureau of Economic Research may set the depreciable life of construction machinery at 8-10 years, but in the same document referenced by CSXT,<sup>212</sup> the Bureau of Economic Research also determines the useful life of railroad equipment at 28 years. CSXT's own real world experience suggests that the useful life is closer to 28 years than 10.

CSXT's equipment documentation provided to Consumers shows that {

} purchased in { } are still in service today, { } years later.

Additionally, CSXT discovery documents also show { }

purchased in { } that are still in service today. Thus, the

Consumers 20-year asset life is well supported and Consumers continues to use it on Rebuttal.

The parties disagree on the total costs for equipment due to the 10-year versus 20-year asset life and their differences in crews and related required equipment.

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<sup>210</sup> *Id.* at III-D-133-134.

<sup>211</sup> *Id.* at III-D-134.

<sup>212</sup> <http://www.bea.gov/national/FA2004/Tablecandtext.pdf>.

Communications System Inspection and Repair. The parties agree on the methodology for calculating outside communications system inspection and repair costs, but differ on the total cost due to their differing calculation of the initial investment costs.<sup>213</sup>

Bridge Inspections. The parties agree on the costs for outside bridge inspections.<sup>214</sup>

Building Maintenance. The parties agree on the methodology for determining annual outside building maintenance costs, but differ on the annual total cost due to their differing calculation of the initial investment costs.<sup>215</sup>

ii. **Unplanned Contracted Maintenance**

Snow Removal. On Opening, Consumers proposed \$100,000 per year for contractors to remove snow near the CERR's various buildings. On Reply, CSXT bumped this figure up to \$160,000 arguing that it would cost \$40,000 per storm (4 storms per year) arguing that there is substantial snow in the area and the equipment that the CERR's in-house personnel would use before resorting to a contractor is not adequate.<sup>216</sup> Consumers accepts the additional contractor costs, but, as explained below, CSXT's assertions regarding the in-house equipment are incorrect.

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<sup>213</sup> *Id.* at III-D-134.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at III-D-135.

<sup>216</sup> *See* CSXT Reply at III-D-136.

Storm Debris Removal. The parties agree on the annual cost for storm debris removal.<sup>217</sup>

**iii. Large Magnitude, Unplanned Maintenance**

Derailments and Clearing Wrecks. The parties agree on the annual cost for derailments and clearing wrecks.<sup>218</sup>

Washouts. The parties agree on the annual cost for washout repairs.<sup>219</sup>

Environmental Cleanups. The parties agree on the annual cost for environmental cleanups.<sup>220</sup>

**f. Contract Maintenance**

**i. Surfacing**

The parties agree on the annual costs for surfacing.<sup>221</sup>

**ii. Bridge Substructure and Superstructure Repair**

The parties agree on the annual costs for bridge substructure and superstructure repair.<sup>222</sup>

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

**g. Equipment**

**i. Hi-Rail Vehicles**

The parties agree on vehicle types and costs to be used by the CERR crews.<sup>223</sup> However, the total costs differ due to staffing differences. In addition, CSXT added additional snow removal equipment, which, as explained below, Consumers has rejected. Moreover, Consumers has not adjusted its staffing. Therefore, Consumers continues to use its Opening costs.

**ii. Equipment for Track and Related Work**

The parties agree on the various track equipment types and costs to be used by the CERR crews.<sup>224</sup> However, the total costs differ due to staffing differences. In addition, CSXT assumed a 10-year life for this equipment rather than the 20-year life used by Consumers on Opening. As explained above, CSXT's 10-year life approach is inconsistent with its own practices and the Bureau of Economic Research document it cited in support of its modification. Moreover, Consumers has not adjusted its staffing. Therefore, Consumers continues to use its Opening costs.

**iii. Snow Removal Equipment**

CSXT drastically overstates the snow removal equipment required on a railroad the size of CERR. CSXT states that it maintains thirteen jet snow blowers, one AF-1 truck mounted cold air blower and seventeen ballast regulators

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<sup>223</sup> *Id.* at III-D-137.

<sup>224</sup> *Id.*



to clear snow on the Chicago and Great Lakes Divisions.<sup>225</sup> The Chicago and Great Lakes Divisions of CSXT constitute the core of railroad's operations in the Midwest and include several thousand miles of track in metropolitan Chicago, St. Louis, Indianapolis, Columbus, Cleveland, Detroit and Toledo. Included in the two Divisions are Willard, Barr (replicated, but on a slightly smaller scale, by the CERR) and Collinwood yards, some of the largest yard facilities on the entire CSXT network. At 233.98 total track miles and with only a single, relatively small yard at Barr, the CERR is, by many measures, orders of magnitude smaller than the CSXT Chicago and Great Lakes Divisions. Despite the vastly different characteristics between the 22<sup>nd</sup> Street to Curtis and Porter to West Olive segments of the CERR, CSXT proposes that the CERR maintain a snow removal equipment fleet consisting of a third the number of jet snow blowers (four) and the same number of air blower trucks as the entire Chicago and Great Lakes Divisions. Given the limited size and scope of CERR operations, CSXT cannot possibly justify such a robust snow removal equipment fleet.

Conversely, CERR's snow removal equipment fleet accurately reflects the size and operations of the railroad. Jet snow blowers are primarily used for clearing yard track and yard switches. In Barr Yard, CERR's sole yard and largest concentration of switches, there are only a small number of switches, most of which are hand operated. Given the relatively small size of Barr Yard, the

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<sup>225</sup> *Id.* at III-D-138.

snow blower equipped ballast regulator could effectively clear all switches and tracks in the yard in a timely fashion, and as such, the added expense of a jet snow blower is excessive and unnecessary. All CERR mainline switches in the 22<sup>nd</sup> Street to Curtis segment are equipped with switch heaters, and as a result require minimal, if any, snow clearing operations. On the Porter to West Olive segment, traffic volumes are such that snow fighting crews, equipped with the CERR backhoes can easily clear the switches at the two sidings on the segments. Thus, on Rebuttal, Mr. Meadows has continued to retain the same approach to snow removal equipment it used on Opening.

**iv. Work Trains**

CSXT did not respond to this section.

**h. Scheduling of Maintenance**

CSXT did not respond to this section.

**i. Contributions from Michigan DOT**

The parties agree on the calculation of the Michigan DOT contributions for the maintenance of road crossings.<sup>226</sup>

**5. Joint Facilities**

On Opening, Consumers calculated that the CERR would incur \$1.5 million in first year operating expenses for payments to BRC, NS, and IHB for the use of four (4) joint facilities agreements. On Reply, CSXT claims that the CERR

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<sup>226</sup> See CSXT Reply at III-D-139.

would need to pay \$4.4 million in first year operating expenses to BRC, NS, and IHB for the use of three (3) of the four (4) joint facilities agreements used by Consumers on Opening plus an additional joint facilities agreement with IHB at the Dolton interchange.<sup>227</sup> CSXT also excludes expenses for an IHB trackage rights agreement covering the Blue Island Yard to Calumet Park segment, which was included by Consumers on Opening.

According to CSXT, the difference of \$2.9 million between Opening and Reply joint facilities expenses is due to: (1) Consumers failed to include costs for locomotives traversing the trackage rights segments; (2) Consumers understated traffic levels that would operate over the joint facilities; (3) Consumers understated the route miles that the CERR would traverse over a NS trackage rights segment; (4) Consumers omitted expenses for the use of IHB's Dolton interlocker; and (5) Consumers incorrectly used reciprocal rates for the NS trackage rights segments.<sup>228</sup> Each of CSXT's claims and the issue of IHB trackage rights over the Blue Island Yard to Calumet Park segment are discussed below.

**a. Excluded Locomotives**

CSXT claimed that Consumers inappropriately excluded locomotives from car counts or car-miles in calculating expenses under the BRC,

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<sup>227</sup> The IHB Dolton interchange agreement was excluded on Opening but added on Reply and is separate from the IHB Blue Island Yard to Calumet Park agreement, which was included on Opening and excluded on Reply.

<sup>228</sup> See CSXT Reply at III-D-140.

IHB and NS trackage rights agreements.<sup>229</sup> Consumers agrees that car counts and car-miles used to calculate trackage rights should include locomotive and makes this correction on Rebuttal. This correction impacts CERR joint facilities expenses by approximately \$25,000 in the first year of CERR operations.<sup>230</sup>

**b. Understated Traffic Levels**

CSXT claimed that Consumers failed to index operating statistics used to develop joint facilities expenses from a base year level to a first year level.<sup>231</sup> Consumers agrees that operating statistics used to develop joint facilities expenses should be on a first-year level and makes this correction on Rebuttal. This correction impacts CERR joint facilities expenses by roughly \$275,000 in the first year of CERR operations.<sup>232</sup>

**c. Excluded NS Miles**

CSXT claimed that Consumers failed to include 2.5 miles of NS trackage rights between Pine Junction and Curtis.<sup>233</sup> CSXT said Consumers' position is "that the trains would hop off NS to travel over the CERR for 2.5 miles

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<sup>229</sup> See CSXT Reply at III-D-140.

<sup>230</sup> See Consumers Rebuttal e-workpaper "JF Bridge Opening to Rebuttal.xlsx," cell E17.

<sup>231</sup> See CSXT Reply at III-D-141.

<sup>232</sup> See Consumers Rebuttal e-workpaper "JF Bridge Opening to Rebuttal.xlsx," cell F17.

<sup>233</sup> See CSXT Reply at III-D-141.

only to return to the NS line.”<sup>234</sup> Opening workpapers cited by CSXT show that this is not the case. Specifically, Consumers did include the 2.5 miles from Pine Junction to Curtis on Opening and does not assume that trains traversing the NS trackage rights “hop off” NS to travel over the CERR for 2.5 miles only to return to the NS line.<sup>235</sup> However, Consumers did understate trackage rights mileage from Curtis to Porter by 2.5 miles.<sup>236</sup> This understatement has been corrected on Rebuttal. This correction impacts CERR joint facilities expenses by roughly \$91,000 in the first year of CERR operations.<sup>237</sup>

**d. Omitted IHB Dolton Interlocking Expenses**

On Reply, CSXT claims that Consumers omitted the joint facilities expense that CSXT pays IHB to operate and maintain the interlocker at Dolton.<sup>238</sup> The IHB Dolton interlocker agreement is dated May 25, 1893 and calls for CSXT to pay one-third of the operating and maintenance costs of the interlocking constructed by IHB on Conrail property.<sup>239</sup> Invoicing from IHB to CSXT shows that total costs for the interlocking in 2014 equaled {                    }, of which CSXT

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<sup>234</sup> *Id.*

<sup>235</sup> See Consumers Opening workpaper “Base Unit Merch Trains v6\_Statistics.xlsx,” tab “Pivot-Cars by OnSarr OffSARR,” cell N5.

<sup>236</sup> See Consumers Opening workpaper “Base Unit Merch Trains v6\_Statistics.xlsx,” tab “Pivot-Cars by OnSarr OffSARR,” cell O5. Mileage from Curtis to Porter should be 12.6 miles, not 10.1 miles.

<sup>237</sup> See Consumers Rebuttal e-workpaper “JF Bridge Opening to Rebuttal.xlsx,” cell G17.

<sup>238</sup> See CSXT Reply at III-D-142.

<sup>239</sup> CSXT Reply e-workpaper “IHB 201X.pdf,” p.1.

paid { }.<sup>240</sup> CSXT included its 2014 payments in its Reply operating expenses.

An examination of IHB's total costs show that { } percent of the costs are for tower operation labor, { } percent of the costs are for maintenance labor, { } percent of the costs are for materials and { } percent of the costs are for equipment.<sup>241</sup> None of IHB's services are required by the CERR and thus, CSXT's costs for the IHB interlocking agreement should not be included in the CERR's operating expenses.

Consumers accounted for investment in the latest technology communications and signaling equipment at various locations, including the Dolton interchange.<sup>242</sup> Consumers included operating expenses to manage train operations at the Dolton interchange. Specifically, Consumers included dispatch desks at its West Olive headquarters to manage operations, including operations at the Dolton Junction.<sup>243</sup> Consumers also accounts for the maintenance of all of its installed communications and signaling equipment with a staff of 11 communications and signals maintenance personnel.<sup>244</sup> On Reply, CSXT also

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<sup>240</sup> Consumers Rebuttal e-workpaper "Summary of 2014 IHB201X Expenses.xls."

<sup>241</sup> *Id.*

<sup>242</sup> Consumers Opening e-workpaper "CERR Opening C-S Costs.xlsx," tab "Signal & Comm Counts," line 26.

<sup>243</sup> *See* Consumers Opening at III-D-24.

<sup>244</sup> *See* Consumers Opening at III-D-104.

includes staffing for both dispatchers and communications and signal maintenance personnel.<sup>245</sup> By including expenses for the Dolton interlocking agreement and expenses for dispatching and maintenance staff, CSXT is double counting operating expenses needed to manage traffic flow through the Dolton interchange.

Even if Consumers did not include investment, maintenance and operating costs needed to pass through a particular interlocking at Dolton, it is very difficult to determine what portion of CSXT payments to IHB should be assumed by the CERR. The IHB agreement with CSXT does not identify what interlockers are covered by the agreement – other than a cryptic diagrams of the general area. Nor is it clear what portion of CSXT’s traffic is covered by the agreement. The CERR clearly would not assume all of CSXT’s costs because the CERR does not move all of traffic that the CSXT does through Dolton. Moreover, CSXT does not suggest what, if any CERR trains, are using the facilities covered by the IHB agreement.

On Rebuttal, Consumers rejects CSXT’s inclusion of IHB Dolton interlocking expenses because Consumers has already accounted for the investment, operating expenses and maintenance expenses needed to manage the Dolton interchanges.

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<sup>245</sup> See CSXT Reply at III-D-53 and III-D-115.

e. Use of NS Reciprocal Rates for Trackage Rights Segments

On Opening, Consumers relied on trackage rights agreements NS 552 and NS 675 that apply to CSXT movements over NS's Rock Island to Porter segments.<sup>246</sup> Invoices provided by CSXT in discovery show that CSXT paid NS a rate of { } per car-mile in 2014 for trains moving over NS's segments.<sup>247</sup> On Reply, CSXT claims these rates cannot be used by Consumers because they are reciprocal rates. Specifically, CSXT states:

these two JFAs constitute only two out of dozens of JFAs that are part of an umbrella reciprocal agreement between CSXT and NS that covers more than 1,700 miles.<sup>248</sup>

Consumers now knows that CSXT and NS entered into a July 4, 2002 Letter Agreement ("2002 Letter Agreement") that called for reciprocal rates to be used for a number of agreements, including NS 552 and NS 675. But CSXT provided no evidence or references to the existence of the 2002 Letter Agreement in discovery productions related to NS 552 or NS 675. Thus, Consumers had no way of knowing that these rates were reciprocal in the development of its Opening evidence. Early in the discovery process, CSXT provided Consumers a listing of joint facilities agreements in Illinois, Indiana and Michigan and asked Consumers

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<sup>246</sup> CSXT incorrectly references the NS 675 agreement as NS 657 at p. III-D-143 of its Reply.

<sup>247</sup> Consumers Opening e-workpaper "Open\_ConsumersJointFacCharges2014.xlsx," tab "NS\_RockPorter," column K. These figures are based on NS invoices provided in discovery.

<sup>248</sup> See CSXT Reply at III-D-143.



to select relevant agreements that it wished to use in its Opening evidence. This listing, which is discovery document “Joint\_Facilities\_List\_IN\_IL\_MI.xlsx,” includes a description for trackage rights agreement NS 552 as follows:

{  
  
} (see cell K355).

Likewise, “Joint\_Facilities\_List\_IN\_IL\_MI.xlsx” includes a description for trackage rights agreement NS 675 as follows:

{  
  
} (see cell  
K381).

Neither one of these descriptions mentions reciprocal rates. In addition, CSXT’s joint facilities listing excludes any reference to reciprocal rates associated with any NS trackage rights agreements. When CSXT provided Consumers with requested joint facilities agreements based on Consumers’ review of CSXT’s joint facilities listing, CSXT included, among other agreements, NS 552 and NS 675. These agreements, like other agreements provided by CSXT, included letter agreements and correspondence related to each agreement. However, neither the NS 552 agreement nor the NS 675 agreement provided by CSXT included the 2002 Letter Agreement indicating the application of reciprocal rates. What CSXT did was to provide a copy of the 2002 Letter Agreement elsewhere within its production of joint facilities agreements requested by

Consumers. The 2002 Letter Agreement was provided as “NS 915,” an agreement that was not included in CSXT’s initial joint facilities listing nor was it requested for production by Consumers. The 2002 Letter Agreement made up seven (7) pages out of the 3,930 pages of joint facilities materials provided by CSXT to Consumers in discovery.<sup>249</sup> Because CSXT did not provide information about reciprocal rates or the 2002 Letter Agreement within its production of the NS 552 and NS 675 agreements, and because CSXT never identified reciprocal rates or the 2002 Letter Agreement in its description of joint facilities, the { } per car-mile rates included in CSXT’s invoice files and relied upon by Consumers on Opening is the best evidence of record and should be used for the calculation of NS joint facilities expenses.

CSXT offered two approaches to developing non-reciprocal rates under the NS 552 and NS 675 trackage rights agreements. The first approach, which is used to support CSXT’s Reply evidence, is based on the development of market rates following procedures adopted by the ICC in *St. Louis Southwestern Railway Company – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis: Trackage Rights Compensation (“SSW”)*. The second

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<sup>249</sup> Joint facilities materials were provided in discovery documents {

}

approach, which is offered by CSXT should the Board disagree with CSXT's first approach, uses what CSXT claims is the most recent non-reciprocal rates under agreements NS 552 and NS 675. Each of CSXT's approaches are discussed below.

CSXT used what it refers to as the SSW Compensation Methodology to develop rates it claimed Consumers would have to pay to utilize NS trackage rights.<sup>250</sup> CSXT said this methodology was developed in *St. Louis Southwestern Ry. Co. Compensation- Trackage Rights*, 4 I.C.C.2d 668 (1987). CSXT claimed that this approach "is the only viable approach to estimate a trackage rights fee absent the reciprocal component."<sup>251</sup> Yet, CSXT followed its evidence for the SSW approach with what it claimed are viable trackage rights rate for use with the NS agreements. Specifically, CSXT suggested the Board consider historical trackage rights rates to calculate NS trackage rights expenses.<sup>252</sup> By its own evidence, CSXT demonstrates that the development of trackage rights based on the SSW methodology is unnecessary because historical rates exist for use in calculating NS trackage rights agreement costs. Because of this, the Board should reject the use of SSW rates as unnecessary.

CSXT anticipated that the Board might not accept its inappropriate trackage rights rates based on its interpretation of the "SSW Methodology," so it

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<sup>250</sup> See CSXT Reply at III-D-150.

<sup>251</sup> *Id.* (emphasis added).

<sup>252</sup> See CSXT Reply at III-D-155.

provided an alternative approach to calculating NS trackage rights rates.

Specifically, CSXT stated;

In the event that the Board does not agree that the SSW methodology is the appropriate methodology for calculating the trackage rights fee, the Board should not settle on the charge negotiated in the reciprocal agreement, for the reasons explained above. Instead, the Board could impose a charge agreed to between NS and CSXT at an earlier date.<sup>253</sup>

For the “charges agreed to between NS and CSXT at an earlier date,” CSXT chose to use a rate of { } per car-mile, which it says was derived from a 1974 agreement between Penn Central and Chesapeake and Ohio.<sup>254</sup> This 1974 agreement, which according to CSXT only covers the segment from Rock Island to Pine Junction, is sourced by CSXT to Reply workpaper “NS552.pdf,”<sup>255</sup> This workpaper does not include the 1974 agreement nor does it provide support for CSXT’s proposed rate of { } per car-mile. However, Reply workpaper “NS552.pdf” does include the NS 552 trackage rights agreement and related letter agreements (excluding the 2002 Letter Agreement) and correspondence.<sup>256</sup> One piece of NS 552 correspondence, a letter dated October 22, 2001 from CSXT to

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<sup>253</sup> See CSXT Reply at III-D-155.

<sup>254</sup> See CSXT Reply at III-D-155.

<sup>255</sup> See CSXT Reply at III-D-155.

<sup>256</sup> The NS 552 trackage rights agreement refers to a { } See CSXT Reply e-workpaper “NS 552.pdf,” p.6. { }, which is identified as NS 539 in CSXT’s workpapers (see CSXT Reply workpaper “NS 552.pdf,” at 13 under “Provision”), was not provided by CSXT in discovery or Reply.

NS, includes a proposal to suspend a June 30, 1974 agreement between predecessors of CSXT and NS covering CSXT rights over NS's Rock Island to Pine segment. The reason for the suspension is the existence of a June 1, 1999 agreement, which Consumers presumes is the June 1, 1999 NS 552 agreement, covering the same segment with compensation provisions approximately the same as under the 1974 agreement.<sup>257</sup> Even if CSXT was able to trace the { } per car-mile rate back to the 1974 agreement, this rate was replaced by the NS 552 rate per the October 22, 2001 letter discussed above. So, CSXT's proposed alternative rate of { } per car-mile should not be considered because: (i) its derivation is not provided or supported by CSXT on Reply; (ii) it only covers a portion of the NS segments utilized by CERR (Rock Island to Pine and not Pine to Porter); and (iii) it was replaced by the NS 552 rate.

What is clear from the workpapers provided by CSXT in discovery and Reply is that the joint facilities agreements in place prior to the 2002 Letter Agreement were NS 552 (Rock Island to Pine) and NS 675 (Pine to Porter). These joint facilities agreements were established well before the 2002 Letter Agreement called for the use of reciprocal rates and neither agreement addresses the concept of reciprocity.<sup>258</sup> Should the Board decide that historical rates should be used to calculate NS joint facilities expenses, it should forgo the use of the 1974 rates as

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<sup>257</sup> CSXT Reply e-workpaper "NS552.pdf," at 14.

<sup>258</sup> CSXT Reply e-workpapers "NS 552.pdf" and "NS 675.pdf."

CSXT suggests and instead use the NS 552 and NS 675 rates in place prior to the 2002 Letter Agreement. Specifically, by using, the NS 552 rate of {

} and the NS 675 rate of {

},<sup>259</sup> escalating each per the corresponding trackage rights

agreement, the Board would arrive at rates equaling { } per car-mile for both agreements at July 1, 2014 levels.<sup>260</sup>

On Rebuttal, Consumers continues to use { } per car miles for NS joint facilities as these rates were the best evidence of record available to Consumers on Opening.

**f. IHB Trackage Rights from Blue Island Yard to Calumet Park**

On Opening, Consumers included trackage rights expenses for IHB's segment between Blue Island Yard and Calumet Park. These trackage rights were required because the real-world CSXT operates trains to and from IHB's Blue Island Yard by way of CSXT's interchange with the IHB at Calumet Park.<sup>261</sup> On Reply, CSXT removed the IHB trackage rights expense, claiming these trackage rights are not needed since CSXT removed trains traversing the Calumet Park to Curtis segment. These trains were removed by CSXT because

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<sup>259</sup> For the NS 552 rate, *see* CSXT Reply e-workpaper "NS552.pdf," at 6. For NS 675 rate, *see* CSXT Reply e-workpaper "NS675.pdf," at 12.

<sup>260</sup> *See* Consumers Rebuttal e- workpaper "Rebuttal\_ConsumersJointFacCharges2014.xlsx," tab "NS Rate," columns E and F.

<sup>261</sup> *See* Consumers Opening at III-C-59.

CSXT claims these trains failed to meet CSXT service levels.<sup>262</sup> Since Consumers retains the Calumet Park/Curtis trains as described in Section III- A-1-b above, Consumers continues to include Blue Island Yard to Calumet Park IHB trackage rights expenses on Rebuttal. On Reply, CSXT correctly identified that traffic traveling over this trackage rights segment is the traffic moving between Calumet Park and Curtis.<sup>263</sup> On Opening, Consumers included traffic traveling to and from the Blue Island IHB connector, which is not the same as Blue Island Yard, to calculate trackage rights expenses. On Rebuttal, Consumers uses traffic traveling between Calumet Park and Curtis to calculate trackage rights expenses under the IHB trackage rights agreement. This correction results in a reduction in joint facilities expenses of roughly \$75,000 in the first year of CERR operations.<sup>264</sup>

**g. Joint Facilities Summary**

When Consumers includes locomotives in operating statistics (impact of roughly \$25,000), indexes operating statistics to first year levels (impact of roughly \$275,000), corrects the mileage between Curtis and Porter (impact of roughly \$91,000) and restates traffic under the IHB Blue Island Yard to Calumet Park agreement (impact of roughly -\$75,000), Rebuttal joint facilities

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<sup>262</sup> See CSXT Reply at III-D-142.

<sup>263</sup> *Id.*

<sup>264</sup> Consumers Rebuttal e-workpaper “JF Bridge Opening to Rebuttal.xlsx,” cell H17.

expenses equal \$1.8 million in the first year, an increase over Opening expenses of \$0.3 million.

**6. Loss and Damage**

CSXT accepts Consumers' methodology for determining loss and damage.<sup>265</sup> The minor difference in costs are attributable to the differing traffic level by commodity posited by the parties.

**7. Insurance**

CSXT accepts Consumers' insurance ratio of 3.75% of operating expenses.<sup>266</sup>

**8. Ad Valorem Tax**

On Opening, Consumers developed CERR's ad valorem taxes for Illinois, Indiana and Michigan in a manner that is consistent with how these taxes are actually developed for the various jurisdictions. Consumers' Opening tax calculation for Illinois relied on a combination of income, cost and equity approaches. Consumers used a cost approach for Indiana taxes and both an income and cost approach for Michigan taxes. Consumers' calculations on Opening resulted in { } in first year ad valorem tax expenses. CSXT accepted the approach used by Consumers on Opening and further accepted Consumers' calculation for Indiana and Michigan taxes.<sup>267</sup>

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<sup>265</sup> See CSXT Reply at III-D-157.

<sup>266</sup> See CSXT Reply at III-D-158.

<sup>267</sup> See CSXT Reply at III-D-158.



While CSXT generally agreed with how Consumers developed ad valorem taxes for Illinois, it disagreed with how Consumers attributes CERR value to the State of Illinois. Specifically, CSXT disagreed with Consumers' use of CERR route miles to determine CERR value attributable to Illinois, which on Opening reflects 18.2 percent of total CERR value. CSXT claimed that Consumers should be using a factor that incorporates traffic units, revenue, tons originated and terminated, and track mileage.<sup>268</sup> CSXT, after restating Illinois taxes and adjusting its tax calculations to reflect Reply net railway operating income, calculated ad valorem taxes to be \$1.2 million in the first year.<sup>269</sup> However, despite its stated position, in its Reply workpapers, CSXT used only train counts and route miles to determine the Illinois factor to apply to total CERR value.<sup>270</sup> Inconsistencies aside, neither approach reflects what the State of Illinois calls for in its property tax code. Illinois property tax code (35 ILCS 200) states

If any railroad company owns or uses operating property partly within and partly outside of this State, the Department shall determine the value of the entire operating property of the railroad but shall take only that part of the entire value as is represented by the average percentage of (a) the length of all track including main, second and additional main track, side track and turnouts within this State, (b) its gross revenues arising from railroad operations in this State,

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<sup>268</sup> See CSXT Reply at III-D-159.

<sup>269</sup> *Id.*

<sup>270</sup> See CSXT Reply e-workpaper "CERR Ad Valorem Taxes\_Reply.xlsx," tab "Usage\_Factor." The development of train counts is further shown on tab "Usage."

(c) the reproduction cost of its operating property within this State, as determined by the Interstate Commerce Commission of the United States, or other competent authority, plus additions and betterments, less retirements and depreciation. (35 ILCS 200/11-100)<sup>271</sup>

Thus, the Illinois tax code calls for track miles, revenues and operating property to be used to allocate CERR value attributable to Illinois. Presumably, CSXT's use of train counts is intended to reflect revenues and its use of route miles is intended to reflect property values. While Consumers agrees that route miles are appropriate for reflecting the amount of operating property in Illinois, Consumers does not agree that train counts should be used to reflect revenues. Rather, Consumers believes route miles are appropriate for reflecting revenues for Illinois. The use of route miles to reflect CERR's profitability has already been used by Consumers and accepted by CSXT for the calculation of income taxes. Specifically, the income tax calculation included in both the Opening and Reply DCF models rely on an allocation of income by route miles by state to calculated income taxes for the entire CERR.<sup>272</sup> Consumers retains the use of route miles as the best indicator of Illinois's portion of CERR revenues,

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<sup>271</sup> See Consumers Rebuttal e-workpaper, "35 ILCS 200\_11\_Property Tax Code.pdf" at 6-7.

<sup>272</sup> See Consumers Opening e-workpaper "Exhibit III-H-1.xlsm," tab "Investment SAC," columns Y through AC. See also CSXT Reply e-workpaper "Exhibit III-H-1\_Reply.xlsm," tab "Investment SAC," columns Y through AC.

trackage and property. After the inclusion of Rebuttal mileage, revenues and operating expenses, first year ad valorem taxes for the CERR equal \$1,955,221.

**9. Intermodal Lift Costs**

On Opening, Consumers developed an estimate of lift fees that CSXIT would charge a third-party per lift. The lift fee developed by Consumers equaled { } per lift and includes CSXT's actual costs associated with lifting containers onto railcars.<sup>273</sup> CSXT did not provide any evidence on Reply that develops the cost per lift. Rather, CSXT claimed that Consumers did not properly allocate revenues and develop costs for intermodal traffic originating or terminating at CSXIT's 59<sup>th</sup> Street intermodal facility. As a result, CSXT treats this traffic as being interchanged with the CSXT at the 59<sup>th</sup> Street terminal and excludes any intermodal lift expenses from its operating expenses. According to CSXT, because CSXIT is an affiliated company with CSXT, CERR must incur operating expenses and investment costs associated with the 59<sup>th</sup> Street facility in order to claim originating or terminating revenue allocations.<sup>274</sup>

As is discussed in Section III-A-3.b.iii(c), CSXIT is not an affiliate of CSXT. CSXIT is a third-party service provider to CSXT and other customers. The CERR is procuring lift services from CSXIT and CERR's obligation to CSXIT is to compensate it for lift services.

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<sup>273</sup> See Consumers Opening at III-D-143.

<sup>274</sup> See CSXT Reply at III-D-160.

{

}. The agreement specifically states:

{

}.<sup>276</sup>

CERR is handling line-haul rail service to and from the facility for its intermodal traffic. As such, CERR must compensate CSXIT for services it needs to be able to claim line-haul revenues from intermodal shippers. This service from CSXIT is one lift at origin and one lift at destination. CSXT clearly states this service level in its Intermodal Service Directory No. 1, which reads:

Line haul rates offered by CSXI<sup>277</sup> provide for normal lift provisions at CSXI facilities, which include transferring a container once from a Chassis to a

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<sup>275</sup> See CSXT Reply at III-A-42.

<sup>276</sup> See Consumers Rebuttal e-workpaper “Terminal Services Agreement Amended and Restated (CSX-CNSMR-HC-17243 to 17249).pdf” at 6.

<sup>277</sup> Consumers Rebuttal e-workpaper “Directory1-Apr2016.pdf” at page 27, section 7.14. This directory is publically available at <http://www.intermodal.com/index.cfm/channel-partners/customer-tools/plan/service-directories/>.

railcar at origin, and once from a railcar to a Chassis at destination.<sup>278</sup>

The cost of the service being provided by CSXIT to CERR should reflect only the cost of one lift at origin and one lift at destination. CSXT claims that CERR should compensate CSXIT for all of the 59<sup>th</sup> Street facility's operating costs even though CSXIT is providing terminal services, such as truck loading and unloading and storage services as well as lift services to other customers.<sup>279</sup>

Consumers maintains that its Opening lift cost calculation is an accurate representation of the costs incurred by CERR and continues to rely upon that value on Rebuttal.

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<sup>278</sup> CSXI, which is CSXT's Intermodal marketing arm, should not be confused with CSXIT which is CSX Terminals and is owned by CSX Corporation.

<sup>279</sup> At Table III-A-3 of its Reply (*see* CSXT Reply at III-A-45), CSXT shows total costs of the 59<sup>th</sup> Street facility of { }, which is the sum of what CSXT refers to in the table as "Excluded" ( { }) and "Included" costs ( { }). This total is also reflected in CSXT's discovery document "CSXIT Costs and Volume.xlsx," tab "2014," cell C61.

**III-E Non-Road  
Property Investment**

### **III. E. NON-ROAD PROPERTY INVESTMENT**

Consumers briefly addressed non-road property investment in Part III-E of its Opening Narrative, indicating that the CERR's non-road property investment costs were addressed elsewhere in its Opening Evidence. CSXT takes a similar approach on Reply.

**III-F Road Property  
Investment**



### III. F. ROAD PROPERTY INVESTMENT

On Opening, Consumers presented feasible and well supported road property investment costs for the CERR. Consumers' Opening costs included significant land acquisition costs for Chicago; real-world costs for common earthwork; and fully supported evidence of other investment categories. As noted herein, Consumers' Opening and Rebuttal road property investment are generally consistent with those presented in other SAC cases.

Consumers also maintains its Opening position with respect to the location of CSXT rail lines being replicated by the CERR, but adds 0.6 route miles consistent with CSXT's Reply to account for the Buffington Connection.<sup>1</sup> As discussed *supra* at III-B-1, this is the only change proposed by CSXT that Consumers is accepting with respect to the CERR's route mileage. Similarly, CSXT proposes additional IHB track in the vicinity of the Dolton interchange and well siding in the vicinity of the Campbell plant. As discussed *supra* at III-B-1, neither one of these modifications is justified based on the RTC model,<sup>2</sup> and as such, is not incorporated by Consumers on Rebuttal.

Not surprisingly, CSXT asserts that Consumers' costs are insufficient and that the CERR requires substantial increases in road property investment. As explained below, CSXT's Reply Evidence is unpersuasive in most respects. For all of the reasons set forth in this Part, the Board should reject

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<sup>1</sup> See III-B-6. Consumers notes that this is different from the total listed by CSXT's land valuation expert, and only accepts the addition of the 0.6 route miles.

<sup>2</sup> See III-B-6.

CSXT’s road property investment costs and accept those presented by Consumers on Rebuttal, as shown in Rebuttal Table III-F-1.

<b>REBUTTAL TABLE III-F-1</b>					
<b><u>CERR Road Property Investment Costs</u></b>					
(millions)					
<b>Item</b>	<b>Consumers Open<sup>1</sup></b>	<b>CSXT Reply<sup>2</sup></b>	<b>Consumers Rebuttal<sup>3</sup></b>	<b>Difference</b>	
1. Land	\$120.20	\$131.70	\$120.63	\$11.50	
2. Roadbed Preparation	\$30.30	\$82.20	\$36.77	\$51.90	
3. Track	\$186.80	\$252.00	\$209.23	\$65.20	
4. Tunnels	\$0.00	\$0.00	\$0.00	\$0.00	
5. Bridges	\$71.90	\$167.40	\$72.48	\$95.50	
6. Signals and Communications	\$33.80	\$46.50	\$41.97	\$12.70	
7. Buildings and Facilities	\$11.90	\$26.50	\$12.38	\$14.60	
8. Public Improvements	\$3.40	\$11.10	\$3.38	\$7.70	
9. Subtotal	\$458.20	\$717.30	\$499.20	\$259.10	
10. Mobilization	\$9.10	\$36.10	\$10.16	\$26.90	
11. Engineering	\$33.80	\$58.60	\$37.62	\$24.80	
12. Contingencies	\$38.10	\$68.00	\$38.64	\$29.90	
<b>13. Total Road Property Investment Costs</b>	<b>\$539.20</b>	<b>\$879.90</b>	<b>\$585.61</b>	<b>\$294.29</b>	

<sup>1</sup> Consumers Opening e-workpaper “III-F- TOTAL - 2015.xlsx”

<sup>2</sup> CSXT Reply e-workpaper “III-F- TOTAL - 2015\_Reply.xlsx”

<sup>3</sup> Consumers Rebuttal e-workpaper “III-F TOTAL – 2015 Rebuttal.xlsx”

1. **Land**

On Rebuttal, Consumers adjusts its land valuation to accommodate the additional land required for the 0.6 additional route miles to reflect the Buffington Connection, but otherwise maintains its position on Opening. On Opening, Consumers' real estate expert, Stuart I. Smith of Stuart I. Smith Realty Advisors, LLC, affiliated with US Realty Consultants, Inc., presented extensive land sale records and a detailed report summarizing the CERR's land acquisition costs. CSXT in their Reply essentially dismissed the evaluation by Mr. Smith and substituted its expert land valuation report prepared by Mr. Charles (Sandy) Rex. Given CSXT's refusal to accept or to build on Mr. Smith's valuation, it is surprising that the two appraisals of the CERR's Right-of-Way are remarkably similar. In fact, as summarized in Rebuttal Tables III-F-2 and III-F-3 below, with the exception of Allegan and Ottawa County, MI, Mr. Rex and Mr. Smith arrived at similar figures.

**REBUTTAL TABLE III-F-2<sup>3</sup>**  
**Comparison of Appraisals from Consumers Opening  
and CSXT Reply for CERR RoW**

<b>Overview of Appraisal Findings</b>						
<b>RoW Segment</b>	<b>Smith Appraisal Findings</b>			<b>RMI Midwest Appraisal Findings</b>		
	<u>Value</u>	<u>Mileage (i)</u>	<u>Value/Mile</u>	<u>Value</u>	<u>Mileage (i)</u>	<u>Value/Mile</u>
Ottawa	\$1,154,934	13.00	\$88,841	\$6,626,568	13.00	\$509,736
Allegan	\$2,176,614	27.40	\$79,438	\$2,811,076	27.40	\$102,594
Van Buren	\$1,859,814	21.40	\$86,907	\$1,783,658	21.40	\$83,349
Berrien	\$27,567,210	46.40	\$594,121	\$27,578,304	46.40	\$594,360
LaPort	\$19,406,640	23.76	\$816,778	\$18,328,157	23.76	\$771,387
Cook	\$50,994,900	22.90	\$2,226,852	\$60,892,141	22.90	\$2,659,045
Total Mainline	\$103,160,112	154.86		\$118,019,904		
<b>Other Assets:</b>						
BRC Alternative @ 25%	\$6,138,347			\$3,027,025		
Dolton	\$3,846,646			\$3,222,536		
IHB @ 21.42%				\$1,024,844		
Buffington				\$455,217		
Microwave Site				\$223,040		
Barr Yard	<u>\$7,033,459</u>			<u>\$6,619,726</u>		
	\$17,018,452			\$14,572,388		
<b>Total CERR</b>	<b>\$120,178,564</b>			<b>\$132,592,292</b>		

*Notes:*

*(i) some minor variations in mileage may be noted between reports*

*(l) Smith mileage used as denominator in each column*

<sup>3</sup> Consumers Rebuttal Exhibit III-F-1, Stuart Smith Valuation Report (“Smith Rebuttal Report”) at 3, Summary Table 1.

**REBUTTAL TABLE III-F-3<sup>4</sup>**  
**Consumers Rebuttal Land Valuation for CERR RoW**

**Rebuttal Table**  
**Consumers Rebuttal Land Value for CERR RoW**

<b>RoW Segment</b>	<u>Value</u>	<u>Mileage</u>	<u>Value/Mile</u>
Ottawa	\$1,154,934	13.00	\$88,841
Allegan	\$2,176,614	27.40	\$79,438
Van Buren	\$1,859,814	21.40	\$86,907
Berrien	\$27,567,210	46.40	\$594,121
LaPort	\$19,406,640	23.76	\$816,778
Cook	<u>\$50,994,900</u>	<u>22.90</u>	\$2,226,852
Total Mainline	\$103,160,112	154.86	
<b>Other Assets:</b>			
BRC Alternative @ 25%	\$6,138,347		
Dolton	\$3,846,646		
IHB @ 21.42%	not included	<sup>1/</sup>	
Buffington	\$455,217	<sup>2/</sup>	
Microwave Site	included above	<sup>3/</sup>	
Barr Yard	<u>\$7,033,459</u>		
	\$17,473,669		
<b>Total CERR</b>	<b>\$120,633,781</b>		
<b>Rounded</b>	<b>\$120,630,000</b>		

**Notes:**

**1/** IHB partial ownership is excluded from the Smith Total CERR value. However, we would accept RMI's estimate of value for this segment if incorporated into the RoW.

**2/** Buffington RoW has been revised to accept RMI's valuation of this segment.

**3/** The six microwave sites were included in the initial estimate of value at the appropriate RoW segment. We valued these microwave tower areas at a total of \$237,402. This compares with RMI's estimate of \$223,040.

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<sup>4</sup> Smith Rebuttal Report at 4, Summary Table 2.

CSXT's expert relies on an extensive statistical analysis to arrive at CSXT's valuation of the CERR's RoW. However, as discussed *supra*, this statistical analysis has numerous flaws, the analysis includes hardcoded data and circular references, and it is based on comparable sales that have not been adequately reviewed. Further, the land acquisition cost is not supported by the evidence, and it is not consistent with STB precedent for such valuations. Therefore, on Rebuttal, Consumers only adjusts its Opening land valuation for the CERR RoW by \$455,217 to accommodate the Buffington Connection. Below is a discussion of (a) CSXT's erroneous critique of Mr. Smith's appraisal of the CERR RoW; and (b) the significant issues and flaws with Mr. Rex's statistical analysis that invalidate his conclusions and valuation of the CERR RoW.

a. **CSXT's Expert Erroneously Concluded that Mr. Smith's Appraisal of the CERR RoW was Invalid**

In preparing his appraisal, Mr. Smith performed a detailed review of comparable sale data and assigned each land segment a value. The "three serious flaws"<sup>5</sup> cited by CSXT are without merit. CSXT alleges that Mr. Smith: (i) did not divide the RoW into small enough land-use segments; (ii) relied on a smaller set of comparable sales that were in some instances farther from the RoW; and (iii) used foreclosures and short sales as part of the comparable sales for the land valuations in Cook County, IL. However, as discussed below, these issues identified by CSXT are primarily due to the different approaches taken by the

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<sup>5</sup> See CSXT Reply at III-F-5.

experts, and in other instances are due to an inadequate or nonexistent review of Mr. Smith's workpapers.

i. **Dividing the RoW into Numerous Identical Land-Use Segments does Not Result in a More Accurate Valuation**

CSXT contends that Mr. Smith's appraisal did not account for the "unique land parcels" along the CERR's RoW and that instead, it is more appropriate to divide the RoW into close to 800 different land segments.<sup>6</sup> This approach on such a small RoW makes little sense, and the end result is an average segment of 2.2 city blocks.<sup>7</sup> Simply dividing the RoW into numerous segments will not yield more accurate results unless there are actually "unique" and different highest and best uses. If there is one gas station in the midst of farmland, this does not change the highest and best use from agricultural land to commercial.<sup>8</sup> Mr. Rex's valuation in several instances divides the RoW into several segments when there is no discernable difference. For example, it does not make much sense to subdivide large sections of rural residential land into upwards of eight separate land use segments:

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<sup>6</sup> See CSXT Rebuttal at III-F-5.

<sup>7</sup> Smith Rebuttal Report at 33.

<sup>8</sup> See Smith Rebuttal Report at 5.

**REBUTTAL TABLE III-F-4**  
**Example of CSXT's Expert Dividing CERR RoW into**  
**Segments with the Same Land Use<sup>1</sup>**

Unit Value ID	County	Land use	Size Adjustment	Other Adjustment	Per Acre	
					Mean	Median
107	Van Buren	RURAL RES	0.60		\$ 11,630	\$ 9,144
108	Van Buren	RURAL RES	0.40		\$ 13,967	\$ 11,013
109	Van Buren	IND	12.50		\$ 5,126	\$ 5,540
110	Van Buren	RURAL RES	5.00		\$ 4,440	\$ 3,471
111	Van Buren	RURAL RES	3.50		\$ 5,222	\$ 4,071
112	Van Buren	RURAL RES	0.35		\$ 14,828	\$ 11,680
113	Van Buren	RURAL RES	2.50		\$ 6,091	\$ 4,806
114	Van Buren	SFR	0.35			
115	Van Buren	COM		No Adjustments		
116	Van Buren	IND	5.00		\$ 9,398	\$ 10,175
117	Van Buren	IND	1.79	MIN	\$ 18,448	\$ 19,968
118	Van Buren	IND	2.50		\$ 14,797	\$ 16,017
119	Van Buren	RESDEV/MF/MH				
120	Van Buren	IND	5.50		\$ 8,803	\$ 9,508
121	Van Buren	RURAL RES	2.75		\$ 5,816	\$ 4,605
122	Van Buren	RURAL RES	1.80		\$ 7,058	\$ 5,540
123	Van Buren	RURAL RES	0.25		\$ 17,289	\$ 13,616
124	Van Buren	RURAL RES	1.00		\$ 9,217	\$ 7,275
125	Van Buren	RURAL RES	2.25		\$ 6,377	\$ 5,006
126	Van Buren	RURAL RES	1.75		\$ 7,146	\$ 5,607
127	Van Buren	RURAL RES	8.00		\$ 3,580	\$ 2,803
128	Van Buren	RURAL RES	3.00		\$ 5,594	\$ 4,405

<sup>1</sup> See CSXT Reply e-workpaper "CERR Land Valuation\_Reply.xlsx," tab "UNITVALUES FULL-REPORT," rows 115-145; CSXT Reply Exhibits III-F-2 at 2 ("Unit Value ID Summary Table – Page 2").

Most problematically, dividing the land into smaller segments allows for several adjustments that further increase the costs. One of the "adjustments" frequently made by Mr. Rex is based on parcel size, even where there is limited sales data or the correlation is almost insignificant.<sup>9</sup> It is understood that smaller

<sup>9</sup> See generally CSXT Reply e-workpaper "15-250IndianaSales01042016.xlsx," tabs "Res dev" and "Res dev Graphs."



parcels typically will result in higher land costs, but by dividing the RoW into a high number of segments and applying a series of adjustments to an average parcel size, the price arrived at for a given segment could easily be inflated. As shown in Table III-F-4A below, CSXT’s approach resulted in neighboring land segments with the same or similar land use being assigned significantly different costs per acre.

<b>REBUTTAL TABLE III-F-4A</b>					
<b>Example of CSXT’s Expert Dividing CERR RoW into Segments with the Same Land Use<sup>1</sup></b>					
<b>Unit Value ID</b>	<b>County</b>	<b>Land use</b>	<b>Size Adjustment</b>	<b>Conclusion Value</b>	
				<b>Per Acre</b>	<b>Per SqFt</b>
121	Van Buren	RURAL RES	2.75	\$ 5,800	\$ 0.13
122	Van Buren	RURAL RES	1.80	\$ 7,060	\$ 0.16
123	Van Buren	RURAL RES	0.25	\$ 17,300	\$ 0.40
124	Van Buren	RURAL RES	1.00	\$ 9,220	\$ 0.21
125	Van Buren	RURAL RES	2.25	\$ 6,380	\$ 0.15
126	Van Buren	RURAL RES	1.75	\$ 7,150	\$ 0.16
127	Van Buren	RURAL RES	8.00	\$ 3,580	\$ 0.08
128	Van Buren	RURAL RES	3.00	\$ 5,600	\$ 0.13

<sup>1</sup> See CSXT Reply e-workpaper “CERR Land Valuation\_Reply.xlsx,” tab “UNITVALUES FULL-REPORT,” rows 115-145; CSXT Reply Exhibits III-F-2 at 2 (“Unit Value ID Summary Table – Page 2”).

Unlike Mr. Rex, Mr. Smith only divides the CERR RoW into segments when there is an appreciable difference in highest and best use, as opposed to isolating the occasional house or gas station.<sup>10</sup> Likewise, where there is a small patch of agricultural land among residential property, the land is classified as residential instead of agricultural. So while Mr. Smith uses fewer

<sup>10</sup> See Smith Rebuttal Report at 5.

land segments, his approach is not contrived and focuses on the highest and best use of the land comprised by the CERR's RoW.<sup>11</sup>

ii. **Consumers' Expert Focused on Quality as Opposed to Quantity of Comparable Sales**

CSXT takes issue with the number of comparable sales used by Mr. Smith and claims that Mr. Rex was unable to review this data.<sup>12</sup> While it is undisputed that Mr. Smith relies on fewer comparable sales for his valuation, this disparity simply results from a difference in the manner in which the experts approach the sales data. With respect to CSXT's claim of data being unreviewable, it appears that Mr. Rex either did not have the workpapers that accompanied Mr. Smith's report, or failed to review the spreadsheets that were in the accompanying tabs in the same worksheet that contained the land valuation.<sup>13</sup> Both of these issues are addressed more fully below.

In comparison to Mr. Rex, Mr. Smith ultimately relies on fewer comparable sales but his valuation is demonstrably more reliable. Mr. Smith's approach was to sort through a large amount of data to arrive at sales that were the most similar to the property being valued, and in some instances, this approach requires going some distance from the CERR RoW. In comparison, Mr. Rex uses more sales data, but does not screen this data sufficiently to determine if, in fact,

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<sup>11</sup> *See id.*

<sup>12</sup> *See* CSXT Reply at III-F-12 (“The only reference to particular sales used in the analysis is by inference from the maps provided in the report....”).

<sup>13</sup> *See* Consumers Opening e-workpaper “Land Valuation Worksheet.xlsx.”

each data point actually represents a comparable sale. Mr. Rex still ends up with fairly small sample sizes after sorting the sales by land use,<sup>14</sup> and this results in the statistical outliers and miscategorized sales that skew his results. By instead focusing on a few truly representative sales, Mr. Smith is able to insure that the comparable sales match the land segment at issue and can make adjustments to account for any dissimilarity in use or location. It should be noted that Mr. Rex, like Mr. Smith, sometimes was required to go fairly far from the CERR's RoW to find comparable sales,<sup>15</sup> but again, Mr. Rex's focus on quantity instead of quality results in these comparable sales frequently not resembling the land segment being valued.<sup>16</sup>

CSXT also erroneously reports that Mr. Smith's data was impossible to verify,<sup>17</sup> and that "[t]he Smith report provides no rationale or calculations to explain the conclusions in the appraisal."<sup>18</sup> CSXT's assertion is incorrect. Mr. Smith includes the relevant calculations in the same worksheet as the land

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<sup>14</sup> See generally CSXT Reply e-workpapers "15-250IndianaSales01042016.xlsx," tab "Res dev" (four sales); "15-250OttawaSales12142015.xlsx," tabs "Rural res" (eight sales) and "Ind" (ten sales).

<sup>15</sup> Strangely, the location factor applied by Mr. Rex did not correlate well with the proximity to the RoW. For example, Mr. Rex classifies a sale that was 20 miles away from the RoW in the same location category as a property that was "virtually on-top of the RoW." See Smith Rebuttal Report at 29 and Figure 1.

<sup>16</sup> See discussion of pricing errors in Smith Rebuttal Report at 26-30.

<sup>17</sup> See CSXT Reply at III-F-12 ("Most problematically, it is not possible to verify any of the sales in the Smith report because no recording information was provided by Smith.").

<sup>18</sup> See CSXT Reply at III-F-12.

valuation, with the second tab even labeled “Blended Calcs Chicago,”<sup>19</sup> and the CERR RoW segments are clearly assigned latitude and longitude coordinates.<sup>20</sup> Additionally, Mr. Smith includes sales data corresponding to these segments that indicate the MLS number, the address, and the parcel identification numbers. In fact, as discussed *supra*, it is evident that Mr. Rex fails to adequately review even his own sales data used for the statistics insofar as several instances exist in which a total price listed for one parcel is in fact a multiple-parcel sale, and there are several examples where Mr. Rex misclassifies a given property.<sup>21</sup> Only Mr. Smith presented comparable sales data that is clearly documented and properly reviewed.

iii. **Foreclosures and Short Sales were Correctly Used as Comparable Sales for the Land Valuations in Cook County, IL**

Mr. Smith appropriately uses foreclosure and short sales as part of his comparable sales data because these types of sales are not isolated in nature or character. If an area has a significant number of foreclosures or short sales, the valuation will necessarily be affected by these sales. In fact, Mr. Rex’s data and conclusions also support the conclusion that Cook County, Illinois has depressed market conditions.<sup>22</sup> As such, Mr. Smith does recognize it was a foreclosure and

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<sup>19</sup> See Consumers Opening e-workpaper “Land Valuation Worksheet.xlsx.”

<sup>20</sup> See Consumers Opening e-workpaper “Land Valuation Worksheet.xlsx,” tab “Overall Pricing.”

<sup>21</sup> See Smith Rebuttal Report at 26-30.

<sup>22</sup> See Smith Rebuttal Report at 6-7.

would appropriately give it less weight as a comparable sale, but Mr. Smith does not purposefully exclude this data because it is indicative of market conditions.<sup>23</sup>

**b. CSXT's Land Valuation is Invalid**

Mr. Rex's land valuation relies on a flawed statistical analysis that incorporates non-comparable sales data. Mr. Rex also fails to introduce credible costs for acquisition. As discussed below, there are numerous flaws with Mr. Rex's land valuation analysis, and as such, Mr. Smith's Rebuttal Report should be relied upon for the final CERR RoW costs.

**i. CSXT's Expert Performed a Flawed Statistical Analysis**

Mr. Smith used a simple average as a statistical tool when evaluating the comparable sales.<sup>24</sup> However, statistics need to be carefully applied when there is a limited data set. Despite the fact that Mr. Rex used more sales data, there was still a relatively small sample size for most of the land use categories. This necessitated a careful application and finesse, but Mr. Rex instead blindly applies a best-fit line to the data and then "adjusts" the comparable sales using the equation generated from this best-fit line.<sup>25</sup> An arithmetic mean is then calculated

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<sup>23</sup> *See id.*

<sup>24</sup> *See generally* "Land Valuation Worksheet\_Rebuttal.xls" (example at tab "2-4 unit Blue Islnd\_Coldon," cells Z & AA).

<sup>25</sup> For example, the residential development land use category for Indiana only had four comparable sales, but Mr. Rex still performs the same statistical analysis and "adjusts" the comparable data for parcel size. *See* CSXT Reply e-workpaper "15-250IndianaSales01042016.xlsx," tab "Res dev."

based on the adjusted sales price data.<sup>26</sup> To generate the value for each land segment, Mr. Rex then applies these same corrections to the adjusted arithmetic mean based on the characteristics of the underlying property.<sup>27</sup> As discussed *infra* and as illustrated by Rebuttal Table III-F-3, this results in neighboring properties being assigned very different costs even when there is no significant change in the underlying land use.

In theory, the statistical approach used by Mr. Rex could work, but the adjustments made to the comparable sales data in the first instance by Mr. Rex are mostly contrived or are unsupported by the data. For example, Mr. Rex frequently applies a location adjustment, which would naturally either be based on the proximity to the RoW or at least to the same general location, but instead, it appears that Mr. Rex uses the term “location” loosely, such that several locations that are geographically disparate would be grouped together.<sup>28</sup> Not surprisingly, this grouping of data results in data essentially being divided by price, and when this data is plotted there is a correlation. Upon inspection, this correlation falls apart when Mr. Smith re-plots the data and removes the statistical outliers. As explained by Mr. Smith:

To illustrate the problem, the statistics and  $R^2$  analysis were re-performed excluding the outlier sales of \$17.91 psf and \$8.66 psf. Consistent with

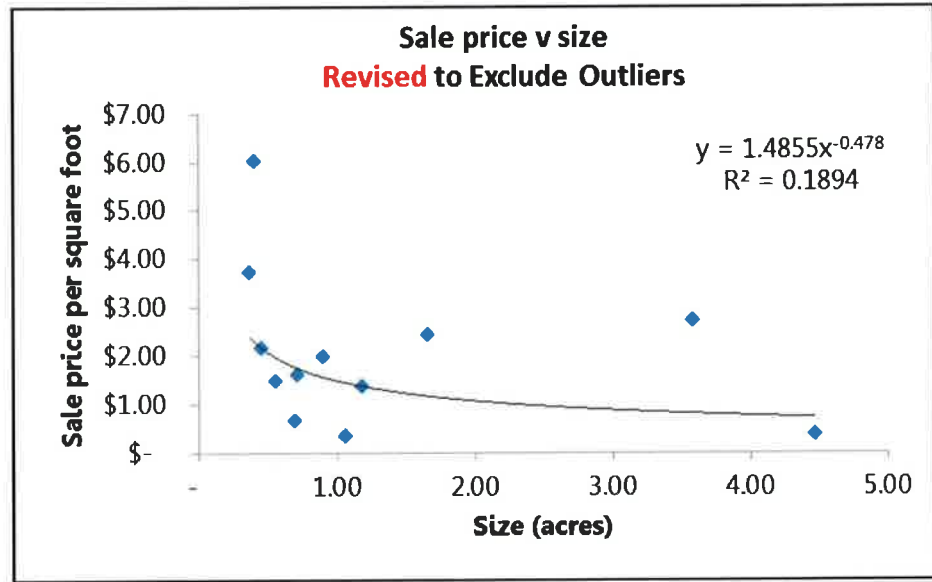
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<sup>26</sup> See CSXT Reply e-workpaper “15-250IndianaSales01042016.xlsx,” tab “Com” at cell AB34.

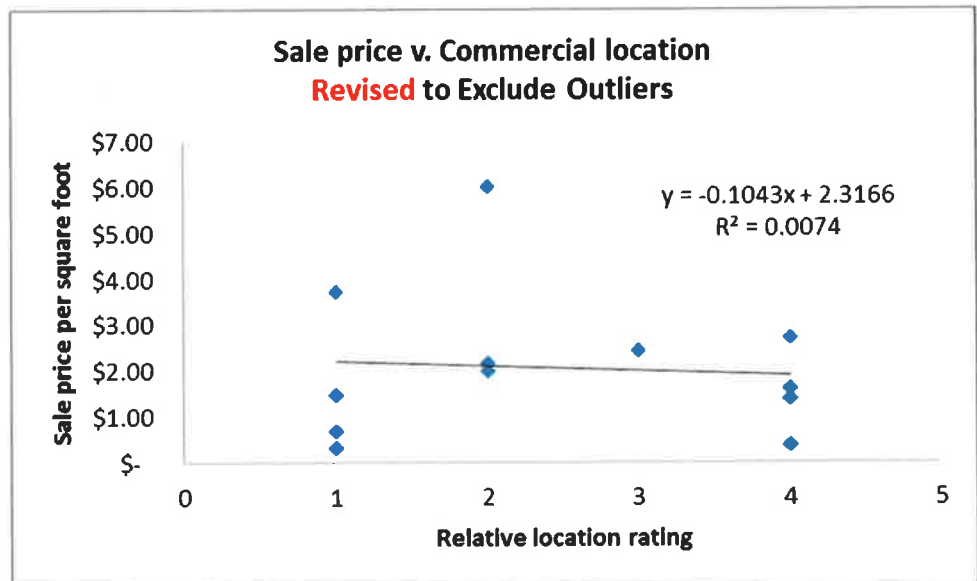
<sup>27</sup> See CSXT Reply e-workpaper “CERR Land Valuation\_Reply.xlsx,” tab “UNITVALUES FULL – REPORT,” columns D and E.

<sup>28</sup> See Smith Rebuttal Report at 24 and Figure 1.

RMI's approach, the Sale Price v. Size was plotted first, and subsequently we replotted the relationship between Sale Price v. Location. As the charts below illustrate, this analysis by RMI was performed on a small enough data set that the removal of outliers changed the output and results of their analysis.



See Consumers Rebuttal Workpaper "15-250OttawaSales12142015 Revised to Exclude Outliers.xlsx," tab "Com Graphs."



See Consumers Rebuttal Workpaper "15-250OttawaSales12142015 Revised to Exclude Outliers.xlsx," tab "Com Graphs."

As evidenced by the charts above, there was not enough data or a strong enough correlation to justify the adjustments made by RMI to the comparable sale data. This is clear from the recalculated  $R^2$ , the coefficient of determination which is less than 1% for Sale Price v. Location. That is to say, that less than one-percent of determination can be related to location. Clearly there must be another determinant in making adjustments to prices not considered in the RMI analysis.

As Mr. Smith demonstrates, Mr. Rex relies on weak statistical correlations that hinge on a small enough data set that the removal of outlier data makes the entire house of cards fold. Mr. Rex could have performed this analysis if he had in the first instance reviewed the data, removed outliers or bad data, and then only used correlations based on a logical relationship such as neighborhood or parcel size. Instead, Mr. Rex's misapplication of contrived and unsupported adjustments results in an initial skewing of the comparable sales data, which Mr. Rex then adjusts a second time to generate the values for the land segments.<sup>29</sup> The net effect is that Mr. Rex's initial adjustment error is compounded and therefore the values assigned to the individual land segments are not supported by the underlying comparable sales data.<sup>30</sup>

**ii. CSXT Does Not Explain its Calculations**

Several of Mr. Rex's workpapers are incomplete with improperly labeled units and side notes. Moreover, most, if not all, of Mr. Rex's workpapers include hardcoded data and contain circular spreadsheet references making it impossible simply to revise Mr. Rex's worksheets. For example, it was not

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<sup>29</sup> See CSXT Reply e-workpaper "CERR Land Valuation\_Reply.xlsx," tab "UNITVALUES FULL – REPORT," columns D and E.

<sup>30</sup> See discussion *infra* at III-F.a.i. and Rebuttal Table III-F-4.



possible to determine where in the worksheet the mean price of the adjusted data was adjusted to fit the land segment. Consumers understands, at least in theory, how CSXT was making its adjustments; however, there are several references made within Mr. Rex's materials that when traced back, lead to hardcoded values.<sup>31</sup> This defect makes the analysis performed by Mr. Rex less than transparent, and in fact, transforms what should be a fairly straightforward statistical analysis with simple best-fit regressions being used in Excel into a black-box model. Therefore, while the underlying methods Mr. Rex uses theoretically were valid, the flawed execution of those methods makes them less than transparent and unreviewable, and as such, this CSXT analysis should be rejected by the Board.<sup>32</sup>

iii. **CSXT's Expert Failed to Perform an Adequate Review of the Comparable Sales Data and the Underlying Property of the CERR**

Mr. Smith makes no qualms that he did not highlight the "McMansions" or "one-offs" along the RoW because these are not representative of highest-and-best use.<sup>33</sup> However, Mr. Rex uses a more fine-grained approach,

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<sup>31</sup> For example, all of the following values within Mr. Rex's "CERR Land Valuation\_Reply.xlsx," were hardcoded: all cells in tab "UV Worksheet;" the "Conclusion" values in tab "UNITVALUES," column H; the per acre mean and median values in tab "UNITVALUES-report," columns F and G; and the mean, median, and conclusion values listed for 1/1/2013 in tab "UNITVALUES FULL – REPORT," columns P, Q, and R. See Consumers Rebuttal workpaper "CSXT Reply Evidence Procedural Violations Complete List.xlsx," level "New GP Violations," rows 91-94.

<sup>32</sup> See Sunbelt at 104.

<sup>33</sup> Smith Rebuttal Report at 5.

which can be done, but requires a careful analysis and a study of the underlying land - something that Mr. Rex fails to do. As discussed in Mr. Smith's Rebuttal Report, the prices CSXT assigned to individual land segments are not always credible when the underlying property of the CERR is checked.<sup>34</sup>

Mr. Rex's statistical analysis relies on a limited sample size, and thus, it was necessary for Mr. Rex to perform a careful review of the comparable sales. Mr. Rex did not perform such a careful review, and outliers therefore are included in Mr. Rex's calculations such that his valuation of the CERR's RoW is invalid. Specific examples identified by Mr. Smith include:

Instrument Number 3500<sup>35</sup>: "The sale price of this property is listed as \$43,050 on 1/8/2010. However, an online search of the public property sales records indicates that the forfeiture sale price for this property on 4/22/2015 was \$2,504."

Instrument Number 5070<sup>36</sup>: Property listed as rural residential when it is listed by Ottawa County as commercial.

Instrument Number 12639<sup>37</sup>: "Acreage listed in the RMI report is less than 25% of the actual acreage....Therefore, the initial sale price per acre should be \$5,290 instead of \$22,658."<sup>38</sup> This land is also actively farmed and should not have been used as a comparable sale for Residential land underlying the CERR.

Instrument Number 12683<sup>39</sup>: Acreage is incorrect and Mr. Rex failed to use the most recent sales data that is publicly available online. This

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<sup>34</sup> See Smith Rebuttal Report at 26-30.

<sup>35</sup> Smith Rebuttal Report at 7.

<sup>36</sup> Smith Rebuttal Report at 18.

<sup>37</sup> Smith Rebuttal Report at 16.

<sup>38</sup> *Id.*

<sup>39</sup> Smith Rebuttal Report at 14-15.

property is listed as acreage when based on a review of aerial maps on Google Earth, this property is improved land with a residence and is actively farmed.

Instrument Number 19185<sup>40</sup>: Listed acreage for this sale is understated by approximately 50%. “[T]he initial sale price per acre should be \$33,287 and not \$65,696....” This property is also listed as industrial when it should have been classified as farmland.

Instrument Number 24729<sup>41</sup>: Land is listed as industrial when it “is clearly farmland and should have been classified as agricultural land.”

Instrument Number 35213<sup>42</sup>: Acreage listed is incorrect by over 50% making it so the statistical analysis incorporated a data point with a cost per acre that was more than double what was supported by this sale. Additionally, instead of being classified as rural residential it should have been classified as agricultural land.

Instrument Number 36587<sup>43</sup>: This property is listed as industrial when the existing and ongoing use is commercial.

Instrument Number 37944<sup>44</sup>: Listed acreage for this sale is understated by approximately 50%, the sale was part of a multi-parcel transaction, and one of the parcels was improved.

**iv. Acquisition Costs are Not Supported by the Record or STB Precedent**

CSXT’s acquisition cost of 16% is unsupported by the evidence and is inconsistent with STB precedent.

CSXT states that Mr. Rex did “not consider all the acquisition costs that would be encountered today in the assemblage of the corridor. The only costs

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<sup>40</sup> Smith Rebuttal Report at 10-11.

<sup>41</sup> Smith Rebuttal Report at 8.

<sup>42</sup> Smith Rebuttal Report at 19.

<sup>43</sup> Smith Rebuttal Report at 11.

<sup>44</sup> Smith Rebuttal Report at 13.

included are those considered by the STB for rate case purposes.”<sup>45</sup> But CSXT fails to cite to evidence proving that it incurred these title, survey, appraisal, negotiation, or closing costs on a per parcel basis, and also has denied Consumers the ability to review information that would make it possible to refute these costs. Consumers on Opening explained how CSXT failed to properly link the “Deed Index.xlsx” with the “Val Map Index IL IN MI.xlsx,” making it impossible to perform an adequate review of the deed records. In fact, because of this failure by CSXT, which CSXT does not dispute, Consumers was unable to identify easements and potentially exclude significant costs from the land valuation.<sup>46</sup> Given that Consumers was denied the ability by CSXT to adequately review this information,<sup>47</sup> it is not permissible for CSXT on Reply to insist it should be able to add acquisition costs.<sup>48</sup>

At a total of \$20.8 million, these acquisition costs equate to “roughly 16% of the total land value assessed for the CERR,”<sup>49</sup> and represent an additional cost per acre of \$10,511.<sup>50</sup> These costs defy all logic, and like the other statistical applications in Mr. Rex’s land valuation, a blanket one-size-fits-all pricing scheme

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<sup>45</sup> CSXT Reply at III-F-18 n. 36.

<sup>46</sup> Consumers Opening at III-F-9.

<sup>47</sup> Consumers as a consequence was unable to identify the easement locations and to exclude or refute these costs on Opening. Consumers Opening at III-F-9.

<sup>48</sup> CSXT Reply at III-F-21.

<sup>49</sup> CSXT Reply at III-F-21.

<sup>50</sup> CSXT’s acquisition costs of \$20,818,184/CSXT’s total acreage of 1,980.62.

does not reflect common sense. Much of the RoW passes through residential areas, particularly Chicago. It is evident that the cost of a house survey is more in the range of \$300 to \$800 rather than \$2,500. Similarly, the cost of a house appraisal is in the range of \$300 to \$400 rather than \$4,500. Thus, these two items alone would be \$600 to \$1,200 per residential parcel not the \$7,000 estimated by Mr. Rex. Additionally, in many comparable transactions, these settlement fees are split between buyer and seller, further magnifying the difference between Mr. Rex's costs and actual fees found in the market.

That aside, these costs are not on the same scale of acquisition costs previously allowed by the Board. In *Sunbelt*, the Board accepted NS's additional acquisition costs of \$823,100,<sup>51</sup> when the total acreage (excluding easements) was 6,936 acres,<sup>52</sup> and the total real estate costs were \$219,931,502.<sup>53</sup> As a percentage, the acquisition costs were 3.7%,<sup>54</sup> and the cost per acre was \$1,187.<sup>55</sup> Likewise, in *DuPont*, the Board accepted NS's acquisition costs of \$111,960,000,<sup>56</sup> when the total acreage (excluding easements) was 94,169 acres,<sup>57</sup> and the total real estate

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<sup>51</sup> *Sunbelt* at 103-104.

<sup>52</sup> *Sunbelt* at 97.

<sup>53</sup> *Sunbelt* at 97 (excluding easements at \$431,000).

<sup>54</sup>  $\$8,233,100/\$219,931,502 = 3.7\%$

<sup>55</sup>  $\$8,233,100/6,936 \text{ acres} = \$1,187/\text{acre}$

<sup>56</sup> *DuPont* at 140-141.

<sup>57</sup> *DuPont* at 142.

costs were \$5,323,836,000.<sup>58</sup> As a percentage, the acquisition costs were 2.1 %, <sup>59</sup> and the cost per acre was \$1,189.<sup>60</sup>

The reason for this departure from the costs in *DuPont* and *Sunbelt* can likely be explained by the possible disconnect or miscommunication between CSXT's experts, Messrs. Rex and Matthewson. Previously, in *DuPont*, Mr. Matthewson, as here, performed a cost estimate on a per parcel basis.<sup>61</sup> However, the same expert also provided a conservative estimate of the number of parcels along the RoW as being "9,000 parcels, which is over ten acres per parcel."<sup>62</sup> Mr. Matthewson justified this per parcel cost as being approximately equal to the "average acreage of the valuation units" as determined by the land valuation expert.<sup>63</sup> As explained by NS, "Mr. Matthewson's assumption conservatively attributes only one parcel per valuation unit."<sup>64</sup> In conjunction with estimating the number of parcels, Mr. Matthewson developed the costs, which as here, contemplate boundary surveys, title work, appraisal, negotiations with landowners, and closing costs."<sup>65</sup>

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<sup>58</sup> *DuPont* at 145.

<sup>59</sup>  $\$111,960,000/\$5,323,836,000 = 2.1\%$

<sup>60</sup>  $\$111,960,000/94,169 \text{ acres} = \$1,189/\text{acre}$ .

<sup>61</sup> See *DuPont*, NS Reply at III-F-287; CSXT Reply Exhibit III-F-1 at 151.

<sup>62</sup> See *DuPont*, NS Reply at III-F-287.

<sup>63</sup> See *DuPont*, NS Reply at III-F-287-288.

<sup>64</sup> *Id.*

<sup>65</sup> CSXT Exhibits III-F-1 at 151-152; *DuPont*, NS Reply at III-F-289.

In the present case, Mr. Rex does not follow what was previously done by Mr. Matthewson in *DuPont*, and instead performs a per parcel count of all parcels from the valuation maps.<sup>66</sup> The problem is that in several instances, these numbers appear to correspond to the section boundaries of the quadrangle map. *See id.* Given that the predecessor railroads were installing track over 100 years ago, it is unlikely that they were dealing with as many owners or had nearly the number of transactions as contemplated by Mr. Rex. In fact, using Mr. Rex's parcel count, there would be a change in ownership or a transaction warranting these fees every 0.9 acres, which is significant given that Mr. Matthewson had estimated his costs in *DuPont* on an average parcel being over ten acres.<sup>67</sup> The costs by Mr. Matthewson contemplate transaction costs, and as such, Mr. Rex's counting of parcels overstates the total number of transactions resulting in illogical and excessive acquisition costs, that at roughly 16%, clearly represent a barrier to entry.

CSXT's own workpaper shows a different calculation for land. This workpaper appears to indicate that CSXT has no legitimate basis for its estimate.<sup>68</sup>

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<sup>66</sup> *See generally* CSX\_ValMap\_22467.pdf; CSX\_ValMap\_22468.pdf; CSX\_ValMap\_22470.pdf.

<sup>67</sup> *DuPont*, NS Reply at III-F-287.

<sup>68</sup> CSXT Reply e-workpaper "Acquisition cost summary.xlsx," columns N-Q, rows 17-27.

\$ 131,001,984	Total ATF		
4,493	parcels		
\$ 12,850	acquisition cost per parcel		
\$ 57,735,050	Total acquisition costs		
44%			
\$ 188,737,034			

**c. Conclusion**

While Mr. Rex performed a statistical analysis for CSXT’s land valuation of the RoW, the Board should reject that analysis because the comparable sales that Mr. Rex relies on are not representative of the land segments being valued. Mr. Smith, as part of his independent review, carefully analyzed sales data to identify comparable sales that were the best evidence for the cost of the land segments being valued. Mr. Smith used his experience and judgement, but relied on good data, something that Mr. Rex failed to do in the first instance before performing his statistical analysis. The Board should accept Mr. Smith’s approach and his expertise over the black-box model that Mr. Rex uses to produce a valuation of the CERR. For the above reasons, the Board should adopt Mr. Smith’s valuation of the CERR RoW as the best evidence of record.



## 2. Roadbed Preparation

Rebuttal Table III-F-5 below shows the parties' Opening, Reply, and Rebuttal roadbed preparation costs.

<u>Item</u> (1)	<u>Consumers</u> <u>Opening</u> (2)	<u>CSXT</u> <u>Reply</u> (3)	<u>Consumers</u> <u>Rebuttal</u> (4)
<b>1. <u>Clearing and Grubbing</u></b>	\$2,354	\$2,149	\$2,358
2. Earthwork			
a. Common	\$12,642	\$26,240	\$11,337
b. Loose Rock	\$66	\$69	\$66
c. Solid Rock	\$295	\$303	\$295
d. Borrow	\$7,415	\$28,030	\$12,674
e. Land for Waste Excavation	\$0	\$7,705	\$0
f. Subtotal - Earthwork	\$20,418	\$62,346	\$24,372
3. Drainage			
a. Lateral Drainage	\$202	\$203	\$203
4. Culverts	\$1,146	\$2,725	\$1,179
5. Retaining Walls	\$4,442	\$11,247	\$6,627
6. Rip Rap	\$251	\$283	\$283
7. Relocation of Utilities	\$40	\$1,484	\$40
8. Topsoil Placement/Seeding	\$27	\$27	\$27
9. Surfacing for Detour Roads	\$199	\$199	\$199
10. Environmental Compliance	\$48	\$48	\$48
11. Fine Grading	\$1,146	\$1,476	\$1,435
<b>12. Total</b>	<b>\$30,274</b>	<b>\$82,187</b>	<b>\$36,771</b>

<sup>1/</sup> See Consumers Rebuttal e-workpaper "CERR Grading\_Rebuttal.xlsm," Tab "Rebuttal Summary."

The major areas of difference in the development of these costs include Consumers' use of MDOT unit costs; CSXT's configuration changes that result in utility relocation and additional retaining walls; and CSXT's calculation of costs for land for waste quantities. Each of these issues, along with CSXT's other modifications to Consumers' Opening evidence, is discussed below.

a. **Consumers' Use of Contractor Bid Data from the Michigan Department of Transportation for Certain Earthwork Costs Should be Accepted by the Board**

On Opening, Consumers used Michigan Department of Transportation (“MDOT”) data from 2010-2015 in order to calculate various CERR unit costs. On Reply, CSXT makes numerous attempts to dismiss Consumers’ use of the MDOT data for CERR unit costs. CSXT claims that Consumers’ MDOT evidence does not follow the “Board precedent that R.S. Means construction cost data are the most reliable and appropriate evidence to use for earthwork costs.”<sup>69</sup>

CSXT goes on to claim that “[i]n *DuPont* and *SunBelt* the Board turned away arguments that Means costs should be replaced with so-called “Trestle Hollow” costs.<sup>70</sup> CSXT contends that the Board rejected the use of Trestle Hollow costs in *DuPont* and *Sunbelt* simply because those costs were not R.S Means costs. This is a biased and improper interpretation of the STB’s decision. In the *DuPont* decision, the Board states that “[a]s NS argues, and we agree, the size, scope, and geographic and topographic diversity of the DRR make the use of Means more appropriate than the extrapolation of costs from a single project.”<sup>71</sup>

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<sup>69</sup> See CSXT Reply at III-F-24.

<sup>70</sup> *Id.*

<sup>71</sup> See Consumers Opening e-workpaper “42125 DuPont v. NS 2014.03.24 ID\_43717 CORRECTIONS TO DECISION.pdf.” at page 149.

Consumers' utilization of MDOT data suffers from none of the Board's issues with the Trestle Hollow costs in *DuPont*. MDOT unit costs are derived from multiple real world construction projects in the same geographic region with the same topographic diversity, utilizing Consumers tiered determination of MDOT costs, as that of the CERR.<sup>72</sup>

i. **R.S. Means is Only One Source for SARR Earthwork Unit Costs**

CSXT claims that Consumers' references to the Board's 2007 decision in *WFA I* and its 2011 decision in *AEPCO*, in which the Board accepted unit costs from actual construction projects and did not rely upon the Means Handbook, do not support Consumers use of MDOT data.<sup>73</sup> CSXT states that "[u]nlike the evidence and circumstances in *WFA I* and *AEPCO 2011*, (1) the MDOT projects are highway projects that were not constructed by CSXT and are not part of the CSXT or CERR system; (2) the MDOT Contractor Costs vary in size and scope in comparison to the CERR."<sup>74</sup> CSXT further states that "[i]n both *WFA I* and *AEPCO 2011*, due primarily to the projects' proximity to the route being replicated by the SARR and the fact that the proffered costs were from

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<sup>72</sup> See Consumers Opening at III-F-13-14 for discussion on the tier system Consumers utilized on opening to allow for the inclusion of unit costs with a similar geographic region and topographical make up as the CERR.

<sup>73</sup> See CSXT Reply at III-F-26.

<sup>74</sup> *Id.* at III-F-26-27.

larger projects conducted by the defendant itself on a Class 1 railroad system,”<sup>75</sup> the Board accepted an alternative to R.S. Means unit costs.

However, CSXT fails to acknowledge what is included in R.S. Means unit costs. R.S. Means unit costs are not specific to Class I railroad system construction. In fact, the R.S. Means handbook consists of various types of projects that take place throughout the country. R.S. Means reaches out to manufacturers, dealers, distributors, etc. across the United States in an effort to determine costs for various projects when compiling the Means Handbook each year. There is no reason to rely upon the Means Handbook costs that were “not constructed by CSXT and are not part of the CSXT or CERR system” and consist of work that takes place throughout the country when there is MDOT data available that relates specifically to the geographical region and topography of the CERR.

Further, *WFA I* and *AEPCO* are not the only cases in which the Means Handbook was not completely relied upon in determining roadbed preparation unit costs. The complainant in *West Texas* used quotes from outside vendors to develop the grading unit costs. The defendant railroad did not agree with this approach and instead relied upon Colorado Department of Transportation (“CODOT”) unit costs. The Board accepted “WTU’s unit costs for earthwork as reasonable, because they are based upon actual quotations obtained from the construction industry and recognized compilation services. While we do not

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<sup>75</sup> *Id.* at III-F-27.

question the estimates in the CODOT publication, WTU is entitled to choose the low-cost bidder for earthworks.”<sup>76</sup> This is further support that the Means Handbook should not be the “rule-of-thumb” just because it has been accepted in previous cases. Just as in *WTU*, the CERR is entitled to choose the low-cost bidder for earthworks, which in this case is the MDOT.

ii. **Means Costs Do Not Reflect Economies of Scale (Not Economies of Density)**

On Opening, Consumers argued that “[t]he Means Handbook costs are very conservative for this application because they are based on an average of costs for projects of all sizes from around the country and assume a unionized workforce. There is no way to scale the Means Handbook unit costs to be commensurate with a project the size of the CERR, or to accurately estimate the impact of using non-union labor.”<sup>77</sup>

On Reply, CSXT claims that “Consumers is mistaken. The Means Handbook specifically discusses how factors affecting costs are handled and explains that the size and scope of work will have a significant impact on cost. Means goes on to caution that smaller sized projects will likely incur costs higher than those reported in its estimating guide.”<sup>78</sup> Significantly, however, CSXT does not include the exact wording from the R.S. Means pages it claims to cite as proof

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<sup>76</sup> See *West Texas* at 704.

<sup>77</sup> See Consumers Opening at III-F-10.

<sup>78</sup> See CSXT Reply at III-F-27-28 (footnotes omitted).

for its statement. The cited R.S. Means handbook page in the section “Factors Affecting Costs” actually reads:

“Costs can vary depending upon a number of variables. Here’s how we have handled the main factors affecting costs...Size of Project – The size, scope of work, and type of construction project will have a significant impact on cost. Economies of scale can reduce costs for large projects. Unit costs can often run higher for small projects.”<sup>79</sup>

CSXT excludes the language in which Means cautions that larger projects would have reduced costs and only includes the statement that smaller projects would have increased costs, implying to the Board that Consumers would have higher costs.

CSXT further offers numerous examples where it believes that R.S. Means, through the larger equipment, would account for economies of scale. In the 1984 paper titled “Economies of density vs economies of scale: why trunk and local service airline costs differ” published in the Rand Journal of Economics, it is noted that there is a “crucial distinction between returns to density (the variation in unit costs caused by increasing transportation services within a network of given size) and returns to scale (the variation in unit costs with respect to proportional changes in both network size and the provision of transportation services).”<sup>80</sup> This distinction of definitions can be extrapolated to this case by changing the wording

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<sup>79</sup> See CSXT Reply e-workpaper “RS Means Info.pdf” at page 4 (highlighting added in Rebuttal).

<sup>80</sup> See Consumers Rebuttal e-workpaper “Economies of Density vs Economies of Scale\_1984.pdf” highlighted passage on page 2.

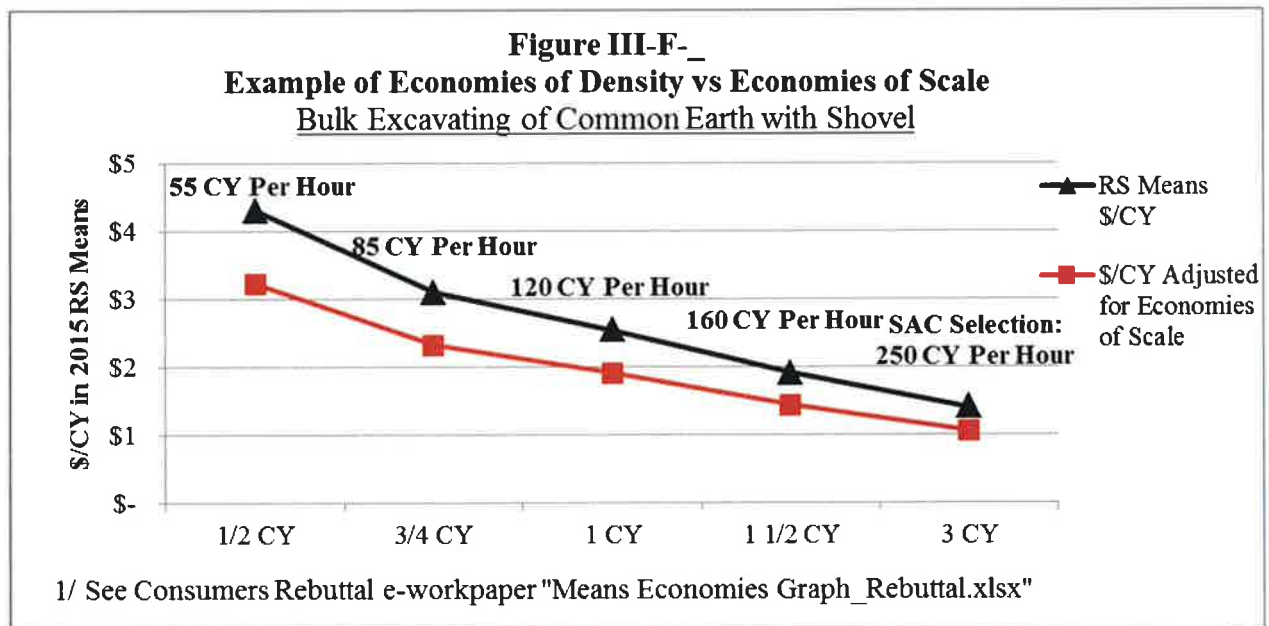
of “transportation services” to “equipment size”, and “network of a given size” to “project of a given size.” Restated for this case, returns to density (or economies of density) are the variation in unit costs caused by increasing equipment size within a project of a given size. CSXT Reply figure III-F-1 shows that a project of a steady size (*i.e.*, not increasing total cubic yards of excavation) would benefit from a decreased unit cost by using a larger shovel, which is a demonstration of the economies of density in R.S. Means. While returns to scale (or economies of scale), on the other hand, are the variation in unit costs with respect to proportional changes in both project size and equipment size. This is where R.S. Means costs do not account for the economies of scale, as there is no mechanism for decreasing unit costs for a variation in project size provided in the Means Handbook.

CSXT’s Reply Figure III-F-1 details extensively how changing the selection of equipment to a larger sized shovel from R.S. Means allows the CERR to experience economies of density, but does not experience economies of scale as Consumers stated in Opening. R.S. Means’ costs do not reflect the economies of scale realized in large projects, which are different than the economies of density CSXT describes on Reply.

In fact, in materials included within CSXT’s own Reply workpaper, the R.S. Means Handbook describes the absence of economies of scale in its unit costs. In particular, the R.S. Means overview notes that “[t]he material prices in RSMMeans cost data books are ‘contractor’s prices.’ They are the prices that contractors can expect to pay at the lumberyards, suppliers/distributers

warehouses, etc. Small orders of specialty items would be higher than the costs shown, while very large orders, such as truckload lots, would be less.”<sup>81</sup> Again, the R.S. Means handbook notes that it does not fully account for the economies of scale in its unit costs.

Figure III-F-1 below demonstrates the difference between the economies of density vs. economies of scale found in R.S. Means.



In Figure III-F-1 above, Consumers has adjusted R.S. Means unit costs assuming a hypothetical 25% discount to show the difference between economies of density and economies of scale. As noted in the front of the R.S. Means book, large orders/projects would expect to see a lower price than that quoted in R.S. Means.

<sup>81</sup> See Consumers Rebuttal e-workpaper “RS Means Info.pdf” at page 2 (highlighting added in Rebuttal).



On Reply, CSXT stated that “the unit costs from Means previously adopted by the Board are tailored specifically to the assumptions underlying the earthwork quantities reported in the Engineering Reports themselves and with the assumptions in the formulas used to adjust the Engineering Report quantities to modern day specifications.”<sup>82</sup> This is a misleading statement by CSXT. The formulas used to adjust the Engineering Report quantities to modern day specifications were first introduced in *WPL* “to reflect differences between the specifications for the early 1900’s railroad and for EWRR.”<sup>83</sup> These formulas adjust the Engineering Report quantities to modern roadbed specifications, and have nothing to do with unit costs, R.S. Means or otherwise. While the cost selected from R.S. Means for common earth has a similar haul distance to that included in the ICC Engineering Reports, that similarity does not require the use of R.S. Means when using the formulas to adjust the Engineering Report quantities. As noted by Consumers in Section III-F-2.a.i., the Board has accepted non-R.S. Means unit costs in *WFA I* and *AEPCO*, which were applied to the ICC Engineering Report quantities and adjusted in the same manner employed by Consumers in the instant case.<sup>84</sup>

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<sup>82</sup> See CSXT Reply at III-F-29.

<sup>83</sup> See Consumers Opening e-workpaper “WPL 091301 decision.pdf” at page 80.

<sup>84</sup> See Consumers Rebuttal e-workpaper “42088 WFA.Basin v. BNSF\_OPENING VOL 2 OF 2.pdf”; see also *id.* at 41 (“The earthwork quantities contained in the ICC Engineering Reports are based on design specifications less stringent than those for modern day construction, and therefore need to be adjusted.”); *id.* at 44 (“Once the adjusted earthwork quantities per mile were

Neither the economies of density found in the R.S. Means Handbook nor the use of R.S. Means unit costs in previous maximum rate cases refutes Consumers' use of MDOT unit costs in this case.

iii. **CSXT's AFE Argument Regarding Earthwork Projects is Meritless**

In addition to the Opening MDOT support for earthwork unit costs, which shows that the Means Handbook should not be relied upon when calculating CERR common excavation costs, Consumers also reviewed CSXT's own invoices provided by CSXT in discovery as further support that earthwork unit costs are lower than Means. Consumers found a CSXT invoice<sup>85</sup> for work done at Casky Yard in Kentucky which contains a common excavation unit cost of {        }.<sup>86</sup> In

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developed, it was necessary to calculate the total earthwork requirements and costs for the LRR."); *id.* at 54 (the "unit cost for common earthwork is derived from documents provided by BNSF in discovery."); Consumers Rebuttal e-workpaper "WFA\_Basin 9\_10\_07 38254.pdf" at 93 ("The parties agree on the unit costs for common excavation...Accordingly, we apply the agreed-upon unit cost.").

<sup>85</sup> CSXT points out in its Reply evidence at III-F-30 that it provided a list of 8,064 AFE projects and Consumers "only" selected 12 projects that contained earthwork costs and of those 12 only one contained unit costs for common excavation. What CSXT fails to point out is that Consumers requested information for 241 projects that it deemed relevant to the CERR based on CSXT's lengthy AFE project list with limited one-sentence descriptions. From the 241 projects that Consumers selected, i.e., guessed would be relevant based on limited information, CSXT produced nearly 750 AFE files and over 14,000 pages of invoices. It is from this universe that Consumers could "only" find one invoice that contained common earthwork unit costs. If CSXT had more information regarding common earthwork unit costs, then it should have provided it in discovery and Consumers would have included it in its Opening evidence.

<sup>86</sup> See Consumers Opening e-workpaper "A42192 Invoice 18.IPM\_7825681.pdf" page 135.

addition to the invoice above, CSXT also provided an Authorization for Expenditure (“AFE”) spreadsheet for the same project in discovery.<sup>87</sup>

CSXT attempts to refute Consumers’ claim that CSXT’s invoice is support for earthwork unit costs that are lower than Means unit costs by artificially inflating the CSXT AFE excavation unit cost of { }<sup>88</sup> per cubic yard. CSXT claims that “[t]he Casky Yard AFE also includes a large lump sum amount for “Misc Grading” that works out to an average cost of { } per cubic yard when spread over all of the cubic yards of excavation reported in the AFE.”<sup>89</sup> In order to calculate this { } per cubic yard unit cost, CSXT took the “Misc Grading” lump sum amount of { }<sup>90</sup> and divided it by the sum of the cubic yards for “Excavation, Used as Fill” ({ }<sup>91</sup>), “Excavation, Waste” ({ }<sup>92</sup>), and “Excavation, Rock” ({ }<sup>93</sup>).

The first issue with CSXT’s critique is that there is nothing in the AFE spreadsheet, or in any other evidence provided by CSXT, that defines what is

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<sup>87</sup> See Consumers Opening e-workpaper “A42192 A41492 AA 04-29-14 Casky KY - Proposed Inspection yard AFE.xls” tab “AFE Detail.”

<sup>88</sup> CSXT incorrectly references this value as { } per cubic yard in its Reply testimony at III-F-30.

<sup>89</sup> See CSXT Reply at III-F-30-31.

<sup>90</sup> See Consumers Opening e-workpaper “A42192 AA 04-29-14 Casky KY - Proposed Inspection yard AFE.xls” tab “AFE Detail” cell M12.

<sup>91</sup> *Id.* at cell G15 and I15.

<sup>92</sup> *Id.* at cell G16 and I16.

<sup>93</sup> *Id.* at cell G18 and I18.

included in the lump sum “Misc Grading” category. CSXT assumes that the lump sum payment is related to the quantity of the three different excavation categories listed above, which total {                    } cubic yards. There is no way of knowing the quantity involved in the “Misc Grading” category, whether it should be expressed in cubic yards, or whether this category is even related to the three excavation categories included in the AFE.

The second issue with CSXT’s approach is that CSXT simply spread the “Misc Grading” lump sum cost across the quantities from the three separate and distinct excavation categories equally. CSXT’s approach does not take into account the fundamental differences in each of the three excavation categories it uses for the sum of the quantities. The “Excavation, Rock” category has a unit cost of {            }, as compared to the “Excavation, Waste” unit cost of {            } and the “Excavation, Used as Fill” unit cost of {            }. Rock excavation is more expensive than waste excavation, and if the grading category “Misc Grading” were in fact proportionally related to the excavation categories, the rock excavation would account for a larger proportion of that lump sum total cost. CSXT ignores this fact and simply assumes that all quantities would represent the calculated unit cost of {            }. Consumers was demonstrating that the unit cost for *common* earthwork found in CSXT’s own invoices was lower than Means. These other grading categories found in the AFE that CSXT relies on to artificially inflate its own unit cost should have no bearing on that demonstration.

The third defect in CSXT’s analysis is that it relies solely upon the CSXT AFE, which is essentially an estimate, and not on the actual invoice CSXT received from the contractor that performed the work and that Consumers relied upon in its opening evidence.<sup>94</sup> The actual CSXT invoice clearly shows that CSXT paid a unit cost of {     } per cubic yard for “Earthwork – Common Excavate.”<sup>95</sup> The only other earthwork category provided in this 319 page invoice is for “Earthwork – Rock Excavate,” which is listed at a cost per cubic yard that is much higher than the common earthwork unit cost. “Misc Grading” is not found on the invoice, nor is any other grading category found on the invoice that would affect the common earthwork unit cost.

**iv.     Consumers Has Accurately Represented the MDOT Data**

CSXT makes several claims that Consumers excluded various pieces of the MDOT unit costs that would need to be included if the MDOT data were to be used to calculate CERR unit costs.<sup>96</sup> CSXT’s inclusion of these supposed missing pieces leads to a MDOT earth excavation unit cost greater than that found in the Means Handbook. CSXT’s analysis of the MDOT data is nothing more than an attempt to artificially inflate MDOT unit costs in an effort to persuade the

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<sup>94</sup> See Consumers Opening at III-F-25.

<sup>95</sup> See Consumers Opening e-workpaper “A42192 Invoice 18.IPM\_7825681.pdf” page 135.

<sup>96</sup> See CSXT Reply III-F-2.a.iv, pages 31-36.

Board that Means is a better approach than MDOT. Consumers discusses CSXT's flawed MDOT unit cost analysis below.

(a) **Consumers is Clear on Which Projects Were Determined to be Similar to the CERR Construction**

On Reply, CSXT states that “[b]ecause all of the MDOT projects reviewed by Consumers are highway projects, it is not clear how Consumers determined which projects were similar to the CERR construction.”<sup>97</sup> As noted above in Rebuttal section III-F-2.a.i, R.S. Means unit costs are not based solely upon railroad construction projects. R.S. Means unit costs are based upon general earthwork construction, which confirms that earthwork for a highway project is similar in scope to that of earthwork for a rail project. If CSXT believes that MDOT unit costs should not be utilized because the MDOT construction projects were not similar to the CERR construction, then it has no basis to use R.S. Means unit costs either.

Furthermore, on Opening, Consumers detailed how it arrived at the tiered mileage system utilized to ensure that the selected MDOT projects were of similar geographical and topographical regions to the CERR in both the narrative<sup>98</sup> and supporting workpapers.<sup>99</sup> Consumers assigned the various projects to one of three tiers: projects that took place within 30 miles of the CERR line were

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<sup>97</sup> See CSXT Reply at III-F-32.

<sup>98</sup> See Consumers Opening III-F-13-14.

<sup>99</sup> See Consumers Opening e-workpaper “Methodology for Developing MDOT Unit Costs.docx.”

assigned to Tier I; Tier II consists of projects that fall between 30 miles and 100 miles of the CERR line; and Tier III consists of MDOT projects with work done outside of 100 miles of the CERR line. Therefore, MDOT unit costs are a better indicator of CERR unit costs which were performed in the CERR region as opposed to R.S. Means unit costs which are based on national averages.

(b) **Embankment Should Not be Included in Earth Excavation Unit Costs**

On Reply, CSXT claims that the MDOT earth excavation unit costs developed by Consumers in its Opening evidence did not include all of the necessary components of railroad roadbed construction. CSXT argues that “[i]f the MDOT contractor bids data were used as the source for CERR common excavation unit prices, the cost for building embankment would need to be added to the cost of excavation to be comparable with the adjusted common excavation quantities derived from the Engineering Reports.”<sup>100</sup> CSXT calculates an MDOT “Embankment, CIP”<sup>101</sup> weighted average unit cost of \$3.27.<sup>102</sup> CSXT’s calculated \$3.27 unit cost was based on the 19 Tier I & II projects identified by Consumers and used in calculating the Opening MDOT earth excavation unit cost

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<sup>100</sup> See CSXT Reply at III-F-34.

<sup>101</sup> Embankment, CIP refers to Embankment, Compacted In Place.

<sup>102</sup> See CSXT Reply at III-F-34 and Consumers Rebuttal e-workpaper “MDOT Excavation Unit Costs\_Reply Analysis\_Consumers.xlsx” tab “Reply Analysis” cell I27.

of \$2.41. CSXT then multiplies this \$3.27 embankment unit cost by 70 percent to arrive at an embankment unit cost of \$2.29.<sup>103</sup>

CSXT's inclusion of embankment as part of earth excavation is an incorrect interpretation of MDOT unit costs. Embankment should not be included in the MDOT earth excavation unit costs. As Consumers explained on Opening, the MDOT Specifications state that the excavated material is the property of the contractor and contractors must "[c]ompact the subgrade to at least 95 percent of its maximum unit weight and to a depth of at least 10 inches..."<sup>104</sup>

In fact, CSXT's own evidence demonstrates that embankment unit costs should not be included in the calculation of the MDOT excavation unit cost. In its calculation of the Wayne County unit costs it deemed necessary to include in the total excavation cost, CSXT did not include any additional embankment cost. CSXT calculates an earth excavation unit cost of \$6.78 for Wayne County and includes Wayne County in its final MDOT earth excavation unit cost.<sup>105</sup>

CSXT follows Consumers' Opening approach in calculating the Wayne County excavation unit costs, and does not include embankment in the Wayne County calculations. CSXT stresses the supposed importance of including embankment unit costs with earth excavation unit costs to replicate the Means

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<sup>103</sup> See Consumers Rebuttal e-workpaper "MDOT Excavation Unit Costs\_Reply Analysis\_Consumers.xlsx" tab "Reply Analysis" cell Z9.

<sup>104</sup> See Consumers Opening at III-F-27.

<sup>105</sup> See Consumers Rebuttal e-workpaper "MDOT Excavation Unit Costs\_Reply Analysis\_Consumers.xlsx" tab "Reply Analysis" cell D15.



Handbook, but then when calculating Wayne County earth excavation costs, CSXT completely ignores the embankment unit costs. This disregard for embankment, when calculating earth excavation for Wayne County, refutes CSXT's claim that both should be included in the CERR's earth excavation unit costs.

While Consumers stands behind its MDOT earth excavation unit cost of \$2.41 from Opening and believes the Board should accept this unit cost, Consumers corrected CSXT's Reply MDOT excavation unit costs that include Embankment CIP should the Board see the need to include it. In CSXT's calculation, it develops the earth excavation and embankment CIP unit costs separately and then merely adds them together.<sup>106</sup> This approach of combining excavation unit costs is incorrect because it does not take into account the quantities involved in each component. For example, if a construction project contains an earth excavation component for 100,000 cubic yards at \$2.00/cy and also contains an embankment CIP component of 1,000 cubic yards at \$4.00/cy, then under CSXT's Reply methodology, the total common earthwork unit cost would be \$6.00/cy ( $\$2.00/\text{cy} + \$4.00/\text{cy} = \$6.00/\text{cy}$ ). However, when the discrepancy in the quantities involved in each of those components is taken into

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<sup>106</sup> See Consumers Rebuttal e-workpaper "MDOT Excavation Unit Costs\_Reply Analysis\_Consumers.xlsx" tab "Reply Analysis" column Z.

account by utilizing a weighted average, then that same total common earthwork unit cost would be \$2.02/cy.<sup>107</sup>

If embankment CIP should be included as part of the CERR common excavation unit cost, then a combined embankment CIP/earth excavation weighted average unit cost should be calculated for each project. On Rebuttal, Consumers calculates a weighted average MDOT excavation/embankment unit price of \$2.75.<sup>108</sup> Based on the evidence presented above, Consumers continues to believe its Opening excavation unit cost of \$2.41 should be accepted. However, if the Board decides that embankment CIP should be included in the MDOT earth excavation calculations, Consumers believes that a unit cost of \$2.75 should be used.

(c) **Mobilization Adjustments to Excavation Unit Costs Should Not be Included**

On Reply, CSXT argues that “[i]n addition to embankment bid items that were ignored by Consumers, the MDOT data included a separate line item for mobilization,” and that “[i]f the MDOT contractor bids data is used as the source for CERR common excavation unit prices, the excavation costs and the cost for building embankment would need to be increased by the amount by which the average project mobilization percentage exceeds the 2.7 mobilization percentage

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<sup>107</sup> Earth excavation (\$2.00/cy x 100,000 cy) + Embankment CIP (\$4.00/cy x 1,000 cy) ÷ total cubic yards (100,000 + 1,000) = \$2.02/cy

<sup>108</sup> See Consumers Rebuttal e-workpaper “MDOT Excavation Unit Costs\_Reply Analysis\_Consumers.xlsx” tab “Tier Calculations-Exc-Emb” cell Z17.

assumed by Consumers, or 4.9 percent”<sup>109</sup> This notion by CSXT is completely absurd, and is nothing more than an attempt to increase the MDOT unit costs.

Mobilization is not a unit cost specific item. Mobilization, as shown in the MDOT standard specifications, is a lump sum pay item for preparatory work and operations, including movements of personnel, equipment, supplies, and incidentals to a project site, as well as the establishment of the Contractor’s offices, buildings and other facilities to support the work site.<sup>110</sup> CSXT provides no evidence that the mobilization costs for an entire project affects the unit cost of one component of that project.

If adjusting actual bid prices by the difference in mobilization percentages used were in fact appropriate, CSXT would also alter its proposed through plate girder unit cost used in III-F-7, which is sourced from a Texas DOT publication, similar to the Michigan DOT data used by Consumers. CSXT provides a September 2015 Texas statewide average lowest bid unit price as the source for through plate girder and this same document shows that the average mobilization percentage is 6.3%,<sup>111</sup> however, CSXT does not alter the through plate girder unit cost by the difference in the Texas mobilization and the CERR mobilization.

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<sup>109</sup> See CSXT Reply at III-F-34.

<sup>110</sup> See Consumers Opening e-workpaper “MDOT 2012 Standard Specifications for Construction.pdf” page 118.

<sup>111</sup> See Consumers Rebuttal e-workpaper “TPG Unit Cost (Page 10 of 34)\_Mobilization Percentage.xlsx,” tab “Table 1,” cell O1701, which is an excel conversion of the CSXT Reply e-workpaper “TPG Unit Cost (Page 10 of 34).pdf.”

Further proof that mobilization should not be included in the earth excavation unit cost can be found in the Means Handbook that CSXT's utilizes on Reply. The Means Handbook provides a brief description of excavation stating that "[w]hen equipment is rented for more than three days, there is often no mobilization charge by the equipment dealer."<sup>112</sup> CSXT's argument that excavation unit costs should be adjusted to include mobilization is completely unfounded and should be dismissed by the Board.

**(d) Wayne County Should Not be Included**

On Reply, CSXT makes the argument that the MDOT unit costs used by Consumers were not representative of the urban areas that the CERR traverses in Illinois and Indiana. CSXT claims that "Consumers has blindly assumed that the cost of excavation experienced in building highways in rural Michigan is representative of the cost of common excavation in the more urban areas that the CERR traverses in Illinois and Indiana."<sup>113</sup> This statement is a mischaracterization of Consumers' Opening evidence.

In order to account for the difference in costs throughout Illinois and Indiana on Opening, Consumers applied the Means Handbook location factors to its earth excavation unit cost of \$2.41. When applying the location factors, Consumers arrived at an MDOT unit cost of \$2.51.<sup>114</sup> CSXT claims that

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<sup>112</sup> See "Means Handbook Excavation Reference Table.pdf."

<sup>113</sup> See CSXT Reply at III-F-35.

<sup>114</sup> See Consumers Opening at III-F-29 and Consumers Opening e-workpaper "CERR Grading\_Opening.xlsm" tab "Total Cost Summary" cell P8.

Consumers’ approach of applying the Means Handbook location factors to the MDOT unit cost results in lower unit costs than would be necessary for Illinois and Indiana, as Consumers’ approach “mixes apples and oranges by applying the Means Location Factors to the MDOT bid cost data for excavation in Illinois and Indiana.”<sup>115</sup> CSXT’s argument has no merit. In fact, CSXT follows the exact same approach (or accepts Consumers’ Opening cost which followed the same approach) of indexing non-Means unit costs by the Means location factors in 10 separate places in its Reply evidence, see Rebuttal Table III-F-6 below.

**Rebuttal Table III-F-6**  
**CSXT Use of Non-Means Unit Costs with Means Location Factor Index in Reply 1/**

	<b>CSXT Reply Section (1)</b>	<b>CSXT Reply Page (2)</b>	<b>Unit Cost Item (3)</b>
1.	III-F-2-f-v	III-F-65-66	Utility Relocation
2.	III-F-3-b-iii	III-F-76	Subballast
3.	III-F-3	Workpaper	Switch Heaters
4.	III-F-5	III-F-87	Bridges
5.	III-F-5-c-v	III-F-104	Through Plate Girders
6.	III-F-5-c-vi	III-F-107	Truss
7.	III-F-5-d	III-F-107	Highway Overpass
8.	III-F-7-d	III-F-129	Locomotive Shop
9.	III-F-7-i	III-F-132	Air Compressor Building and Yard Air System
10.	III-F-8-c	III-F-137	At-grade Crossings

1/ See Consumers Rebuttal e-workpaper “Use of Means Location Factor for Unit Costs.xlsx,” tab “Table”

Specifically, in CSXT’s III-F-2 calculation of utility relocation unit costs in its grading spreadsheet, CSXT used the Means City index for Chicago to

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<sup>115</sup> See CSXT Reply at III-F-35 n.67.

index a unit cost from a National Council on Electricity Policy Report.<sup>116</sup> In addition, in Section III-F-5-c-v of CSXT Reply, CSXT added a Texas Department of Transportation (“DOT”) bid for through plate girders, and adjusted this Texas DOT unit cost using the R.S. Means location factor to reflect a unit cost that is applicable to the CERR.<sup>117</sup> These are two examples of the exact same location factor methodology that CSXT claims that Consumers misused in developing excavation unit costs using the MDOT data.

CSXT argues that to represent the urban areas of the CERR, the unit costs for Wayne County must be included in the MDOT earth excavation unit costs. CSXT calculates an earth excavation unit cost of \$6.78 for Wayne County and includes Wayne County in its final MDOT earth excavation unit cost.<sup>118</sup> CSXT notes that Wayne County encompasses Detroit, but CSXT offers no additional explanation for the claim that Wayne County’s unit cost is superior to a location factor adjusted unit cost. The MDOT project locations Consumers selected and analyzed on Opening run along the same shore of Lake Michigan as the areas in Illinois and Indiana that the CERR is replicating. Wayne County, on the other hand, borders Lake St. Charles, Lake Erie and Canada. CSXT offers no proof that the topography and the excavation needs of the projects in Wayne

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<sup>116</sup> See CSXT Reply e-workpaper “CERR Grading\_Reply.xlsm” tab “Cottage Utility Reloc” cell C5 through G5.

<sup>117</sup> See CSXT Reply e-workpaper “Bridge Costs\_Reply.xlsx,” tab “Bridge Costs by Type Summary,” Row 36.

<sup>118</sup> See Consumers Rebuttal e-workpaper “MDOT Excavation Unit Costs\_Reply Analysis\_Consumers.xlsx” tab “Reply Analysis” cell D15.

County are more similar to those in Illinois and Indiana than the projects Consumers selected. As shown by CSXT's own use of an R.S. Means Location Factor Index to account for the indexing of a non-R.S. Means cost to be applicable to the CERR throughout its Reply evidence, Consumers stands behind its Opening methodology, and does not believe Wayne County DOT data needs to be included in calculating the common excavation unit cost.

(e) **The Winning Bid Is The Important Bid**

As discussed on Opening, Consumers only used the MDOT unit costs that were submitted by the vendors that were awarded MDOT contracts. While there are multiple vendors bidding on each project, which leads to multiple unit costs, Consumers was only concerned with the vendor awarded the contract to ensure the CERR would incur the same costs as actually incurred by the vendors performing the MDOT work.

On Reply, CSXT claims that Consumers "does not explain why only the winning bid amounts would be relevant...Excavation represents an average of only 3.4% of the bid dollars analyzed by Consumers. As such, the bid price for excavation did not drive the determination of the successful bidder...[T]here is no reason why the average excavation bid price is any less relevant than the average of the winning bid price selected by Consumers."<sup>119</sup> In fact, there is a very important reason why the average winning bid price for excavation is more relevant than the average of the bid price for excavation from all bids. The

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<sup>119</sup> See CSXT Reply at III-F-35-36.

winning bid prices consist of the contractors that actually performed the work. This ensures that the CERR is incurring the same costs as those that real world contractors charged the state of Michigan. The other bid prices were submitted to MDOT, but MDOT did not accept these bids and these contractors did not perform any actual work, therefore their costs do not reflect the cost of any actual construction.

In summary, CSXT presents numerous improper positions seeking to escalate the MDOT unit costs. Consumers believes the Board should accept its use of the MDOT as a source for CERR unit costs.

**b. Clearing and Grubbing**

CSXT accepts Consumers' clearing and grubbing quantities developed based on ICC Engineering Reports.<sup>120</sup> The difference in total costs for clearing and grubbing is attributable to the difference in unit costs used. On Opening, Consumers used the MDOT database to develop a CERR clearing and grubbing unit cost of \$3,329 per acre.<sup>121</sup> On Reply, CSXT claims that Consumers' methodology should be rejected and the Means Handbook should be used to calculate the unit cost used for clearing and grubbing.

As support for its Opening unit cost, Consumers referenced a CSXT invoice provided in discovery that showed CSXT had a bid for a 300 acre clearing

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<sup>120</sup> See CSXT Reply at III-F-38.

<sup>121</sup> See Consumers Opening at III-F-20 and Consumers Opening e-workpaper "CERR Grading\_Opening.xlsm" tab "Total Cost Summary" cells P24 and P25.



and grubbing project in KY with a unit cost of { } per acre at 1Q15 levels.<sup>122</sup>

On Reply, CSXT responds that “a detailed review of the AFE invoice data produced by CSXT shows that CSXT was billed by the contractor a cost of { } per acre for clearing and grubbing.”<sup>123</sup> CSXT fails to acknowledge, however, that the unit cost of { } from the invoice was for only 40 acres of clearing and grubbing, not the 300 acres from the AFE bid, which was originally cited by Consumers. This difference in unit cost based on the difference in acres cleared and grubbed supports Consumers’ position that the MDOT data is more reliable. The difference in the bid price per acre and the invoice price per acre shows that when clearing and grubbing, there are significant economies of scale in unit cost per acre. As the CERR will be clearing 513 acres and grubbing 194, the initial bid for 300 acres is far closer than the invoice for 40 acres.

On Reply, CSXT criticizes Consumers’ use of a single unit cost for clearing and grubbing by stating that “[w]ithout information identifying the ratio of clearing only versus clearing and grubbing from the MDOT data, [CSXT footnote: “Consumers did not provide any such information in its evidence”] it is impossible to determine if the undifferentiated unit cost from the MDOT data is appropriate to estimate costs of clearing operations and clearing and grubbing operations along the entirety of the CERR.”<sup>124</sup> In calculating its Opening MDOT

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<sup>122</sup> See Consumers Opening at III-F-17.

<sup>123</sup> See CSXT Reply at III-F-39.

<sup>124</sup> See CSXT Reply at III-F-40.

clearing and grubbing unit cost of \$3,329 per acre, Consumers calculated the MDOT unit cost for “Clearing”, “Grubbing”, and “Clearing and Grubbing” separately.<sup>125</sup> In other words, Consumers calculated the differentiated unit costs for the three categories before utilizing a weighted average of all three to arrive at a total “Clearing and Grubbing” unit cost. CSXT’s argument therefore indicates that CSXT failed to perform an adequate review of Consumers’ Opening workpapers. As shown in Consumers’ Opening MDOT Clearing & Grubbing calculations, no MDOT bids in Tier I and Tier II had a line item for “Grubbing” alone. As such, Consumers utilized the weighted average of “Clearing & Grubbing” activities to apply to both acres of clearing and acres of grubbing.

As none of CSXT’s claims holds any merit as to why MDOT unit costs are not relevant to the CERR, Consumers continues to utilize the MDOT unit costs on Rebuttal.

**c. Earthwork**

**i. ROW Quantities**

On Reply, CSXT accepts Consumers’ methodology for developing excavation and embankment quantities from the ICC Engineering Reports, with the exception of a valuation segment CWI-3-IL.<sup>126</sup> On Opening, Consumers had mistakenly categorized the ICC engineering report quantity for “Embankment, hauled from Dune Park, Ind.” from valuation segment CWI-3-IL as Excavation:

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<sup>125</sup> See Consumers Opening e-workpaper “MDOT Clearing & Grubbing Unit Costs.xlsx” tab “Tier Calculations.”

<sup>126</sup> See CSXT Reply at III-F-42.

Common and not Embankment: Common. CSXT corrects this oversight on Reply, which Consumers accepts in Rebuttal.<sup>127</sup>

**ii. Yard Quantities**

On Reply, CSXT accepts Consumers' yard earthwork quantities calculated using ICC Engineering Reports.<sup>128</sup> In addition, CSXT adds yard quantities for a locomotive turntable and bad order set out track at Barr Yard.<sup>129</sup> As described in Part III-B, Consumers rejects these track miles in Barr Yard, and therefore has not added the associated yard grading quantities.

**iii. Segments with Partial CSXT Ownership**

As discussed in Part III-B, on Reply, CSXT falsely claims that the CERR must account for partial ownership of the IHB lines the CERR replicates via trackage rights. On Rebuttal, Consumers continues with its Opening position and does not include investment costs for IHB lines.

**iv. Total Earthwork Quantities**

Table III-F-7 shows a comparison of earthwork quantities proposed in each round of evidence.

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<sup>127</sup> See Consumers Rebuttal e-workpaper "CERR Grading\_Rebuttal.xlsm," Tab "Eng Report Grading Inputs," Cell S7.

<sup>128</sup> See CSXT Reply at III-F-43.

<sup>129</sup> *Id.*

Rebuttal Table III-F-7  
Comparison of CERR Earthwork Quantities 1/

<u>Item</u> (1)	<u>Consumers Opening</u> (2)	<u>CSXT Reply</u> (3)	<u>Consumers Rebuttal</u> (4)
<b>1. Common Excavation</b>	5,042,044	4,536,059	4,521,670
2. Loose Rock Excavation	5,246	5,274	5,246
3. Solid Rock Excavation	18,072	18,169	18,072
4. Borrow	716,135	1,254,240	1,224,039
<b>5. Total</b>	<b>5,781,497</b>	<b>5,813,743</b>	<b>5,769,028</b>

1/ See Consumers Rebuttal e-workpaper "CERR Grading\_Rebuttal.xlsm," Tab "Rebuttal Summary."

**v. Earthwork Unit Costs**

The main driver behind CSXT's excessive roadbed preparation costs is CSXT's use of the Means Handbook costs rather than the real world MDOT costs that Consumers used in Opening. CSXT attempts to validate its approach in Reply with a discussion of Means Handbook costs and a critique of the MDOT costs. Consumers responded to CSXT's various MDOT claims in Section III-F-2.a. above. The evidence presented by Consumers shows that the MDOT, as a real world example of recent construction in the area surrounding the CERR, is preferable to Means Handbook costs.

**(a) Common Excavation**

On Opening, Consumers used MDOT data from 2010-2015 in order to calculate an earth excavation unit cost of \$2.41.<sup>130</sup> Consumers analyzed over 1,000 projects listed in the MDOT construction cost database to determine earth excavation unit costs in Michigan for projects that were similar to the CERR construction.<sup>131</sup> On Opening, Consumers identified 21 MDOT projects that took place within 100 miles of the CERR and required earth excavation.<sup>132</sup> Based on the 21 MDOT projects Consumers calculated a 1Q15 indexed unit cost of \$2.51 per CY for common excavation.<sup>133</sup>

As discussed above in Section III-F-2.a.iv, CSXT made many baseless attempts to inflate Consumers' MDOT unit cost. On Reply, CSXT presents an additional argument against the use of MDOT unit costs. CSXT claims that the MDOT data is flawed and that it understates earthwork costs for the CERR due to the fact that "the MDOT bid data projects average approximately 50,000 cubic yards of excavation per mile, while the earthwork quantities for the CERR average approximately 30,000 cubic yards per mile. The higher concentration of earthwork volumes on MDOT projects allows for increased

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<sup>130</sup> See Consumers Rebuttal e-workpaper "MDOT Excavation Unit Costs\_Reply Analysis\_Consumers.xlsx" tab "Tier Calculations" cell Z17.

<sup>131</sup> See Consumers Opening at III-F-26.

<sup>132</sup> *Id.* at III-F-26-27.

<sup>133</sup> *Id.* at III-F-29.

production from earthmoving equipment and likely results in lower haul distances, resulting in lower MDOT costs per unit.”<sup>134</sup>

CSXT discusses the Means Handbook economies of density. CSXT provides no support, and there is no mention in the Means Handbook, that shows the cubic yards of excavation per mile has any effect on the costs that make up the various Means Handbook projects. Thus, CSXT provides no support as to why Means should be used over MDOT. The Means Handbook unit costs are also made up of various sized projects that take place throughout the country, whereas MDOT projects are specific to the CERR region.

On Reply, CSXT also discusses its calculation of R.S. Means based common excavation unit cost, which includes an 80/20 sheepsfoot roller to steel wheel roller ratio for compaction.<sup>135</sup> This 80/20 ratio argument is addressed in section III-F-2 Loose Rock excavation below.

As discussed above in Sections III-F-2.a.iv.(b), III-F-2.a.iv.(d), and III-F-2.a.iv.(c), CSXT’s claimed “corrections” to MDOT unit costs for common excavation including “(1) Additional cost for embankment (2) Substitution of bid prices from Wayne County for CERR lines in Illinois and Indiana (3) Adjustment of bid prices to reflect the higher mobilization percentages included in MDOT contractor bids,”<sup>136</sup> are baseless and should be rejected by the Board. On Rebuttal,

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<sup>134</sup> See CSXT Reply at III-F-44-45.

<sup>135</sup> *Id.* at III-F-45-46.

<sup>136</sup> *Id.* at III-F-47.

Consumers continues to utilize its Opening MDOT common earthwork unit cost of \$2.51 per CY.

**(b) Loose Rock Excavation**

CSXT accept Consumers' unit cost for loose rock excavation with two modifications. First, CSXT modifies the R.S. Means average compaction calculations and second, CSXT adds a swell factor calculation. As explained below, Consumers rejects both of these modifications in Rebuttal.

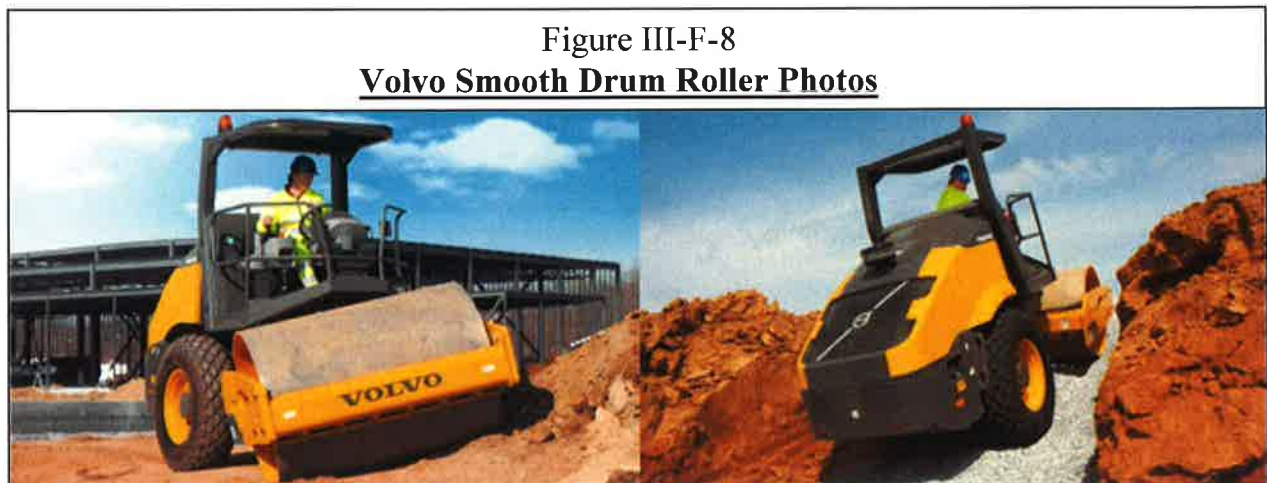
On Reply, CSXT falsely claims that the ratio Consumers used in the development of the R.S. Means compaction unit cost is impractical. This ratio is also used in CSXT's common excavation and solid rock excavation calculations. On Opening, Consumers proposed a 50/50 split for embankment compaction between a smooth drum vibrating roller and a sheepsfoot roller. Without any support or justification CSXT states that "[w]hen embankments are initially constructed, the terrain is uneven. Steel wheel rollers are almost impossible to maneuver on uneven surfaces because the smoothness of the steel drum causes them to slide downhill."<sup>137</sup> Based on this statement, CSXT proposes to replace Consumers 50/50 split with a 20/80 split between smooth drum vibratory roller and a sheepsfoot roller.<sup>138</sup>

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<sup>137</sup> See CSXT Reply at III-F-45.

<sup>138</sup> *Id.* III-F-46.

CSXT claims that smooth drum rollers are impossible to maneuver on uneven surfaces are completely baseless. In fact nearly every major soil compactor brochure contains language discussing the use of smooth drum rollers on uneven terrain or at significant grades. Volvo, in all of its compactor models, offers its trademarked “No-Spin” differential,<sup>139</sup> which provides “increase[d] traction and precludes tire slippages, improving gradeability, performance and productivity.” These brochures contain photos of smooth drum rollers operating on uneven terrain and at grade, examples of which are shown in Figure III-F-8.<sup>140</sup>



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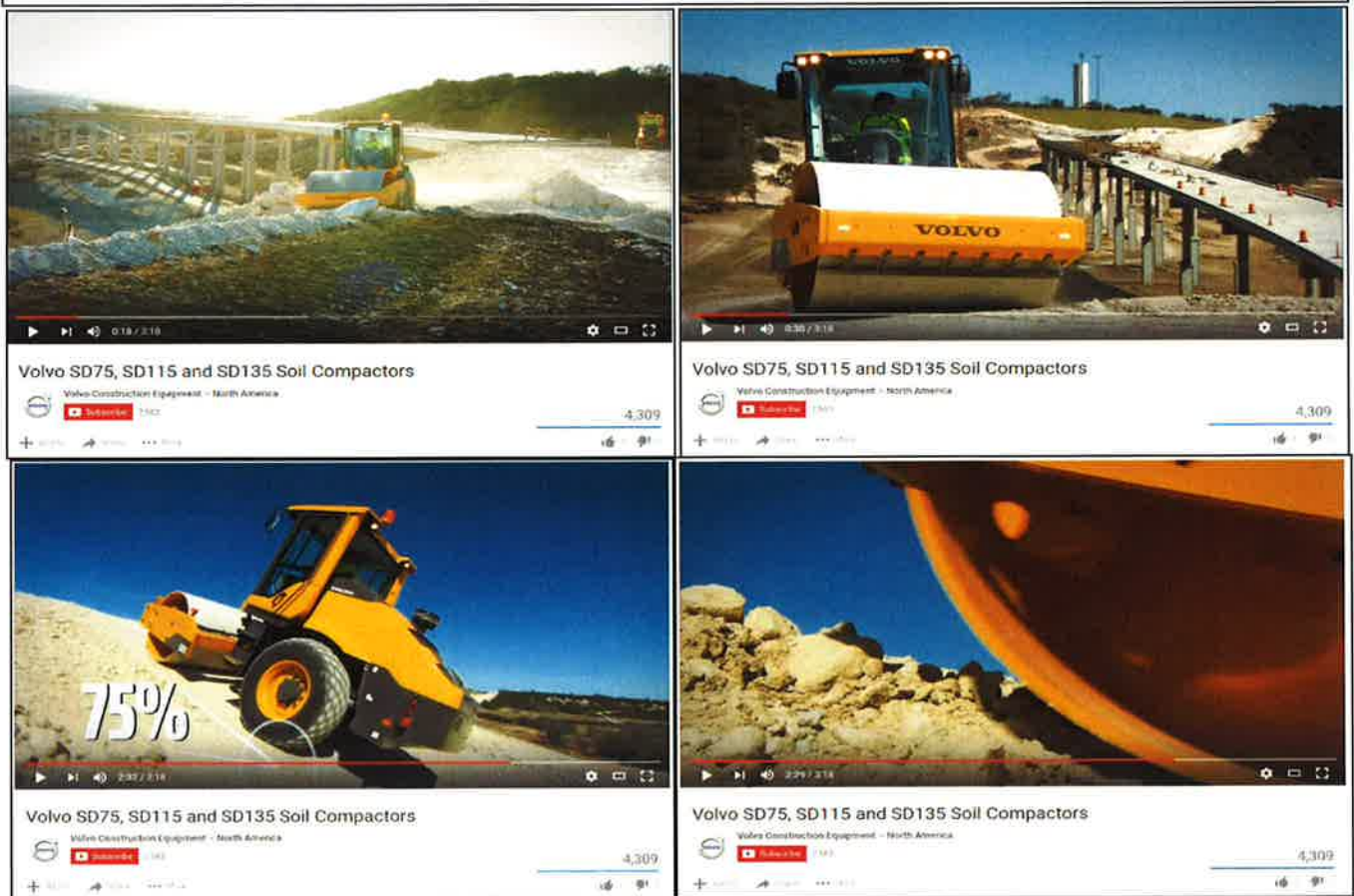
<sup>139</sup> See Consumers Rebuttal e-workpapers “Volvo SD45 Compactor Product Brochure.pdf” page 2 highlighted in yellow, and “Volvo SD75 Compactor Product Brochure.pdf” page 2 highlighted in yellow.

<sup>140</sup> See Consumers Rebuttal e-workpaper “Volvo SD75 Compactor Product Brochure.pdf” page 2.



In addition to Volvo’s brochures, Volvo’s promotional video shows smooth drum rollers operating at grade and in uneven terrain.<sup>141</sup> Figure III-F-9 below displays still frames from this video that demonstrates the various terrain where smooth drum rollers operate.

Figure III-F-9  
Volvo Promotional Video Smooth Drum Roller



<sup>141</sup> See Consumers Rebuttal e-workpaper “Volvo Construction Equipment\_Soil Compactors Promotion Video Link.docx” for link to video.

In addition to Volvo, brochures for Caterpillar soil compactors notes that they are “built around the exclusive Cat dual pump propel system, two pumps provide separate dedicated flow to drum drive motor and rear axle motor for exceptional gradeability and traction in forward and reverse.”<sup>142</sup> The “[t]wo propel pump system has dedicated pumps to drive the heavy-duty, high-torque rear wheel and drum motors independently. Should the drum or wheels begin to spin, the non-spinning motor still receives hydraulic flow, allowing continuous tractive efforts especially useful in loose underfoot conditions.”<sup>143</sup>

Again these brochures contain photos,<sup>144</sup> seen in Figure III-F-10 below, that show smooth drum compactors operating at grade without “sliding downhill.”

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<sup>142</sup> See Consumers Rebuttal e-workpaper “CAT\_CS34.pdf” page 1 highlighted in yellow.

<sup>143</sup> See Consumers Rebuttal e-workpaper “CAT\_CS54.pdf” page 6 highlighted in yellow, and “CAT\_CS533E.pdf” page 7 highlighted in yellow.

<sup>144</sup> *Id.*

Figure III-F-10  
Caterpillar Smooth Drum Roller Photos



The “[t]wo propel pump system has dedicated pumps to drive the heavy-duty, high-torque rear wheel and drum motors independently. Should the drum or wheels begin to spin, the non-spinning motor still receives hydraulic flow, allowing continuous tractive efforts especially useful in loose underfoot conditions.”<sup>145</sup> Again these brochures contain photos,<sup>146</sup> seen in Figure III-F-10 below, that show smooth drum compactors operating at grade without “sliding downhill.”

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<sup>145</sup> See Consumers Rebuttal e-workpaper “CAT\_CS54.pdf” page 6 highlighted in yellow, and “CAT\_CS533E.pdf” page 7 highlighted in yellow.

<sup>146</sup> *Id.*

Furthermore, in its description of its soil compactors Dynapac states: “Both the smooth & padfoot drum with drum drive offer excellent gradeability even on steep slopes. The infinitely variable hydrostatic propulsion system provides efficient power transmission, to both drum and wheels. Vertical oscillation on the center hitch provides excellent stability over uneven terrain.”<sup>147</sup>

These are but a few real-world examples<sup>148</sup> that demonstrate how smoothly drum rollers operate on uneven terrain. CSXT’s claims to the contrary are baseless.

In fact in *AEP Texas*, the Board agreed that AEP Texas’ 50/50 split of smooth drum rollers and sheepsfoot rollers was appropriate as “BNSF has not shown that AEP Texas’ mix of equipment would not be capable of compacting the soil. Therefore, we use AEP Texas’ cost figures for common excavation.”<sup>149</sup>

CSXT provided no evidence to show that Consumers 50/50 split is not capable of compacting the soil along the CERR. Therefore, Consumers continues to utilize the 50/50 split from Opening on Rebuttal.

In addition to the changes to the compaction ratio, CSXT argues on Reply that loose rock excavation unit costs in R.S. Means should be subject to a

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<sup>147</sup> See Consumers Rebuttal e-workpaper “Dynapac\_CA134\_CA144.pdf,” page 2.

<sup>148</sup> See Consumers Rebuttal e-workpaper “Additional Soil Compactor Quotations.docx”, for additional examples and specifications from other manufacturers of smooth drum rollers

<sup>149</sup> See Consumers Rebuttal e-workpaper “AEP Texas 9\_10\_07 36778.pdf” decision page 81, pdf page 88.

swell factor.<sup>150</sup> Specifically CSXT claims that “R.S. Means shows that its excavation unit costs are in BCY [bank cubic yards] and that the cost per unit for a 22 CY hauler are reported as LCY [loose cubic yards]. The density difference for two types of materials is 27% for loose rock quantities (using a 1.27 swell factor).”<sup>151</sup> CSXT tries a new spin on the same argument that failed in both *Sunbelt* and *DuPont*.<sup>152</sup> In *DuPont* and *Sunbelt* the carrier, NS, argued that the ICC Engineering Report quantities were in BCY, while the hauling unit cost was in LCY.<sup>153</sup> In the *Sunbelt* decision that rejected the NS proposed swell factor the Board stated that:

“NS does not cite any support for its claim that the Engineering Reports record earthwork quantities in bank cubic yards, and the fact is not self-evident. “Bank” means in place, undisturbed, natural ground, and the Engineering Reports address earthwork in its post-construction state.”<sup>154</sup>

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<sup>150</sup> See CSXT Reply at III-F-49.

<sup>151</sup> *Id.* At III-F-55.

<sup>152</sup> See Consumers Rebuttal e-workpaper “42130 SunBelt v NS STB Maximum Rate Decision.pdf” at page 126, STB decision page 116, which stat that the STB will “reject its [NS’s] additional costs stemming from hauler distance and from a shrinkage and swell factor.” See also Consumers Opening e-workpaper “42125 DuPont v. NS 2014.03.24 ID\_43717 CORRECTIONS TO DECISION.pdf” at page 185, which states that “[t]he Board will reject NS’s adjustment for swell because we agree with DuPont’s assessment that Means’ earthwork costs already account for the costs of swell.”

<sup>153</sup> *Id.*

<sup>154</sup> See Consumers Rebuttal e-workpaper “42125 DuPont v. NS 2014.03.24 ID\_43717 CORRECTIONS TO DECISION.pdf” at page 184.

On Reply, CSXT mischaracterizes the Board’s decision by only focusing on the final portion of the Board’s assertion in *Sunbelt* that “ICC Engineering Report quantities ‘address earthwork in its post-construction state,’ i.e., its final or compacted/embanked state (ECY).”<sup>155</sup> CSXT then attempts to make the same argument it has in *DuPont* and *Sunbelt* by replacing its use of BCY in those cases with ECY in this case. However, The Board made it very clear in the rest of the *Sunbelt* and *DuPont* decisions that CSXT did not focus on that RS Means fully accounts for the swell of soil. As the Board cited in the *Sunbelt* decision “NS’s adjustments are unnecessary because Means costs are based on the specific type of earthwork, thereby accounting for shrinkage and swell associated with that use.”<sup>156</sup> The Board re-iterated this same sentiment in the *DuPont* decision that “[t]he Board agrees that Means reflects work being done and it is a standard industry practice to bid on earthwork in its compacted state, which would already account for swell.”<sup>157</sup> The Board has made it clear, that regardless of the compacted state, “Bank” or “Embanked”, no adjustment to the R.S. Means units costs are necessary to account for swell.

This point is further emphasized in the very same workpaper CSXT uses to make its argument that the swell factor needs to be accounted for in Means

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<sup>155</sup> See CSXT Reply at III-F-54, footnotes omitted.

<sup>156</sup> See Consumers Rebuttal e-workpaper “42130 SunBelt v NS STB Maximum Rate Decision.pdf” at page 126, STB decision page 116.

<sup>157</sup> See Consumers Rebuttal e-workpaper “42125 DuPont v. NS 2014.03.24 ID\_43717 CORRECTIONS TO DECISION.pdf” at page 185.

unit costs. Specifically, the Ringwald's Means Heavy Construction Handbook states, "BCY is the unit of preference in discussing earthwork of any kind. On heavy construction jobs, the cubic yard figure for which a contractor is paid a unit price is almost always in BCY. Nothing extra is paid for the loose or compacted states occupied by the same BCY throughout the course of the job."<sup>158</sup> CSXT's workpapers clearly demonstrate that "nothing extra is paid" for the various states of compaction that occur during an earthwork project. Therefore, as the Board has previously ruled and as demonstrated in CSXT's workpapers, no adjustment to the RS Means units costs are necessary to account for swell.

For the reasons discussed above, Consumers continues to use its Opening R.S. Means loose rock excavation unit costs in Rebuttal.

(c) **Solid Rock Excavation**

On Reply, CSXT accepts Consumers unit cost for solid rock excavation with two modifications. First CSXT modifies the RS Means average compaction calculations and second CSXT added a swell factor calculation. As explained in Section III-F-2.c.v.(b) above, Consumers rejects both of these modifications on Rebuttal, and continues to use its Opening solid rock unit costs.

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<sup>158</sup> See CSXT Reply e-workpaper "Swell and Shrinkage - Ringwald, Means heavy Construction Handbook.pdf" at page 2.

(d) **Embankment/Borrow**

On Opening, Consumers used the MDOT database to develop a borrow unit cost indexed to 1Q15 of \$10.35 per CY.<sup>159</sup> CSXT claims that “Consumers’ four MDOT projects account for a scant 6,360 cubic yards of borrow compared to over a million cubic yards of borrow on the CERR. As such, Consumers’ MDOT sample is not representative and therefore not a reliable source for CERR borrow costs.”<sup>160</sup> Based on economics of scale CSXT’s argument is moot.

By definition, borrow is material that is brought in from outside a project, meaning soil material that is purchased from elsewhere and, as noted in the R.S. Means Handbook CSXT cited, when purchased in large quantities there are often cost savings. In 2013, the State of Louisiana conducted wetlands conservation and restoration project where “[a]pproximately 9,300 feet of beach and dune will be rebuilt using nearly 2 million cubic yards of dredged sand, and 150 acres of marsh habitat will be rebuilt using nearly 1 million cubic yards of dredged material.”<sup>161</sup> The reports final quantities and pay amounts table show that 2.7 million cubic yards of beach and dune fill were brought in at a calculated unit cost of \$7.85 per cubic yard, and 1.4 million cubic yards of marsh fill were

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<sup>159</sup> See Consumers Opening at III-F-35.

<sup>160</sup> See CSXT Reply at III-F-49.

<sup>161</sup> See Consumers Rebuttal e-workpaper “West Belle Pass Louisiana Restoration Project Report\_5015680-1.pdf” page 1, highlighted in yellow.



brought in at a calculated unit cost of \$3.25 per cubic yard.<sup>162</sup> This demonstration shows that Consumers' Opening unit cost of \$10.35 per cubic yard was a conservative estimate of borrow costs to the CERR, which would require considerably more borrow than found in the MDOT projects Consumer relied upon.

It is unrealistic for CSXT to expect Consumers to find projects the size of CERR for comparison purposes in MDOT or elsewhere. Projects requiring more than 1,000,000 cubic yards of borrow are not everyday occurrences. In fact, when looking through CSXT's AFE documents provided in discovery, Consumers was only able to find five projects that required borrow.<sup>163</sup> Of the five projects, Consumers was then able to find two invoices for which CSXT was billed.<sup>164</sup> Of these seven instances of borrow found by Consumers while going through discovery provided by CSXT, none of them showed a borrow quantity greater than 40,000 cubic yards.

In addition, CSXT claimed that Michigan represents a small portion of the total cubic yards of borrow needed, since the majority of the CERR borrow quantities are found in Illinois and Indiana according to the ICC engineering

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<sup>162</sup> See Consumers Rebuttal e-workpaper "West Belle Pass Louisiana Restoration Project Report\_5015680-1.pdf" page 6, highlighted in yellow and red box for calculations.

<sup>163</sup> See Consumers Opening e-workpaper "CSXT Invoice Unit Cost Summary.xlsx" tab "CSXT AFE Project Data" rows 18, 27, 31, 34, and 36.

<sup>164</sup> See Consumers Opening e-workpaper "CSXT Invoice Unit Cost Summary.xlsx" tab CSXT AFE Project Data" rows 31 and 34.

reports. Thus, the MDOT borrow unit cost should not be used.<sup>165</sup> Again, CSXT's claim has no merit. Similar to the common excavation unit cost discussed above in section III-F-2.a.iv.(d), Consumers applied the Means Handbook location factor to the MDOT borrow unit cost. This leads to an increase in the MDOT borrow unit cost based on location and ensures that the CERR borrow unit cost is taking into account the higher construction costs in Illinois and Indiana.<sup>166</sup>

(e) **Land for Waste Excavation**

On Opening, Consumers noted that since the MDOT specifications state that earth excavation is “the property of the Contractor”, Consumers would not need additional land for waste quantities.<sup>167</sup> However, on Reply, CSXT claims that this assertion is “irreconcilable with the narrow right of way that Consumers posits for its SARR.”<sup>168</sup>

As Consumers noted on Opening, the contractor would own the waste material and not the CERR. As such, the contractor has free reign to use the wasted material in other projects or to sell this material for profit. The size of the right of way would have no impact on the need or lack thereof for the CERR to purchase land for waste quantities.

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<sup>165</sup> See CSXT Reply at III-F-50.

<sup>166</sup> See Consumers Opening e-workpaper “CERR Grading\_Opening.xlsm” tab “Unit Costs” cell BF75.

<sup>167</sup> See Consumers Opening at III-F-35.

<sup>168</sup> See CSXT Reply at III-F-51-52.

In addition, CSXT land for waste quantities unit costs should be rejected if the Board decides to calculate costs for land for waste quantities. In its calculation of the unit cost for land for waste quantities, CSXT attempts to artificially inflate the costs by using an average cost per acre of land along the CERR instead of an average cost per acre of rural land, per Board precedent in *DuPont* and *Sunbelt*.<sup>169</sup> Using CSXT Reply files, this difference in unit cost is {            } per acre for the average of all land along the CERR, compared to {            } per acre for the average of rural land along the CERR.<sup>170</sup> Should the Board include land for waste quantities, which Consumers continues to argue against, it should utilize the Rebuttal revised average rural land calculation of {            } per acre, which has been included in the Rebuttal Grading.<sup>171</sup>

**(f) Total Earthwork Cost**

The Rebuttal total earthwork cost associated with constructing the CERR is \$36.8 million.<sup>172</sup>

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<sup>169</sup> See *DuPont* at 170, “Because we find that DuPont’s approach to placing waste excavation in rural land sites is feasible, we will recalculate NS’s land costs based upon its rural land unit costs and not its average unit land costs.” And *Sunbelt* at “With waste volume occurring primarily in rural areas, the cost for waste areas would be more correctly based on rural land costs than on the urban acreage NS would have us include in the average land cost.”

<sup>170</sup> See Consumers Rebuttal e-workpaper “CERR Land Valuation\_Reply\_with Rural vs Urban per acre calculations.xlsx,” tab “Summary,” cell P24 and cell P22.

<sup>171</sup> See Consumers Rebuttal e-workpaper “CERR Grading\_Rebuttal.xlsm,” tab “Unit Costs,” cell M72.

<sup>172</sup> See Consumers Rebuttal e-workpaper “CERR Grading\_Rebuttal.xlsm,” tab “Rebuttal Summary,” cell K27.

d. **Drainage**

i. **Lateral Drainage**

CSXT accepts Consumers' lateral drainage costs and quantities.<sup>173</sup>

ii. **Yard Drainage**

Yard drainage costs at Barr Yard are discussed in site development costs in part III-F-7.

iii. **Culverts**

Consumers on Opening presented culvert inventories based on information provided by CSXT in discovery.<sup>174</sup> Consumers substituted two culverts for one bridge.<sup>175</sup> The total cost for culverts on Opening was \$1.15 million.<sup>176</sup> CSXT on Reply more than doubles the costs for the culverts, at \$2.73 million, disagreeing with the unit and quantity costs.<sup>177</sup> CSXT rejects the conversion of the one bridge to culverts and corrected the bedding costs from Means.<sup>178</sup> CSXT also takes issue with Consumers' proposed method of construction, adding costs for excavation, bedding material, and trench backfill.<sup>179</sup> Consumers accepts the revised Means cost for bedding, which increases the total

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<sup>173</sup> See CSXT Reply at III-F-56.

<sup>174</sup> See Consumers Opening e-workpaper "CULVERT COST WORKSHEETS.xls," tab "CULVERT COST SUMMARY."

<sup>175</sup> Consumers Opening at III-F-39.

<sup>176</sup> See Consumers Opening e-workpaper "CULVERT COST WORKSHEETS.xls," tab "CULVERT COST SUMMARY," cell AF196.

<sup>177</sup> See CSXT Reply e-workpaper "III-F TOTAL\_Reply.xlsx," cell F6.

<sup>178</sup> CSXT Reply at III-F-57-62.

<sup>179</sup> CSXT Reply at III-F-57-62.

culvert costs to \$1.18 million, but rejects all of the other modifications and additional costs proposed by CSXT.

**(a) Culvert Unit Costs**

Consumers' engineers reject CSXT's methods and additional costs for trenching excavation. CSXT's trenching excavation costs are based on the embankment being constructed first, before the area is trenched and the culverts installed. Consumers' engineers propose to instead proceed using the more cost-conscious, logical, and real-world method that requires first excavating the bedding area, then installing culverts, and lastly constructing the embankment. This approach is consistent with STB precedent.<sup>180</sup> Therefore, Consumers rejects the proposed construction methods and the additional costs for trenching excavation.

**(b) Culvert Installation Plans**

CSXT claims that Consumers underestimated the amount of bedding material required for construction of the culverts. This assertion is incorrect. Consumers' engineers provided for bedding materials and costs that are consistent with CSXT's proposed methods.<sup>181</sup> Notably, Consumers' engineers, just like CSXT's engineers, call for the crushed rock to surround the CMP to the

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<sup>180</sup> See generally *SunBelt* at 121-122.

<sup>181</sup> The engineering drawings for the CMP pipe and the box culverts both show the location of the bedding and backfill material, and include the formulas used by Consumers' engineers for excavation and bedding quantities. See Consumers Opening e-workpapers "RCP Bedding Detail.pdf" (box culverts); "CMP bedding detail.pdf" (CMP culverts).

springline.<sup>182</sup> Therefore, Consumers rejects any additional costs for bedding materials.

Consumers also rejects CSXT's additional trench backfill costs, because like the trenching excavation costs, these are unnecessary. As previously explained, it makes the most sense to install the CMP before constructing the embankment. The detail for the CMP pipe also specifically states that the backfill from the springline of the CMP to the surface will be covered under earthwork costs.<sup>183</sup> Therefore, Consumers rejects CSXT's trench backfill costs.

**(c) Culvert Quantities**

CSXT alleges that Consumers engineers improperly converted a bridge to a culvert,<sup>184</sup> when in fact CSXT previously listed this "bridge" as two 10ft x 10ft box culverts.<sup>185</sup> Therefore, Consumers engineers reject this proposed change to the bridge list.

CSXT also alleges there is a problem of using CMP pipe for all culverts when in fact, as designed by Consumers' engineers, there is no problem. Consumers' engineers accept CSXT's cleansing velocity for the pipe of three (3) feet per second ("fps") and CSXT's friction coefficient of 0.024 for CMPs and 0.012 for all non-CMP culverts. However, CSXT uses the wrong formula for

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<sup>182</sup> See Consumers Opening e-workpaper "CMP bedding detail.pdf."

<sup>183</sup> See Consumers Opening e-workpaper "CMP bedding detail.pdf."

<sup>184</sup> See Consumers Opening "Culvert Cost Worksheets.xlsx," tab "Culvert Cost Summary," row 85 (MP CG 85.90).

<sup>185</sup> See Consumers Rebuttal e-workpaper "CSX Track Chart MP CG85 to CG 90.pdf."

calculating flows for a CMP to obfuscate the issue, and exaggerates the effects of water backing up on the embankment suggesting it will be a “complete washout.”<sup>186</sup> In fact, Consumers’ engineers determined that using the CMP pipe would at the most add 1 foot of water backing up onto the embankment.<sup>187</sup>

CSXT engineers in correcting Consumers’ culvert quantities made assumptions because there was no data in some instances to determine culvert length, number of barrels, or delivery area. But as admitted by CSXT, this is because the list CSXT provided for culverts did not include this information.<sup>188</sup> If this data does not exist and was not produced as part of discovery, CSXT engineers may not now make self-serving guesstimates and present them as well-reasoned corrections.

**(d) Total Culvert Costs**

Consumers on Opening had a total cost for culverts of \$1.15 million. CSXT is proposing to increase the total culvert costs that Consumers had on Opening from \$1.15 million<sup>189</sup> to \$2.73 million.<sup>190</sup> On Rebuttal, Consumers has revised upwards the costs to \$1.18 million, but does not adopt CSXT’s costly construction methods or change the number and size of culverts.

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<sup>186</sup> CSXT Reply at III-F-59.

<sup>187</sup> See Consumers Rebuttal e-workpaper “III-F Culvert Narrative.pdf.”

<sup>188</sup> See CSXT Reply at III-F-62 (“Consumers has not included quantities for culverts from the CSXT inventory list that did not have a given length, size, number of barrels, or delivery area.”).

<sup>189</sup> See Consumers Opening e-workpaper “CULVERT COST WORKSHEETS.xls,” tab “CULVERT COST SUMMARY,” cell AF196.

<sup>190</sup> See CSXT Reply e-workpaper “III-F TOTAL\_Reply.xlsx,” cell F6.

e. **Other**

i. **Side Slopes**

CSXT accepted Consumers' average side-slope ratio of 1.5:1.<sup>191</sup>

ii. **Ditches**

CSXT accepted Consumers' specifications of side ditches having trapezoidal sections with cuts two feet wide and two feet deep for all locations.<sup>192</sup>

iii. **Retaining Walls**

CSXT accepted Consumers' unit costs for retaining walls, but makes three changes to Consumers' quantities.<sup>193</sup> First, in Opening, Consumers stated in its narrative its intention to use a conversion of 1.54 of Masonry quantities to convert ICC engineering report masonry quantities to gabion baskets.<sup>194</sup> However, as pointed out by CSXT on Reply, Consumers inadvertently used the non-converted quantities in the calculation of total costs. Consumers corrected this problem in Rebuttal.<sup>195</sup>

Second, CSXT noted that retaining walls along the BRC line replicated by the CERR between 76<sup>th</sup> Street and 79<sup>th</sup> Street are visible on google earth. However, CSXT falsely stated that it was required to use its own retaining wall quantity calculations in lieu of ICC Engineering Report information.

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<sup>191</sup> See CSXT Reply at III-F-62.

<sup>192</sup> *Id.* at III-F-63.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> See Consumers Rebuttal e-workpaper "CERR Grading\_Rebuttal.xlsm," tab "total Cost Summary," cell A19.



According to the 1913 Chicago & Western Indiana Railroad Annual Report “five main tracks were elevated between 73<sup>rd</sup> and 77<sup>th</sup> Streets, and retaining walls constructed on the west side of the right-of-way between 72<sup>nd</sup> and 74<sup>th</sup> Streets and between 76<sup>th</sup> and 79<sup>th</sup> Streets.”<sup>196</sup> The ICC Engineering Reports submitted by Consumers in Opening for valuation Segment CWI-3-IL have a date of inventory of June 30, 1918, which confirms the retaining wall quantities are in fact included in the ICC Engineering Reports.<sup>197</sup>

In Opening, Consumers did not include these quantities because they fall under the subheading “Clearing Yard” in the ICC Engineering Report, which the CERR was not replicating. However, in Rebuttal, Consumers agrees that these particular retaining walls are on the main line which the CERR is replicating. Therefore, Consumers added the ICC Engineering Report quantities for the retaining walls and included the subsequent additional costs for the additional retaining walls in the same manner as other ICC Engineering Report retaining wall quantities produced in Opening.<sup>198</sup>

Finally, in Reply, CSXT added retaining walls for the Clark Road flyover.<sup>199</sup> As described in Section III-F-5.d, Consumers rejected CSXT’s added

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<sup>196</sup> See Consumers Rebuttal e-workpaper “CWI\_1913 Annual Report.pdf” at page 8.

<sup>197</sup> See Consumers Opening e-workpaper “ICC Engineering Reports\_CERR\_opening.pdf” at PDF page 42.

<sup>198</sup> See Consumers Rebuttal e-workpaper “CERR Grading\_Rebuttal.xlsm,” tab “Eng Report Grading Inputs,” excel row 8 through 13.

<sup>199</sup> See CSXT Reply at III-F-64.

flyover and therefore will not be including the additional quantities for these retaining walls.

**iv. Rip Rap**

CSXT accepted Consumers unit costs for rip-rap, as well as quantities for rip-rap for non-culvert rip-rap.<sup>200</sup> However, CSXT increases the total amount of rip rap for the construction of culverts because it proposes to increase the total number and size of the culverts.<sup>201</sup> Consumers rejects this increase in rip rap quantities because Consumers does not agree that the number and size of the culverts should be revised upwards.<sup>202</sup>

**v. Relocating and Protecting Utilities**

CSXT accepted Consumers' unit costs for relocating and protecting utilities but adds additional costs for relocating two high power electric lines at Cottage Grove Avenue.<sup>203</sup> As described in Section III-F-5.2.d, Consumers is rejecting CSXT's added overpass over Cottage Grove Avenue and therefore has not included these additional costs in Rebuttal.

However, should the Board accept CSXT's relocation of the high power electric lines at Cottage Grove Avenue, the Board should restate the costs calculated by CSXT in its Reply evidence. By CSXT's own admission the unit costs provided are "typical cost per mile for constructing **new** high transmission

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<sup>200</sup> *Id.* at III-F-65.

<sup>201</sup> *Id.*

<sup>202</sup> See discussion *infra* in Part III-F.2.d.ii.

<sup>203</sup> *Id.* at III-F-65.

overhead electric lines,”<sup>204</sup> while the CERR would simply need to elevate the existing towers without replacing the lines. In addition the cost to replace the 0.8 miles of high power transmission lines, CSXT also, without any explanation, added the costs to replace 120 utility poles in 0.8 miles.<sup>205</sup> Not only has CSXT provided no explanation why 120 utility poles need to be replaced, CSXT has also not cited how their unit cost of \$820 per pole<sup>206</sup> was developed.

In the event the Board accepts the Cottage Grove Utility relocation, it should only accept costs for raising the existing line. For various reasons, raising existing power poles has become a more common practice and the method used has been streamlined to allow for raising an existing structure while leaving the line in service.<sup>207</sup> Therefore, in Rebuttal, Consumers conservatively calculated the cost to fully rebuild the 4 towers being raised using R.S. Means unit costs from the ground up at a total cost of \$70,564,<sup>208</sup> should the Board deem this cost necessary.

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<sup>204</sup> *Id.* with emphasis added.

<sup>205</sup> See CSXT Reply e-workpaper “CERR Grading\_Reply.xlsm,” tab “Cottage Utility Reloc,” cell F4.

<sup>206</sup> See CSXT Reply e-workpaper “CERR Grading\_Reply.xlsm,” tab “Cottage Utility Reloc,” cell C4.

<sup>207</sup> See Consumers Rebuttal e-workpaper “Articles on Increasing the Height of Transmission Towers Carrying Energized Lines.pdf”

<sup>208</sup> See Consumers Rebuttal e-workpaper “CERR Grading\_Rebuttal.xlsm,” tab “Cottage Utility Reloc,” cell G19.

**vi. Seeding/Topsoil Placement**

CSXT accepted Consumers' embankment protection quantities and seeding costs.<sup>209</sup>

**vii. Fine Grading**

CSXT accepted Consumers' fine grading unit costs, but in Reply added fine grading quantities for yard track and second main track.<sup>210</sup> In Rebuttal, Consumers accepts CSXT's additional fine grading quantities, but corrects CSXT's additional quantities for second main track, as CSXT's calculation for valuation segment CWI-3-IL did not account for the CERR's 25% ownership and instead assumed 100% ownership.<sup>211</sup>

**viii. Subgrade Preparation**

CSXT accepted Consumers' exclusion of additional subgrade preparation costs.<sup>212</sup>

**ix. Surfacing for Detour Roads**

CSXT accepted Consumers' costs for surfacing detour roads.<sup>213</sup>

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<sup>209</sup> See CSXT Reply at III-F-66.

<sup>210</sup> *Id.* at III-F-53.

<sup>211</sup> See Consumers Rebuttal e-workpaper "CERR Grading\_Rebuttal.xlsm," tab "Road Grading," cell CW18.

<sup>212</sup> See CSXT Reply at III-F-56.

<sup>213</sup> *Id.* at III-F-66.

x. **Construction Site Access Roads**

CSXT did not address this section in its Reply narrative, nor did it add costs in Reply. Therefore, CSXT implicitly accepted that no costs are needed for construction site access roads.

xi. **Environmental Compliance**

CSXT accepted Consumers' costs for environmental compliance.<sup>214</sup>

3. **Track Construction**

a. **Geotextile Fabric**

On Reply, CSXT agrees with Consumers' geotextile specifications and unit costs.<sup>215</sup> However, CSXT adjusts the geotextile quantities for the additional turnouts and crossing diamonds it proposes.<sup>216</sup> On Rebuttal, Consumers rejects the CSXT revised configuration and therefore did not include additional geotextiles, except for the minor inclusion of the Buffington Connection.<sup>217</sup>

b. **Ballast**

Consumers on Opening provided quantities and costs for ballast, and used transportation costs consistent with {

}<sup>218</sup> CSXT on Reply accepts the methods

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<sup>214</sup> *Id.*

<sup>215</sup> CSXT Reply at III-F-67; Consumers Opening at III-F-47-49.

<sup>216</sup> CSXT Reply at III-F-67.

<sup>217</sup> Consumers Rebuttal e-workpaper "2015 OTM Worksheet\_Rebuttal.xlsx," tab "Total Cost Summary," row 263.

<sup>218</sup> Consumers Opening at III-F-49-50; Consumers Opening e-workpaper "UP Rail Transportation Costs.pdf."

Consumers used for calculating the ballast quantities and the ballast costs, but takes issue with Consumers' on-line and off-line transportation rates. Consumers on Rebuttal maintains its position on Opening with respect to the transportation rates, but does adjust upwards its ballast quantities for the addition of the Buffington connection and to correct a spreadsheet error.<sup>219</sup>

**i. Ballast Quantities**

Consumers accepts CSXT's revisions to the ballast quantities for the Grand Rapids and Fremont subdivisions that were a result of a spreadsheet error.<sup>220</sup> Consumers also increases the total ballast quantities to accommodate the addition of the Buffington Connection.<sup>221</sup>

**ii. Ballast Pricing**

Consumers on Opening sourced the ballast from quarries in Ironton, MO and from Findlay, OH.<sup>222</sup> For transportation from the quarries to the railhead Consumers used {

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<sup>219</sup> Consumers Rebuttal e-workpaper "2015 Ballast & subballast Worksheet\_Rebuttal .xlsx," tab "Grand Rapids – PORTER TO WAVERLY," cells F4 and F5, tab "Fremont – WAVERLY TO WEST OLIVE," cells F4 and F5, and tab "TOTAL COST SUMMARY," rows 7 and 8, columns G and H; CSXT Reply at III-F-68.

<sup>220</sup> *Id.*

<sup>221</sup> Consumers Rebuttal e-workpaper "2015 Ballast & subballast Worksheet\_Rebuttal .xlsx," tabs "Total Cost Summary" & "Barr-VERMONT TO PINE," cell B14.

<sup>222</sup> Consumers Opening at III-F-49 & III-F-51.

}<sup>223</sup> and the \$0.035 per ton-mile that has previously been accepted by the Board. Consumers also provided a quote from Ohio Track that included the transportation of the ballast from the railhead to the point of installation.<sup>224</sup> CSXT on Reply accepts Consumers' quarry locations and ballast price, but rejects Consumers' transportation rates.

(a) **Material Transportation From Supplier to Railhead**

CSXT disputes the interline courtesy rate Consumers uses to transport ballast off-line on the UP track. Consumers is entitled to rely on a known transportation rate provided by CSXT in discovery. CSXT claims that the use of this interline rate would be improper because the CERR does not already exist and because it is not a member { }<sup>225</sup> There is no basis for CSXT's objection.<sup>226</sup>

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<sup>223</sup> Consumers Opening at III-F-49-50; Consumers Opening e-workpaper "UP Rail Transportation Costs.pdf."

<sup>224</sup> See Consumers Opening e-workpaper "Ohio Track Cost Estimate.pdf."

<sup>225</sup> See CSXT Reply at III-F-70-71.

<sup>226</sup> CSXT also argues that "Consumers has provided no evidence that the predecessor CSXT railroads benefitted from such a courtesy," but in several instances, which is why the CERR includes diamond costs, CSXT or its predecessors was not the most senior railroad. See CSXT Reply at III-F-70.

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The AFE relied on by Consumers for the off-line rate is also better evidence of a ton-mile rate because it is an example of a rate that was actually charged and paid.<sup>227</sup> In comparison, the quote provided as evidence by CSXT was a ballpark guess provided by an aggregate supplier for a “confidential project order of magnitude study” and was for the transport of 130-140,000 tons of ballast.<sup>228</sup> Therefore, not only was the made-for-litigation bid generated in a non-competitive situation and is not a rate that was actually paid or charged, but it involved no economy of scale. The CERR requires 1.9 million tons of ballast, and it is likely that for an order that large, the rate would be significantly lower.

Lastly, the price used by CSXT is on the high-end of the range provided by aggregate supplier’s ballpark estimate.<sup>229</sup> Instead of { } it should be { } because the quote provided an upper range of { }<sup>230</sup>

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<sup>227</sup> Consumers Opening e-workpaper “UP Rail Transportation Costs.pdf.”

<sup>228</sup> See CSXT Reply e-workpaper “Vulcan Ballast Transportation Quote.pdf.”

<sup>229</sup> See CSXT Reply e-workpaper “Vulcan Ballast Transportation Quote.pdf.”

<sup>230</sup> See CSXT Reply e-workpaper “Vulcan Ballast Transportation Quote.pdf.”



CSXT also disputes the \$0.035 ton-mile rate, stating that because this was rejected recently in *DuPont*, that it should be rejected here, and that the { } used by Consumers as evidence supporting the \$0.035 rate should be discounted. What CSXT fails to mention is that while the Board disallowed the \$0.035 rate in *DuPont* and *Sunbelt*, the carrier was the only party to submit new evidence of a rate that was not simply indexed from a previous STB rate case.<sup>231</sup> CSXT also fails to mention that in *Sunbelt*, the Board accepted NS's rate stating that "a recent cost example is superior to a historically updated cost for this purpose."<sup>232</sup> Here, the AFE that CSXT is disputing is from 2015 and is the most recent cost evidence. Additionally, the fact that this { } was provided by CSXT as part of discovery provides sufficient evidence that the \$0.035 ton-mile rate is not outdated and is a conservative estimate.

For the above reasons, Consumers continues to use its Opening transportation rates.

(b) **Ballast Material Distribution Along the CERR Right-of-Way**

CSXT tries to argue that Consumers did not include on-line transportation costs for ballast because the quote provided does not specify where

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<sup>231</sup> See *DuPont* at 193; *SunBelt* at 135.

<sup>232</sup> *SunBelt* at 135.

<sup>233</sup> See Consumers Opening e-workpaper "UP Rail Transportation Cost.pdf" at 2.

the delivery points are located “or how far apart they are spaced.”<sup>234</sup> However, it is of no consequence that the quote does not spell out the distances or include a map as to where these are located. The fact is that the quote states as item no. 4 that “[m]aterial transportation from delivery points is included in the quote.”<sup>235</sup> The quote specifies “points,” not “point,” therefore the quote clearly contemplates multiple destinations. The quote is also for installation of other rail materials, so this is not from a supplier that is unaware that this is for the construction of track. Further, Consumers is providing on Rebuttal a copy of the phone log that was made by Consumers’ engineers to Ohio Track requesting the bid.<sup>236</sup> From the phone log, it is clear that Ohio Track understood that there installation costs would include transportation of the materials from the railhead to the point of installation.<sup>237</sup>

**iii. Subballast**

**(a) Subballast Quantities**

Consumers and CSXT agree on the method for estimating the subballast quantities.<sup>238</sup> CSXT on Reply corrects a spreadsheet error and adjusts the quantities upwards to account for the changes CSXT proposes to the CERR

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<sup>234</sup> CSXT III-F-74.

<sup>235</sup> See Consumers Opening e-workpaper “Ohio Track Cost Estimate.pdf.”

<sup>236</sup> See Consumers Rebuttal e-workpaper “Ohio Track Phone Log.pdf.”

<sup>237</sup> See *id.*

<sup>238</sup> CSXT Reply at III-F-75; Consumers Opening at

configuration.<sup>239</sup> On Rebuttal, Consumers accepts CSXT’s correction for the spreadsheet error, but only increases the subballast quantities to account for the addition of the Buffington Connection.<sup>240</sup>

**(b) Subballast Material Costs**

CSXT accepts Consumers’ material and transportation costs for subballast.<sup>241</sup>

**(c) Subballast Material Placement Costs**

CSXT accepts Consumers’ costs for subballast placement.<sup>242</sup>

**iv. Ties**

On Opening, Consumers used an AFE provided by CSXT as part of discovery for tie unit costs and for total mileage.<sup>243</sup> Although Consumers suspected that the AFE included transportation costs, Consumers nevertheless added separate transportation costs in order to be conservative.<sup>244</sup> Consumers used the same transportation rate for ties that it used for ballast, with { } per ton-mile on the UP and 0.035 per ton-mile on NS.<sup>245</sup> On Reply, CSXT accepts

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<sup>239</sup> CSXT Reply at III-F-75.

<sup>240</sup> Consumers Rebuttal e-workpaper “2015 Ballast & subballast Worksheet\_Rebuttal .xlsx,” column B.

<sup>241</sup> CSXT Reply at III-F-76; Consumers Opening at III-F-52-53.

<sup>242</sup> CSXT Reply at III-F-76.

<sup>243</sup> Consumers Opening at III-F-54; Consumers Opening e-workpaper “AFE-IL, Utica-BIF 92.pdf.”

<sup>244</sup> Consumers Opening at III-F-54-55.

<sup>245</sup> Consumers Opening e-workpaper “2015 OTM Worksheet .xlsx,” tab “TIE COST,” rows 23-24 & 35-36.

Consumers' unit cost and spacing for the ties, but disputes the total mileage and Consumers' transportation rate for ties.<sup>246</sup> On Rebuttal, Consumers adjusts the costs to correct for spreadsheet errors identified by CSXT, but maintains its position on Opening with respect to total mileage and transportation costs.

CSXT disputes Consumer's assumption of a \$0.035 per ton-mile rate for off-line transportation but this price is not "outdate," as suggested by CSXT and as discussed *supra*. See CSXT Reply at III-F-2. The \$0.035 is supported by the evidence of the { } which was submitted for the record.<sup>247</sup> Further, the AFEs produced by CSXT for ties did not allow Consumers to generate a transportation rate. It is improper for CSXT to rely on evidence in support of a rate that was not available to Consumers on Opening.

Rather than CSXT supplying a quote that aligns with the AFE such that it uses the same supplier, CSXT instead introduces evidence based on a quote obtained from a supplier that is 590 miles from Chicago. The quote specifically states that "[t]he \$6000 is a slightly high estimate to cover fuel surcharges and any miscellaneous charges such as Switch charges."<sup>248</sup> Clearly, this is not the best evidence of record. Further, it is an example of an instance in which CSXT provided information as part of discovery that specifically did not include transportation costs, Consumers relied on this evidence and tried to make

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<sup>246</sup> CSXT Reply at III-F-76-77.

<sup>247</sup> See Consumers Opening e-workpaper "UP Rail Transportation Cost.pdf" at 2.

<sup>248</sup> CSXT Reply e-workpaper "Mccord Tie Transportation Quote.pdf"

reasonable assumptions, and then CSXT on Reply introduces evidence with costs that are unreasonable.

**c. Rail**

Consumers on Opening used new 115# Continuous Welded Rail (“CWR”) for the construction of the CERR from Porter to West Olive, and new 136# CWR for the higher mainline tracks from Ogden Jct. to Curtis and the BRC track.<sup>249</sup> Consumers used information provided by CSXT in discovery for the rail material prices and approximate distances that the 1,400 foot long CWR segments would need to be shipped.<sup>250</sup> Consumers determined that from the welding facility in { } that a rail train would be required. CSXT accepts the rail material prices and the source of the rail, but rejects Consumers use of new 136# CWR on “high density” curves, and rejects Consumers transportation costs.

**i. Rail Quantities**

Consumers rejects the use of premium rail on “high density” curves. This railroad will operate at slower speeds, in the 35 mph range, and although it has tonnages ranging from 43.8 to 66 MGT on its line from UP/Ogden to Curtis, Indiana, the lower speeds and medium range tonnages do not require the use of premium rails in the curves as proposed by CSXT. The degree of curves and recommended tonnages to use premium rail as provided by CSXT from its

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<sup>249</sup> Consumers Opening at III-F-56.

<sup>250</sup> See Consumers Opening at III-F-56; Consumers Opening e-workpapers “Rail Worksheet-2011.xls” and “Rail Prices.xls.”

Engineering Standards are arbitrary and differ from standards used by other Class I railroads and AREMA has no standard for its use .

The determination as to whether to use premium rail in high density curves is one of economics. Each railroad looks at its expected maintenance costs versus the increase in capital costs to use premium rail and then makes a determination as to when to use a premium rail. In fact, when a study of the rail lines that the CERR is replicating was performed by Consumers, and data on the rail installed before 1980 was reviewed, the average lifespan for this “non-premium” rail was 24 years.<sup>251</sup> Notably, the track the CERR is replicating has actual “high-density,” and the track in all locations except one, lasted at least 20 years. In summary, Consumers rejects the additional material costs for premium rail because it is an economic determination that each railroad can make factoring in the average speed and yearly tonnage across the line.

**ii. Rail Material Pricing**

Consumers on Opening used information provided by CSXT in discovery to develop its rail material prices for regular 115# and 136# CWR. On Reply, CSXT accepts these prices for rail materials and uses the same AFEs for the price of premium 136# rail. On Rebuttal, Consumers accepts CSXT’s rail material costs for 136# rail, but rejects its use on the CERR.

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<sup>251</sup> See Consumers Rebuttal e-workpaper “CURVE DATA WORKSHEET \_ Rebuttal.xlsx,” tab “Non head Hard Rail.”

### iii. Off-Line Rail Transportation Costs

To be conservative, Consumers included transportation costs on Opening at a rate of \$0.035 per ton-mile from the welding facility in {  
}. Consumers also assumed that a rail train at a total cost of \$3,000 would be required for delivery of the CWR.<sup>252</sup>

On Reply, while agreeing to the source of the rail and the location of the welding facility, CSXT disputes all of the components of the transportation costs. Specifically, CSXT revises the mileage upwards, increases the transportation rate, and disputes the rail train rental fee. Consumers rejects each of these proposed modifications because the evidence Consumers submitted on Opening was based on information provided by CSXT in discovery, which Consumers reasonably may rely upon in its presentation.

On Opening, Consumers only included transportation costs because the information provided by CSXT was inconclusive. Further, the limited information provided by CSXT in discovery required that Consumers estimate the total mileage. The fact that the mileage difference that CSXT identifies on Reply is less than 100 miles militates against requiring a revision upwards. Moreover, CSXT has not definitively demonstrated that its mileage is correct.

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<sup>252</sup> These delivery costs by the rail train include both the transportation for the 1,000 rail miles and the cost for the rail work car. See e-workpapers “Rail Worksheet – 2015.xls” and “LB Foster Train Cost – Page 2.pdf.”

With respect to the transportation rate, Consumers used the \$0.035 per ton-mile rate. This rate is a 2015 rate and is based on the {  
} that Consumers' engineers were able to derive from an AFE that CSXT provided in discovery. Consumers therefore rejects CSXT's proposed rate of \$0.079 per ton-mile.

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254 Consumers Opening e-workpaper "LB Foster Train Cost - Page 2" at 2.

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<sup>257</sup> { }

<sup>258</sup> *See* Pettibone, Speed Swing,  
<http://www.gopettibone.com/products/speed-swing/> (last accessed May 19, 2016).

<sup>259</sup> {  
}

<sup>260</sup> {  
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<sup>261</sup> {

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iv. **Field Welds**

On Opening, Consumers provided a quote from Orgo-Thermit for field weld kits<sup>262</sup> and from Ohio Track for installation costs.<sup>263</sup> In its Reply filing, CSXT accepts the unit costs for field welds, but argues that the costs provided by Consumers do not include installation, and as such add costs for labor.<sup>264</sup>

Consumers' engineers reject the additional labor costs proposed by CSXT engineers for field welds. This is because, as explained in Consumers' Opening, "[t]he cost of labor for all field and comp welds is included in the bid provided by Ohio Track, Inc., which also provided a price for the installation of the main track and turnouts."<sup>265</sup> The Ohio Track, Inc. quote provides that it "is intended to provide a fully completed product" and the track construction costs are listed on a per mile basis.<sup>266</sup> Given that track is not transported in one-mile lengths, and with both parties listing field welds as required every 1,400 feet,<sup>267</sup> the general provision that the quote "is intended to provide a fully completed product" (*see* Consumers Rebuttal e-workpaper "Ohio Track Cost Estimate.pdf")

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<sup>262</sup> *See* Consumers Opening e-workpaper "Orgo-Thermit Inc Quote.pdf."

<sup>263</sup> *See* Consumers Opening e-workpaper "Ohio Track Cost Estimate.pdf."

<sup>264</sup> CSXT Reply at III-F-82.

<sup>265</sup> *See* Consumers Opening at III-F-58.

<sup>266</sup> *See* Consumers Opening e-workpaper "Ohio Track Cost Estimate.pdf."

<sup>267</sup> *See* Consumers Opening e-workpaper "Track Quantities-2015.xls," tab "Track Quantities," cell C100; CSXT Reply e-workpaper "Track Quantities-2015\_Reply.xls," tab "Track Quantities," cell C100.

would necessarily require that field welds be included in the total labor price for track construction.

Further, the field weld labor costs provided by CSXT are artificially high, seemingly to create the impression that Ohio Track Inc. could not possibly have included these costs. But for the field weld labor costs, CSXT submitted a quote from Bankhead Railway Services, Inc., which is located in Atlanta, GA to perform “[a]pproximately 750 136# welds” in the “Chicago IL” area. *See* CSXT Reply e-workpaper “Weld Labor Quote.pdf.” Having a separate welding service from 588 miles (714 highway miles) come out to perform the welds also results in a gold-plated price of \$675 per weld.<sup>268</sup> In comparison, as evidenced by CSXT’s own force account for work to be performed in Miami-Dade County, which lists the installation of field welds as part of “Track Labor,” the cost for performing eight (8) field welds, when there was no economy of scale, was \$1,560.66 when indexed to First Quarter 2015, or just \$195.08/field weld.<sup>269</sup> Consumers’ engineers maintain that Ohio Track Inc.’s quote included the labor costs for field welds, and that this is just another attempt by CSXT to find an error or omission and to drive up costs, even when the quote submitted by Consumers’ engineers

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<sup>268</sup> *See id.*

<sup>269</sup> *See* Consumers Rebuttal e-workpaper “Miami Cost for Installation of Field Weld.pdf” (4Q2006 field weld estimate for field of \$1,260, indexed to 1Q2015 = \$1,560.66; \$1,560.66 total field weld cost/8 field welds = \$195.08 per field weld).

clearly provides for all labor costs required on a per mile basis for track construction.<sup>270</sup>

**v. Insulated Joints**

CSXT and Consumers both discuss insulated joints in Part III-F-6, signals and communications.<sup>271</sup>

**d. Switches**

Consumers' engineers accept CSXT's substitution of five power switches for five hand switches in the vicinity of the Barr Yard.<sup>272</sup> CSXT's engineers did not apply a historical factor to their switch costs and Consumers' engineers have corrected this on Rebuttal.<sup>273</sup>

**e. Other**

**i. Rail Lubricators**

On Opening, Consumers provided a quote from LB Foster indexed to 2015.<sup>274</sup> On Reply, CSXT includes additional costs for grease, mats, and installation.<sup>275</sup> Consumers' engineers reject the costs for mats and for installing

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<sup>270</sup> See Consumers Opening e-workpaper "Ohio Track Quote.pdf."

<sup>271</sup> CSXT Reply at III-F-82; Consumers Opening at III-F-58.

<sup>272</sup> See "2015 OTM Worksheet Rebuttal.xlsx," tab "Total Cost Summary," cell C140.

<sup>273</sup> See "2015 OTM Worksheet Rebuttal.xlsx," tab "Total Cost Summary," cells E138 & E139.

<sup>274</sup> Consumers Opening at III-F-59-60; Consumers Opening e-workpapers "LB Foster Lubricator Quote.pdf" and "2015 OTM Worksheet.xls," tab "TOTAL COST SUMMARY" rows 130 to 132.

<sup>275</sup> CSXT Reply at III-F-84.

rail lubricators, but accept CSXT's shipping costs for grease and lubricators.<sup>276</sup>

Consumers also adopts CSXT's cost for lubricators.

Consumers rejects the costs for mats because mats would not have been required for the construction of the original CSXT track and they also are not an AREMA requirement. Additionally, the biodegradable greases that are now on the market make the CSXT proposed costs for mats completely unjustified, and this is the grease that Consumers uses on Rebuttal.<sup>277</sup> Consumers also rejects the costs for installing lubricators because the quote provided by Ohio Track Inc. specifically covers these installation costs.<sup>278</sup> The new costs for lubricators and grease is \$693,169 which is an increase of \$148,335 from Consumers' costs for lubricators on Opening.<sup>279</sup>

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<sup>276</sup> See CSXT Reply e-workpaper "CSXT\_Rail\_Lubricator\_LB\_Foster.pdf;" Consumers Rebuttal e-workpaper "2015 OTM Worksheet\_Rebuttal.xlsx," tab "TOTAL COST SUMMARY," cells M126:M137.

<sup>277</sup> For example, LB Foster carries both "BIOCURVE" and "BioRail." See Consumers Rebuttal e-workpapers "BIOCURVE Rail Grease Specification.pdf" ("BIOCURVE is a premium quality biodegradable rail curve grease formulated from U.S.-grown vegetable oils and a lithium-based thickener."); "BioRail Curve Grease Specification.pdf" ("based on oils from vegetable sources that are 100% biodegradable.").

<sup>278</sup> See Consumers Opening e-workpapers "Ohio Track Inc. Quote.pdf" (Item 17: "Installation of Rail Lubricator" and "quote is intended to provide a fully completed product" with track construction costs listed on a per mile basis); "LB Foster Lubricator Quote.pdf"; "2015 OTM Worksheet.xlsx," tab "Total Cost Summary," row 243 (installation cost for lubricators).

<sup>279</sup>  $\$148,335 = \$693,169 - \$544,834$ . See Consumers Rebuttal e-workpaper "2015 OTM Worksheet\_Rebuttal.xlsx," tab "TOTAL COST SUMMARY," cell G132; Consumers Opening e-workpaper "2015 OTM Worksheet.xlsx," tab "TOTAL COST SUMMARY," cell F132.

**ii. Plates Spikes and Anchors**

CSXT on Reply accepts Consumers' unit costs and methods for determining quantities of plates, spikes, and anchors.<sup>280</sup>

**(a) Derails**

Consumers on Opening included costs for derails at turnouts.<sup>281</sup>

CSXT on Reply accepts Consumers costs for derails, but adds split point derails at points it has determined where the CERR will cross a PTC equipped railroad.<sup>282</sup>

Consumers rejects these costs for split point derails because traffic on the CERR will be moving at a maximum speed of 40 mph.<sup>283</sup> Pursuant to 49 C.F.R. Section 236.1005(a)(1)(i), which has the same requirements as the workpaper submitted into evidence by CSXT,<sup>284</sup> when a PTC route is intersected by a non-PTC route and the maximum speed is less than or equal to 40 mph, only interlocking signal arrangements are required. Therefore, Consumers rejects CSXT's additional costs for split point derails.

**(b) Wheel Stops**

CSXT accepts Consumers' unit costs for wheel stops.<sup>285</sup>

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<sup>280</sup> See CSXT Reply at III-F-84; Consumers Opening at III-F-60-61.

<sup>281</sup> Consumers III-F-61; Consumers Opening e-workpaper "2015 RS Means Page 678.pdf" (cost for derails and wheel stops).

<sup>282</sup> CSXT Reply at III-F-85.

<sup>283</sup> See Consumers Opening at III-C-27.

<sup>284</sup> CSXT Reply e-workpaper "PTC Split Point Derails.pptx."

<sup>285</sup> See CSXT Reply at III-F-85; Consumers Opening at III-F-61-62; Consumers Opening e-workpaper "2015 RS Means Page 678.pdf" (cost for derails and wheel stops).

### iii. Crossing Diamonds

Consumers on Opening provided for one double diamond at MP DC 28.0.<sup>286</sup> CSXT on Reply adds numerous diamonds asserting that CSXT or its predecessors would have incurred these costs. CSXT, in addition to not agreeing with Consumers diamond crossing inventory, also disputes the “material, transportation, and installation costs.”<sup>287</sup> Consumers modifies its costs to include labor, but maintains its position on Opening with respect to the transportation and unit costs for diamonds. As summarized in Rebuttal Table III-F-11 below, Consumers has accepted some of the additional diamond crossings proposed by CSXT and has updated its costs accordingly.<sup>288</sup>

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<sup>286</sup> Consumers Opening at III-F-59.

<sup>287</sup> CSXT Reply at III-F-85.

<sup>288</sup> See Consumers Rebuttal e-workpaper “2015 OTM Worksheet\_Rebuttal.xlsx,” tab “TOTAL COST SUMMARY,” cell I189 (total diamond costs).

**REBUTTAL TABLE III-F-11**  
**CERR Diamond Inventory**

Location	Number of Diamonds	Consumers Rebuttal <sup>1/3</sup>
Barr / MP 6.00 / NS (Stateline)	4	<b>Accept.</b> Joint Facility Agreement reviewed indicates that CSXT's predecessor may have paid 100% installation costs.
Barr / MP 6.10 / IHB (Stateline)	0	<b>Reject.</b> Joint Facility Agreement reviewed indicates CSXT's predecessor did not have to pay the costs. <sup>1/</sup>
Barr / MP 10.70 / UP (Dolton)	4	<b>Accept.</b> C&CT was the junior railroad (installed by 1890) and when installed crossed the senior C&WI (installed prior to 1885).
Barr / MP 10.80 / NS (Dolton)	0	<b>Reject.</b> CSXT does cross the NS at Dolton; however, not on the alignment of the CERR. The CSXT single connection track heading south to the jointly owned Villa Grove Sub crosses the single NS track. <sup>2/</sup>
Barr / MP 10.90 / IHB (Dolton)	0	<b>Reject.</b> C&CT installed by 1890 crosses the more junior CH&W (IHB) track that was installed between 1895-1900. <sup>3/</sup>
		{
BRC / MP 19.50 / NS	{ }	
		} <sup>4/</sup>



Blue Island / MP 22.5 / NS (75th Street)	2	Accept. In the vicinity of Blue Island the CSXT line being replicated was originally installed by the CT-Chicago Terminal & Transfer (B&OCT) in 1895.
Blue Island / MP 22.6 / BRC (75th Street)	2	As such, it was the junior RR and would have incurred diamond costs at MPs 22.5, 22.6, 27.39, and 28.00.
Blue Island / MP 27.39 / CN (Brighton Park)	2	Accept. Diamonds at Brighton Park installed as part of CREATE but with RR funding.
Blue Island / MP 28.00 / CN (Ash Street)	2	Accept. Same as MPs 22.5 and 22.6.
IHB Dolton Interlocking	4	Accept.
<b>Total</b>		
<b>CERR Diamonds on BOCT 137.1-IL Segment</b>	{ }	
<b>CERR Diamonds on BOCT 136.1-IN Segment</b>	{ }	
<sup>1/</sup> See Consumers Rebuttal e-workpaper { }		
<sup>2/</sup> See Consumers Rebuttal e-workpaper "Dolton Diamond.pdf"		
<sup>3/</sup> See Consumers Rebuttal e-workpaper "1848-1910 Construction of RRs_Chicago.pdf"		
<sup>4/</sup> See Consumers Rebuttal e-workpaper "Pullman Junction Interlocking.pdf"		

(a) **Materials Transportation**

CSXT and Consumers both address materials transportation costs for an item within the relevant section discussing its costs, or in the applicable e-workpapers.

(b) **Track Construction Labor**

Consumers on Opening provided a bid from Ohio Track that covered both the installation and transport of materials from the railhead to the point of installation. CSXT on Reply contends that additional costs are required "to

transport ballast from the railhead to the point of placement in track.”<sup>289</sup>

Consumers rejects this increase in labor costs associated with the transport of ballast because this was included in the Ohio Track Inc. quote.<sup>290</sup> This is further discussed *supra* in Parts III-F-3.c.iv and III-F.3.b.ii(b).

**4. Tunnels**

There are no tunnels on the lines that the CERR is replicating.

**5. Bridges**

Consumers’ engineers on Opening provided a bridge list and standard bridge designs based on the existing spans and an inspection of the lines the CERR is replicating.<sup>291</sup> Consumers omitted the costs for constructing the Calumet Sag Channel Bridge and the Chicago Sanitary Canal Bridge because these projects were funded by the City of Chicago.<sup>292</sup>

On Reply, CSXT includes costs for the Calumet Sag Channel Bridge and the Chicago Sanitary Canal Bridge. CSXT also increases the bridge costs arguing that the bridges as designed by Consumers’ engineers would obstruct water or pedestrian traffic, and more generally that there were design and calculation errors.<sup>293</sup>

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<sup>289</sup> CSXT Reply at III-F-87.

<sup>290</sup> Consumers Opening e-workpaper “Ohio Track Cost Estimate.pdf”

<sup>291</sup> Consumers Opening at III-F-62-63.

<sup>292</sup> *See id.*

<sup>293</sup> CSXT Reply at III-F-87-88.

Consumers maintains its original position on Opening but makes the following minor modifications and corrections: Consumers adds one bridge that was not changed to a culvert, removes a duplicate structure also on the culvert list, corrects the number of spans on Bridge DC 29.96, and corrects the spreadsheet to properly include the cost for bridge DC30.19.

a. **The CERR Is Not Required to Pay for the Construction of the Calumet Sag Channel Bridge and Chicago Sanitary Channel Bridge**

The Chicago Sanitary Canal Bridge and the Cal-Sag Channel Bridges were constructed as part of major public works projects to reverse the flow of the Chicago and Calumet Rivers so they would not flow into Lake Michigan. The existing railroads would not have been required to build new bridges over new man-made waterways that cut through their railroad networks.

Photographs of the Cal Sag Channel bridges show the bridges all look alike, using essentially the same design, even though they are owned by different railroads.<sup>294</sup> If the individual railroads had been required to build these bridges at their own expense, this uniformity would not exist. Each railroad would have built its bridge to match the railroad's bridge standard of the day.

All evidence and references to the construction of these bridges indicates that these railroad bridges were public works projects that were funded with public money. The evidence presented on Opening – while not detailing the

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<sup>294</sup> See Consumers Rebuttal e-workpapers “Cal-Sag Bridges Aerial.jpg;” “Cal-Sag Bridges #3-#7.jpg;” “Cal-Sag Bridges #5- #7.jpg.”

specifics of the construction for these bridges – does clearly show that this was a public works project.<sup>295</sup> However, in response to CSXT’s protests to these bridges being publicly funded, Consumers performed additional research and found direct evidence of the Sanitary District funding the construction of these bridges in the Daily News Chicago Almanac circa 1912.<sup>296</sup>

CSXT’s is wrong to argue that the CERR should still have to pay something because replacement spans may exist because these bridges were specifically constructed to span a newly constructed channel. Even if some minor canal existed before these major public works projects began, any pre-existing bridges would be insignificant in size, and nowhere near the size of the current bridges. Moreover, CSXT has not provided any evidence that it ever incurred such costs for the original spans or any potential replacement spans.

For the above reasons, Consumers maintains its position on Opening and omits the costs for the Calumet Sag Channel Bridge and the Chicago Sanitary Channel Bridge.

**b. The CERR’s Bridges are Already Designed to Allow Sufficient Space for Below-Bridge Water Flow, Automotive Traffic, and Pedestrian Traffic**

The CERR’s bridges have the same opening sizes as the CSXT Bridges because they can be built with vertical backwalls, which have the same

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<sup>295</sup> See Consumers Opening e-workpaper “Bascule Bridge Over CSSC Railway Gazette indicating that the Sanitary district paid.pdf.”

<sup>296</sup> See Consumers Rebuttal e-workpaper “Sanitary District of Chicago\_Calumet\_Sag Bridge Construction.pdf.”

openings as wall abutments. CSXT's engineers wrongly assume that the CERR's proposed bridges must have a spill slope, even though Consumers added costs on Opening to include pre-cast wing walls. For bridges over streets and highways, CSXT proposes very expensive cast in place "Wall Abutments" at three times the price of the CERR's proposed steel pile and precast wing wall design. For stone arch bridges over streams and dirt roads in rural areas, CSXT proposes doubling or even tripling the bridge lengths.

Consumers designed the CERR bridges to be able to be built to span the same length as the current CSXT inventory. The size and design of the wing wall will vary depending on the conditions under the bridge, but such items can still be pre-cast, rather than cast in place.<sup>297</sup> The precast wing walls can provide a vertical face where required. The precast wing wall cost was based on the most common wing wall design used by other Class 1 railroads, per the quote from Coreslab.<sup>298</sup> This was intended as an "average cost" not necessarily the cost for every location. In the case of the vertical face wing walls used to span over city streets, no Rip Rap will be required even though all three bridge types have \$18,200 included in the abutment costs for Rip-Rap.<sup>299</sup> After applying the

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<sup>297</sup> See Consumers Rebuttal e-workpapers "Bridge Costs\_Reply.xlsx," tab "Bridge Type 3," "Coreslab RR Brochure.pdf," Contech Pre Cast Wing Walls.pdf," "Typical Chicago Street.pdf." See also Consumers Opening e-workpaper "Coreslab Precast Components Cost.pdf."

<sup>298</sup> Consumers Opening e-workpaper "Coreslab Precast Components Cost.pdf."

<sup>299</sup> CSXT Reply e-workpaper "Bridge Costs\_Reply.xlsx," tab "Bridge Type 3," cell C18 ((rows 76-91, IHR 3.80, AFE A35844).

location factor, the Rip Rap cost included in Chicago Streets Bridges is \$23,600 per bridge.<sup>300</sup> The lower than average Rip Rap cost for Chicago Streets Bridges, \$23,600 below average (since Rip Rap is not needed at all), will offset the higher than average wing wall costs. Pre-Cast wing wall panels costs presented in opening and not challenged in reply, are \$1,000 each plus \$2,500 per lift. The \$23,600 Rip Rap allowance will cover the cost of 6 additional Pre Cast Wall panels. The pre-cast wing wall cost is applied to every bridge, even though there are some locations where wing walls would not be necessary.<sup>301</sup>

The railroad bridges over the streets of Chicago will not have a spill slope, but instead require vertical face wing walls. The abutments can still be driven piles with pre-cast pile caps and the wing walls can still be pre-cast construction, exactly like the proposed CERR prototypes. Columns placed at the edge of the road, between the road and the sidewalk, and one set in the median, is the norm in the City of Chicago. For example, on the Blue Island Subdivision, this exact configuration was observed 19 times, and only 3 of 29 bridges do not have some intermediate columns in the sidewalk or median, yet CSXT Engineers

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<sup>300</sup> Consumers Rebuttal e-workpaper “Bridge Costs\_Reply\_Rebuttal.xlsx,” tab “Route Bridges,” column Y (location factor) and tab “Bridge Cost by Type Summary,” cell D13 (location factor for Kentucky) (most of the location factors in column Y are for Chicago, these are significantly greater than the one in Kentucky at cell D13).

<sup>301</sup> See Consumers Rebuttal e-workpapers “Bridge Costs\_Reply\_Rebuttal.xlsx:” tab “Bridge Type 1,” cell C15; tab “Bridge Type 2,” cell C22; tab “Bridge Type 3,” cell C18; “Coreslab RR Brochure.pdf,” Contech Pre Cast Wing Walls.pdf,” “Typical Chicago Street.pdf.” See also Consumers Opening e-workpaper “Coreslab Precast Components Cost.pdf.”

in reply claim this arrangement is “unacceptable.” On the BRC portion used by the CERR there is not a single bridge that does not have columns located on either the sidewalks or median. The typical 4 span arrangement is used on 25 of the 31 railroad over street bridges.<sup>302</sup> For the CERR in Chicago north of the Cal-Sag Channel , the 4 span arrangement with a Type 1 or Type 2 superstructure is used on all but 6 bridges,<sup>303</sup> where the longer spans of the Type 3 bridge are needed.<sup>304</sup>

Rather than delving into average abutment and wing wall costs, CSXT engineers propose lengthening some bridges by outrageous proportions, at least doubling and sometimes tripling the existing bridge length. At MP 61.0 of the Grand Rapids Sub, it is proposed to replace a 24’ concrete arch bridge with an 84 feet long, 4 span, type 1 bridge.<sup>305</sup> At MP 34.80 of the Grand Rapids Sub, it is proposed to replace an 18’ concrete box bridge with a 108 feet long, 5 span, type 1 bridge.<sup>306</sup> There are a number of additional proposed length increases, equally

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<sup>302</sup> Consumers Rebuttal e-workpaper “Bridge Costs\_Reply\_Rebuttal.xlsx,” tab “Route Bridges,” column M, rows 43-71.

<sup>303</sup> *Id.* at column M, rows 84-114.

<sup>304</sup> See Consumers Opening e-workpaper “Field Photos Barr Blue Island and Kenton Subs.pdf” (at 10-277 depict the Blue Island Sub bridges north of the Cal-Sag Channel) (at 377-621 depict the Kenton Sub bridges).

<sup>305</sup> See Consumers Opening e-workpaper “Field Photos Grand Rapids and Freemont Subs.pdf” at 794 (photo P8060795).

<sup>306</sup> See Consumers Opening e-workpaper “Field Photos Grand Rapids and Freemont Subs.pdf” at 1058 (photo P8061059).

absurd, that are in remote locations where reconnaissance photos were not taken.<sup>307</sup>

c. **Additional Reponses to CSXT Bridge Design and Cost Corrections**

CSXT individually challenges almost every bridge configuration.<sup>308</sup> This is despite the fact that individual bridge span lengths were not provided by CSXT in discovery. Instead, CSXT's bridge list provided just the overall length of the bridge and the number of spans.<sup>309</sup> An average span length was computed by dividing the length by the number of spans. For this reason, Consumers does not know every span length of every bridge because that information was not provided in discovery.

CSXT's engineers were very excited by the possibility that some individual spans might exceed the 50 feet span length of the Type 3 prototype bridge. CSXT's engineers specifically reference the bridge at MP 36.0 of the Grand Rapids Subdivision, which crosses the Kalamazoo River.<sup>310</sup> The overall length of the bridge is listed at 356'-0" and has 7 spans. The average span length is the 50.85 feet, or 50'-10." But this does not mean a completely different bridge type must be developed. The superstructure of the Type 3 Bridge is an

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<sup>307</sup> Comments for individual bridges are contained in the spreadsheet. Cite to Spreadsheet X at column\_.

<sup>308</sup> Reference cost spreadsheet, column P of the Route Bridges Tab.

<sup>309</sup> Consumers Rebuttal e-workpaper "Bridge Costs\_Reply\_Rebuttal.xlsx," tab "Route Bridges," columns L & M.

<sup>310</sup> See CSXT Reply e-workpaper "Bridge Costs\_Reply.xlsx," tab "Route Bridges" row 10," cells P10 & Q10.



exact replica of a CSXT bridge, which spanned 50' and used six parallel W36x302 rolled beams. The W36x302 is not the only beam size ever made or readily available. The W36x302 rolled beam is in the middle of a series of available beams. There are 8 different W36 rolled beams heavier (stronger) than the W36x302 and an even greater number lighter than the W36x302. For this one bridge that has spans a mere 2% longer than the prototype, Consumers' engineers simply elected to use the next size larger beam. It is nominally the same size, but the webs and flanges are slightly thicker. It weighs more and thus does cost more. But for every span of a Type 3 bridge that is less than 50' long, lighter beams could be used and the lighter beams will cost less. The 50' span is not the upper limit of the Type 3 Bridge, it is the point where the cost estimating formula is the most accurate.<sup>311</sup> Slightly longer spans merely require slightly heavier beams, which are available. A Type 4 Bridge could have been developed as a scaled up version of the Type 3 Bridge using larger beams. This was not done because the bridge inventory could be reasonably replicated with the three bridge types presented in opening.<sup>312</sup>

CSXT unnecessarily rejects the pier design for the Type 3 Bridge, apparently oblivious to the fact that this was their design, used on their bridge at

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<sup>311</sup> This is because the prototype bridge used for the Type 3 Bridge spanned 50' and used six parallel W36x302 rolled beams.

<sup>312</sup> See Consumers Rebuttal e-workpaper "W36 beam sizes.pdf."

{ }.<sup>313</sup> They claim there are not enough piles per pier when that is the quantity they used for their bridge with 50’ spans. They are correct in claiming that Consumers provided no sketches, plans or details depicting what this bridge looks like. This information should have been provided by CSXT in discovery when the information on { } was requested. Had this information been provided to Consumers in discovery, it would have been included in the opening work papers. Apparently, CSXT not only withheld information from Consumers, they also withhold information from members of their own team, as they claim ignorance about a recently built CSXT bridge. The Cost Estimate for AFE A35844,<sup>314</sup> indicates 24 piles and 24 H-Pile Points were used for a bridge that requires 4 support frames (one at each end and two intermediate supports). If indeed 8 piles were used for each pier at MP IHR 3.80, CSXT could have produced drawings or photographs proving this, but they did not. The six piles are in a single row, similar to the arrangement shown in Consumers Opening e-workpaper “CSXT ballasted deck.pdf.” The argument about the need for wider and heavier precast pier caps is unfounded since a single row of piles is used.<sup>315</sup>

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<sup>313</sup> See CSXT Reply e-workpaper “Bridge Costs\_Reply.xlsx,” tab “Bridge Type 3,” (rows 76-91, IHR 3.80, AFE A35844).

<sup>314</sup> See Consumers Rebuttal e-workpaper “Bridge Costs\_Reply\_Rebuttal.xlsx,” tab “Type 3.”

<sup>315</sup> See Consumers Opening e-workpaper “CSXT ballasted deck.pdf.”

There are 5 locations over river crossings where CSXT laments about additional bridge piers potentially blocking river flow. In four instances the existing bridges use two spans and thus have one large pier right in the middle of the river. The CERR uses three span bridges so that piers will be located closer the shore of the river or in the flood plains on either side, and most importantly, no pier in the middle of the river where the current is the strongest. The size of the existing piers in the middle of the rivers are very large, generally about 4 feet wide, compared to the piers created by using 14” H-Piles that are nominally 14” wide.<sup>316</sup> The cross section of the proposed CERR piers are less than half the size of the existing stone and concrete piers, plus their locations away from the middle of the river are clearly advantageous for greater water flow.<sup>317</sup>

**d. Highway Overpasses**

Consumers on Opening for its costs used an overpass that was built to cross CSXT tracks.<sup>318</sup> Consumers also assumed that the CERR would be responsible for 10% of the costs for the highway overpasses.<sup>319</sup> CSXT on Reply accepts Consumers’ inventory of highway overpasses and costs, but adds costs for an overpass at Cottage Grove, relocates one of the existing highway overpasses,

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<sup>316</sup> USGS maps, aerial photos and a sketch depicting these bridges are included as links to work papers in the bridge cost Spreadsheet. *See* Consumers Rebuttal e-workpaper “Bridge Costs\_Reply\_Rebuttal.xlsx.”

<sup>317</sup> *See* Consumers Rebuttal e-workpaper “Typical River Bridge.pdf.”

<sup>318</sup> *See* Consumers Opening at III-F-68.

<sup>319</sup> *Id.* at 70.

and then seeks 100% of the costs at two locations because CSXT contends they were greenfield construction.

Consumers rejects the costs for a flyover at BI 248.3 (Clark Road).<sup>320</sup> In the first instance, a flyover would not work due to elevation problems with nearby turnouts, and it would need to instead be a highway overpass. More importantly this is a “back entrance” that has over a dozen pre-existing at-grade crossings that are frequently obstructed by passing trains. Therefore it makes the most sense to keep the at-grade crossings because the main access to the site is via Buchanan Street at BI 245.83 where there are currently no at-grade crossings.

Consumers also rejects the overpass at Cottage Grove because the overpass at DC 9.97 was purposefully avoided by fouling the track along the main line whenever the train length was greater than the available track between this point and the main line. Basically, the longer trains are just kept on the main line for ~30 minutes, which isn't a problem and this parameter was incorporated into the RTC model.

Lastly, CSXT failed to submit evidence of this greenfield construction and Consumers was unable to determine why these particular locations would qualify for 100% cost reimbursement. As such, these additional costs are rejected.

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<sup>320</sup> This was proposed as a bridge, but is discussed here because it would only work as an overpass. See Consumers Rebuttal e-workpaper “Bridge Costs\_Reply\_Rebuttal.xlsx,” tab “Reply Summary,” row 11.

For the above reasons, Consumers rejects all of CSXT's proposed additional costs and modifications to the highway overpasses inventory.

**6. Signals and Communications**

Consumers on Opening provided for a CTC traffic control system from the CERR's Blue Island and Barr Subdivision main lines between 22<sup>nd</sup> and Curtis.<sup>321</sup> The remainder of the CERR lines between Porter and West Olive are "dark" territory.<sup>322</sup> CSXT on Reply has accepted most of the signal and communications costs and configurations, but modified the interlocking configurations, added some signal components, and added shipping costs for a significant number of the signals components.<sup>323</sup> On Rebuttal, Consumers generally accepts CSXT's additional costs, but rejects the following modifications proposed by CSXT: (a) 15% markup of materials; (b) the changes to the rate for the site engineer; (c) the foundation costs for the tower and the shed; (d) fencing around the microwave towers; (e) the total track connector costs; and (f) the total BRC Signal Bridge costs.

A comparison of Consumers' and CSXT's Signals and Communications costs for the CERR is summarized below in Rebuttal Table III-F-12.

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<sup>321</sup> Consumers Opening at III-F-70.

<sup>322</sup> *Id.*

<sup>323</sup> *See* CSXT Reply at III-F-108-109.

**REBUTTAL TABLE III-F-12**  
**CERR Signal and Communications Costs**  
(millions)

Item	Consumers Open <sup>1</sup>	CSXT Reply <sup>2</sup>	Consumers Rebuttal <sup>3</sup>	Difference
1. Signals and Wayside CTC	\$13.11	\$19.83	\$15.69	\$4.13
2. Communications	\$5.92	\$11.19	\$10.77	\$0.43
3. Crossings	\$12.07	\$12.27	\$12.27	\$0.00
4. AEIs and FEDs	\$1.03	\$1.13	\$1.13	\$0.00
5. Central CTC	\$0.84	\$0.84	\$0.84	\$0.00
6. Locomotive PTC	\$0.85	\$1.27	\$1.27	\$.000
<b>7. Total Signal &amp; Communications Costs</b>	<b>\$33.82</b>	<b>\$46.54</b>	<b>\$41.97</b>	<b>\$4.56</b>

<sup>1</sup> Consumers Opening e-workpaper “CERR Opening C-S Costs.xlsx.”

<sup>2</sup> CSXT Reply e-workpaper “ CERR Opening C-S Costs\_Reply.xlsx”

<sup>3</sup> Consumers Rebuttal e-workpaper “ CERR Opening C-S Costs\_Rebuttal.xlsx”

**a. 15% Markup of Labor and Materials is Not Warranted**

Consumers on Opening already included the 15% markup of labor,<sup>324</sup> and so CSXT adding these costs again on reply duplicates these costs.<sup>325</sup> Additionally, on Reply CSXT adds a 15% markup to the material costs but does not provide an explanation or reason for this across the board increase in costs.<sup>326</sup>

This general markup of materials is not consistent with Board precedent, and a

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<sup>324</sup> See Consumers Opening e-workpaper “CERR C-S Costs.xlsx,” tab “Signal & Comm Costs,” column H, and tab “Components,” column L.

<sup>325</sup> See CSXT Reply e-workpaper “CERR C-S Costs\_Reply.xlsx,” tab “CSXT Reply Totals,” column R.

<sup>326</sup> See *id.*

review of the decisions and testimony in AEPCO, DuPont, and SunBelt indicate that this may be a new cost that was either added accidentally, or is an attempt to surreptitiously set new precedent regarding materials costs. Either way, Consumers rejects the additional markup of labor by 15% and the markup of materials by 15%, which reduces costs by \$4.6 million.<sup>327</sup>

**b. CSXT Overstates the Foundation Costs for the Sheds and the Towers**

CSXT overstates the costs required for the sheds and the towers.<sup>328</sup>

Foundations are poured into trenches or pits and buried. There is no need to erect and strip forms, erect and strip keyways, cure and protect concrete or rub and patch irregularities. The tower foundations are done in two pours, a base or mat,<sup>329</sup> which can be done crudely since it is buried. CSXT's spreadsheet shows many of the concrete items listed twice, because they have estimated the base and columns separately.<sup>330</sup> CSXT's estimates have been revised to only include the base for the towers.<sup>331</sup> Additionally, for the communications shed, it is small enough that it is

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<sup>327</sup> CSXT Reply e-workpaper "CERR C-S Costs\_Reply.xlsx" (sum of cells in column R = \$31,017,032); Consumers Rebuttal e-workpaper "CERR C-S Costs\_Rebuttal.xlsx" (sum of cells in column R = \$26,456,141).  $\$31,017,032 - \$26,456,141 = \$4,560,891$ .

<sup>328</sup> See Consumers Rebuttal e-workpapers "CSX Communications Tower and Shed Cost Estimate Revised.pdf."

<sup>329</sup> See Consumers Rebuttal e-workpaper "tower with foundation.pdf" (illustration of typical foundation for a tower).

<sup>330</sup> See CSXT Reply e-workpaper "CSX Communications Tower and Shed Cost Estimate.pdf."

<sup>331</sup> See Consumers Rebuttal e-workpapers "CSX Communications Tower and Shed Cost Estimate Revised.pdf."

not necessary to include rebar in the footers. It is also not necessary to include costs to cure or rub and patch the footers, which is instead something included for a house or higher-end installation. The remaining costs are more reasonable and have been revised to be approximately \$500 per cubic yard of installed concrete. These revisions result in an overall decrease in costs from the CSXT Reply of \$19,778.<sup>332</sup>

**c. Revising the Cost for the Site Engineer is Not Warranted**

Consumers rejects CSXT's increase for Site Engineer labor for the microwave towers given the inclusion of several other engineering tasks including a frequency study, a feasibility study, and a path and contour analysis.<sup>333</sup>

**d. Fencing Around the Microwave Towers**

Consumers has eliminated the fencing around the microwave towers because there is already sufficient fencing around the sheds. As proposed, CSXT would be constructing a fence inside a fence, and therefore Consumers has eliminated the interior fence.<sup>334</sup>

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<sup>332</sup> See Consumers Rebuttal e-workpapers "CSX Communications Tower and Shed Cost Estimate Revised.pdf;" "CERR LMR Cost Development\_Rebuttal.xlsx," cells O31 & O34; CSXT Reply e-workpaper "CERR C-S Costs\_Reply.xlsx" (Total Tower Costs; Reply = \$42,109,485; Rebuttal = \$42,101,320) (Total Shed Costs; Reply = \$42,109,485; Rebuttal = \$42,097,872).

<sup>333</sup> See CSXT Reply at III-F-118; Consumers Rebuttal e-workpaper "CERR LMR Cost Development\_Rebuttal.xls," row 13, columns O & P.

<sup>334</sup> See CSXT Reply e-workpapers "CERR LMR Cost Development\_Rebuttal," tab "Per Tower Equipment," cells O32 & P32.



e. **CSXT's Total Track Connector Costs are Too High**

The track connector costs used by CSXT were not for track connectors, but instead were for joint bars. These costs have been revised by Consumers' engineers to be \$2.50<sup>335</sup> per connector, instead of \$41 per connector.<sup>336</sup>

f. **CSXT Overstates BRC Signal Bridge Costs**

Signal bridge costs were overstated for one of the signal bridges added because of the five tracks, the BRC only owns three, and this is reflected in the evidence submitted by CSXT.<sup>337</sup> Consumers on Rebuttal revises the BRC ownership for this bridge accordingly.<sup>338</sup>

7. **Buildings and Facilities**

Consumers on Opening included costs for facilities that included a headquarters building, a locomotive shop, in addition to roadway buildings for crew changes and maintenance of way staff.<sup>339</sup> Consumers did not provide extensive facilities because as discussed on Opening, the CERR is limited both geographically and has relatively few staff.<sup>340</sup> CSXT in Reply took issue in several instances with the limited nature of the facilities, and added features that

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<sup>335</sup> See Consumers Rebuttal e-workpaper "CERR Track Connector.pdf."

<sup>336</sup> See CSXT Reply e-workpaper "CSXT Unit Cost Workpapers.pdf" at 3.

<sup>337</sup> See CSXT Reply e-workpaper "BRC - Signal Bridge MP 14.55.pdf" ("BRC Responsible Fro [sic] 3/5 (60%) of Signal Bridge (Typical)").

<sup>338</sup> See Consumers Rebuttal e-workpaper "CERR C-S Costs\_Rebuttal.xlsx," tab "Rebuttal Totals," cell F77.

<sup>339</sup> Consumers Opening at III-F-76.

<sup>340</sup> Consumers Opening at III-F-76.

are not justified given the scope of the CERR operations. Table III-F-13 below summarizes the differences between Consumers and CSXT’s proposed building and facilities investments for the CERR.

<b>REBUTTAL TABLE III-F-13</b>				
<b><u>CERR Road Property Investment Costs</u></b>				
(millions)				
<b>Section</b>	<b>Consumers Open<sup>1</sup></b>	<b>CSXT Reply<sup>2</sup></b>	<b>Consumers Rebuttal<sup>3</sup></b>	<b>Difference</b>
1. Headquarters Building	\$2,051,902	\$2,724,806	\$2,486,955	\$237,852
2. Locomotive Shop & Office	\$2,475,048	\$6,308,759	\$2,142,321	\$4,166,438
3. Roadway Buildings (Crew, MOW)	\$1,246,273	\$8,723,935	\$1,426,823	\$7,297,112
4. Yard Site Costs	\$6,092,900	\$8,719,636	\$6,326,132	\$2,393,504
<b>5. Total Building and Facilities</b>	<b>\$11,866,122</b>	<b>\$26,477,136</b>	<b>\$12,382,231</b>	<b>\$14,094,905</b>

<sup>1</sup> Consumers Opening e-workpaper “III-F- TOTAL - 2015.xlsx”

<sup>2</sup> CSXT Reply e-workpaper “III-F- TOTAL - 2015\_Reply.xlsx”

<sup>3</sup> Consumers Rebuttal e-workpaper “III-F- TOTAL - 2015.xlsx”

**a. Headquarters Building**

Consumers on Opening provided for a headquarters building for the CERR at the West Olive yard in Michigan.<sup>341</sup> CSXT has accepted the location for the headquarters building, but has added several items including a headquarters support building.<sup>342</sup> Consumers’ engineers accepts CSXT’s site costs for the

<sup>341</sup> See Consumers Opening at III-F-77.

<sup>342</sup> See CSXT Reply at III-F-120-125.

Headquarters Building of \$461,590,<sup>343</sup> but rejects most of the building cost increases proposed by CSXT's engineers because they are unjustified given the limited scope and operations of the CERR.<sup>344</sup> As such, Consumer's engineers reject any addition of overall increase in square footage for the headquarters building.

CSXT accepted the CERR's placement of the headquarters building location at its West Olive yard in Michigan.<sup>345</sup> Therefore, it makes no sense to have the foundation conform to the Chicago Municipal Code. Michigan Building Code is based on the International Building Code and therefore, while Consumers will accept that a foundation will be required, it only needs to use an arrangement of 24" diameter x 48" deep concrete piers. In total, there will need to be 348 piers at a cost of \$277 each for the foundation, bringing the total cost for the foundation to \$96,370.10.<sup>346</sup> Additionally, a floor slab is not required because the site under the building will be cleared, excavated and filled with a dozer.<sup>347</sup> This method

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<sup>343</sup> See CSXT Reply e-workpaper "2015 Buildings\_Reply.xlsx" at Cell D10.

<sup>344</sup> CSXT's engineers list the total costs for the Headquarters Building as \$2,724,806 (\$461,590 = site costs; \$2,259,338 = building costs; \$3,879 = tie to existing sewer; \$2,724,806 = total costs). See CSXT Reply e-workpaper "2015 Buildings\_Reply.xlsx," tab "Total Building Cost Summary," row 10 (cells F10 & G10 list total costs); CSXT Reply at III-F-120, Table III-F-16 at row 1, column "Reply."

<sup>345</sup> See CSXT Reply at III-F-120.

<sup>346</sup> See Consumers Rebuttal e-workpaper "ModSpace Building Foundations.pdf"

<sup>347</sup> See Consumers Rebuttal e-workpaper "2015 Building Sites\_Rebuttal.xlsx," tab "Headquarters," cells D4 and D5.

provides a flat compacted earth surface that is free of debris and that is all that is required under a building of this type.<sup>348</sup>

It is unclear why CSXT's engineers list "critical communications equipment"<sup>349</sup> as a Headquarters Building cost when these costs are already included as part of the Section 6 "Signals and Communications" costs.<sup>350</sup> Further, the CTC Office System costs, which were included as part of the Central CTC costs, were accepted by CSXT on Reply as part of Signal and Communications costs.<sup>351</sup> Therefore, Consumers rejects CSXT's additional costs for "critical communications equipment" that are listed as "Headquarters Building" costs.<sup>352</sup>

Consumers' engineers reject the additional costs for an Electrical Room because there is already a Mechanical Room and Server Room. Therefore, there is no need for an extra "Electrical Room" given that this equipment can be accommodated in the Mechanical Room.

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<sup>348</sup> Consumers' engineers note that a concrete slab is convenient for crawling under the building to make repairs but it serves no other purpose.

<sup>349</sup> CSXT Reply at III-F-122.

<sup>350</sup> See Consumers' Opening at III-F-72-73 ("The entire system is linked into the dispatching center at the CERR's West Olive headquarters. . .the dispatching center costs are presented in this section.").

<sup>351</sup> See CSXT Reply e-workpaper "CERR C-S Costs\_Reply.xlsx," at tab "Components," cell N51 (CTC office system material unit costs); and at tab "CTC," cell E5.

<sup>352</sup> This "critical communication" equipment for headquarters is listed by CSXT to cost \$109,550.25. See CSXT Reply e-workpaper "2015 Buildings\_Reply.xlsx," tab "Headquarters" ( sum of Cells E29+E30+E31+E32).

Fire protection was not omitted and the original quote provided by Consumers from ModSpace<sup>353</sup> includes both a fire alarm and a sprinkler system. Consumers' headquarters building also included a mechanical room to house the system.

Consumers accepts CSXT's costs for emergency backup power and for exterior stairs and a handicap accessible ramp. But Consumers rejects the pavement marking costs because the lot is gravel. The pavement marking costs (assuming there is pavement) are also not justified because there is adequate parking at this facility and a limited number of employees. Consumers, unlike CSXT, is not planning to include a support building and base 32 MOW staff at this facility so parking will be less of an issue. Consumers is also rejecting CSXT's proposed addition of locker rooms because these facilities are in the crew change building.

**b. Headquarters Support Building**

Consumers on Opening did not provide for a headquarters support building. CSXT on Reply is adding this building, stating that “[a]n additional 32 MOW staff will be based here who do not require offices but will need to access facilities such as restrooms and lockers.”<sup>354</sup> Consumers rejects this addition of the Headquarters Support Building because the existing crew change facilities and

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<sup>353</sup> Consumers Opening e-workpaper “HQ MOW CREW ModSpace Building Proposal.pdf” at 18-19

<sup>354</sup> CSXT Reply at III-F-123.

Headquarters Building will provide adequate space for staff. It also makes no sense to have all personnel for the CERR located in West Olive.

**c. Fueling Facilities**

Consumers on Opening did not provide for any fixed fueling facilities as direct-to-locomotive (“DTL”) fueling will be performed by trucks at the CERR’s Barr Yard and the Campbell plant.<sup>355</sup> CSXT on Reply agrees with this fueling arrangement, but includes additional costs for oil/water separators, asphalt, and lighting.<sup>356</sup> As discussed below, Consumers agrees to modify its costs for lighting, but rejects CSXT’s request for additional asphalt and oil/water separators.

**i. No Additional Oil/Water Separators are Required**

Consumers’ engineers reject CSXT’s proposed increase in the total number of oil/water separator systems because it is completely illogical to have nine when at the CERR’s Barr Yard these would only need to be installed to cover spills and drainage from the three fueling locations in addition to the locomotive shop. CSXT’s only justification for this increase is that nine are required to match Consumers’ Opening narrative.<sup>357</sup> But CSXT misquotes exactly what Consumers’ engineers stated on Opening, and it is clear from Consumers workpapers that this

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<sup>355</sup> Consumers Opening at III-F-78.

<sup>356</sup> CSXT Reply at III-F-124-125.

<sup>357</sup> CSXT Reply at III-F-124.

was not an error or omission by Consumers' engineers.<sup>358</sup> With the benefit of hindsight, Consumers would have included a longer description of the fuel containment system, but it was most definitely not Consumers' intent to have nine oil/water separators when there are only three fueling locations and the locomotive shop.<sup>359</sup> Further, CSXT's Reply workpapers provide costs for only four oil/water separators and state, just as Consumers' Opening workpaper did, that one is required at the locomotive shop and three total for each of the three fueling points in the Barr Yard.<sup>360</sup> The fueling pads and the locomotive shop are each connected to oil/water separator systems, and as depicted on the "BARR YARD.pdf," these fueling pads are clustered in three distinct locations at the facility. Just as a gas station will typically have only one oil/water separator, Consumers' engineers provided for an oil/water separator at each cluster of fueling pads. Therefore, between the fueling locations and the locomotive shop there are only a total of four oil/water separators.

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<sup>358</sup> CSXT's Reply provides that "Consumers' narrative states that '[f]or the locomotive shop and each of the eight fueling pads there is an oil/water separator system that is part of the containment cost.'" CSXT Reply at III-F-124. However, Consumers' Opening narrative states that "[f]or the locomotive shop and for each of the eight fueling pads there is an oil/water separator system that is part of the fuel containment system." Consumers Opening at III-F-85.

<sup>359</sup> See Consumers Opening e-workpaper "BARR YARD.pdf."

<sup>360</sup> See CSXT's Reply e-workpaper "2015 Buildings\_Reply.xlsx," tab "Locomotive Shop Equipment," cell I17 (there are a total of "4 Oil interceptors = 1 for loco shop and 1 for each of 3 fueling points in Yard").

ii. **Asphalt Meets Illinois DOT Standards**

Consumers reject s CSXT’s increase in costs for additional asphalt to accommodate heavier fuel trucks. CSXT’s engineers state that “a heavier industrial asphalt section [is] necessary to accommodate the heavier loads for [the DTL fuel trucks].”<sup>361</sup> But this extra asphalt is not warranted because Consumers’ engineers included a 6-inch compacted subbase such that a 4-inch section of pavement will accommodate these fuel trucks and is what is required for local roads in Illinois,<sup>362</sup> which are designed for loads of 80,000 lbs or 40 tons.<sup>363</sup> Notably, in the United States the federal commercial maximum gross vehicle weight without special permitting is 80,000 lbs,<sup>364</sup> and the fuel trucks will not be exceeding this limit. UP on its website states that “transportation modes for diesel fuel” include a “7500 gallon transport truck”, or a “2500 to 4000 gallon tank wagon”, in addition to rail and barge.<sup>365</sup> The load a semi-trailer would haul is 7,500 gallons, or 27 tons, and a typical tank wagon with a carrying capacity of

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<sup>361</sup> CSXT Reply at III-F-124.

<sup>362</sup> See Consumers Rebuttal e-workpaper “ILDOT district 1 asphalt paving.pdf.”

<sup>363</sup> See ILDOT, Bureau of Local Roads & Street Manual at 1463, <http://www.idot.illinois.gov/Assets/uploads/files/Doing-Business/Manuals-Guides-&-Handbooks/Highways/Local-Roads-and-Streets/Local%20Roads%20and%20Streets%20Manual.pdf> (80,000 lb load limit).

<sup>364</sup> See Consumers e-workpaper “U.S. DOT Maximum Vehicle Weight.pdf,” <http://ops.fhwa.dot.gov/Freight/sw/overview/index.htm> (last accessed May 14, 2016).

<sup>365</sup> See UP, Transportation of Fuel to Union Pac. R.R., [https://www.up.com/suppliers/orderinfo/fuel\\_transportation/index.htm](https://www.up.com/suppliers/orderinfo/fuel_transportation/index.htm) (last accessed May 14, 2016).



4,000 gallons has a gross vehicle weight of approximately 56,000 lbs.<sup>366</sup> For the above reasons, Consumers rejects the additional costs for “a heavier industrial asphalt section” because the road as designed on Opening will accommodate the DTL fuel trucks.

**iii. Consumers Agrees to Revise Lighting Costs**

Consumers’ engineers reject CSXT’s proposed unit costs for the additional lighting fixtures at the fueling pads. Consumers’ engineers specified on Opening that there would be extra fixtures at the fueling pads;<sup>367</sup> however, Consumers’ engineers did not add the correct number of lights and omitted the pole boxes. The spreadsheet has been revised on Rebuttal and CSXT’s costs were used for the pole boxes.<sup>368</sup>

**d. Locomotive Shop & Office**

Consumers’ engineers based the design for the locomotive shop on the CSXT’s existing shop at Barr Yard.<sup>369</sup> Consumers’ engineers also modified

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<sup>366</sup> See generally Seneca Tank Inventory, <https://inventory.senecatank.com/tanktruck/Unit125655> (last accessed May 14, 2016).

<sup>367</sup> See Consumers Opening e-workpaper “FUELING PANS SITE.pdf.”

<sup>368</sup> See Consumers Rebuttal e-workpaper “Building Sites\_Rebuttal.xlsx,” tab “YARD,” cell X (number of lights) and cell Y (electrical enclosures, i.e. pole boxes); CSXT Reply e-workpaper “Electrical Enclosure - Unit Costs.pdf.”

<sup>369</sup> See Consumers Opening e-workpaper “Loco Shop Blueprint - Barr Yard (CSX-CNSMR-C-16616 to 16648).pdf” at 4-5; Consumers Opening at III-F-79-80 (“the only key differences” between the existing Barr Yard and the CERR’s Barr Yard, “is that the pit for CERR’s locomotive shop is a different size and there is a jib crane” instead “of an overhead crane”).

the building to be one-level and to include additional storage.<sup>370</sup> Consumers’ engineers had Kessel Construction, Inc. (“Kessel”) based on the proposed design specifications<sup>371</sup> generate a quote for the locomotive shop and office.<sup>372</sup> CSXT on Reply made several modifications to the locomotive shop stating that despite Consumers’ design including “the same number of ancillary items such as toilets and lockers, and ...the same number of tracks and square footage as the [existing] Barr locomotive shop,”<sup>373</sup> that Consumers’ design for the locomotive shop has “almost no relevance to the design of the actual Barr locomotive shop.”<sup>374</sup> But it is illogical to have a large locomotive shop when the CERR only has 15 locomotives.<sup>375</sup> Consumers’ engineers maintain on Rebuttal that with the exception of the additional costs for an H-Frame crane hoist,<sup>376</sup> that Kessel’s quote of \$2.5 million for the 17,050 square foot locomotive shop is adequate for the CERR operations.

**i. Costs for Inspection Pits Included in Opening**

Consumers’ engineers reject CSXT’s proposed cost increases for inspection pits because Consumers’ engineers on Opening included these costs.

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<sup>370</sup> *Id.* at III-F-80.

<sup>371</sup> Consumers Opening e-workpaper “Locomotive Shop specs.pdf.”

<sup>372</sup> Consumers Opening at III-F-80.

<sup>373</sup> CSXT Reply at III-F-125.

<sup>374</sup> CSXT Reply at III-F-125.

<sup>375</sup> Consumers Rebuttal at III-D-7.

<sup>376</sup> *See* Consumers Rebuttal e-workpaper “Jib Crane and Hoist Unit Costs.pdf” (additional cost of \$7,625).

Of note, is that the drawings supplied by CSXT in discovery did not depict building foundations or pits.<sup>377</sup> However, Kessel’s drawings did show foundations<sup>378</sup> and the pits are described in their proposal.<sup>379</sup> As such, Consumers’ engineers reject these additional costs.

ii. **A 6.5 foot Pit Is Inadequate to House Drop Table Equipment**

Consumers rejects any cost increases for a larger pit or a drop table because while the Barr Yard locomotive shop would allow for approximately 99% of running repairs to be made onsite, this facility is not designed to accommodate large-scale maintenance operations. As explained on Opening, “[t]he CERR’s Barr Yard locomotive shop performs sanding, lubrication or other quick-turnaround servicing requirements as needed at the CERR’s locomotive shop.”<sup>380</sup> {

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<sup>377</sup> See Consumers Opening e-workpaper “Loco Shop Blueprint - Barr Yard (CSX-CNSMR-C-16616 to 16648).pdf,” at 6-7 of 33.

<sup>378</sup> Consumers Opening e-workpaper “Chicago IL Locomotive Shop KCI Drawing Set.pdf.”

<sup>379</sup> “The two 3’-6” deep “Gauge Pits” with “Jack Stand Pads” will each be 100’ long and access[ed] by two sets of stairs at each end as show on the proposal dwg. Each side of the pits will have thickened floor slabs 24” thick by 36” wide the full length of the pits to be used for Jack Stands.” Consumers Opening e-workpaper “Chicago IL Locomotive Shop KCI Proposal.pdf” at 9.

<sup>380</sup> See Consumers Opening at III-D-12.

} Consumers' engineers did not include a drop table or larger pit because the existing Barr Yard, which is what Consumers engineers used in designing the pit, has a similar "wheel" or smaller pit to allow for single wheel sets. The terms "wheel pit" and "drop table" are sometimes used incorrectly,<sup>382</sup> and just as this industry article reports a drop table at the existing CSXT Barr Yard when due to space constraints it must be a wheel,<sup>383</sup> the Kessel proposal also used the incorrect terminology and used "drop table pit" instead of "drop pit."<sup>384</sup> CSXT seizes on the semantics to make this point and misstates what Consumers' engineers included in their Locomotive Shop design specifications with respect to a drop table.<sup>385</sup> CSXT's Reply incorrectly states that "Consumers requests pits. . .with one track including a 6.5 foot deep section for a drop table.....," when Consumers never included a drop table as part of its specifications for the Barr Yard.<sup>386</sup> Consumers' engineers agree with CSXT's engineers that a 6.5' drop pit

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<sup>381</sup> See CSXT Reply at III-D-28.

<sup>382</sup> A drop table pit is able to accommodate a 2 or 3 axle truck assembly. Here, a single axle drop pit is contemplated and this will allow for the removal of a single wheel set.

<sup>383</sup> See William C. Vantuono, *CSX re-opens Chi. Locomotive Shop*, *RailwayAge* (Dec. 18, 2014), <http://www.railwayage.com/index.php/mechanical/locomotives/csx-re-opens-chicago-locomotive-shop.html?channel=>.

<sup>384</sup> See Consumers Opening e-workpaper "Chicago IL Locomotive Shop KCI Proposal.pdf" at 7.0 (p. 9 of 34).

<sup>385</sup> See Consumers Rebuttal e-workpaper "CSXT discovery drawing S-3.pdf" (shows a pit labeled "turn-table pit 6'-6" deep").

<sup>386</sup> Compare *id.* with CSXT Reply at III-F-126-127; see also Consumers Opening e-workpaper "Locomotive Shop specs.docx."

is inadequate to house drop table equipment. It was never Consumers' engineers intent to have such a small drop pit accommodate a drop table and as provided by the specifications to Kessel state, this is a "perpendicular drop pit 6'6" deep that is 9' x 38'."<sup>387</sup> Consumers' engineers were merely replicating the CSXT shop drawing provided in discovery that has a pit 6'6" deep.<sup>388</sup> At the CERR Barr Yard locomotive shop, it is expected that this pit will be used to remove a single wheel set and therefore a drop table or large crane, which is required to drop an entire truck assembly, is not warranted because these larger repairs would be sent out and {  
} <sup>389</sup>

**iii. Consumers' Design Does Not Require Additional Exhaust Ventilation**

Consumers rejects the costs for exhaust ventilation in the pits because ventilation is not required or necessary. The 6'6" pit will not have people working in it, and the 3'6" pit does not meet OSHA standard for a confined space

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<sup>387</sup> Consumers Opening e-workpaper "Locomotive Shop specs.docx"  
<sup>388</sup> See Consumers Rebuttal e-workpaper "CSXT discovery drawing S-3.pdf" (shows a pit labeled "turn-table pit 6'-6" deep").  
<sup>389</sup> As explained on Opening, {

} no cost for overhauls of road locomotives is included in Consumers' calculations." See Consumers Opening at III-D-10-11.

as people are generally taller than 3'6" and therefore will not be "fully" entering the pit.<sup>390</sup> However, ventilation is provided for the production area.<sup>391</sup>

**iv. Additional Grinder Pump Costs are Not Required**

Consumers rejects the additional costs for grinder pumps because the costs for drains were already included on Opening and there is nothing that would prevent the installation of a gravity fed drainage system. Consumers' engineers as part of the Locomotive Shop bid specifications provided to Kessel Construction, Inc. ("KCI") required the pits to have floor drains.<sup>392</sup> While Consumers' engineers did not specify whether the drains needed to be gravity fed or be equipped with pumps, given that the specifications clearly contemplated a drainage system and that KCI referenced these specifications in their proposal, these costs were included as part of the KCI quote.<sup>393</sup>

**v. Fall Protection was Included on Opening**

Consumers rejects CSXT's proposed increase in costs for fall protection for the drop pit because railing costs were already included as part of

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<sup>390</sup> See OSHA, Permit-Required Confined Spaces, <https://www.osha.gov/Publications/osha3138.html> (last accessed May 14,2016) ("By definition, a confined space: Is large enough for an employee to enter fully and perform assigned work....").

<sup>391</sup> See Consumers Opening e-workpapers "Chicago IL Locomotive Shop KCI Proposal.pdf" at 13.1 (p.23 of 36).

<sup>392</sup> Consumers Opening e-workpaper "Locomotive Shop specs.docx" at 1.1 and 1.2 ("Pits should have lights, power, air and floor drains."; and see generally Consumers Rebuttal e-workpaper "All Buildings CERR 2015.dwg." (provided to KCI for bid).

<sup>393</sup> See Consumers Opening e-workpaper "Chicago IL Locomotive Shop KCI Proposal.pdf" at 2 (cover letter to Dick Balas).

the Kessel proposal.<sup>394</sup> Consumers also takes issue with CSXT’s statement that “Consumers also only includes platforms at floor level on one track and omits fall protection, which makes this one platform unsafe and locomotives on other tracks inaccessible.”<sup>395</sup> This statement by CSXT is incorrect as all of the platforms have fall protection<sup>396</sup> and the locomotives are all accessible at floor level platforms.<sup>397</sup>

vi. **Additional Fluid Service Storage and Distribution Equipment is Not Required**

Consumers did not err by “omit[ing] fluid service storage and distribution equipment.” It is not necessary for each of the service and inspection spots to have their own station with fluids. Further, there is adequate space in the equipment room and adjacent rooms such that the fluids can be stored in close proximity to the distribution equipment.<sup>398</sup> It would also be possible to temporarily store some of the fluids outside. Again, the CERR’s Barr Yard is designed to service significantly fewer locomotives than the existing Barr Yard (15 dedicated CERR locomotives plus occasional inspection of road locomotives

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<sup>394</sup> See Consumers Opening e-workpaper “Chicago IL Locomotive Shop KCI Proposal.pdf” at 7.0 (p. 9 of 34) (“each side will have elevated platforms on each side with fixed railings.”).

<sup>395</sup> CSXT Reply at III-F-127.

<sup>396</sup> Consumers Opening e-workpaper “Locomotive Shop specs.docx” at 1.2 (“Track also needs platforms (with handrails and stairs) on both sides of track at locomotive floor height.”).

<sup>397</sup> See *id.*

<sup>398</sup> The two rooms are 35’x32’ and 35’x39’. See Consumers Opening “Locomotive Shop specs.docx” at 1.7 (“32’x36’ room in shop area for Mechanical equipment...”); “Chicago IL Locomotive Shop KCI Drawing Set.pdf” (room is at intersection of column lines B and 4).

v. “maintenance and repair of 120 locomotives per month” at existing Barr Yard),<sup>399</sup> and as such does not warrant additional space for fluid storage and distribution equipment because it will not be necessary as CSXT contends, to limit the “hostling of locomotives within the repair facility.”<sup>400</sup>

**vii. Opening Design Included Sufficient Clearances and Structural Support**

Consumers rejects CSXT’s argument and associated costs for modifying the layout of the locomotive shop to increase clearances and structural support. The existing Barr Yard, which according to the CSXT blueprints provided in discovery<sup>401</sup> does not have the “12 freestanding support columns” called for as part of CSXT’s Reply.<sup>402</sup> Problematically, the CSXT quote for the crane specifies that it is 95 feet wide,<sup>403</sup> whereas the CSXT locomotive shop drawing has the crane span as 97 feet,<sup>404</sup> proving that the crane is not sitting on the 12” columns it should be. If not an oversight, this is purposefully misleading as CSXT is arguing that their design is superior as it would have more open floor space and would not be obstructed by extra columns. But CSXT would need to

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<sup>399</sup> See CERR Operating Statistics\_Rebuttal.xlsx,” cell K28. See William C. Vantuono, *CSX re-opens Chi. Locomotive Shop*, RailwayAge (Dec. 18, 2014), <http://www.railwayage.com/index.php/mechanical/locomotives/csx-re-opens-chicago-locomotive-shop.html?channel=>.

<sup>400</sup> See CSXT Reply at III-F-127.

<sup>401</sup> See Consumers Opening e-workpaper “Loco Shop Blueprint - Barr Yard (CSX-CNSMR-C-16616 to 16648).pdf.”

<sup>402</sup> See CSXT e-workpaper “Overhead Crane Unit Costs.pdf” at 2.

<sup>403</sup> See *id.* at 4.

<sup>404</sup> CSXT e-workpaper “CERR Loco Shop Layout.pdf.”



include two sets of columns because a separate set would be required in addition to the set already depicted by CSXT that are recessed against the wall.<sup>405</sup> Further, as discussed *infra* at III-F-d.viii, Consumers' engineers do not suggest that a bridge crane be added at the Barr Yard, which means that hose reels can continue to be hung from the ceiling and will not need to be floor mounted.<sup>406</sup> Of note, is that the existing CSXT Barr Yard, which has the same layout as the proposed CERR Barr Yard, services 120 locomotives per month. This is upwards of nine to ten times the number of locomotives that are expected to be serviced at the CERR's Barr Yard even when the sporadic maintenance of foreign locomotives is included.<sup>407</sup> Further, the existing CSXT locomotive shop at the Barr Yard has a partial wall between the two tracks, and as can be seen from the picture in the Railway Age article,<sup>408</sup> there is no clear path for a forklift to drive between locomotives and yet this facility is reported to have the capacity to service 120 locomotives a month. Given that the CERR's Barr Yard design was based on CSXT's existing Barr Yard, Consumers rejects these additional costs to increase clearances and structural support.

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<sup>405</sup> *See id.*

<sup>406</sup> *See* CSXT Reply at III-F-127.

<sup>407</sup> *See* CERR Operating Statistics\_Rebuttal.xlsx," cell K28; William C. Vantuono, *CSX re-opens Chi. Locomotive Shop*, RailwayAge (Dec. 18, 2014), <http://www.railwayage.com/index.php/mechanical/locomotives/csx-re-opens-chicago-locomotive-shop.html?channel=>.

<sup>408</sup> *See id.*

**viii. Consumers Accepts Costs for Larger Crane**

As discussed above, the CERR's Barr Yard is not designed to accommodate large-scale maintenance operations. However, Consumers' engineers agree that a larger crane will be required to lift the wheel sets and therefore will accept the additional costs for the H-Frame crane hoist.<sup>409</sup> But the H-Frame crane hoist is all that will be required because Consumers' engineers specifically are not including a drop table, and as such there would be no reason to lift an entire truck assembly or to remove a traction motor. Instead, these items would be removed at the same off-site location where they would be serviced.<sup>410</sup>

**ix. A Drop Table is Not Required**

Consumers engineers reject CSXT's proposed additional costs for a drop table because, as discussed *infra*, a drop table was never contemplated and was not included in the specifications<sup>411</sup> because the existing pit at CSXT's Barr Yard also has a maximum depth of 6.5 feet, which as CSXT states in their Reply does not allow for the installation of a drop table.<sup>412</sup> The fact that the proposal prepared by the building contractor states the costs for a drop table are not included cannot be used by CSXT as conclusive evidence that Consumers'

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<sup>409</sup> See Consumers Rebuttal e-workpaper "Jib Crane and Hoist Unit Costs.pdf" (additional cost of \$7,625).

<sup>410</sup> See discussion *supra* at III-F-7.ii regarding larger maintenance and repairs being performed off-site.

<sup>411</sup> See Consumers Opening e-workpaper "Locomotive Shop specs.docx."

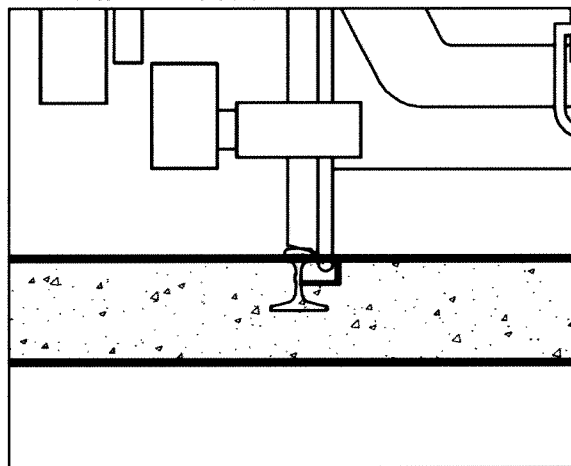
<sup>412</sup> See CSXT Reply at III-F-127 ("A 6.5 foot pit is not deep enough to house drop table equipment....").

engineers intended to include a drop table. This is a game of semantics, and given that Consumers’ engineers never made reference to a “drop table,”<sup>413</sup> Consumers rejects these additional costs.

x. **Embedded Rail was Included in Opening Costs**

Consumers’ engineers agree with CSXT that embedded rail is required and these costs were accounted for in Opening.<sup>414</sup> The drawing below is from KCI’s cross-section of the locomotive shop and it clearly depicts rail embedded in concrete:

**REBUTTAL FIGURE III-F-1: Cross Section of Rail Embedded in Concrete<sup>415</sup>**



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<sup>413</sup> See Consumers Opening e-workpapers “Locomotive Shop specs.docx.” (pit is referred to as a “drop pit” and not a “drop table pit”); “2015 Buildings.xlsx,” tab “Locomotive Shop Equipment,” cell A14 (pit is referred to as a “wheel pit (38’x9’x6.5’)”).

<sup>414</sup> It should be noted that while CSXT states the “locomotive shop contains a myriad of other omissions and inadequacies,” frequently the costs for these items were included on Opening. See CSXT Reply at III-F-128.

<sup>415</sup> See Consumers Opening e-workpaper “Chicago IL Locomotive Shop KCI Drawing Set.pdf” at 2 (drawing depicts locomotive sitting on rail that is in concrete).

While the first page of KCI's locomotive shop drawings does not show embedded rail, this is because this is a more general drawing and it uses ties to represent track.<sup>416</sup>

**xi. Pedestal Rail was Included in Opening Costs**

Consumers rejects any additional costs for pedestal rail because these were included as part of the Opening costs. While Consumers' engineers did not specifically call out this item, the Locomotive Shop specifications require track to be placed in a 20'6" wide pit, and as depicted by KCI's drawing, they are in the center of this pit and therefore would require support.<sup>417</sup> KCI's proposal provides that "[s]upport stands for the train rail (supplied and installed by owner) will be fabricated, installed and finish painted."<sup>418</sup> Consumers' engineers included the costs for the rail "supplied by the owner" as part of the III-F-3 track for the Yard, and notably, this amount of track through the buildings is not deducted in the Yard track mile costs.<sup>419</sup> Consumers' engineers also had Kessel prepare this quote specifically because they have experience building locomotive shops.<sup>420</sup> This was not an error or omission, as CSXT suggests, but instead reliance by

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<sup>416</sup> *See id.* at 1.

<sup>417</sup> *See* Consumers Opening e-workpaper "Locomotive Shop specs.docx" at 1.2; "Chicago IL Locomotive Shop KCI Drawing Set.pdf" at 1.

<sup>418</sup> *See* Consumers Opening e-workpaper "Chicago IL Locomotive Shop KCI Proposal.pdf" at 7.0 (p. 11 of 36).

<sup>419</sup> *See* Consumers Opening e-workpaper "2015 Ballast & subballast Worksheet.xlsx," tabs "YARDS, LOCO SHOP," cells K6 and L6.

<sup>420</sup> *See* Consumers Rebuttal e-workpaper "Kessel experience.pdf."

CSXT on preliminary design drawings that were prepared to accompany KCI's bid.

**xii. Ramps Can Be Adjusted at No Additional Cost**

If CSXT wants to dispute the slope of the ramps into pits that is fine, but Consumers does not see the point of this objection because the costs for ramps were included on Opening,<sup>421</sup> and the Kessel drawings were preliminary and not the final design. As such, the slope of the ramps could be modified without incurring any increase in costs.

**xiii. Stairs from Shop to Gage Pits Included in Opening**

Consumers on Opening included stairs from the shop to the gage pits, and these were also included in Kessel's proposal.<sup>422</sup> Again, it appears that CSXT was relying on a cursory review of the Kessel drawing<sup>423</sup> instead of reviewing the text of Consumers' specifications and the Kessel proposal.

**xiv. Overhead Locomotive Doors are Adequate**

CSXT's contention that the overhead doors are not large enough is without merit. Consumers' engineers had to scale off the measurements from the CSXT drawing that was provided in discovery,<sup>424</sup> because even though it was

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<sup>421</sup> See Consumers Opening e-workpaper "Locomotive Shop specs.docx" (item 1.2 includes a "3'6" deep ramp").

<sup>422</sup> See Consumers Opening e-workpaper "Chicago IL Locomotive Shop KCI Proposal.pdf" at 7.0 (p. 9 of 34).

<sup>423</sup> Consumers Opening e-workpaper "Chicago IL Locomotive Shop KCI Drawing Set.pdf."

<sup>424</sup> See Consumers Opening e-workpaper "Loco Shop Blueprint - Barr Yard (CSX-CNSMR-C-16616 to 16648).pdf" at 6.

stamped as a final design, these dimensions were not provided. At CSXT's existing Barr Yard locomotive shop the dimensions of the overhead doors are 14ft x 16.5ft. In comparison, the CERR's Barr Yard locomotive shop will have 12ft x 16ft doors, which is adequate for a locomotive that is only 10.5ft x 15.25ft.

**xv. Emergency Backup Power is Not Required**

Consumers rejects having emergency power for the locomotive shop because there was no evidence submitted by CSXT to suggest that the power outages are frequent or lengthy enough to warrant such a system for a small shop that is fairly limited and primarily serves 15 locomotives.

**e. Car Repair Shop**

CSXT and Consumers are in agreement that the CERR does not require a Car Repair Shop.<sup>425</sup>

**f. Crew Change Facilities and Yard Office**

Consumers on Opening provided for crew change buildings along the CERR at 71<sup>st</sup> Street, Barr Yard, Curtis, and West Olive.<sup>426</sup> CSXT on Reply removed the facility at the Barr Yard and proposed additional costs for a foundation, exterior stairs, paving, a women's restroom, and square footage.<sup>427</sup> Consumers rejects CSXT's proposal to remove the crew change facility at the Barr Yard and to increase the square footage, but has accepted some of CSXT's other design modifications.

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<sup>425</sup> Consumers Opening at III-F-81; CSXT Reply at III-F-129.

<sup>426</sup> Consumers Opening at III-F-82.

<sup>427</sup> CSXT Reply at III-F-130-131.

Consumers accepts that concrete piers and a foundation will be required, but rejects CSXT's over-design requiring a perimeter foundation, stem walls, and a slab. A floor slab is not required because the site under the building will be cleared, excavated and filled with a dozer.<sup>428</sup> This method provides a flat compacted earth surface that is free of debris and that is all that is required under a building of this type.<sup>429</sup> Consumers also accepts the costs for the deeper footings for the Crew Change facility at 71<sup>st</sup> Street because it is located in the Chicago Municipal area, but rejects these costs for the Curtis office because it is most definitely not in the Chicago municipal area and as such would not be subject to these municipal code requirements.<sup>430</sup>

Consumers accepts CSXT's additional costs for ramps and stairs, but rejects the additional costs for "women's restrooms" because it included a separate single occupancy accessible restroom for that purpose. Each facility is designed to accommodate 15 persons, and as such having a separate locker room does not make sense beyond providing for a separate bathroom that locks, which can accommodate the opposite sex and handicapped personnel. This separate

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<sup>428</sup> See Consumers Rebuttal e-workpaper "2015 Building Sites\_Rebuttal.xlsx," tab "Crew Change," cells D4 and D5.

<sup>429</sup> Consumers' engineers note that a concrete slab is convenient for crawling under the building to make repairs but it serves no other purpose.

<sup>430</sup> See generally City of Chicago, Planning & Zoning Bureau, <https://gisapps.cityofchicago.org/zoning/viewframe.htm> (searchable map that illustrates Chicago municipal area).

bathroom also satisfies all legal requirements as it is a facility with an occupant load of fewer than 15 persons.<sup>431</sup>

Consumers also rejects the additional paving area and associated costs. Consistent with existing rail facilities, these parking spaces do not need to be painted and are gravel.<sup>432</sup> Consumers' engineers also provided for 20 spaces, so even if two spaces are eliminated on the end to allow for additional room to maneuver, there will still be 18 spaces.<sup>433</sup> Notably, the amount of paving that CSXT proposes (432 square feet for Crew Change facilities and 864 square feet for MOW buildings) is only for the backup space at the end of the "dead-end aisle" - the little turn around area at the end of the parking lot. In summary, CSXT is proposing a paved area at the end of a gravel parking area so a car can back out of a space that isn't painted on a gravel lot. Given the bizarre nature of this request, Consumers is rejecting these additional costs.

**g. Maintenance of Way Buildings (Roadway Buildings)**

Consumers on Opening provided for Maintenance of Way ("MOW") office and garage buildings at the Barr Yard and at Grand Junction.<sup>434</sup> CSXT on Reply removes the MOW building at the Barr Yard, but keeps the MOW garage,

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<sup>431</sup> According to the International plumbing code section 403.2.2, separate facilities shall not be required in structures where occupant load is fewer than 15 persons. See Consumers Rebuttal e-workpaper "International plumbing code 403.2.pdf."

<sup>432</sup> See Consumers Rebuttal e-workpapers "Google Earth MP 85.95.pdf" and "Google Earth MP 85.95 close up.JPG."

<sup>433</sup> See Consumers Opening e-workpaper "Crew Building.pdf."

<sup>434</sup> Consumers Opening at III-F-83.



and makes the same modifications to the MOW buildings that it did to the Crew Change Facilities.<sup>435</sup> Consumers rejects the removal of the MOW building at the Barr Yard and any increases to the overall square footage, but accepts some of CSXT's proposed design modifications.

Consumers accepts CSXT's additional costs for ramps and stairs and agrees to include additional costs for piers and a foundation.<sup>436</sup> However, as with the crew change buildings, Consumers rejects CSXT's other modifications requiring additional square footage and parking. The MOW building is designed to accommodate less than 15 occupants, as such, the parking area with 20 spaces (18 if two are removed for additional room to maneuver) is adequate. Likewise, given that fewer than 15 persons will be in the MOW building at any one time, having a separate single occupancy restroom will satisfy the female bathroom requirement.<sup>437</sup> Consumers also specifically rejects CSXT's over-design requiring a perimeter foundation, stem walls, and a slab. A floor slab is not required because the site under the building will be cleared, excavated and filled with a

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<sup>435</sup> CSXT Reply at 131-132.

<sup>436</sup> Foundation will include twenty-six 24" diameter x 48" deep concrete piers. Each pier will cost \$277, making the total foundation cost for each building \$7,200. *See* Consumers Rebuttal e-workpapers "2015 Buildings\_Rebuttal.xlsx," cell C16 (0.47 cubic yards per pier at \$595/cubic yard = \$277 per pier); "page 75 ModSpace Building Foundations.pdf" (\$595/cubic yard).

<sup>437</sup> According to the International plumbing code section 403.2.2, separate facilities shall not be required in structures where occupant load is fewer than 15 persons. *See* Consumers Rebuttal e-workpaper "International plumbing code 403.2.pdf."

dozer.<sup>438</sup> This method provides a flat compacted earth surface that is free of debris and that is all that is required under a building of this type.<sup>439</sup>

**h. Turntable**

Consumers on Opening did not provide costs for a turntable, and on Reply CSXT adds these costs stating that one is necessary at the Barr Yard in order to turn the locomotives.<sup>440</sup> Consumers on Opening did not provide a reason or alternative to the turntable that exists at the current Barr Yard because a turntable is more of a historical item or relic that is no longer in use by most Class I railroads today.<sup>441</sup> In the past, when steam locomotives could only operate in one direction a turntable was a necessity, but today's diesel locomotives can run in both directions. Therefore, a turntable, like a drop table, would have little to no practical use at the CERR's shop that is designed to service 15 locomotives. Instead of a turntable, the "Y" track at the Dolton interchange that is 0.56 miles away from the shop could be used when it is necessary to turn the locomotives. For these reasons, Consumers rejects the costs of installing and maintaining a turntable.

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<sup>438</sup> See Consumers Rebuttal e-workpaper "2015 Building Sites\_Rebuttal.xlsx," tab "MOW," cells D4 and D5.

<sup>439</sup> Consumers' engineers note that a concrete slab is convenient for crawling under the building to make repairs but it serves no other purpose.

<sup>440</sup> CSXT Reply at 132.

<sup>441</sup> Consumers' engineers actually tried to cost this item but not surprisingly, the only record found was of the Illinois Railway Museum's purchase in an auction of the UP Burnham shop's turntable for \$10,000. See Consumers Rebuttal e-workpaper "A BIG announcement - Illinois Railway Museum Blog.pdf."

**i. Air Compressor Building & Yard Air Systems**

Consumers on Opening did not provide for an air compressor building or yard air because Consumers' engineers determined that the yard activity was light enough to not require it.<sup>442</sup> CSXT in Reply disputed this and argued that having an air system is necessary for charging of the air brakes.<sup>443</sup> Consumers rejects CSXT's additional costs for an air compressor building at the CERR's Barr Yard. It will be possible to re-charge the air using the locomotives, and Consumers' engineers estimate that while this may take upwards of 30-40 minutes, this is something that would not be problematic given the limited traffic and that only 15 locomotives will be primarily serviced at the CERR's Barr Yard.<sup>444</sup> That aside, the inflated costs provided by CSXT defy all logic. The air compressor building called for by CSXT's engineers is over {

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<sup>442</sup> Consumers Opening at III-F-86.

<sup>443</sup> CSXT Reply at III-F-132-133.

<sup>444</sup> Locomotives are required to be able to recharge the air for the brake system. Without this function, trains could never move after braking in an emergency or if they braked away from yard air. *See generally* 49 C.F.R §§ 229, 232 (generally provide that a locomotive is the means to charge the air for braking purposes, but allow for alternate means such as yard air or a locomotive that is coupled up that will not ultimately be the lead locomotive); 49 C.F.R. § 232.107(a)(1) ("A railroad shall adopt and comply with a written plan to monitor all yard air sources, other than locomotives, to determine that they operate as intended..."); 49 C.F.R. § 232.107(b) ("Condensation and other contaminants shall be blown from the pipe or hose from which compressed air is taken prior to connecting the yard air line or motive power to the train.").

}<sup>445</sup> First, CSXT uses costs for

an air compressor building at {

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<sup>445</sup> See Consumers Rebuttal e-workpaper “2015 Buildings\_Rebuttal.xlsx,”  
tab “Locomotive Shop,” cell I20.

<sup>446</sup> {

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<sup>447</sup> {

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**j. Wastewater Treatment**

CSXT on Reply accepted Consumers' wastewater treatment costs.<sup>453</sup>

**k. Yard Site Costs**

Consumers on Opening included the discussion of lighting, paving, drainage and fencing within III-F-7.h. "Yard Air, Yard Lighting and Yard Drainage," and as necessary within the other sections on CERR building and site costs. These items are now addressed separately below in order to conform to CSXT's Reply format.

**i. Yard Lighting**

Consumers on Opening provided for lighting at the CERR's Barr Yard. CSXT on Reply accepted most of Consumers' lighting calculations, but proposed some modifications with respect to electrical enclosures and re-sizing of

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<sup>451</sup> See Greg Zielinski, *On the Right Track: R.R. efficiency made better*, EDF+Business (Oct. 25, 2011), <http://business.edf.org/blog/tag/union-pacific-railroad/> ("Using 50 HP compressors in place of 150 HP units that consumer energy at a cost of \$40k per year can save up to \$20k annually *per compressor*." (emphasis in original)).

<sup>452</sup> Consumers Opening at III-F-86.

<sup>453</sup> CSXT Reply at III-F-133; Consumers Opening at III-F-84.

conduits. Consumers will accept CSXT's additional costs for electrical enclosures at Barr Yard, but rejects the additional costs for replacing the 2-inch conduit with a 4-inch conduit. CSXT contends that a 4-inch conduit is necessary because it will need to house "five electrical wires,"<sup>454</sup> and specifically 4 #2 wires and 1 #4 wire.<sup>455</sup> However, the 2-inch galvanized steel conduit is sufficient as it will hold 64 #10 wires, or alternatively, 16 #4 wires or 8 #2 wires.<sup>456</sup> Therefore, Consumers rejects these additional costs to increase the size of the conduit.

**ii. Yard Paving**

Consumers on Opening only provided for paving from the Barr Yard entrance to the fuel pad, and a turnaround area for the fuel trucks.<sup>457</sup> CSXT on Reply agreed to these quantities and unit costs, but then requests "paving to provide additional parking for additional headquarter support and MOW personnel at the expanded Barr Yard facilities."<sup>458</sup> In the first instance, Consumers does not agree to have all personnel reporting to the Barr Yard and rejects all increase in square footage and acreage. In the second instance, it makes no sense to provide for a few paved parking spaces when the rest of the lot is gravel. For these reasons, Consumers rejects these additional costs for yard paving.

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<sup>454</sup> See CSXT Reply at III-F-134.

<sup>455</sup> See CSXT Reply e-workpaper "2015 Building Sites\_Reply.xlsx," tab "Unit Costs," cells A84 & A85.

<sup>456</sup> See Consumers Rebuttal e-workpaper "NEC code table.pdf."

<sup>457</sup> See Consumers Opening e-workpaper "Barr Yard.pdf"; and Stick Diagrams

<sup>458</sup> CSXT Reply at III-F-134.

### iii. Yard Drainage

Consumers on Opening provided for drywells to manage yard drainage.<sup>459</sup> CSXT on Reply argues that this storm water management system for the Barr Yard is inadequate based on the underlying soils and substitutes the costs for a catch basin and storm sewer.<sup>460</sup> But Consumers' engineers determined that the soils map presented by CSXT does not show the types of soils present in the Barr Yard, as it is classified "533 Urban Land."<sup>461</sup> Urban Land has no soils parameters described by the Soil Conservation Service. In accordance with the map presented by CSXT, the land immediately to the north of the Barr Yard and along its entire length, is classified as "153A Pella silty clay loam."

According to Table 19 – Physical Properties of the Soils, page 695 of the "Soil Survey of Cook County, Illinois" prepared by the USDA, soil type "153A Pella," at a depth of 42" to 60" has a permeability rate of 0.6 to 6 inches per square foot per hour. Assuming an average permeability rate of 3.4 inches per square foot per hour, this is more than sufficient for subsurface storm water disposal.<sup>462</sup>

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<sup>459</sup> Consumers Opening e-workpaper "Yard Drainage Cost.pdf."

<sup>460</sup> CSXT Reply at III-F-134-135.

<sup>461</sup> See CSXT Reply e-workpaper "Barr Yard NRCS Soil Report.pdf."

<sup>462</sup> The area immediately to the south of the Barr Yard consists of a soil designated "805B Orthents, clayey, undulating," and this is a much poorer soil from the permeability standpoint, with a rate at a depth of 7" to 60" of 0.02 to 0.06 inches per hour. See Consumers Reply e-workpaper "Barr Yard NRCS Soil Report.pdf"; Consumers Rebuttal e-workpaper "Soil Survey Cook, IL – Page 695.pdf." However, based on the map it appears this soil is only in the areas

Storm water systems are sized based upon a recurring rainfall event. The Illinois Dept. of Transportation uses a 25 year storm event for sizing drainage culverts. This means there is a 4% chance of a 25 year storm event happening in any given year. CERR Engineers have used a 100 year storm event to size the Barr Yard drainage system. There is a 1 % chance that this severity of storm will occur in any year. A 100 year storm in the area of the Barr Yard produces 7.75 inches of rain in 24 hours.<sup>463</sup> Consumers' engineers determined that each drywell could take 2,277 cubic feet of water per hour, which is almost ten (10) times what is necessary to accommodate a 100 year storm event.<sup>464</sup>

Given that the drywells will provide sufficient drainage for the Barr Yard, Consumers rejects CSXT's additional costs for a catch basin and storm sewer network.

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immediately around the pond that is between the yard and W 138th Street. *See* Consumers Reply e-workpaper "Barr Yard NRCS Soil Report.pdf." The area immediately on the southeastern side of the Barr Yard is listed as "232A Ashkum," and the permeability rate from 29"-60" is 0.2 to 0.6 inches per hour, an acceptable rate. *See* Soil Survey Cook, IL – Page 696.pdf."

<sup>463</sup> The 100 year storm for this portion of the City of Chicago is shown on page 29 of Circular 172 "Frequency Distributions of Heavy Rainstorms in Illinois." Consumers Rebuttal e-workpaper "Circular 172 - Frequency Distribution of Heavy Rainstorms in Ill.pdf."

<sup>464</sup> *See* Consumers Rebuttal e-workpapers "Revised Stormwater rebuttal.pdf" and "Table X1245.pdf."



#### iv. Fencing

Consumers on Opening did not provide for fencing of the CERR's Barr Yard because the existing Barr Yard does not have a perimeter fence.<sup>465</sup> As such, Consumers rejects CSXT's costs for yard fencing because these costs are unsubstantiated. CSXT states that 10,014 feet of fencing exists in the current Barr Yard and therefore assumes that these totals reflect the fencing requirements of the CERR's Barr Yard.<sup>466</sup> However, the CERR's Barr Yard is only 63.32 acres,<sup>467</sup> whereas the existing Barr Yard is estimated to be 205 acres.<sup>468</sup> It makes no sense to use the same amount of fencing when the CERR's Barr Yard is 140 acres smaller than the existing Barr Yard.<sup>469</sup> Additionally, while CSXT in its workpaper states that this fencing is "evident in aerial photos,"<sup>470</sup> it is also possible to determine using Google Earth that this fencing belongs to the neighboring non-railroad properties. Specifically, it was determined by Consumers' engineers that the fencing on the south side of the yard west of Route 1 or Halsted Street, which

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<sup>465</sup> Consumers Opening at III-F-86.

<sup>466</sup> See CSXT Reply at III-F-136; CSXT Reply e-workpapers "2015 Building Sites\_Reply.xlsx, tab "YARD" and "Barr Fence Quantities.pdf."

<sup>467</sup> See Consumers Opening e-workpaper "Barr Yard Site Development Costs.xls," tab "Yard Acreage," cell A2.

<sup>468</sup> See Consumers Rebuttal e-workpaper "Barr Yard Acres Calc using Google Earth Pro.jpg."

<sup>469</sup>  $141.7 \text{ acres} = 205 \text{ acres}$  (approximate acreage of existing Barr Yard)–63.32 (CERR's Barr Yard acreage).

<sup>470</sup> See CSXT Reply e-workpaper "2015 Building Sites\_Reply.xlsx," tab "YARD" at cell F5.

CSXT labels as being 2,209 feet,<sup>471</sup> is the property of the Metropolitan Water Reclamation District of Greater Chicago.<sup>472</sup> Additionally, the fence on the south side west of Halsted only surrounds the MWRDGC pond.<sup>473</sup> It was also determined that the 4,045 feet of fencing on the south side of the yard is the property of the city and does not prevent access to the Barr Yard because it is open on both ends.<sup>474</sup> Lastly, the fence on the north side of the yard, which CSXT labels as being 2,831 feet,<sup>475</sup> encloses the neighboring properties and as such, was most likely not installed by the railroad. The north fencing that is west of Halsted is likely the property of Calumet Armature & Electric Co., Expert Transport Repair; whereas fencing east of Halsted is most likely owned by Bonell Manufacturing Co. Inc.<sup>476</sup> This is therefore not an instance where the railroad has installed fencing to keep people out, but instead most likely a case where the neighboring properties have already installed fencing. CSXT cannot now come in and claim that fencing installed by neighbors should be included as part of the CERR's Barr Yard costs. For the above reasons, Consumers rejects CSXT's additional costs for fencing as unnecessary and unjustified.

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<sup>471</sup> See CSXT Reply e-workpaper "Barr Fence Quantities.pdf."

<sup>472</sup> See MWRDGC fence sign photo.pdf."

<sup>473</sup> See Consumers Rebuttal "Barr yard fence around MWRDGC pond.pdf."

<sup>474</sup> See Consumers Rebuttal e-workpaper "Barr yard fence south side.pdf."

<sup>475</sup> See CSXT Reply e-workpaper "Barr Fence Quantities.pdf."

<sup>476</sup> See Consumers Rebuttal "Barr yard fence north side.pdf."

## 8. **Public Improvements**

### a. **Fences**

Consumers on Opening did not provide for fencing because there was no evidence of existing fencing along the lines that the CERR is replicating. CSXT on Reply agrees with Consumers “that the vast majority of the CSXT right-of-way being replicated in this case is not fenced,” but adds security fencing for signal and communications equipment.<sup>477</sup> Consumers agrees to these additional costs for security fencing.

### b. **Signs**

CSXT has accepted Consumers’ inventory and cost for signs.

### c. **Highway Crossings and Road Crossing Devices**

#### i. **Grade Separations**

The CERR grade separations are all highway overpasses and are discussed *supra* in Part III-F-5.

#### ii. **At-grade Crossings**

Consumers on Opening provided an inventory of at-grade crossings along the CERR and 100 percent of the construction costs.<sup>478</sup> CSXT on Reply accepts Consumers’ at-grade crossing inventory, but adds costs for “drainage, traffic control, and pavement striping.”<sup>479</sup> Consumers did not need to add costs to

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<sup>477</sup> CSXT Reply at III-F-136.

<sup>478</sup> Consumers Opening at III-F-87; Consumers Opening e-workpapers “2015 Crossing List.xls” and “III - F TOTAL - 2015.xlsx.”

<sup>479</sup> CSXT Reply at III-F-137.

install “drainage and dig-out the crossing” (\$8,500) because these costs are included in the roadbed preparation cost for constructing the initial roadbed. The drainage portion of this cost is for a small 4” perforated drain which would be installed during the roadbed construction. The pavement markings (at a cost of \$5,000) are the responsibility of the local municipality. The estimate relied on by Consumers’ engineers was an instance where the crossing was rebuilt and the contractor was disturbing the existing markings.<sup>480</sup> Likewise, traffic control when the crossing is first installed would be covered under the original permit and would not be a separate cost incurred by the contractor.

**9. Mobilization**

CSXT accepted Consumers’ Mobilization cost factor of 2.7% for all CERR road property investments except for land, but added land acquisition costs.<sup>481</sup> For the reasons discussed *supra* at III-F-1.b.iv, Consumers rejects these additional costs.

**10. Engineering**

CSXT accepted Consumers’ engineering additive of 10%.<sup>482</sup>

**11. Contingencies**

CSXT accepted Consumers’ contingency factor of 10%.<sup>483</sup>

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<sup>480</sup> See Consumers Opening e-workpaper “CR Construction Quote For Crossing.pdf.”

<sup>481</sup> CSXT Reply at III-F-137-138.

<sup>482</sup> CSXT Reply at III-F-138; Consumers Opening at III-F-88.

<sup>483</sup> CSXT Reply at III-F-138; Consumers Opening at III-F-88.

12. **Construction Schedule**

CSXT accepted Consumers' 30-month construction schedule.<sup>484</sup>

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<sup>484</sup> CSXT Reply at III-F-138; Consumers Opening at III-F-88-90.

**III-G Discounted  
Cash Flow**

### III. G. DISCOUNTED CASH FLOW ANALYSIS

In Part III-G of its Reply, CSXT takes issue with elements of Consumers' SAC DCF analysis, and promotes major alterations to the Board's established approach on equity flotation costs. Each of these issues is addressed below.

#### 1. Cost of Capital

The CERR's cost of capital is comprised of the cost of common equity ("COE"), the cost of debt ("COD") and the cost of preferred equity (if any). CSXT "accepts Consumers' use of the Board determined railroad industry cost of capital as the starting point for the CERR," but then made three (3) changes to Consumers' calculations.<sup>1</sup> First, CSXT corrects a transposition error in Consumers' presentation of the 2013 COD in its DCF model. Second, CSXT argues for the inclusion of equity flotation costs in its COE calculation. Third, CSXT claims that Consumers' DCF model improperly calculated interest payments on the CERR's COD. Consumers acknowledges the transposition error that substituted the Board-determined value for the 2013 railroad industry debt as a percent of capital for the Board-determined value for the 2013 railroad COD.<sup>2</sup> Consumers corrected the reference issue in its Rebuttal DCF analysis.<sup>3</sup> CSXT's remaining two (2) arguments are without merit, and should be rejected.

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<sup>1</sup> CSXT Reply at III-G-1.

<sup>2</sup> CSXT Reply at III-G-1.

<sup>3</sup> See Consumers Rebuttal e-workpaper "Exhibit III-H-1\_Rebuttal.xlsm," tab "Inputs," cell C62.

a. **Consumers Did Not Improperly Omit Equity Flotation Costs**

CSXT opens its argument with a misstatement of Board precedent on the issue of equity flotation costs. While claiming that the Board has “endorsed the principle” that they should be included -- implying some sort of settled rule<sup>4</sup> -- CSXT failed to mention that the Board has *never* included an equity flotation cost in any proceeding where it was a contested issue.<sup>5</sup> Indeed, the Board consistently has ruled that flotation costs “already are included in the Board’s cost of capital computation,”<sup>6</sup> and therefore should not normally be added as a separate item. A contrary notion appeared for the first time in *Sunbelt*,<sup>7</sup> but the Board gave no explanation for any intended change in its position.<sup>8</sup> Even so, however, the Board rejected the inclusion of equity flotation costs in *Sunbelt* (a figure of 2.1%

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<sup>4</sup> See CSXT Reply at III-G-1.

<sup>5</sup> An equity flotation cost has only been applied once, and that case involved both parties’ agreement to such application. See *AEPCO 2011* at 137 (describing the 2007 *AEP Texas* decision where an equity flotation cost was used).

<sup>6</sup> *AEPCO 2011* at 138, citing *Duke/CSXT*, 7 S.T.B. at 433. See also *DuPont* at 274.

<sup>7</sup> *Sunbelt* at 184.

<sup>8</sup> Had the Board intended such a change, it would have been obliged to explain and justify the shift. See *Manufacturers Railway Co. v. S.T.B.*, 676 F.3d 1094, 1095 (D.C. Cir. 2012); *New York Cross Harbor Railroad v. S.T.B.*, 374 F.3d 1171, 1181 (D.C. Cir. 2004). Certainly the lack of any recent issuances of equity by the railroads that are included in the Board’s cost of capital determination could not suffice; at the time of the *AEPCO 2011* ruling, there had not been such a railroad equity issuance for at least 20 years. In *Sunbelt*, the Board only made a reference to *AEP Texas 2007*, a unique case in which both parties agreed to include flotation costs as part of a recapitalization of the SARR subsequent to its initial stock and debt issuance, a circumstance that is not presented here.



was advocated by the defendant) because a reasonable estimate could not be determined.<sup>9</sup>

In this case, CSXT claims that a flotation cost can be estimated by reviewing the costs of initial public offerings (“IPO”) that have occurred over the last decade.<sup>10</sup> The “evidence” that CSXT offers for its extraordinary 6% flotation cost,<sup>11</sup> however, is flawed and not qualitatively superior to claims that the Board has rejected previously, and fails to meet the strict standard that the Board has set as a condition for considering the inclusion of a separate flotation cost, a condition which has not been satisfied in any previous case (including *Sunbelt*). Consumers therefore does not include equity flotation costs in its Rebuttal DCF model.

**i. CSXT’s Made-for-Litigation Study  
Is Not Valid**

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In *Sunbelt*, the Board echoed its previous holdings that in order to even consider approval of an equity flotation additive, it would have to be presented with “evidence of the existence and size of the equity flotation fee for stock issuances of a similar size (and for transportation companies or other companies with a similar profile) as that needed by the SARR.”<sup>12</sup> To support its

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<sup>9</sup> See CSXT Reply at III-G-2.

<sup>10</sup> CSXT Reply at III-G-2 to III-G-4.

<sup>11</sup> CSXT’s proposed flotation cost for the CERR is almost triple the levels proposed by the defendant (and rejected by the Board) in *Sunbelt* and *DuPont*, and more than 50% higher than the cost advocated by the defendants in *AEPCO 2011*, which the Board also rejected.

<sup>12</sup> *Sunbelt* at 185.

claim here, CERR performed a made-for-litigation study of IPOs across firms from various industries over the last decade, which CSXT contends supports a 6% flotation fee for the CERR.<sup>13</sup> The CSXT study fails the *Sunbelt* test.

First, the Board in the past has repeatedly rejected studies produced specifically for litigation. For Example, in *TMPA* the Board rejected the use of traffic forecasts produced by the defendant's marketing executives and a third-party expert.<sup>14</sup> Likewise, in *Duke/NS* the Board affirmed the preferability of studies that have not been specifically prepared for litigation.<sup>15</sup> In this instance, CSXT relied upon a study produced specifically for this case that is based upon data that is not readily available to the public. CSXT's workpapers show that the data came from Standard & Poor's Capital IQ platform.<sup>16</sup> Capital IQ is a web-based subscription service of Standard & Poor's that provides business research and analyses for its paid subscribers. The data contained within Capital IQ is not readily available to the public at large, so it is not possible to determine the range and domain of the IPO data used by CSXT in its study.<sup>17</sup> CSXT's use of non-

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<sup>13</sup> CSXT Reply at III-G-2 to III-G-4.

<sup>14</sup> *TMPA*, 6 S.T.B. at 603.

<sup>15</sup> *Duke/NS*, 7 S.T.B. at 145.

<sup>16</sup> CSXT Reply at III-G-3, n. 5.

<sup>17</sup> Publicly available data indicates there were likely over 1,200 IPOs in the last decade compared to the approximately 500 included in CSXT's study. For example, Renaissance Capital's IPO Center reported 1,700 IPOs between 2007 and 2015. <http://www.renaissancecapital.com/ipohome/press/ipofilings.aspx>. Also, Professor Jay Ritter, a Professor of Finance at the University of Florida tracks IPO statistics. His data shows there were over 1,000 IPOs between 2005

publicly available data is contradictory to Board precedent, which prefers the use of public, verifiable information instead of proprietary data sources.<sup>18</sup>

Second, CSXT's proffered study does not include analyses of any transportation companies or companies "of a similar size ... [and] with a similar profile" to the CERR.<sup>19</sup> CSXT arrogantly asserts that if its private data study is not accepted then the Board "would in reality be rejecting any such costs for the CERR or any other SARR,"<sup>20</sup> but the fact is that CSXT was well aware of the *Sunbelt* test and simply failed to meet it. It is no excuse to say that the standard is difficult; indeed, given the long-standing precedent against including separate flotation costs on the ground that they already are reflected in the Board's cost of capital calculation,<sup>21</sup> the Board *should* demand precise and clearly comparable evidence specific to the SARR at issue as a condition of considering such an addition.

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and 2014, the last years available. Dr. Ritter's statistics may be lower because he excludes closed-end funds, REITs, acquisition companies, offer prices below \$5, ADRs, limited partnerships, units, banks and S&Ls, and those not listed on CRSP from his statistics. See, [https://www.quandl.com/data/RITTER/US\\_IPO\\_STATS-Historical-US-IPO-Statistics](https://www.quandl.com/data/RITTER/US_IPO_STATS-Historical-US-IPO-Statistics).

<sup>18</sup> *Railroad Cost of Capital – 2006*, Ex Parte No. 558 (Sub-No. 10), at 7 (STB served April 15, 2008) ("[w]e conclude, therefore, that it is perfectly acceptable to rely on changes in the S&P 500 Price Return Index and reject the AAR's reliance on a proprietary data source").

<sup>19</sup> *Sunbelt* at 185.

<sup>20</sup> CSXT Reply at III-G-5.

<sup>21</sup> *DuPont* at 274; *AEPCO 2011* at 138.

**ii. CSXT Disregards Private Lower Cost Equity Placements**

Another key flaw in CSXT's equity flotation cost argument is its underlying presumption that a SARR will incur relatively high costs issuing common equity through an IPO.<sup>22</sup> A high-cost IPO is not the only method available for a company to raise equity capital. CSXT improperly disregards the fact that there are other ways that would be open to a SARR, including private equity placements.<sup>23</sup>

**(a) Private Equity Placements Are Less Expensive**

A private placement (or non-public offering) is a funding round of securities which are sold not through a public offering, but through private transactions, usually to a single or a small number of chosen, accredited investors.<sup>24</sup> Investors in privately placed securities predominantly are highly sophisticated entities or individuals that understand the risk associated with the issuing company and have access to sufficient capital to limit the number of parties involved in the deal. Such investors include, but are not limited to, large

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<sup>22</sup> See CSXT Reply at III-G-2.

<sup>23</sup> CSXT offers a self-serving statement that Consumers has not provided any proof of the feasibility of a private equity placement by the CERR, nor quantified the costs of a private placement. CSXT Reply at III-G-4, n. 6. Since the Board has never included equity flotation costs where the issue has been contested by the parties in the case, it was not Consumers' burden to prove the measure of equity costs that *should* be included.

<sup>24</sup> See, e.g., Brealey, R. A., Myers, S. C., and Allen, F., "*Principles of Corporate Finance, Eighth Edition*," McGraw-Hill Irwin, 2006, at 403 ("Brealey, Myers and Allen").

conglomerates, insurance companies, pension funds, mezzanine funds, stock funds, and trusts.

Private placement of equity entails a much simpler issuing process than a public sale, since in many cases registration statements and other regulatory actions are not required. This allows the issuing companies to avoid the time, expense, and disclosure requirements of filing registration statements and other regulatory notices.<sup>25</sup> They also can avoid the use of underwriters, and avoid expenses avoided with sales commissions and finder's fees.

A SARR such as the CERR would be an excellent candidate for use of a private placement to raise any needed equity capital. The entity has an assured customer base, a reliable cost structure, and a guaranteed revenue stream that is calculated to assure a return on invested capital equal to the cost of that capital. From an investor's perspective, the CERR is a low-risk enterprise that would be fairly easy to evaluate. It is far more likely that the roughly \$500 million in equity capital that the CERR would need could be raised privately, and that a higher-risk/higher cost IPO would not be necessary.

Contrary to CSXT's claim that private equity placements may be more expensive than an IPO, they are by their very nature and purpose less time consuming and expensive than IPOs. This fact is borne out in both academic and financial industry studies.

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<sup>25</sup> See, "*Introduction to Private Placements*" at <http://www.seclaw.com/docs/privateplacement.php/>.

- The underwriting fee for a private placement is believed to be much less than for an equivalent public issue, since the underwriter acts solely as an agent for the issuer and none of the financial risks associated with public underwriting are assumed. To the extent that private placements permit raising significant amounts of funds more quickly and at much less expense than in the case of a prospectus distribution, these are more attractive to both the issuer and investors.<sup>26</sup>
- The advantages of private placements: Lower issuance costs and issuance can be quickly placed.<sup>27</sup>
- In a private placement, securities are sold to one or a few investors, generally institutional investors. The primary advantages of private placements are: (1) lower flotation costs; and (2) greater speed, since the shares do not have to go through the SEC registration process.<sup>28</sup>
- As non-public offerings, most private placements do not have to be registered with the SEC. In addition, businesses do not typically need to disclose detailed financial information, and the need for a prospectus is often waived. For these and other reasons, private placements are usually significantly less complicated and expensive than public offerings.<sup>29</sup>
- Companies opting to raise capital by means of a private placement usually do so because of the lesser time and lower cost associated

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<sup>26</sup> “*Everyone’s A Winner: A Study of Shareholder Gains and Flotation Costs of Private Equity*,” Srivastava, A.K., Carleton University, 1991 at 4 (“Srivastava”). A copy of the paper is included in Consumers Rebuttal e-workpapers at “Flotation Costs of Private Placements.pdf”.

<sup>27</sup> Emery, D.R., Finnerty, J.D., Stowe, J.D., “*Corporate Financial Management*,” Prentice Hall; 3rd edition (October 21, 2006) at Chapter 19. A copy of the text’s slides is included as Consumers Rebuttal e-workpaper “Emery Finnerty Stowe.ppt.”

<sup>28</sup> Brigham, E. F., and Ehrhardt, M.C., “*Financial Management*”, South-Western College Pub; 12th edition (2007). A copy of the relevant pages is included as Consumers Rebuttal e-workpaper “Brigham and Ehrhardt.ppt.”

<sup>29</sup> “Pros and Cons of Private Placement for Your Business”, Sadler, D., *allBusiness*. A copy of the complete article can be found at <https://www.allbusiness.com/pros-and-cons-of-private-placement-for-your-business-12953293-1.html> .

with the offering's preparation and execution, as compared to a public offering, which requires, among other things, the filing of a registration statement with the SEC.<sup>30</sup>

- Any cost comparison starts with the fact that direct transactions take far less time than syndicated transactions, with their written prospectuses and numerous drafting sessions that involve those attorneys, extensive due diligence, and public filings. Nor is there that requirement for a road show, with all its logistics or lead time involved in educating sales forces of investment banks involved in the deal. In addition, direct investments simplify interactions with regulators which can delay or even kill a public offering while the prospectus is scrutinized... This shorter time to market- along with the fact that [private placements] investments are generally not made public until closing -- adds up to enormous cost advantages to issuers.<sup>31</sup>

An illustrative example of some of the foregoing observations is

Airbnb, Inc.'s sale of private equity in 2012, 2014 and 2015. According to Forms D filed by Airbnb, Inc. with the SEC<sup>32</sup>, the company raised \$200 million, \$475 million and \$1.5 billion privately in 2012, 2014 and 2015, respectively, while

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<sup>30</sup> *"Raising Capital: Securities Laws and Business Considerations"*, Minnesota Department of Employment and Economic Development and Oppenheimer, Wolff & Donnelly LLP, Sixth Edition, May 2010, at 53. A copy of the book is contained at Consumers Rebuttal e-workpaper "Raising Capital-Securities Law and Business Considerations.pdf."

<sup>31</sup> *"PIPEs: A Guide to Private Investments in Public Entity"*, edited by Steven Dresner, Bloomberg Press, 2003, at 244. A private investment in public entity ("PIPE") is a type of private placement in which an already publicly traded company performs a private placement of its stock.

<sup>32</sup> According to the SEC, companies may use an exemption under Regulation D to offer and sell securities without having to register the offering with the SEC. When relying on such an exemption, companies must file what's known as a "Form D" after they first sell their securities. Form D is a brief notice that includes basic information about the company and the offering, such as the names and addresses of the company's executive officers, the size of the offering and the date of first sale. See <https://www.sec.gov/answers/formd.htm>.

incurring no sales commissions or finder's fees.<sup>33</sup> By definition, private placements of equity are private, and terms and fees associated with them are not readily reported or are confidential. However, Consumers' research located two (2) academic papers that provide insight into what a private placement may cost.

- Barclay, Holderson and Sheenan examined the evidence on private placements of large-percentage blocks of stock and the rationale for companies to make such placements.<sup>34</sup> The authors found that the reported costs, which include legal and accounting fees, printing fees and the like, averaged only 0.4 percent of the value of the shares registered, with the highest costs being 0.9 percent and the lowest at 0.1 percent.<sup>35</sup>
- Srivastava examined Canadian firms that issued private placements of equity between 1981 and 1987, and found that flotation costs ranged from 0.541 percent for offerings in the \$50 to \$100 million range to 1.402 percent for offerings in the \$20 to \$30 million range.<sup>36</sup>

The costs associated with private equity placements developed by independent researchers are significantly less than the 6% assumed by CSXT for an IPO.

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<sup>33</sup> See [https://www.sec.gov/Archives/edgar/data/1559720/000155972014000002/xsIFormDX01/primary\\_doc.xml](https://www.sec.gov/Archives/edgar/data/1559720/000155972014000002/xsIFormDX01/primary_doc.xml), [https://www.sec.gov/Archives/edgar/data/1559720/000155972014000003/xsIFormDX01/primary\\_doc.xml](https://www.sec.gov/Archives/edgar/data/1559720/000155972014000003/xsIFormDX01/primary_doc.xml), and [https://www.sec.gov/Archives/edgar/data/1559720/000116840415000029/xsIFormDX01/primary\\_doc.xml](https://www.sec.gov/Archives/edgar/data/1559720/000116840415000029/xsIFormDX01/primary_doc.xml).

<sup>34</sup> "Private Placements and Managerial Entrenchment", Barclay, M.J., Holderson, C.G., and Sheenan, D.P., *Journal of Corporate Finance*, 13 (2007), 461 to 484. A copy of the paper is included in Consumers Rebuttal e-workpapers at "Private Placements and Managerial Entrenchment.pdf."

<sup>35</sup> *Id.* at 483.

<sup>36</sup> Srivastava at 21.



**(b) A CERR Private Equity  
Placement Is Plausible**

CSXT implies that a private placement of equity may not be plausible for the CERR.<sup>37</sup> This is unfounded, for three (3) reasons.

First, the CERR operates in a hypothetical contestable market, which assumes unlimited availability of resources, including capital. Capital is just like any other resource required to construct a railroad. While a SARR has to pay prevailing market rates for the resources required to construct the SARR, the Board has continuously found that the SARR would face no limits on resource availability.<sup>38</sup>

Second, the private placement market is an extremely large market for capital. A 2012 study found that even in the mid-2000s, the market for private equity reached nearly \$50 billion.<sup>39</sup> The market also has seen large private equity placements in the last decade. As described earlier, home-rental service Airbnb Inc. completed one of the biggest private equity funding rounds ever, raising \$1.5 billion in 2015.<sup>40</sup> Airbnb was not alone. Over 230 companies in industries as

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<sup>37</sup> CSXT Reply at III-G-4 to III-G-5, n.6.

<sup>38</sup> *West Tex. Utils. Co.*, 1 S.T.B. at 671.

<sup>39</sup> “The Role of Investment Bank Reputation and Relationships in Equity Private Placements”, Erhemjamts, O. and Raman, K., *The Journal of Financial Research*, Vol. XXXV, No. 2, pages 183-210 at 187.

<sup>40</sup> “Airbnb Raises \$1.5 Billion in One of Largest Private Placements,” *Wall Street Journal*, June 26, 2015. The story can be accessed at <http://www.wsj.com/articles/airbnb-raises-1-5-billion-in-one-of-largest-private-placements-1435363506>.

diverse as power generation, manufacturing and travel have sold more than \$100 million in private equity each since 2009, based on Form D filings with the SEC.<sup>41</sup>

Third, real world companies have shown a willingness to invest large sums of money on a private basis to acquire and operate railroads. The prime example of this is Berkshire Hathaway's decision to invest \$34 billion to acquire BNSF Railway. While not a private equity placement in the classic sense, Berkshire Hathaway's acquisition nevertheless shows that sophisticated investors are available to provide sufficient capital to build and operate a railroad larger than the CERR, without the need for raising equity capital through an IPO.<sup>42</sup> Indeed, the roughly \$500 million required to acquire all of the CERR's equity logically would be an attractive investment for Berkshire Hathaway or BNSF (which already originates the Campbell traffic), Canadian Pacific (which has publicly indicated an eagerness to expand into the Chicago area), and other major transportation and infrastructure companies.

As in *Sunbelt*, *DuPont* and *AEPCO 2011*, CSXT in this case has not presented "evidence of a similar-sized issuance of stock and the related equity

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<sup>41</sup> Consumers Rebuttal e-workpaper "Companies Selling Private Equity Pursuant to SEC Form D.xlsx."

<sup>42</sup> Another large railroad equity transaction was Fortress Investment Group's \$1.1 billion acquisition of RailAmerica in February 2007. "Private Equity Takes to the Rails," *Forbes*, May 8, 2007. The story can be accessed at [http://www.forbes.com/2007/05/08/fortress-florida-update-markets-equity-cx\\_jl\\_0508markets22.html](http://www.forbes.com/2007/05/08/fortress-florida-update-markets-equity-cx_jl_0508markets22.html)

flotation fee”<sup>43</sup> for a company with “a similar profile”<sup>44</sup> to the CERR. Moreover, its made-for-litigation private analysis wrongly assumes that the CERR could only raise equity capital through the higher risk and higher cost IPO process, to the exclusion of others.<sup>45</sup> CSXT has not carried its burden on the issue of equity flotation costs, and Consumers on Rebuttal follows the Board’s consistent line of precedents holding against their inclusion in the capital cost determination.

**b. Consumers Properly Handled CERR’s Interest Payments**

In its Opening Evidence, Consumers explained that it structured its interest payments on debt capital in the same fashion as the real world Class I railroads, including CSXT.<sup>46</sup> Specifically, instead of assuming that the SARR would issue debt structured like a typical home mortgage loan, Consumers structured the interest payments in the same fashion as a Class I railroad and other large corporations that make coupon payments on the debt consisting of fixed interest payments.<sup>47</sup> This approach is consistent with how CSXT structures its

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<sup>43</sup> *AEPCO 2011* at 138.

<sup>44</sup> *Sunbelt* at 185.

<sup>45</sup> The low costs associated with the private placement alternative examined herein demonstrate the unreasonableness of CSXT’s made-for-litigation 6% figure. Even if the Board considers inclusion of an equity flotation cost in this case, CSXT’s proffer does not constitute the better evidence on this issue. *See AEPCO 2011* at 85 (Board agreed with defendants that undercutting costs should be considered, but rejected defendants’ costs as unjustified and unreasonable). *See also Xcel I*, 7 S.T.B. at 619, 649.

<sup>46</sup> Consumers Opening at III-G-5.

<sup>47</sup> *Id.* at III-G-5 to III-G-6.

own debt, and also is consistent with the Board's assumption that the SARR's capital structure does not change over time.<sup>48</sup>

In *DuPont* and *Sunbelt*, the Board explicitly acknowledged the treatment of interest associated with SARR debt used by Consumers in this case was in-line with real world railroads' debt practices.<sup>49</sup> Nevertheless, the Board rejected the shippers' evidence in those cases, stating that the SARR is evaluated through a "regulatory lens," whereas the railroad industry is evaluated every day by the financial markets, which assess whether a railroad will be able to pay its debt.<sup>50</sup> The Board was concerned that freeing the SARR from this regulatory evaluation, by allegedly allowing it to pay only interest and no principal on its assets, would insulate its borrowing from any scrutiny at all, because the SARR is not subject to the scrutiny of the financial markets. Thus, while the Board recognized the importance of allowing the SARR to use the same business strategies as the railroad industry to the maximum extent possible, it would not permit an interest-only approach to the repayment of debt, detached from the checks and balances that apply in the real world.

Consumers submits that the Board erred in rejecting the real world approach of accounting for railroad debt in *DuPont* and *Sunbelt*. Contrary to the

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<sup>48</sup> *Id.* at III-G-5 and III-G-8.

<sup>49</sup> *DuPont* at 281; *Sunbelt* at 191. See also, *Nevada Power II*, 10 I.C.C. 2d at 319.

<sup>50</sup> *DuPont* at 279-282; *Sunbelt* at 189-191.

Board's belief and CSXT's contention in this proceeding,<sup>51</sup> Consumers' approach not only accounts for interest payments on debt, but it fully takes into consideration the repayment of all principal amounts borrowed to construct the SARR.<sup>52</sup>

According to the Board, fixed coupon payments mean that the SARR is paying only interest on its debt and not repaying the principal, which would impede the ability of the SAC test to determine the SARR's ability to pay the cost of constructing, maintaining and operating its system.<sup>53</sup> Consumers respectively submits that the Board's position is incorrect, because the repayment of any principal amounts borrowed is accounted for in the levelized stream of capital recovery payments, not in the debt amortization approach.

As the Board noted in *Sunbelt*, the computerized DCF model "simulates how the SARR would likely recover its capital investments, taking into account inflation, Federal and state tax liabilities, and a reasonable rate of return".<sup>54</sup> The DCF model ensures that sufficient cash is generated to meet the

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<sup>51</sup> See CSXT Reply at III-G-6. Contrary to CSXT's claim, Consumers did take note of the Board's decisions in *DuPont* and *Sunbelt*, and described why it believed the Board erred in its treatment of amortized debt. Consumers Opening at III-G-8.

<sup>52</sup> As Consumers noted in Opening, because the CERR's approach to debt service is derived from the actual experience of CSXT, the "checks and balances" of the real world effectively have been applied to the CERR by virtue of their application to CSXT. Consumer Opening at III-G-9.

<sup>53</sup> *Sunbelt* at 191.

<sup>54</sup> *Sunbelt* at 6.

required rate of return to debt and equity holders on the SARR's investment, as well as ensuring sufficient cash flows for the return of the required investments. This occurs through the capital carrying charges included in the "Investment SAC" level of the DCF model, which ensure that the SARR is developing enough quarterly cash flows to pay back not only the interest on the debt (as encompassed in the weighted-average cost of capital used as a discount factor), but also the principal amount originally borrowed (as reflected in the investment costs and interest during construction costs). The quarterly capital charges explicitly account for repaying principal on existing and future investments. Thus, the repayment of principal is already accounted for in the DCF model, regardless of whether the SARR uses a home mortgage amortization approach or a coupon approach.

As the DCF model shows, the principal repayment values calculated in the home-mortgage amortization are *not* directly used to develop any actual principal repayment. Those values are used only in calculating the interest component of the assumed home-style mortgage payment.<sup>55</sup> The interest payments on the debt are then used to develop the interest tax shields to determine state and Federal tax payments. Contrary to the Board's inferences in *Sunbelt* and *DuPont*, the principal components of the debt amortization do not directly feed into the capital carrying charges, which provide the SARR's return on, and return

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<sup>55</sup> See, e.g., CSXT Reply e-workpaper "Exhibit III-H-1 Reply.xlsm," tab "Interest 20 Year Amort," columns (I), (Y) and (AP).

of, capital. The sole purpose of the debt amortization calculation is to develop the expected interest payments for use in estimating state and Federal taxes. The Board should follow the general rule and “recognize the importance of allowing the SARR to use the same business strategies as the railroad industry to the maximum extent possible...”, and permit the CERR to use fixed coupon payments for the treatment of its debt.<sup>56</sup>

In addition to repeating the Board’s rationale for rejecting the coupon-interest approach, CSXT implies that Consumers is advocating for issuance of a single 20-year note.<sup>57</sup> CSXT states that the railroad industry cost of debt is effectively a weighted average of notes of various lengths, not single notes of 20-year terms,<sup>58</sup> and that the amortization of debt for the CERR should be similar in structure to a home mortgage to better reflect the actual payment of debt. CSXT’s claims are wrong for several reasons.

First, Consumers did not assume it would issue a single 20-year debt instrument to finance the CERR’s initial construction. Consistent with *Major Issues*, Consumers assumed that the debt for road property investment is *financed* over 20 years.<sup>59</sup> Such financing can include multiple debt instruments of varying duration. In its Opening Evidence, Consumers recognized the Board’s concern

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<sup>56</sup> *DuPont* at 282. *See also Sunbelt* at 191.

<sup>57</sup> CSXT Reply at III-G-11.

<sup>58</sup> *Id.* at III-G-9 to III-G-10.

<sup>59</sup> Consumers Opening e-workpaper “Exhibit III-H-1.xlsx,” tab “Interest.”

about the SARR issuing 20-year debt obligations that may not match the actual length of debt obligations issued by the railroads in the cost of capital determination group. However, this concern should not impact the assumption of coupon payments. As Consumers explained, the railroads' level of debt has remained fairly constant since the last round of mergers in the mid 1990's.<sup>60</sup> This is because the railroads are issuing new debt as debt instruments mature, or as they redeem older debt issuances and replace them with newer issuances. As such, the CERR's interest payments would be expected to be consistent from year to year and not declining over time.<sup>61</sup>

The fact that the Board's average cost of railroad industry debt is a weighted-average of short, medium, and long-term interest rates is more consistent with Consumers' determination of quarterly interest payments than with CSXT's argument for home-mortgage style amortization. CSXT assumes that the interest payments under its home-mortgage style amortization approach reflect the payment of interest on short, medium, and long-term debt, and that the fall in debt interest payments over time is simply the reflection of the CERR paying off shorter-term notes and the continued payment of interest on longer-term notes.<sup>62</sup> However, if this were the case, the relative interest payments would be higher in the future, because of the term-structure of interest rates, whereunder longer-term

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<sup>60</sup> Consumers Opening at III-G-8.

<sup>61</sup> *Id.*

<sup>62</sup> CSXT Reply at III-G-10.



bonds generally have higher interest rates than shorter-term bonds.<sup>63</sup> However, the interest rate does not change over time in the Board's DCF model. This steady-state distribution is indicative of the railroad holding a steady-capital structure as new debt is issued and old debt is retired. This is exactly the assumption underlying Consumers' interest calculations.

CSXT claims that Consumers' approach locks in the cost of debt that occurs during the construction period, and ignores any changes in interest rates that may occur in the future.<sup>64</sup> CSXT contends that as debt instruments mature or are retired, there is no guarantee that future debt will carry the same interest rates.<sup>65</sup> However, the Board's DCF model already makes a contrary assumption. In calculating the interest tax shields associated with future asset replacements, the Board's DCF model assumes future interest payments will equal prior year interest payments. CSXT used this assumption itself in calculating interest payments on future asset replacements.<sup>66</sup> CSXT has offered no other solution to estimate future interest rates or provided any type of future interest forecast. Consumers' approach simply uses the Board long-standing method for estimating future interest rates when no other forecast has been provided.

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<sup>63</sup> This ignores those rare instances where markets see inverted yield-curves.

<sup>64</sup> CSXT Reply at III-G-7 to III-G-9.

<sup>65</sup> CSXT Reply at III-G-8.

<sup>66</sup> CSXT Reply e-workpaper "Exhibit III-H-1\_Reply.xlsm," tab "Replacement Interest," cell D5.

CSXT also contends that some of the debt instruments that form the basis of the SARR's cost of debt are "paid in full" at maturity.<sup>67</sup> CSXT's statement is misleading because the "full payment" by the relevant railroad likely involved reissuance of the principal in a new debt instrument. As indicated in Consumers' Opening Evidence, the railroads' capital structure has remained constant over the last decade, notwithstanding the appreciation in equity values, indicating that as old debt is retired or paid in full, new or additional debt is issued to replace it.<sup>68</sup> Additionally, the DCF model accounts for any repayment of debt principal through its calculation of quarterly capitalized carrying charges, which provide sufficient cash flows, on a discounted basis, to repay debt used to construct and operate the SARR.

In sum, real world companies, including railroads, set a target capital structure, and attempt to maintain it for many reasons, including using the power of leverage to manage earnings and to maintain cash flexibility. The CERR is employing the same approach that real world railroads do, and holding a stable capital structure. This is consistent with the Board's DCF model, which assumes the capital structure does not change over time.<sup>69</sup> This is also consistent with the Board's DCF model assumption that future interest rates will equal prior year interest rates. To reflect this steady-state nature, the SARR must reissue debt as

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<sup>67</sup> CSXT Reply at III-G-10.

<sup>68</sup> Consumers Opening at III-G-8.

<sup>69</sup> *Id.*

older debt is retired, which ultimately leads to consistent interest payments as reflected in Consumers' DCF model. Consumers continue to rely upon its proper and correct interest rate methodology in its Rebuttal DCF.

**c. Rebuttal Cost of Equity and Debt**

In April 2016, the Association of American Railroads ("AAR") submitted its calculation of the 2015 railroad industry cost of capital.<sup>70</sup> Consistent with Board precedent, Consumers updated the DCF model's cost of common equity, cost of debt, and cost of capital to include the 2015 data. Consumers' Rebuttal CERR cost of equity calculations are shown in Rebuttal Table III-G-1 below.

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<sup>70</sup> *Railroad Cost of Capital – 2015*, Ex Parte No. 558 (Sub-No. 19), Comments of the Association of American Railroads (filed April 20, 2016).

**Rebuttal Table III-G-1**  
**Summary of Consumers Opening and Comparison Of**  
**CSXT Reply and Consumers Rebuttal CERR Cost of Equity**

<u>Year</u>	<u>Consumers Opening<sup>1/</sup></u>	<u>CSXT Reply<sup>2/</sup></u>	<u>Consumers Rebuttal<sup>3/</sup></u>	<u>Difference<sup>4/</sup></u>
(1)	(2)	(3)	(4)	(5)
2012	11.12%	11.12%	11.12%	0.00%
2013	13.80%	11.32%	11.32%	0.00%
2014	10.65%	10.65%	10.65%	0.00%
2015	12.42%	11.17%	9.64%	1.53%
2016	12.42%	11.17%	10.78%	0.39%
2017	12.42%	11.17%	10.78%	0.39%
2018	12.42%	11.17%	10.78%	0.39%
2019	12.42%	11.17%	10.78%	0.39%
2020	12.42%	11.17%	10.78%	0.39%
2021	12.42%	11.17%	10.78%	0.39%
2022	12.42%	11.17%	10.78%	0.39%
2023	12.42%	11.17%	10.78%	0.39%
2024	12.42%	11.17%	10.78%	0.39%

1/ Consumers Opening e-workpaper “Exhibit III-H-1 (Errata).xlsm.”

2/ CSXT Reply e-workpaper “Exhibit III-H-1\_Reply.xlsm.”

3/ Consumers Rebuttal 3-workpaper “Exhibit III-H-1\_Rebuttal.xlsm.”

4/ Column (3) – Column (4).

**2. Inflation Indices**

CSXT accepted Consumers’ road property asset indices derived from the AAR railroad chargeout prices and wage rate indices for eastern railroads and IHS Economics’ Rail Cost Adjustment Factor Forecast.<sup>71</sup> CSXT updated those indices using IHS Economics’ January 2016 forecast.<sup>72</sup> Since CSXT submitted its Reply, IHS Economics has issued its April 2016 forecast.

<sup>71</sup> CSXT Reply at III-G-11. CSXT continues use to the name Global Insight in its Reply.

<sup>72</sup> This was the most recently available forecast at the time of CSXT’s Reply.

Consumers has included IHS Economics' April 2016 forecasts and updated actual AAR indices in its Rebuttal DCF analysis.

CSXT also accepted Consumers' land inflation forecast based on historic rural land values reported by the U.S. Department of Agriculture ("USDA") and on a combination of indices published by investment reporting firms Moody's and Standard & Poor's.<sup>73</sup> Since the filing of CSXT's Reply, Moody's and Standard & Poor's have all released updated values. Consumers has included these updated values in its Rebuttal evidence.<sup>74</sup>

While CSXT accepted Consumers' land inflation forecast, it rejected the use of Consumers' land index to adjust land values to their year of acquisition by the CERR.<sup>75</sup> As discussed in Part III-F, CSXT's Reply land value methodology is flawed, and Consumers continues to utilize its Opening approach to adjust land values in Rebuttal.

### **3. Tax Liability**

CSXT accepts Consumers' assumed Federal tax rate of 35 percent and its calculated composite state income tax rate for the CERR.<sup>76</sup>

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<sup>73</sup> CSXT Reply at III-G-12.

<sup>74</sup> See Consumers Rebuttal e-workpaper "CERR Land Appreciation(Rebuttal).xlsx," tabs "Case-Shiller National Updated" and "Moody's RCA Updated".

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

**4. Capital Cost Recovery**

CSXT accepts Consumers' capital recovery calculations except for the issues raised above and certain other issues CSXT addressed in Reply Part III-H.<sup>77</sup> The other issues raised by CSXT in Reply Part III-H are addressed in Consumers' Rebuttal Part III-H.

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<sup>77</sup> CSXT Reply at III-G-13.



### **III. H. RESULTS OF SAC ANALYSIS**

In this section, Consumers addresses the claims raised by CSXT in its Reply regarding Consumers' DCF analysis and its maximum rate calculations.

#### **1. Results of SAC DCF Analysis**

Consumers has modified its DCF model to accommodate the changes made by Consumers in this Rebuttal Evidence and discussed in Parts III-A through III-G, *supra*. Consumers describes these modifications below. Additionally, Consumers uses this Part III-H to address numerous errors made by CSXT in its Reply DCF model.

Consumers' Rebuttal DCF analyses are shown in Rebuttal Exhibit III-H-1. The calculations shown in each table of Rebuttal Exhibit III-H-1 are summarized below.<sup>1</sup>

##### **a. Cost of Capital**

As discussed in Part III-G, CSXT accepted Consumers' use of the 2012 to 2014 cost of common equity during the CERR construction period, and the use of the simple average of the 2012 to 2014 cost of common equity for the years 2015 to 2024.<sup>2</sup> In Rebuttal, Consumers incorporates the AAR's 2015 railroad industry cost of capital calculations which were submitted to the Board on

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<sup>1</sup> The cost of capital (Table A) and inflation indices (Table B) are addressed in Part III-G.

<sup>2</sup> See CSXT Reply at III-H-1-2.



April 20, 2016,<sup>3</sup> after CSXT filed its Reply evidence in this proceeding. Updating the cost of capital to reflect the most current information available is consistent with Board precedent in maximum rate cases.<sup>4</sup> In Rebuttal, Consumers calculates and uses the simple average of the 2012 to 2015 cost of common equity for years 2016 to 2024.

In addition, Consumers corrected the transposition error that impacted the 2013 cost of CERR debt, and relies upon the CERR capital structure, which includes the AAR's 2015 calculations. For the reasons and based on the authorities explained in Part III-G, however, Consumers rejects CSXT's inclusion of a 6% equity flotation cost. Consumers' updated cost of capital figures are set forth in Table A of Consumers' Rebuttal Exhibit III-H-1.<sup>5</sup>

**b. Road Property Investment Values**

The calculation of road property investment costs is summarized in Table C of Rebuttal Exhibit III-H-1<sup>6</sup>. Consumers incorporates its updated road property investment values addressed in Part III-F, where Consumers also

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<sup>3</sup> See *Railroad Cost of Capital – 2015*, Ex Parte No. 558 (Sub-No. 19), Comments of the Association of American Railroads (filed April 20, 2016).

<sup>4</sup> *WFA I* at 135 (“We use our annual cost-of-capital findings for the railroad industry for 2004 through 2005 to determine the cost of equity that would be experienced by the LRR. The latest railroad-industry cost of equity was determined after the close of the record. Nevertheless, to reflect the most current data available, and consistent with Board practice in prior SAC cases, we update the analysis to include that figure.”).

<sup>5</sup> See Consumers Rebuttal e-workpaper “Exhibit III-H-1\_Rebuttal.xlsm,” tab “Cost of Capital.”

<sup>6</sup> *Id.* at tab “Investment.”

responds to CSXT's criticisms of Consumers' Opening Evidence. In its Reply, CSXT accepts Consumers' construction schedule for the CERR, and its methodology to index annual investment values, excluding land inflation values.<sup>7</sup>

As discussed in Part III-F-1, *supra*, CSXT's land valuation approach, and its subsequent indexing of land values, is biased and inconsistent with Board precedent. These facts render CSXT's associated final land values unreliable. In Rebuttal, Consumers continues to use its Opening valuation and indexing approach for land values, but as described in Section III-G-2, updates the land index values with more current historic values.

**c. Interest During Construction**

Interest During Construction ("IDC") accrues on the road property assets of the CERR. In its Reply, CSXT utilizes the same methodology that Consumers did to calculate IDC.<sup>8</sup> Consumers continues to use this same methodology in Rebuttal.

**d. Interest On Debt Capital**

As discussed in Section III-G-1-b, Consumers structured its interest payments on CERR debt capital in the same fashion as CSXT and the other Class I railroads do in the real world.<sup>9</sup> In Reply, CSXT uses a 20-year home-style mortgage amortization schedule on CERR debt. In Rebuttal, Consumers continues

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<sup>7</sup> See CSXT Reply at III-H-2.

<sup>8</sup> *Id.*

<sup>9</sup> See Consumers Opening at III-H-3-4.

to utilize an approach to debt capital that mirrors the debt actually issued by CSXT and the other U.S. Class I railroads included in the Board’s annual cost of capital determination.

e. **Present Value of Replacement Cost**

Table F of Rebuttal Exhibit III-H-1<sup>10</sup> shows the additional investment (on a present value basis) that the CERR would have to make if each of its assets (excluding land) was replaced at the end of its useful life, indefinitely into the future.

CSXT claims that Consumers erred in not including a 20-year amortization schedule for debt issued for future asset replacement, and says that it reestablished a 20-year debt amortization schedule for replacement assets.<sup>11</sup> However, CSXT’s adjustment to the replacement cost calculations to “reestablish” debt amortization for replacement assets is invalid, as it leads to a double count of interest tax shields.

As discussed in its Opening Evidence, Consumers corrected the DCF model’s capital carrying charge determination to reflect the constant capital structure assumed by the Board’s DCF model by calculating a terminal interest value.<sup>12</sup> This terminal interest value calculation takes into consideration interest payments incurred for debt issued by the SARR in perpetuity, including debt used

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<sup>10</sup> See Consumers Rebuttal e-workpaper “Exhibit III-H-1\_Rebuttal.xlsm,” tab “Replacement.”

<sup>11</sup> See CSXT Reply at III-H-3.

<sup>12</sup> See Consumers Opening at III-H-6.

for future replacement assets. Separately including interest payments for future replacement assets double-counts the payments. Therefore, Consumers continues to exclude interest payments for replacement assets in its Rebuttal DCF model.

**f. Tax Depreciation Schedules**

CERR is entitled to take advantage of the "bonus" depreciation provisions<sup>13</sup> that were part of the Tax Relief, Unemployment Compensation Reauthorization, and Job Creation Act of 2010; the American Taxpayer Relief Act of 2012; and the Tax Increase Prevention Act of 2014. These laws provided bonus depreciation on capital investments with MACRS recovery periods of 20 years or less. Qualifying investments are allowed a 50 percent depreciation bonus in the year that they are placed into service for assets placed into service prior to September 8, 2010, and 100 percent depreciation for assets thereafter. Tax depreciation for the remaining 50 percent of the cost, or the remaining cost basis, is calculated using the standard MACRS schedules. Table G of Rebuttal Exhibit III-H-1<sup>14</sup> displays the amount of bonus depreciation available to the CERR in 2015 through 2018.

CSXT objects to Consumers' use of bonus depreciation, asserting that it provides the CERR with an advantage over CXST and creates a reverse barrier to entry because identical bonus depreciation was not available to CSXT

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<sup>13</sup> *Id.* at III-H-4.

<sup>14</sup> *See* Consumers Rebuttal e-workpaper "Exhibit III-H-1\_Rebuttal.xlsx," tab "Tax Depreciation."

during the time that the lines replicated by the CERR originally were constructed.<sup>15</sup> CSXT also argues that bonus depreciation is inappropriate because it exists as a byproduct of the CERR's 30-month construction period, and thus confers tax benefits on the CERR that were not available to CSXT.

CSXT's complaints have been rejected by the Board in previous cases,<sup>16</sup> including twice in the past few years,<sup>17</sup> and should be rejected here as well. The Board held in *SunBelt* and *DuPont* that the SARR construction period results both in benefits and disadvantages for the SARR, and that it would be improper to bar the SARR from receiving the benefits while requiring the SARR to endure the disadvantages. CSXT challenges those decisions, asserting that the Board did not specify any of the disadvantages that the SARR would experience.<sup>18</sup> Consumers herein offers a partial outline.

First, prices for materials and services could be elevated during the period of SARR construction, thus forcing the SARR to expend more than it would under normal conditions. For example, if the price of steel is unusually high during the construction period, the SARR is forced to pay the elevated price for all steel on its system. In contrast, real world railroads such as CSXT benefit from having the option to acquire their steel assets over many decades, in both boom

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<sup>15</sup> See CSXT Reply at III-H-3-6.

<sup>16</sup> See, e.g., *West Tex. Utils. Co.*, 1 S.T.B. at 714; *McCarty Farms*, 2 S.T.B. at 525-529.

<sup>17</sup> *SunBelt* at 188-189; *DuPont* at 277-279.

<sup>18</sup> See CSXT Reply at III-H-4.

and bust cycles. Similarly, CSXT has had the option of choosing not to construct new lines during unfavorable market conditions, whereas a SAC complainant must take conditions as they are during the SARR construction period, which is dictated by the timing of the defendant's own rate actions.

Second, a SARR can be negatively impacted by prevailing debt interest rates. The cost of capital utilized by the Board in the DCF model includes both an equity component and a debt component.<sup>19</sup> The debt component is based upon the average railroad industry cost of debt during the SARR construction period.<sup>20</sup> If the SARR construction period coincides with a period of high interest rates, the SARR would be saddled with debt costs that could be considerably higher than the incumbent railroad's costs. This negative impact again would be a direct consequence of the SARR's defined construction period. Compared to the SARR, the incumbent would have incurred moderate levels of debt over many decades of financing, thus smoothing out any period of high interest rates.

The SAC concept is predicated upon developing an "optimally efficient" SARR, which means that the SARR necessarily will have certain "advantages" over the incumbent. CSXT's logic would require the SARR to use the same production techniques that CSXT used to build the original rail lines a century ago, rather than more efficient modern techniques, or prohibit the SARR

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<sup>19</sup> See, e.g., *Railroad Cost of Capital - 2014*, STB Ex Parte No. 558 (Sub-No. 18) (STB served Aug. 7, 2015).

<sup>20</sup> *AEP Texas II* at 107.

from being more efficient, or use better technology than the incumbent, all of which conflict with SAC principles.

According to Dr. William Baumol, one of the principal developers of Contestable Market Theory, "[t]he crucial feature of a contestable market is its vulnerability to hit-and-run entry."<sup>21</sup> In order to hypothesize a contestable rail market, the Board assumes that a SARR can be constructed in the minimum amount of time dictated by technological feasibility for the most complex and time-consuming project on the SARR.<sup>22</sup> Therefore, "hit-and-run entry" means that the SARR must be able to enter the market within the foregoing time frame and pay "current market prices" for construction. That includes bonus depreciation.<sup>23</sup> It also means that the SARR must incur "current market prices" at the time construction actually occurs, including prices for land, material and labor, regardless of what the incumbent may have paid (unless the incumbent paid nothing, in which case the SARR also pays nothing).

It is noteworthy that CSXT itself has benefited substantially not only from the current bonus depreciation laws, but from prior tax benefits that are not available to the CERR. CSXT offers to allow the CERR to take bonus depreciation to the same extent that CSXT itself did over the 2008 to 2014 time period, based

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<sup>21</sup> See Baumol, William, J. "Contestable Markets: An Uprising in the Theory of Industry Structure," *The American Economic Review*, Vol. 72, No. 1, March 1982 at 1-15, p. 4.

<sup>22</sup> *West Tex. Utils. Co.*, 1 S.T.B. at 671-672.

<sup>23</sup> *Id.* at 672.

on a proration of CSXT's bonus depreciation based on route miles.<sup>24</sup> However, this gives an unfair advantage to CSXT, because other (now-expired) tax and/or legal provisions were available to CSXT and its predecessors in previous decades that are not available to the CERR.

These include:

- The U.S. government provided surveyors to the Baltimore & Ohio Railroad ("B&O", a CSXT predecessor) at government expense;<sup>25</sup>
- Favorable state tax treatment for investments in B&O stock, thereby encouraging purchase of the stock;<sup>26</sup>
- The Revenue Act of 1962, which enacted an investment tax credit ("ITC") equal to seven (7) percent of qualified investment property;
- The Tax Reform Act of 1969, which established rapid depreciation of railroad rolling stock;
- The Revenue Reform Act of 1971, which updated the ITC and allowed a 3-year carryback and 7-year carry forward of the credits which could not be used in current years because of tax liability limitations;
- The Tax Reduction Act of 1975, which increased the ITC to ten (10) percent for all taxpayers and increased the tax liability limitations for railroad companies;
- The Tax Reform Act of 1976, which extended the ten (10) percent ITC through December 31, 1980;

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<sup>24</sup> See CSXT Reply at III-H-6.

<sup>25</sup> See James Dilts, *The Great Road: The Building of the Baltimore and Ohio, the Nation's First Railroad, 1828-1853* (1996) at 49, Consumers Rebuttal e-workpaper "The Great Road\_Select Pages.pdf," at 4.

<sup>26</sup> *Id.* at 44, "The Great Road\_Select Pages.pdf," at 2.



- The Revenue Act of 1978, which permanently increased the ITC to 10 percent instead of reverting to seven (7) percent in 1981, and extended the ITC to certain qualified rehabilitation expenditures;
- The Economic Recovery Act of 1981 which allowed for more generous ITC amounts, the enactment of safe-harbor leasing laws and increases in the credits available for qualified rehabilitation projects;
- The Job Creation and Worker Assistance Act of 2002 which enacted a 30 percent bonus depreciation rate for the years 2002 to 2004; and
- The Jobs Growth and Tax Reconciliation Act of 2003 that increased the bonus depreciation to 50 percent and extended its use to 2005.

CSXT makes the claim that since the Board has stated that a SARR is a replacement for the segment of the incumbent's rail system that the SARR would serve, the SARR should not be able to enjoy any benefits (which essentially are economic efficiencies) not fully available to the incumbent railroad.<sup>27</sup> The logical extension of CSXT's argument is that the CERR must be constructed and operated in the same manner as the incumbent, a notion that the Board consistently has rejected.<sup>28</sup> In *West Tex. Utils. Co.*, the Board recognized the trade-off in benefits between the SARR and the incumbent, holding that while a SARR may realize benefits from its shorter construction period, the incumbent benefited from

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<sup>27</sup> See CSXT Reply at III-H-6.

<sup>28</sup> *AEPCO 2011* at 10; *McCarty Farms*, 2 S.T.B. at 468. The SARR does not even have to be a railroad. See *Coal Rate Guidelines*, 1 I.C.C. at 543; *WFA II* at 14 (“using the densities of the hypothetical SARR makes no sense, as under SAC the hypothetical competitor to BNSF does not even need to be a railroad at all.”).

building its system in a sequential manner, allowing it to earn returns on individual line segments before the entire system was complete.<sup>29</sup>

Finally, CSXT's position would inject unwarranted speculation into the SAC process. CSXT criticizes the bonus depreciation provision utilized by the CERR as a "temporary" measure,<sup>30</sup> but CSXT ignores the fact that the industrial legal landscape is constantly evolving and changing. New laws are being enacted while old ones expire or are superseded. Federal and state agencies pass new regulations on a regular and ongoing basis. If, as CSXT contends, certain laws in effect at the time of the SARR's construction should be ignored or limited, then there would be no limits to the arguments of future litigants (on both sides) at to the statutes, policies, regulations and other conditions that should or should not be recognized. CSXT's position would unleash even greater speculation into the already hypothetical realm of SAC. As the Board has said, it "must follow existing law."<sup>31</sup>

**g. Average Inflation in Asset Prices**

Table H of Rebuttal Exhibit III-H-1<sup>32</sup> computes the average annual inflation rate by which the capital recovery charge in Table I<sup>33</sup> is indexed. CSXT accepts Consumers' inflation assumptions for assets.<sup>34</sup>

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<sup>29</sup> *West Tex. Utils. Co.*, 1 S.T.B. at 671 -672.

<sup>30</sup> See CSXT Reply at III-H-4.

<sup>31</sup> *AEPCO 2011* at 34.

<sup>32</sup> See Consumers Rebuttal e-workpaper "Exhibit III-H-1\_Rebuttal.xlsm," tab "Asset Inflation."

**h. Discounted Cash Flow**

Consumers explained in its Opening Evidence that it utilized the Board's standard capital recovery methodology, including the modification that the Board made in *AEPCO 2011*, to calculate the present value of unused depreciation in the terminal value calculation.<sup>35</sup> Likewise, Consumers adjusted “the terminal value in the capital carrying charges to reflect the cost of capital assumption that the SARR's level of debt is held constant into perpetuity, and that interest tax shields consistent with this level of debt are accounted for in the cash flow calculation.”<sup>36</sup>

The Board's DCF model historically had assumed that after year 20, and until the first assets are replaced in the model, the railroad has no debt and no tax shielding interest payments. This creates an irreconcilable mismatch between the SARR's cost of capital and its cash flows. The cost of capital assumes that the SARR is carrying debt, and the associated interest payments, but the cash flows reflect no benefits from the interest tax shields. The Board recognized this mismatch and changed the terminal value calculation in *DuPont* and *SunBelt*.<sup>37</sup>

Consumers included the Board's revised terminal value calculations in its Opening Evidence. Consumers adjusted the terminal value in the capital

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<sup>33</sup> *Id.* at tab “Investment SAC.”

<sup>34</sup> *See* CSXT Reply at III-H-7

<sup>35</sup> *See* Consumers Opening at III-H-6. *See also*, *AEPCO 2011* at 140-141.

<sup>36</sup> *SunBelt* at 192.

<sup>37</sup> *DuPont* at 282-284; *SunBelt* at 193.

carrying charges to reflect the assumption that the CERR's level of debt is held constant into perpetuity, and that interest tax shields consistent with this level of debt are accounted for in the cash flow calculation. Consumers calculated an interest tax shield in perpetuity by dividing the last full quarterly coupon payment by one plus the quarterly real cost of capital.<sup>38</sup> This calculation aligns the cost of capital assumption of a fixed level of debt forever, with the interest payable on this debt.<sup>39</sup>

In its Reply, CSXT incorrectly claims that the Board did not accept this modification in *SunBelt*.<sup>40</sup> As the Board explicitly stated, "Consistent with the Board's decision in *DuPont*, we will accept Sunbelt's argument regarding the terminal value adjustment to correct the mismatch it has identified...."<sup>41</sup> What the Board did not accept in *SunBelt* was the shipper's method to calculate the interest expense included in the terminal value calculation. Instead of following the approach taken by Consumers in this proceeding, and matching the interest payments made by railroads in the real world, the Board used a mortgage-style debt amortization. To account for this difference in interest payments in its DCF

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<sup>38</sup> This is the same type of calculation used to develop the terminal capital carrying charge.

<sup>39</sup> As described above, to avoid a double count in the impact of the interest tax shields, Consumers has adjusted the asset replacement calculations to remove the impact of the interest tax shields on replacement assets.

<sup>40</sup> See CSXT Reply at III-H-8. The Board also made the change now rejected by CSXT in *DuPont*, but CSXT ignores this precedent.

<sup>41</sup> *SunBelt* at 193.

model terminal value calculation, the Board developed the simple average of the SARR's interest payments over 20-years, instead of using the average bond interest payment.<sup>42</sup> However, the Board continued to use a terminal value calculation based on a perpetuity model that takes into consideration the SARR's static capital structure.

Acknowledging the outcome in *SunBelt*, CSXT nevertheless claims that the Board made two errors in that case.<sup>43</sup> First, CSXT argues that Board made a conceptual error by introducing inconsistency into the DCF model by applying different financial assumptions between debt used for assets acquired during the construction period and debt used to acquire replacement assets.<sup>44</sup> Second, CSXT asserts that the Board made a mathematical error by overriding the interest payments in years 11 to 20 of the DCF model and instead using the average interest payments.<sup>45</sup> Neither claim has merit.

As to the alleged conceptual error, CSXT claims that before the correction to the terminal value calculation, the DCF model was configured to assume that both debt used to acquire assets during the initial construction period and debt used to acquire replacement assets would be amortized over 20 years,

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<sup>42</sup> *Id.* at 193-194.

<sup>43</sup> CSXT Reply at III-H-9.

<sup>44</sup> CSXT Reply at III-H-9.

<sup>45</sup> CSXT Reply at III-H-10.

while after the correction, the debt amortization assumptions are different.<sup>46</sup>

CSXT alleges that debt used to acquire the original assets is still amortized over 20 years, but there will be no amortization of debt used for the acquisition of assets in subsequent replacement cycles.<sup>47</sup>

CSXT's argument is wrong for two reasons. First, the DCF model used in *SunBelt* did not assume that both debts associated with original assets and debt used for replacement assets would have a 20-year amortization period. Rather, the model assumed debt associated with replacement assets would be amortized over the *lesser of* the service life of the asset, or 20 years. The "different assumptions" objection made by CSXT (regarding debt associated with original and replacement assets) existed prior to the terminal value correction accepted in *SunBelt*.

Second, if the Board does not calculate its debt interest in the manner proposed by Consumers, the terminal value correction will account for amortization of debt used to acquire future assets in the same manner as original CERR debt. CSXT's claim that there will be no amortization of debt for assets in subsequent asset replacement cycles<sup>48</sup> ignores the fact that the debt reflected in

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<sup>46</sup> CSXT Reply at III-H-10. CSXT's claims rest, in part, on the assumption that the Board will continue to assume the SARR amortizes its debt using a home mortgage style amortization schedule. Correcting the interest calculation to the coupon style approach used by Consumers eliminates any alleged mismatch, and provides yet another reason why the Board should adopt Consumers' approach.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

the terminal value calculation is there to perpetually replace future assets (as well as to account for other corporate needs as is the case with real world railroads). If anything, the terminal value correction adopted by the Board removes an inconsistency that was already present in the DCF model.

CSXT also argues that the Board's correction of the mismatch would create a mathematical error by overstating the amount of interest a SARR would pay in years 11 through 20.<sup>49</sup> CSXT claims that, because interest payments are lower than average in the later years of the amortization period, the use of average interest payments over this period would overstate the interest expense.<sup>50</sup> However, CSXT fails to consider that while the interest payments in the second half of the 20-year amortization period are lower than the average, the interest payments in the first half of the amortization period are higher. The use of an average interest payment within the perpetuity calculation takes into consideration both the lower payments that occur in the second half of the amortization period and the higher payments in the first half.

Based on its erroneous claims, CSXT's Reply relies on the terminal value methodology used in *AEPCO 2011*.<sup>51</sup> However, the *AEPCO 2011* adjustment, which simply used the present value of the years 11 through 20 mortgage-style interest payments in the terminal value calculation, suffered from

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<sup>49</sup> *Id.* at III-H-10-13.

<sup>50</sup> *Id.* at III-H-14.

<sup>51</sup> *Id.* at III-H-12.

the same mismatch between future interest payments and the static capital structure that was addressed and resolved by the Board in *SunBelt*. CSXT's proposed terminal value calculation should be rejected.

**i. Computation of Tax Liability – Taxable Income**

CSXT accepted Consumers' assumed Federal tax rate of 35 percent and its calculated composite state income tax rate for the CERR.<sup>52</sup>

**j. Operating Expenses**

Table K of Rebuttal Exhibit III-H-1<sup>53</sup> displays the operating expenses incurred in each year of the DCF period. CSXT accepted Consumers' approach for indexing operating costs, but used its overstated Reply operating expense calculations in its DCF model.<sup>54</sup> In this Rebuttal, Consumers continues to use its Opening approach of indexing all operating expenses based on the CERR's change in net ton-miles.

**k. Summary of SAC**

Consumers' Rebuttal calculation of total SAC for the CERR is presented in Table L of Rebuttal Exhibit III-H-1<sup>55</sup> and compared with CSXT's Reply values in Rebuttal Table III-H-1 below.

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<sup>52</sup> *Id.*

<sup>53</sup> See Consumers Rebuttal e-workpaper "Exhibit III-H-1\_Rebuttal.xlsm," tab "Operating SAC" and "Operating SAC 2."

<sup>54</sup> See CSXT Reply at III-H-12.

<sup>55</sup> See Consumers Rebuttal e-workpaper "Exhibit III-H-1\_Rebuttal.xlsm," tab "Netting."



**Rebuttal Table III-H-1**  
**Summary of CSXT Reply and Consumers Rebuttal SAC Results for the CERR**  
(\$ in millions)

Year	CSXT Reply <sup>1/</sup>			Consumers Rebuttal <sup>2/</sup>		
	SAC	SARR Revenue	Over-Payments (Shortfall)	SAC	SARR Revenue	Overpayments (Shortfall)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
2015	\$165.1	\$109.4	(\$55.7)	\$113.3	\$139.6	\$26.4
2016	\$159.1	\$92.5	(\$66.5)	\$107.1	\$121.6	\$14.5
2017	\$166.6	\$109.5	(\$57.1)	\$116.6	\$155.7	\$39.1
2018	\$171.8	\$105.3	(\$66.5)	\$120.8	\$156.4	\$35.6
2019	\$178.9	\$109.6	(\$69.3)	\$125.9	\$161.4	\$35.5
2020	\$186.7	\$118.9	(\$67.8)	\$132.8	\$177.0	\$44.2
2021	\$193.5	\$120.6	(\$72.9)	\$138.3	\$183.5	\$45.3
2022	\$202.1	\$128.9	(\$73.2)	\$144.7	\$197.6	\$52.9
2023	\$209.0	\$124.8	(\$84.2)	\$148.8	\$198.7	\$50.0
2024	\$218.5	\$138.0	(\$80.5)	\$156.2	\$219.4	\$63.2

<sup>1/</sup> See CSXT Reply at III-H-13.

<sup>2/</sup> See Consumers Rebuttal e-workpaper “Exhibit III-H-1\_Rebuttal.xlsm,” tab “Summary.”

As shown in Rebuttal Table III-H-1 above, contrary to CSXT’s calculations, the CERR revenues exceed the stand-alone costs in each year of the study period. Where stand-alone revenues are shown to exceed costs, rates for the members of the traffic group must be adjusted to bring revenues and SAC into equilibrium.

## 2. Maximum Rate Calculation

In *Major Issues*, the Board adopted MMM as its rate prescription approach under the *Coal Rate Guidelines*.<sup>56</sup> Consistent with that decision, Consumers has used the MMM as required under the Board's *Major Issues* decision to bring SAC and stand-alone revenues into equilibrium.<sup>57</sup>

CSXT generally accepted Consumers' MMM approach, but claims that the URCS index that Consumers used in its Opening MMM calculations does not properly reflect future CSXT variable costs because it does not include gains in CSXT productivity over the modeling period.<sup>58</sup> CSXT proposes that the Board either revert to using the RCAF-A to adjust the MMM variable costs, or add a productivity component to the URCS index used by Consumers in its Opening Evidence.<sup>59</sup> CSXT's proposed adjustments are unnecessary and result in less accurate estimates of future variable costs, as explained in detail below.

The productivity adjustment factor ("PAF") used to calculate the RCAF-A, and which CSXT proposes to use in this case either by directly applying the RCAF-A or by modifying Consumers' URCS index, is developed by calculating the change in the input cost index divided by the change in the output index for all reporting Class I carriers. The input index reflects the R-1 total expenses for the Class I railroads, on a constant dollar basis, using the AAR's

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<sup>56</sup> *Major Issues* at 14-23.

<sup>57</sup> See Consumers Opening at III-H-9.

<sup>58</sup> See CSXT Reply at III-H-14.

<sup>59</sup> See CSXT Reply at III-H-17-18.

RCR as the deflator. The change in expenses reflects both the inflation on input prices, and the utilization of the cost inputs (e.g., labor, fuel, etc.) for all Class I railroads, not just CSXT. Expressing the expenses on a constant dollar basis is intended to remove the impact of inflation in input prices. However, this is not exact, because the distribution of expenses in the RCR is not necessarily the same as the distribution of costs in the total expenses. Moreover, this distribution is, by definition, not the same as the CSXT distribution of the CSXT cost components in the variable cost calculation.

Similarly, the output index used in the PAF also reflects general industry changes, not changes specific to CSXT. The output index in the STB's productivity calculation determines the change in ton-miles (weighted on revenues) for 189 unique movement parameters. This produces an output matrix that reflects different key parameters, including: (1) shipment weights; (2) lengths of haul; (3) car types; and (4) service types (based on cars per shipment). In general terms, for Class I railroads, productivity gains are realized when there is a shift to more efficient types of service, *i.e.*, heavier loads, longer hauls and more cars per waybill. These shifts are not uniform across the industry, though. There is no reason to believe that CSXT's changes in the output factors that make up the PAF output index will be in lockstep with the rest of the industry.

In *DuPont* and *SunBelt*, the Board rejected the use of a “generalized, industry index when a more specific approach is available.”<sup>60</sup> CSXT’s proposed adjustment to URCS would introduce a general industry index to an approach that utilizes CSXT specific costs. In Rebuttal, Consumers continues to use its CSXT specific URCS index to adjust the variable costs in the MMM application, consistent with the Board’s *DuPont* and *SunBelt* decisions.

### 3. **Internal Cross-Subsidy**

CSXT argues that if the Board determines that CERR revenues exceed CERR SAC, then the Board also must test for the existence of internal cross-subsidies.<sup>61</sup> CSXT’s position is flatly contradicted by precedent. As the Board found both in *WFA II* and *AEPCO 2011*, when a *defendant* fails to identify a section of the SARR that it claims is not self-supporting, it has not met its burden to demonstrate an internal cross subsidy and there is no basis to alter the SARR’s traffic group or modify the SAC analysis.<sup>62</sup>

In this case, CSXT has not presented any evidence that any specific section of the CERR is not self-supporting, and therefore has not met its burden regarding any alleged cross-subsidy.

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<sup>60</sup> *DuPont* at 285-286; *SunBelt* at 196.

<sup>61</sup> *See* CSXT Reply at III-H-18.

<sup>62</sup> *WFA II* at 10; *AEPCO 2011* at 16.

#### 4. Maximum Reasonable Rates

The SAC analysis summarized in Parts III-A through III-G, *supra*, and displayed in Rebuttal Exhibit III-H-1, demonstrates that over the 10-year DCF period, the revenues generated by the CERR exceed its total capital and operating costs. Rebuttal Table III-H-2 below shows the measure of excess revenue over SAC in each year of the DCF period for this case.

**Rebuttal Table III-H-2**  
**Summary of Consumers Rebuttal DCF Results for the CERR**  
**January 1, 2015 to December 31, 2024**

<u>Year</u>	<u>Annual Stand-Alone Requirement</u>	<u>Stand-Alone Revenues</u>	<u>Over-Payments (Shortfall)</u>	<u>PV Difference</u>	<u>Cumulative PV Difference</u>
(1)	(2)	(3)	(4)	(5)	(6)
2015	\$113,264,186	\$139,628,736	\$26,364,550	\$25,177,985	\$25,177,985
2016	\$107,085,713	\$121,592,139	\$14,506,427	\$12,440,432	\$37,618,417
2017	\$116,631,577	\$155,739,878	\$39,108,301	\$30,273,360	\$67,891,777
2018	\$120,835,080	\$156,446,662	\$35,611,582	\$24,882,821	\$92,774,598
2019	\$125,908,109	\$161,400,726	\$35,492,617	\$22,385,306	\$115,159,904
2020	\$132,770,953	\$176,952,127	\$44,181,174	\$25,152,372	\$140,312,276
2021	\$138,276,463	\$183,545,475	\$45,269,012	\$23,262,660	\$163,574,936
2022	\$144,653,867	\$197,592,151	\$52,938,284	\$24,555,280	\$188,130,216
2023	\$148,762,860	\$198,740,607	\$49,977,747	\$20,925,140	\$209,055,356
2024	\$156,166,068	\$219,400,189	\$63,234,121	\$23,897,907	\$232,953,262

Source: Consumers Rebuttal e-workpaper "Exhibit III-H-1Rebuttal.xlsm," tab "Summary."

Application of MMM yields the following maximum R/VC ratios for Consumers' Campbell coal traffic for each year of the DCF model.

<b>Rebuttal Table III-H-3 Rebuttal MMM Results</b>	
<b>Year</b>	<b>Maximum R/VC Ratios</b>
(1)	(2)
2015	358.6%
2016	419.9%
2017	310.6%
2018	325.4%
2019	327.3%
2020	302.3%
2021	298.8%
2022	280.3%
2023	282.0%
2024	252.4%

Source: Rebuttal Exhibit III-H-2

As indicated in Rebuttal Table III-H-3, the maximum R/VC ranges from 252.4 percent to 419.9 percent over the 10-year DCF period.

As applied to the unadjusted Phase III URCS variable costs for the issue movements, the following MMM maximum reasonable rates apply to shipments to Campbell from the Chicago interchange at the 1Q15 wage and price levels.

<b>Table III-H-4</b>		
<b><u>CONSUMERS' MMM RATES PER TON – 1Q15</u></b>		
<b><u>CSXT Origin</u></b>	<b><u>Car Type</u></b>	<b><u>MMM Rate Per Ton 1Q15</u></b>
(1)	(2)	(3)
1. Chicago, IL	Gondola	\$10.22
2. Chicago, IL	Hopper	\$10.08

Source: Consumers Rebuttal e-workpaper “1Q15 to 1Q16 MMM Rates\_Rebuttal.xlsx,” tab “Rates,” cells D28 and E28.

The maximum lawful rates for the transportation of coal from the origin covered by Tariff CSXT-13952, Amendment 1, equals the greater of the jurisdictional threshold or the MMM maximum rates. Table III-H-5 compares CSXT’s rates to Consumers to the jurisdictional threshold and the MMM maximum. The issue rates are greater than both the jurisdictional threshold and the MMM rates.

**Table III-H-5**  
**MAXIMUM RATE SUMMARY FOR 1Q15 TO 1Q16**

<u>Quarter</u> (1)	<u>CSXT Rate Level (Including fuel surcharge)</u> (2)	<u>Jurisdictional Threshold per Ton</u> (3)	<u>MMM Rate Per Ton</u> (4)	<u>Maximum Rate Per Ton<sup>1/</sup></u> (5)
<b>Gondola</b>				
1. 1Q 2015	\$14.95	\$5.13	\$10.22	\$10.22
2. 2Q 2015	\$14.95	\$5.20	\$10.36	\$10.36
3. 3Q 2015	\$14.95	\$5.17	\$10.29	\$10.29
4. 4Q 2015	\$15.07	\$5.09	\$10.15	\$10.15
5. 1Q 2016	\$15.33	\$4.93	\$11.51	\$11.51
<b>Hopper</b>				
6. 1Q 2015	\$14.95	\$5.06	\$10.08	\$10.08
7. 2Q 2015	\$14.95	\$5.13	\$10.22	\$10.22
8. 3Q 2015	\$14.95	\$5.09	\$10.15	\$10.15
9. 4Q 2015	\$15.07	\$5.02	\$10.01	\$10.01
10. 1Q 2016	\$15.33	\$4.88	\$11.38	\$11.38

<sup>1/</sup> The Maximum Rate Per Ton equals the greater of the Jurisdictional Threshold (Column (3)) or MMM Rate (Column (4)) per ton.

Source: Consumers Rebuttal e-workpaper "1Q15 to 1Q16MMM Rates\_Rebuttal.xlsx," tab "Rates."

## 5. Reparations

As described in Part I of its Opening Evidence, Consumers has been paying rates under Tariff CSXT-13952, Amendment 1, in excess of the maximum reasonable rates per ton since January 1, 2015. CSXT thus owes Consumers the difference between the rates paid and the lawful maximum levels in principal reparations payments. Such principal will increase until CSXT complies with a final order of the Board in this proceeding. Consumers also is entitled to interest on all principal reparations amounts, calculated from the date that the first



unlawful charge was paid at the rate assessed under CSXT-13952, and otherwise in accordance with 49 C.F.R. § 1141.1, *et seq.*

The Board's regulations (49 C.F.R. § 1141.1, *et seq.*) provide for interest at the U.S. Prime Rate as published by the Wall Street Journal, updated and compounded for each change in the published rate. *See also Ex Parte No. 715* at 35-36, 41.



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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<b>CONSUMERS ENERGY COMPANY</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. NOR 42142</b>
	)	
<b>CSX TRANSPORTATION, INC.</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

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**PART IV**

**REVENUE ADEQUACY**

Consumers’ Opening Evidence demonstrated that the Board should grant the revenue adequacy rate relief that Consumers requested under 49 U.S.C. § 10704(a)(2) and the *Coal Rate Guidelines*.

Relying on the accompanying report of Dr. John F. Hennigan (“Hennigan Report”), the former director of the ICC’s Office of Economics,<sup>1</sup> and other materials, Consumers first demonstrated that CSXT had achieved revenue adequacy on a long-term basis and was likely to remain so for the long term. While CSXT has not yet been found to be revenue adequate under the Board’s annual “snapshot” ROI=COC test using the Board’s values for the current cost of capital (“COC”), Consumers showed that the shortfall in recent years has been so

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<sup>1</sup> Dr. Hennigan is also sponsoring Part IV of Consumers’ Rebuttal Evidence and submitting an accompanying Verified Statement (“Hennigan Rebuttal Report”).

small as to lack statistical significance. Consumers further demonstrated that CSXT satisfied the ROI=COC test by a very substantial amount on a long-term basis using any of a number of well-supported adjustments to the Board's COC methodology or the COC as calculated by independent observers {  
}.<sup>2</sup>

The finding of revenue adequacy under the ROI=COC test as reasonably applied is confirmed by review of the individual criteria for measuring revenue adequacy that Congress specified at 49 U.S.C. § 10704(a)(2).<sup>3</sup> Consumers also showed that consideration of standard financial ratios long relied upon by investors and analysts, and previously utilized by the Board's predecessor, provided further evidence of CSXT's revenue adequacy,<sup>4</sup> as did analyses by respected independent financial analysis firms focusing on long-term considerations.<sup>5</sup>

Finally, Consumers showed that CSXT's revenue adequacy compelled a ruling that CSXT's January 1, 2015 rate increase on Consumers' Campbell coal traffic was unlawful under the *Coal Rate Guidelines* and applicable precedent.<sup>6</sup>

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<sup>2</sup> Consumers Opening at IV-2-11.

<sup>3</sup> *Id.* at IV-11-25.

<sup>4</sup> *Id.* at IV-25-37.

<sup>5</sup> *Id.* at IV-37-42.

<sup>6</sup> *Id.* at IV-42-46.

CSXT's Reply is more significant for what it does *not* contend than for what it does. CSXT takes no issue with the accuracy of Consumers' calculations, underlying data, and other evidence. For example, CSXT stresses, repeatedly, that the Board has not made an annual finding of revenue adequacy for CSXT under its snapshot test, but CSXT does not challenge Consumers' demonstration that the shortfall has been statistically insignificant in recent years. CSXT does not dispute any of the COC adjustments that show CSXT to be revenue adequate, the underlying support for those adjustments, or the accuracy of Consumers' financial ratio calculations. CSXT also does not address, much less challenge, Consumers' showing that CSXT satisfies the revenue adequacy criteria specified by statute, beyond urging the use of replacement costs, which the Board has repeatedly rejected and is contrary to the Board's governing statute. CSXT also makes no attempt to show that there is some reason why the Campbell movement specifically should experience a rate increase, despite CSXT's revenue adequacy.

CSXT instead devotes its Reply to contending that: (A) the Board should abandon altogether any Revenue Adequacy Constraint based on system-wide revenues;<sup>7</sup> (B) Consumers cannot seek relief under the *Guidelines*' SAC Constraint and Revenue Adequacy Constraint at the same time;<sup>8</sup> (C) CSXT cannot be found revenue adequate because it fails the ROI=COC test using the Board's

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<sup>7</sup> CSXT Reply at IV-3-26.

<sup>8</sup> *Id.* at IV-26-29

annual COC;<sup>9</sup> and (D) earnings above the COC should not trigger revenue adequacy liability.<sup>10</sup>

These are a remarkable set of defective contentions. Contentions (A) and (B) are directly contrary to the *Coal Rate Guidelines* and agency precedent, and the Board already rejected them in its June 15, 2015 decision that denied CSXT's January 13, 2015 motion to dismiss Consumers' revenue adequacy claim. Contention (C) also is contrary to the Board's decision, and to agency precedents allowing shippers to present "other competent and probative evidence" of a carrier's revenue adequacy in an individual rate case. Contention (D) grossly distorts and misrepresents the relief that Consumers has requested and the basis for that relief.

CSXT's Reply made no effort to track the organization of Consumers' Opening Part IV. In order to be responsive and ease the Board's burdens, Consumers has organized its Part IV Rebuttal to track CSXT's Part IV Reply, but with captions that reflect Consumers' positions. The trade-off in using CSXT's organization is that some of CSXT's repetition carries over to Consumers' Rebuttal.

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<sup>9</sup> *Id.* at IV-29-61.

<sup>10</sup> *Id.* at IV-61-66.

**A. THE BOARD MUST AND SHOULD APPLY THE EXISTING REVENUE ADEQUACY CONSTRAINT**

CSXT’s lead argument against Consumers’ evidence is that “the Board should abandon a revenue adequacy rate constraint based on CSXT’s system-wide revenue needs.”<sup>11</sup> CSXT’s request necessarily concedes the fact that the Revenue Adequacy Constraint already is part of the *Coal Rate Guidelines*.

The Revenue Adequacy Constraint is not an incidental appendage to CMP. Instead, it resides at the core, as “the logical *first* constraint on a carrier's pricing is that its rates not be designed to earn greater revenues than needed to achieve and maintain this ‘revenue adequacy’ level.”<sup>12</sup> “The Revenue Adequacy Constraint is a necessary, explicit condition needed to complete CMP and to apply its competitive pricing principles to a regulatory framework.”<sup>13</sup> CSXT’s request to eliminate the Constraint would fundamentally alter the *Coal Rate Guidelines* and leave SAC as the only protection for captive shippers against unreasonable rates. Such a direct attack on the *Guidelines* should not be permitted in an individual rate case.<sup>14</sup>

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<sup>11</sup> CSXT Reply at IV-3 (capitalization altered).

<sup>12</sup> *Coal Rate Guidelines*, 1 I.C.C.2d at 535 (emphasis added).

<sup>13</sup> Hennigan Rebuttal Report at 3.

<sup>14</sup> CSXT claims it may challenge the Revenue Adequacy Constraint “in its entirety” because the *Guidelines* are merely a general statement of policy and thus do not represent a “legislative rule.” CSXT Reply at IV-33. Such claims should have been brought when the *Guidelines* were challenged and upheld on review. *Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987). CSXT is foreclosed from making such a broad challenge now.

The notion that a separate regulatory constraint should apply if a railroad is revenue adequate is entirely logical. Professor Baumol has explained that SAC does not represent the optimal rate or establish a rate floor, as CSXT claims. Instead, SAC represents the maximum rate ceiling that a monopolist, or any other firm, should ever be able to charge:

To summarize, the contestable markets rule that at least some regulatory agencies have adopted to constrain pricing by firms considered to have market power is the following.

No price is allowed to be higher than stand-alone cost and no price is allowed to be lower than incremental cost, but any price in between these two levels is permitted.<sup>15</sup>

Professor Baumol noted that contestable markets, like perfectly competitive ones, allow “[p]rofits no higher than the competitive level.”<sup>16</sup> Contestable markets surpass competitive ones because they enable economies of scale to be realized, without allowing excessive profits.<sup>17</sup> The consideration whether a carrier already is earning its cost of capital on an entity-wide basis is thus inherently fundamental to determining whether that carrier should be able to raise the rates of a captive shipper that is already paying differentially higher rates.

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<sup>15</sup> William J. Baumol, *Contestable Markets: Applications and Their Theoretical Foundation*, Momigliano Lecture (1997) at 15, included in Consumers e-workpapers at “RA-BaumolMomigliano.pdf”.

<sup>16</sup> *Id.* at 8 (italics deleted).

<sup>17</sup> *Id.* at 7.



The Revenue Adequacy Constraint flows directly from this principle:

Our revenue adequacy standard represents a reasonable level of profitability for a healthy carrier. It fairly rewards the rail company's investors and assures shippers that the carrier will be able to meet their service needs for the long term. Carriers do not need greater revenues than this standard permits, and we believe that, in a regulated setting, they are not entitled to any higher revenues.<sup>18</sup>

Allowing a carrier to exceed the revenue adequacy level carries the same adverse consequences as allowing a carrier to charge more than SAC: (a) captive shippers pay, and the carrier collects, more than is required for the carrier to “be able to meet their service needs for the long term;” (b) the resulting reduction in volume, or deadweight loss, represents a misallocation of societal resources; and (c) the excess payments overcompensate railroad investors and can cross-subsidize competitive traffic, contrary to the Long-Cannon factors at 49 U.S.C. § 10701(d)(2).<sup>19</sup>

The fact that the SAC Constraint includes a revenue adequacy component of sorts, *i.e.*, the SARR’s rates are set so that the SARR recoups its cost of capital,<sup>20</sup> does not render the Revenue Adequacy Constraint superfluous. As Dr. Hennigan explained at the Board’s hearing in *Ex Parte No. 722*, and in greater detail in his Rebuttal Report, the two constraints achieve the same

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<sup>18</sup> *Coal Rate Guidelines*, 1 I.C.C.2d at 535.

<sup>19</sup> Hennigan Rebuttal Report at 3-7.

<sup>20</sup> CSXT Reply at IV-3-4 & n.7.

Ramsey-type result, but by different means, as SAC applies on a bottom-up basis, and revenue adequacy is top-down in nature.<sup>21</sup> As the Board previously explained:

The revenue adequacy ... constraint[] employ[s] a “top-down” approach, examining the incumbent carrier’s existing operations, and ... the revenues, expenses, asset values, and liabilities associated with rail operations reported in the carrier’s financial statements. If the carrier is revenue adequate (earning sufficient funds to cover its costs and provide a fair return on its investment),... the complaining shipper may be entitled to relief.... In contrast, the SAC constraint uses a “bottom-up” approach, calculating the revenue requirements that a hypothetical new, optimally efficient carrier would need to provide rail service to the complaining shipper. Thus, the SAC constraint does not rely on book values.<sup>22</sup>

As Dr. Hennigan further explains, the Revenue Adequacy Constraint, like SAC, allocates unattributable costs on the basis of differential demand, allowing the carrier to recoup its costs on a sustainable basis, while efficiently maximizing the carrier’s output. A regulated carrier does not need to, nor should it charge rates on captive traffic higher than required to achieve revenue adequacy, just as it should not charge rates higher than SAC, as doing either confers an excessive recovery that is not needed to allocate the costs of production on a Ramsey-efficient, differentially-priced basis.<sup>23</sup>

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<sup>21</sup> STB Hearing in *Ex Parte No. 722*, July 22, 2015, tr. at 41; Hennigan Rebuttal Report at 8-13.

<sup>22</sup> *Western Coal Traffic League--Pet. for Decl. Order*, Finance Docket No. 35506 (STB served July 25, 2013) at 8 (“*WCTL Petition BNSF*”).

<sup>23</sup> Hennigan Rebuttal Report at 8-13; *see also*, IV-14-20, *infra*.

Abandoning the constraint would enable CSXT to extract excessive returns on captive traffic that it does not need to cover its unattributable costs and attract and maintain investment, thereby violating contestable market principles, basic economic principles, and the requirement in 49 U.S.C. §§ 10701(d)(1) and 10702(1) that rates on market dominant traffic be reasonable.

**1. CSXT’s Revenue Adequacy Provides Useful Guidance for the Reasonableness of Particular Rates and is Not Undermined by Cases Applying Only the SAC Constraint**

CSXT argues that its “system-wide revenue requirements provide no guidance whatsoever on the rate Consumers[] should pay” because those requirements are “irrelevant,” citing various Board and D.C. Circuit decisions in *Xcel I* and elsewhere.<sup>24</sup> CSXT misreads those decisions, none of which invoked the Revenue Adequacy Constraint.

In *Xcel I*, the shipper sought relief under the SAC Constraint, and BNSF tried to defend its above-SAC rates based on its revenue inadequacy. The Board and the D.C. Circuit correctly rejected BNSF’s defense, as SAC implements the basic principle that even a revenue inadequate carrier should not be permitted to impose an unreasonable rate:

The Board is on solid ground here. Regardless whether BNSF as a system is revenue-adequate, system-wide revenue inadequacy is not a basis upon which a carrier may defend an unreasonable rate over a segment of its system. *See Coal Rate Guidelines*, 1 I.C.C.2d at 536 (“[A] rate may be unreasonable even if the carrier is far short of revenue adequacy”). As the Board

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<sup>24</sup> CSXT Reply at IV-4-8.

explained in denying BNSF's petition for reconsideration, the SAC test is designed to take into account the railroad's need for revenue adequacy "on the portion of its system that is included in the system of the SARR." *Decision II*, at 6; *see also Burlington N. R.R. v. ICC*, 985 F.2d 589, 597 (D.C. Cir. 1993) ("CMP explicitly builds in the idea of revenue adequacy (subject to the SAC constraint)").<sup>25</sup>

As the *Xcel I* shipper did not even seek revenue adequacy relief, the decision provides no support for CSXT's claim that a revenue adequate carrier should be allowed to collect a higher SAC rate when the Revenue Adequacy Constraint identifies a lower maximum reasonable rate.<sup>26</sup>

CSXT next depicts its position as "the inverse of the long held view that the revenue inadequacy of a carrier is irrelevant in a rate case."<sup>27</sup> But in *Omaha Power*, as in the other cases, the shipper did not even seek revenue adequacy relief, so CSXT's logic fails for that reason alone. Beyond that, relying on the inverse of a proposition constitutes a broadly recognized logical fallacy.<sup>28</sup>

CSXT ignores the precedent wherein the Board applied the Revenue Adequacy Constraint in spite of the carrier's claim that SAC identified a higher

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<sup>25</sup> *BNSF Ry. v. S.T.B.*, 453 F.3d 473, 480 (D.C. Cir. 2006).

<sup>26</sup> CSXT quotes language rejecting BNSF's claim that the SAC rates should not be set below the RSAM level. CSXT Reply at IV-5. RSAM's insignificance in a SAC case has no bearing for a rate claim founded upon the Revenue Adequacy Constraint, where revenue adequacy is applied on a top-down basis.

<sup>27</sup> CSXT Reply at IV-5, citing *Omaha Public Power Dist. v. Burlington Northern, Inc.*, 3 I.C.C.2d 123, 157 (1986).

<sup>28</sup> *E.g.*, [www.algebra.com/algebra/homework/Conjunction/THEO-2011-08-22-02.lesson](http://www.algebra.com/algebra/homework/Conjunction/THEO-2011-08-22-02.lesson) (explaining to the effect that the proposition that if it barks, then it is a dog, does not prove that if it does not bark, then it is not a dog).

rate.<sup>29</sup> The D.C. Circuit affirmed that the Board's holding that the carrier's SAC evidence was not relevant, even if it would have yielded a different result, "was a reasonable reading of the agency's rate guidelines and is not subject to reversal by this court." *Id.* *CF Industries* is more apposite than the cases noted by CSXT.

CSXT's final contention is that Consumers should not receive relief under the Revenue Adequacy Constraint because its movement uses less than 1% of CSXT's route miles.<sup>30</sup> CSXT's logic fails in multiple respects.

First, CSXT has not shown that Consumers' movement is atypical in any way. CSXT's contention is just another argument that there should be no Revenue Adequacy Constraint at all, when the *Coal Rate Guidelines*, contestable market theory, and precedent all show otherwise. The fact that CSXT handles many movements -- some long, short, big, small, *etc.* -- creates the economies of scale, scope, and density that give rise to CSXT's market power and the related need for meaningful regulation to address the potential for the accumulation of supra-competitive profits.<sup>31</sup>

Second, CSXT's focus on miles ignores the fact that the Campbell movement utilizes CSXT's facilities in Chicago, which CSXT elsewhere depicts

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<sup>29</sup> *CF Indus., Inc. v. Koch Pipeline Co.*, 4 S.T.B. 637 (2000), *aff'd sub nom. CF Indus., Inc. v. Surface Transp. Bd.*, 255 F.3d 816, 827-28 (D.C. Cir. 2001).

<sup>30</sup> CSXT Reply at IV-5-8.

<sup>31</sup> Baumol, Momigliano Lecture, at 7, 11.

as a vital portion of its network.<sup>32</sup> The Campbell movement is not as isolated or insular as CSXT claims.

Third, the Campbell movement is very significant to CSXT under other salient metrics such as volume, revenues, margin, contribution, *etc.* Simply by falling above the jurisdictional threshold, the Campbell movement necessarily makes a greater contribution than the majority of CSXT's other traffic revenues.

As part of its RSAM calculation, the Board divides each carrier's costed waybill sample into three segments based on its revenue to variable cost ratio ("R/VC"): (a) at least 180%, (b) at least 100%, but below 180%, and (c) below 100%. For CSXT in 2014, revenues were \$4.7 billion for (a), \$5.2 billion for (b), and \$1.2 billion for (c).<sup>33</sup> Accordingly, even if the R/VC for the expiring 2014 contract rate on the Campbell movement in effect immediately prior to this litigation was merely 180% { }, so as to fall at the bottom of (a), its markup would still exceed the majority (at least 57%) of CSXT's other traffic.

Fourth, even if CSXT were correct that the Campbell movement constitutes a *de minimis* portion of CSXT's total transportation, it would follow that the rate relief requested would have no greater impact on CSXT. CSXT's claim that the movement is insignificant is no reason to withhold relief.

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<sup>32</sup> *E.g.*, CSXT Reply at IV-28-29, 70.

<sup>33</sup> See e-workpaper "RA-CSXTWaybillAnalysis.xlsx", tab "Analysis", line 10, rows cell H11, I11, J11, and K11. Source data taken from [https://www.stb.dot.gov/stb/docs/Economic%20Data/RSAM%20Computation\\_2014\\_Locked.xlsx](https://www.stb.dot.gov/stb/docs/Economic%20Data/RSAM%20Computation_2014_Locked.xlsx), tab "RSAM\_2014\_Class\_I\_Costs\_and\_Rev", line 9, columns g through I, included as e-workpaper "RA-RSAMWBreakdown.xlsx".

Finally, the nature of a top-down constraint is that it potentially applies to all of a carrier's eligible captive traffic. As Dr. Hennigan explains, the constraint involves a Ramsey-efficient allocation of all of a carrier's unattributable costs to its full traffic base.<sup>34</sup> Excluding a particular movement because it is "small" violates the foundation of the constraint. Nonetheless, a particular movement may be ineligible for relief if the carrier can "demonstrate with particularity: (1) a need for the higher revenues; (2) the harm it would suffer if it could not collect them; and (3) why the captive shippers should provide them."<sup>35</sup> CSXT had this opportunity, but opted to forego any such showing in its Reply Evidence.

In sum, CSXT has provided no support for its claims that the Constraint should be abandoned or that Consumers is ineligible for such relief.

**2. Replacement Costs Should Not be Utilized to Measure CSXT's Revenue Adequacy**

CSXT argues at length that any assessment of revenue adequacy should be based on replacement costs. CSXT Reply at IV-8-26. CSXT bases its position on various considerations, each of which is addressed below. However, the short answer is that CSXT's contentions cannot be accepted for three fundamental reasons. First, the Board does not utilize replacement costs for measuring revenue adequacy and has consistently rejected repeated railroad

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<sup>34</sup> Hennigan Rebuttal Report at 8, 10-11.

<sup>35</sup> *Coal Rate Guidelines*, 1 I.C.C.2d at 536 n.36.

requests that it do so. Second, even if replacement costs could be considered, CSXT has submitted no quantitative evidence regarding its actual replacement costs. Third, even if CSXT had submitted such evidence, it would be necessary to determine CSXT's "'real' cost of capital to avoid double-counting the effects of inflation."<sup>36</sup> CSXT has submitted no evidence regarding the real cost of cost of capital.<sup>37</sup>

**a. Regulatory Policy Should Replicate the Disciplining Forces of Competition, and the Revenue Adequacy Constraint Does So Utilizing GAAP Costs**

Consumers agrees with CSXT's general statement that "[t]he goal of regulation is to replicate the result in a competitive market."<sup>38</sup> Indeed, that is precisely what the Revenue Adequacy Constraint seeks to accomplish, as explained in Hennigan Rebuttal Report at 8-10. Firms in competitive markets do not earn monopoly profits because such profits induce others to enter and compete, and monopoly profits cannot be sustained in the face of such competition.<sup>39</sup> In a monopoly market, barriers to entry exist, often in the form of economies of scale, scope, and density, and prevent competitive entry, allowing an incumbent to garner supra-competitive profits in excess of its cost of capital.<sup>40</sup>

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<sup>36</sup> *Assoc. of Am. R.R.--Pet. Regarding Methodology for Determining R.R. Revenue Adequacy*, Ex Parte No. 679 (STB served Oct. 23, 2008) at 5.

<sup>37</sup> Hennigan Rebuttal Report at 14.

<sup>38</sup> CSXT Reply at IV-11.

<sup>39</sup> Baumol, Momigliano Lecture, at 8.

<sup>40</sup> *Id.* at 7, 11.



Railroads are subject to rate regulation to the extent that they do not operate in competitive markets with respect to their captive traffic. The Revenue Adequacy Constraint serves as a check that the railroad does not extract excessive rents on captive traffic. The revenue adequacy level “represents a reasonable level of profitability for a healthy carrier” that “fairly rewards the rail company’s investors and assures shippers that the carrier will be able to meet their service needs.”<sup>41</sup> “Carriers do not need greater revenues than this standard permits, and we believe that, in a regulated setting, they are not entitled to any higher revenues.”<sup>42</sup> The Revenue Adequacy Constraint protects captive shippers from paying too much, while allowing carriers to receive the revenues that they need to provide service by allocating unattributable costs on a Ramsey-efficient basis.<sup>43</sup>

Where Consumers and CSXT diverge is how the presence of monopoly profits should be ascertained, and what consequences should follow if they are present. Consumers’ position is that use of historical or generally accepted accounting principles (“GAAP”) costs are appropriate and preferable for this purpose, and that use of the replacement costs as advocated by CSXT will undermine accuracy and increase complexity. As Dr. Hennigan explains, deployment of the Revenue Adequacy Constraint using GAAP costs and the nominal cost of capital results in Ramsey-efficient pricing that allocates an

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<sup>41</sup> *Coal Rate Guidelines*, 1 I.C.C.2d at 535.

<sup>42</sup> *Id.*

<sup>43</sup> Hennigan Rebuttal Report at 5-7, 10-11.

appropriate, but not excessive, amount of unattributable costs to captive shippers such as Consumers. Allowing carriers to collect more constitutes an overrecovery for which there is no economic justification.<sup>44</sup>

Significantly, others reviewing the issue, including Congress in the Staggers Rail Act of 1980 (requiring use of GAAP accounting to the maximum extent practicable in 49 U.S.C. § 11161), the ICC, the Railroad Accounting Principles Board (“RAPB”), the General Accounting (now Government Accountability) Office (“GAO”), and the Board itself, have reached the same conclusion that the revenue adequacy constraint should utilize GAAP costs, as explained in Hennigan Rebuttal Report at 17-23.<sup>45</sup>

The RAPB considered the merits of using replacement costs for revenue adequacy purposes at length, and concluded that the potential benefits did not outweigh the costs and risks.<sup>46</sup> The RAPB specifically considered whether using GAAP costs would undermine the railroads’ ability to attract needed capital, and concluded that the use of GAAP costs was consistent with the revenue adequacy objective:

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<sup>44</sup> *Id.* at 7-10, 15-16, 22-29.

<sup>45</sup> *Assoc. of Am. R.R.--Pet. Regarding Methodology for Determining R.R. Revenue Adequacy*, Ex Parte No. 679 (STB served Oct. 23, 2008) (denying AAR petition and citing prior ICC, RAPB, and GAO decisions and reports rejecting use of replacement costs to measure revenue adequacy); *WCTL Petition BNSF* at 8 (Revenue Adequacy Constraint uses “revenues, expenses, asset values, and liability associated with rail operations reported in carrier’s financial statements”).

<sup>46</sup> RAPB Report, Volume 2, at *e.g.*, 40-41, 46-48.

A primary object of the [Staggers Rail Act] is to assist railroads in attaining revenue adequacy. To accomplish this objective, investors must be permitted to earn a market return on their investment. As long as investors can earn a rate of return comparable to their market rates of return for investments of comparable risk, they will continue to invest.

Use of GAAP cost is consistent with the objective of enabling railroad entities to attract capital for the replacement of necessary assets. Railroad assets will be replaced so long as competitive returns are allowed on the existing and new investments of the entity.... if investors reasonably can expect to earn a competitive return, capital can be attracted when it is required, and the accumulation of funds in advance of the reinvestment is not necessary.<sup>47</sup>

CSXT acknowledged this reality in stating in response to Consumers' Interrogatory No. 20 "that it calculates and utilizes the replacement cost of assets every time it replaces an asset, because replacement costs are by definition the true cost necessary to replace railroad infrastructure."<sup>48</sup> In other words, CSXT calculates the replacement cost of an asset when it needs to, which is when the asset is actually replaced or a new asset is acquired. CSXT has sufficient funds, and sufficient access to capital, to make those replacements when needed. The cost is verifiable, as it is the price actually paid at the time. The actual investment then enters the investment base, where it is utilized to determine the carrier's ongoing revenue needs.<sup>49</sup> Not all assets require replacement when

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<sup>47</sup> *Id.* at 47, discussed in Hennigan Rebuttal Report at 22-23.

<sup>48</sup> E-workpaper "RA-CSXT-InterNo20.pdf".

<sup>49</sup> Hennigan Rebuttal Report at 25-26.

they wear out, and some assets can be replaced with a different or superior asset; *e.g.*, CSXT no longer purchases coal-fired locomotives and has little use for manned cabooses, but relies more extensively on computers and other advanced technology.<sup>50</sup>

Relying on GAAP costs does not undermine the carriers' ability to obtain adequate capital, when and as needed. Indeed, the assessment of whether a carrier is providing a "competitive return" that "represents a reasonable level of profitability" and "fairly rewards the rail company's investors" is best made when its investment base can be compared to those of other firms. Those other firms, whether they operate in monopoly or more competitive markets, are near uniform in reporting their results and being evaluated by investors on the basis of GAAP and not replacement costs.<sup>51</sup>

CSXT is asking the Board to deviate from the type of cost recognition that is the norm not only for rate regulation in the United States, but also for investment in non-regulated companies. For its own part, CSXT sees no need to account for the replacement cost of its asset base in conducting its affairs. As stated in its discovery response, "[i]n the ordinary course of business CSXT

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<sup>50</sup> *Id.* at 18, 22, 26-27.

<sup>51</sup> Hennigan Rebuttal Report at 15-17.

does not maintain any database, spreadsheet, or other document that calculates the overall replacement costs of the CSXT system.”<sup>52</sup>

Moreover, CSXT has not shown that relying on the GAAP approach imposes any sort of hardship on its operations, its investment and financial decisions, or its ability to attract needed capital. Significantly, CSXT explains in its Proxy Statement for 2016<sup>53</sup> that half of its long-term incentive compensation for its executives, which “is intended to incent employee behavior that supports strategic initiatives to drive shareholder value over a multi-year period,” is based on Return on Assets (“ROA”).<sup>54</sup> CSXT calculates ROA as tax-adjusted operating income, excluding certain non-recurring items, divided by net property, which is measured by subtracting accumulated depreciation from gross property.<sup>55</sup> CSXT thus relies on GAAP to measure and incent its own long-term value, even as it argues that the Board should use replacement costs for that purpose

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<sup>52</sup> Letter from CSXT Counsel to Consumers Counsel, dated August 13, 2015, excerpt included as e-workpaper “RA-CSXT-Supp-InterNo20.pdf”; Hennigan Rebuttal Report at 26-27.

<sup>53</sup> E-workpaper “RA-CSX2016ProxyStatement.pdf”.

<sup>54</sup> *Id.* at 43, 44. As discussed *infra*, the other half of the incentive compensation is based on operating ratio. CSXT’s management compensation arrangements are discussed in greater detail in Hennigan Rebuttal Report at 27-29.

<sup>55</sup> *Id.* For the eleven-quarter period from the April 2013 through December 2015, CSXT’s ROA averaged 7.86%, exceeding the threshold return of 7.69%. *Id.* at 44, 45. As explained in Hennigan Rebuttal Report at 29, 43, it would make little sense for CSXT to set ROA compensation targets below its cost of capital, as such performance would theoretically not contribute to growth in long-term value.

**b. CSXT’s Cited Support for Using Replacement Costs was Previously Considered and Rejected, and Remains Underwhelming**

CSXT claims that “the academic support for the use of replacement costs is overwhelming.”<sup>56</sup> But the support that CSXT identifies (the Economist Letter, *etc.*) is all very dated, and has been previously considered and repeatedly rejected, as the Board noted in denying the AAR’s petition in *Ex Parte No. 679* in 2008.

If the support were so “overwhelming,”<sup>57</sup> one would expect to find replacement costs used pervasively in economic regulation, CSXT’s own internal practices, and financial and investment analysis of non-regulated firms generally. CSXT has supplied no such evidence. However, the norm in all of those contexts is to rely on GAAP, not replacement costs.<sup>58</sup>

CSXT fails to identify a single instance where full-scale replacement costs are utilized for general rate regulation. CSXT has not provided a basis for the Board to depart from its own established practice and that of numerous other agencies that utilize GAAP costs, and instead turn to replacement costs to determine a regulated entity’s overall revenue requirements.

CSXT cannot even show that it tracks and utilizes the total replacement costs for conducting its own affairs. “In the ordinary course of

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<sup>56</sup> CSXT Reply at IV-12 (capitalization deleted).

<sup>57</sup> *Id.* at IV-10, 12-13.

<sup>58</sup> Hennigan Rebuttal Report at 15-16.

business CSXT does not maintain any database, spreadsheet, or other document that calculates the overall replacement costs of the CSXT system.”<sup>59</sup> CSXT relies on GAAP costs, not replacement costs, to calculate and incent its ROA for executive compensation designed “to drive shareholder value over a multi-year period.”<sup>60</sup>

CSXT also has not adduced empirical or other evidence to support its broad claim that “[p]rices in competitive markets are based on current costs, not historical costs,”<sup>61</sup> in a way that requires or supports the use of total replacement costs for a firm’s assets. Public companies are required to report on the basis of GAAP, and GAAP forms the foundation for evaluation and analysis in the financial and investment community.<sup>62</sup>

CSXT attempts to analogize to circumstances where some individual assets are valued on a replacement cost basis, such as the costs of a semitrailer for a trucking firm and the rental rate for a house in the housing market.<sup>63</sup> In doing so, CSXT misconstrues the nature of the Revenue Adequacy Constraint. As Dr. Hennigan explained in his testimony to the Board, the Revenue Adequacy Constraint operates on a top-down basis, and not bottom-up, as with SAC and

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<sup>59</sup> E-workpaper “RA-CSXT-Supp-InterNo20.pdf;’ Hennigan Rebuttal Report at 26-27.

<sup>60</sup> CSXT 2016 Proxy Statement at 44-45, “RA-CSX2016ProxyStatement”, discussed at IV-19, *supra*, and Hennigan Rebuttal Report at 28.

<sup>61</sup> CSXT Reply at IV-13.

<sup>62</sup> Hennigan Rebuttal Report at 15-17.

<sup>63</sup> CSXT Reply at IV-13-14.

Simplified SAC. The revenue adequacy constraint looks to the total investment base in the aggregate. Some assets may be very new and others old, although older assets often benefit from substantial ongoing capital expenditures.<sup>64</sup> CSXT's ongoing capital expenditures are substantial and result in an ongoing renewal of its assets, *e.g.*, CSXT "calculates and utilizes the replacement cost of assets every time it replaces an asset, because replacement costs are by definition the true cost necessary to replace railroad infrastructure."<sup>65</sup> When an asset is replaced or updated, the replacement cost/expenditure enters its asset base.<sup>66</sup> The need to replace assets from time to time does not require that all of a firm's assets be valued on a replacement cost basis.

Use of replacement costs is thus not required to achieve "the universally accepted principle of striving to replicate the results of competitive markets." As the RAPB explained in the passage quoted at IV-17, *supra*, investors logically will continue to invest as long as they receive a competitive return on their investments, including the replacement cost of assets as they are

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<sup>64</sup> Hennigan Rebuttal Report at 24-26. CSXT's claim that land is different because it does not depreciate is discussed at IV-24-26, *infra*.

<sup>65</sup> "RA-CSXT-InterNo.20.pdf".

<sup>66</sup> Hennigan Rebuttal Report at 25-26 (showing how the net book value of CSXT's physical assets grew by 20.1% from 2010 to 2014).



replaced. CSXT has not suggested, much less demonstrated, that it is short on invested capital or has been unable to raise needed capital.<sup>67</sup>

CSXT then turns to the accounting for railroad mergers and other control acquisitions, where CSXT claims “a market transaction that sets the price of railroad assets.”<sup>68</sup> Here, too, CSXT distorts both marketplace reality and Board precedent. Railroad control transactions set a price for the overall enterprise on an overall going concern basis, not the replacement or market cost of individual assets.<sup>69</sup> GAAP then requires that the negotiated acquisition price (including any premium) be allocated to individual assets, some of which may be written-up and others written-down. But the price itself has been negotiated for the overall enterprise. The substantial premiums paid in the recent mergers have not been for the raw assets considered in isolation.

The premiums and the associated increases in the jurisdictional threshold resulting from control transactions certainly have disturbed captive shippers. However, the agency’s recognition of some write-ups in conjunction with the mergers, based on GAAP, provides no support for using replacement costs generally. The Board has been very clear on this distinction:

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<sup>67</sup> *E.g.*, Hennigan Rebuttal Report at 24-29. CSXT’s fictitious revenue adequacy shortfall is addressed at IV-40-42, *infra*, and Hennigan Rebuttal Report at 48-51.

<sup>68</sup> CSXT Reply at IV-14.

<sup>69</sup> At least in part, the premium reflects projected synergies and other gains arising from expanded economies of scale, scope, and density, such as consolidated overhead and reduced interchanges.

Purchase accounting is required by GAAP; replacement cost accounting is not. Purchase accounting requires a *one-time* adjustment to asset values and is triggered by a *company specific market event* that signals that the book values of that company's assets are under- or overstated relative to their real values. In contrast, replacement cost accounting would need to be applied across the entire industry and would be imposed by a change in accounting philosophy rather than a market event.<sup>70</sup>

The use of write-ups in railroad mergers provides no basis for using replacements costs generally or to measure revenue adequacy. Such use of replacement costs is directly contrary to GAAP and Congress' directive that the Board conform its accounting rules to GAAP to the maximum extent practicable.

**c. CSXT's Discussion of the Replacement Cost of Land is Deficient and Unavailing**

CSXT claims that land particularly demonstrates the need for replacement costs because it does not depreciate and instead increases in value, such that it would be sold if it does not cover its replacement cost. CSXT Reply at IV-16-17. CSXT's analysis proves no such thing, and the nature of land only confirms that replacement costs should not be used to evaluate revenue adequacy.

First, in deciding whether a particular segment is covering its costs, CSXT would not logically look at the value of the land in isolation, but would instead consider the segment's relationship to the greater whole. CSXT would

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<sup>70</sup> *WCTL Petition BNSF* at 21 (original emphasis).

hesitate to abandon a small segment that links major parts of its network.

Focusing on land or any other individual asset in isolation is of no value.

Second, even a revenue adequate carrier, whether measured by replacement costs or not, may decide that it has surplus land or other assets and choose to abandon segments or otherwise consolidate its operations. For example, CSXT announced that it was reducing operations in Erwin, Tennessee, on October 15, 2015, closing mechanical shops in Corbin, Kentucky, on October 20, 2015, consolidating operations administration from ten divisions to nine and closing administrative offices at Huntington, West Virginia, on January 18, 2016, and streamlining mechanical operations at sixteen locations on February 12, 2016.<sup>71</sup> Such developments do not prove revenue inadequacy, only an opportunity to improve profitability and efficiency, possibly in response to changes in a dynamic market.<sup>72</sup> A segment, including associated land, may cover its full costs, but the firm may decide that it can earn an even greater return by selling those assets and deploying the proceeds elsewhere.

Third, CSXT controls a significant portion of its land under easements rather than fee interests. CSXT would not recoup anything for

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<sup>71</sup> CSXT's announcements are included as e-workpaper "RA-CSXT-ReductionAnnouncements.pdf".

<sup>72</sup> Hennigan Rebuttal Report at 30-31.

disposing of a segment owned by easement. Valuing such land at its replacement cost substantially overstates CSXT's investment.<sup>73</sup>

CSXT's concluding paragraph in this section is to the effect that use of something less than replacement cost will deprive the railroads of the ability to earn a reasonable return and force them to curtail investment.<sup>74</sup> The RAPB explained nearly thirty (30) years ago that reliance on the GAAP investment base is sufficient and preferable for determining if a firm is able to attract sufficient capital to remain in business and expand as needed. Other firms generally report and are evaluated on the basis of GAAP.

**d. CSXT Has Not Overcome the Practical Problems with Replacement Costs, or Even Attempted To Do So**

CSXT contends that the practical problems with using replacement costs to measure revenue adequacy have been overcome because (a) it has no excess capacity, obviating the need to identify excess assets,<sup>75</sup> and (b) the BEA statistics can be utilized to determine the current value of railroad assets.<sup>76</sup>

CSXT's claims do not survive review.

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<sup>73</sup>CSXT's specific focus on the replacement cost of land also appears inconsistent with its proposal to use the Bureau of Economic Analysis approach to replacement cost less depreciation (CSXT Reply at IV-21-22). As land is not used up and does not depreciate, the replacement cost for land less (non-existent) depreciation is the same as its full replacement cost.

<sup>74</sup> CSXT Reply at IV-17.

<sup>75</sup> *Id.* at IV-17-21

<sup>76</sup> *Id.* at IV-21-22

CSXT is quite correct that shippers expressed frustration in *Ex Parte No. 724* and elsewhere about the poor railroad service during 2013-2014.

However, those service problems cannot be attributed to an inability or failure to make long-term investments required to handle unprecedented traffic volumes.<sup>77</sup>

Traffic volumes in 2013-2014 were, by various measures, either below or modestly above the pre-recession peaks,<sup>78</sup> and the underlying problem was not a lack of basic track infrastructure. While weather played a role, the problems would not have persisted if weather were the only or even the main cause. In substantial part, the problems stemmed from railroad decisions to control expenses by reducing labor counts and storing locomotives.<sup>79</sup>

CSXT's own recent decisions demonstrate that it believes it still has excess assets, as evidenced by its recent actions in Erwin, Tennessee, Corbin, Kentucky, and elsewhere discussed at IV-25, *supra*. CSXT's actions reflect a determination that some of its assets will not be needed in the future, and such pruning likely will continue. A replacement cost methodology remains suspect in

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<sup>77</sup> See, e.g., <http://www.mprnews.org/story/2014/12/14/rail-delays>, "Documents cast doubt on BNSF explanation of shipping delays" (December 14, 2014), included as e-workpaper "RA-DoubtsAboutBNSFDelays.pdf".

<sup>78</sup> Hennigan Rebuttal Report at 47-48 and e-workpapers referenced therein.

<sup>79</sup> See, e.g., [http://www.omaha.com/money/buffett/service-problems-in-give-bnsf-a-lot-of-work-to/article\\_36d807e8-8644-5c92-a8d0-3e999299571d.html](http://www.omaha.com/money/buffett/service-problems-in-give-bnsf-a-lot-of-work-to/article_36d807e8-8644-5c92-a8d0-3e999299571d.html) (March 1, 2015) (quoting Professor David Kass of the University of Maryland, commenting about BNSF, "But it does raise the question of how much the service problems were weather-related and how much they were a result of bad managerial decisions."); e-workpaper "RA-BNSF2014ServiceProblems.pdf".

assuming that every existing asset today will be replaced, and with the same type of asset, in the future.<sup>80</sup>

CSXT also references very robust traffic growth projections.<sup>81</sup> However, meeting future traffic growth does not require the use of replacement costs, as the RAPB explained. *See* discussion at IV-18-19, *supra*.

CSXT's claim that the answer to the practical question of how to "reasonably transform the unreliable accounting values into current replacements ... may lie within the BEA"<sup>82</sup> also is deficient. CSXT did not provide an actual replacement cost calculation based on the BEA data, or show how to apply the BEA data to its assets.<sup>83</sup> Instead, CSXT merely asserts that "[t]he answer may lie within the BEA", "urges the Board to begin a rulemaking proceeding to explore how to use this published data," and acknowledges that its approach (whatever it turns out to be) "will not be perfect."<sup>84</sup> Those general statements do not provide anything that the Board can actually use in the instant rate case. CSXT also ignores the need to use a real cost of capital to avoid double-counting inflation, a long a recognized drawback to utilizing replacement costs.<sup>85</sup>

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<sup>80</sup> Hennigan Rebuttal Report at 21-22 (discussing Economists Letter).

<sup>81</sup> CSXT Reply at IV-9-10 & n.20, and 19.

<sup>82</sup> CSXT Reply at IV-21.

<sup>83</sup> Hennigan Rebuttal Report at 27, 31.

<sup>84</sup> CSXT Reply at IV-21-22.

<sup>85</sup> *E.g.*, Ex Parte No. 679 at 5; Hennigan Rebuttal Report at 31-32.

Third, CSXT ignores the Congressional directive for the Board to rely upon GAAP accounting “to the maximum extent practicable.”<sup>86</sup> The applicable statutory provisions and their history are discussed in Hennigan Rebuttal Report at 19-20. CSXT’s effort to “transform the unreliable accounting values into current replacement costs”<sup>87</sup> violates Congress’ directive. The RAPB also did not view GAAP data as unreliable in general or unsuitable for assessing railroad revenue adequacy, but found it superior to using replacement costs, as did the GAO, the ICC, and the Board in prior decisions.<sup>88</sup>

**e. Congress Has Not Directed the Use of Replacement Costs to Measure Revenue Adequacy**

CSXT next argues that Congress, in Section 16 of recently enacted S. 808, the *Surface Transportation Board Reauthorization Act of 2015*, Pub. L. No. 114-110, 129 Stat. 2228, directed the use of replacement costs to determine the revenue adequacy of railroads.<sup>89</sup>

As explained below, Congress did no such thing. Moreover, any action that Congress did take would have no bearing on Consumers’ rate case, because of what Congress did specify in Section 17:

SEC. 17. Construction.

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<sup>86</sup> 49 U.S.C. §§ 11161, 11164.

<sup>87</sup> CSXT Reply at IV-21.

<sup>88</sup> Hennigan Rebuttal Report at 17-29.

<sup>89</sup> CSXT Reply at IV-22-26.

Nothing in this Act may be construed to affect any suit commenced by or against the Surface Transportation Board, or any proceeding or challenge pending before the Surface Transportation Board, before the date of the enactment of this Act.

Since Consumers' rate case was already pending "before the Surface Transportation Board, before the date of the enactment [December 18, 2015] of" S. 808, the legislation cannot be construed to have any impact on Consumers' rate case. Any claim otherwise is at least disingenuous, and raises questions as to counsel's candor and fairness under 49 C.F.R. § 1103.27.

Even if Section 16 somehow was applicable, it would not support CSXT's position because Congress did not direct the use of replacement costs or other forward-looking valuation of assets. To the contrary, the accompanying Senate Report on the legislation expressly states that "[t]his section would not require *any* change to how the STB determines railroad revenue adequacy,"<sup>90</sup> a position confirmed by Senator Thune's letter to the Board dated March 31, 2016. There is also no basis to infer that Congress has directed the use of something other than GAAP costs, particularly as Congress did not alter the directive in 49 U.S.C. § 11161 to the Board to rely on GAAP "to the maximum extent practicable."

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<sup>90</sup> Senate Report No. 114-52 (2015) at 14 (emphasis added). Since the House of Representatives passed the Senate bill, there was no need for a separate House Report or Conference Report on the legislation.



As CSXT observes, Congress did amend 49 U.S.C. § 10704(a)(2) to include language noting the need “for the infrastructure and investment needed to meet the present and future demand for rail services.” The section-by-section review explains that the provision “would clarify standards and procedures for evaluating revenue adequacy and emphasizes the infrastructure needed in order for rail services to be able to meet the present and future demand for rail service.”<sup>91</sup> Such language addressing service needs is not surprising in view of the railroad operational problems that afflicted shippers during 2013-2014, which the Senate Report reviews at 3-7. But clarifying standards and emphasizing needs are very different than fundamentally altering a costing approach that has been used for over thirty (30) years, and remains strongly encouraged by a separate statutory provision that was not amended.

In stating that S. 808 “would clarify that a carrier’s capability to meet its current and future service needs is relevant when considering revenue adequacy,” the Senate Report includes a footnote that cites and quotes in part from the statement in *Coal Rate Guidelines* that under the revenue adequacy constraint “captive shippers should not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting its *current and*

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<sup>91</sup> S. Rep. at 14.

*future service needs.*”<sup>92</sup> The *Coal Rate Guidelines* and the Revenue Adequacy Constraint already incorporate the need for revenues to meet “current and future service needs.” Section 16 does not add anything new.

**B. CONSUMERS MAY SEEK RELIEF UNDER BOTH THE SAC AND REVENUE ADEQUACY CONSTRAINTS**

CSXT claims that Consumers cannot seek relief under both the SAC Constraint and the Revenue Adequacy Constraint simultaneously.<sup>93</sup> CSXT makes this claim despite acknowledging that the *Coal Rate Guidelines*, *Arkansas Power & Light*, and *Nevada Power* all hold otherwise.<sup>94</sup>

CSXT argues instead that entertaining a revenue adequacy claim is improper because it could confer relief by identifying a rate below the applicable SAC level, creating a cross-subsidy prohibited by SAC theory as described in *Otter Tail*, and *PPL Montana*.<sup>95</sup> CSXT’s claim is completely contrary to the *Coal Rate Guidelines*, contestable market theory, and Board precedent.

First, the *Coal Rate Guidelines* define revenue adequacy as “the logical first constraint” on a market dominant carrier’s pricing. As such, it applies even before stand-alone costs are considered, and its applicability is not

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<sup>92</sup> S. Rep. at 8 & n.44, citing *Coal Rate Guidelines*, 1 I.C.C.2d at 535-56 (italics added for the *Guidelines* language that is quoted in the Senate Report footnote).

<sup>93</sup> CSXT Reply at IV-26-29.

<sup>94</sup> *Id.* at IV-28 & nn.62-64, citing *Nevada Power*, 6 I.C.C.2d 1, *Arkansas Power & Light*, 3 I.C.C.2d 757, and *Coal Rate Guidelines*, 1 I.C.C.2d at 545-58.

<sup>95</sup> *Id.* at IV-27.

undermined if the SAC analysis identifies a higher maximum reasonable rate.

“Thus, the various constraints contained in CMP may be used individually or in combination to analyze whether the rate at issue is unreasonably high, *i.e.*, set at a level greater than necessary to collect the portion of unattributable costs that can properly be charged to that shipper.”<sup>96</sup>

Second, contestable market theory does *not* identify SAC as the undisputed reasonable price, but merely as the *ceiling* on the reasonable price. “No price is allowed to be higher than stand-alone cost and no price is allowed to be lower than incremental cost, but any price in between these two levels is permitted.”<sup>97</sup> The fact that a revenue adequacy analysis identifies a lower rate than the SAC analysis does not violate SAC principles. Under CSXT’s approach, a SAC analysis showing that all of a revenue adequate carrier’s rates are below the SAC level would allow the carrier to take additional rate increases on captive traffic, even though the carrier already is revenue adequate. Such an outcome, amounts to unconstrained market pricing and runs afoul of Ramsey pricing principles and the *Guidelines*.<sup>98</sup>

Third, CSXT’s claim that awarding revenue adequacy relief will cause Consumers to fail to cover its unattributable costs, or benefit from some

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<sup>96</sup> *Coal Rate Guidelines*, 1 I.C.C.2d at 548.

<sup>97</sup> Baumol, Momigliano Lecture, 1997, at 15.

<sup>98</sup> Hennigan Rebuttal Report at 7, 12-13.

(unidentified) cross-subsidy,<sup>99</sup> distorts the nature of the Revenue Adequacy Constraint. As Dr. Hennigan explains, the Revenue Adequacy Constraint, just like SAC, results in an efficient allocation of unattributable costs.<sup>100</sup> Consumers will still cover not only its attributable costs, but also its share of unattributable costs, efficiently allocated in accordance with Ramsey pricing principles:

*CMP provides two approaches for determining the revenue requirements of an efficient carrier. They can be calculated for the existing carrier on a system-wide basis by applying the revenue adequacy and management efficiency constraints. Alternatively, they can be hypothesized using a potential, “stand-alone cost” system. In either case, the approach taken obviates the need for movement-by-movement estimates of demand elasticities for the carrier’s entire system. CMP will have defined the total amount of unattributable costs to which the shipper must contribute and focused on the traffic which can reasonably be expected to pay those costs. At that point, market forces will largely determine the share of the costs to be borne by each shipper. The result of this process is a rate structure which reflects long-run marginal costs, demand elasticity, and the differential pricing of unattributable costs--the same result that occurs under Ramsey pricing. Thus, in spite of the lack of mathematical precision in CMP, it should yield rates similar to those produced by Ramsey pricing.<sup>101</sup>*

The footnote explains that revenue adequacy and SAC both allocate unattributable costs efficiently, albeit differently, and that the shipper may choose between them:

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<sup>99</sup> CSXT Reply at IV-27-29.

<sup>100</sup> Hennigan Rebuttal Report at 8-13.

<sup>101</sup> *Coal Rate Guidelines*, 1 I.C.C.2d at 534 (footnote omitted; emphasis added).

*However, the rate to an individual shipper may vary depending upon which of the two CMP approaches is used. If the shipper adopts the revenue adequacy approach, adjusted for demonstrated management inefficiencies, to determine the reasonableness of the rate, the total unattributable costs of the existing system are subject to recovery via differential pricing. Thus, the shipper's rate reflects the recovery of these costs whether or not the shipper benefits from all the system's services. When stand-alone cost is sued to determine rate reasonableness, the shipper may specify the level of service provided and, therefore, the costs for which it is responsible. A complainant should consider these factors in deciding which approach to pursue.<sup>102</sup>*

CSXT correctly observes that revenue adequacy and SAC “represent different means of approaching the same basic issues, *i.e.*, the extent of unattributable costs to be covered through differential pricing and the portion that can be charged to the shipper involved.”<sup>103</sup> However, CSXT’s conclusion that SAC should override a lower rate under revenue adequacy, does not follow.

As Dr. Hennigan explained in his initial report and further explains in his Rebuttal Report, “[b]oth the revenue adequacy and stand-alone cost constraints are guided by and emulate competitive market principles,” but they do so in different ways.<sup>104</sup> The Revenue Adequacy Constraint applies on a top-down basis, using the GAAP costs of the existing carrier as a whole. “The revenue

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<sup>102</sup> *Id.* at n.35 (emphasis added).

<sup>103</sup> CSXT Reply at IV-20, quoting *Coal Rate Guidelines*, 1 I.C.C.2d at 547.

<sup>104</sup> Hennigan Rebuttal Report at 8.

adequacy constraint is a limit on the total revenues a carrier can collect.”<sup>105</sup> All unattributable costs have been allocated, as the carrier otherwise would not be revenue adequate. What CSXT ignores is that the allocation is made on the basis of Ramsey-type differential pricing, as explained in Hennigan Rebuttal Report at 3-7, 10-13. Before the January 1, 2015 rate increase, Consumers already was paying a rate with a high R/VC markup { }, substantially above CSXT’s RSAM. Other customers likewise pay markups that reflect an allocation based on relative demand. CSXT did not need to collect more from Consumers to be revenue adequate, and Consumers should not be paying more.<sup>106</sup>

Consumers’ requested relief does not require any other shipper to pay more, diminish the relief that might be available to some other shipper, or force CSXT to the brink of revenue inadequacy. It does not “steal from a penniless Peter to pay Paul.”<sup>107</sup> To the contrary, Consumers’ relief under the Revenue Adequacy Constraint simply cancels a rate increase that CSXT did not require in order to remain revenue adequate by a substantial margin.

Finally, the Board already has held that revenue adequacy relief is available even if SAC might approve a higher maximum reasonable rate:

There is simply no reason why complainants should not be allowed to apply the revenue adequacy constraint here, or why a SAC presentation should be

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<sup>105</sup> *Coal Rate Guidelines*, 1 I.C.C.2d at 547.

<sup>106</sup> Hennigan Rebuttal Report at 8, 12-13.

<sup>107</sup> CSXT Reply at IV-27, quoting from *PPL Montana v. S.T.B.*, 437 F.3d at 1246.

necessary. As we have recognized, there is "no single formula" that can perfectly test the reasonableness of rates. *Rate Guidelines*, 1 I.C.C.2d at 524. Thus, CMP purposely affords complaining parties the flexibility to approach a rate analysis from alternative perspectives, examining either the pricing needs of a hypothetical carrier or the defendant carrier's pricing needs. *Id.* at 547-48.<sup>108</sup>

The D.C. Circuit upheld the Board's use of the constraint, stating that the agency's holding that the carrier's "SAC evidence was not relevant even if it would have yielded a different result, was a reasonable reading of the agency's rate guidelines and is not subject to reversal by this court."<sup>109</sup> CSXT's argument already has been rejected by a reviewing court, so there is no reason for the Board to entertain it further here.

### **C. CSXT IS REVENUE ADEQUATE**

CSXT argues at length (CSXT Reply at IV-29-60) that it cannot be found revenue adequate because it has not passed the Board's snapshot ROI=COC test, and no other information can or should be considered. The Board rejected this position when it denied CSXT's Motion to Dismiss, ruling that Consumers was entitled to present "other competent and probative evidence" to make its case.

Consumers did present such other evidence. Consumers showed that CSXT's ROI=COC deficit using the Board's COC was so small as to lack

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<sup>108</sup> *CF Indus., Inc.*, 4 S.T.B. at 657.

<sup>109</sup> *CF Indus., Inc. v. Surface Transp. Bd.*, 255 F.3d at 827-28. *Accord*, *Bituminous Coal – Hiawatha, UT to Moapa, NV*, 6 I.C.C.2d at 6-17; *Arkansas Power & Light Company v. Burlington Northern Railroad Company*, 3 I.C.C.2d 757, 765-77 (1987).

statistical significance; that CSXT was revenue adequate under the ROI=COC test if a more reasonable COC was used {

}; that the financial and investment community considered CSXT to be revenue adequate; and that standard financial ratios confirmed CSXT's revenue adequacy. Significantly, Consumers also showed that CSXT fulfilled each of the statutory criteria for revenue adequacy specified by Congress in 49 U.S.C. § 10704(a)(2), which CSXT ignores entirely.<sup>110</sup>

CSXT did not present any affirmative evidence of its own revenue inadequacy, choosing instead to dispute Consumers' evidence. Consumers responds to CSXT's individual arguments below.

**1. The ROI=COC Test is Not the Only Competent and Probative Evidence of CSXT's Revenue Adequacy**

CSXT argues that the use of the ROI=COC test is a "legislative rule" that precludes consideration of other revenue adequacy evidence.<sup>111</sup> But there is no such rule, legislative or otherwise, as the Board and the ICC consistently have made clear that "other competent and probative evidence" will continue to be considered in individual cases:

We will also consider these findings in individual rate reasonableness proceedings conducted under 49 U.S.C. § 10701a, but will not necessarily treat these findings as determinative of revenue adequacy issues

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<sup>110</sup> Hennigan Rebuttal Report at 33-47.

<sup>111</sup> CSXT Reply at IV-32-33, citing *Standards I*, 364 I.C.C. at 809-10, *Standards II*, 3 I.C.C.2d at 267-68, and *Arkansas Power & Light v. Burlington Northern N. R.R.*, 3 I.C.C.2d at 765.



raised in those cases. Rather, we will continue to consider all probative evidence submitted in such cases pertaining to the revenue adequacy of the particular carrier(s) involved.<sup>112</sup>

The agency then affirmed in *Nevada Power* that “[w]e have stated that any other competent and probative evidence relative to the carrier’s revenue adequacy may be submitted in individual rate reasonableness proceedings.”<sup>113</sup> That decision clearly establishes that the annual snapshot determinations on which CSXT now relies do not preclude findings of revenue adequacy and associated rate relief under the *Coal Rate Guidelines*.

CSXT’s claim that use of Board’s hybrid estimate of the cost of equity (“COE”) portion of the COC for purposes of assessing revenue adequacy is also a legislative rule<sup>114</sup> rests on even less support. A willingness to consider other competent and probative evidence necessarily entails the possibility that such evidence will demonstrate revenue adequacy, when the ROI=COC test shows otherwise. In considering whether the ROI=COC test yields a “false negative” (or, in CSXT’s case, a false neutral), one must consider whether the ROI=COC test is defective, at least as applied.

An inherent pitfall of relying on a single factor test such as ROI=COC is that the individual components may be flawed, and such flaws may

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<sup>112</sup> *Railroad Revenue Adequacy -- 1987 Determination*, 4 I.C.C.2d 731, 731 (1988).

<sup>113</sup> 6 I.C.C.2d at 7 n.24 (citing *1987 Determination*).

<sup>114</sup> CSXT Reply at IV-33.

prove critical.<sup>115</sup> If the ROI=COC test and other probative evidence yield disparate results, then an effort should be made to reconcile the two and consider whether the COC input is flawed, especially when it utilizes values substantially higher than those utilized by the financial and investment community {

}. Competent and probative evidence can include a showing that the Board's COC estimate is inaccurate. As the Board allows parties to show that a different COC should apply for SAC purposes,<sup>116</sup> it follows that a party should be allowed to show that a different COC should apply for revenue adequacy purposes in a specific case under the *Guidelines*.

## **2. CSXT's Claimed Revenue Shortfall Analysis is Implausible**

CSXT claims to have fallen short of the ROI=COC threshold every year since 1986, and that the net present value of its shortfall since 1999 now exceeds \$33.5 billion, such that CSXT cannot possibly be found to be revenue adequate on a long-term basis.<sup>117</sup>

CSXT presented the same analysis (through 2013) in its Motion to Dismiss, which was denied. There is no \$33.5 billion shortfall that CSXT is owed or owes to anyone. It is, at most, the compounded sum of a set of artificial annual shortfalls of measured revenues as compared to an industry COC calculation, which by the end of the period disappears within the statistical range of accuracy.

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<sup>115</sup> Hennigan Rebuttal Report at 36.

<sup>116</sup> *E.g., Arizona Elec. Power Coop. v. BNSF*, Docket No. 42113 (STB served Nov. 22, 2011) at 137.

<sup>117</sup> CSXT Reply at IV-34-38.

If CSXT really had an escalating deficit of that magnitude, it would have careened into a death-spiral ending in bankruptcy or at least stagnated, neither of which has occurred.<sup>118</sup>

CSXT's alleged cumulative shortfall has not impaired its viability or prevented it from meeting the revenue adequacy criteria specified in 49 U.S.C. § 10704(a)(2). As explained at IV-62-63, *infra*, CSXT has not even disputed that it satisfies the statutory criteria. CSXT has also provided an admirable return to its shareholders during the period covered by the alleged revenue shortfall.<sup>119</sup> As of December 31, 1998, CSXT had a split-adjusted share price of \$6.91 and a market capitalization of \$9.01 billion. As of December 31, 2014, CSXT's share price was \$36.23, representing a 424% increase, and its market capitalization was \$35.93 billion, representing a 299% increase. By comparison, the S&P 500 index over the same period rose from a value 1229.23 to a value of 2058.9, an increase of 67%.

A firm that had an actual shortfall of \$33 billion in the funding it needs for its long-term survival over this period would not have seen its market capitalization grow by \$27 billion. Similarly, a long-term "buy and hold" equity investor in CSXT would not have experienced any loss over this period, but

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<sup>118</sup> Hennigan Rebuttal Report at 48-51.

<sup>119</sup> Hennigan Rebuttal Report at 50-51, and e-workpaper "RA-Table34.xlsx". As CSXT chose not to address the decline in its stock price since 2014 in its Reply Evidence, it should be foreclosed from seeking to do so at some later time.

instead would have realized a highly attractive return. CSXT itself repurchased a substantial quantity of its own shares during the period, and continues to do so.

**3. Consumers' Other Evidence of CSXT's Revenue Adequacy is Compelling**

CSXT next purports to respond to Consumers' demonstration of CSXT's revenue adequacy.<sup>120</sup> CSXT does not dispute the actual substance of Consumers' showing, but instead focuses on the permissibility of the evidence presented (other than the review of the 49 U.S.C. § 10704(a)(2) criteria, which CSXT ignores altogether).

**a. Consumers' Evidence Addresses Long-Term Revenue Adequacy**

CSXT begins by characterizing the Morningstar, Standard & Poor's ("S&P"), and ValueLine reports and analysis presented by Consumers as "short term" in nature, while claiming that "long term" data is needed.<sup>121</sup>

CSXT ignores the substance of Consumers' presentation, which focused on the long-term, fundamental aspects of the analyses, and not short-term buy/sell, overweight/underweight, or other timing recommendations.<sup>122</sup>

Morningstar, for example, stated that CSXT was highly likely to outearn its cost of

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<sup>120</sup> CSXT Reply at IV-38-61.

<sup>121</sup> CSXT Reply at IV-39-40, quoting *Standards II*, 3 I.C.C.2d at 267-68 (noting that "security analysts are interested not only in long-term viability but also in the potential profits for the short-term. Indeed, sometimes the potential to make a short term profit may far outweigh their interest in the long term health and earnings capacity of the railroad.").

<sup>122</sup> See Hennigan Rebuttal Report at 40-41.

capital for the next ten (10) years, and more likely than not for the following ten (10). When combined with the historical data that Consumers presented, CSXT is shown to be revenue adequate for a period of at least 25 years. Consumers also focused on the long-term aspects of the S&P and ValueLine analyses.

Despite criticizing Wall Street analysts for their short-term focus, CSXT insists on retaining the MSDCF component of the Board's COC, which relies on relatively short-term projections of those same analysts.<sup>123</sup> The MSDCF utilizes estimates of growth in earnings per share ("EPS") to project future cashflows. (EPS is a defective metric for a DCF model that utilizes firm-wide cashflows when buybacks reduce the number of shares.) The EPS estimates are prepared by the same analysts that CSXT criticizes for focusing on short-term factors. While the EPS projections may be called "long term," they cover a period only from three to five years. CSXT also ignores the fact that the Board calculates RSAM and measures railroad productivity over four and five years, respectively.<sup>124</sup>

**b. Other Cost of Capital Evidence is Properly Considered**

CSXT insists that Consumers cannot depart from the Board-determined COE values because: (1) the methodology constitutes a legislative

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<sup>123</sup> CSXT Reply at IV-41-43.

<sup>124</sup> The ICC experimented with longer measuring periods for productivity to capture the business cycle, but concluded that doing was not necessary or practicable and that consistent use of a five-year period was superior. *Productivity Adjustment--Implementation*, 9 I.C.C.2d 1072, 1079 (1993).

rule; (2) CSXT and the AAR defended the existing methodology in *Ex Parte No. 664 (Sub-No. 2)*; (3) the agency has long used an industry-wide and not a firm-specific COC; and (4) Consumers has advocated a different approach in its own utility rate cases.<sup>125</sup> Each of these is addressed below.

**i. Consumers' Alternative Costs of Capital Constitutes Competent and Probative Evidence that is Properly Considered in its Rate Case**

CSXT argues that since challenges to the Board's COC methodology are not to be presented in the annual *Ex Parte No. 558* proceedings, Consumers cannot present other evidence based on alternative COC calculations in its individual rate case.<sup>126</sup>

CSXT's argument is a *non sequitur* because Consumers is not challenging the Board's general industry cost of capital calculation here. Instead, Consumers has submitted evidence in and for purposes of its rate case that compares CSXT's ROI to the railroad COC, for both the industry as a whole and CSXT specifically, calculated following standard practices of the financial and investment community { }. The information constitutes "other competent and probative evidence" permitted under the Board's order denying CSXT's Motion to Dismiss.

In addition, CSXT's legal authority does not support CSXT's conclusion. For example, CSXT states that the COC sets "the

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<sup>125</sup> CSXT Reply at IV-40-51.

<sup>126</sup> *Id.* at IV-41-44.

profitability threshold that plays a key role in determining whether a railroad is revenue adequate.”<sup>127</sup> But “key role” in a general industry determination does not mean “exclusive determinant” for purposes of an individual rate proceeding.<sup>128</sup> Allowing additional evidence necessarily entails the possibility that the evidence will conflict rather than confirm. Moreover, the Board allows parties to use alternative costs of capital in rate cases, as CSXT itself admits.<sup>129</sup> The same principle should hold for the revenue adequacy portion of a combined rate case, especially as “other competent and probative evidence” is to be considered.

**ii. Strong Reasons Support Utilizing a More Accurate Cost of Capital**

CSXT replies to Consumers’ showing why a more accurate COC should be utilized by arguing that the Board’s existing COC methodology should be retained. CSXT’s offers nothing new in support of its position, and refers only to the AAR’s submission in *Ex Parte No. 664 (Sub-No. 2)*.<sup>130</sup>

As CSXT simply referenced other submissions without presenting anything directly, Consumers will refer to the presentation that it made in its Opening Evidence, rather than review again the infirmities in the Board’s existing MSDCF and CAPM approaches to calculating the COE. However, Consumers

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<sup>127</sup> CSXT Reply at IV-22, quoting *R.R. Cost of Capital -- 2007*, Ex Parte No. 558 (Sub-No. 11) (STB served Apr. 23, 2008) at 2.

<sup>128</sup> *1987 Determination*, 4 I.C.C.2d at 731.

<sup>129</sup> CSXT Reply at IV-43.

<sup>130</sup> *Id.* at IV-44 & n.90.

notes that CSXT made no claim that the investment and financial community actually utilizes the Board's MSDCF and CAPM approaches, or considers the Board's COC values to be realistic. {

} The disparity is so wide that the Board's ROI=COC test fails to provide a useful assessment of whether a carrier's returns are healthy enough to attract needed capital.

On February 23, 2016, Morgan Stanley issued a report that further confirms that the Board's COC is substantially overstated.<sup>131</sup> Morgan Stanley presents a weighted average cost of capital ("WACC" or COC) of 6.7 % for CSXT (pp. 38-39), 7.2% for UP (pp. 33-34), and between 6% and 8% for railroads generally (p. 28).<sup>132</sup> Even if these values reflect a tax shield for equity, the impact should be no more than 50 basis points.<sup>133</sup> Accordingly, CSXT's COC without the possible tax shield would be no more than 7.2% and the midpoint of the industry range would be 7.5%, more than 300 basis points below the Board's COC for

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<sup>131</sup> Morgan Stanley, *Rails: End of the Pricing Renaissance: Time for Quality and Defense* (Feb. 23, 2016), excerpts included as e-workpaper "RA-MorganStanley.pdf".

<sup>132</sup> Morgan Stanley did not provide values for NS or CP, presumably because Morgan Stanley was advising NS with respect to CP's merger overtures.

<sup>133</sup> The tax shield reflects the percentage of debt times the tax rate times the cost of debt. Conservatively assuming a capital structure with 35% debt, a 35% corporate tax rate, and a 4% cost of debt, the resulting tax shield is 0.49% or 49 basis points ( $0.35 \times 0.35 \times 0.04 = 0.0049$ ).



2014, and 211 basis points below the 9.61% that the AAR calculates as the COC for 2015 in its April 20, 2016 filing in *Ex Parte No. 558 (Sub-No. 19)*.

The reasonable conclusion to be drawn is that the Board's COC figures have been substantially overstated since at least 2005, and distort the use of the ROI=COC test in an individual rate proceeding. Ignoring this evidence on the grounds that only the Board-determined COC can be considered constitutes a willful denial of reality.

**iii. A CSXT-Specific Cost of Capital May be Considered and CSXT's Own Figure is Relevant**

CSXT maintains that an industry-wide COC should be utilized because it is more accurate and provides an incentive for efficient management, and that Consumers' evidence regarding a CSXT-specific COC should not be considered at all. CSXT Reply at IV-44-46. CSXT distorts Consumers' position.

Consumers submitted CSXT-specific COC data to confirm that: (a) the Board's COC values are unrealistic, (b) CSXT is revenue adequate by a wide margin, and (c) the requested relief will not deprive CSXT of needed funds or impose any sort of hardship on CSXT or its other shippers. Consumer accepts that a wider data set with more similar railroads is generally more desirable statistically. However, the Board's annual sample of only three or four railroads is small, and the individual members vary significantly.<sup>134</sup> Such a narrow sample is

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<sup>134</sup> The sample excludes BNSF, the larger member; UP, the second largest, operates in the West; KCS, the smallest member is significantly smaller and has

not superior to a CSXT-specific value, and Morgan Stanley {  
} confirm that an accurate industry average would be lower than what the Board has calculated.

CSXT's claim that using a CSXT-specific COC will undermine its incentive to become more efficient<sup>135</sup> ignores the nature of the revenue adequacy relief requested. CSXT still will outearn its COC and remain incented to do so. The relief applies only to Consumers' movement, and its R/VC will continue to far exceed the jurisdictional threshold and CSXT's RSAM ratio, both of which are determined using the Board's COC.

**iv. Railroads and Utilities Differ, and Their COCs Should Not be Calculated Using the Same Methods**

CSXT criticizes Consumers for taking a different approach to COC in a utility rate proceeding before the MPSC than it does here before the Board, and claims this "inconsistency, by itself, is sufficient reason to give no weight to Consumers position here."<sup>136</sup>

CSXT ignores the major differences between railroads and utilities and their associated regulatory environments, which support the use of different cost of capital methods. Unlike railroads, utilities (a) face pervasive rate regulation and strong prohibitions on rate discrimination, (b) have lower and more

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more foreign presence. CSXT references the RAPB's analysis (CSXT Reply at IV-45), but there were many more domestic Class I railroads at the time.

<sup>135</sup> CSXT Reply at IV-45.

<sup>136</sup> *Id.* at IV-47.

stable growth rates, (c) generally do not engage in major stock buybacks, (d) are often bought primarily for their dividend yield, and (e) tend to be counter-cyclical. These differences support use of a DCF method to supplement potential weaknesses in the CAPM as applied under those conditions, and use of a longer historical MRP for utilities. These factual differences and their COC consequences are explained further below.

**(a) Use of Multiple Models**

As CSXT notes, Consumers presented several COE models in its own rate case before the MPSC, but only the CAPM in its case before the Board.<sup>137</sup> However, the context must be understood.

The relatively low near-term growth rates, lack of stock buybacks, and pervasive rate regulation for utilities all enable the DCF approach to yield plausible results for utilities. Consumers' DCF COE was close to those under its other models. In contrast, the Board's MSDCF values as applied to railroads exceeded its CAPM values by a large amount over a sustained period. The Board's CAPM values are themselves substantially overstated, as shown by the lower values from Morgan Stanley, { }, and Consumers' other analyses.

The problems associated with applying a MSDCF approach to the railroads, with their high growth rates, substantial buybacks, and limited regulation, are exacerbated by the Board's choice of MSDCF model. Using a

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<sup>137</sup> *Id.* at IV-47-48.

different MSDCF model, such as the one that the Brattle Group, the AAR's retained expert in the *Ex Parte No. 664 (Sub-No. 2)* proceeding, for example, may help to mitigate these problems.<sup>138</sup> The Brattle standard model likely would yield a lower railroad COC. The differences between the Brattle and Board MSDCF models are substantial when applied to the railroads, but are not so material when applied to utilities, whose initial growth rates are lower and closer to the terminal growth rates.

In short, the issue is not whether the use of multiple models is preferable *per se*, but rather whether the models, assumptions, and inputs fit the industries and contexts in which they are used, especially when the results deviate widely from other available and credible information. Those problems are compounded when disparate results are blithely averaged together, as under the Board's hybrid methodology, without attempting to consider the disparities or determine whether some results are more credible than others.

#### **(b) CAPM**

CSXT claims Consumers' support for CAPM in its Opening Evidence contrasts "starkly" with Consumers' negative depiction of the CAPM

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<sup>138</sup> The Western Coal Traffic League's Reply Comments in *Ex Parte No. 664 (Sub-No. 2)* (Nov. 4, 2014), explained that Brattle's standard model defines cashflows as dividends plus buybacks, starts the phase-in to the terminal growth rate at year six, and does not expand cash flows at the start of the third stage. The EPS growth rates should also be adjusted to account for stock buybacks, which are substantial for the railroad industry. The Brattle model is very similar to what the League suggested in *Ex Parte No. 664 (Sub-No. 1)* (if a second model was needed), which yielded a COE below that of the CAPM for the years reviewed.

before the MPSC.<sup>139</sup> However, the short paragraph quoted by CSXT has no bearing on the application of the CAPM to railroads.

The Blume adjustment mitigates beta sensitivity by assigning a two-thirds weight to the observed beta and a one-third weight to a neutral beta of 1.0, thus moderating both high and low betas. Consumers utilized this Blume adjustment in its Opening Evidence at IV-6.<sup>140</sup> Also, utility betas tend to be very low, whereas railroad betas show less deviation from the mean of 1.0.<sup>141</sup>

Second, utility stocks are bought in major part for their dividend yield, making them especially sensitive to interest rate fluctuations.<sup>142</sup> Their interest rate sensitivity, particularly when combined with regulatory lag, induces counter-cyclical price movements. Rising interest rates often signal increased economic activity and a rising stock market, but the lag in updating the utility

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<sup>139</sup> CSXT Reply at IV-49.

<sup>140</sup> CSXT misstates what Consumers actually said. CSXT claims Consumers sought a COE based on CAPM, a 50-year MRP, and a MRP no greater than 5%. CSXT Reply at IV-47. Consumers actually recommended CAPM, a 50-year MRP, and the Blume beta adjustment. Consumers Opening at IV-6.

<sup>141</sup> The utility betas that Consumers submitted to the MPSC ranged from a low of 0.60 to a high of 0.85, with an average of 0.72. Exhibit of Dhenuvakonda Rao in U-17735, DVR-1 (dated December 2014) at 3. The beta values used by the Board during 2006-2014 have shown less deviation from the mean, ranging from a 2006 low of 0.8604 to a 2013 high of 1.3499.

<sup>142</sup> “One stock market sector closely tied to interest rates is utilities. With historically high dividend yields, utilities stocks compete with bonds and other interest-bearing securities for income-seeking investors.” 4 Oversold Utilities Stocks, The Smarter Investor, U.S. News & World Report (May 19, 2015), <http://money.usnews.com/money/blogs/the-smarter-mutual-fund-investor/2015/05/19/4-oversold-utilities-stocks>; e-workpaper “RA-USNewsUtilitiesStocks.pdf”.

ROE will cause utility stock prices to trail general stock market increases, at least until regulators catch up, at which time the opposite may occur. This counter-cyclicality and regulatory lag combine to lower the utilities' measured beta and associated CAPM COE. In contrast, railroads are more cyclical (rail volumes are often a leading economic indicator), and regulatory lag is not a concern. CAPM is thus a much better fit for the railroads. Railroads also are not subject to the pervasive economic regulation (ROE determination, ban on discrimination, pervasive regulatory lag) that applies to utilities and can suppress the movement of utility stock prices.

In short, the beta and other CAPM concerns that apply to utilities, which Consumers noted before the MPSC, do not apply to railroads.

### **(c) Market Risk Premium**

CSXT also criticizes Consumers for supporting a shorter historical period for the market risk premium ("MRP") before the Board than it sought for itself before the MPSC.<sup>143</sup> Again, CSXT's criticism is unfounded.

First, use of a 1926-based MRP is common in rate cases before public service commissions. Unlike railroads, utilities face pervasive rate and ROE regulation, and the ROE is typically not reset on an annual or other regular basis. Utilities also are typically more leveraged than railroads.<sup>144</sup> Utilities thus

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<sup>143</sup> CSXT Reply at IV-49-51.

<sup>144</sup> The MPSC adopted a capital structure for Consumers that consisted of 41.66% common equity at a ROE of 10.3% and an overall weighted cost of capital was 6.18%. MPSC Decision in U-17735 (Nov. 19, 2015) at 49.

face a much more immediate risk that a low ROE may provide an inadequate return that chokes off access to capital before the next rate case can be completed and the new ROE and rates go into effect. Utilities rarely can write-up assets following a merger, and face disallowances under meaningful “used and useful” and prudence tests that do not apply to railroads. One response to these increased regulatory risks is to seek a longer historical MRP for the CAPM portion of the ROE. Also, because utilities are subject to long-term, pervasive rate regulation, a longer-term historical MRP can provide stability for both the utility and its customers.

Second, since there are many separate utilities, public service commissions logically take into account the ROE set by fellow commissions, as the MPSC did, particularly as utilities compete in the first instance with each other for the same pool of investment dollars. “The Commission observes that 10.3% is at the upper point of the Staff’s recommended ROE range, and Consumers showed, using the Staff’s exhibit, that the average ROE resulting from recently decided cases in Michigan, Indiana, Ohio, Pennsylvania, and Wisconsin was 10.26%.”<sup>145</sup> How the ROE is derived often is less important than whether the ROE is close to the norm for other utilities. In contrast, railroads are substantially

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<sup>145</sup> MPSC Decision at 47.

unregulated and depict themselves as competing for capital in the unregulated marketplace, where use of CAPM and a lower MRP is the norm.<sup>146</sup>

In short, the utility and railroad industries and their respective regulatory environments differ substantially. A COC approach that works well for one industry may work poorly for the other. There was nothing deviant in Consumers' submissions. CSXT's efforts to exploit isolated statements regarding the CAPM in Consumers' MPSC filing in no way undermine Consumers' criticisms of the railroad COC methodology advocated by CSXT here as the only acceptable indication of revenue adequacy.

**c. Financial Ratios Provide Proper Evidence of CSXT's Revenue Adequacy**

CSXT argues at length that Consumers' financial ratios evidence cannot be considered because their use in determining the annual industry snapshot was discontinued in *Standards II*, 3 I.C.C.2d at 266 (with two Commissioners dissenting), and the ratios otherwise provide an incomplete depiction of CSXT's long-term revenue adequacy, as opposed to financial health.<sup>147</sup>

CSXT fundamentally distorts the nature of Consumers' presentation. Consumers did not present single-year ratios, but analyzed data over multiple

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<sup>146</sup> The AAR's witness agreed with the Western Coal Traffic League that use of CAPM was the norm for nonregulated industries. July 23, 2015 transcript for *Ex Parte Nos. 722 and 664 (Sub-No. 2)* at 129.

<sup>147</sup> CSXT Reply at IV-51-57.



years (2010-2014). Likewise, Consumers does not propose that the ratios be considered as the sole evidence of CSXT's long-term revenue adequacy, or that the Board replace the ROI=COC test for annual revenue adequacy under 49 U.S.C. § 10704(a)(3) with the financial ratios.

Consumers advocates that the multiple-year ratios be considered part of the "other competent and probative evidence" that confirms CSXT's long-term revenue adequacy. CSXT admits that the ratios are "indicators ... of the railroads' financial health"<sup>148</sup> and does not identify any errors in the calculations or underlying data. They extend over at least five years and provide more than a short-term indication. The data uniformly show that CSXT is healthy, sustainable, and viable on a long-term basis, and there is no need to weigh factors against each other.<sup>149</sup> CSXT's efforts to criticize each ratio in isolation ignore their interaction and support in the other data that Consumers presented.<sup>150</sup>

CSXT itself relies on two GAAP-based ratios, operating ratio and ROA, measured over just eleven quarters, to incent its executives "to drive shareholder value over a multi-year period."<sup>151</sup> CSXT's own actions show that

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<sup>148</sup> *Id.* at IV-51.

<sup>149</sup> *Id.* at IV-52

<sup>150</sup> Hennigan Rebuttal Report at 35-36.

<sup>151</sup> CSXT 2016 Proxy Statement at 43; "RA-CSX2016ProxyStatement.pdf".

multiple GAAP-based ratios are a valuable measure of long-term financial health.<sup>152</sup>

CSXT's criticisms of the individual ratios are considered below.

**i. Market to Book Value Ratios**

CSXT criticizes Consumers' market-to-book value ratios for using historical book value and not replacement costs. CSXT Reply at IV-54. However, the market prices CSXT above book value not because of its high replacement costs (*id.*), but because the carrier has a favorable going concern value. If replacement costs were so key to CSXT's market valuation, there would be a readily accessible and frequently utilized source for those costs. But there is none. CSXT does not maintain such data, and relies on GAAP values for its long-term incentive compensation.<sup>153</sup>

**ii. Operating Ratios**

CSXT criticizes Consumers' operating ratios as being short-term in nature, showing only relative improvement, supposedly by ignoring capital expenditure requirements.<sup>154</sup>

The criticisms are makeweight. CSXT's operating ratios are commendably low, have been so for a sustained period, and have been more than sufficient to fund the capital expenditures, dividends, and buybacks, without a

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<sup>152</sup> Hennigan Rebuttal Report at 27-29.

<sup>153</sup> *Id.* at 26-29.

<sup>154</sup> CSXT Reply at IV-55.

significant increase in debt-to-capital ratios (addressed next).<sup>155</sup> CSXT has explicitly stated that it expects the low operating ratios to persist for the long term and even improve further.<sup>156</sup> Moreover, Consumers is not proposing that the Board consider the operating or other ratio in isolation for a single year, but as part of a larger, broader review spanning at least five years into the past and extending into the future.

CSXT itself views operating ratio as sufficiently important to assign half of its long-term incentive compensation for its executives to them, measured over an eleven-quarter period.<sup>157</sup> CSXT's own actions refute its criticism.

### **iii. Debt-to-Capital Ratios**

CSXT criticizes the debt-to-capital ratios as only signifying a choice about capital structure.<sup>158</sup> However, the ratio shows that CSXT has not achieved its success through excessive leverage. Combined with CSXT's favorable debt ratings, the debt-to-capital ratios confirm that CSXT has adequate access to capital, one of the elements of revenue adequacy under 49 U.S.C. § 10704(a)(2) and a key criterion under the RAPB Report. {

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<sup>155</sup> Consumers Opening at IV-18-20, 28-29, 35-36. Capital expenditures increase depreciation, and CSXT's operating ratio improved despite the 17.8% increase in CSXT's depreciation expense from 2010 (\$977 million) to 2014 (\$1,151 million). Consumers Opening e-workpaper "RA-xlsx", tab "Table\_3", row 13, columns B and F.  $\$1,151/\$977=1.178$ .

<sup>156</sup> *Id.* at IV-39.

<sup>157</sup> CSXT 2016 Proxy Statement at 43-44, discussed in Hennigan Rebuttal Report at 27-29.

<sup>158</sup> CSXT Reply at IV-54-55.

} The ratio further shows that CSXT’s present financial condition is both stable and sustainable. Together with the other information, the ratio provides an additional “indication of the adequacy of a railroad’s rate of return on investment.”<sup>160</sup>

**iv. Return on Equity**

CSXT minimizes Consumers’ showing of CSXT’s “consistently high” return on equity on the grounds that the returns (which CSXT terms “ROI”) “at best provides only a partial measure of railroad returns because it can also be directly affected by other factors that have nothing to do with a firm’s overall ability to earn its weighted average cost of capital, which reflects both equity and debt.”<sup>161</sup>

CSXT is vague as to its “other factors,” but the concern appears to be that a high return on equity means little if achieved through excessive leverage. CSXT does not actually claim to have excessive leverage, and Consumers’ other evidence shows that it does not. CSXT has a relatively low debt-to-capital ratio, favorable credit ratings, and {

}.<sup>162</sup> CSXT similarly tried to

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<sup>159</sup> { }

<sup>160</sup> CSXT Reply at IV-55; Hennigan Rebuttal Report at 35-36.

<sup>161</sup> CSXT Reply at IV-56.

<sup>162</sup> Consumers Opening at IV-49 and IV-57-58, *supra*.

minimize the debt-to-capital ratio, claiming it addresses capital structure, and nothing more. CSXT criticizes each ratio and data point in isolation in order to divert attention from the overall pattern of revenue adequacy.<sup>163</sup>

**v. Cash Flow To Equity Ratios**

CSXT criticizes Consumers' presentation of cash flow to equity ratios as providing only a short-term analysis, reflecting leverage, and ignoring the need for capital expenditures.<sup>164</sup> These criticisms likewise are invalid.

The ratios are not short-term as they cover five years of data, and are further supported by the significant appreciation in stock price and market value during the period that CSXT supposedly was generating a massive (fictitious) revenue shortfall. Any concerns about leverage are answered by the previous debt-to-capital ratio discussion. The cash flows have been sufficient to cover CSXT's capital expenditures (including ongoing replacement and expansion of assets as needed), as well as dividends and share buybacks while maintaining leverage.<sup>165</sup>

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<sup>163</sup> Hennigan Rebuttal Report at 35-36.

<sup>164</sup> CSXT Reply at IV-56.

<sup>165</sup> Consumers Opening at IV-18-20, 28-29, 35-36. Hennigan Rebuttal Report at 36.

**vi. Dividend Payment Ratios (Dividend Yields)**

CSXT also minimizes Consumers' discussion of CSXT's dividend yield ratios on the grounds that investors would expect to receive more from an equity investment than from a risk-free Treasury bond.<sup>166</sup>

CSXT's equity investors have received much more through the sustained appreciation in its stock prices during the very period CSXT claims it experienced a revenue shortfall.<sup>167</sup> The dividend yields occurred despite the stock appreciation, as CSXT repeatedly increased its dividends. CSXT could have increased the dividend yield substantially more by using funds that instead were devoted instead to buybacks.<sup>168</sup>

In short, the financial ratios further confirm that CSXT has achieved long-term revenue adequacy and is likely to remain so, and that the ROI=COC test with the Board's COC does not accurately depict CSXT's financial condition.<sup>169</sup>

**d. There is No CSXT Cash Cow Fallacy**

CSXT claims that Consumers has presented a "cash cow" fallacy regarding CSXT, and that acceptance of Consumers' evidence would cause CSXT to resemble the former Southern Pacific Railroad before it was acquired by UP.<sup>170</sup>

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<sup>166</sup> CSXT Reply at IV-57.

<sup>167</sup> IV-40-42, *supra*; Hennigan Rebuttal Report at 48-50.

<sup>168</sup> Consumers Opening at IV-19.

<sup>169</sup> Hennigan Rebuttal Report at 35-36.

<sup>170</sup> CSXT Reply at IV-57-61.

CSXT's claims are entirely unfounded and at odds with reality, { }.<sup>171</sup> CSXT is not revenue adequate simply because it has enough cash on hand to cover capital expenditures and provide dividends and buybacks to its shareholders.<sup>172</sup> Consumers showed that CSXT is generating those funds from its operations, as shown by the favorable operating ratios.<sup>173</sup> The analogy to SP is particularly far-fetched, as it reported operating ratios of 100.7% for 1993, 92.6% for 1994, and 100.4% for 1995.<sup>174</sup> The operating ratio disparity alone shows that today's CSXT in no way resembles the former SP.

Furthermore, CSXT has not been funding its progress by selling off large amounts of assets not used for railroad operations or issuing junk bonds.<sup>175</sup> CSXT has favorable bond ratings that have improved in recent years, a stable favorable debt-to-capital ratio, and {

} CSXT's analogy to SP is specious.

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<sup>171</sup> Hennigan Rebuttal Report at 43-44.

<sup>172</sup> CSXT Reply at IV-57-58.

<sup>173</sup> Consumers Opening at IV-13-14, 17; Hennigan Rebuttal Report at 44-47.

<sup>174</sup> Hennigan Rebuttal Report at 44-45. SP's 10-K Report for 1996, <http://www.sec.gov/Archives/edgar/data/92259/0000898430-96-001043.txt>, excerpt included as e-workpaper "RA-SP-1995-10K.pdf" (at p. 2 of the report or p. 4 of the pdf e-workpaper).

<sup>175</sup> CSXT Reply at IV-58-60.

CSXT claims that if railroad earnings exceeded their COC, then railroads would aggressively expand, and then postulates that the reason they are not expanding “is probably because they are not earning their cost of capital on the replacement cost of rail assets.”<sup>176</sup> This assertion is entirely devoid of factual and logical support. CSXT cannot plausibly suggest that failure to “earn[] their cost of capital on the replacement cost of rail assets” explains anything when, by its own admission, CSXT does not even calculate those replacement costs and instead relies on GAAP to track and incent its long term value.<sup>177</sup> Notably, no CSXT executive stepped forward to verify this claim.

Furthermore, CSXT, like its fellow railroads, has been investing in its expansion through its capital expenditures. As explained in Hennigan Rebuttal Report at 25-26, CSXT’s capital expenditures caused its total assets to grow by 23%, its accumulated depreciation to grow by 30.2%, and its net book value to grow by 20.1%, from the beginning of 2010 to the end of 2014. CSXT’s revenues are plainly adequate to cover operating expenses, make needed capital expenditures, cover debt, and provide a return to stockholders adequate to support a large increase in its stock price. Nothing more is or should be required to demonstrate revenue adequacy under 49 U.S.C. § 10704(a).

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<sup>176</sup> CSXT at IV-58.

<sup>177</sup> Hennigan Rebuttal Report at 26-27.



**e. CSXT Ignored the Statutory Revenue Adequacy Criteria**

CSXT's Reply made no attempt to show that CSXT fails to satisfy any of the revenue adequacy criteria that Congress specified in 49 U.S.C. § 10704(a)(2). Consumers devoted a substantial portion of its Opening Evidence to showing that CSXT satisfied all of them.<sup>178</sup> CSXT's failure to address the specified statutory criteria in any way should be deemed an admission that CSXT indeed fulfills them.<sup>179</sup>

**D. CSXT'S CLAIM THAT EARNING ONE CENT ABOVE THE COST OF CAPITAL TRIGGERS REVENUE ADEQUACY LIABILITY MISREPRESENTS CONSUMERS' POSITION**

CSXT claims that Consumers' presentation shows that earning one cent above the cost of capital triggers revenue adequacy liability and prevents CSXT from ever earning more than its cost of capital.<sup>180</sup> CSXT again misrepresents Consumers' position and the basis for the requested relief.

First, Consumers has shown that CSXT has achieved revenue adequacy by a substantial measure, over a sustained period of time (at least five (5) years), and is likely to remain revenue adequate for a substantial period into the future, *e.g.*, at least twenty (20) years according to Morningstar. CSXT more than satisfies the criteria stated in CSXT's referenced rulemaking notice for *Coal*

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<sup>178</sup> Consumers Opening at IV-11-24; Hennigan Report at 9-25.

<sup>179</sup> Hennigan Rebuttal Report at 34.

<sup>180</sup> CSXT Reply at IV-61-65.

*Rate Guidelines* (“a consistent pattern of returns substantially in excess of a carrier’s revenue needs”),<sup>181</sup>

Second, the relief that Consumers seeks is limited to a rollback of the rate *increase* that CSXT imposed on Consumers on January 1, 2015, when CSXT already had achieved revenue adequacy, and a return of excess charges collected thereafter. Such relief does not limit CSXT’s rates generally or prevent CSXT from continuing to outearn its cost of capital. Moreover, subject to the outcome of the SAC analysis, CSXT could adjust the Campbell rate in the future to track the RCAF-A. The relief applied to Consumers would not be available the great majority of CSXT’s other traffic, and even eligible shippers would need to commence formal proceedings before the Board and satisfy the statute’s jurisdictional prerequisites as a precursor to relief.

CSXT’s discussion of statistical error<sup>182</sup> also distorts Consumers’ evidence. Dr. Hennigan explained that CSXT is within the range of statistical significance for revenue adequacy under the annual snapshot ROI=COC test using the Board’s flawed COC. A more plausible COC, *e.g.*, those used by the financial and investment community in general, Morningstar, Morgan Stanley, {  
  
}, shows CSXT to be revenue adequate beyond the range of statistical error.

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<sup>181</sup> CSXT Reply at IV-63 & n.147. CSXT’s repeated reliance on the notice of proposed rulemaking and not the final *Coal Rate Guidelines* decision itself indicates that CSXT could find no support in the Commission’s final order, which was upheld on judicial review.

<sup>182</sup> CSXT Reply at IV-62, 64.

CSXT's attempt to compare railroad returns and COC to those of other industries<sup>183</sup> adds nothing other than confusion. While CSXT indicates that the data is from 2014, it actually covers the period from 2004-2013.<sup>184</sup> The AAR/CSXT data does not focus on the period covered by Consumers' analysis, and no back-up quantitative workpapers were provided by either CSXT or the AAR, in violation of the Board's standards for rate cases.<sup>185</sup> The data presented also includes deferred taxes in the investment base, and the railroad ROI is calculated as a simple average,<sup>186</sup> further deviations from the Board's standards. The COC derivation is not detailed, but the railroad COC is below 10%, which would make the industry revenue adequate under the Board's ROI=COC test.<sup>187</sup>

That some firms in some other industries may enjoy higher excess returns relative to their COC does not establish that CSXT should enjoy similar excess returns before it is subject to the Revenue Adequacy Constraint, particularly when it already meets the revenue adequacy criteria under the *Coal Rate Guidelines* and 49 U.S.C. § 10704(a)(2). "Carriers do not need greater

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<sup>183</sup> CSXT Reply at IV-64-65.

<sup>184</sup> Brinner VS in AAR Opening Comments in *Ex Parte No. 722*, at 10.

<sup>185</sup> *FMC*, 4 S.T.B. at 733.

<sup>186</sup> Brinner VS at 14-15 & n.15.

<sup>187</sup> Exhibit 2 in Brinner VS at 13 shows a railroad industry COC below 10%, and Exhibit 3a in Brinner VS at 15 shows a simple average return of 9.9% for the four railroads included in the S&P 500. "On average, over the period 2004-2013, the STB-estimated rate of return for the four railroads within the S&P 500 is 2.7 percentage points above the Bloomberg-estimated rate of return for those railroads." *Id.* at 15.

revenues than this standard permits, and we believe that, in a regulated setting, they are not entitled to any higher revenues.”<sup>188</sup>

#### **E. CONSUMERS DOES NOT PROPOSE NIXON-ERA PRICE CONTROLS**

CSXT presents a disparate and somewhat duplicative set of claims against revenue adequacy relief under a rather strange final heading to the effect that the Board should avoid Nixon-era price controls.<sup>189</sup>

CSXT’s claim here is silly. Consumers seeks relief only for the Campbell movement, and CSXT may adjust that rate to track overall cost changes and retain savings from keeping its costs below changes in the RCAF-A. CSXT also eschewed its opportunity to show that the Campbell movement should bear a higher rate, indicating an inability on its part to do so. CSXT’s “Nixon-era” problem is a product of its imagination.<sup>190</sup>

##### **1. Consumers is Not Seeking an Across-the-Board Price Ceiling**

CSXT claims that Consumers’ reliance on *CF Indus., Inc.* amounts to advocacy of an “across-the-board price ceiling” or “a *system-wide* price freeze on all captive traffic once a railroad becomes revenue-adequate.”<sup>191</sup>

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<sup>188</sup> *Coal Rate Guidelines*, 1 I.C.C.2d at 535.

<sup>189</sup> CSXT Reply at IV-66-73.

<sup>190</sup> CSXT cites the *Guidelines* notice, not the final *Guidelines* itself, for its concern with “maintain[ing] perfect year-to-year conformance with the prescribed revenue adequacy level.” CSXT Reply at IV-66 n.152. The problem does not exist. CSXT is already revenue adequate by a substantial margin, and the margin will be at least preserved, and probably expanded.

<sup>191</sup> CSXT Reply at IV-67 (capitalization removed; original emphasis).

This is nonsense. Consumers seeks relief on rates from a single interchange to a single destination. Concerns about other CSXT rates can be addressed in other rate cases, if and when they are brought. Much of CSXT's other traffic is not subject to the Board's rate authority because it is exempt, under contract, pays rates below the jurisdictional threshold, or otherwise not captive.

The "across-the-board rate freeze" is another fallacy. Not even the Campbell rate would be frozen, as RCAF-A cost adjustments are permitted. Consumers' relief is equivalent to that obtained in *CF Industries*, which also was limited to the complaining shippers' own traffic.<sup>192</sup> Seeking relief previously granted by the agency is hardly improper.

CSXT seeks to distinguish *CF Industries* on two grounds, both of which are contrived. CSXT first claims that it, unlike Koch, is challenging the validity of the Revenue Adequacy Constraint. That is a distinction without a difference. Both Koch and CSXT objected to the application of the Constraint; CSXT's additional attack on its existence is irrelevant. The Revenue Adequacy Constraint adopted as part of *Coal Rate Guidelines* was upheld on appeal. Moreover, Koch, like CSXT, argued that the SAC Constraint should apply exclusively, but the Board ruled otherwise and its decision was upheld.<sup>193</sup> If

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<sup>192</sup>Because of the limited number of customers for the pipeline at issue in *CF Industries*, the relief awarded effectively applied to much of the defendant's "system." The far broader nature of CSXT's customer base belies any "system wide" impact of granting relief to Consumers.

<sup>193</sup> *CF Industries, Inc. v. S.T. B.*, *supra*.

CSXT wanted to challenge the validity of the Revenue Adequacy Constraint, it should have done so when the *Coal Rate Guidelines* were adopted.

Second, CSXT seeks to equate the Revenue Adequacy Constraint with “a public utility model of rate regulation” that could be appropriate for across-the-board regulation of pipelines, but that Congress rejected for railroads.<sup>194</sup> However, the relief that Consumers seeks hardly amounts to pervasive regulation. Rates will not automatically be regulated. To obtain relief, shippers must bring complaints and show both quantitative and qualitative market dominance. The rate relief, if available and awarded, limits the exercise of further differential pricing, but by itself does not disturb the preexisting level of differential pricing or limit CSXT’s total margins. Shippers that obtain relief will have different R/VC mark-ups. The relief is not equivalent to uniform, pervasive, and non-discriminatory pipeline regulation.

## **2. No Unlawful Presumption of Unreasonableness Would Exist**

CSXT alleges that the fictitious price freeze would create unlawful presumptions with “pitfalls reminiscent of the failed price control policies adopted during the Nixon and Ford Administrations.”<sup>195</sup>

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<sup>194</sup> CSXT Reply at IV-67-69. CSXT’s claim that CF Industries sought full regulation of the Koch Pipeline is incorrect. CF sought relief only for its own traffic, and some relief was denied for lack of market dominance. 4 S.T.B. at 639, 655. CSXT also cites *WCTL Petition BNSF*, Finance Docket No. 35506, at 16 (CSXT Reply at IV-68 n.158), but that case discussed the revenue adequacy constraint favorably, as noted at IV-8, *supra*.

<sup>195</sup> CSXT Reply at IV-69-73.

CSXT's claims are unfounded. CSXT's real complaint is that it is losing a conclusive presumption of revenue inadequacy under the ROI=COC test using a flawed COC. There is no legal or policy obstacle to making an informed and credible finding of revenue adequacy and then applying the constraint adopted thirty (30) years ago in *Coal Rate Guidelines* and previously applied in *CF Industries*.

As noted *supra*, CSXT would continue to earn returns exceeding a credible cost of capital and likely increase that excess. There would be no rate freeze:

- Shippers still must file rate complaints in order to obtain relief;
- Shippers would need to establish market dominance;
- Those shippers obtaining relief would have differing R/VC ratios;
- Carriers can adjust their regulated rates to reflect changes in the RCAF-A and retain savings by keeping increases in their overall costs below the RCAF-A;
- Carriers could show that a particular shipper should bear additional costs under the Board's *Guidelines* criteria;<sup>196</sup>
- Carriers could negotiate a non-regulated contract rates for movements covered by revenue adequacy relief; and
- Most traffic would not be subject to rate regulation at all, because it is under the jurisdictional threshold, otherwise is non-captive, moves under contract, or is exempt.

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<sup>196</sup> 1 I.C.C. 2d at 536 n. 36.

**a. Consumers' Requested Relief Would Not Create a Price Freeze or Improper Presumption of Relief**

CSXT claims that Consumers' proposal would create a presumption of rate unreasonableness that is not permitted under the ICCTA or the Administrative Procedure Act, apparently because there would be no finding that the particular rate is unreasonable.<sup>197</sup>

CSXT's objection is murky, as CSXT does not identify any precedent to support its contention, and its claim appears to duplicate its earlier objections. CSXT's referenced statutory provisions do not support its claim that "shift[ing] the burden of proof in rate reasonableness cases from complaining shippers to defendant railroads" would be "contrary to ICCTA and the Administrative Procedure Act."<sup>198</sup> Moreover, under the constraint as advocated by Consumers, no such shift takes place. The shipper must demonstrate market dominance, and must carry the burden of showing that the defendant carrier is revenue adequate. The railroad's ability to avoid application of the constraint by invoking the "special showing" exception in the *Guidelines*, (1 I.C.C.2d at 536 n.36), represents an affirmative defense, not a shift in the primary burden of proof.

CSXT's real concern appears to be that it would no longer be presumed revenue inadequate and that SAC would cease to be the sole operative prong of CMP under the *Coal Rate Guidelines*. But no improper or unwarranted

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<sup>197</sup> *Id.* at IV-69.

<sup>198</sup> *Id.*



presumption would apply. The various statutory provisions that CSXT references<sup>199</sup> would remain applicable. To obtain relief, shippers still must bring complaints and show market dominance under 49 U.S.C. §§ 11701(a) and 10707. A mere finding of market dominance would not establish a presumption that the rate is unreasonable under 49 U.S.C. § 10707(c).<sup>200</sup> Instead, any finding of unreasonableness would flow from the carrier's revenue adequacy status and application of the *Coal Rate Guidelines*. Relief would be available only after a hearing under 5 U.S.C. § 556(d),<sup>201</sup> where CSXT would have the opportunity to show that the particular movement still should bear a higher rate.

**b. The Availability of Revenue Adequacy Relief Does Not Create An Unlawful Presumption of Market Power**

CSXT next claims that Consumers improperly asks the Board to presume that any rate increase on captive traffic would be an unreasonable exercise of market power.<sup>202</sup> CSXT's claim duplicates at least some of its previous claims and is rather vague, as CSXT first claims rates need to be found unreasonable on a case-by-case basis, and then turns to more of a quasi-policy assertion to the effect that congestion pricing might be needed in locations such as Chicago. *Id.*

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<sup>199</sup> *Id.* at IV-69 nn.162-163.

<sup>200</sup> *Id.* at IV-69 n.163

<sup>201</sup> *Id.* at IV-69 n.162

<sup>202</sup> *Id.* at IV-70.

Both of CSXT's arguments fail. To obtain relief, a shipper must bring a rate case,<sup>203</sup> establish market dominance,<sup>204</sup> and show that the rate is unreasonable,<sup>205</sup> before relief is awarded.<sup>206</sup> A prior finding of revenue adequacy may help show that an increase in a particular railroad's captive rate is unreasonable under the Revenue Adequacy Constraint, but the carrier would retain the ability to show that the prior finding should not apply, circumstances have changed, or a higher rate is justified under the particular circumstances. 1 I.C.C.2d at 536 n.36.

CSXT itself raises the possibility that a carrier might claim a higher rate should apply in order to address congestion in a location such as Chicago.<sup>207</sup> CSXT made no such showing for the Campbell movement, nor could it as the Campbell movement had such a high R/VC ratio {                    }, before CSXT imposed the rates that triggered this case. Nonetheless, CSXT's ability to conceive of such a claim shows that there is no conclusive presumption of rate unreasonableness under the Revenue Adequacy Constraint.

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<sup>203</sup> 49 U.S.C. § 11701(a).

<sup>204</sup> *Id.* at § 10707

<sup>205</sup> *Id.* at § 10701(d)(1)

<sup>206</sup> *Id.* at § 10704

<sup>207</sup> CSXT Reply at IV-70.

**c. CSXT's Incentive and Ability to Invest Would Remain**

CSXT claims that the fictitious rate freeze would reduce its ability to invest to improve service and increase productivity and efficiency.<sup>208</sup> CSXT's claims are unfounded.

Relief under the Revenue Adequacy Constraint is available only if the carrier is revenue adequate, and a revenue adequate carrier can, by definition, obtain the capital needed for investments. CSXT does not need a higher return in order to attract capital and make investments.<sup>209</sup> Nonetheless, CSXT's return would continue to exceed the COC: the relief does not reduce CSXT's earnings to the revenue adequacy level, but only limits further rate increases. CSXT would retain pre-increase margins on protected traffic. And no restrictions would apply to its contract, exempt, and non-captive traffic, which form the majority of its customer base.

Even as to traffic potentially subject to relief, CSXT would retain the ability and the incentive to increase its margins by reducing its costs relative to the RCAF-A. CSXT also could enter into contracts to provide service or other benefits superior to those under the common carriage for additional compensation.

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<sup>208</sup> *Id.* at IV-70-71. CSXT's heading, but not its text, refers to incentive.

<sup>209</sup> *Coal Rate Guidelines*, 1 I.C.C.2d at 535.

**d. Revenue Adequacy Relief Would Not Unreasonably Deter Transportation Contracting**

CSXT next claims that the relief advocated by Consumers would create a disincentive to transportation contracting because a carrier would be reluctant to agree to a lower contract rate that might impede its ability to set a higher rate after the contract expired.<sup>210</sup>

CSXT's logic fails on multiple grounds. First, CSXT is effectively claiming that because it has exploited market power in its revenue inadequate past, it should be able to exercise additional market power to take further rate increases after achieving revenue adequacy. That claim flies in the face of the requirement that rates on captive traffic must be reasonable under 49 U.S.C. §§ 10701(d)(1).

Second, a regulatory backstop should provide a captive shipper with some bargaining ability in dealing with a market dominant carrier, and parties generally should take their regulatory options and risks into account in dealing with each other. Reaching voluntary agreements without actual Board intervention is efficient. However, such agreements should be voluntary, and relief should be available where parties cannot reach agreement. The railroads can use their market power to force captive shippers to enter into involuntary contracts of adhesion. The fact that the SAC rate constraint does not work at all for many, if

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<sup>210</sup> CSXT Reply at IV-72.

not most, shippers creates an additional need for a meaningful Revenue Adequacy Constraint.<sup>211</sup>

Third, CSXT's concerns with the challenges of comparing certain potential contract and common carrier rates<sup>212</sup> are misplaced. CSXT has not identified any factor that complicates the comparison in Consumers' case. Insofar as there may be concerns in other cases, they are better addressed at that time. However, if comparisons do become difficult, it will be because the carrier exercises its flexibility to establish the initial rate and service terms for common carrier movements, subject to later review by the Board.<sup>213</sup> The carrier's ability to complicate the comparison between a new common carrier rate and an expiring contract rate is no reason to deny or preclude rate relief. Carriers should not be allowed to benefit from complications of their own making. And shippers and carriers always can negotiate mutually beneficial contracts after the Board has awarded relief, which has occurred on multiple occasions following previous Board decisions in rate cases.

Fourth, carriers have had more than ample time to transition to Ramsey-type rates that they consider to be adequately compensatory. The Staggers Act was enacted over thirty-five (35) years ago, and the *Coal Rate Guidelines*, including the Revenue Adequacy Constraint, was adopted over thirty

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<sup>211</sup> *E.g., DuPont v. Norfolk Southern*, NOR 42125 (STB served Dec. 23, 2015) (Miller concurrence, and Begeman dissent).

<sup>212</sup> CSXT Reply at IV-72 & n.168.

<sup>213</sup> 49 U.S.C. §§ 10701(c) and (d)(1).

(30) years ago. During that time, most shippers have lacked an effective rate remedy. If some transitional issues arise, they are not a reason to suspend an element of CMP that was established so long ago.

**e. CSXT's Concerns with Market Distortions Are Unfounded and Misdirected**

CSXT claims that the imaginary rate freeze “would distort market signals by preventing price adjustments based upon consumer demand,” as carriers would be unwilling or unable to make needed investments.<sup>214</sup> These claims are without merit.

The “price adjustments” that CSXT has in mind are rate increases, as CSXT always can reduce rates if it chooses. CSXT’s desire to increase a rate above a maximum reasonable level must give way to the requirement in 49 U.S.C. §§ 10701(d)(1) and 10701(2) that rates on captive traffic must be reasonable. The restriction applies only if there is a lack of effective competition. Where that is the case, market signals already are distorted, creating the need for regulatory intervention.

CSXT’s speculation that revenue adequacy relief will incent it “to devote its scarce capital resources to routes that are subject to effective competition” instead of captive movements<sup>215</sup> defies logic. A carrier that has incentive to invest in its competitive movements has at least an equal incentive to

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<sup>214</sup> CSXT Reply at IV-72.

<sup>215</sup> *Id.* at IV-72.

invest in its more profitable captive movements, which would remain more profitable than competitive ones even after relief under the Revenue Adequacy Constraint is awarded. The R/VC ratios on captive movements will continue to exceed the jurisdictional threshold, and will exceed the markups on the majority of CSXT's other traffic.

CSXT also ignores the fact that competitive and captive movements share facilities, such that investment that benefits one group also benefits the other. For example, the Campbell movement traverses the Chicago area, and CSXT will not withhold investment there simply because it benefits a very profitable captive movement along with less profitable competitive traffic.

**f. CSXT's Concerns with Challenges to the Adequacy of the Level of Rail Service are also Misplaced**

CSXT advances the rather odd claim that additional problems with the non-existent rate freeze will occur if the level of service is not also frozen, as if there has always been some sort of lock-step relationship between rate levels and service quality.<sup>216</sup>

It is unclear how CSXT's concern here is any different from that presented regarding the alleged disincentive to contract and other market distortions.<sup>217</sup> As noted *supra*, the lack of effective competition exposes captive shippers to both high rates and poor service, because captive shippers pay higher

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<sup>216</sup> *Id.* at IV-73.

<sup>217</sup> *Id.* at IV-71-72

rates, carriers receive revenues more than sufficient to provide adequate service to those shippers. Moreover, contract commitments to competitive shippers should not leave carriers unable to serve their captive traffic that is subject to relief under the *Coal Rate Guidelines*. “Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.”<sup>218</sup>

**g. CSXT’s Concerns About Cross-Subsidies Are Unfounded**

CSXT’s concluding argument is that the non-existent rate freeze would create improper cross-subsidies because the captive shippers “would ... benefit from ‘locked in’ rates” that are not available “to new shippers or shippers with shifting movement pattern resulting from a more fluid network of customers and suppliers.”<sup>219</sup> CSXT’s point is vague, because CSXT left the nature of this additional traffic so undefined. Regardless, CSXT’s assertions seem to duplicate its earlier claims and are defective for much the same reasons.

A captive shipper, like Consumers, that receives relief already is paying higher rates to a revenue adequate carrier, so other shippers are not cross-subsidizing Consumers, and awarding relief to Consumers does not limit the relief available to others. Instead, CSXT is receiving excess revenue relative to what it requires in order to be able to meet its current and future service needs.

Competitive shippers may have bargaining leverage that captive shippers lack, and shifting movement patterns may reflect the presence of

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<sup>218</sup> 49 U.S.C. § 11101(a).

<sup>219</sup> CSXT Reply at IV-73.



competitive forces and leverage. However, a captive shipper should not be forced to bear an otherwise unreasonable rate increase just so a revenue adequate carrier can handle an additional unit of competitive or less compensatory traffic. Doing so forces the captive shipper to bear an excessive share of the carrier's unattributable costs, and violates the Long-Cannon factors at 49 U.S.C. § 10701(d)(2).

**V Witness Qualifications &  
Verifications**

## PART V

### WITNESS QUALIFICATIONS AND VERIFICATIONS

This Part contains the Statements of Qualifications of additional witnesses who have not previously sponsored evidence on behalf of Consumers Energy Company in this proceeding. It also contains the Verifications of Consumers' other witnesses, whose Statements of Qualifications appear in Part V of Consumers' Opening Evidence.

#### 1. MICHAEL J. PETRO

Mr. Petro is a Principal Consultant, Transportation and Logistics, and Global Practice Lead for Intermodal at Advisian Inc. His business address is 10500 Richmond Avenue, Houston, TX 77042. The specific evidence that Mr. Petro is co-sponsoring (together with Paul Bovitz) addresses whether vessel transportation represented an effective competitive alternative to rail and the differences between Muskegon Lake and Pigeon Lake. This evidence appears in Part II-B-2 of Consumers' Rebuttal Evidence.

Mr. Petro is a proven leader in the transportation industry for more than 30 years, with extensive experience in the intermodal, steamship, rail, and trucking industries. He holds a B.S. in Commerce from the McIntire School of Commerce at University of Virginia. His areas of expertise include business strategy, operations management, service design, organizational transformation, process improvement, systems design and implementation, and fleet management.

Mr. Petro has performed transportation project work for over 50 separate clients, including shippers, terminal operators, port authorities, government agencies,

railroads, insurance companies, and private equity firms. He has managed over 20 multimodal transportation projects in North America and globally.

Prior to joining Advisian, Mr. Petro was Managing Partner of Point B Logistics, a Transportation and Logistics Consultancy he founded in 2001. Prior to 2001, Mr. Petro held executive positions with CSX Intermodal, American President Lines, and CSX Transportation.

He served as Managing Director of Service Design for CSXT managing a portfolio of rail assets valued at more than \$1 billion. Mr. Petro has managed transportation projects in North America, South America, Asia, Africa and Europe, and has contributed to project teams in more than a dozen countries.

**VERIFICATION**

I, Michael J. Petro, verify under penalty of perjury that I have read the Rebuttal Evidence of Consumers Energy Company in this proceeding that I have co-sponsored (together with Paul Bovitz) related to Part II-B, as described in the Statement of Qualifications; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.



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Michael J. Petro

Executed on May 16, 2016

2. **PAUL J. BOVITZ**

Mr. Bovitz is a Principal Consultant, Science and Ecology, at Advisian Inc. His business address is 10500 Richmond Avenue, Houston, TX 77042. The specific evidence that Mr. Bovitz is co-sponsoring (together with Michael Petro) addresses whether vessel transportation represented an effective competitive alternative to rail and the differences between Muskegon Lake and Pigeon Lake. This evidence appears in Part II-B-2 of Consumers' Rebuttal Evidence.

Mr. Bovitz has over 30 years of professional experience in managing environmental investigations, assessing ecological impacts from both proposed and legacy projects, and preparing permits for projects, including energy and transportation. He has worked extensively with assessing risks from contaminated sediments and recently presented a short course at Rutgers University on making ecologically-based remedial action decisions at contaminated sites. He is familiar with port activities having managed multi-year environmental call-in contracts for the Port of New York and New Jersey.

Mr. Bovitz has participated as a peer review panel member for several NEPA reviews of USACE environmental impact statements throughout the U.S., including for the Chicago District. He has worked extensively with the U.S. Army Corps of Engineers, U.S. Environmental Protection Agency and other state and local agencies, including Michigan DEQ and Michigan DNR (the latter on the Kalamazoo River oil spill). He is an experienced project manager who has managed multi-million dollar contracts and is aware of pricing and costs for permitting projects.

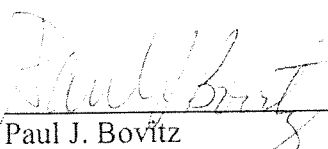
Mr. Bovitz holds a B.S. in Wildlife Biology from Colorado State University as well as an M.S. in Ecology and an executive MBA with a concentration in Finance from Rutgers University.

Mr. Bovitz is a member of the Licensed Site Remediation Professional Association of New Jersey and the Rutgers University Financial Alumni Association.

Mr. Bovitz is also a certified Professional Wetland Scientist, Society of Wetland Scientists, and LEED AP. He serves as an acting member of the New Jersey Governor's Science Advisory Board, Ecological Sciences Committee and formerly served on the Comparative Risk Analysis Panel of NJDEP.

VERIFICATION

I, Paul J. Bovitz, verify under penalty of perjury that I have read the Rebuttal Evidence of Consumers Energy Company in this proceeding that I have co-sponsored (together with Michael Petro) related to Part II-B, as described in the Statement of Qualifications; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
Paul J. Bovitz

Executed on May 17, 2016



VERIFICATION

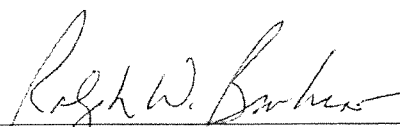
I, Brian D. Gallaway, verify under penalty of perjury that I am the same Brian D. Gallaway whose Statement of Qualifications appears in Part V of the Narrative portion of Consumers Energy Company Opening Evidence in this proceeding; that I have read Part II-B and Part III-A.2 of the Rebuttal Evidence that I am sponsoring; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
\_\_\_\_\_  
Brian D. Gallaway

Executed on May 17, 2016

VERIFICATION

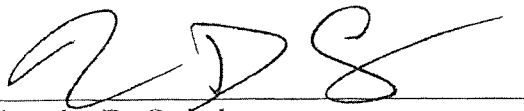
I, Ralph W. Barbaro, Ph.D., verify under penalty of perjury that I am the same Ralph W. Barbaro, Ph.D. whose Statement of Qualifications appears in Part V of the Narrative portion of Consumers Energy Company Opening Evidence in this proceeding; that I have read Part II of the Rebuttal Evidence that I am sponsoring; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
\_\_\_\_\_  
Ralph W. Barbaro, Ph.D.

Executed on May 13, 2016

VERIFICATION


I, Timothy D. Crowley, verify under penalty of perjury that I am the same Timothy D. Crowley whose Statement of Qualifications appears in Part V of the narrative portion of Consumers Energy Company Opening Evidence in this proceeding: that I have coordinated the workpaper production of all electronic files in accordance with the Surface Transportation Board's ("STB") March 12, 2001 decision in Ex Parte No. 347 (Sub-No. 3), *General Procedures For Presenting Evidence in Stand-Alone Cost Rate Cases* and the STB's July 10, 2015 decision in NOR 42142 *Consumers Energy Co. vs. CSXT* for the format of evidence to be presented, that I have read the Rebuttal Evidence related to quantitative market dominance in Part II-A and the roadbed preparation/earthworks component of the road property investment cost of the SARR in Part III-F that I am sponsoring, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
\_\_\_\_\_  
Timothy D. Crowley

Executed on May 18, 2016

VERIFICATION

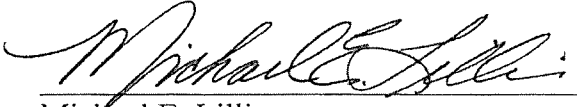
I, Daniel L. Fapp, verify under penalty of perjury that I am the same Daniel L. Fapp whose Statement of Qualifications appears in Part V of the narrative portion of Consumers Energy Company Opening Evidence in this proceeding: that I have read the Rebuttal Evidence related to the SARR traffic selection and revenue in Part III-A that I am sponsoring as well as Part III-G and Part III-H of the Rebuttal Evidence that I am co-sponsoring with Witness Thomas D. Crowley, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
Daniel L. Fapp

Executed on May 16, 2016

VERIFICATION

I, Michael E. Lillis, verify under penalty of perjury that I am the same Michael E. Lillis whose Statement of Qualifications appears in Part V of the narrative portion of Consumers Energy Company Opening Evidence in this proceeding: that I have read the Rebuttal Evidence related to the forecast of the SARR traffic group and related revenues in Part III-A that I am sponsoring, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
\_\_\_\_\_  
Michael E. Lillis

Executed on May 18, 2016

VERIFICATION

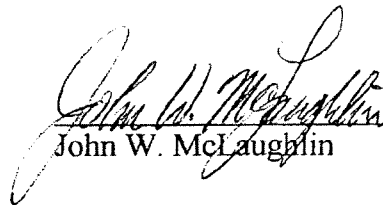
I, Robert D. Mulholland, verify under penalty of perjury that I am the same Robert D. Mulholland whose Statement of Qualifications appears in Part V of the narrative portion of Consumers Energy Company Opening Evidence in this proceeding: that I have read the Rebuttal Evidence related to the development of the base year and peak period train lists in Part III-C that I am sponsoring, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
\_\_\_\_\_  
Robert D. Mulholland

Executed on May 18, 2016

**VERIFICATION**

I, John W. McLaughlin, verify under penalty of perjury that I am the same John W. McLaughlin whose Statement of Qualifications appears in Part V of the Narrative portion of Consumers Energy Company Opening Evidence in this proceeding; that I have read the evidence related to train speeds and locomotives per train from the RTC Model simulation of the CERR's operations in Part III-C-2 that I am sponsoring and that I have read the evidence related to the simulation and validation of the CERR's infrastructure and operating plan, as well as development of certain operating statistics discussed in Part III-C and Part III-D that I am co-sponsoring; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
\_\_\_\_\_  
John W. McLaughlin

Executed on May 15, 2016

VERIFICATION

I, Brian A. Despard, verify under penalty of perjury that I am the same Brian A. Despard whose Statement of Qualifications appears in Part V of the narrative portion of Consumers Energy Company Opening Evidence in this proceeding; that I have read the Rebuttal Evidence related to the analysis of joint facilities costs in Part III-C and the development of operating expenses in Part III-D that I am sponsoring, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

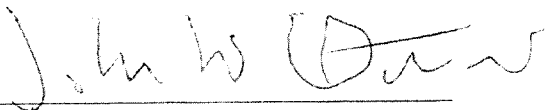
  
Brian A. Despard

Executed on May 18, 2016



VERIFICATION

I, John W. Orrison, verify under penalty of perjury that I am the same John W. Orrison whose Statement of Qualifications appears in Part V of the Narrative portion of Consumers Energy Company Opening Evidence in this proceeding; that I have read the evidence that I co-sponsored in Part III-B related to the CERR system's configuration and facilities, Part III-C related to the CERR's operating plan, and Part III-D related to the operating personnel and their equipment needs as well as the CERR's outsourcing plan; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
\_\_\_\_\_  
John W. Orrison

Executed on May 17, 2016

VERIFICATION

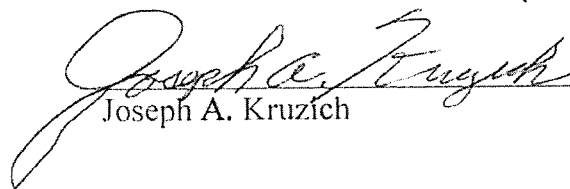
I, Robert T. Holmstrom, verify under penalty of perjury that I am the same Robert T. Holmstrom whose Statement of Qualifications appears in Part V of the Narrative portion of Consumers Energy Company Opening Evidence in this proceeding; that I have read the portions of the Rebuttal Evidence that I am co-sponsoring, including Part III-B related to the CERR system's configuration and facilities including its route, track and yard facilities, and traffic control system, Part III-C related to the CERR's operating plan, and Part III-D related to the operating personnel and their equipment needs, and the CERR's outsourcing plan; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
Robert T. Holmstrom

Executed on May 17, 2016

VERIFICATION

I, Joseph A. Kruzich, verify under penalty of perjury that I am the same Joseph A. Kruzich whose Statement of Qualifications appears in Part V of the Narrative portion of Consumers Energy Company Opening Evidence in this proceeding; that I have read Part III-D of the Rebuttal Evidence related to Transportation Management Systems, and Information Technology personnel and hardware/software that I am sponsoring; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
Joseph A. Kruzich

Executed on May 14, 2016

VERIFICATION

I, R. Lee Meadows, Jr., verify under penalty of perjury that I am the same R. Lee Meadows, Jr. whose Statement of Qualifications appears in Part V of the Narrative portion of Consumers Energy Company Opening Evidence in this proceeding; that I have read Part III-D of the Rebuttal Evidence related to maintenance of way plan, personnel and costs evidence that I am sponsoring; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

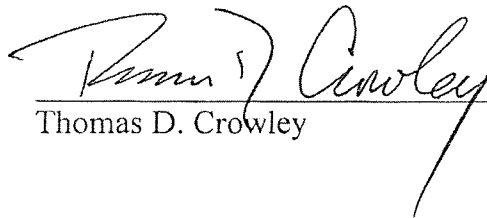
R. Lee Meadows, Jr.

R. Lee Meadows, Jr.

Executed on May 18, 2016

VERIFICATION

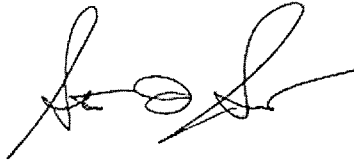
I, Thomas D. Crowley, verify under penalty of perjury that I am the same Thomas D. Crowley whose Statement of Qualifications appears in Part V of the narrative portion of Consumers Energy Company Opening Evidence in this proceeding: that I have read Part III-G and Part III-H of the Rebuttal Evidence that I am co-sponsoring with Witness Daniel L. Fapp, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
Thomas D. Crowley

Executed on May 18, 2016

**VERIFICATION**

I, Stuart I. Smith, verify under penalty of perjury that I am the same Stuart I. Smith whose Statement of Qualifications appears in Part V of the Narrative portion of Consumers Energy Company Opening Evidence in this proceeding; that I have read Part III-F-1 of the Rebuttal Evidence related to land valuation costs that I am sponsoring; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.




\_\_\_\_\_  
Stuart I. Smith

Executed on May 16, 2016

VERIFICATION

I, Victor F. Grappone, verify under penalty of perjury that I am the same Victor F. Grappone whose Statement of Qualifications appears in Part V of the Narrative portion of Consumers Energy Company Opening Evidence in this proceeding; that I have read Part III-F of the Rebuttal Evidence related to the signals and communications plan and cost evidence that I am sponsoring, and Part III-D-4 related to certain elements of signals maintenance that I am co-sponsoring; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
\_\_\_\_\_  
Victor F. Grappone

Executed on May 17, 2016

VERIFICATION

I, Harvey H. Stone, verify under penalty of perjury that I am the same Harvey H. Stone whose Statement of Qualifications appears in Part V of the Narrative portion of Consumers Energy Company Opening Evidence in this proceeding; that I have read Part III-B regarding the CFRR system's configuration and facilities and Part III-F regarding SARR construction costs of the Rebuttal Evidence that I am co-sponsoring; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.



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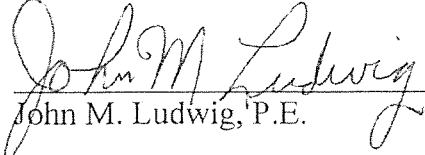
Harvey H. Stone

Executed on May 16, 2016



VERIFICATION

I, John M. Ludwig, P.E., verify under penalty of perjury that I am the same John M. Ludwig, P.E. whose Statement of Qualifications appears in Part V of the Narrative portion of Consumers Energy Company Opening Evidence in this proceeding; that I have read Part III-F-5 of the Rebuttal Evidence related to bridge design and costs that I am sponsoring; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

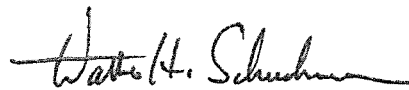
  
\_\_\_\_\_  
John M. Ludwig, P.E.

Executed on May 16, 2016

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VERIFICATION

I, Walter H. Schuchmann, verify under penalty of perjury that I am the same Walter H. Schuchmann whose Statement of Qualifications appears in Part V of the Narrative portion of Consumers Energy Company Opening Evidence in this proceeding; that I have read Part III-C of the Rebuttal Evidence related to the simulation and validation of the CERR's infrastructure and operating plan, as well as development of certain operating statistics that I am co-sponsoring; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.



\_\_\_\_\_  
Walter H. Schuchmann

Executed on May 16, 2016

VERIFICATION

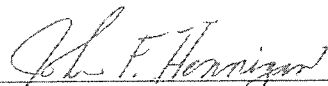
I, Richard C. Balas, verify under penalty of perjury that I am the same Richard C. Balas whose Statement of Qualifications appears in Part V of the Narrative portion of Consumers Energy Company Opening Evidence in this proceeding; that I have read Part III-F of the Rebuttal Evidence regarding SARR construction costs that I am co-sponsoring; that I know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
Richard C. Balas

Executed on May 16, 2016

VERIFICATION

I, John F. Hennigan, Ph.D., verify under penalty of perjury that I have read the Rebuttal Evidence of Consumers Energy Company in this proceeding that I have sponsored, as described in the Statement of Qualifications, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
\_\_\_\_\_  
John F. Hennigan, Ph.D.

Executed on May 12, 2016

**PUBLIC VERSION**  
**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

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CONSUMERS ENERGY COMPANY	)	
	)	
	)	
	)	
v.	)	Docket No. NOR 42142
	)	
CSX TRANSPORTATION, INC.	)	
	)	
	)	
Defendant.	)	
	)	

---

**REBUTTAL EVIDENCE OF COMPLAINANT**

**EXHIBITS**

CONSUMERS ENERGY COMPANY

Catherine M. Reynolds  
Senior Vice President and General Counsel  
Eric V. Luoma  
Assistant General Counsel  
Consumers Energy Company  
One Energy Plaza  
Jackson, Michigan 49201

OF COUNSEL:

SLOVER & LOFTUS LLP  
1224 Seventeenth St., N.W.  
Washington, D.C. 20036

Kelvin J. Dowd  
Robert D. Rosenberg  
Andrew B. Kolesar III  
Daniel M. Jaffe  
Katherine F. Waring  
SLOVER & LOFTUS LLP  
1224 Seventeenth St., N.W.  
Washington, D.C. 20036

Dated: May 20, 2016

(202) 347-7170

## LIST OF EXHIBITS

### **EXHIBIT**

### **TITLE**

### **EXHIBIT**

#### **II-**

- 1 Rebuttal Report by Ralph W. Barbaro, Ph.D., PE
- 2 Verified Statement of Michael Petro and Paul Bovitz

### **EXHIBIT**

#### **III-B-**

- 1 Rebuttal CERR Track Diagrams

### **EXHIBIT**

#### **III-F-**

- 1 Rebuttal Report by Stuart Smith

### **EXHIBIT**

#### **III-H-**

- 1 Rebuttal Discounted Cash Flow Model
- 2 Rebuttal CERR Maximum Markup Methodology R/VC Ratios

### **EXHIBIT**

#### **IV-**

- 1 Rebuttal Verified Statement by John F. Hennigan, Ph.D.

## **II Market Dominance**

## **EXHIBIT II-1**

**Redacted**



## **EXHIBIT II-2**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

CONSUMERS ENERGY COMPANY	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. NOR 42142
	)	
CSX TRANSPORTATION, INC.	)	
	)	
Defendant.	)	

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**VERIFIED STATEMENT  
OF  
MICHAEL PETRO  
PAUL BOVITZ**

**on behalf of**

**CONSUMERS ENERGY COMPANY**

Advisian Inc.  
10500 Richmond Avenue  
Houston, TX 77042

May 12, 2016

## **I. INTRODUCTION**

We are Michael Petro, Principal Consultant, Transportation and Logistics, and Global Lead for Intermodal, at Advisian, Inc.; and Paul Bovitz, Principal Consultant, Science and Ecology, at Advisian. Our respective qualifications and experience are summarized in Part V of the Rebuttal Evidence of Consumers Energy Company (“Consumers”), of which this Verified Statement also is a part.

This Verified Statement is submitted on behalf of Consumers, and in response to certain claims made in the Reply Evidence filed by CSX Transportation, Inc. (“CSXT”) in Surface Transportation Board Docket No. NOR 42142, on March 7, 2016 (hereafter “CSXT Reply Evidence”).

On July 1, 2015, approximately eight months after submission of the WorleyParsons 2014 Report to Consumers that is referenced in Part II of the CSXT Reply Evidence, WorleyParsons created a new subsidiary company called Advisian. Advisian provides strategic and management consulting services integrated with engineering and technical expertise. The individuals who prepared the original WorleyParsons report to Consumers in 2014 are now part of Advisian, and are the same individuals who are making this Statement.

We reviewed documents produced in the CSXT Reply Evidence as well as information produced on the record in the proceeding by Consumers’ witnesses, including:

- TranSystems Corporation report, dated March 4, 2016 and filed by CSXT with the Surface Transportation Board (hereafter “TS Report”)
- Report of Ralph W. Barbaro, Ph.D., PE, dated October 29, 2015 and filed by Consumers with the Surface Transportation Board as Exhibit II-1 to Consumers’ Opening Evidence (“Barbaro Report”)

- Spicer Study of Coal Delivery Options JHC, dated October 10, 2014 (“Spicer Report”)
- Cardno Preliminary Assessment of Campbell Plant Alternatives and Strategies, dated July 21, 2014 (“Cardno Report”)
- ERM Campbell Plant Vessel Coal Delivery Feasibility Report, dated October 2007
- ERM West Side Rail Study Report, dated March 2007

## **I.2 STRUCTURE OF THIS VERIFIED STATEMENT**

This Verified Statement is being submitted in response to statements made in the CSXT Reply Evidence regarding our work and work performed by other consultants for Consumers in 2014, and contains five sections. In addition to this Introduction (Section I), Section II examines the scope and purpose of WorleyParsons’ 2014 assignment and Report for Consumers and describes the analyses we performed. We describe the battery limits of our study, the order of magnitude of our cost estimates, and our inputs and assumptions. We also describe items that were outside the scope of our assignment.

Section III reviews the opinions presented by Consumers’ witness, Dr. Barbaro, as part of Consumers’ Opening Evidence. In this section we review the use of previous work in his analysis and we show that the opinions expressed by Dr. Barbaro are consistent with our conclusions in 2014.

Section IV discusses inaccuracies presented in the CSXT Reply Evidence concerning our work and our previous opinions. We show how CSXT inaccurately used our preliminary

conclusions regarding technical and environmental feasibility and expressed them as if they were final opinions that support conclusions regarding the economic competitiveness of transportation service. We discuss examples of these inaccuracies and how they affect conclusions regarding technical feasibility, permitting and cost of delivery options to Campbell.

Section V describes the differences between Muskegon Lake and Pigeon Lake, both of which are located in Michigan. CSXT takes the position that the J.H. Campbell site near Pigeon Lake is a “nearly identical location” to that of Consumers’ now-idled Cobb Station near Muskegon Lake, from the standpoint of the receipt of coal by vessel. We believe that in fact there are many significant and consequential differences between these two bodies of water, and we describe them in Section V.

## **II. PURPOSE AND SCOPE OF WORLEYPARSON’S 2014 REPORT**

On May 21, 2014, Consumers asked WorleyParsons to perform a “fast track” study to evaluate three alternatives (Options D, E and R) for coal delivery to Consumers’ JH Campbell facility. Our initial report was issued five weeks later on June 29, 2014.

On October 15, 2014, WorleyParsons was asked by Consumers to perform a small amount of additional work, and our final report including that additional analysis was issued on October 22, 2014.

The scope of our 2014 study included:

- a preliminary review of environmental and community impacts
- a preliminary review of materials handling
- a preliminary review of marine structural requirements

- high level 'screening' cost estimates

Our analysis was based upon a review of prior reports and documentation provided to us by Consumers and prior WorleyParsons work on similar studies. The scope of our study did not include:

- simulation modelling
- analysis of vessel capacity
- analysis of vessel availability
- analysis of commercial trends of Great Lake vessel operations
- detailed investigations of regulatory requirements or discussion with regulatory bodies
- analysis of the economic competitiveness of any option

WorleyParsons' principal scope of work was to review prior studies and information provided by Consumers. Our scope did not include contacting any third parties, including regulatory authorities, permitting agencies, short line or Class I railroads, barge operators, terminal operators, or community groups. WorleyParsons did not review information regarding Consumers' contract terms with CSXT, or the terms of other agreements involving third parties, such as { }.

The work that we performed for Consumers is similar to work we perform regularly for other clients in early phase or 'concept' phase engagements.



The potential alternatives discussed in the TS Report are similar – but not identical – to scenarios 2) and 3) above.

WorleyParsons was not asked to evaluate the source of the coal vessel loading or the feasibility of loading coal to vessels at KCBX or any other terminals where the coal would arrive from the Powder River Basin in Wyoming prior to shipment by vessel to either J.H. Campbell or Cobb.

KCBX was mentioned only twice in our 275-page report (and in the Glossary where we define the acronym). On page 3 and on page 36 of the WorleyParsons report we describe the marine structural design of Option D as capable of accommodating vessel deliveries from multiple locations including KCBX, Detroit Edison, Midwest Energy Resources, or other coal handlers/producers. KCBX is not specifically mentioned in our report as it pertains to Option E.

Consumers did not ask WorleyParsons to evaluate vessel availability on Lake Michigan. We were asked to provide our expert opinion on the *operational maneuverability* of various vessel sizes. Our review of operational maneuverability included an evaluation of operations as it pertained to:

- a) safe entry into the Pigeon Lake channel
- b) safe positioning of a vessel within Pigeon Lake for offloading at a dock for Option E
- c) safe exit from Pigeon Lake channel
- d) safe positioning of a vessel for offloading offshore for Option D, and
- e) general operations in Lake Michigan.



For Option D and Option R, WorleyParsons was asked to review and update the design and costs which were presented by ERM in their 2007 report.

***a. The WorleyParsons study was principally an engineering analysis; cost estimates were focused on physical plant and basic operational components.***

Option D and Option R were studied previously by ERM in 2007. WorleyParsons was asked to review the ERM design and update the ERM costs to present dollars based on the scope and quantities defined by ERM in their study. The deliverable in our agreed scope of work relating to cost estimates was to update to present dollars the estimate included in the 2007 ERM study for Option D based on the scope and quantities as defined in ERM study, and to recommend any modifications in scope.<sup>3</sup>

Consumers asked WorleyParsons to develop preliminary costs for only one new option (Option E). As part of the evaluation of this new Option E, Consumers asked us to review cost estimates prepared by ERM (2007) for three other Options (A, B and C). Consumers had previously rejected these three options because of the 316(b) environmental regulations associated with the J.H. Campbell plant's cooling water intake. We used the ERM cost estimates from Options A, B and C as the basis for our Option E cost estimates as all options involved the introduction of a new dock at Pigeon Lake for unloading of coal delivered by water.

In our operating cost estimates for both options D and E, Consumers asked us to include a cost per ton estimate for barge shipping transport. Since we did not know the proposed origin of the coal for Option D or E, we could not accurately estimate barge transport costs. For our barge transport cost estimate, therefore, we used the same cost per ton that Consumers provided

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<sup>3</sup> {

}

to us as a benchmark for the cost of barge transport to Cobb. We advised Consumers that using the Cobb benchmark as the estimate was a preliminary assumption.

In our study we did not provide cost estimates for anything outside of the physical plant and basic operational components. We provided no cost estimate or allowance for inventory carrying costs, carrying costs related to stockpiling coal, vessel or rail delays, origin transportation cost differentials, or other elements that could be relevant to a full analysis but were outside the scope of our study.

The cost estimates that we provided were at a { }. Our cost estimates included provisions for certain factors based on a percentage of the installed cost, as is customary in high-level desk top cost estimates. Our provisions included:

- { } engineering and procurement
- { } construction management
- { } contingency

***b. WorleyParsons completed a First Phase analysis: three additional phases are needed before a project can be considered financially feasible.***

Major projects are developed in phases. Each subsequent phase builds on the prior phase as the planning and execution of the project evolves from its initial conception through to its construction and deployment. The level of analysis, design, and project governance becomes increasingly detailed with each subsequent phase. The cost to implement each phase increases substantially from step to step as more work is required. The phased approach ensures that investors do not needlessly spend money on a project which ultimately turns out to be uneconomical or infeasible. As more information and understanding of the project is attained,

the confidence around the project's value increases. The project may become increasingly attractive or increasingly unattractive depending on what subsequent phases uncover.

Different organizations label these phases differently. WorleyParsons follows a construct of four phases defined as follows:

- 1) Identification – in this phase the project is defined in very broad terms as to the purpose, presumed rationale, the conceptual design, and a first order evaluation of options. The Identification phase results in a decision to abandon the project or to define the study parameters for the next phase.
- 2) Pre-Feasibility Study – A Pre-Feasibility Study is an engineering economics case evaluation of the potential of a proposed project. Project proponents use the Pre-Feasibility Study to determine whether the estimated benefits of the project are sufficiently higher than the estimated costs of the project to warrant the project sponsors to fund additional design phases. The Pre-Feasibility Study phase outlines and analyses alternatives and methods of achieving the desired outcome.
- 3) Feasibility Study or Front End Engineering Design (FEED) – A high-level design is needed to bridge a gap between the concept design and the future detailed design. FEED is especially important in cases where the concept design does not sufficiently inform the project sponsors. In a FEED study the system configuration is defined. The FEED will include schematics, diagrams, and layouts of the project to describe the project's configuration.
- 4) Bankable Feasibility Study or Detailed Design - This phase further elaborates each aspect of the project/product by complete description through solid modeling,

drawings as well as specifications, and may consist of procurement of materials as well.

Some example specifications to be finalized in the Detailed Design phase may include:

- Operating parameters
- Operating and non-operating environmental factors
- Test requirements
- External dimensions
- Maintenance and testability provisions
- Materials requirements
- Reliability requirements
- External surface treatment
- Design life

The 2014 WorleyParsons Report to Consumers was a first phase identification analysis with a limited intended scope.

***c. WorleyParsons conducted preliminary permit and environmental reviews. We specifically noted that more in-depth analysis was required.***

Our preliminary permit and environmental review was performed without contacting any regulatory agencies. We advised Consumers that if the project continued beyond the initial phase, additional work would be necessary to determine the requirements for permitting and WorleyParsons would then implement a four-step permitting analysis process.

The “*initial reconnaissance*” we performed in this study focused on developing a listing of permits and approvals required and defined the framework and critical paths of the project’s

regulatory schedule. Utilizing our knowledge and experiences with similar projects, regional community concerns and resource agencies' requirements, we completed the Initial Permit survey and identified the primary tasks anticipated. WorleyParsons prepared a matrix of Federal, state and local regulatory requirements, including key permitting steps and supporting documentation such as habitat or other studies that can reasonably be expected to significantly affect project design activities. We prepared a preliminary comparison of the schedule, some of the costs, and to the extent possible at this initial stage, discussed risk of a protracted permitting process or denial for the Maritime options (Option D and E) and the Rail Options.

We went on to state in our Report that {

}<sup>4</sup>

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<sup>4</sup> {

}

***d. WorleyParsons estimated some but not all costs associated with permits and regulatory approvals.***

WorleyParsons' cost estimates for different coal delivery Options were provided in spreadsheet format within Appendix 4 of our 2014 report. Our cost estimates were limited both by our scope of work, as well as information available at the time.

Specifically, our final cost estimates did not include several significant items:

- Stakeholder coordination/public outreach/meetings with community groups;
- Rezoning for a section of the northern shoreline of Pigeon Lake currently designated as lakeshore residential;
- Selection of dredged material disposal sites that will handle the material to be dredged both initially and annually;
- Dredge testing, dewatering and transportation to confined disposal sites.
- Hazardous waste disposal for any dredged material that may not pass toxicity characteristic leaching procedures (TCLP) in the future, or might otherwise be considered to be impacted so that reuse for beach nourishment or local disposal is not allowable;
- Annual maintenance dredging costs for the 64-acre area to be channelized within Pigeon Lake;
- Any permitting/approvals on the Chicago terminal end (KCBX is currently under pressure to reduce stockpiles);
- EIS for the Cobb option – rail extension would be over one mile and cross private property, including running within 50 ft. of a church.

In addition, while the text of our report discussed the potential need for \$ { } in permitting costs, including an EIS for Option E, that figure was not included in the actual cost estimate presented in Appendix 4.

Finally, while we clearly stated that litigation costs and negotiated settlements could run an additional { }, that number was not included in the cost presented in the spreadsheet in Appendix 4. The cost estimate for Option E in Appendix 4 of our Report covered only the costs for engineering items in nine specific categories: Dredging, Infrastructure, Dock, Terminal, Utilities, Navigational Aids, Materials Handling Equipment, Electrical and Mobilization. We also included cost estimates for Engineering, Procurement and Construction Management based on a percentage of the Total Installed Cost (TIC) of the project. We did not include cost estimates for several items such as environmental permits or litigation. It is common in a preliminary study to exclude non-engineering costs that cannot be estimated at the desired level of accuracy. We were, however, quite clear in our report about the possibility of these costs being required:

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<sup>5</sup> {

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We believed the likelihood of an EIS being required for Option E (Pigeon Lake) was high. We did not include that estimate in our overall cost estimate, however, given our recommendation that the next step to be taken would be to meet with the regulators, confirm the regulatory requirements, and discuss in earnest the likelihood of any of these options being permitted.

Further, the \${ } litigation cost estimate was just that: an estimate. Litigation costs are very difficult to predict in advance, and the actual issues to be litigated might not arise until the permitting process is well underway and the public and other stakeholders have had an opportunity to respond.

***g. Consumers did not ask and WorleyParsons did not offer opinions as to final permit approvals, the economic feasibility of any options, or the effectiveness of any options as competitive alternatives to CSXT.***

#### **Final Permit Approvals**

In our Report we do not describe any option as “permissible”. Only regulatory agencies can make that determination. Our report states that { }, but that further investigation was required.

In our Report we stated that: {



}<sup>6</sup>

In our Report we highlighted significant concerns related to permitting. We identified possible barriers to permitting, several of which were potential {

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<sup>6</sup> {

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### **Economic Feasibility**

Consumers did not ask WorleyParsons to offer an opinion whether any transportation alternative was economically competitive to CSXT, and we never stated in our report that any transportation alternative was economically competitive. We identified technically viable options, provided cost estimates for certain physical facilities { }, identified risks, and made recommendations to Consumers to “carry forward for further studies, based on costs, environmental considerations and operational considerations.” Nowhere did we offer an opinion regarding any alternative’s economic feasibility or competitiveness.

### **III. REVIEW OF DR. BARBARO’S OPINION**

Dr. Barbaro’s Report in this proceeding provides an analysis of coal delivery options to Consumers’ Campbell facility drawing on prior work done by WorleyParsons, ERM and Spicer, and adding new detail not analyzed in the WorleyParsons 2014 study.

The Barbaro Report includes analysis of details that were not within the scope of the 2014 WorleyParsons Report, including:

- Lake vessel availability
- Lake vessel rates for transporting coal
- Tug boat harbor assistance requirements at MERC or KCBX, Carrying cost of coal stockpiles
- The Capital Recovery Factor for new investments in infrastructure
- Capacity of KCBX or MERC facilities
- BNSF rail rate differential for delivery of coal to Lake terminals
- Consumers’ Cost of Capital and IRR requirements to justify capital expenditure

- KCBX issues that could impact service and cost of coal shipments from KCBX to Campbell:
  - Chicago Department of Public Health new rules for controlling emissions from bulk materials storage
  - KCBX ongoing issues dealing with fugitive dust with complaints from local citizens and property owners
  - Inability to stockpile PRB coal in the winter

The Barbaro Report also provides a more complete economic analysis of potential options, as it includes information not reviewed by WorleyParsons, including but not limited to:

- The CSXT rates for rail deliveries to Campbell
- The BNSF rate from the Powder River Basin to Chicago
- The BNSF contract requirements regarding shipments
- Actual costs of transporting coal to Consumers' Cobb facility
- Actual vessel transportation costs
- Actual dredging costs for Pigeon Lake
- The terms of contracts involving third parties, { }
- Consumers' minimum after tax return or weighted average cost of capital

The cost estimate prepared by Dr. Barbaro is generally consistent with the WorleyParsons Report. Our cost estimates were based on information provided at the time and did not include estimates for items outside of our scope of work. In some cases Dr. Barbaro has included costs that represent either new sources of information or actual contracts that were not available to WorleyParsons at the time that our estimate was developed.

From the perspective of permitting and environmental approvals, the opinions offered by Dr. Barbaro regarding the issues that would be encountered in order to permit the facility are consistent with our own conclusions. For example, at pages 81-82 of his Report, Dr. Barbaro states:

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In comparison, the WorleyParsons 2014 Report identified the following environmental and community considerations that would be encountered in obtaining approvals for Option E at Pigeon Lake:

- Ability to obtain federal and state permits (e.g., Critical Dunes [NREPA Part 353]; Wetlands [Part 303 and CWA Section 404]; Stream / Lake [Part 301; LHA Section 10]; FERC agreement for Ludington Pump Station; disposal of dredged materials;
- Potential Limitations on allowable land uses in Subaqueous Lands Leases. Riparian rights and other legal agreements may limit implementation of this alternative;
- Adequate acreage of Consumers Energy owned lands (or availability to acquire) for mitigation of wetlands including emergent wetlands which must be mitigated at a 4:1 ratio (or higher);
- Recreational boat navigation hindrances within Pigeon Lake;
- Mitigation of emergent wetlands, considered highly valuable so high replacement ratios may apply;
- Hydraulic effects and erosion impacts of vessels berthed at the mouth of intake channel on Pigeon Lake;
- Increased commercial traffic in the lake Recreational use of Pigeon Lake including fishing and boating;

- Noise, dust and aesthetic impacts to local residences and Pigeon Lake property owners.<sup>11</sup>

Further, there are several citations in the Barbaro Report that refer to issues that WorleyParsons did not quantify, or estimated a cost that was not included in the overall project costs presented in the spreadsheet in Appendix 4 to our 2014 study. Specifically with regard to the Pigeon Lake vessel alternative, they include the following:

Barbaro, p. 4:

{

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<sup>11</sup> {

}

}

Each of these statements is accurate; WorleyParsons preliminarily estimated \$  
} for permitting Option E, including an EIS, but that cost was not included in our  
spreadsheet within Appendix 4. Likewise, while we broadly estimated that litigation costs and



stakeholder coordination could run from \$ { }, we did not include those estimates in our overall costs as presented in Appendix 4 of our report.

Finally, WorleyParsons stated clearly in our 2014 report (p. 52) that we did not attempt to estimate port operating costs and we “included { } operations cost as a placeholder.”

Dr. Barbaro’s Report states on p. 5: {

}

Dr. Barbaro’s observation is correct. Due to the scope of study, we considered some, but not all costs associated with permitting and approvals. For example, WorleyParsons entered a generic cost of { } for dredging, based on previous studies. As Dr. Barbaro pointed out on p. 13 of his Report:

{

}

This assessment is consistent with our understanding that dredging a large section of Pigeon Lake (about 28% of the lake area) will present significant regulatory, environmental and

technical challenges that will exceed the { } nominal cost included in our original cost estimate.

#### IV. CSXT DISTORTS THE WORLEYPARSONS REPORT

CSXT uses our 2014 report to attempt to justify its conclusions regarding the alleged economic viability or the permissibility of a vessel delivery option for coal moving to the Campbell Station. The following are examples where CSXT inaccurately cited our statements, inaccurately referenced our conclusions out of context, or stretched our preliminary conclusions regarding operational feasibility into final opinions that we did not offer.

1) {

}<sup>12</sup> WorleyParsons never stated that any transportation alternative was economically competitive. The evaluation of the competitiveness of any option was not within our scope of work. We identified technically viable options and made recommendations to Consumers to “carry forward for further studies, based on costs, environmental considerations and operational considerations.”<sup>13</sup>

2) CSXT states that “Consumers' prior consultants estimated { } to construct a dock alternative. . . .”<sup>14</sup> CSXT used the lowest estimate in our range of cost estimates to support its point, and claimed that this represents the actual cost for a Pigeon Lake dock alternative. In actuality, we estimated that the capital cost to construct a dock and develop the necessary infrastructure to support water options was in the *range* of \$ {

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<sup>12</sup> CSXT Reply at I-9.

<sup>13</sup> {

<sup>14</sup> CSXT Reply at I-10.

}

} based on option and vessel size selected. The \$  
) was for a shoreline dock which could accommodate a  
15000 DWT vessel. It cannot be used as a surrogate cost for the system designed by TS,  
which contemplates 18,000 ton vessels using a mid-lake unloading platform and a coal  
conveyor.

3) CSXT refers to {

}<sup>15</sup> This quote is not from our report, contrary to the footnote  
on page I-12 of CSXT's Reply Narrative, and does not accurately represent our report,  
which only concluded *preliminarily* that certain options were technically viable from an  
engineering standpoint, but also noted that further study was needed to assess costs and  
the prospects for obtaining the necessary permits.

4) CSXT states that {

}<sup>16</sup> This is an excerpted quote from our report  
that is taken out of context. The report continues, {

} WorleyParsons also states that permit approval

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<sup>15</sup> CSXT Reply at I-11-12.

<sup>16</sup> CSXT Reply at I-12.

<sup>17</sup> {

}

would likely require an Environmental Impact Statement, and that community opposition could result in litigation costs requiring a contingency of { }.<sup>18</sup>

5) CSXT states that: {

{<sup>19</sup> Analysis of vessel capacity was not in our work scope, as noted earlier in this Statement. In fact, our report goes on to state: {

}<sup>20</sup>

6) In at least 8 places, CSXT states that {

{<sup>21</sup> Nowhere in our report did WorleyParsons describe any option as { } Only regulatory agencies can make a determination regarding permissibility. Our report states only that based on our permit research regarding prior approvals, we thought that both Options D and E *could* successfully obtain permits, but that considerable further investigation and research was needed in order to reach a conclusion.<sup>22</sup> Significantly, we also did not provide a detailed timetable or cost estimate for all of the phases of permitting that would be involved.

Our report pointed to several significant possible barriers to permitting, and stated that the permitting process could end in a denial.<sup>23</sup>

7) Our prior work provides no support for the CSXT statement that {

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<sup>18</sup> *Id.* at 83.

<sup>19</sup> CSXT Reply at II-B-38.

<sup>20</sup> {

<sup>21</sup> *See, e.g.*, CSXT Reply at II-B-36.

<sup>22</sup> {

<sup>23</sup> {

}

}

}

}<sup>24</sup> In fact, our report notes the presence of multiple high-priced homes, and two powerful homeowners associations - the Mountain Beach Home Owners Association (MBHA) and Port Sheldon Home Owners Association (PSHA) – that would provide a common voice to the owners of impacted homes and any common lands. As we noted in our report, a protracted legal battle with local homeowners over compensation for property value loss is possible and could drive permitting costs { } and potentially end in a denial.<sup>25</sup> Moreover, these observations related to a dock that would be located on the Pigeon Lake shoreline. The identical risks are not mitigated by CSXT’s consultants’ alternate placement of a dock (or platform) within Pigeon Lake, which we note very likely would run afoul of local zoning rules in any event.

## **V. THE CAMPBELL FACILITY IS NOT “NEARLY IDENTICALLY SITUATED” AS THE COBB FACILITY**

CSXT repeatedly contends that Consumers could employ a water-based approach at Campbell because “Consumers exclusively used water transportation *at a plant nearly identically situated to Campbell.*”<sup>26</sup> This assertion that Cobb and Campbell are identically situated ignores gross physical differences between the two water bodies that are adjacent to the two plants, and dramatically different vessel operations that would be required at the two plants. The claim that

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<sup>24</sup> CSXT Reply Evidence at II-B-37.

<sup>25</sup> {

<sup>26</sup> CSXT Reply Evidence at I-7 (emphasis added).

}

the two plants are identically situated also wrongly implies that the environmental impacts of commercial vessel operations and required mitigation are similar.

The Cobb facility and its dock were constructed long before any state or federal environmental regulations were in place, regulations that in the modern era would severely restrict dock construction, and would affect shoreline stabilization, continuous operating vessel traffic, and dredging.

The two locations also are very different in ways that materially affect the technical and environmental feasibility of Pigeon Lake hosting a vessel unloading facility, including:

1. Size, Depth and Physical Characteristics;
2. Dredging requirements;
3. Land Use and Socioeconomic Impacts;
4. Natural Resources and Environmental impacts;
5. Recreational Use;
6. Technical differences between the Cobb and Campbell facilities; and
7. Regulatory Requirements that did not exist in 1949 (when Cobb was constructed)

### **1. Size, Depth and Physical Characteristics**

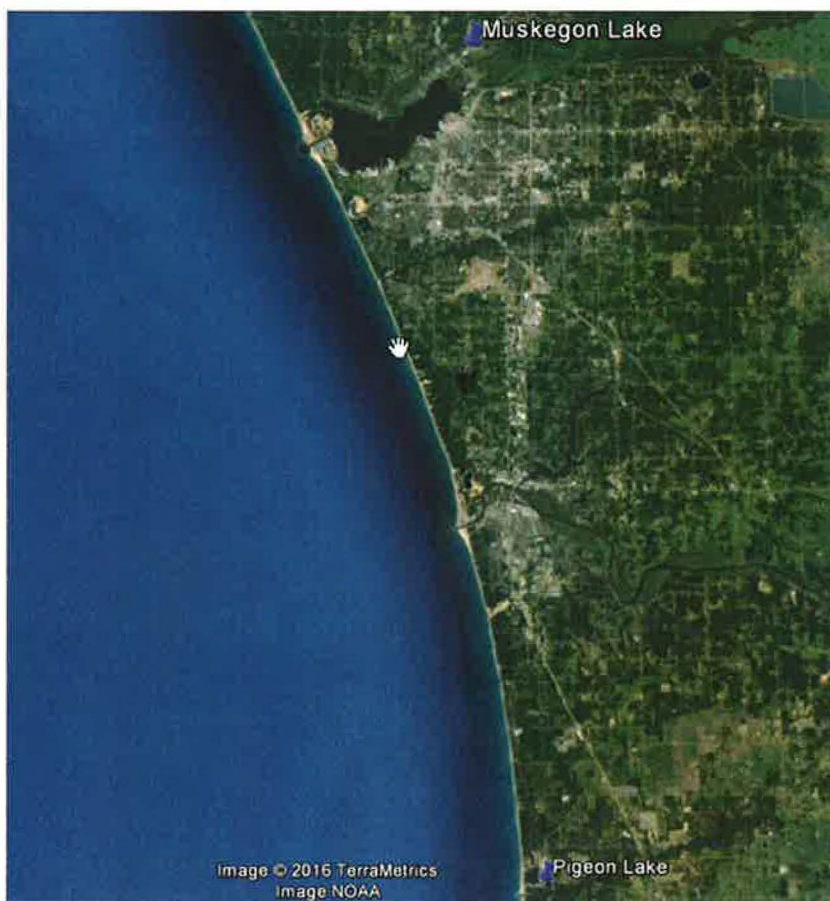
The overall size and depth characteristics of the two lakes are very important in differentiating the ability to obtain approvals required to build a coal dock in Pigeon Lake and to allow vessel traffic through the area. The depth and sediment characteristics are important in understanding potential environmental impacts and necessary dredging. Dredging in Pigeon Lake

would be required both for initial construction and also to maintain the channel and dock area were one to attempt to operate coal vessels there on a regular basis.

### **Size**

A comparison through aerial photography (Figure 1) indicates that Muskegon Lake, where the Cobb plant is located, is a much larger water body (6.48 square miles) than Pigeon Lake (0.35 square miles or 225 acres). Muskegon Lake is much more conducive to commercial vessel traffic as there is ample room to bring in vessels and tugs and much of the shoreline is already developed with commercial, industrial and suburban development.

**Figure 1 - Aerial Photograph of Lake Michigan Shoreline<sup>27</sup>**



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<sup>27</sup> Google Earth

## Depth

Muskegon Lake also is a significantly deeper water body (79 ft. maximum depth) than Pigeon Lake (27 ft. maximum depth).<sup>28</sup>

## Bottom Characteristics

Describing the bottom characteristics of Pigeon Lake, Jude et al. (1981) reported that: “*The deepest part of the lake, located in the western portion, is 8.25 m; a moderately deep channel (2.1-3.5 m) follows the southern shoreline, which accommodates many docking facilities; approximately 40 exist in the whole lake.*” They further state that “*The eastern third of the lake has a maximum depth of 3.25 m, an organic bottom, and extensive beds of aquatic macrophytes. The western two-thirds has a bottom of mixed organic material and sand, while the extreme west end has a sand bottom.*” Clearly the bottom sediments of Pigeon Lake have been subjected to far less commercial vessel traffic and as a result can be expected to be much less contaminated than those in Muskegon Lake. In contrast, Muskegon Lake has bottom sediments reflecting a long history of commercial vessel traffic and industrial use.<sup>29</sup> The report from a 2002 study prepared by Grand Valley State University for EPA described different areas of contamination in lake sediments stemming from its industrialized history (see Figure 2).<sup>30</sup> In describing the history of Muskegon Lake it noted:

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<sup>28</sup> See David J. Jude et al., *The Physical, Chemical, and Biological Nature of Pigeon Lake, A Michigan Coastal Lake* (Apr. 1981), <http://quod.lib.umich.edu/g/glrr/4739141.0001.001?rgn=main;view=fulltext>. See also FishMich.com, <http://www.fishmich.com/counties/muskegon-lakes/muskegon-lake.html> (last visited May 6, 2016).

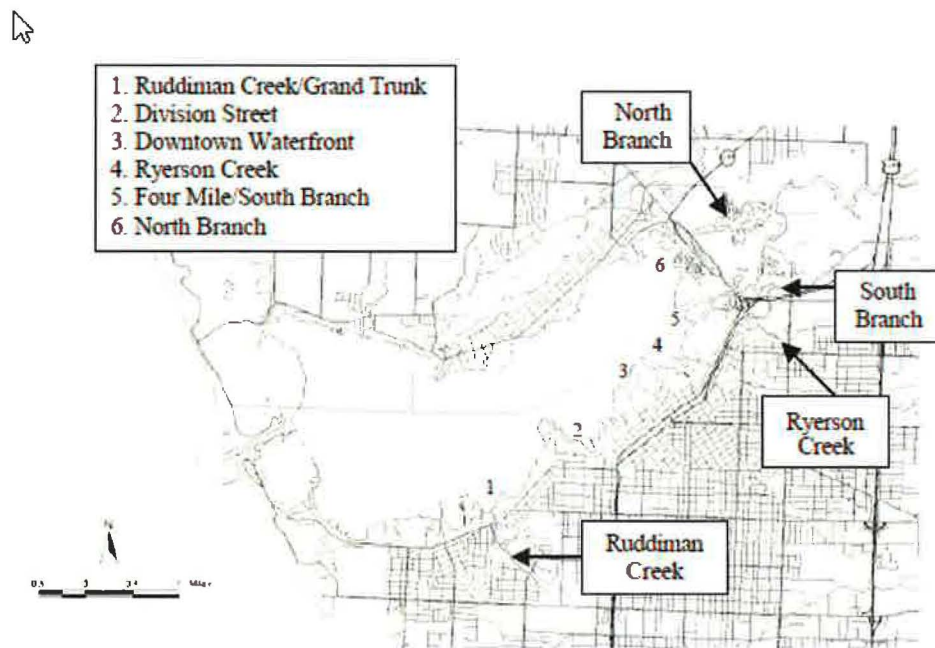
<sup>29</sup> Lynn Moore, *Lumber mill debris being dredged from Muskegon Lake as part of \$5 million cleanup*, MLive (Oct. 1, 2015), [http://www.mlive.com/news/muskegon/index.ssf/2015/10/lumber\\_mill\\_debris\\_being\\_dredg.html](http://www.mlive.com/news/muskegon/index.ssf/2015/10/lumber_mill_debris_being_dredg.html).

<sup>30</sup> Dr. Richard Rediske et al., *Preliminary Investigation of the Extent of Sediment Contamination in Muskegon Lake*, Figure 1.2 at 5 (July 2002) (Report prepared for EPA by Annis Water Resources Institute at Grand Valley State University), [https://www.gvsu.edu/cms4/asset/C171E200-A9E7-33B9-57544583AFC2C9D4/muskegon\\_sediment\\_assessment.pdf](https://www.gvsu.edu/cms4/asset/C171E200-A9E7-33B9-57544583AFC2C9D4/muskegon_sediment_assessment.pdf).



*“The system was drastically changed in the 1800s when lumber barons harvested the region’s timber resources and left behind a legacy of barren riparian zones and severe erosion. Saw mills were then constructed on the shoreline and much of the littoral zone was filled with sawdust, wood chips, timber wastes, and bark. Large deposits of lumbering waste can still be found today in the nearshore zone of Muskegon Lake. The lumbering era was followed in the 1900s by an era of industrial expansion related to foundries, metal finishing facilities, petrochemical production, and shipping. Local dunes were extensively mined for foundry sand and the shoreline of Muskegon Lake had to be further modified to support heavy industry. Large quantities of waste foundry sand and slag were used as fill material in the remaining littoral zone.”<sup>31</sup>*

**Figure 2 – Sediment Contamination in Muskegon Lake<sup>32</sup>**



The report concluded that:

*“A preliminary investigation of the nature and extent of sediment contamination in Muskegon Lake was performed using Sediment Quality Triad methodology. Sediment chemistry, solid phase toxicity, and benthic macroinvertebrates were examined at 15*

<sup>31</sup> *Id.* at 3-4.

<sup>32</sup> *Id.* Figure 1.2 at 5.

*locations. In addition, three core samples were evaluated using radiodating and stratigraphy to assess sediment stability and contaminant deposition. High levels of cadmium, copper, chromium, lead, and mercury were found in the Division Street Outfall area. These levels exceeded the Probable Effect Concentrations (PECs) for current sediment quality guidelines. Most of the heavy metals were found in the top 80 cm of the core samples. Deeper layers of contamination were only found near the former Teledyne foundry and downstream from Ruddiman Creek. High concentrations of PAH compounds were found at a location down gradient from the former lakeshore industrial area. These levels also exceeded PEC guidelines. Sediment toxicity was observed at two stations in the Division Street Outfall area and at the lakeshore industrial area. These locations had the highest concentrations of metals and PAH compounds, respectively. Benthic macroinvertebrate communities throughout Muskegon Lake were found to be indicative of organically enriched conditions.”<sup>33</sup>*

It is apparent from their contrasting conditions that the introduction of regular commercial coal operations such as TS’ proposed Direct Water alternative would cause new and adverse environmental impacts to Pigeon Lake, affecting both the ability to obtain permits and posing such operational challenges as the ability to dispose of dredged material economically.

## **2. Dredging Requirements**

Because Muskegon Lake is much deeper, the dredging requirements for commercial vessel traffic are far less than would be the case for the shallow water body of Pigeon Lake. Muskegon Lake’s larger size also means that dredging is less likely to result in hydrodynamic changes to the overall water body that could change erosion and sedimentation rates. In contrast, the amount of dredging proposed by TS at Pigeon Lake (64 acres), even if we assume that no more would be required, constitutes 28% of the total lake bottom area, which would result in the dredging having a major impact on turbidity and other hydrodynamic conditions. Additionally, the presence of organic material and

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<sup>33</sup> *Id.* at 100.

finer sediment in the eastern portion of Pigeon Lake indicates that sloughing of the sides of the channel would occur more readily, requiring even more frequent maintenance dredging. Also, because the sediment in the eastern portion of Pigeon Lake is mixed with organic material, it would need to be tested for toxins and other constituents before being disposed of, and it would be more difficult to dewater, both of which add to construction and operating costs.

Pigeon Lake has a relatively shallow depth because of the silt deposits resulting from it being at the mouth of Pigeon Creek. The eastern third of the lake contains organic sediments with thick aquatic vegetation growth indicative of its depositional nature. These are important characteristics that are quite different from Muskegon Lake. CSXT's consultants ignored the importance of this shallow depth when they failed to include maintenance dredging for both the channel and dock areas. Nor did they account for all the permitting considerations that would be required for initial approval to construct an unloading facility.

### **3. Land Use and Socioeconomic Impacts**

Review of Figures 1 through 5 and relevant literature (e.g. City of Muskegon zoning plan<sup>34</sup>) indicates that land use characteristics vary greatly between the two lakes. Not surprisingly, land use patterns have affected their respective water quality and natural resources. As shown on the City of Muskegon zoning map,<sup>35</sup> much of the area around the lake including much of the southern and eastern lakeshore has been developed. Muskegon Lake has decades of history with commercial barge shipping in support of industries along its shoreline.

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<sup>34</sup> Master Land Use Plan, City of Muskegon, <http://www.muskegon-mi.gov/departments/planning/plans/master-plan/> (last visited May 6, 2016).

<sup>35</sup> City of Muskegon Zoning Map, <http://www.muskegon-mi.gov/cresources/zoningmap.pdf> (last visited May 6, 2016).

Incrementally adding another vessel or two per day would not have nearly the same effect as it would within Pigeon Lake, where currently there are virtually no commercial vessels.

While coal and other vessel traffic has been steady and regular at Muskegon Lake to support Consumers' Cobb facility and the many other industries that have been located along its shores, the Campbell facility on Pigeon Lake has not, to our knowledge, received vessel shipments of coal. There only have been occasional barge shipments of equipment to the Campbell facility over the last four years, and each shipment has attracted considerable attention from the local news media.<sup>36</sup> These news articles demonstrate that commercial barge traffic in Pigeon Lake is considered extraordinary by the public.

The economics of land use in the vicinity of each lake is linked to their differing paths of development. While the J.H. Campbell plant has been in the vicinity of the Pigeon Lake lakeshore for many years, most of the lake is surrounded by expensive lake homes and locations with recreational boat access. And as shown on Figures 3 and 4, the contrast between the boat launches at Pigeon and Muskegon Lakes is quite evident.

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<sup>36</sup> Barge deliveries of equipment for use at the Campbell plant are considered newsworthy as evidenced by articles that CSXT has submitted for the record. *See* CSXT Reply e-workpapers "2011 Environmental Equipment Delivery.pdf"; "2013 Barge Deliveries to Campbell.pdf"; "2014 Barge Deliveries to Campbell.pdf."

**Figure 3 - Boat Launch at Pigeon Lake**



**Figure 4 – Boat Launch at Muskegon Lake**



**Figure 5 – Lakefront home just north of the Pigeon Lake inlet**



A zoning map for Port Sheldon township (Figure 6) shows that land currently owned by Consumers is zoned industrial, but that other shoreline areas that would be impacted by construction of a coal unloading facility (shoreline stabilization, erosion, dredging) are zoned as residential and lakeshore residential, such that that rezoning authorization would be required by the township. CSXT’s own documents show that township officials have expressed their authority in reviewing any projects that would affect land use along the Lake.<sup>37</sup> In documents prepared by CSXT’s consultants, {

}<sup>38</sup> The mid-

lake platform and conveyor proposed by TS in this litigation would conflict with this policy.

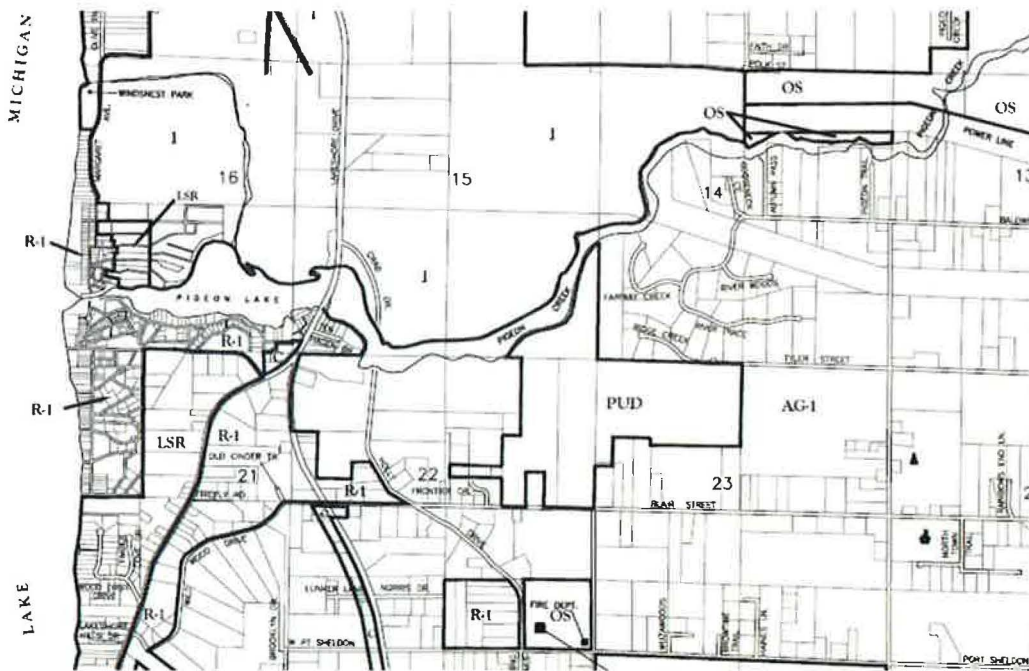
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<sup>37</sup> {

<sup>38</sup> *Id.*

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**Figure 6 – Port Sheldon Township Zoning Map showing vicinity of Pigeon Lake<sup>39</sup>**



Home values in Ottawa County (where Pigeon Lake is located) are considerably higher than home values in Muskegon County. This very likely reflects the fact that the area is less developed with commercial and industrial properties. According to Realtor.com, as of April 1, 2016, the average home price in Muskegon County was \$59,900, while the average home price in Ottawa County was \$219,900.<sup>40</sup> By comparison, the average home price for the state of Michigan was \$99,900. The 2014 WorleyParsons report indicated that expensive vacation homes and boat slips line a significant portion of the Pigeon Lake shoreline. The impacts of daily arrivals of 15,000+ ton coal vessels into Pigeon Lake would be far greater than the impacts of the historic vessel movements to Cobb on Muskegon Lake.

<sup>39</sup> <http://www.portsheldontwp.org/wp-content/uploads/2013/10/ZoningMap.pdf>

<sup>40</sup> Realtor.com, [http://www.realtor.com/local/Ottawa-County\\_MI/home-prices?v7=1](http://www.realtor.com/local/Ottawa-County_MI/home-prices?v7=1) (last visited Apr. 1, 2016).

A defining feature of Pigeon Lake is its well-known recreational use.<sup>41</sup> A perusal of Google Maps confirms that the lake is adjacent to a Lake Michigan beach, its coastline is lined with private docks for pleasure boats, it offers a kayak launch, a motorized boat launch, expensive single family residences and vacation homes, and hosts establishments such as the Sandy Point Beach House, “Into the Woods Retreat”, and Port Sheldon Natural Area. The latter is described by its web site as “a beautifully groomed County Park.” All of these pre-existing uses would be adversely impacted by the introduction of commercial coal vessels on a regular basis, and those impacts would feature prominently in the evaluation of developments permit applications and lake use restrictions.

#### **4. Natural Resources and Environmental Impacts**

Only a preliminary environmental review was performed in connection with the 2014 reviews of a vessel route to Campbell. The Cardno JFNew report, presented as Appendix F in the Spicer (2014) study, concluded:

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}<sup>42</sup>

CSXT does not mention this quote in its Reply Evidence.

There is a significant amount of information that would have to be collected before anyone could conclude, as CSXT and TS appear to assume, that the proposed Direct Water project would not have significant adverse impacts on the aquatic ecology of Pigeon Lake. For example, while Jude et al. (1981) mentioned that much of the eastern third of the lake was vegetated, no formal

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<sup>41</sup> Richard Corrigan, *Pigeon Lake Fishing in W. Olive, Mich.*, USA Today Travel Tips, <http://traveltips.usatoday.com/pigeon-lake-fishing-west-olive-michigan-107858.html> (last visited May 6, 2016).

<sup>42</sup> {

}



wetland delineation of the area proposed by TS for its sheet piling and conveyor has been conducted. Such areas can provide significant habitat for waterfowl, piscivorous birds and mammals such as herons, osprey and mink, and a variety of other species of reptiles, amphibians, birds and mammals that may use the shoreline. Nor has any review been conducted of benthic communities, fish or wildlife that would be affected by at least 64 acres of dredging in a 225 acre lake.

There is no detailed discussion in prior reports or in the TS Report of the species impacted by at least 2.5 to 4 acres of wetland fill and 2 acres of dune disturbance associated with installation of coal unloading facilities in Pigeon Lake. The U.S. Fish and Wildlife Service’s web page notes that Pitcher’s thistle (*Cirsium pitcher*) a state-threatened plant species, has been reported on “stable dunes and blow-out areas” in Ottawa County. No related investigation has yet been conducted of the project area.<sup>43</sup>

Cardno JFNew did note that wetlands might well need to be replaced at a ratio of 5 acres to every 1 disturbed:

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}<sup>44</sup>

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<sup>43</sup> U.S. Fish & Wildlife Service, Michigan County Distribution of Federally –Listed Threatened, Endangered, Proposed, and Candidate Species, <http://www.fws.gov/midwest/endangered/lists/michigan-cty.html> (last visited May 6, 2016).

<sup>44</sup> {

}

These facts are ignored by TS in the cost estimates set out in Appendix 3 to its Report for CSXT.

## **5. Technical Layout of Cobb versus Campbell**

The configuration of the existing wharf structure at the Cobb location is significantly different than what is being proposed by CSXT and TS for the Campbell location. As the TS Report acknowledges, the wharf at Cobb was “constructed to handle Class I vessels with a capacity of approximately 50,000 tons per vessel.” Coal at Cobb was delivered by self-unloading vessels that discharged into a receiving hopper at the rear of the wharf face. The hopper served a 72-inch, electric belt-conveyor extending to a stacker in the rear. The existing wharf at Cobb is a steel sheet-pile bulkhead with concrete-surfaced solid fill that provides approximately 1,800 ft. of berthing space.<sup>45</sup> This type and size of quay configuration and alignment provides flexibility in that many different vessel sizes with self-unloading capability can call on the port, and would have sufficient room to maneuver safely to the dock.

In contrast, the smaller pile-supported platform and mooring dolphin arrangement proposed by TS for Pigeon Lake were selected apparently because the dimensions of the lake cannot accommodate a large wharf structure. TS addressed this by proposing that the platform (mooring face) be located in deeper water and away from the shallow water and shoreline wetlands, with a conveyor connecting the platform to the shore and the Campbell coal handling facilities. However, even with this proposed change in layout, maneuvering space for the vessel designed by TS is limited, especially in the event of adverse weather conditions, as its own schematic shows.<sup>46</sup>

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<sup>45</sup> Seaport Find the Data, <http://seaport.findthedata.com/l/6410/Consumers-Power-Co-B-C-Cobb-Plant-Wharf> (last visited May 6, 2016).

<sup>46</sup> See CSXT Reply Exhibit II-B-1, Appendix 1.

## **6. Many Current Regulatory Requirements did not exist in 1949**

The CSXT argument regarding Cobb as a model for options at Campbell ignores history in considering whether such a facility could be built today. While it might be technically feasible to build a dock in Pigeon Lake from an engineering standpoint (*i.e.*, one could physically construct it), it is not likely to happen without encountering significant regulatory and community opposition.

The Cobb facility on Muskegon Lake was built in 1949, before the advent of environmental regulation. The following is a list of key Federal statutes, resource laws and executive orders that likely would be applicable today for compliance and obtaining approvals and permits to construct commercial infrastructure in Pigeon Lake which were not in effect in 1949.

- **Water Quality Act of 1965** - October 2, 1965 President Johnson signed the Water Quality Act, preventing water pollution by requiring states to establish and enforce water quality standards for interstate waterways.
- **National Historic Preservation Act of 1966** - The National Historic Preservation Act, was signed into law on October 15, 1966. The act requires federal agencies to evaluate the impact of all federally funded or permitted projects on historic properties (buildings, archaeological sites, etc.) through a process known as Section 106 Review.
- **National Environmental Policy Act (NEPA) of 1969 – Enacted January 1, 1970**  
**Clean Water Act (CWA) - Federal Water Pollution Control Act Amendments of 1972** Under sections 301 and 502 of the Clean Water Act, any discharge of dredged or fill materials into "waters of the United States," including wetlands, is forbidden unless authorized by a permit issued by the USACE pursuant to section 404 of the Act.

**CWA § 404: Permits for Dredged or Fill Material** “Facilities that discharge dredged or fill materials into waters of the United States must apply for a permit issued by the Army Corps of Engineers (USACE). In certain circumstances, EPA also may prohibit, restrict or deny the issuance of a Section 404 permit to discharge dredged or fill material into a water of the United States whenever the Administrator determines the discharge will have an unacceptable adverse effect on resources identified in the Act.”<sup>47</sup> Section 404(b) guidelines (Section 230.10) state that “*no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.*” **Consumers already has access to all-rail coal delivery service to Campbell**, which is clearly a practicable alternative to proposed water delivery options that would impact aquatic ecosystem in Pigeon Lake. This would make it difficult for USACE to permit the option proposed by TS.

**CWA § 401 - State Certification of Water Quality** “The major Federal licenses and permits subject to Section 401 are Section 402 and 404 permits (in nondelegated States), Federal Energy Regulatory Commission (FERC) hydropower licenses, and Rivers and Harbors Act Section 9 and 10 permits. States and Tribes may choose to waive their Section 401 certification authority. States and Tribes make their decisions to deny, certify, or condition permits or licenses primarily by ensuring the activity will comply with State water quality standards. In addition, States and Tribes look at whether the

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<sup>47</sup> EPA, Enforcement, Clean Water Act (CWA) and Federal Facilities, <https://www.epa.gov/enforcement/clean-water-act-cwa-and-federal-facilities> (last visited May 6, 2016) (§ 404: Permits for Dredged or Fill Material).

activity will violate effluent limitations, new source performance standards, toxic pollutants, and other water resource requirements of State/Tribal law or regulation.”<sup>48</sup>

The 1972 amendments:

- Established the basic structure for regulating pollutant discharges into the waters of the United States.
  - Gave EPA the authority to implement pollution control programs such as setting wastewater standards for industry.
  - Maintained existing requirements to set water quality standards for all contaminants in surface waters.
  - Made it unlawful for any person to discharge any pollutant from a point source into navigable waters, unless a permit was obtained under its provisions.
  - Funded the construction of sewage treatment plants under the construction grants program.
  - Recognized the need for planning to address the critical problems posed by nonpoint source pollution.
- **Great Lakes Water Quality Agreement of 1972** - The U.S. and Canada first signed the Agreement in 1972. It was amended in 1983 and 1987. In 2012, it was updated to enhance water quality programs that ensure the “chemical, physical, and biological integrity” of the Great Lakes.
  - **Endangered Species Act of 1973** – Section 7 of the Act states the following:  
“(2) Each Federal agency shall, in consultation with and with the assistance of the

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<sup>48</sup> EPA, Overview of Section 401 Certification and Wetlands, <https://www.epa.gov/cwa-404/overview-section-401-certification-and-wetlands> (last visited May 6, 2016).

Secretary, insure that any action **authorized**, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”

- **Title I of the Great Lakes Critical Programs Act of 1990** – A bill to implement key provisions of the Great Lakes Water Quality Agreement to protect and restore the Great Lakes. The statute put into place parts of the Great Lakes Water Quality Agreement of 1972, signed by the U.S. and Canada, where the two nations agreed to reduce certain toxic pollutants in the Great Lakes. That law required EPA to establish water quality criteria for the Great Lakes addressing 29 toxic pollutants with maximum levels that are safe for humans, wildlife, and aquatic life. It also required EPA to help the States implement the criteria on a specific schedule

None of these federal statutes and their associated regulations were in place when the Cobb facility was constructed. In 1949 there were no Michigan state regulations enforced by the Michigan Department of Environmental Quality and Department of Natural Resources, and no township zoning that would have inhibited Cobb construction. In contrast, all of these regulations would need to be considered by permitting authorities for the proposed changes to the facilities that CSXT and TS propose for Pigeon Lake and Campbell.

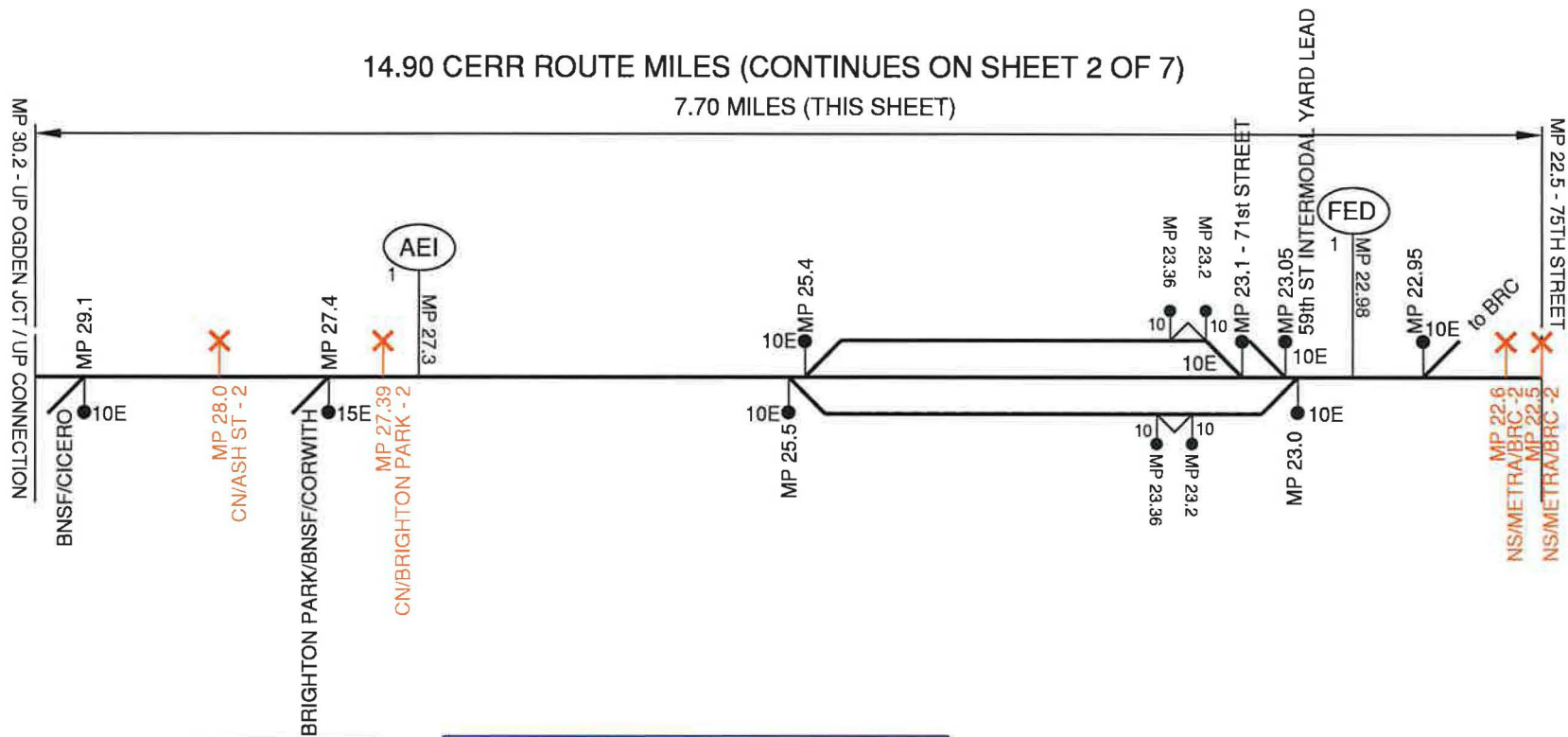


**III-B Stand-Alone Railroad  
System**



14.90 CERR ROUTE MILES (CONTINUES ON SHEET 2 OF 7)

7.70 MILES (THIS SHEET)



WELDS, DERAILS, WHEELSTOPS AND MP SIGNS PER SUBDIVISION	
DESCRIPTION	COUNT
COMP. WELDS	8
DERAILS	4
WHEEL STOPS	0
MP SIGN 1	0
MP SIGN 2	8
MP SIGN 3	0

TURNOUTS, FED & AEI COUNTS PER SUBDIVISION	
DESCRIPTION	COUNT
#10H TURNOUTS	4
#10E TURNOUTS	7
#15E TURNOUTS	1
FED	1
AEI	1
CROSSOVER	0
DIAMOND	8

SUBDIVISION: **BLUE ISLAND**

FROM: **UP OGDEN JCT**

TO: **75TH STREET**

MP: **30.2**

MP: **22.5**

DATE: **5/20/16**

NOT TO SCALE

**LEGEND:**

- 136# STANDARD CWR
- 115# CWR



FAILED EQUIPMENT DETECTOR WITH NUMBER OF TRACKS COVERED  
 HB = HOT BEARING DETECTOR  
 DE OR DED = DRAGGING EQUIPMENT DETECTOR  
 HW = HOT WHEEL DETECTOR



AUTOMATIC EQUIPMENT IDENTIFICATION SCANNER WITH NUMBER OF TRACKS COVERED

X = DIAMOND CROSSING

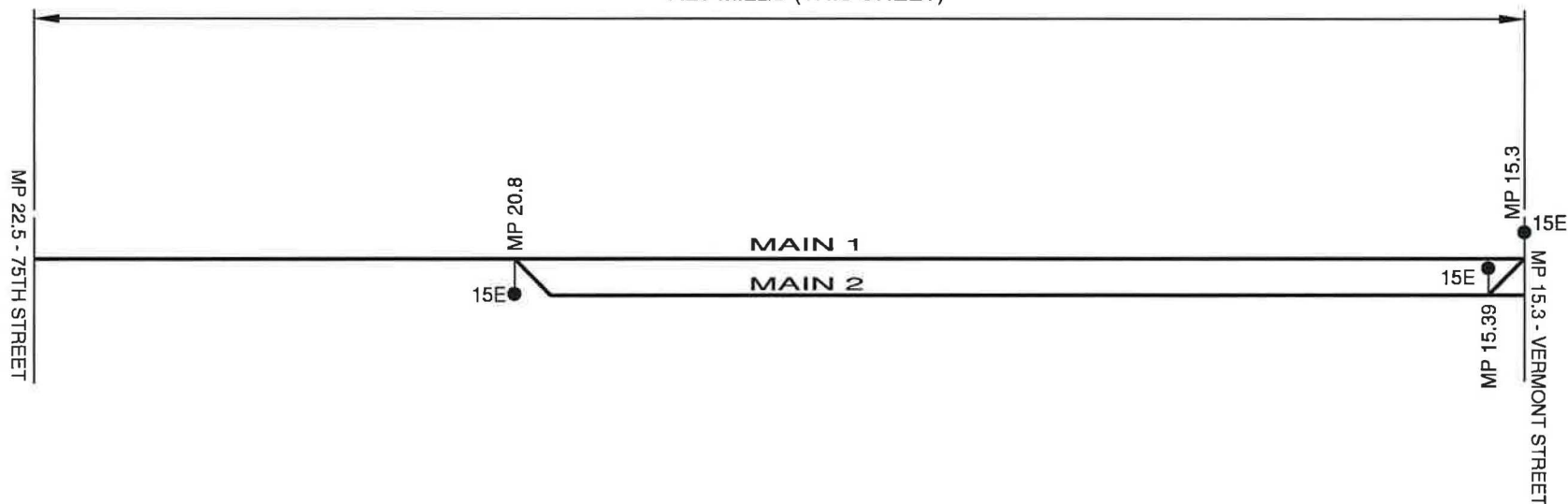
● = TURNOUT TYPE\*

\* TURNOUT TYPES

- 20 - #20 ELECTRIC
- 15E - #15 ELECTRIC
- 15S - #15 HAND-THROWN
- 10S - #10 SPRING
- 10 - #10 HAND-THROWN
- 10E - #10 ELECTRIC

EXHIBIT:  
**III-B-1**

14.90 CERR ROUTE MILES  
7.20 MILES (THIS SHEET)



WELDS, DERAILS, WHEELSTOPS AND MP SIGNS PER SUBDIVISION

DESCRIPTION	COUNT
COMP. WELDS	0
DERAILS	0
WHEEL STOPS	0
MP SIGN 1	0
MP SIGN 2	6
MP SIGN 3	0

TURNOUTS, FED & AEI COUNTS PER SUBDIVISION

DESCRIPTION	COUNT
#10H TURNOUTS	0
#10E TURNOUTS	0
#15E TURNOUTS	1
FED	0
AEI	0
CROSSOVER	1
DIAMOND	0

SUBDIVISION: **BLUE ISLAND**

FROM: **75TH STREET**

TO: **VERMONT STREET**

MP: **22.5**

MP: **15.3**

DATE: **5/20/16**

NOT TO SCALE

**LEGEND:**

- 136# STANDARD CWR
- 115# CWR

- (FED)<sub>1</sub> FAILED EQUIPMENT DETECTOR WITH NUMBER OF TRACKS COVERED
- HB = HOT BEARING DETECTOR
- DE OR DED = DRAGGING EQUIPMENT DETECTOR
- HW = HOT WHEEL DETECTOR
- (AEI)<sub>1</sub> AUTOMATIC EQUIPMENT IDENTIFICATION SCANNER WITH NUMBER OF TRACKS COVERED

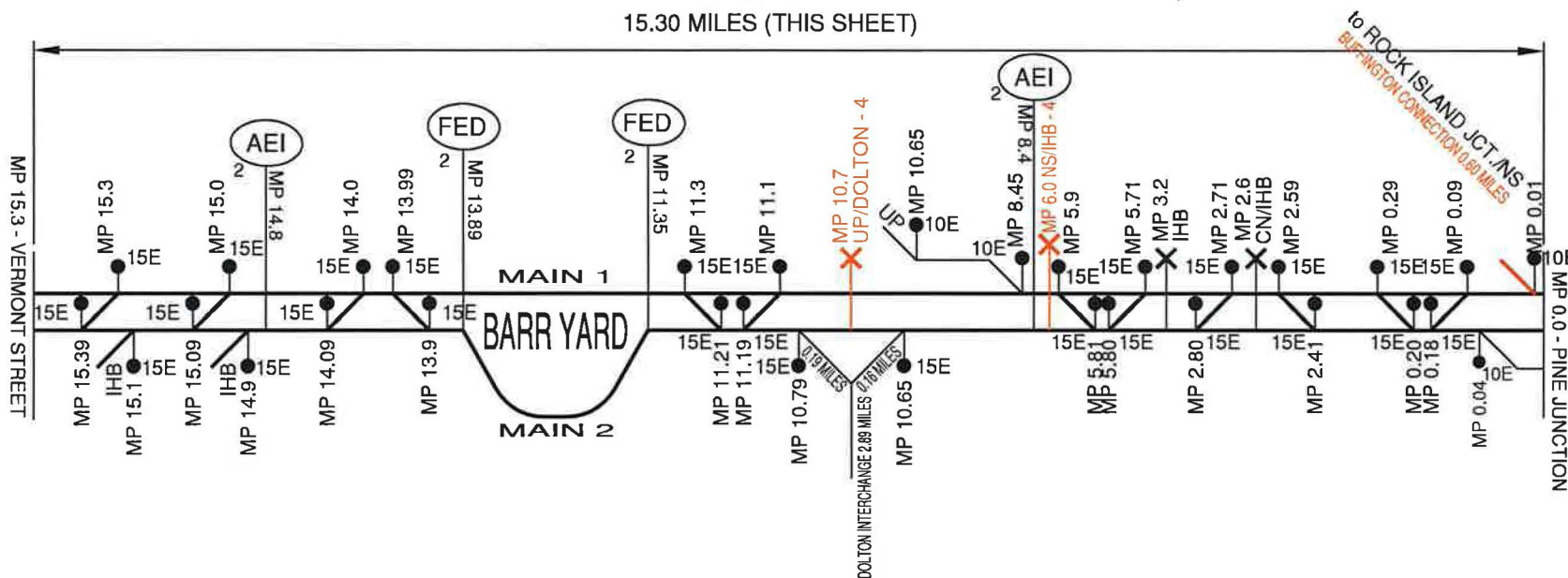
- X = DIAMOND CROSSING
- = 20 = TURNOUT TYPE\*

- \* TURNOUT TYPES
- 20 - #20 ELECTRIC
- 15E - #15 ELECTRIC
- 15- #15 HAND-THROWN
- 10S - #10 SPRING
- 10- #10 HAND-THROWN
- 10E - #10 ELECTRIC

EXHIBIT:  
**III-B-1**

17.80 CERR ROUTE MILES (CONTINUES ON SHEET 4 OF 7)

15.30 MILES (THIS SHEET)



WELDS, DERAILS, WHEELSTOPS AND MP SIGNS PER SUBDIVISION

DESCRIPTION	COUNT
COMP. WELDS	8
DERAILS	0
WHEEL STOPS	0
MP SIGN 1	10
MP SIGN 2	6
MP SIGN 3	0

TURNOUTS, FED & AEI COUNTS PER SUBDIVISION

DESCRIPTION	COUNT
#10H TURNOUTS	0
#10E TURNOUTS	4
#15E TURNOUTS	4
FED	4
AEI	4
CROSSOVER	12
DIAMOND	8

SUBDIVISION: **BARR**

FROM: **VERMONT STREET**

TO: **PINE JUNCTION**

MP: **15.3**

MP: **0.00**

DATE: **5/20/16**

NOT TO SCALE

LEGEND:

- 136# STANDARD CWR
- 115# CWR

- (FED)<sub>1</sub> FAILED EQUIPMENT DETECTOR WITH NUMBER OF TRACKS COVERED
- HB = HOT BEARING DETECTOR
- DE OR DED = DRAGGING EQUIPMENT DETECTOR
- HW = HOT WHEEL DETECTOR
- (AEI)<sub>1</sub> AUTOMATIC EQUIPMENT IDENTIFICATION SCANNER WITH NUMBER OF TRACKS COVERED

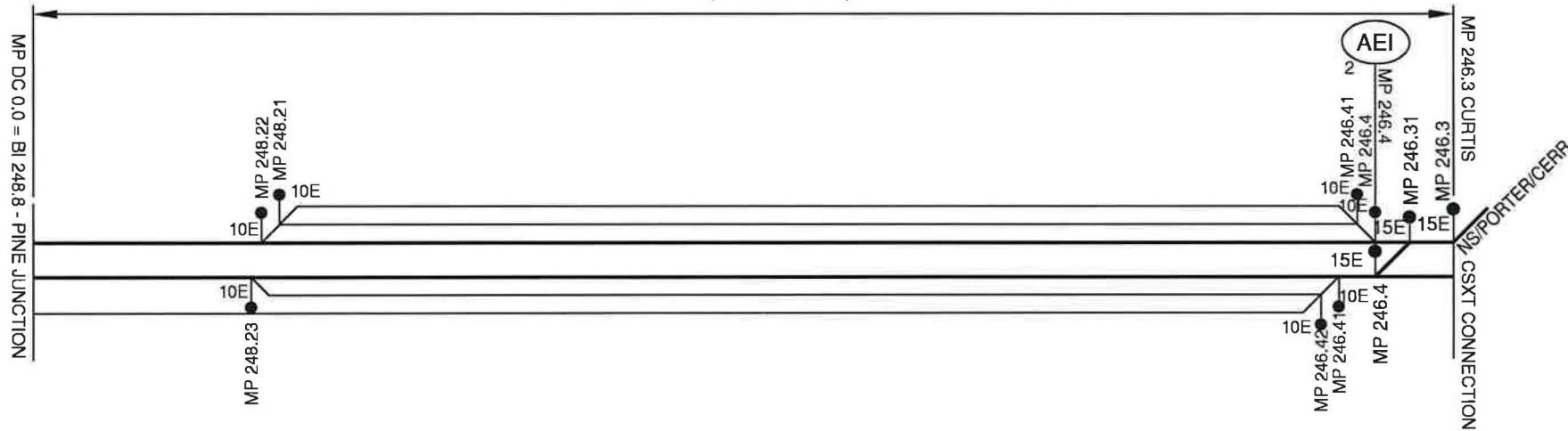
- X = DIAMOND CROSSING
- = 20 = TURNOUT TYPE\*

\* TURNOUT TYPES

- 20 - #20 ELECTRIC
- 15E - #15 ELECTRIC
- 15- #15 HAND-THROWN
- 10S - #10 SPRING
- 10- #10 HAND-THROWN
- 10E - #10 ELECTRIC

EXHIBIT:  
**III-B-1**

17.80 CERR ROUTE MILES  
2.50 MILES (THIS SHEET)



WELDS, DERAILS, WHEELSTOPS AND MP SIGNS PER SUBDIVISION

DESCRIPTION	COUNT
COMP. WELDS	8
DERAILS	0
WHEEL STOPS	0
MP SIGN 1	0
MP SIGN 2	0
MP SIGN 3	2

TURNOUTS, FED & AEI COUNTS PER SUBDIVISION

DESCRIPTION	COUNT
#10H TURNOUTS	0
#10E TURNOUTS	7
#15E TURNOUTS	1
FED	0
AEI	2
CROSSOVER	1
DIAMOND	0

SUBDIVISION: **BARR**

FROM: **PINE JUNCTION**

MP: **248.8**

TO: **CURTIS/NS & CSXT CONNECTION** MP: **246.3**

DATE: **5/20/16**

NOT TO SCALE

LEGEND:

- 136# STANDARD CWR
- 115# CWR



FAILED EQUIPMENT DETECTOR WITH NUMBER OF TRACKS COVERED  
HB = HOT BEARING DETECTOR  
DE OR DED = DRAGGING EQUIPMENT DETECTOR  
HW = HOT WHEEL DETECTOR



AUTOMATIC EQUIPMENT IDENTIFICATION SCANNER WITH NUMBER OF TRACKS COVERED

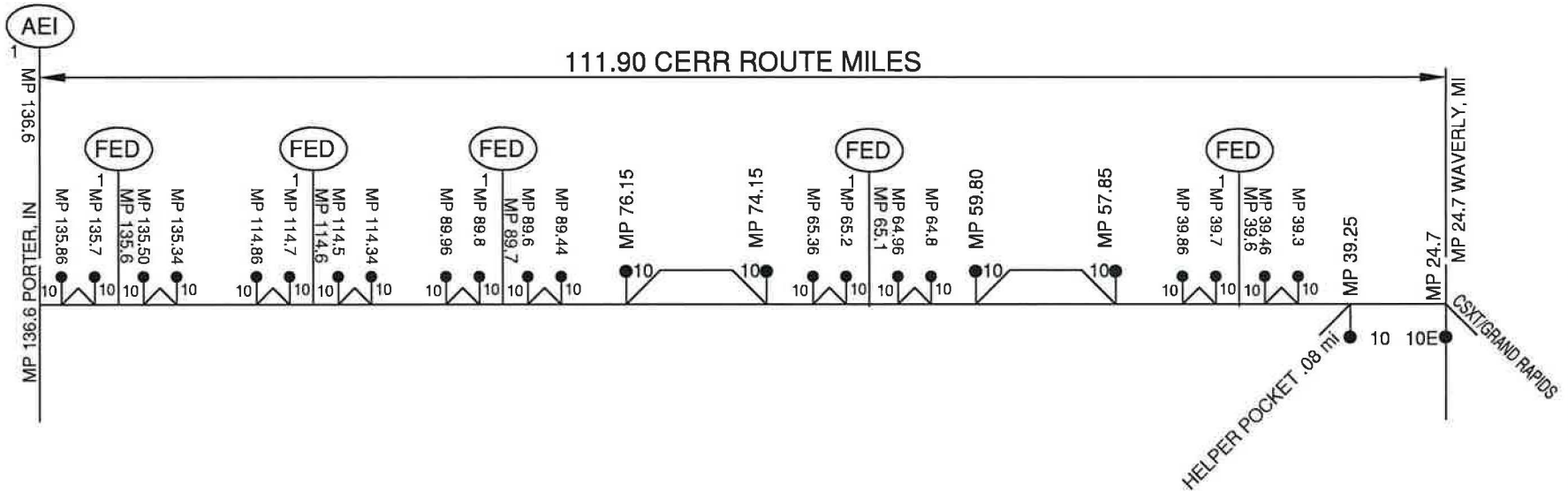
X = DIAMOND CROSSING

20 = TURNOUT TYPE\*

\* TURNOUT TYPES

- 20 - #20 ELECTRIC
- 15E- #15 ELECTRIC
- 15- #15 HAND-THROWN
- 10S- #10 SPRING
- 10- #10 HAND-THROWN
- 10E- #10 ELECTRIC

EXHIBIT:  
**III-B-1**



WELDS, DERAILS, WHEELSTOPS AND MP SIGNS PER SUBDIVISION

DESCRIPTION	COUNT
COMP. WELDS	0
DERAILS	21
WHEEL STOPS	1
MP SIGN 1	0
MP SIGN 2	75
MP SIGN 3	36

TURNOUTS, FED & AEI COUNTS PER SUBDIVISION

DESCRIPTION	COUNT
#10H TURNOUTS	25
#10E TURNOUTS	1
#15E TURNOUTS	0
FED	5
AEI	1
CROSSOVER	0
DIAMOND	0

SUBDIVISION: **GRAND RAPIDS**

FROM: **PORTER**

TO: **WAVERLY, MI**

MP: **136.6**

MP: **24.7**

DATE: **5/20/16**

NOT TO SCALE

**LEGEND:**

- 136# STANDARD CWR
- 115# CWR



FAILED EQUIPMENT DETECTOR WITH NUMBER OF TRACKS COVERED  
 HB = HOT BEARING DETECTOR  
 DE OR DED = DRAGGING EQUIPMENT DETECTOR  
 HW = HOT WHEEL DETECTOR



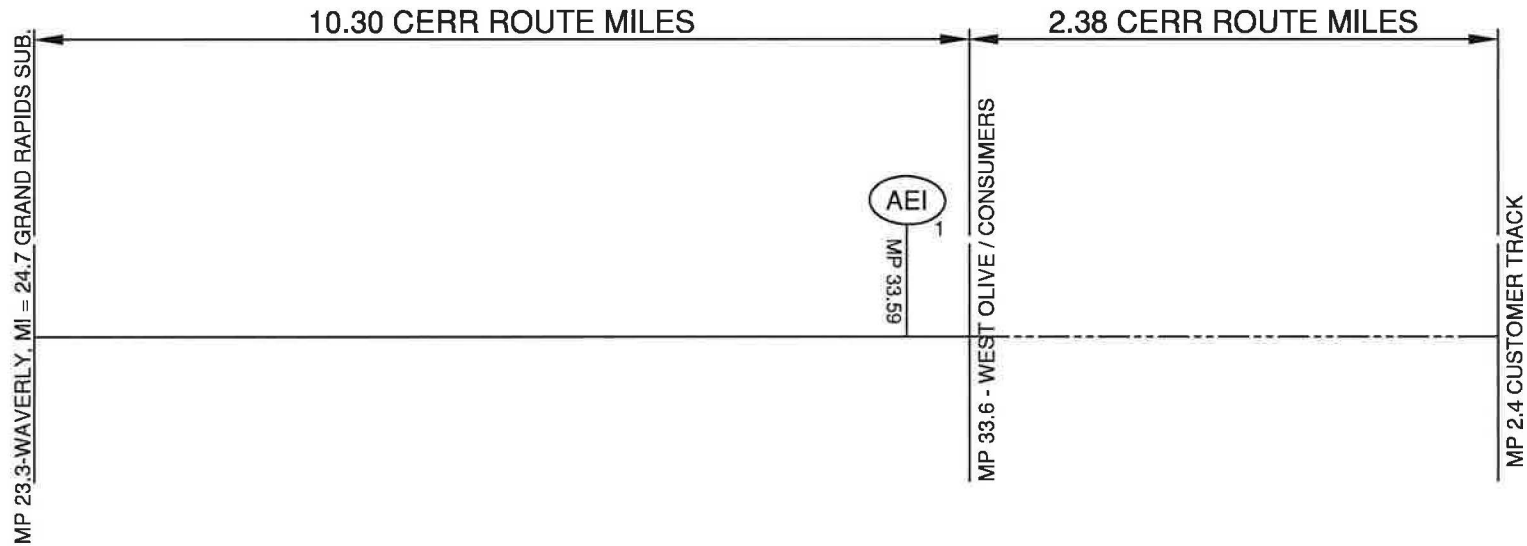
AUTOMATIC EQUIPMENT IDENTIFICATION SCANNER WITH NUMBER OF TRACKS COVERED

- X = DIAMOND CROSSING
- = TURNOUT TYPE\*

\* TURNOUT TYPES

- 20 - #20 ELECTRIC
- 15E - #15 ELECTRIC
- 15- #15 HAND-THROWN
- 10S - #10 SPRING
- 10- #10 HAND-THROWN
- 10E - #10 ELECTRIC

EXHIBIT:  
**III-B-1**



WELDS, DERAILS, WHEELSTOPS AND MP SIGNS PER SUBDIVISION

DESCRIPTION	COUNT
COMP. WELDS	0
DERAILS	0
WHEEL STOPS	0
MP SIGN 1	3
MP SIGN 2	10
MP SIGN 3	0

TURNOUTS, FED & AEI COUNTS PER SUBDIVISION

DESCRIPTION	COUNT
#10H TURNOUTS	0
#10E TURNOUTS	0
#15E TURNOUTS	0
FED	0
AEI	1
CROSSOVER	0
DIAMOND	0

SUBDIVISION: **FREMONT**

FROM: **WAVERLY, MI**

MP: **23.3**

TO: **WEST OLIVE / CONSUMERS MP: 33.6**

DATE: **5/20/16**

NOT TO SCALE

**LEGEND:**

- - 136# STANDARD CWR
- - 115# CWR

- ✕ = DIAMOND CROSSING
- = 20 = TURNOUT TYPE\*



FAILED EQUIPMENT DETECTOR WITH NUMBER OF TRACKS COVERED  
 HB = HOT BEARING DETECTOR  
 DE OR DED = DRAGGING EQUIPMENT DETECTOR  
 HW = HOT WHEEL DETECTOR

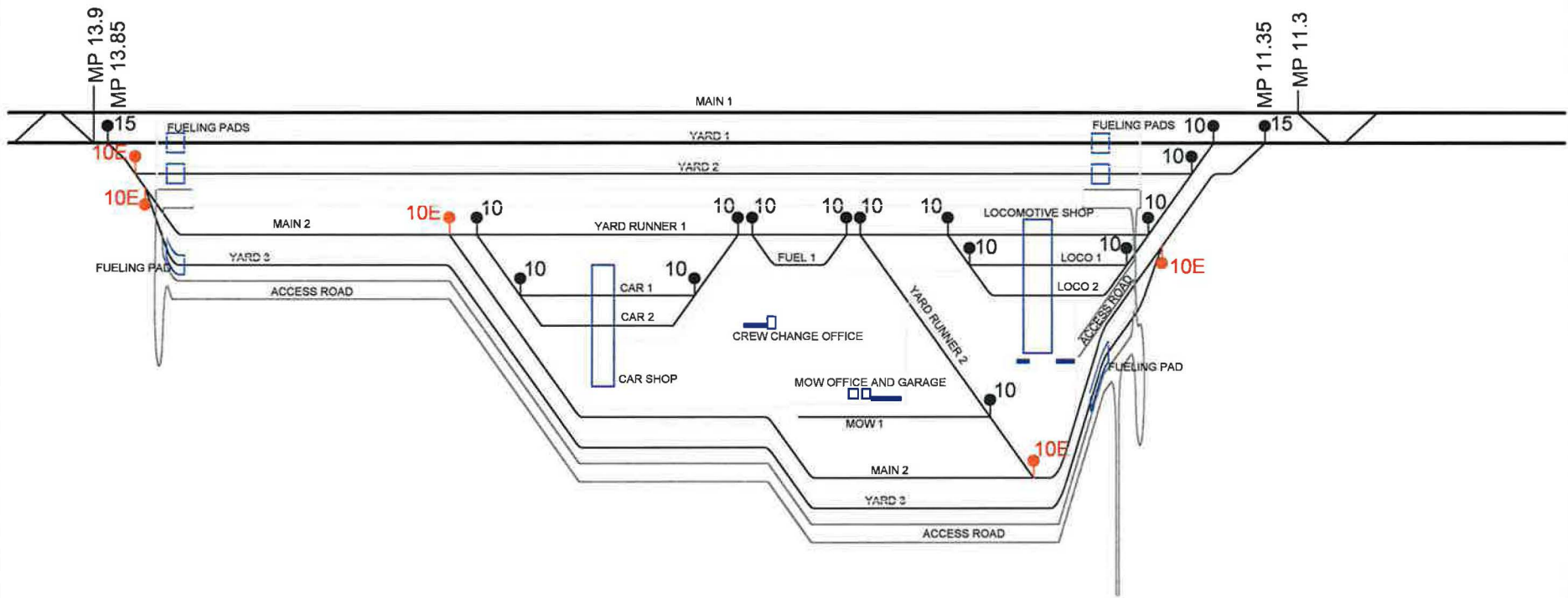


AUTOMATIC EQUIPMENT IDENTIFICATION SCANNER WITH NUMBER OF TRACKS COVERED

**\* TURNOUT TYPES**

- 20 - #20 ELECTRIC
- 15E- #15 ELECTRIC
- 15- #15 HAND-THROWN
- 10S- #10 SPRING
- 10- #10 HAND-THROWN
- 10E- #10 ELECTRIC

EXHIBIT:  
**III-B-1**



WELDS, DERAILS, WHEELSTOPS AND MP SIGNS PER SUBDIVISION	
DESCRIPTION	COUNT
COMP. WELDS	4
DERAILS	2
WHEEL STOPS	1
MP SIGN 1	0
MP SIGN 2	0
MP SIGN 3	0

TURNOUTS, FED & AEI COUNTS PER SUBDIVISION	
DESCRIPTION	COUNT
#10H TURNOUTS	14
#10E TURNOUTS	5
#15E TURNOUTS	2
FED	0
AEI	0
CROSSOVER	0
DIAMOND	0

PAGE 7 OF 7

SUBDIVISION: **BARR YARD**

FROM:

MP: **13.9**

TO:

MP: **11.3**

DATE: **5/20/16**

NOT TO SCALE

**LEGEND:**

- 136# STANDARD CWR
- 115# CWR



FAILED EQUIPMENT DETECTOR WITH NUMBER OF TRACKS COVERED  
 HB = HOT BEARING DETECTOR  
 DE OR DED = DRAGGING EQUIPMENT DETECTOR  
 HW = HOT WHEEL DETECTOR



AUTOMATIC EQUIPMENT IDENTIFICATION SCANNER WITH NUMBER OF TRACKS COVERED

✕ = DIAMOND CROSSING

● = 20 = TURNOUT TYPE\*

**\* TURNOUT TYPES**

- 20 - #20 ELECTRIC
- 15E - #15 ELECTRIC
- 15- #15 HAND-THROWN
- 10S- #10 SPRING
- 10- #10 HAND-THROWN
- 10E- #10 ELECTRIC

EXHIBIT:  
**III-B-1**

**III-F Road Property  
Investment**



**EXHIBIT III-F-1**

**STUART I. SMITH REAL ESTATE ADVISORS LLC  
REBUTTAL TO RMI APPRAISAL REVIEW / CERR**

**EXECUTIVE SUMMARY:**

RMI has prepared an appraisal of the subject property largely predicated on statistical modeling. While statistical analysis is an important tool used by appraisers, the industry has not adopted automated valuation for commercial or unique properties.

The essence of statistical analysis is the credibility of the sample population in relation to the subject property. We believe that statistical analysis alone based on the vagaries of the real estate markets in three states with nearly 800 different uses (per RMI assumptions) is risky.

RMI's identification of nearly 800 different land uses in a route that covers about 155 miles in length and stretches through largely rural areas is contrived.

When we analyzed the RMI comparable-transactions within the context of their statistical model, we discovered several significant errors. These errors included inappropriate data selection methodology, statistically insignificant sample size, and the misleading application of that data in determining prices, trends and adjustments. The variables input to the RMI valuation model did not, in our view, account for inconsistencies, shortcomings and limitations in the use of that data.

Appraisal is more than calculating the 'mean, median, mode and standard deviation' of a subset of data. We believe that RMI's layers of interdependent calculations predicated on weak market data produced multiple inaccuracies. Appraisal should be a thought-provoking process that requires an intimate knowledge of how markets work as well as what and how information is used and interpreted by investors. While statistics and modeling are very useful tools in this process, the mass appraisal of disparate properties cannot be achieved through rote calculations.

**WE ARE  
REMINDED OF THE  
6-FOOT TALL  
STATISTICIAN  
THAT DROWNED  
CROSSING A RIVER  
WITH AN  
'AVERAGE' DEPTH  
OF 6 FEET.**

### SMITH REBUTTAL TO RMI

RMI submitted an extensive quantitative analysis in support of their appraisal of the real estate for the CERR. However, as discussed *infra*, the workpapers submitted include circular references with hardcoded data that are undefined. The spreadsheets are replete with errors. RMI divided the CERR into numerous unsupported land use segments inconsistent with across-the-fence uses. The consequence being that the total land costs reported by RMI do not reflect a reasonable approximation of the market value for the underlying real estate required for construction of the CERR.

The appraisal of real estate has variously been described as a curious blend of art and science. In our view appraising is a skill that integrates data and interpretation. If it was a science you could state things unequivocally – 5 appraisers using the same data would arrive at the same answer. However, unlike official regulations guiding accountants and actuaries, the professional regulations impacting appraisals are perceived more as guidelines.

While statistical methods both simple and sophisticated are important and are helpful when combined with other market evidence, the use of statistical lexicon such as mean, average, coefficients, correlations and r-factors may impart more science than warranted since these factors are also subject to interpretation, particularly when data is limited and disparate.

The purpose of this document is to respond to issues of value raised in the RMI Midwest's appraisal report of the CERR vis-à-vis their review of the Smith Appraisal report.

One criticism levied by RMI was that the Smith sales data was unreviewable. We believe this to be unsupported since the Smith data included:<sup>1</sup>

- Mapped location
- Identification by longitude and latitude
- Land area
- Grantor / seller
- Grantee / buyer
- Property address
- City and state location
- Sales data
- Unit price
- Price per acre of land

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<sup>1</sup> Consumers Opening e-workpaper "CERR RoW Land Valuation Report 10 30 2015.pdf" at 61-65 (Comparable Sales Digest starts on p.59 of the Appraisal Report).

Clearly there was adequate information to identify the sales transactions in both public and proprietary databases. As a note, by using the same data descriptors for the RMI sales, as provided in the Smith report, we were able to identify transactional data in public records; it is uncertain why RMI was unable to complete similar research.

The following two summary tables present (1) our initial value conclusion compared to RMI conclusion of value; and (2) the Smith revised conclusions of value that incorporate several segments not included the original valuation. There were no changes to our base line value conclusions.

**Summary Table 1: Comparison of Initial Appraisal Findings**

**Overview of Appraisal Findings**

	Smith Appraisal Findings			RMI Midwest Appraisal Findings		
	Value	Mileage (i)	Value/Mile	Value	Mileage (i)	Value/Mile
<b>RoW Segment</b>						
Ottawa	\$1,154,934	13.00	\$88,841	\$6,626,568	13.00	\$509,736
Allegan	\$2,176,614	27.40	\$79,438	\$2,811,076	27.40	\$102,594
Van Buren	\$1,859,814	21.40	\$86,907	\$1,783,658	21.40	\$83,349
Berrien	\$27,567,210	46.40	\$594,121	\$27,578,304	46.40	\$594,360
LaPort	\$19,406,640	23.76	\$816,778	\$18,328,157	23.76	\$771,387
Cook	<u>\$50,994,900</u>	<u>22.90</u>	\$2,226,852	<u>\$60,892,141</u>	22.90	\$2,659,045
Total Mainline	\$103,160,112	154.86		\$118,019,904		
<b>Other Assets:</b>						
BRC Alternative @ 25%	\$6,138,347			\$3,027,025		
Dolton	\$3,846,646			\$3,222,536		
IHB @ 21.42%				\$1,024,844		
Buffington				\$455,217		
Microwave Site				\$223,040		
Barr Yard	<u>\$7,033,459</u>			<u>\$6,619,726</u>		
	\$17,018,452			\$14,572,388		
<b>Total CERR</b>	<b>\$120,178,564</b>			<b>\$132,592,292</b>		

*Notes:*

- (i) some minor variations in mileage may be noted between reports*
- (l) Smith mileage used as denominator in each column*

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**Summary Table 2: Smith Final Conclusion of Land Values**

**Rebuttal Table**

**Consumers Rebuttal Land Value for CERR RoW**

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<b>RoW Segment</b>	<u>Value</u>	<u>Mileage</u>	<u>Value/Mile</u>
Ottawa	\$1,154,934	13.00	\$88,841
Allegan	\$2,176,614	27.40	\$79,438
Van Buren	\$1,859,814	21.40	\$86,907
Berrien	\$27,567,210	46.40	\$594,121
LaPort	\$19,406,640	23.76	\$816,778
Cook	<u>\$50,994,900</u>	<u>22.90</u>	\$2,226,852
Total Mainline	\$103,160,112	154.86	
<b>Other Assets:</b>			
BRC Alternative @ 25%	\$6,138,347		
Dolton	\$3,846,646		
IHB @ 21.42%	not included	<sup>1/</sup>	
Buffington	\$455,217	<sup>2/</sup>	
Microwave Site	included above	<sup>3/</sup>	
Barr Yard	<u>\$7,033,459</u>		
	\$17,473,669		
<b>Total CERR</b>	<b>\$120,633,781</b>		
<b>Rounded</b>	<b>\$120,630,000</b>		

**Notes:**

**1/** IHB partial ownership is excluded from the Smith Total CERR value. However, we would accept RMI's estimate of value for this segment if incorporated into the RoW.

**2/** Buffington RoW has been revised to accept RMI's valuation of this segment.

**3/** The six microwave sites were included in the initial estimate of value at the appropriate RoW segment. We valued these microwave tower areas at a total of \$237,402. This compares with RMI's estimate of \$223,040.

In their analysis, RMI Midwest implied that the Smith report was 'impressionistic' and by default their report was 'scientific'. In our view, RMI Midwest has framed the issue of differences in terms of highest and best use, selection of underlying data, and the analysis of that data.

This rebuttal will focus on the following items:

- Highest and Best Use
- Data Analysis
- Interpretation of Value and Value Conclusions

**HIGHEST AND BEST USE:**

Valuation of corridors typically involves the "Across the Fence (ATF)" method of land valuation. This is generally not a parcel-by-parcel valuation but rather one that is focused on the dominant land use.

It is important to recognize that 'land' is valued in accordance with its highest and best use as if vacant. This means that just because an owner of several gas stations or convenience centers deems it profitable to improve a parcel for their business, those improvements do not necessarily drive nor do they necessarily represent the highest and best use of land as if vacant. Another example, would be the construction of a "McMansion" in a neighborhood and on a street of second generation row houses. The construction of those improvements may impact the value of the property 'as improved' but the land value remains constant for its dominant use as a lot for row houses regardless of what's on the site.

We believe it is arbitrary and misleading to divide a corridor into different and often hop-scotched uses by defining H&BU in terms of what is built on the site. Our approach to establishing H&BU is more generalized and better reflects the underlying land use. Doing so, avoids the pitfalls of changing or alternating land use 'every block' and arbitrarily changing land values for adjacent and otherwise identical parcels of land.

Beyond this, our review of the RMI report revealed some very serious flaws in the examination of highest and best use. In a number of instances, the H&BU concluded by RMI is inconsistent either with its workpapers and/or with the visual representation of each the sites presented in their addenda. Specifically, consider the examples discussed below as indicative of the

misinterpretations scattered throughout RMI's analysis which they tout as 'superior' based, in large part, on the 792 valuation segments identified in the RoW.

**DATA ANALYSIS:**

RMI states that its use of GIS methodologies and its statistical analyses yield superior conclusions of land value. Based on this assertion, we examined their techniques and conclusions. Our re-examination focused on the Ottawa and Allegan RoW segments since those were presented in depth and described as illustrative of the analysis applied through the RMI study.

To summarize, we found:

- I. Inappropriate collection of data;
- II. Statistical issues, including the:
  - a. Misuse of data samples,
  - b. Calculations not supported by RMI worksheets
  - c. Inclusion of statistical outliers,
  - d. Reliance on results with marginal inference; and
- III. Lack of common sense with regard to interpreting inferential data.

**I. INAPPROPRIATE COLLECTION OF DATA:**

RMI charged that in some of the RoW segments Smith used inappropriate data. One such example was their criticism of our inclusion of distressed and related sales primarily for residential product in Cook County / predominately Chicago.

To the contrary, our analysis led us to conclude that distressed sales were a considerable part of the local market. To exclude those sales would be to make an arbitrary determination that RMI knew better than the market how to price real estate. The essence of appraisal is not to impose the appraiser's view of market conditions and factors, but rather to accurately portray market pricing and market assumptions. Thus, if distressed sales are part of the market they must be considered as a factor which is indicative of value.

This criticism manifests in the apparent conflict between assertion and assumptions in the RMI study. While RMI criticizes Smith's use of distressed sales in the Chicago area, RMI's own chart

summarizing changes in values between 2013 and 2015 for Cook County (Figure 118, page 155) clearly states that there is "0%" change in value during that period. Obviously, the underlying value of the RoW in this segment is dominated by its trackage through the City of Chicago. It is our view that NO INCREASE in price for a two-year period in the Cook County area is clearly indicative of a no-growth, price sluggish market – at best. Thus, RMI's own analysis would support the inclusion of distressed sales and Smith is entirely correct in using distressed and other related transactions in its valuation of that segment of the RoW.

**RMI Comparable Sales were not Comparable and Do Not Reflect Current or Best Use:**

In several instances, the comparable sales relied on to generate the statistics and estimates for the land underlying the CERR were incorrectly classified, inaccurately recorded and, as a result reflected unit sale prices that were misleading, skewing the analysis.

**1.1 RMI's Comparable Sales for Industrial ATF Valuation, Ottawa**

The comparable sales listed by RMI were compared to public property records available online. Five of the ten sales either had the incorrect acreage listed, was sold more recently, or the land use was misclassified.

- Instrument Number 3500:

The sale price of this property is listed as \$43,050 on 1/8/2010. However, an online search of the public property sales records indicates that the forfeiture sale price for this property on 4/22/2015 was \$2,504.<sup>2</sup> Based on RMI's criticism of the Smith Report, this sale should have been (a) used as a lower indication of value, or (b) excluded from consideration since it last traded as a 'forfeiture' which RMI suggested was not indicative of the market.

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<sup>2</sup> See Ottawa Michigan Real Property Search, <https://www.miottawa.org/Property/salesHist.do?ppn=70-16-05-300-045> (search for APN 70-16-05-300-045). While this transaction occurred beyond the date of value, it is our view that this sale is timely and appropriate to include in this analysis because of the inherent lag time between the actual price negotiation, acquisition, and final recordation.



The screenshot shows the miOttawa.org website interface. At the top, there is a navigation bar with links for Online Services, Officials & Departments, Courts & Sheriff, Parks & Recreation, Community & Health, and Connect with miOttawa. The main heading is "Real Property Search". Below this, there is a "Sales History" section with a sub-menu containing Property Summary, Taxes, GIS Map, Sales History, Split History, Payments, and Parcel Report. A disclaimer states that sales listed are for county equalization and do not include all documents recorded with the Register of Deeds. The specific parcel information is: Parcel Number: 70-16-05-300-045, Property Address: 0 RANSOM ST. The sales history table is as follows:

Doc. Num	Sale Date	Type	Seller (Grantor)	Buyer (Grantee)	Sales Price	Multiple Parcel Sale
2015-0012176	03/01/2015	FF	OTTAWA COUNTY TREASURER	KLW BROKERS LLC	\$2504.00	
2015-0014084	04/22/2015	TC	OTTAWA COUNTY TREASURER	K L W BROKERS LLC	\$2504.00	
2015-0016002	03/17/2015	QC	C E W HOLLAND	RED DUCK HILL INC	Confidential	
2015-0016003	03/17/2015	QC	K L W BROKERS	RED DUCK HILL INC	Confidential	
2015-0016004	03/17/2015	WD	LANDPRO CO	K L W BROKERS LLC	Confidential	

- Instrument Number 24729:

The sale of property to River Ridge Farms in December 2012 is classified by RMI as “industrial” and is used to calculate the adjusted sale price per acre for all industrial property for the CERR in Ottawa. However, as depicted below, this land is clearly farmland and should have been classified as agricultural land.

**RMI Ottawa County Industrial ATF Valuation included APN 70-05-25-200-013<sup>3</sup>**



As further evidence of property use, this parcel was also sold to River Ridge Farms, which according to the Coopersville Area Chamber of Commerce is an "Agriculture" business, i.e. a farm.<sup>4</sup>

- Instrument Number 16221:

Acreage listed for instrument number 16221, located at 1653 Chicago Drive, Jenison, MI, is also incorrect. RMI listed the sale price for this property as \$200,000 and the acreage as 4.88. According to the quit claim deed, CSXT subsequently sold these two parcels together totaling approximately 4.92 acres to Van Os Enterprises LLC.<sup>5</sup>

Interestingly, this property is located outside of Grand Rapids, Michigan, and is over 15 miles from the CERR right-of-way.

<sup>3</sup> Ottawa County Property Mapping, <https://gis.miottawa.org/ottawa/geocortex/propertymapping/?run=searchPIN&PIN=70-05-25-200-013> (accessed on Apr. 7, 2016).

<sup>4</sup> See Coopersville Area Chamber of Commerce, <http://www.coopersville.com/list/member/river-ridge-farms-inc-156> (accessed on Apr. 8, 2016).

<sup>5</sup> See Consumers Rebuttal Workpaper "Instrument Number 16221\_CSXT Quit Claim Deed.pdf."

- Instrument Number 19185:

Acreage listed is incorrect by ~50%. The total acreage reported by RMI at 7.23 acres is only for one parcel of a multiple parcel sale. The actual total acreage is 14.27 acres and includes two parcels.

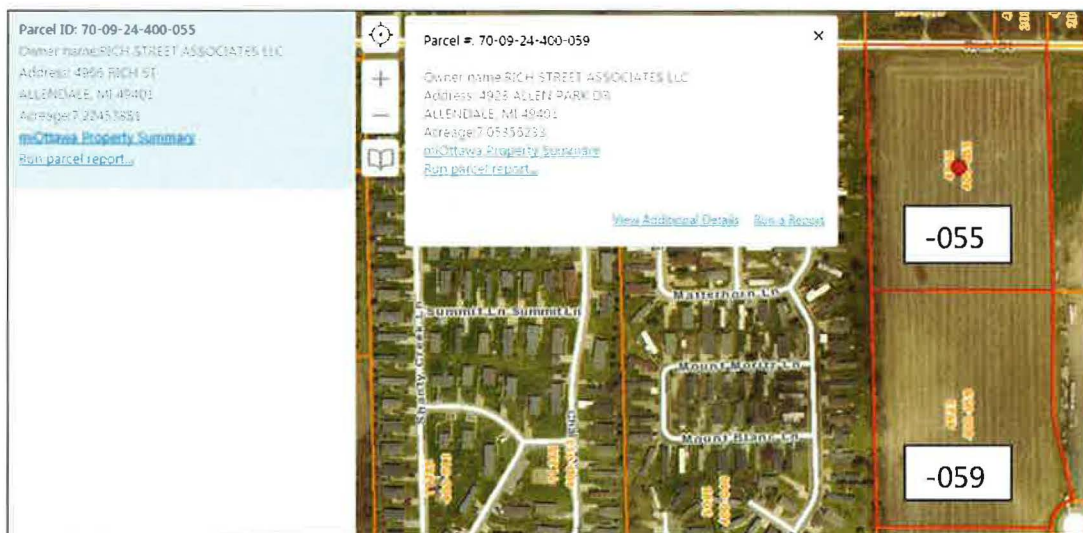
RMI reports that on 5/12/2015, Glad Properties LLC conveyed 7.23 acres to Rich Street Associates LLC for \$475,000.<sup>6</sup> However, in a search of public records online, a downloaded copy of the warranty deed lists the actual sale as \$475,000 for two parcels- APN 70-09-24-400-055 (7.22 acres) and for APN 70-09-24-400-059 (7.05 acres).<sup>7</sup>

The street address for these two adjacent parcels is 4966 Rich Street and 4923 Allen Park Drive, Allendale Township, Michigan.

Thus, the initial sale price per acre should be \$33,287<sup>8</sup> and not \$65,696 as reported by RMI.

Please refer to the following property tax map information.

**RMI Ottawa County Property Map for APNs 70-09-24-400-055 and 70-09-24-400-059<sup>9</sup>**



<sup>6</sup> See CSXT Reply at Exhibits III-F-44, Figure 7 "Ottawa County Industrial Sales" at line 5.

<sup>7</sup> See "Instrument Number 19185\_Rich Street Assoc Warranty Deed.pdf" (includes APN numbers and sale information); Ottawa County Property Mapping, <https://gis.miottawa.org/ottawa/geocortex/propertymapping/?run=searchPIN&PIN=70-09-24-400-055> (accessed on Apr. 8, 2016) (includes acreage information).

<sup>8</sup> Price per acre = \$475,000/(7.22 acres + 7.05 acres) = \$33,287/acre.

<sup>9</sup> Ottawa County Property Mapping, <https://gis.miottawa.org/ottawa/geocortex/propertymapping/?run=searchPIN&PIN=70-09-24-400-055> (accessed on Apr. 8, 2016).

RMI also misclassifies this property and lists it as industrial, when the aerial map and the warranty deed clearly indicate that this land is rural in nature and includes farmland. Specifically, the warranty deed from 2015 includes the following statement:

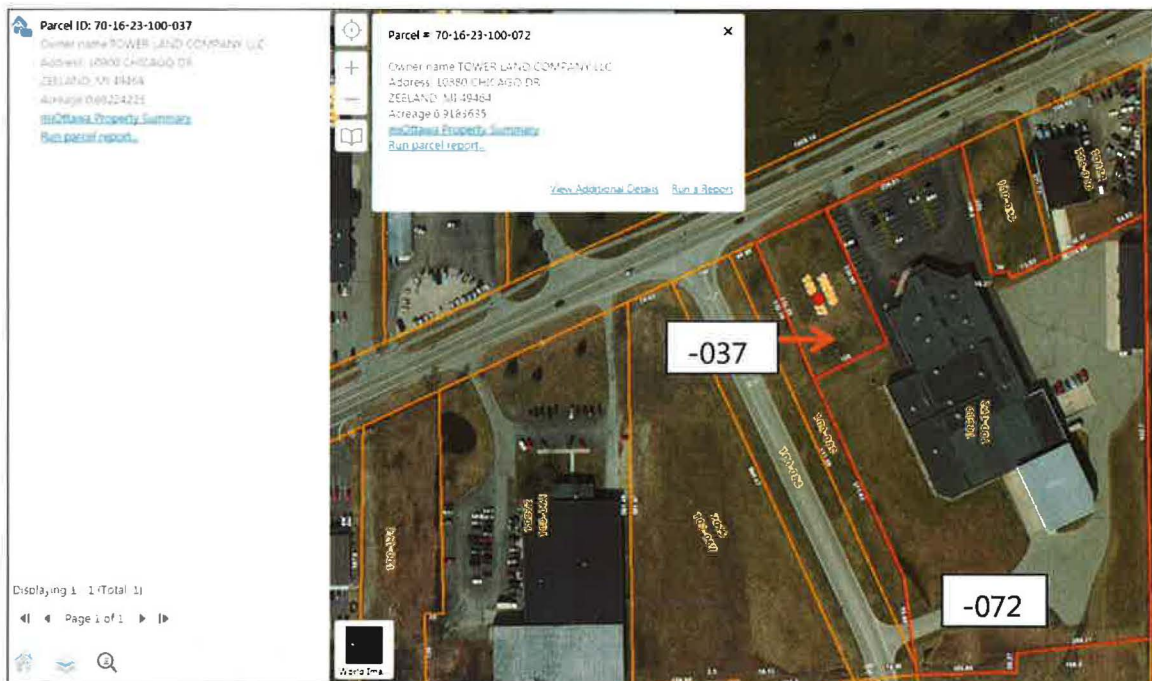
*The property may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors and other associated conditions may be used and are protected by the Michigan Right to Farm Act.*

- Instrument Number 36587:

As illustrative of another problem with RMI's statistical analysis is its misclassification of property. For example, RMI classified this property as industrial when it is clearly commercial. This property, APN 70-16-23-100-037, was purchased by Tower Land Company LLC in 2010. The Tower Land Company LLC also owns the adjacent property, on which is located the Van Hill Furniture Superstore.

The property address is 10900 Chicago Drive, Holland Township, Michigan.

**RMI Ottawa County Industrial ATF Valuation included APN 70-16-23-100-037<sup>10</sup>**



<sup>10</sup> Ottawa County Property Mapping, <https://gis.miottawa.org/ottawa/geocortex/propertymapping/?run=searchPIN&PIN=70-05-25-200-013> (accessed on Apr. 7, 2016).

- APN 70-16-23-100-037 is located next to a Furniture Superstore<sup>11</sup>



Clearly this is not an Industrial Property<sup>12</sup>



A screenshot of a Yelp listing for 'Van Hill Furniture'. The listing shows a 5-star rating with 5 reviews, the address '10880 Chicago Dr, Zeeland, MI 49464', and the phone number '(616) 396-6547'. A map shows the location at the intersection of Chicago Dr and Van Hill Dr. A red arrow points from the street view image above to the map in the listing.

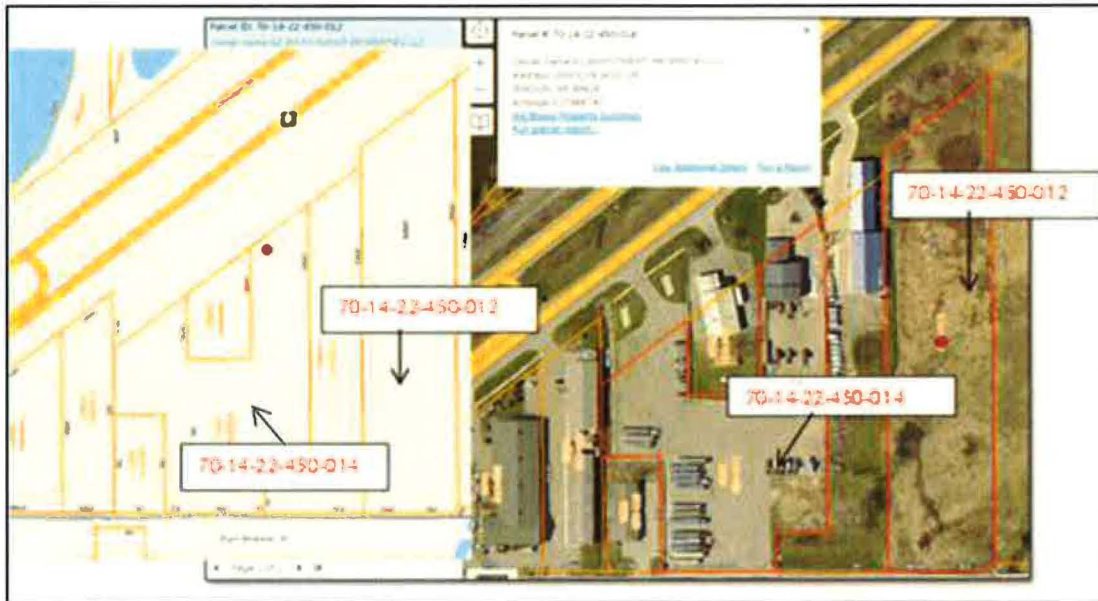
<sup>11</sup> Google Earth images, downloaded Apr. 7, 2016 (aerial and street view of 10900 Chicago Drive).  
<sup>12</sup> Yelp, <http://www.yelp.com/biz/van-hill-furniture-zeeland> (accessed Apr. 7, 2016).

## 1.2 RMI's Comparable Sales for Commercial ATF Valuation, Ottawa

- Instrument Number 37944:

Acreage listed is incorrect by ~50% and sale included an improved parcel. Again, the total acreage listed (3.59 acres) is only for one of the parcels that was part of a multiple parcel sale. RMI lists that on 8/29/2012 that Stevens Properties & Dev. LLC conveyed 3.59 acres to AZ Investment Properties LLC for \$425,000.<sup>13</sup> However, in a search of public records online, a downloaded copy of the warranty deed lists the actual sale as \$425,000 for two parcels- APN 70-14-22-450-012 (3.64 acres) and for APN 70-14-22-450-014 (3.28 acres).<sup>14</sup> Therefore, the initial sale price per acre should be \$33,287<sup>15</sup> instead of \$65,696.

### **RMI Ottawa County Property Maps for APNs 70-14-22-450-012 and 70-14-22-450-014<sup>16</sup>**



<sup>13</sup> See CSXT Reply at Exhibits III-F-45, Figure 11 "Ottawa County Commercial Sales" at line 11.

<sup>14</sup> See "Instrument Number 37944\_AZ Investment Properties Warranty Deed.pdf" (includes APN numbers and sale information); Ottawa County Property Mapping, <https://gis.miottawa.org/ottawa/geocortex/propertymapping/?run=searchPIN&PIN=70-14-22-450-012> (accessed on Apr. 8, 2016) (includes acreage information).

<sup>15</sup> Price per acre = \$425,000/(3.64 acres + 3.28 acres) = \$33,287/acre.

<sup>16</sup> Ottawa County Property Mapping, <https://gis.miottawa.org/ottawa/geocortex/propertymapping/?run=searchPIN&PIN=70-14-22-450-012> (accessed on Apr. 8, 2016).

Also, as depicted in the above aerial map, APN 70-14-22-450-014 is an **improved** parcel and has one building with extensive parking located on it. This level of improvement is consistent with adjacencies along Chicago Drive. Therefore, to reflect the unimproved cost of the land, the price per acre of \$61,416.18 would need to be further adjusted downwards.

- Instrument Number 12683:

Acreage is incorrect and RMI did not use the most recent sales data available online. RMI reports that on 3/13/2013 that Smith John W & Amanda B conveyed 24.64 acres to Steele for \$485,000.<sup>17</sup>

However, Ottawa County's online public records, shown below, indicate that this transaction was part of a multiple parcel sale. These records also show that the parcel listed by RMI, APN 70-10-21-100-012,<sup>18</sup> was sold most recently on 8/14/2015 for \$250,000 as part of a multiple parcel sale.<sup>19</sup>

Parcel Number: 70-10-21-100-012						
Property Address: 0 LINDEN DR						
Doc. Num	Sale Date	Type	Seller (Grantor)	Buyer (Grantee)	Sales Price	Multiple Parcel Sale
<a href="#">2013-0012683</a>	03/13/2013	WD	SMITH JOHN W- AMANDA	STEELE MARCIA	\$485000.00	X
<a href="#">2015-0031098</a>	08/14/2015	QC	STEELE MARCIA	SLADE KELSEY	\$250000.00	X

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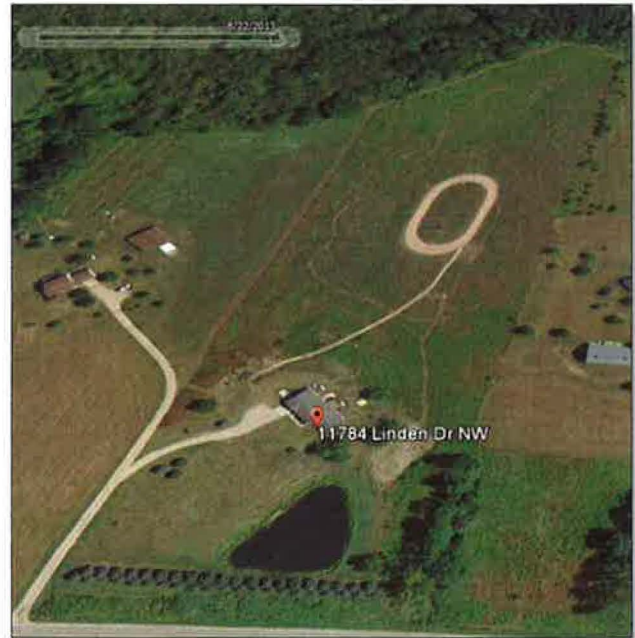
<sup>17</sup> See CSXT Reply at Exhibits III-F-43, Figure 6 "Ottawa County Acreage Sales" at line 3.

<sup>18</sup> *Id.*

<sup>19</sup> See Ottawa Michigan Real Property Search, <https://www.miottawa.org/Property/salesHist.do?ppn=70-10-21-100-012> (search for APN 70-10-21-100-012) (accessed on Apr. 8, 2016).

The property transfer in 2013 and 2015 included three separate parcels: APNs 70-10-20-200-033; 70-10-21-100-012; and 70-10-20-200-034.<sup>20</sup> This property has a recorded street address of: 11784 Linden Dr, 0 Linden Dr NW, Linden Dr.<sup>21</sup>

In reviewing these addresses on Google Earth, the property located at 11784 Linden Drive is improved land that includes a residence and is actively farmed. As such, this sale should not be included as a comparable sale for acreage.<sup>22</sup>



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<sup>20</sup> See Consumers Rebuttal Workpapers "Instrument Number 12683\_2013 Deed.pdf" and "Instrument Number 12683\_2015 Deed.pdf."

<sup>21</sup> See *id.*

<sup>22</sup> Google Earth image, (accessed Apr. 8, 2016) (image dated Aug. 22, 2013).



### 1.3 RMI's Comparable Sales for Residential Development ATF Valuation, Ottawa

- Instrument Number 12639

Acreage listed in the RMI report is less than 25% of the actual acreage. The total acreage listed (9.42 acres) is only for one of the parcels that was part of a multiple parcel sale. RMI reports that on 3/27/2015 that Machiela Andrew C et. ux. conveyed 9.42 acres to Lubbers Properties LLC \$213,500.<sup>23</sup>

However, in a search of public records online, a downloaded copy of the warranty deed lists the actual sale as \$213,500 for four parcels totaling 40.36 acres- APN 70-14-33-400-041 (9.39 acres); APN 70-14-33-400-061 (5.54 acres); APN 70-14-34-300-016 (13.19 acres); and for APN 70-14-33-200-005 (12.24 acres).<sup>24</sup> Therefore, the initial sale price per acre should be \$5,290<sup>25</sup> instead of \$22,658.

#### **RMI Ottawa County Property Map for APNs 70-14-33-400-041; 70-14-33-400-061; 70-14-34-300-016; and 70-14-33-200-005<sup>26</sup>**



<sup>23</sup> See CSXT Reply at Exhibits III-F-47, Figure 15 "Ottawa and Allegan Counties Residential Development Sales" at line 1.

<sup>24</sup> See "Instrument Number 12639\_Lubbers Properties LLC Warranty Deed.pdf" (includes APN numbers and sale information); Ottawa County Property Mapping, <https://gis.miottawa.org/ottawa/geocortex/propertymapping/?run=searchPIN&PIN=70-14-33-400-041> (accessed on Apr. 11, 2016) (includes acreage information).

<sup>25</sup> Price per acre = \$673,000/(20.68 acres + 18.02 acres) = \$17,390/acre.

<sup>26</sup> Ottawa County Property Mapping, <https://gis.miottawa.org/ottawa/geocortex/propertymapping/?run=searchPIN&PIN=70-14-33-400-041> (accessed on Apr. 11, 2016) (search performed for 70-14-33-400-041, other parcels manually selected).



Additionally, the land for APN 70-14-33-200-005 has two buildings on it (see adjacent Google Map extract) and is actively farmed land. As such, it is not an unimproved parcel. Given the fact this sale was for multiple parcels and included improved land, this comparable sale should not have been used for pricing Residential land underlying the CERR.



**1.4 RMI's Comparable Sales for Rural Residential ATF Valuation, Ottawa**

- Instrument Number 5070

RMI lists the purchase of land (APN 70-15-10-100-060) by Consumers Energy from the Reformed Heritage Community Church as "rural residential,"<sup>27</sup> when Ottawa County lists this property as commercial (APN 70-15-10-100-060). As such, this comparable sale should not be included as a comparable sale and used for pricing Rural Residential land underlying the CERR.

**Ottawa County Public Records list Instrument Number 5070 as Commercial property<sup>28</sup>**

<b>Parcel Identification</b>	
Parcel Number:	70-15-10-100-060
Property Address:	0 Quincy St
Property Status:	ACTIVE
Government Unit:	20 - PARK TOWNSHIP
Taxing Unit:	20 - PARK TOWNSHIP
Classification:	202 - COMMERCIAL
School District:	70070 - WEST OTTAWA
Approximate Acreage:	
Active Date:	11/04/2010
Current Liber/Page:	<a href="#">Sales History</a>

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<sup>27</sup> See CSXT Reply e-workpaper "15-250OttawaSales12142015.xlsx" at row 15.

<sup>28</sup> See Ottawa Michigan Real Property Search, <https://www.miottawa.org/Property/backRealEstate.do> (search for APN 70-15-10-100-060) (accessed on Apr. 8, 2016).

- Instrument Number 35213

Acreage listed is incorrect by over 50%. Again, the total acreage listed (17.79 acres) is only for one of the parcels that was part of a multiple parcel sale. RMI lists that on 9/30/2014 that Vander Kooi John J Trust conveyed 17.79 acres to Vanderkooi \$673,000.<sup>29</sup> However, in a search of public records online, a downloaded copy of the warranty deed lists the actual sale as \$673,000 for two parcels- APN 70-08-26-300-006 (20.68 acres) and for APN 70-08-26-300-007 (18.02 acres).<sup>30</sup> Therefore, the initial sale price per acre should be \$17,390<sup>31</sup> instead of \$37,838.

Further "Vanderkooi" is a very uncommon name. A deed transfer from "Vanderkooi" to "Vanderkooi" is most likely to be a 'non-arms-length' transaction and should be excluded from an independent market-value analysis.

**RMI Ottawa County Property Map for APNs 70-08-26-300-006 and 70-08-26-300-007<sup>32</sup>**



Further, as evidenced by the aerial map above, this land is Agricultural and both parcels appear to be actively farmed. Ottawa County also classifies both APNs 70-08-26-300-006 and 70-08-26-300-007 as Agricultural property.

<sup>29</sup> See CSXT Reply at Exhibits III-F-48, Figure 19 "Ottawa County Rural Residential Sales" at line 7.

<sup>30</sup> See "Instrument Number 35213\_Vander Kooi Warranty Deed.pdf" (includes APN numbers and sale information); Ottawa County Property Mapping,

<https://gis.miottawa.org/ottawa/geocortex/propertymapping/?run=searchPIN&PIN=70-08-26-300-007> (accessed on Apr. 11, 2016) (includes acreage information).

<sup>31</sup> Price per acre = \$673,000/(20.68 acres + 18.02 acres) = \$17,390/acre.

<sup>32</sup> Ottawa County Property Mapping,

<https://gis.miottawa.org/ottawa/geocortex/propertymapping/?run=searchPIN&PIN=70-08-26-300-007> (accessed on Apr. 11, 2016).

Ottawa County Public Records list APNs 70-08-26-300-006 and 70-08-26-300-007 as Agricultural Property<sup>33</sup>

Parcel Identification		Parcel Identification	
Parcel Number:	70-08-26-300-006	Parcel Number:	70-08-26-300-007
Property Address:	11187 112TH AVE	Property Address:	0 PIERCE ST
Property Status:	ACTIVE	Property Status:	ACTIVE
Government Unit:	23 - ROBINSON TOWNSHIP	Government Unit:	23 - ROBINSON TOWNSHIP
Taxing Unit:	23 - ROBINSON TOWNSHIP	Taxing Unit:	23 - ROBINSON TOWNSHIP
Classification:	102 - AGRICULTURAL	Classification:	102 - AGRICULTURAL
School District:	70350 - ZEELAND	School District:	70350 - ZEELAND
Approximate Acreage:		Approximate Acreage:	
Active Date:	PRIOR TO 1975	Active Date:	01/06/2004
Current Liber/Page:	<a href="#">Sales History</a>	Current Liber/Page:	<a href="#">Sales History</a>

RMI's statistical analysis is only as good as the nature of the input. Here again, we note that RMI failed to review the underlying data and this compromises their analysis. Because this sale is a likely non-arms-length transaction and given the discrepancy in the acreage as well as the misclassification of the property, this sale should have been excluded by RMI as a comparable sale.

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<sup>33</sup> See Ottawa Michigan Real Property Search, <https://www.miottawa.org/Property/backRealEstate.do> (search for APNs 70-08-26-300-006 and 70-08-26-300-007) (accessed on Apr. 11, 2016).

**II. STATISTICAL ISSUES:**

At first blush, the RMI analysis appears to be scientific. However, closer inspection of their manipulation of the data suggests a lack of perspective with regard to analyzing and interpreting data. The following examples are focused on the data presented for Ottawa and Allegan where detailed explanations of their methodology were provided.

**Size & Location Adjustments:**

Please refer to "Commercial ATF Valuation for Ottawa County, page 45 of the RMI report. RMI used statistical analysis to fit a regression line to selected sale comparables. They adjusted each one of the comparables to the 'best fit' equation and developed a price adjustment based on relative size. For purposes of illustration please refer to RMI's "Commercial ATF Valuation," CSXT Reply Exhibit III-F-1-45-46, Figures 11-14.

- The initial adjustment for differences in price related to size is relatively straight forward; however that analysis is complicated by the inclusion of comparable sales that are clearly outside the parameters of a 'comparable' sale.
- Specifically, two high-end sales were included that should have been omitted from the overall analysis:
  - #16748 is a corner lot with strong commercial potential in a downtown area of Holland, the area with the highest priced real estate in Ottawa County. It's most likely use is for a branch bank site.
  - #52400 is a parcel located in Park Township, Michigan, desirable corner location along a commercial corridor near Pigeon Lake.

**#16748 – 671 Michigan Ave, Holland**



**#52400 – Douglas Ave, Holland**

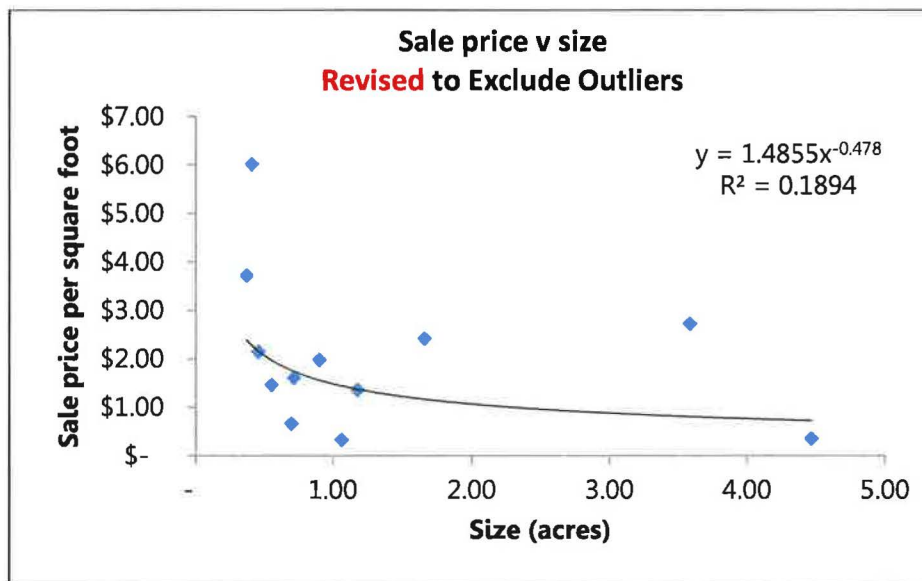


- Neither of these sales is indicative of the RMI-commercially-designated RoW segments #'s 62 and 67 to which the highest unit prices were applied. Those higher unit prices would not have existed if the two outliers #'s 16748 and 52400 (pictured above) were not included in the initial sample.
- Statistically, outlier sales #16748 and #52400 at \$17.91 psf and \$8.66 psf; respectively, are 1.5 times the interquartile range, often known as the "mid-fifty" range, and should have been excluded from the comparable data set. By definition, comparable sales need to be representative and where there is a substantial and unsupported deviation, those sales will skew the statistics. Specifically, RMI was relying on a small data set, and thus the outlier data had an unwarranted impact on the analysis.

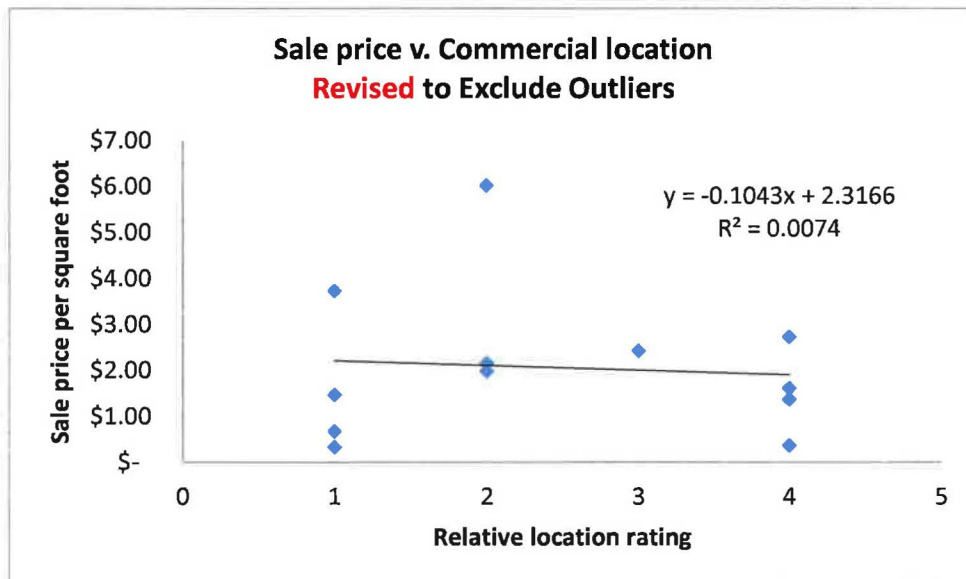
The other commercial transactions in this data set, range from \$0.32 psf to \$6.02 psf; averaging \$2.06 psf (unadjusted), nearly 45% below the group average that includes the two high-end sales. Further, in reviewing just the sales that RMI listed as having a rating (actually a group name) of "4," which it applies to high-end properties, the other unadjusted sale prices in this group are reported at \$0.35; \$1.36; \$1.61; and \$2.72, per square foot of land area.

As we have emphasized, you cannot start from a non-probability sample, include sales that are not indicative of the population, mechanically calculate statistics, apply those statistics without interpretation and expect the results to be accurate from an appraisal standpoint. Outliers by definition bias the results.

- To illustrate the problem, the statistics and R<sup>2</sup> analysis were re-performed excluding the outlier sales of \$17.91 psf and \$8.66 psf. Consistent with RMI's approach, the Sale Price v. Size was plotted first, and subsequently we replotted the relationship between Sale Price v. Location. As the charts below illustrate, this analysis by RMI was performed on a small enough data set that the removal of outliers changed the output and results of their analysis.



See Consumers Rebuttal Workpaper "15-250OttawaSales12142015 Revised to Exclude Outliers.xlsx," tab "Com Graphs."



See Consumers Rebuttal Workpaper "15-250OttawaSales12142015 Revised to Exclude Outliers.xlsx," tab "Com Graphs."

- As evidenced by the charts above, there was not enough data or a strong enough correlation to justify the adjustments made by RMI to the comparable sale data. This is clear from the recalculated  $R^2$ , the coefficient of determination which is less than 1% for Sale Price v. Location. That is to say, that less than one-percent of determination can be



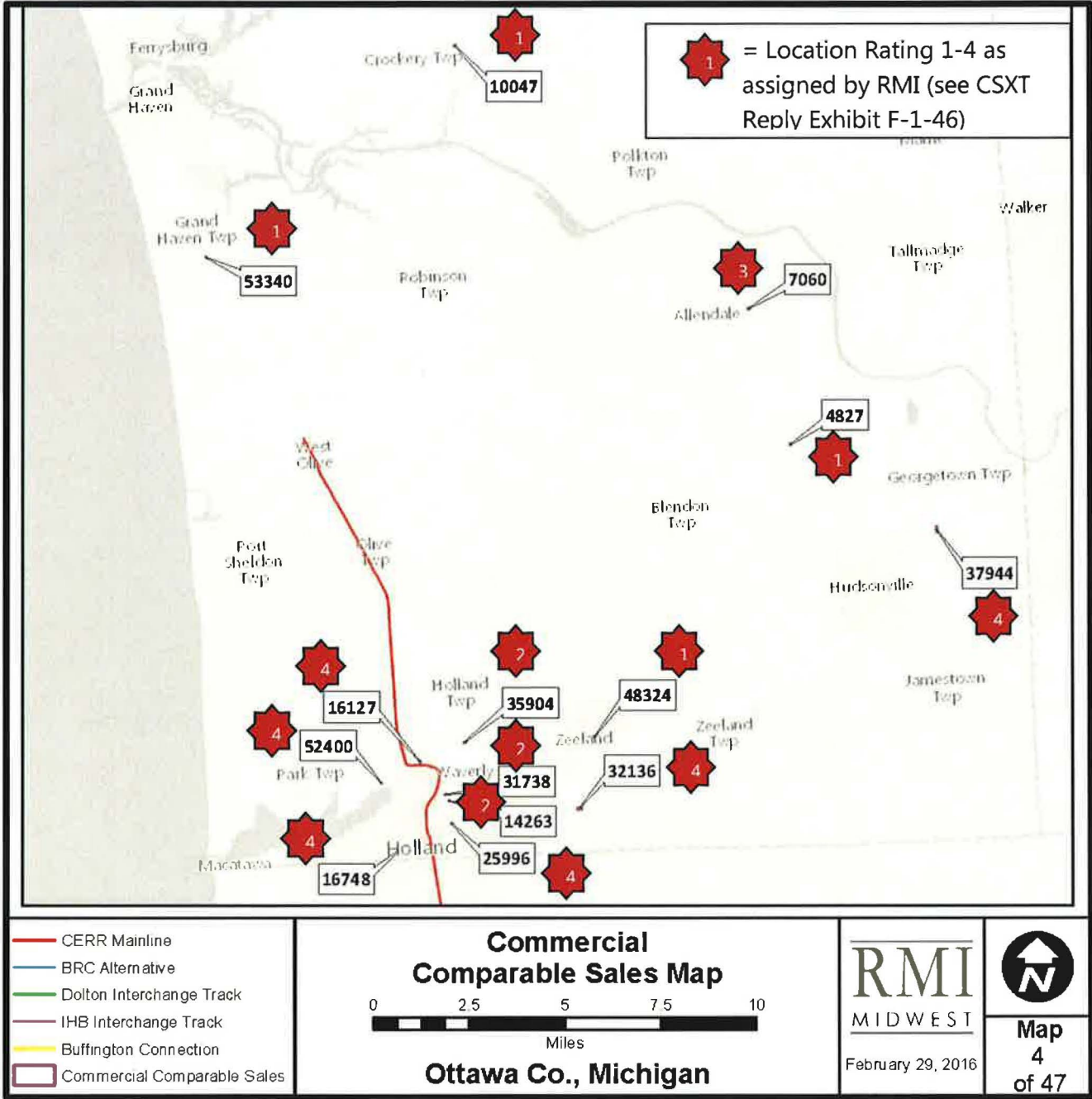
related to location. Clearly there must be another determinant in making adjustments to prices not considered in the RMI analysis.

- It should also be noted that this "location rating" RMI used is not very location specific, and when the "ratings" are mapped there is little, to no correlation. It makes no sense to take two very geographically distant comparables and apply a single-locational adjustment.

For example, RMI classifies sale #37944 which is about 20 miles from the RoW in the same category 4 location as it does sale #16127 which is virtually on-top of the RoW. Both comparables are adjusted downward by 48% (Figure 11) regardless of their physical proximity to the RoW.

The physical manifestation of the single-locational adjustment is illustrated in Figure 1 below, which is based on CSXT Reply WP "Appraisal Report Addendum.pdf" at 153 (Map 4 of 47). From our analysis of RMI's model, RMI's adjustments for location are statistically invalid and yield erroneous conclusions.

Figure 1 – Commercial Comparable Sales Mapped with RMI’s “Location Rating”



**Selected Examples of Pricing Errors:**

Based on questionable adjustments for size and location, RMI concluded several 'unit values' psf attributable to various line segments. The conclusions of value ranges from \$0.25 to \$9.40 per square foot. We followed up on the values as applied to specific land segments Nos. 62 and 67, and found the following:

- Value ID#34 and ID#35 (sale data inputs), page 46, for Ottawa Commercial land concluded adjusted unit values of \$9.40 and \$8.75 psf. Those values were applied to RMI value segments #62 and #67; see maps 8 and 9.
- The segment values for #62 and #67 at \$9.40 and \$8.75 psf were well above any of the Ottawa 'adjusted' sale prices shown in RMI's Figure 11, on page 45 (erroneously labeled as sale price per acre).

Therefore to apply this 'outside the range' conclusions, RMI would have had to make the determination that these RoW line segments were well above the norm. This does not appear to be the case.

- Let's take a closer look at those purported high-value segments on the aerial maps included by RMI in their appraisal.
  - Commercial RMI segment #62 is priced at \$9.40 psf and segment #67 is priced at \$8.75 psf of land area.
  - Aerial #62 shows the dominant use as single-family residential; not high-end commercial.

While there is a small one-story office building located on the 17<sup>th</sup> Street side of the line segment (it's a dead-end residential street) all other parcels adjacent to the RoW are characterized by older, typically-clapboard-style, 2-story SFD residential properties on both sides of the RoW.

Clearly, the RoW segment is not a dominant commercial location and, and is not an area that would warrant extraordinary pricing similar to that of a corner, commercial site in a downtown market area. Please refer to the following illustrations and keep in mind that RMI has priced this segment well above the 'adjusted' price range per square foot of land area.

**RMI Map No 8 of 141**



To further examine the utility of this site, we have drilled down to street level geography. Please refer to the more detail site views of the RMI segment shown on the following pages.

Enlarged View of Section 62 from Google Earth



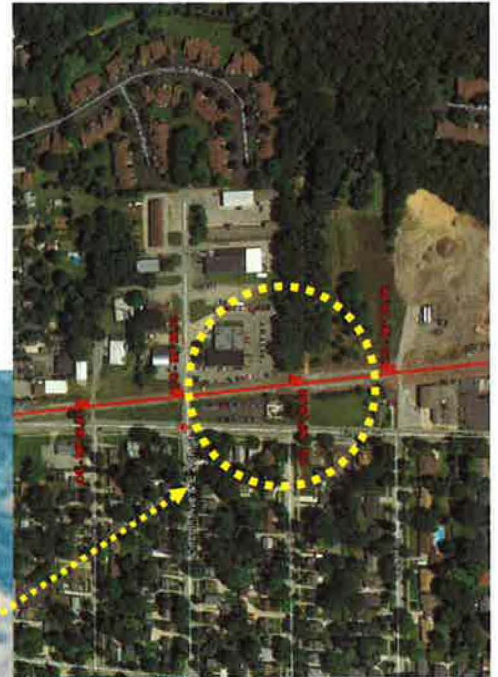
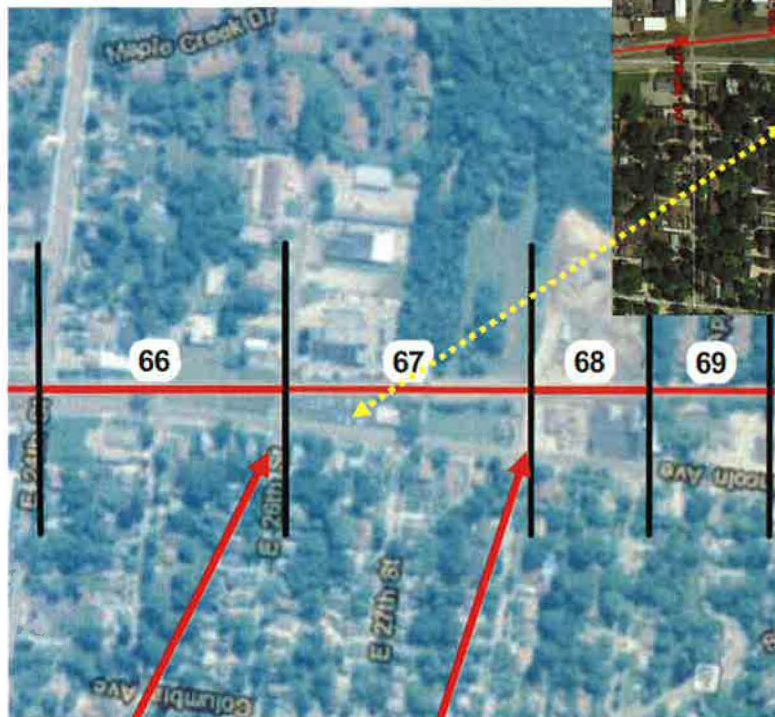


While we do not suggest using Zillow to support value estimates, it is useful to note, however, that the Zillow data base also identifies the surrounding property as predominately residential. As such, while not definitive, it is illustrative that the Zillow prices listed for the multiple, adjacent improved properties do not support RMI's vacant commercial land estimate of \$409,464 per acre.<sup>34</sup>

<sup>34</sup> Zillow,  
[http://www.zillow.com/homes/for\\_sale/74203102\\_zpid/any\\_days/globalrelevanceex\\_sort/42.784282,-86.096992,42.780616,-86.103965\\_rect/17\\_zm/](http://www.zillow.com/homes/for_sale/74203102_zpid/any_days/globalrelevanceex_sort/42.784282,-86.096992,42.780616,-86.103965_rect/17_zm/) (Apr. 1, 2016).

Similarly, section #67 is described by RMI as a commercial valued outlier parcel at \$8.75 psf. Again, RMI is pricing this segment above the adjusted range of value, indicative of a premium location. The following aerials show the relevant intersections at 26<sup>th</sup> and 29<sup>th</sup> Streets. While these are industrial / warehouse type uses, they are not high value locations, i.e. a high-end industrial park/center city.

Again, we believe that this type of analysis which divides the RoW into arbitrary H&BU segments, forces RMI to develop more values than are warranted in the market in order to justify their approach.



**Challenges to RMI's Selective Use of Sales Data:**

RMI's statistical assessment for ATF Acreage Valuation for Ottawa County is also significantly flawed because it fails to exclude statistical outliers. The first step in sales comparison is to identify credible comparables that best reflect the nature of the assignment. These transactions must not only be physically comparable but also be relevant in terms of the transactional date. Therefore, the more current the comparable sales are, the more reliable the estimate will be.

In keeping with this theme, we examined acreage sales data presented by RMI in its Acreage ATF Valuation chart displayed on page 43. We simply re-ordered the sales by transaction year. Doing so provides a much different result from RMI's statistical conclusion of a base rate of \$7,800 per acre.

	<u>2010-2013</u>	<u>2014</u>	<u>2015</u>
	\$3,553	\$5,067	\$3,157
	\$19,682	\$1,916	\$5,601
	\$7,805		\$7,491
	\$6,628		
	\$3,869		
	\$15,331		
	\$9,005		
	\$1,078		
	<u>\$14,044</u>		
<b>Average:</b>	<b>\$8,999</b>	<b>\$3,492</b>	<b>\$5,416</b>
<b>Exclude sales &gt; \$10K</b>	<b>\$5,323</b>		

Clearly, RMI's \$7,800 per acre conclusion distorts the final value. Again, appraisal is more than adding and subtracting numbers; a critical evaluation of data and a common sense approach are requisite for property valuation results.

Our re-examination suggests a much lower price per acre, say \$5,450 per acre; a reduction of about 30% from the RMI conclusion. This re-estimate is more closely aligned with recent sales data.

Since this a 'methodological' issue, we believe – by simple extrapolation - that RMI has made similar errors in technique in the valuation applicable to other segments of RoW. Logically, we would expect to find similar inconsistencies in the remaining 778 segments.



Another compelling way to assess RMI's actual conclusions of value, is to examine the actual values placed on groups of adjacent segments along the RoW. Again, we have focused on the Ottawa County RoW given that this is the greatest difference between our value conclusions.

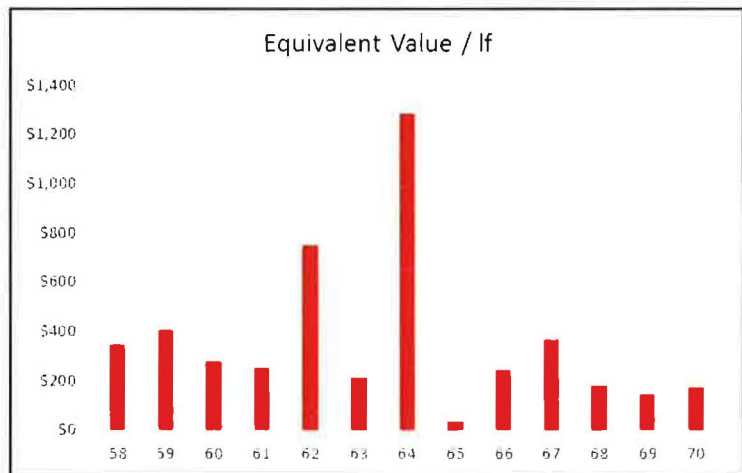
The following table abstracts data from the RMI report. Based on the data presented, we simply calculated the implied value per linear foot of RoW.

This chart illustrates the impact and consequences of RMIs approach to the assessment of highest and best use and the implications of the apparent rote use of statistics to opine segment values.

**Segment Unit Values by Linear Foot / Ottawa County**

RMI Seg	RMI Use 1	RMI Use 2	Length-m	Length-lf	RMI Segment Value	Equivalent Value / lf
58	COM	COM	0.1	528	\$182,026	\$345
59	COM	COM	0.02	106	\$42,906	\$406
60	COM	COM	0.31	1637	\$453,990	\$277
61	COM	SFR	0.19	1003	\$250,421	\$250
62	COM	COM	0.06	317	\$237,447	\$750
63	SFR	IND	0.09	475	\$101,983	\$215
64	IND	IND	0.02	106	\$135,803	\$1,286
65	MF	ROAD	0.13	686	\$23,485	\$34
66	ROAD	IND	0.13	686	\$166,696	\$243
67	COM	IND	0.13	686	\$251,404	\$366
68	IND	IND	0.06	317	\$56,434	\$178
69	IND	MF	0.06	317	\$45,315	\$143
70	IND	IND	0.08	422	\$74,154	\$176

- These RMI Segments are designated as having separate highest and best uses.
- The 13 segments contain about one and one-third linear mile of RoW.
- Unit values range from \$34 to \$1,286 per linear foot of RoW.



- Inexplicably, the highest value per linear foot is situated between industrial/SFR and industrial/road; the two low points in overall value per linear foot. Additionally, we should point out that a conclusion of 'road' per se is not an example of highest and best use. It may be what is present, but it would not represent the highest and best use, as if-vacant.

In our view, RMI's analysis was derailed in the first instance by relying on non-comparable sales data. RMI also failed to adequately review the data, and then relied on these small data sets that included questionable transactions to perform their adjustments. RMI needed to be more critical in their selection of the sales and be more analytical and careful in the model application.

### **INTERPRETATION OF VALUES**

RMI has analyzed the transactions as though they were a bio-medical study of the spread of disease rather than, in our view, as unique parcels of real property. Statistical analysis is important to appraisers. Appraisals have always relied on the science of data as the core for valuation. However, the reliability and validity of this inference is dependent on a number of factors including sample size and how well the sample represents the population. The measure of accuracy is usually reported along with an inference. The measure of accuracy states the degree of uncertainty associated with the inference. Uncertainty may not, however, be quantifiable when the sample is a non-probability sample (a sampling that does not involve random selection). With a small sample size, a non-probability sampling model may or may not represent the population. Thus while mass appraisal and the automated valuation model has come to the residential domain, it offers limited appeal to commercial real property where highest and best use and value is far more complicated and far more unique to each parcel.

Our sense is that while modern statistical analysis can contribute to the appraisal process, the ease of making multiple calculations on a rote basis can lead to the production of less-than credible work. In this regard we believe that RMI has made a considerable number of errors in the analysis and interpretation of data. Appraisal relies on the careful interpretation of quality data in a way that reflects the manner in which the market would determine value.

Starting from the very foundation of the RMI report that cuts the RoW into 792 separate valuation segments over less than 160 miles, it implies that highest and best use (a complicated assessment of what is physically possible, legally permissible, financially feasible and maximally productive) materially changes, on average, every 1,067 linear feet.

To put this into a local perspective, the average linear footage for a typical block along K Street in Washington, DC is about 480 feet. Thus RMI is suggesting that this largely rural, agricultural, industrial RoW-corridor changes its' underlying (highest and best) use the equivalent of every 2.2 city-blocks. This does not make sense!

**CONCLUSIONS:**

RMI's development of highest and best use does not pass the 'common sense test.' Our analysis of RMI's data, techniques, and the quality of their conclusions shows that RMI's approach has some significant flaws, including:

- The incorrect identification of highest and best use which has been artificially cut into nearly 800 pieces, a little more than 1,000 linear feet each in areas with considerable homogeneity of use.
- The incorrect identification of property type as higher-end commercial when, in fact, the parcel is inherently residential.
- The inclusion of statistical outliers in the collection of market data which can materially skew statistical results and values.
- The use of statistical findings where the 'coefficient of determination',  $R^2$ , is low indicating a gap in the explanation of variation attributable to the specific data set being analyzed. As to how much one should expect in terms of variability, it is our view that the answer is fairly domain specific. On the one hand the benefits of new medication or of the efficacy of new teaching methodologies can be expected to have a low proportion of variance explained by a single variable; however, on the other hand, if you are testing performance of a product you may require a larger fraction of variance to be explained by a specific variable.

The RMI report remains silent on this issue and analyzes clusters of as small as 10 data points and extrapolates these findings to the valuation of 792 segments with little to no comment on the overall efficacy of the statistical model and the potential impact, if any, of social science data relative to the behavior of markets; which definitely do not perform in a linear manner.

Real estate markets cannot simply be modeled as straight lines particularly when the underlying data set is limited, variable, and potentially not representative of the parcels it portends to describe. Appraisal is a unique blend of art, science and common sense wherein valuation is not inextricably linked to statistics because it must incorporate the subjective, including how the market actually selects, analyzes and responds to data.

*In this context we are reminded of the 6-foot tall statistician that drowned crossing a river with an 'average' depth of 6 feet.*

**The Smith report which blends common sense market experience, a hands-on assessment of highest and best use and the application of modern GIS techniques and statistical analysis provides the most credible indication of value for the CERR RoW.**

**III-H Results of SAC  
Analysis**

**TABLE A: CERR ANNUAL COST OF CAPITAL**

<b>Year</b>	<b>Industry Cost of Capital</b>	<b>Industry Cost of Debt 1/</b>	<b>Industry Cost of Preferred Equity 2/</b>	<b>Industry Cost of Equity 3/</b>	<b>CERR's Cost of Debt</b>	<b>CERR's Cost of Preferred Equity</b>	<b>CERR's Cost of Equity</b>	<b>Debt as a Percent of Total Investment</b>	<b>Preferred Equity as a Percent of Total Investment</b>	<b>Equity as a Percent of Total Investment</b>	<b>Composite Cost of Capital</b>	<b>1 + Cost of Capital</b>	<b>STB Prescribed Debt as a % of Capital 4/</b>	<b>STB Preferred Equity as a % of Capital 4/</b>
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
2012	11.12%	3.29%	0.00%	13.40%	3.29%	0.00%	13.40%	22.56%	0.000%	77.44%	11.12%	1.1112	22.560%	0.000%
2013	11.32%	3.68%	3.87%	12.96%	3.68%	3.87%	12.96%	17.69%	0.004%	82.31%	11.32%	1.1132	17.690%	0.004%
2014	10.65%	3.58%	3.69%	12.06%	3.58%	3.69%	12.06%	16.66%	0.004%	83.34%	10.65%	1.1065	16.660%	0.004%
2015	9.61%	3.55%	3.68%	10.96%	3.60%	3.37%	10.96%	17.82%	0.004%	82.17%	9.65%	1.0965	18.160%	0.000%
2016					3.60%	3.37%	12.35%	17.82%	0.004%	82.17%	10.79%	1.1079		
2017					3.60%	3.37%	12.35%	17.82%	0.004%	82.17%	10.79%	1.1079		
2018					3.60%	3.37%	12.35%	17.82%	0.004%	82.17%	10.79%	1.1079		
2019					3.60%	3.37%	12.35%	17.82%	0.004%	82.17%	10.79%	1.1079		
2020					3.60%	3.37%	12.35%	17.82%	0.004%	82.17%	10.79%	1.1079		
2021					3.60%	3.37%	12.35%	17.82%	0.004%	82.17%	10.79%	1.1079		
2022					3.60%	3.37%	12.35%	17.82%	0.004%	82.17%	10.79%	1.1079		
2023					3.60%	3.37%	12.35%	17.82%	0.004%	82.17%	10.79%	1.1079		
2024					3.60%	3.37%	12.35%	17.82%	0.004%	82.17%	10.79%	1.1079		

1/ Cost of railroad industry debt from the STB Decisions in Ex Parte No. 558 (Sub-No. 16), *Railroad Cost of Capital - 2012*, decided August 30, 2013, Ex Parte No. 558 (Sub-No. 17), *Railroad Cost of Capital - 2013*, decided July 31, 2014, Ex Parte No. 558 (Sub-No. 18), *Railroad Cost of Capital - 2014*, decided August 7, 2015. The 2015 railroad industry cost of debt was taken from the AAR's filing in Ex Parte No. 558 (Sub-No. 19), *Railroad Cost of Capital - 2015*, filed with the STB on April 20, 2016.

2/ Cost of preferred equity from the STB Decisions Ex Parte No. 558 (Sub-No. 17), *Railroad Cost of Capital - 2013*, decided July 31, 2014, Ex Parte No. 558 (Sub-No. 18), *Railroad Cost of Capital - 2014*, decided August 7, 2015. The 2015 railroad industry cost of preferred equity was taken from the AAR's filing in Ex Parte No. 558 (Sub-No. 19), *Railroad Cost of Capital - 2015*, filed with the STB on April 20, 2016. There was no railroad preferred equity issued in 2012 or 2015.

3/ Cost of railroad common equity from the STB Decisions in Ex Parte No. 558 (Sub-No. 16), *Railroad Cost of Capital - 2012*, decided August 30, 2013, Ex Parte No. 558 (Sub-No. 17), *Railroad Cost of Capital - 2013*, decided July 31, 2014, Ex Parte No. 558 (Sub-No. 18), *Railroad Cost of Capital - 2014*, decided August 7, 2015. The 2015 railroad industry cost of common equity was taken from the AAR's filing in Ex Parte No. 558 (Sub-No. 19), *Railroad Cost of Capital - 2015*, filed with the STB on April 20, 2016.

4/ Railroad average capital structure from the STB Decisions in Ex Parte No. 558 (Sub-No. 16), *Railroad Cost of Capital - 2012*, decided August 30, 2013, Ex Parte No. 558 (Sub-No. 17), *Railroad Cost of Capital - 2013*, decided July 31, 2014, Ex Parte No. 558 (Sub-No. 18), *Railroad Cost of Capital - 2014*, decided August 7, 2015. The 2015 average capital structure was taken from the AAR's filing in Ex Parte No. 558 (Sub-No. 19), *Railroad Cost of Capital - 2015*, filed with the STB on April 20, 2016.



**TABLE C: CERR PROPERTY INVESTMENT VALUES**

Construction of the CERR occurs between July 1, 2012 and January 1, 2015.

Investments are assumed to be in January 1, 2015 dollars.

<u>Property Account</u>	<u>Property Component</u>	<u>Service Life In Years 1/</u>	<u>Investment In 3Q2012 Dollars 2/</u>	<u>Investment In 3Q2013 Dollars 3/</u>	<u>Investment In 3Q2014 Dollars 4/</u>	<u>2012 Investment Value 5/</u>	<u>2013 Investment Value 6/</u>	<u>2014 Investment Value 7/</u>	<u>Total Property Investment 1Q 2015 8/</u>
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1	Engineering	NA	\$38,485,991	\$38,631,278	\$39,992,396	\$23,091,594	\$15,452,511	\$0	\$38,544,106
2	Land	NA	\$88,240,233	\$99,888,654	\$113,587,644	\$37,817,243	\$57,079,231	\$0	\$94,896,474
3	Grading	69	\$44,626,178	\$44,672,907	\$46,177,580	\$0	\$44,672,907	\$0	\$44,672,907
5	Tunnels	76	\$0	\$0	\$0	\$0	\$0	\$0	\$0
6	Bridges & Culverts	61	\$69,752,014	\$69,825,053	\$72,176,901	\$0	\$48,877,537	\$21,653,070	\$70,530,607
8	Ties	20	\$58,607,862	\$57,627,119	\$59,030,596	\$0	\$24,697,337	\$33,731,769	\$58,429,106
9	Rails and OTM	34	\$82,152,900	\$80,778,154	\$82,745,462	\$0	\$34,619,209	\$47,283,121	\$81,902,330
11	Ballast	36	\$50,588,092	\$49,741,552	\$50,952,980	\$0	\$21,317,808	\$29,115,989	\$50,433,797
12	Labor	31	\$45,807,089	\$45,980,015	\$47,600,055	\$0	\$19,705,721	\$27,200,031	\$46,905,752
13	Fences and Roadway Signs	47	\$97,882	\$97,984	\$101,285	\$0	\$41,993	\$57,877	\$99,870
16	Stations and Office Buildings	40	\$2,280,710	\$2,283,098	\$2,359,998	\$0	\$913,239	\$1,415,999	\$2,329,238
17	Roadway Buildings	37	\$1,518,993	\$1,520,583	\$1,571,799	\$0	\$608,233	\$943,080	\$1,551,313
19	Fuel Stations	29	\$0	\$0	\$0	\$0	\$0	\$0	\$0
20	Shops and Enginehouses	34	\$2,647,607	\$2,650,379	\$2,739,649	\$0	\$1,060,152	\$1,643,790	\$2,703,941
26	Communications Systems	13	\$11,461,808	\$11,473,810	\$11,860,271	\$0	\$0	\$11,860,271	\$11,860,271
27	Signals and Interlockers	29	\$33,224,587	\$33,259,377	\$34,379,619	\$0	\$0	\$34,379,619	\$34,379,619
39	Public Improvements	44	\$12,165,075	\$12,177,813	\$12,587,987	\$0	\$5,219,063	\$7,193,135	\$12,412,198
	Total		\$541,657,021	\$550,607,777	\$577,864,224	\$60,908,837	\$274,264,941	\$216,477,752	\$551,651,530

1/ 1 ÷ Depreciation Rate shown in Schedule 332 of CSXT's 2014 Annual Report R-1

2/ January 1, 2015, indexed to 2012 dollars; Investment Exhibit - 1Q2015 x Inflation Index from Table B, 3Q2012 ÷ 1Q2015.

3/ January 1, 2015, indexed to 2013 dollars; Investment Exhibit - 1Q2015 x Inflation Index from Table B, 3Q2013 ÷ 1Q2015.

4/ January 1, 2015, indexed to 2014 dollars; Investment Exhibit - 1Q2015 x Inflation Index from Table B, 3Q2014 ÷ 1Q2015.

5/ Column (4) x Percent constructed in 2012.

6/ Column (5) x Percent constructed in 2013.

7/ Column (6) x Percent constructed in 2014.

8/ Sum of Columns (7) through (9).



**TABLE D: INTEREST DURING CONSTRUCTION**

<u>Month of Installation</u>	<u>Cost of Funds 1/</u>	<u>Timing of Account 1 Investment 2/</u>	<u>Timing of Account 2 Investment 2/</u>	<u>Timing of Accounts 3, 5 and 6 Investment 2/</u>	<u>Timing of Accounts 8 Through 39 Investment 2/</u>	<u>Total Investment by Month 3/</u>	<u>Interest During Construction 4/</u>	<u>Cost of Debt 5/</u>	<u>Deductible Interest During Construction 6/</u>
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Jul-12	0.88%	\$3,848,599	\$0	\$0	\$0	\$3,848,599	\$0	0.27%	\$0
Aug-12	0.88%	\$3,848,599	\$0	\$0	\$0	\$3,848,599	\$33,963	0.27%	\$2,345
Sep-12	0.88%	\$3,848,599	\$0	\$0	\$0	\$3,848,599	\$68,226	0.27%	\$4,711
Oct-12	0.88%	\$3,848,599	\$12,605,748	\$0	\$0	\$16,454,347	\$102,791	0.27%	\$7,098
Nov-12	0.88%	\$3,848,599	\$12,605,748	\$0	\$0	\$16,454,347	\$248,905	0.27%	\$17,188
Dec-12	0.88%	\$3,848,599	\$12,605,748	\$0	\$0	\$16,454,347	\$396,308	0.27%	\$27,366
Jan-13	0.90%	\$3,863,128	\$14,269,808	\$0	\$0	\$18,132,936	\$554,294	0.30%	\$32,952
Feb-13	0.90%	\$3,863,128	\$14,269,808	\$0	\$0	\$18,132,936	\$722,014	0.30%	\$42,922
Mar-13	0.90%	\$3,863,128	\$14,269,808	\$0	\$0	\$18,132,936	\$891,239	0.30%	\$52,982
Apr-13	0.90%	\$3,863,128	\$14,269,808	\$6,381,844	\$0	\$24,514,779	\$1,061,983	0.30%	\$63,133
May-13	0.90%	\$0	\$0	\$6,381,844	\$0	\$6,381,844	\$1,291,537	0.30%	\$76,779
Jun-13	0.90%	\$0	\$0	\$13,364,349	\$0	\$13,364,349	\$1,360,406	0.30%	\$80,874
Jul-13	0.90%	\$0	\$0	\$13,364,349	\$17,600,188	\$30,964,537	\$1,492,563	0.30%	\$88,730
Aug-13	0.90%	\$0	\$0	\$13,364,349	\$17,600,188	\$30,964,537	\$1,783,868	0.30%	\$106,048
Sep-13	0.90%	\$0	\$0	\$13,364,349	\$18,245,594	\$31,609,944	\$2,077,789	0.30%	\$123,521
Oct-13	0.90%	\$0	\$0	\$13,364,349	\$18,245,594	\$31,609,944	\$2,380,140	0.30%	\$141,495
Nov-13	0.90%	\$0	\$0	\$6,982,505	\$18,245,594	\$25,228,100	\$2,685,204	0.30%	\$159,630
Dec-13	0.90%	\$0	\$0	\$6,982,505	\$18,245,594	\$25,228,100	\$2,935,729	0.30%	\$174,523
Jan-14	0.85%	\$0	\$0	\$7,217,690	\$18,739,885	\$25,957,575	\$3,007,920	0.29%	\$173,740
Feb-14	0.85%	\$0	\$0	\$7,217,690	\$18,739,885	\$25,957,575	\$3,253,165	0.29%	\$187,906
Mar-14	0.85%	\$0	\$0	\$7,217,690	\$18,739,885	\$25,957,575	\$3,500,486	0.29%	\$202,191
Apr-14	0.85%	\$0	\$0	\$0	\$18,739,885	\$18,739,885	\$3,749,902	0.29%	\$216,598
May-14	0.85%	\$0	\$0	\$0	\$18,739,885	\$18,739,885	\$3,940,318	0.29%	\$227,596
Jun-14	0.85%	\$0	\$0	\$0	\$34,153,182	\$34,153,182	\$4,132,347	0.29%	\$238,688
Jul-14	0.85%	\$0	\$0	\$0	\$33,486,037	\$33,486,037	\$4,456,502	0.29%	\$257,412
Aug-14	0.85%	\$0	\$0	\$0	\$33,486,037	\$33,486,037	\$4,777,754	0.29%	\$275,967
Sep-14	0.85%	\$0	\$0	\$0	\$0	\$0	\$5,101,726	0.29%	\$294,680
Oct-14	0.85%	\$0	\$0	\$0	\$0	\$0	\$5,144,921	0.29%	\$297,175
Nov-14	0.85%	\$0	\$0	\$0	\$0	\$0	\$5,188,482	0.29%	\$299,691
Dec-14	0.85%	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>	<u>\$5,232,412</u>	0.29%	<u>\$302,229</u>
<b>Total</b>		<b>\$38,544,106</b>	<b>\$94,896,474</b>	<b>\$115,203,514</b>	<b>\$303,007,436</b>	<b>\$551,651,530</b>	<b>\$71,572,895</b>		<b>\$4,176,172</b>

1/  $((1 + \text{Cost of Capital from Table A for the applicable year})^{(1/12)} - 1) \times 100$ .

2/ Applicable account value from Table C for the applicable investment period.

3/ Sum of Columns (3) through (6).

4/ July 12 equals Column (2) x prior Column (7), all other periods equal Column (2) x ((Sum of Column (7) for all prior periods) + (Sum of Column (8) for all prior periods)).

5/  $((1 + \text{Cost of Debt from Table A for the applicable year})^{(1/12)} - 1) \times 100$ .

6/ July 12 equals prior Column (7) x Column (9) x Table A, Column (9) for 2012, all other periods equal Column (9) x ((Sum of Column (7) for all prior periods) + (Sum of Column (8) for all prior periods)) x Table A, Column (9) for the applicable year.

**TABLE E: CERR INTEREST PAYMENTS FOR ASSETS PURCHASED WITH DEBT CAPITAL**

INTEREST SCHEDULE FOR THE CERR 2012 ROAD PROPERTY INVESTMENT FOR THE 1Q2015 START-UP		INTEREST SCHEDULE FOR THE CERR 2013 ROAD PROPERTY INVESTMENT FOR THE 1Q2015 START-UP		INTEREST SCHEDULE FOR THE CERR 2014 ROAD PROPERTY INVESTMENT FOR THE 1Q2015 START-UP	
1. Total Investment	\$60,908,837 1/	1. Total Investment	\$274,264,941 1/	1. Total Investment	\$216,477,752 1/
2. IDC	\$850,193 2/	2. IDC	\$19,236,766 2/	2. IDC	\$51,485,936 2/
3. Principal	\$13,932,837 3/	3. Principal	\$51,920,452 3/	3. Principal	\$44,642,750 3/
4. Interest	3.29% 4/	4. Interest	3.68% 4/	4. Interest	3.58% 4/
5. Term (Quarters)	80 5/	5. Term (Quarters)	80 5/	5. Term (Quarters)	80 5/
6. Quarterly Coupon	\$113,210 6/	6. Quarterly Coupon	\$471,214 6/	6. Quarterly Coupon	\$394,298 6/
<u>Quarter</u>	<u>Interest 7/</u>	<u>Quarter</u>	<u>Interest 7/</u>	<u>Quarter</u>	<u>Interest 7/</u>
(1)	(2)	(3)	(4)	(5)	(6)
1	\$113,210	1	\$471,214	1	\$394,298
2	\$113,210	2	\$471,214	2	\$394,298
3	\$113,210	3	\$471,214	3	\$394,298
4	\$113,210	4	\$471,214	4	\$394,298
5	\$113,210	5	\$471,214	5	\$394,298
6	\$113,210	6	\$471,214	6	\$394,298
7	\$113,210	7	\$471,214	7	\$394,298
8	\$113,210	8	\$471,214	8	\$394,298
9	\$113,210	9	\$471,214	9	\$394,298
10	\$113,210	10	\$471,214	10	\$394,298
11	\$113,210	11	\$471,214	11	\$394,298
12	\$113,210	12	\$471,214	12	\$394,298
13	\$113,210	13	\$471,214	13	\$394,298
14	\$113,210	14	\$471,214	14	\$394,298
15	\$113,210	15	\$471,214	15	\$394,298
16	\$113,210	16	\$471,214	16	\$394,298
17	\$113,210	17	\$471,214	17	\$394,298
18	\$113,210	18	\$471,214	18	\$394,298
19	\$113,210	19	\$471,214	19	\$394,298
20	\$113,210	20	\$471,214	20	\$394,298
21	\$113,210	21	\$471,214	21	\$394,298
22	\$113,210	22	\$471,214	22	\$394,298
23	\$113,210	23	\$471,214	23	\$394,298
24	\$113,210	24	\$471,214	24	\$394,298
25	\$113,210	25	\$471,214	25	\$394,298
26	\$113,210	26	\$471,214	26	\$394,298
27	\$113,210	27	\$471,214	27	\$394,298
28	\$113,210	28	\$471,214	28	\$394,298
29	\$113,210	29	\$471,214	29	\$394,298
30	\$113,210	30	\$471,214	30	\$394,298
31	\$113,210	31	\$471,214	31	\$394,298
32	\$113,210	32	\$471,214	32	\$394,298
33	\$113,210	33	\$471,214	33	\$394,298
34	\$113,210	34	\$471,214	34	\$394,298
35	\$113,210	35	\$471,214	35	\$394,298
36	\$113,210	36	\$471,214	36	\$394,298
37	\$113,210	37	\$471,214	37	\$394,298
38	\$113,210	38	\$471,214	38	\$394,298
39	\$113,210	39	\$471,214	39	\$394,298
40	\$113,210	40	\$471,214	40	\$394,298
41	\$113,210	41	\$471,214	41	\$394,298
42	\$113,210	42	\$471,214	42	\$394,298
43	\$113,210	43	\$471,214	43	\$394,298
44	\$113,210	44	\$471,214	44	\$394,298
45	\$113,210	45	\$471,214	45	\$394,298
46	\$113,210	46	\$471,214	46	\$394,298
47	\$113,210	47	\$471,214	47	\$394,298
48	\$113,210	48	\$471,214	48	\$394,298
49	\$113,210	49	\$471,214	49	\$394,298
50	\$113,210	50	\$471,214	50	\$394,298
51	\$113,210	51	\$471,214	51	\$394,298
52	\$113,210	52	\$471,214	52	\$394,298
53	\$113,210	53	\$471,214	53	\$394,298
54	\$113,210	54	\$471,214	54	\$394,298

**TABLE E: CERR INTEREST PAYMENTS FOR ASSETS PURCHASED WITH DEBT CAPITAL**

INTEREST SCHEDULE FOR THE CERR 2012 ROAD PROPERTY INVESTMENT FOR THE 1Q2015 START-UP		INTEREST SCHEDULE FOR THE CERR 2013 ROAD PROPERTY INVESTMENT FOR THE 1Q2015 START-UP		INTEREST SCHEDULE FOR THE CERR 2014 ROAD PROPERTY INVESTMENT FOR THE 1Q2015 START-UP	
1. Total Investment	\$60,908,837 1/	1. Total Investment	\$274,264,941 1/	1. Total Investment	\$216,477,752 1/
2. IDC	\$850,193 2/	2. IDC	\$19,236,766 2/	2. IDC	\$51,485,936 2/
3. Principal	\$13,932,837 3/	3. Principal	\$51,920,452 3/	3. Principal	\$44,642,750 3/
4. Interest	3.29% 4/	4. Interest	3.68% 4/	4. Interest	3.58% 4/
5. Term (Quarters)	80 5/	5. Term (Quarters)	80 5/	5. Term (Quarters)	80 5/
6. Quarterly Coupon	\$113,210 6/	6. Quarterly Coupon	\$471,214 6/	6. Quarterly Coupon	\$394,298 6/
<u>Quarter</u> (1)	<u>Interest 7/</u> (2)	<u>Quarter</u> (3)	<u>Interest 7/</u> (4)	<u>Quarter</u> (5)	<u>Interest 7/</u> (6)
55	\$113,210	55	\$471,214	55	\$394,298
56	\$113,210	56	\$471,214	56	\$394,298
57	\$113,210	57	\$471,214	57	\$394,298
58	\$113,210	58	\$471,214	58	\$394,298
59	\$113,210	59	\$471,214	59	\$394,298
60	\$113,210	60	\$471,214	60	\$394,298
61	\$113,210	61	\$471,214	61	\$394,298
62	\$113,210	62	\$471,214	62	\$394,298
63	\$113,210	63	\$471,214	63	\$394,298
64	\$113,210	64	\$471,214	64	\$394,298
65	\$113,210	65	\$471,214	65	\$394,298
66	\$113,210	66	\$471,214	66	\$394,298
67	\$113,210	67	\$471,214	67	\$394,298
68	\$113,210	68	\$471,214	68	\$394,298
69	\$113,210	69	\$471,214	69	\$394,298
70	\$113,210	70	\$471,214	70	\$394,298
71	\$113,210	71	\$471,214	71	\$394,298
72	\$113,210	72	\$471,214	72	\$394,298
73	\$113,210	73	\$471,214	73	\$394,298
74	\$113,210	74	\$471,214	74	\$394,298
75	\$113,210	75	\$471,214	75	\$394,298
76	\$113,210	76	\$471,214	76	\$394,298
77	\$113,210	77	\$471,214	77	\$394,298
78	\$113,210	78	\$471,214	78	\$394,298
79	\$113,210	79	\$471,214	79	\$394,298
80	\$113,210	80	\$471,214	80	\$394,298

1/ From Table D, Column (7) for the applicable year investment.  
2/ From Table D, Column (8) for the applicable year investment.  
3/ (Total Investment + IDC) x (Proportion of Debt from Table A, Column (9)).  
4/ From Table A, Column (6) for the applicable year investment.  
5/ Based on Ex Parte No. 657 20-year payment period x 4.  
6/ Quarterly coupon payments on Line 3 principal and Line 4 interest rates.  
7/ Line 6 coupon payment.

**TABLE F: CERR PRESENT VALUE OF REPLACEMENT COST**

<u>Property Account</u>	<u>Property Component</u>	<u>Service Life In Years 1/</u>	<u>Investment 2/</u>	<u>Salvage 3/</u>	<u>Replacement Year Asset Net Cost 4/</u>	<u>Replacement Cost Adjusted To Reflect An Infinite Life 5/</u>	<u>Present Value Of Replacement Cost Adjusted To Reflect An Infinite Life (2015 Dollars) 6/</u>
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
3	Grading	69	\$449,395,692	\$0	\$382,829,685	\$386,569,436	\$354,352
5	Tunnels	76	0	0	0	0	0
6	Bridges & Culverts	61	554,218,234	0	465,711,074	0	976,145
8	Ties	20	103,116,607	0	81,446,767	108,891,372	13,626,073
9	Rails and OTM	34	188,436,536	13,311,950	137,894,674	153,070,806	4,690,463
11	Ballast	36	120,252,903	0	94,981,889	104,083,080	2,638,994
12	Labor	31	152,496,367	0	120,449,425	138,071,507	6,192,086
13	Fences and Roadway Signs	47	508,620	0	427,395	446,380	3,817
16	Stations and Office Buildings	40	9,429,882	0	7,923,956	8,520,992	154,690
17	Roadway Buildings	37	5,742,639	0	4,825,555	5,274,587	128,443
19	Fuel Stations	29	0	0	0	0	0
20	Shops and Enginehouses	34	9,332,252	0	7,841,917	8,704,966	266,741
26	Communications Systems	13	21,148,306	0	16,704,013	28,653,638	7,662,739
27	Signals and Interlockers	29	101,003,965	3,385,701	77,027,516	89,644,703	4,659,364
39	Public Improvements	44	<u>57,800,024</u>	<u>0</u>	<u>48,569,516</u>	<u>51,216,095</u>	<u>587,444</u>
	Total		\$1,772,882,028	\$16,697,651	\$1,446,633,381	\$1,083,147,563	\$41,941,354

1/ From Table C, Column (3).

2/ (Table C, Column (10) after allocation of Engineering) x (Table B, 1.0 + Annual Inflation Index)^(Column (3)).

3/ [(Column (4) x Salvage %) - (Table C, Column (10) after allocation of Engineering x Salvage %)] x (1 - Current Federal Tax Rate) + (Table C, Column (10) after allocation of Engineering x Salvage %).

4/ Column (4) - (Present Value of the remaining tax deductions for depreciation, interest expense and the Present Value of any salvage).

5/ Column (6) + [(Column (6) / ((1 + Real Cost of Capital)^Column (3) - 1)].

6/ Column (7) / ((1 + Average Nominal Cost of Capital from Table A Column (2))^Column (3)).

**TABLE G PART 1: TAX DEPRECIATION SCHEDULES**

Depreciation of Start-up investment for tax purposes using accounting lives from Modified Accelerated Cost Recovery System (MACRS) 1/

<u>Road Property Account</u> (1)	<u>Road Property Component</u> (2)	<u>Asset Lives Per MACRS 2/</u> (3)	<u>Total 1Q 2015 Investment</u> (4)	<u>Depreciable Base</u> (5)
1	Engineering	5	\$38,544,106	\$38,544,106
2	Land	N/A	\$94,896,474	\$0
3	Grading	50	\$44,672,907	\$44,672,907
5	Tunnels	50	\$0	\$0
6	Bridges & Culverts	20	\$70,530,607	\$70,530,607
8	Ties	7	\$58,429,106	\$58,429,106
9	Rails and OTM	7	\$81,902,330	\$81,902,330
11	Ballast	7	\$50,433,797	\$50,433,797
12	Labor	7	\$46,905,752	\$46,905,752
13	Fences and Roadway Signs	20	\$99,870	\$99,870
16	Stations and Office Buildings	20	\$2,329,238	\$2,329,238
17	Roadway Buildings	20	\$1,551,313	\$1,551,313
19	Fuel Stations	20	\$0	\$0
20	Shops and Enginehouses	20	\$2,703,941	\$2,703,941
26	Communications Systems	7	\$11,860,271	\$11,860,271
27	Signals and Interlockers	7	\$34,379,619	\$34,379,619
39	Public Improvements	20	\$12,412,198	\$12,412,198
<b>Total</b>			<b>\$551,651,530</b>	<b>\$456,755,056</b>

1/ Applicable Depreciation Method: 200 or 150 percent Declining Balance Switching to Straight Line  
Applicable Recovery Periods: 7, 20 and 50 a/ years  
Applicable Convention: Mid-quarter(property placed in service in first quarter)

The Depreciation Rates are as follows for the corresponding Recovery Period and Recovery year:

<u>Year</u>	<u>5-Year</u>	<u>7-Year</u>	<u>20-Year</u>	<u>50-Year a/</u>
1	20.00%	25.00%	6.56%	2.00%
2	20.00%	21.43%	7.00%	2.00%
3	20.00%	15.31%	6.48%	2.00%
4	20.00%	10.93%	6.00%	2.00%
5	20.00%	8.75%	5.55%	2.00%
6		8.74%	5.13%	2.00%
7		8.75%	4.75%	2.00%
8		1.09%	4.46%	2.00%
9			4.46%	2.00%
10			4.46%	2.00%
11			4.46%	2.00%
12			4.46%	2.00%
13			4.46%	2.00%
14			4.46%	2.00%
15			4.46%	2.00%
16			4.46%	2.00%
17			4.46%	2.00%
18			4.46%	2.00%
19			4.46%	2.00%
20			4.46%	19-50
21			0.57%	

a/ 50 year property uses the Straight Line Method for all time periods

2/ Bonus Depreciation Per the Tax Relief, Unemployment Compensation Reauthorization, and Job Creation Act of 2010, the American Taxpayer Relief Act of 2012 and the Tax Increase Prevention Act of 2014.

<u>MARCS Lives</u>	<u>Bonus Depreciation - 50%</u>
7	\$141,955,438
20	\$44,813,584

**TABLE G PART 2: TAX DEPRECIATION SCHEDULES**

Road Property													
Year	Amortization - 5 Years			Depreciation - MACRS 7 Years			Depreciation - MACRS 20 Years			Depreciation - MACRS 50 Years			Total
	Unamortized Investment 1/	Rate 2/	Annual Amort. 3/	Undepreciated Investment 4/	Rate 2/	Annual Amount 5/	Undepreciated Investment 6/	Rate 2/	Annual Amount 7/	Unamortized Investment 8/	Rate 2/	Annual Amount 9/	Annual Depreciation 10/
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)
1	\$38,544,106	20.00%	\$7,708,821	\$141,955,438	25.00%	\$35,488,859	\$44,813,584	6.56%	\$2,941,116	\$44,672,907	2%	\$893,458	\$233,801,276
2	\$30,835,285	20.00%	\$7,708,821	\$106,466,578	21.43%	\$30,421,050	\$41,872,468	7.00%	\$3,136,951	\$43,779,449	2%	\$893,458	\$42,160,280
3	\$23,126,463	20.00%	\$7,708,821	\$76,045,528	15.31%	\$21,733,378	\$38,735,517	6.48%	\$2,904,817	\$42,885,991	2%	\$893,458	\$33,240,473
4	\$15,417,642	20.00%	\$7,708,821	\$54,312,150	10.93%	\$15,515,729	\$35,830,701	6.00%	\$2,687,022	\$41,992,533	2%	\$893,458	\$26,805,031
5	\$7,708,821	20.00%	\$7,708,821	\$38,796,421	8.75%	\$12,421,101	\$33,143,678	5.55%	\$2,485,361	\$41,099,074	2%	\$893,458	\$23,508,741
6				\$26,375,320	8.74%	\$12,406,905	\$30,658,317	5.13%	\$2,298,937	\$40,205,616	2%	\$893,458	\$15,599,300
7				\$13,968,415	8.75%	\$12,421,101	\$28,359,380	4.75%	\$2,126,853	\$39,312,158	2%	\$893,458	\$15,441,412
8				\$1,547,314	1.09%	\$1,547,314	\$26,232,528	4.46%	\$1,998,238	\$38,418,700	2%	\$893,458	\$4,439,010
9							\$24,234,290	4.46%	\$1,998,238	\$37,525,242	2%	\$893,458	\$2,891,696
10					100%		\$22,236,052	4.46%	\$1,998,238	\$36,631,784	2%	\$893,458	\$2,891,696
11							\$20,237,814	4.46%	\$1,998,238	\$35,738,326	2%	\$893,458	\$2,891,696
12							\$18,239,577	4.46%	\$1,998,686	\$34,844,867	2%	\$893,458	\$2,892,144
13							\$16,240,891	4.46%	\$1,998,238	\$33,951,409	2%	\$893,458	\$2,891,696
14							\$14,242,653	4.46%	\$1,998,686	\$33,057,951	2%	\$893,458	\$2,892,144
15							\$12,243,967	4.46%	\$1,998,238	\$32,164,493	2%	\$893,458	\$2,891,696
16							\$10,245,730	4.46%	\$1,998,686	\$31,271,035	2%	\$893,458	\$2,892,144
17							\$8,247,044	4.46%	\$1,998,238	\$30,377,577	2%	\$893,458	\$2,891,696
18							\$6,248,806	4.46%	\$1,998,686	\$29,484,119	2%	\$893,458	\$2,892,144
19							\$4,250,120	4.46%	\$1,998,238	\$28,590,661	2%	\$893,458	\$2,891,696
20							\$2,251,883	4.46%	\$1,998,686	\$27,697,202	2%	\$893,458	\$2,892,144
21							\$253,197	0.57%	\$253,197	\$26,803,744	2%	\$893,458	\$1,146,655
22										\$25,910,286	2%	\$893,458	\$893,458
23								100%		\$25,016,828	2%	\$893,458	\$893,458
24										\$24,123,370	2%	\$893,458	\$893,458
25										\$23,229,912	2%	\$893,458	\$893,458
26										\$22,336,454	2%	\$893,458	\$893,458
27										\$21,442,995	2%	\$893,458	\$893,458
28										\$20,549,537	2%	\$893,458	\$893,458
29										\$19,656,079	2%	\$893,458	\$893,458
30										\$18,762,621	2%	\$893,458	\$893,458
31										\$17,869,163	2%	\$893,458	\$893,458
32										\$16,975,705	2%	\$893,458	\$893,458
33										\$16,082,247	2%	\$893,458	\$893,458
34										\$15,188,788	2%	\$893,458	\$893,458
35										\$14,295,330	2%	\$893,458	\$893,458
36										\$13,401,872	2%	\$893,458	\$893,458
37										\$12,508,414	2%	\$893,458	\$893,458
38										\$11,614,956	2%	\$893,458	\$893,458
39										\$10,721,498	2%	\$893,458	\$893,458
40										\$9,828,040	2%	\$893,458	\$893,458
41										\$8,934,581	2%	\$893,458	\$893,458
42										\$8,041,123	2%	\$893,458	\$893,458
43										\$7,147,665	2%	\$893,458	\$893,458
44										\$6,254,207	2%	\$893,458	\$893,458
45										\$5,360,749	2%	\$893,458	\$893,458

**TABLE G PART 2: TAX DEPRECIATION SCHEDULES**

Year	Amortization - 5 Years			Road Property Depreciation - MACRS 7 Years			Depreciation - MACRS 20 Years			Depreciation - MACRS 50 Years			Total
	Unamortized		Annual	Undepreciated		Annual	Undepreciated		Annual	Unamortized		Annual	Annual
	Investment 1/ (2)	Rate 2/ (3)	Amort. 3/ (4)	Investment 4/ (5)	Rate 2/ (6)	Amount 5/ (7)	Investment 6/ (8)	Rate 2/ (9)	Amount 7/ (10)	Investment 8/ (11)	Rate 2/ (12)	Amount 9/ (13)	Depreciation 10/ (14)
46										\$4,467,291	2%	\$893,458	\$893,458
47										\$3,573,833	2%	\$893,458	\$893,458
48										\$2,680,374	2%	\$893,458	\$893,458
49										\$1,786,916	2%	\$893,458	\$893,458
50										\$893,458	2%	\$893,458	\$893,458
											100%		

1/ From Table G Part 1, Column (5), Road Property Accounts 1 minus Table G Part 1

2/ From Table G, Footnote 1/, Page 8.

3/ Column (2), Year 1 x Column (3).

4/ From Table G Part 1, Column (5), Road Property Accounts 8, 9, 11, 12, 26 and 27 minus Table G Part 1, 7-Year Bonus Depreciation.

5/ Column (5), Year 1 x Column (6).

6/ From Table G Part 1, Column (5), Road Property Accounts 6, 13, 16, 17, 19, 20 and 39 minus Table G Part 1, 20-Year Bonus Depreciation.

7/ Column (8), Year 1 x Column (9).

8/ From Table G, Page 8, Column (5), Road Property Accounts 3 and 5.

9/ Column (11), Year 1 x Column (12).

10/ Column (4) + Column (7) + Column (10) + Column (13) plus Page 8, 7 & 20 Year Bonus Depreciation.

**TABLE H: CERR AVERAGE ANNUAL INFLATION IN ASSET PRICES**

Development of average annual inflation factors for all capital assets

1. 1Q 2015 Land value	\$94,896,474 1/
2. 1Q 2015 Property asset value accounts 3, 5, 6, 13, 16, 17, 26, 27, 39 and 52	\$180,539,965 1/
3. 1Q 2015 Road Property asset value accounts 8, 9, and 11	\$190,765,233 1/
4. 1Q 2015 Road Property asset value accounts 1 and 12	\$85,449,858 1/

Period (1)	Quarter (2)	Inflation Index For Land 2/ Land 2/ (3)	Inflation Index For Line 2 Property Assets 3/ Assets 3/ (4)	Inflation Index For Line 3 Road Property Assets 4/ Assets 4/ (5)	Inflation Index For Line 4 Road Property Assets 5/ Assets 5/ (6)	Land Value 6/ Value 6/ (7)	Road Property Value 7/ Value 7/ (8)	1Q 2015 Inflation Index 8/ Index 8/ (9)
0		1.000	1.000	1.000	1.000	\$94,896,474	\$456,755,056	1.000
1	1Q 2015	1.032	1.020	0.944	1.032	\$97,963,575	\$452,386,881	0.998
2	2Q 2015	1.065	1.025	0.938	1.039	\$101,046,423	\$452,817,957	1.004
3	3Q 2015	1.086	1.022	0.927	1.037	\$103,040,339	\$449,862,787	1.002
4	4Q 2015	1.104	1.026	0.944	1.039	\$104,791,711	\$454,064,233	1.013
5	1Q 2016	1.117	1.021	0.908	1.040	\$105,967,440	\$446,419,729	1.001
6	2Q 2016	1.129	1.019	0.908	1.037	\$107,156,727	\$445,694,829	1.002
7	3Q 2016	1.142	1.025	0.913	1.043	\$108,359,735	\$448,368,998	1.009
8	4Q 2016	1.155	1.033	0.928	1.049	\$109,576,625	\$453,118,573	1.020
9	1Q 2017	1.168	1.043	0.929	1.062	\$110,807,564	\$456,257,346	1.028
10	2Q 2017	1.181	1.051	0.939	1.069	\$112,052,717	\$460,289,021	1.038
11	3Q 2017	1.194	1.061	0.956	1.078	\$113,312,254	\$466,087,990	1.050
12	4Q 2017	1.207	1.069	0.960	1.086	\$114,586,346	\$468,955,870	1.058
13	1Q 2018	1.221	1.079	0.970	1.096	\$115,875,165	\$473,608,824	1.069
14	2Q 2018	1.235	1.089	0.981	1.106	\$117,178,888	\$478,186,364	1.079
15	3Q 2018	1.249	1.099	0.991	1.116	\$118,497,692	\$482,808,406	1.090
16	4Q 2018	1.263	1.109	1.001	1.126	\$119,831,755	\$487,475,386	1.101
17	1Q 2019	1.277	1.119	1.011	1.135	\$121,181,260	\$491,731,779	1.111
18	2Q 2019	1.291	1.128	1.020	1.145	\$122,546,392	\$496,025,387	1.121
19	3Q 2019	1.306	1.138	1.029	1.154	\$123,927,335	\$500,356,534	1.132
20	4Q 2019	1.321	1.147	1.038	1.164	\$125,324,279	\$504,725,550	1.142
21	1Q 2020	1.336	1.157	1.046	1.174	\$126,737,414	\$508,857,092	1.152
22	2Q 2020	1.351	1.167	1.054	1.184	\$128,166,934	\$513,022,545	1.162
23	3Q 2020	1.366	1.177	1.062	1.194	\$129,613,034	\$517,222,188	1.173
24	4Q 2020	1.381	1.187	1.071	1.205	\$131,075,912	\$521,456,303	1.183
25	1Q 2021	1.397	1.198	1.080	1.216	\$132,555,769	\$526,165,133	1.194
26	2Q 2021	1.413	1.209	1.089	1.227	\$134,052,807	\$530,916,537	1.205
27	3Q 2021	1.429	1.220	1.099	1.239	\$135,567,232	\$535,710,900	1.217
28	4Q 2021	1.445	1.231	1.108	1.250	\$137,099,252	\$540,548,612	1.228
29	1Q 2022	1.461	1.242	1.117	1.262	\$138,649,077	\$545,105,895	1.239
30	2Q 2022	1.478	1.253	1.126	1.273	\$140,216,920	\$549,701,697	1.251
31	3Q 2022	1.494	1.264	1.135	1.284	\$141,802,997	\$554,336,345	1.262
32	4Q 2022	1.511	1.275	1.144	1.295	\$143,407,526	\$559,010,168	1.273
33	1Q 2023	1.528	1.286	1.152	1.307	\$145,030,729	\$563,524,204	1.284
34	2Q 2023	1.546	1.296	1.161	1.318	\$146,672,828	\$568,074,849	1.296
35	3Q 2023	1.563	1.307	1.169	1.329	\$148,334,051	\$572,662,401	1.307
36	4Q 2023	1.581	1.318	1.178	1.341	\$150,014,627	\$577,287,162	1.318
37	1Q 2024	1.599	1.329	1.186	1.352	\$151,714,787	\$581,819,497	1.330
38	2Q 2024	1.617	1.340	1.194	1.364	\$153,434,768	\$586,387,736	1.341
39	3Q 2024	1.635	1.352	1.203	1.376	\$155,174,807	\$590,992,165	1.353
40	4Q 2024	1.654	1.363	1.211	1.388	\$156,935,144	\$595,633,075	1.364

Annual Average 9/

3.48%

1/ Table C, Page 3, Column (10).  
2/ Previous Column (3) x (1 + Quarterly Inflation Rate Change from Table B).  
3/ Previous Column (4) x (1 + Quarterly Inflation Rate Change from Table B).  
4/ Previous Column (5) x (1 + Quarterly Inflation Rate Change from Table B).  
5/ Previous Column (6) x (1 + Quarterly Inflation Rate Change from Table B).  
6/ Line 1 x Column (3) for applicable quarter.  
7/ (Line 2 x Column (4) for applicable quarter) + (Line 3 x Column (5) for applicable quarter) + (Line 4 x Column (6) for applicable quarter).  
8/ (Column (7) + Column (8)) ÷ (Period 0; (Column (7) + Column (8))).  
9/ Annual weighted inflation using the last two quarters, used to calculate real cost of capital.



**TABLE I: CERR DISCOUNTED CASH FLOW**

Discounted Cash Flow  
Present Value of the Cash Flow Discounted at the Cost of Capital in Table A  
Inflation In Asset Values From Table H

1. 1Q 2015 Road Property Investment	\$551,651,530 1/	Federal Tax Rate	35.0%
2. Interest During Construction (1Q 2015 Invest.)	\$71,572,895 2/		
3. Total 1Q 2015 Investment	\$623,224,424 3/	Route Mile Weighted	
4. Present Value Of Replacement Cost for the CERR	\$41,941,354 4/	Average State Tax Rate	6.38% 6/
5. Total Cost Recovered From Quarterly Revenue Flow	\$665,165,778 5/		

Period	Quarter	Quarterly Levelized C Carrying Charge Requirement 6/	Interest on Investment Financed With Debt 7/	Tax Depreciation 8/	Actual Federal Tax Payments 9/	Actual State Tax Payments 10/	Cash Flow 11/	Present Value Cash Flow 12/	Cumulative Present Value 13/
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1	1Q 2015	\$14,996,787	\$978,723	\$58,450,319	\$0	\$0	\$14,996,787	\$14,825,125	\$14,825,125
2	2Q 2015	\$15,092,539	\$978,723	\$58,450,319	\$0	\$0	\$15,092,539	\$14,580,177	\$29,405,302
3	3Q 2015	\$15,066,346	\$978,723	\$58,450,319	\$0	\$0	\$15,066,346	\$14,223,573	\$43,628,874
4	4Q 2015	\$15,228,557	\$978,723	\$58,450,319	\$0	\$0	\$15,228,557	\$14,049,467	\$57,678,341
5	1Q 2016	\$15,052,286	\$978,723	\$10,540,070	\$0	\$0	\$15,052,286	\$13,553,245	\$71,231,586
6	2Q 2016	\$15,064,941	\$978,723	\$10,540,070	\$0	\$0	\$15,064,941	\$13,221,703	\$84,453,289
7	3Q 2016	\$15,170,592	\$978,723	\$10,540,070	\$0	\$0	\$15,170,592	\$12,977,818	\$97,431,107
8	4Q 2016	\$15,333,175	\$978,723	\$10,540,070	\$0	\$0	\$15,333,175	\$12,785,285	\$110,216,392
9	1Q 2017	\$15,452,248	\$978,723	\$8,310,118	\$0	\$0	\$15,452,248	\$12,558,829	\$122,775,221
10	2Q 2017	\$15,596,039	\$978,723	\$8,310,118	\$0	\$0	\$15,596,039	\$12,355,233	\$135,130,454
11	3Q 2017	\$15,788,380	\$978,723	\$8,310,118	\$0	\$0	\$15,788,380	\$12,191,394	\$147,321,848
12	4Q 2017	\$15,901,246	\$978,723	\$8,310,118	\$0	\$0	\$15,901,246	\$11,968,126	\$159,289,974
13	1Q 2018	\$16,063,157	\$978,723	\$6,701,258	\$0	\$0	\$16,063,157	\$11,784,334	\$171,074,309
14	2Q 2018	\$16,223,418	\$978,723	\$6,701,258	\$0	\$0	\$16,223,418	\$11,601,007	\$182,675,316
15	3Q 2018	\$16,385,304	\$978,723	\$6,701,258	\$0	\$0	\$16,385,304	\$11,420,549	\$194,095,865
16	4Q 2018	\$16,548,829	\$978,723	\$6,701,258	\$0	\$0	\$16,548,829	\$11,242,915	\$205,338,780
17	1Q 2019	\$16,701,587	\$978,723	\$5,877,185	\$0	\$0	\$16,701,587	\$11,059,833	\$216,398,613
18	2Q 2019	\$16,855,785	\$978,723	\$5,877,185	\$0	\$0	\$16,855,785	\$10,879,752	\$227,278,364
19	3Q 2019	\$17,011,437	\$978,723	\$5,877,185	\$0	\$0	\$17,011,437	\$10,702,621	\$237,980,986
20	4Q 2019	\$17,168,556	\$978,723	\$5,877,185	\$0	\$0	\$17,168,556	\$10,528,394	\$248,509,379
21	1Q 2020	\$17,319,646	\$978,723	\$3,899,825	\$0	\$0	\$17,319,646	\$10,352,530	\$258,861,910
22	2Q 2020	\$17,472,107	\$978,723	\$3,899,825	\$0	\$0	\$17,472,107	\$10,179,629	\$269,041,538
23	3Q 2020	\$17,625,950	\$978,723	\$3,899,825	\$0	\$0	\$17,625,950	\$10,009,638	\$279,051,177
24	4Q 2020	\$17,781,191	\$978,723	\$3,899,825	\$0	\$0	\$17,781,191	\$9,842,509	\$288,893,686
25	1Q 2021	\$17,949,830	\$978,723	\$3,860,353	\$0	\$0	\$17,949,830	\$9,684,663	\$298,578,349
26	2Q 2021	\$18,120,097	\$978,723	\$3,860,353	\$3,444,213	\$670,654	\$14,005,230	\$7,365,353	\$305,943,702
27	3Q 2021	\$18,292,008	\$978,723	\$3,860,353	\$4,408,107	\$858,342	\$13,025,559	\$6,676,962	\$312,620,663
28	4Q 2021	\$18,465,580	\$978,723	\$3,860,353	\$4,464,981	\$869,417	\$13,131,183	\$6,560,932	\$319,181,595
29	1Q 2022	\$18,631,996	\$978,723	\$1,109,753	\$5,420,796	\$1,055,532	\$12,155,668	\$5,919,972	\$325,101,567
30	2Q 2022	\$18,799,952	\$978,723	\$1,109,753	\$5,475,830	\$1,066,249	\$12,257,874	\$5,818,823	\$330,920,390
31	3Q 2022	\$18,969,464	\$978,723	\$1,109,753	\$5,531,374	\$1,077,064	\$12,361,026	\$5,719,443	\$336,639,833
32	4Q 2022	\$19,140,546	\$978,723	\$1,109,753	\$5,587,432	\$1,087,980	\$12,465,135	\$5,621,799	\$342,261,632
33	1Q 2023	\$19,307,783	\$978,723	\$722,924	\$5,768,982	\$1,123,331	\$12,415,470	\$5,457,839	\$347,719,470
34	2Q 2023	\$19,476,532	\$978,723	\$722,924	\$5,824,276	\$1,134,098	\$12,518,159	\$5,363,856	\$353,083,326
35	3Q 2023	\$19,646,809	\$978,723	\$722,924	\$5,880,070	\$1,144,962	\$12,621,777	\$5,271,526	\$358,354,852
36	4Q 2023	\$19,818,626	\$978,723	\$722,924	\$5,936,369	\$1,155,924	\$12,726,332	\$5,180,817	\$363,535,669
37	1Q 2024	\$19,988,458	\$978,723	\$722,924	\$5,992,018	\$1,166,760	\$12,829,680	\$5,090,847	\$368,626,516
38	2Q 2024	\$20,159,809	\$978,723	\$722,924	\$6,048,164	\$1,177,693	\$12,933,952	\$5,002,471	\$373,628,987
39	3Q 2024	\$20,332,693	\$978,723	\$722,924	\$6,104,813	\$1,188,724	\$13,039,157	\$4,915,662	\$378,544,649
40	4Q 2024	\$20,507,124	\$978,723	\$722,924	\$6,161,969	\$1,199,853	\$13,145,303	\$4,830,391	\$383,375,040
	Future	\$1,209,434,715	\$57,721,457	\$21,169,164	\$370,444,050	\$72,132,522	\$766,858,142	\$281,790,738	\$665,165,778

1/ From Table C, Column (10) + Repaving and Rail Grinding Capital Costs from []  
2/ From Table D, Column (8).  
3/ Line 1 + Line 2.  
4/ Table F Column (8).  
5/ Line 3 + Line 4.  
6/ Michigan, Illinois, and Indiana corporate income tax rates weighted on CERR route miles.  
7/ Quarterly carrying costs needed to recover the total investment over 40 quarters after consideration of the applicable interest payments, tax depreciation and tax liability. The Future value is an estimate of a perpetual income stream for the CERR and is calculated by taking the Period 40, Column (3) value and dividing it by the CERR's estimated quarterly Real Cost of Capital.  
8/ Value from Table E.  
9/ Value from Table G - Part 2, Column (14) divided by 4 quarters.  
10/ Table J: Part 1.  
11/ Table J: Part 2.  
12/ (Column (3) - Column (6) - Column (7)).  
13/ Column (8) discounted by the fourth root of the annual Cost of Capital adjusted to Midquarter dollars from Table A. Cumulative total of Column (9).

**TABLE J - PART 1: COMPUTATION OF FEDERAL TAX LIABILITY - TAXABLE INCOME**

**(Road Property)**

<u>Time Period</u> (1)	<u>Taxable Income B/4 NOL's IRR 1/</u> (2)	<u>Net Operating Losses Generated 2/</u> (3)	<u>NOL's Generated Plus Carryforward 3/</u> (4)	<u>Carryforward Utilized 4/</u> (5)	<u>Carryforward Remaining 5/</u> (6)	<u>Carryback Available 6/</u> (7)	<u>Carryback Utilized 7/</u> (8)	<u>Carryback Remaining 8/</u> (9)	<u>Annual Taxable Income 9/</u> (10)	<u>Annual Tax Liability 10/</u> (11)
2012	(\$58,709)	(\$58,709)	(\$58,709)	\$0	(\$58,709)	(\$58,709)	\$0	(\$58,709)	\$0	\$0
2013	(\$1,143,589)	(\$1,143,589)	(\$1,202,298)	\$0	(\$1,202,298)	(\$1,202,298)	\$0	(\$1,202,298)	\$0	\$0
2014	(\$2,973,874)	(\$2,973,874)	(\$4,176,172)	\$0	(\$4,176,172)	(\$4,176,172)	\$0	(\$4,176,172)	\$0	\$0
1Q 2015	(\$44,432,255)	(\$44,432,255)	(\$48,608,427)	\$0	(\$48,608,427)	(\$48,608,427)	\$0	(\$48,608,427)	\$0	\$0
2Q 2015	(\$44,336,502)	(\$44,336,502)	(\$92,944,929)	\$0	(\$92,944,929)	(\$92,944,929)	\$0	(\$92,944,929)	\$0	\$0
3Q 2015	(\$44,362,696)	(\$44,362,696)	(\$137,307,625)	\$0	(\$137,307,625)	(\$137,307,625)	\$0	(\$137,307,625)	\$0	\$0
4Q 2015	(\$44,200,484)	(\$44,200,484)	(\$181,508,109)	\$0	(\$181,508,109)	(\$181,508,109)	\$0	(\$181,508,109)	\$0	\$0
1Q 2016	\$3,533,493	\$0	(\$181,508,109)	\$3,533,493	(\$177,974,615)	(\$177,974,615)	\$0	(\$177,974,615)	\$0	\$0
2Q 2016	\$3,546,148	\$0	(\$177,974,615)	\$3,546,148	(\$174,428,468)	(\$174,428,468)	\$0	(\$174,428,468)	\$0	\$0
3Q 2016	\$3,651,799	\$0	(\$174,428,468)	\$3,651,799	(\$170,776,669)	(\$170,776,669)	\$0	(\$170,776,669)	\$0	\$0
4Q 2016	\$3,814,382	\$0	(\$170,776,669)	\$3,814,382	(\$166,962,286)	(\$166,962,286)	\$0	(\$166,962,286)	\$0	\$0
1Q 2017	\$6,163,407	\$0	(\$166,962,286)	\$6,163,407	(\$160,798,880)	(\$160,798,880)	\$0	(\$160,798,880)	\$0	\$0
2Q 2017	\$6,307,198	\$0	(\$160,798,880)	\$6,307,198	(\$154,491,682)	(\$154,491,682)	\$0	(\$154,491,682)	\$0	\$0
3Q 2017	\$6,499,539	\$0	(\$154,491,682)	\$6,499,539	(\$147,992,143)	(\$147,992,143)	\$0	(\$147,992,143)	\$0	\$0
4Q 2017	\$6,612,405	\$0	(\$147,992,143)	\$6,612,405	(\$141,379,738)	(\$141,379,738)	\$0	(\$141,379,738)	\$0	\$0
1Q 2018	\$8,383,176	\$0	(\$141,379,738)	\$8,383,176	(\$132,996,561)	(\$132,996,561)	\$0	(\$132,996,561)	\$0	\$0
2Q 2018	\$8,543,438	\$0	(\$132,996,561)	\$8,543,438	(\$124,453,123)	(\$124,453,123)	\$0	(\$124,453,123)	\$0	\$0
3Q 2018	\$8,705,323	\$0	(\$124,453,123)	\$8,705,323	(\$115,747,800)	(\$115,747,800)	\$0	(\$115,747,800)	\$0	\$0
4Q 2018	\$8,868,849	\$0	(\$115,747,800)	\$8,868,849	(\$106,878,951)	(\$106,878,951)	\$0	(\$106,878,951)	\$0	\$0
1Q 2019	\$9,845,679	\$0	(\$106,878,951)	\$9,845,679	(\$97,033,272)	(\$97,033,272)	\$0	(\$97,033,272)	\$0	\$0
2Q 2019	\$9,999,877	\$0	(\$97,033,272)	\$9,999,877	(\$87,033,395)	(\$87,033,395)	\$0	(\$87,033,395)	\$0	\$0
3Q 2019	\$10,155,529	\$0	(\$87,033,395)	\$10,155,529	(\$76,877,866)	(\$76,877,866)	\$0	(\$76,877,866)	\$0	\$0
4Q 2019	\$10,312,649	\$0	(\$76,877,866)	\$10,312,649	(\$66,565,217)	(\$66,565,217)	\$0	(\$66,565,217)	\$0	\$0
1Q 2020	\$12,441,099	\$0	(\$66,565,217)	\$12,441,099	(\$54,124,119)	(\$54,124,119)	\$0	(\$54,124,119)	\$0	\$0
2Q 2020	\$12,593,559	\$0	(\$54,124,119)	\$12,593,559	(\$41,530,560)	(\$41,530,560)	\$0	(\$41,530,560)	\$0	\$0
3Q 2020	\$12,747,403	\$0	(\$41,530,560)	\$12,747,403	(\$28,783,157)	(\$28,783,157)	\$0	(\$28,783,157)	\$0	\$0
4Q 2020	\$12,902,643	\$0	(\$28,783,157)	\$12,902,643	(\$15,880,514)	(\$15,880,514)	\$0	(\$15,880,514)	\$0	\$0
1Q 2021	\$13,110,754	\$0	(\$15,880,514)	\$13,110,754	(\$2,769,760)	(\$2,769,760)	\$0	(\$2,769,760)	\$0	\$0
2Q 2021	\$12,610,367	\$0	(\$2,769,760)	\$2,769,760	\$0	\$0	\$0	\$0	\$9,840,607	\$3,444,213
3Q 2021	\$12,594,590	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$12,594,590	\$4,408,107
4Q 2021	\$12,757,088	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$12,757,088	\$4,464,981
1Q 2022	\$15,487,988	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$15,487,988	\$5,420,796
2Q 2022	\$15,645,229	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$15,645,229	\$5,475,830
3Q 2022	\$15,803,925	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$15,803,925	\$5,531,374
4Q 2022	\$15,964,092	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$15,964,092	\$5,587,432
1Q 2023	\$16,482,806	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$16,482,806	\$5,768,982
2Q 2023	\$16,640,788	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$16,640,788	\$5,824,276
3Q 2023	\$16,800,200	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$16,800,200	\$5,880,070
4Q 2023	\$16,961,055	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$16,961,055	\$5,936,369
1Q 2024	\$17,120,052	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$17,120,052	\$5,992,018
2Q 2024	\$17,280,470	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$17,280,470	\$6,048,164
3Q 2024	\$17,442,323	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$17,442,323	\$6,104,813

**TABLE J - PART 1: COMPUTATION OF FEDERAL TAX LIABILITY - TAXABLE INCOME**

(Road Property)

<u>Time Period</u> (1)	<u>Taxable Income B/4 NOL's IRR 1/</u> (2)	<u>Net Operating Losses Generated 2/</u> (3)	<u>NOL's Generated Plus Carryforward 3/</u> (4)	<u>Carryforward Utilized 4/</u> (5)	<u>Carryforward Remaining 5/</u> (6)	<u>Carryback Available 6/</u> (7)	<u>Carryback Utilized 7/</u> (8)	<u>Carryback Remaining 8/</u> (9)	<u>Annual Taxable Income 9/</u> (10)	<u>Annual Tax Liability 10/</u> (11)
4Q 2024	\$17,605,625	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$17,605,625	\$6,161,969
Future	\$1,058,411,572	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$1,058,411,572	\$370,444,050

1/ Table I Column (3) - Table E Columns (2),(4) & (6) - Table G, Column (14) / 4 - Table J - Part 2, Column (11). Values for 2012 from Table D, Sum of Column (10).

2/ Column (2) if less than zero, otherwise zero.

3/ Cumulative total of Column (2).

4/ If Column (2) is greater than zero, and (Column (2) + Column (4)) is less than zero, then Column (2), otherwise Column (4).

5/ Column (4) + Column (5) + Column (8).

6/ Previous period Column (9) + current period Column (3) - current period Column (5).

7/ If previous Column (10) is greater than zero, and previous Column (10) is less than current Column (7), then previous Column (10), otherwise zero.

8/ Column (7) + Column (8).

9/ If Column (2) is greater than zero, then Column (2) - Column (5) - Column (8), otherwise zero.

10/ Column (10) times applicable Federal Statutory Tax Rate.

**TABLE J - PART 2: COMPUTATION OF STATE TAX LIABILITY - TAXABLE INCOME**

**(Road Property)**

<u>Time Period</u> (1)	<u>Taxable Income B/4 NOL's IRR 1/</u> (2)	<u>Net Operating Losses Generated 2/</u> (3)	<u>NOL's Generated Plus Carryforward 3/</u> (4)	<u>Carryforward Utilized 4/</u> (5)	<u>Carryforward Remaining 5/</u> (6)	<u>Carryback Available 6/</u> (7)	<u>Carryback Utilized 7/</u> (8)	<u>Carryback Remaining 8/</u> (9)	<u>Annual Taxable Income 9/</u> (10)	<u>Annual Tax Liability 10/</u> (11)
2012	(\$58,709)	(\$58,709)	(\$58,709)	\$0	(\$58,709)	(\$58,709)	\$0	(\$58,709)	\$0	\$0
2013	(\$1,143,589)	(\$1,143,589)	(\$1,202,298)	\$0	(\$1,202,298)	(\$1,202,298)	\$0	(\$1,202,298)	\$0	\$0
2014	(\$2,973,874)	(\$2,973,874)	(\$4,176,172)	\$0	(\$4,176,172)	(\$4,176,172)	\$0	(\$4,176,172)	\$0	\$0
1Q 2015	(\$44,432,255)	(\$44,432,255)	(\$48,608,427)	\$0	(\$48,608,427)	(\$48,608,427)	\$0	(\$48,608,427)	\$0	\$0
2Q 2015	(\$44,336,502)	(\$44,336,502)	(\$92,944,929)	\$0	(\$92,944,929)	(\$92,944,929)	\$0	(\$92,944,929)	\$0	\$0
3Q 2015	(\$44,362,696)	(\$44,362,696)	(\$137,307,625)	\$0	(\$137,307,625)	(\$137,307,625)	\$0	(\$137,307,625)	\$0	\$0
4Q 2015	(\$44,200,484)	(\$44,200,484)	(\$181,508,109)	\$0	(\$181,508,109)	(\$181,508,109)	\$0	(\$181,508,109)	\$0	\$0
1Q 2016	\$3,533,493	\$0	(\$181,508,109)	\$3,533,493	(\$177,974,615)	(\$177,974,615)	\$0	(\$177,974,615)	\$0	\$0
2Q 2016	\$3,546,148	\$0	(\$177,974,615)	\$3,546,148	(\$174,428,468)	(\$174,428,468)	\$0	(\$174,428,468)	\$0	\$0
3Q 2016	\$3,651,799	\$0	(\$174,428,468)	\$3,651,799	(\$170,776,669)	(\$170,776,669)	\$0	(\$170,776,669)	\$0	\$0
4Q 2016	\$3,814,382	\$0	(\$170,776,669)	\$3,814,382	(\$166,962,286)	(\$166,962,286)	\$0	(\$166,962,286)	\$0	\$0
1Q 2017	\$6,163,407	\$0	(\$166,962,286)	\$6,163,407	(\$160,798,880)	(\$160,798,880)	\$0	(\$160,798,880)	\$0	\$0
2Q 2017	\$6,307,198	\$0	(\$160,798,880)	\$6,307,198	(\$154,491,682)	(\$154,491,682)	\$0	(\$154,491,682)	\$0	\$0
3Q 2017	\$6,499,539	\$0	(\$154,491,682)	\$6,499,539	(\$147,992,143)	(\$147,992,143)	\$0	(\$147,992,143)	\$0	\$0
4Q 2017	\$6,612,405	\$0	(\$147,992,143)	\$6,612,405	(\$141,379,738)	(\$141,379,738)	\$0	(\$141,379,738)	\$0	\$0
1Q 2018	\$8,383,176	\$0	(\$141,379,738)	\$8,383,176	(\$132,996,561)	(\$132,996,561)	\$0	(\$132,996,561)	\$0	\$0
2Q 2018	\$8,543,438	\$0	(\$132,996,561)	\$8,543,438	(\$124,453,123)	(\$124,453,123)	\$0	(\$124,453,123)	\$0	\$0
3Q 2018	\$8,705,323	\$0	(\$124,453,123)	\$8,705,323	(\$115,747,800)	(\$115,747,800)	\$0	(\$115,747,800)	\$0	\$0
4Q 2018	\$8,868,849	\$0	(\$115,747,800)	\$8,868,849	(\$106,878,951)	(\$106,878,951)	\$0	(\$106,878,951)	\$0	\$0
1Q 2019	\$9,845,679	\$0	(\$106,878,951)	\$9,845,679	(\$97,033,272)	(\$97,033,272)	\$0	(\$97,033,272)	\$0	\$0
2Q 2019	\$9,999,877	\$0	(\$97,033,272)	\$9,999,877	(\$87,033,395)	(\$87,033,395)	\$0	(\$87,033,395)	\$0	\$0
3Q 2019	\$10,155,529	\$0	(\$87,033,395)	\$10,155,529	(\$76,877,866)	(\$76,877,866)	\$0	(\$76,877,866)	\$0	\$0
4Q 2019	\$10,312,649	\$0	(\$76,877,866)	\$10,312,649	(\$66,565,217)	(\$66,565,217)	\$0	(\$66,565,217)	\$0	\$0
1Q 2020	\$12,441,099	\$0	(\$66,565,217)	\$12,441,099	(\$54,124,119)	(\$54,124,119)	\$0	(\$54,124,119)	\$0	\$0
2Q 2020	\$12,593,559	\$0	(\$54,124,119)	\$12,593,559	(\$41,530,560)	(\$41,530,560)	\$0	(\$41,530,560)	\$0	\$0
3Q 2020	\$12,747,403	\$0	(\$41,530,560)	\$12,747,403	(\$28,783,157)	(\$28,783,157)	\$0	(\$28,783,157)	\$0	\$0
4Q 2020	\$12,902,643	\$0	(\$28,783,157)	\$12,902,643	(\$15,880,514)	(\$15,880,514)	\$0	(\$15,880,514)	\$0	\$0
1Q 2021	\$13,110,754	\$0	(\$15,880,514)	\$13,110,754	(\$2,769,760)	(\$2,769,760)	\$0	(\$2,769,760)	\$0	\$0
2Q 2021	\$13,281,021	\$0	(\$2,769,760)	\$2,769,760	\$0	\$0	\$0	\$0	\$10,511,261	\$670,654
3Q 2021	\$13,452,933	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$13,452,933	\$858,342
4Q 2021	\$13,626,505	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$13,626,505	\$869,417
1Q 2022	\$16,543,521	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$16,543,521	\$1,055,532
2Q 2022	\$16,711,477	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$16,711,477	\$1,066,249
3Q 2022	\$16,880,989	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$16,880,989	\$1,077,064
4Q 2022	\$17,052,071	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$17,052,071	\$1,087,980
1Q 2023	\$17,606,137	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$17,606,137	\$1,123,331
2Q 2023	\$17,774,886	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$17,774,886	\$1,134,098
3Q 2023	\$17,945,162	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$17,945,162	\$1,144,962
4Q 2023	\$18,116,979	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$18,116,979	\$1,155,924
1Q 2024	\$18,286,812	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$18,286,812	\$1,166,760
2Q 2024	\$18,458,163	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$18,458,163	\$1,177,693
3Q 2024	\$18,631,047	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$18,631,047	\$1,188,724

**TABLE J - PART 2: COMPUTATION OF STATE TAX LIABILITY - TAXABLE INCOME**

(Road Property)

<u>Time Period</u> (1)	<u>Taxable Income B/4 NOL's IRR 1/</u> (2)	<u>Net Operating Losses Generated 2/</u> (3)	<u>NOL's Generated Plus Carryforward 3/</u> (4)	<u>Carryforward Utilized 4/</u> (5)	<u>Carryforward Remaining 5/</u> (6)	<u>Carryback Available 6/</u> (7)	<u>Carryback Utilized 7/</u> (8)	<u>Carryback Remaining 8/</u> (9)	<u>Annual Taxable Income 9/</u> (10)	<u>Annual Tax Liability 10/</u> (11)
4Q 2024	\$18,805,478	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$18,805,478	\$1,199,853
Future	\$1,130,544,095	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$1,130,544,095	\$72,132,522

1/ Table I Column (3) - Table E Columns (2),(4) & (6) - Table G, Column (14) ÷ 4 - Table J - Part 2, Column (11). Values for 2012 from Table D, Sum of Column (10).

2/ Column (2) if less than zero, otherwise zero.

3/ Cumulative total of Column (2).

4/ If Column (2) is greater than zero, and (Column (2) + Column (4) is less than zero, then Column (2), otherwise Column (4).

5/ Column (4) + Column (5) + Column (8).

6/ Previous period Column (9) + current period Column (3) - current period Column (5).

7/ If previous Column (10) is greater than zero, and previous Column (10) is less than current Column (7), then previous Column (10), otherwise zero.

8/ Column (7) + Column (8).

9/ If Column (2) is greater than zero, then Column (2) - Column (5) - Column (8), otherwise zero.

10/ Column (10) times applicable route mile weighted State Statutory Tax Rates.

**TABLE K - PART I: CERR OPERATING EXPENSES**

<b>Item</b> (1)	<b>2015</b> (2)	<b>2016</b> (3)	<b>2017</b> (4)	<b>2018</b> (5)	<b>2019</b> (6)	<b>2020</b> (7)	<b>2021</b> (8)	<b>2022</b> (9)	<b>2023</b> (10)	<b>2024</b> (11)
1. Train & Engine Personnel	\$7,225,988	\$6,468,269	\$7,847,258	\$7,693,531	\$7,707,271	\$8,102,896	\$8,155,978	\$8,450,439	\$8,302,059	\$8,785,568
2. Locomotive Lease Expense	\$1,644,964	\$1,472,472	\$1,786,393	\$1,751,398	\$1,754,526	\$1,844,588	\$1,856,672	\$1,923,704	\$1,889,926	\$1,999,995
3. Locomotive Maintenance Expense	\$2,213,750	\$1,981,615	\$2,404,081	\$2,356,986	\$2,361,195	\$2,482,398	\$2,498,661	\$2,588,872	\$2,543,414	\$2,691,541
4. Locomotive Operating Expense	\$4,521,676	\$4,047,532	\$4,910,436	\$4,814,241	\$4,822,839	\$5,070,402	\$5,103,618	\$5,287,878	\$5,195,029	\$5,497,585
5. Railcar Lease Expense	\$5,062,421	\$4,531,574	\$5,497,674	\$5,389,974	\$5,399,601	\$5,676,770	\$5,713,958	\$5,920,253	\$5,816,300	\$6,155,039
6. Material & Supply Operating	\$626,289	\$626,289	\$626,289	\$626,289	\$626,289	\$626,289	\$626,289	\$626,289	\$626,289	\$626,289
7. Ad Valorem Tax	\$1,986,847	\$1,986,847	\$1,986,847	\$1,986,847	\$1,986,847	\$1,986,847	\$1,986,847	\$1,986,847	\$1,986,847	\$1,986,847
8. Operating Managers	\$5,067,703	\$5,067,703	\$5,067,703	\$5,067,703	\$5,067,703	\$5,067,703	\$5,067,703	\$5,067,703	\$5,067,703	\$5,067,703
9. General & Administration	\$7,034,134	\$7,172,332	\$7,172,332	\$7,172,332	\$7,172,332	\$7,172,332	\$7,172,332	\$7,172,332	\$7,172,332	\$7,172,332
10. Loss and Damage	\$111,052	\$99,407	\$120,600	\$118,237	\$118,449	\$124,529	\$125,345	\$129,870	\$127,590	\$135,020
11. Trackage Rights	\$1,777,373	\$1,590,997	\$1,930,186	\$1,892,374	\$1,895,754	\$1,993,065	\$2,006,122	\$2,078,550	\$2,042,053	\$2,160,982
12. Intermodal Lift Costs	\$5,933,928	\$5,311,695	\$6,444,111	\$6,317,871	\$6,329,154	\$6,654,039	\$6,697,629	\$6,939,439	\$6,817,589	\$7,214,643
13. Insurance 3.75%	\$1,950,243	\$1,843,403	\$2,047,275	\$2,024,547	\$2,026,579	\$2,085,069	\$2,092,916	\$2,136,450	\$2,114,513	\$2,185,996
14. Maintenance of Way	<u>\$8,805,976</u>	<u>\$8,805,976</u>	<u>\$8,805,976</u>	<u>\$8,805,976</u>	<u>\$8,805,976</u>	<u>\$8,805,976</u>	<u>\$8,805,976</u>	<u>\$8,805,976</u>	<u>\$8,805,976</u>	<u>\$8,805,976</u>
15. Total Operating Expenses	\$53,962,342	\$51,006,111	\$56,647,160	\$56,018,305	\$56,074,513	\$57,692,901	\$57,910,045	\$59,114,602	\$58,507,618	\$60,485,516
16. Expense Per Quarter	\$13,490,585	\$12,751,528	\$14,161,790	\$14,004,576	\$14,018,628	\$14,423,225	\$14,477,511	\$14,778,651	\$14,626,905	\$15,121,379
17. Net-Ton Miles	1,877,568,723	1,680,686,473	2,038,996,792	1,999,052,895	2,002,623,126	2,105,420,571	2,119,213,161	2,195,724,720	2,157,170,084	2,282,802,921

**TABLE K - PART 2: CERR OPERATING EXPENSES INDEXED**

<u>Period</u> (1)	<u>Quarter</u> (2)	<u>Hybrid Index 1/</u> (3)	<u>Operating Expense Indexed For Inflation 2/</u> (4)
1	1Q 2015	100.000	\$14,173,427
2	2Q 2015	93.014	\$13,230,984
3	3Q 2015	87.621	\$12,503,413
4	4Q 2015	91.095	\$12,972,132
5	1Q 2016	91.309	\$11,643,230
6	2Q 2016	88.728	\$11,314,182
7	3Q 2016	91.452	\$11,661,528
8	4Q 2016	92.897	\$11,845,780
9	1Q 2017	93.157	\$13,192,707
10	2Q 2017	94.499	\$13,382,682
11	3Q 2017	96.129	\$13,613,533
12	4Q 2017	96.773	\$13,704,744
13	1Q 2018	97.668	\$13,677,965
14	2Q 2018	98.734	\$13,827,294
15	3Q 2018	99.812	\$13,978,253
16	4Q 2018	100.902	\$14,130,860
17	1Q 2019	102.033	\$14,303,577
18	2Q 2019	103.161	\$14,461,813
19	3Q 2019	104.303	\$14,621,799
20	4Q 2019	105.456	\$14,783,554
21	1Q 2020	106.655	\$15,383,070
22	2Q 2020	107.847	\$15,555,081
23	3Q 2020	109.053	\$15,729,014
24	4Q 2020	110.273	\$15,904,893
25	1Q 2021	111.375	\$16,124,292
26	2Q 2021	112.463	\$16,281,893
27	3Q 2021	113.563	\$16,441,034
28	4Q 2021	114.673	\$16,601,730
29	1Q 2022	115.578	\$17,080,896
30	2Q 2022	116.463	\$17,211,615
31	3Q 2022	117.354	\$17,343,335
32	4Q 2022	118.252	\$17,476,062
33	1Q 2023	119.169	\$17,430,695
34	2Q 2023	120.065	\$17,561,758
35	3Q 2023	120.968	\$17,693,807
36	4Q 2023	121.877	\$17,826,850
37	1Q 2024	122.850	\$18,576,657
38	2Q 2024	123.806	\$18,721,132
39	3Q 2024	124.769	\$18,866,731
40	4Q 2024	125.739	\$19,013,462

1/ 1Q15 equals 100.0, all other quarters equal Quarterly Inflation Indexes for the Hybrid Index from Table B.

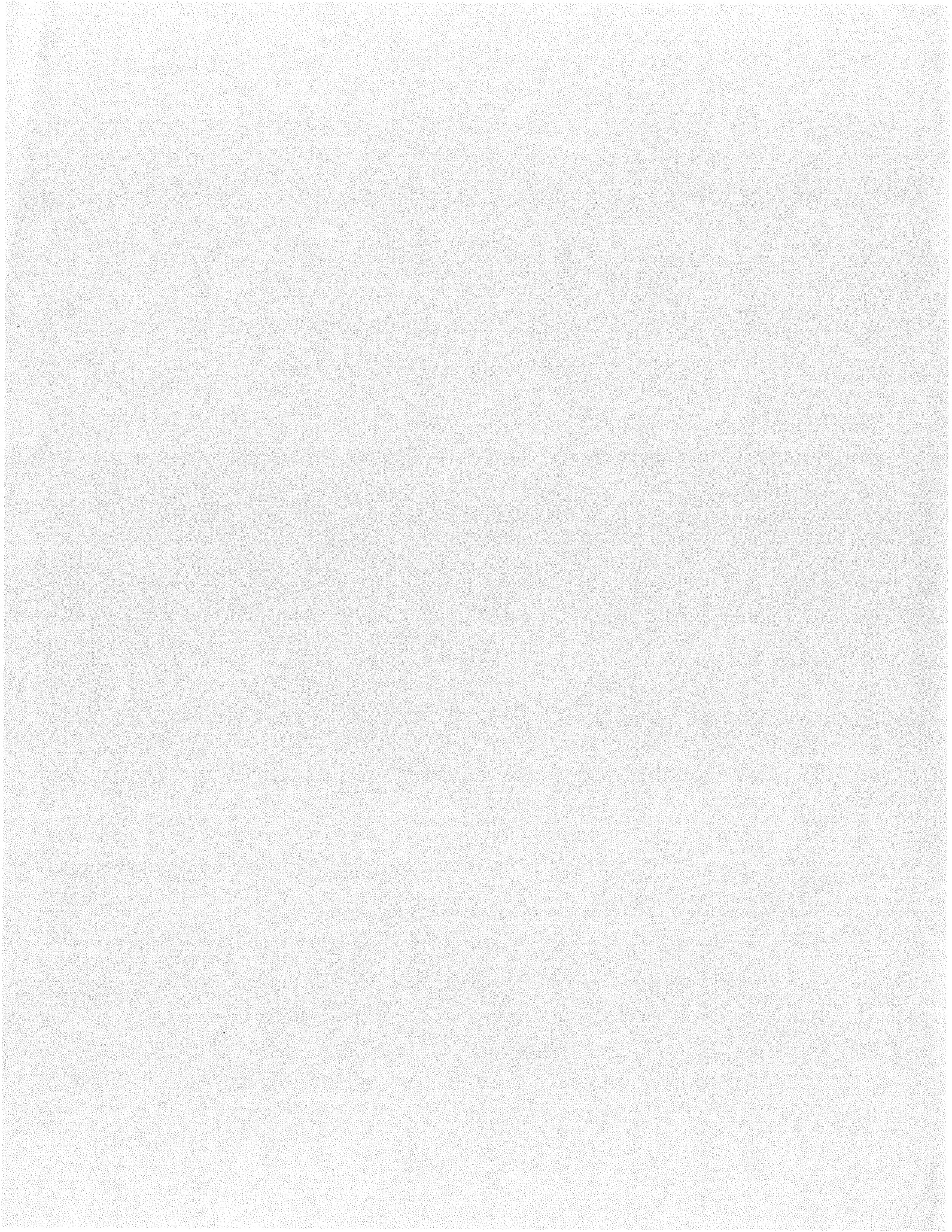
2/ Quarterly expense from Table K, Page 18, for the applicable time period x Column (3) ÷ 1Q15. Start-up costs have been distributed over the first 12 months in periods 1 - 4.

**TABLE L: CERR STAND-ALONE COSTS AND REVENUES**

Revenue Requirements to Cover Total Stand-Alone Costs

<u>Period</u>	<u>Quarter</u>	<u>Quarterly Capital Requirement Road Property</u>	<u>Quarterly Operating Expense</u>	<u>Annual Stand-Alone Requirement</u>	<u>Annual Stand-Alone Revenues</u>	<u>Overpayments Or Shortfalls In Revenues</u>	<u>PV Difference</u>	<u>Cumulative PV Difference</u>
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1	1Q 2015	\$14,996,787	\$14,173,427					
2	2Q 2015	\$15,092,539	\$13,230,984					
3	3Q 2015	\$15,066,346	\$12,503,413					
4	4Q 2015	\$15,228,557	\$12,972,132	\$113,264,186	\$139,628,736	\$26,364,550	\$25,177,985	\$25,177,985
5	1Q 2016	\$15,052,286	\$11,643,230					
6	2Q 2016	\$15,064,941	\$11,314,182					
7	3Q 2016	\$15,170,592	\$11,661,528					
8	4Q 2016	\$15,333,175	\$11,845,780	\$107,085,713	\$121,592,139	\$14,506,427	\$12,440,432	\$37,618,417
9	1Q 2017	\$15,452,248	\$13,192,707					
10	2Q 2017	\$15,596,039	\$13,382,682					
11	3Q 2017	\$15,788,380	\$13,613,533					
12	4Q 2017	\$15,901,246	\$13,704,744	\$116,631,577	\$155,739,878	\$39,108,301	\$30,273,360	\$67,891,777
13	1Q 2018	\$16,063,157	\$13,677,965					
14	2Q 2018	\$16,223,418	\$13,827,294					
15	3Q 2018	\$16,385,304	\$13,978,253					
16	4Q 2018	\$16,548,829	\$14,130,860	\$120,835,080	\$156,446,662	\$35,611,582	\$24,882,821	\$92,774,598
17	1Q 2019	\$16,701,587	\$14,303,577					
18	2Q 2019	\$16,855,785	\$14,461,813					
19	3Q 2019	\$17,011,437	\$14,621,799					
20	4Q 2019	\$17,168,556	\$14,783,554	\$125,908,109	\$161,400,726	\$35,492,617	\$22,385,306	\$115,159,904
21	1Q 2020	\$17,319,646	\$15,383,070					
22	2Q 2020	\$17,472,107	\$15,555,081					
23	3Q 2020	\$17,625,950	\$15,729,014					
24	4Q 2020	\$17,781,191	\$15,904,893	\$132,770,953	\$176,952,127	\$44,181,174	\$25,152,372	\$140,312,276
25	1Q 2021	\$17,949,830	\$16,124,292					
26	2Q 2021	\$18,120,097	\$16,281,893					
27	3Q 2021	\$18,292,008	\$16,441,034					
28	4Q 2021	\$18,465,580	\$16,601,730	\$138,276,463	\$183,545,475	\$45,269,012	\$23,262,660	\$163,574,936
29	1Q 2022	\$18,631,996	\$17,080,896					
30	2Q 2022	\$18,799,952	\$17,211,615					
31	3Q 2022	\$18,969,464	\$17,343,335					
32	4Q 2022	\$19,140,546	\$17,476,062	\$144,653,867	\$197,592,151	\$52,938,284	\$24,555,280	\$188,130,216
33	1Q 2023	\$19,307,783	\$17,430,695					
34	2Q 2023	\$19,476,532	\$17,561,758					
35	3Q 2023	\$19,646,809	\$17,693,807					
36	4Q 2023	\$19,818,626	\$17,826,850	\$148,762,860	\$198,740,607	\$49,977,747	\$20,925,140	\$209,055,356
37	1Q 2024	\$19,988,458	\$18,576,657					
38	2Q 2024	\$20,159,809	\$18,721,132					
39	3Q 2024	\$20,332,693	\$18,866,731					
40	4Q 2024	\$20,507,124	\$19,013,462	\$156,166,068	\$219,400,189	\$63,234,121	\$23,897,907	\$232,953,262





**CERR MMM Revenue to Variable Cost Ratios - 2015 to 2024**

	<b><u>Year</u></b> (1)	<b><u>MMM Revenue to Variable Cost Ratios</u></b> (2)
1.	2015	358.6%
2.	2016	419.9%
3.	2017	310.6%
4.	2018	325.4%
5.	2019	327.3%
6.	2020	302.3%
7.	2021	298.8%
8.	2022	280.3%
9.	2023	282.0%
10.	2024	252.4%

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Source: e-workpaper "CERR MMM\_Rebuttal.xlsm,"  
worksheet "Exhibit III-H-2," cells F10 to F19.

## **EXHIBIT IV-1**

THE REVENUE ADEQUACY STATUS OF  
CSX TRANSPORTATION, INC.

Rebuttal Verified Statement

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**Introduction**

My name is John F. Hennigan. My initial Verified Report in this proceeding is included as Exhibit IV-1 in the Opening Evidence of Complainant dated November 2, 2015. In that report, I include an overview of my qualifications, along with my professional resume, and thus do not do so here. I will also use the same abbreviations and conventions as in my initial report.

I have been asked by counsel to respond to various points or issues from the CSXT reply submission dated March 7, 2016. I will address these issues separately in the sections that follow.

**A. The Revenue Adequacy and Stand Alone Cost constraints are both necessary to emulate and ensure competitive and efficient market pricing for railroad captive shippers.**

In its reply statement at page IV-3, CSXT argues that the Board should abandon a revenue adequacy rate constraint based on CSXT's system-wide revenue needs and rely exclusively on the Board's Stand-Alone Cost (SAC) and Simplified-SAC rate reasonableness standards.

This recommendation should be rejected by the Board. The revenue adequacy constraint is a necessary and vital element of the economic foundation of the Board's Constrained Market Pricing methodology (CMP), and should not be ignored or revoked. The constraint defines the overall revenue requirements for an efficient railroad, and provides a needed alternative tool to the stand-alone cost test for captive shippers. Now that railroads have achieved revenue adequacy, the need for the revenue adequacy constraint in Coal Rate Guidelines is even greater. The revenue adequacy constraint in the Coal Rate Guidelines should be fully implemented and applied by the Board in reviewing the reasonableness of rates to captive shippers.

In the following sub-sections I will address three important aspects of the revenue adequacy constraint: the continuing and critical need for the constraint; how the revenue adequacy constraint complements the SAC test for determining the revenue requirements of an efficient carrier; and how the revenue adequacy and stand-alone cost constraints help to emulate a competitive marketplace by reconciling the interests of both shippers and railroads on an efficient basis.

**1. The revenue adequacy constraint is a necessary explicit condition needed to complete CMP and to apply competitive pricing principles to a regulatory framework.**

Achieving railroad revenue adequacy was affirmed as a national policy goal by the Staggers Act, and actually achieving revenue adequate levels by a railroad was later included as a constraint on railroad pricing of captive shippers in the Coal Rate Guidelines decision. The revenue adequacy and other constraints form the critical underlying components of the CMP that the ICC adopted in its 1985 decision in Coal Rate Guidelines. In the Guidelines decision, the ICC clearly highlighted the importance of the revenue adequacy constraint, “Therefore, the logical first constraint on a carriers pricing is that its rates not be designed to earn greater revenue than needed to achieve and maintain this ‘revenue adequacy’ level. In other words, captive shippers should not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to

ensure a financially sound carrier capable of meeting its current and future service needs.”<sup>1</sup> That is a very clear statement of the ICC’s logic, intent, and priority in the CMP of first endorsing differential pricing flexibility, but then constraining its exercise as to captive shippers when that flexibility is no longer needed for the carrier to achieve an adequate level of revenues. The revenue adequacy and other constraints serve as a check to unlimited differential pricing flexibility of railroad services and thus complete the methodology of CMP.<sup>2</sup>

The ICC based the economic framework for the CMP on the need for differential pricing and the contestability of markets. With respect to pricing, the Guidelines described the cost structure of the railroad industry with its scale and scope economies, large fixed costs, and large costs that could not be attributed to a particular user. These factors necessitated differential pricing of rail services to recover all unattributable costs, i.e., charging some shippers higher rates by incorporating greater shares of the unattributable costs into the prices charged them, compared to other shippers. To provide greater theoretical support and a proper construct for this endorsement of differential pricing, the ICC referenced, analyzed, and adopted the principles of Ramsey pricing.<sup>3</sup> Ramsey pricing is a theoretical and widely recognized method of using differential pricing principles to solve public financing and public welfare issues. Ramsey pricing concepts were originally applied to determine optimal tax rates for financing of public services, and were later used more broadly to set

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<sup>1</sup> Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 535-536 (1985).

<sup>2</sup> The SAC and management efficiency constraints, under the Coal Rate Guidelines, are also available for captive shippers to use in filing a rate complaint desiring to pay no more than is necessary for efficient service on the route at issue. The management efficiency constraint will not be directly addressed in this testimony.

<sup>3</sup> F. Ramsey, “A Contribution to the Theory of Taxation,” The Economic Journal, Volume 37, March, 1927, 47-61, including as e-workpaper RA-Ramsey1927.pdf.

prices for public utility services to meet revenue levels or profit constraints. As the ICC stated in Coal Rate Guidelines:

Ramsey pricing, is a widely recognized method of differential pricing, which is, pricing in accordance with demand. Under Ramsey pricing, each price or rate contains a mark-up above the long run marginal cost of the product or service to cover a portion of the unattributable costs. The unattributable costs are allocated among the purchasers or users in inverse relation to their demand elasticity. Thus, in a market where shippers are very sensitive to price changes (a highly elastic market), the mark-up would be smaller than in a market where shippers are less price sensitive. The sum of the mark-ups equals the unattributable costs of an efficient producer.

Applied to the railroad industry, Ramsey pricing would permit an efficient carrier to cover all of its costs (including the cost of capital) and thus become revenue adequate.<sup>4</sup>

While the ICC recognized that imposing pure Ramsey pricing was not practical, it decided to use what it called “Constrained Market Pricing” as an alternative and more pragmatic implementation of the principles and objectives underlying Ramsey pricing. The ICC stated,

Under CMP, the carriers are expected to use the market demand which they observe as the basis for their pricing, but they need not calculate the precise elasticity of demand for every movement. Indeed, where information on demand elasticity is required under the CMP methodology, we will consider qualitative (rather than necessarily quantitative) evidence on the relative demand elasticity of specific movements and/or commodities. We are satisfied that the constraints and incentives CMP contains should lead to rates approximating Ramsey prices and protect captive shippers from possible carrier abuse of pricing discretion.<sup>5</sup>

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<sup>4</sup> Coal Rate Guidelines, Nationwide, 1 I.C.C.2d at 526-527.

<sup>5</sup> Coal Rate Guidelines, Nationwide, 1 I.C.C.2d at 527-528.



Ramsey pricing concepts and formulas were initially devised as a method for determining efficient tax rates for a public entity in order, for example, to recover needed revenues, eliminate a budget deficit or constraint, or set optimal prices to achieve a fixed profit constraint in the case of public utility regulation, while also meeting the public's needs.<sup>6</sup> In other words, Ramsey pricing was a means to optimally price public services so that the total revenues received (the revenue constraint) equals, but does not exceed, the total costs of providing the service for all users. The underlying basis for the more theoretical Ramsey pricing model, and the ICC's and Board's CMP methodology based on Ramsey pricing, is the need to set an effective constraint, one that eliminates the revenue shortfall or subsidy, and maximizes output and associated production efficiencies, without creating or increasing an overrecovery.<sup>7</sup>

Constrained Market Pricing, based on the Ramsey pricing concept, similarly allows efficiently set demand-based prices in order for carriers to recover all the unattributable costs of their railroad operations, thus generating adequate levels of railroad revenue. Just like using Ramsey pricing concepts to set efficient tax rate levels to generate needed levels of tax revenues, the pricing flexibility permitted by the ICC and the Board under the CMP allows and encourages railroads to use differential pricing and other flexibilities, to generate rail revenues sufficient for a carrier to become revenue adequate over time. That revenue constraint is a necessary condition of the model in that it also specifies the amount of

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<sup>6</sup> For an excellent overview of the Ramsey analysis, see William J. Baumol and David F. Bradford, Optimal departures from Marginal Cost Pricing, American Economic Review, Volume 60, Issue 3 (June., 1970), p. 66, included as e-workpaper RA-Baumol1970.pdf.

<sup>7</sup> The revenue need or profit constraint implicit in the Ramsey pricing model is explicitly described in footnote number 15 of the Coal Rates Guideline, Nationwide, 1 I.C.C.2d at 527, footnote 15.

unattributable costs that need to be recovered by the railroad through differential pricing. Once the carrier is able to recover those unattributable costs on a regular basis, the revenue adequacy need has been met, and further and higher railroad differential pricing margins above the marginal cost of captive shipper's service ceases to be necessary or useful. At that point, there is no justification for further differential pricing. The actual constraint on the needed level of revenues is thus a critical constraint on differential pricing by the carriers. Absent a constraint or effective target for policy, there is no overall limit on, for example, revenue generation in the case of setting Ramsey tax rates or abuse of market power by railroads against captive shippers.

The revenue adequacy constraint needs to be retained by the Board as an integral part of the Coal Rate Guidelines; the constraint should also be more fully defined and applied by the Board as an element of its maximum rate reasonableness determinations. It is especially important today, after 35 plus years since the Staggers Act was passed, that railroads like CSXT have now had adequate time, opportunity, and incentive to transition to Ramsey-like differential pricing and have achieved revenue adequacy. Allowing increased differential pricing under such circumstances amounts to unconstrained differential pricing.

**2. Both the revenue adequacy and stand-alone cost constraints are guided by and emulate competitive market principles.**

The ICC chose the CMP methodology in 1985 as an alternative to pure Ramsey pricing due to the difficulty and burden of universal application of pure Ramsey pricing. But the ICC affirmed the underlying value of the Ramsey pricing theory. The ICC stated in the Coal Rate Guidelines decision, "...our purpose in CMP is to approximate Ramsey pricing," and the ICC recognized that the "the resulting Ramsey price model represents the logical pricing patterns of an efficient firm."<sup>8</sup> CMP approximates Ramsey pricing by establishing differential pricing freedoms within a set of constraints that induce the railroads to price all traffic efficiently. "As with Ramsey pricing, services are priced according to market demand and to cover only the total costs of an efficient carrier. CMP provides two approaches for determining the revenue requirements of an efficient carrier. They can be calculated for the existing carrier on a system-wide basis by applying the revenue adequacy and management efficiency constraints. Alternatively, they can be hypothesized using a potential, 'stand-alone cost' system."<sup>9</sup>

Thus, use of the revenue adequacy constraint, which determines the overall revenue requirements of a carrier and then allocates those costs, attributable and unattributable, on a firm-wide basis, is consistent with the efficiency and pricing of competitive markets. Prices are based on market demand, inefficiencies in operation are removed, and revenue or profit

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<sup>8</sup> Coal Rate Guidelines, Nationwide, 1 I.C.C.2d at 534.

<sup>9</sup> Coal Rate Guidelines, Nationwide, 1 I.C.C.2d at 534.

levels are constrained at the required cost of capital. Achieving revenue adequacy ensures that the carrier earns competitive returns over time. Additional differential pricing of captive shippers should not be permitted.

The SAC constraint is similarly consistent with and emulates pricing in competitive markets. It allows captive shippers, which should not bear the costs of facilities or services from which they derive no benefit, to propose an alternate stand-alone carrier, unconstrained by entry or other barriers, in which the relevant railroad plant size and traffic base are designed to maximize the efficiencies and production economies. The operating assumption is that without entry and other barriers, this hypothetical new rail system would provide the rail price competition for the shipper as if there were an actual alternate carrier able to provide the service. Thus, the SAC model provides a hypothetical new service provider and an alternative competitive rate for the captive shipper, consistent with the competitive marketplace.

The revenue adequacy and the stand-alone cost constraints both mimic the competitive marketplace, but in different ways. The revenue adequacy constraint assures that shippers will be protected from monopoly prices. Once revenue adequacy is achieved, the carrier's unattributable costs have been fully covered and the carrier is efficiently pricing its traffic to cover all its costs. Shippers are paying no more than necessary for efficiently-priced services. This outcome mimics the competitive marketplace, using current operating costs,

including the asset base as recognized under GAAP in conjunction with the nominal current cost of capital.

For the stand-alone cost test, captive shippers that believe they should not bear the costs of facilities or services from which they derive no benefit, can introduce the competitive standard of contestability into a non-competitive market. They can develop a hypothetical stand-alone railroad and determine what the simulated competitive price of service, using replacement costs, would be against which the actual rates they are charged can be compared. Ultimately, the Board's final decision in a stand-alone case will determine whether or not a lower competitive stand-alone rate for the service is available and should be awarded to the shipper. This outcome also mimics the competitive marketplace.

**3. The revenue adequacy and stand-alone cost constraints complement each other, but SAC does not displace the need for the revenue adequacy constraint, especially as carriers become revenue adequate.**

Under both the revenue adequacy and the stand-alone cost constraints, rail services are efficiently priced according to market demand and cover only the carrier's total costs. The full revenue requirements of the incumbent carrier can be determined on a system-wide basis using the revenue adequacy constraint. Alternately, the specific revenue requirements needed to serve a particular shipper or a series of shipper commodity movements can be estimated using the stand-alone cost approach. Both methods produce efficient outcomes

because both, as previously stated, follow competitive market pricing principles. Under the revenue adequacy constraint, the shippers pay their Ramsey-based share of what is necessary for railroads to earn adequate revenue levels; under SAC, the captive shipper should not bear the costs of any facilities or services from which it derives no benefit.

The revenue adequacy constraint is referred to as a top-down approach to ratemaking. The focus is on the entire railroad and the critical issue is whether the carrier's overall revenue levels are adequate to allow it to cover its costs and attract needed capital (defined by whether the carrier's return on investment equals the industry required cost of capital). The cost of service and revenues required to complete this revenue adequacy test are based on the carrier's actual costs as measured under generally accepted accounting principles (GAAP) and its actual rates (before application of the contested rate increase).

SAC is a bottom-up approach to rate review since it focuses on a particular part of a railroad's system used to deliver the shipper's traffic at issue. It is based on the principle that captive shippers should not bear the costs of facilities or services from which they derive no benefit. The SAC method develops a hypothetical alternative railroad from the ground up, with all available operating and scale efficiencies, to provide an alternative rail service for the shipper's movement, to compare the rate actually paid with the rate that would be charged by the efficient competitor. SAC costs are typically developed based on new equipment, new rail routings, and selected non-issue traffic flows over the hypothetical

system. The cost and other operational data of the bottoms-up developed railroad may, but need not, reflect the actual costs of the incumbent.

The top-down and bottom-up tests both identify constraints on the rates to be charged captive shippers. The tests under the two constraints are similar but different, in that they start from different vantage points. As such, they can result in different prescribed coal rates for the shipper, as the ICC itself noted in Coal Rate Guidelines.<sup>10</sup>

A captive shipper can rely on any or all CMP constraints in a rate complaint case filed before the Board or the predecessor ICC. Historically, since the guidelines were implemented, there was no relief granted and little opportunity for rail shippers to use the revenue adequacy constraint in a rate complaint case because, until recently, carriers were perceived to fall far short of revenue adequacy levels. As a result, most cases used the stand-alone cost test to determine competitive rates for particular movements in the rail system. Still, the revenue adequacy constraint was, as previously discussed, part of the underlying foundation for the CMP methodology and becomes an important option for captive shippers seeking rate relief now and into the future -- when railroads, as the Staggers Act had hoped for, achieve revenue adequacy. That time has come. The revenue adequacy constraint should not be revoked, especially now that it is relevant. In addition, while shippers have relied on stand-alone cost tests in rate cases, a shipper should not be forced to pay a higher SAC determined rate when the revenue adequacy constraint

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<sup>10</sup>Coal Rate Guidelines, Nationwide, 1 I.C.C.2d at 534, footnote 35.

identifies a lower rate as being sufficient for a railroad to cover its attributable and unattributable costs for its existing output on a Ramsey-efficient basis.

As carriers become revenue adequate, individual shippers can file complaints against specific rates on captive traffic using the revenue adequacy constraint test under CMP, and request that the Board find that the carrier is revenue adequate and reject any greater differential pricing increases on the captive movement in question. The shipper can also file the rate complaint, relying on the use of the stand alone cost test, under which the shipper should not bear the cost of services or facilities from which it derives no benefits. Both methods are needed to ensure that captive shipper rail rate relief is available when justified. Shippers should continue to be able to use all available tools to ensure that their rail rates are judged reasonable or unreasonable by the Board, where there is a demonstrated lack of effective competition for the service in question.

**B. Use of Replacement Cost for Revenue Adequacy Determination is not required and remains unworkable.**

In its reply statement in Section IV-A-2 (pages IV-8-22), CSXT contends that the Board's measurement of revenue needs should be based on the current value of railroad assets. "It [CSXT] has long maintained that any revenue adequacy constraint must be premised on the current value of rail assets needed to meet the demand for rail service, regardless of the



sources of funds used. And the current value of existing assets is best determined by the replacement cost of those depreciated assets.”<sup>11</sup>

CSXT and other railroads have previously recommended the use the replacement cost of rail assets for revenue adequacy determinations, and those recommendations have been repeatedly rejected-- by the Board since 1995 and by the ICC since at least the Staggers Act. CSXT's arguments in this case should be rejected once again by the Board for three major reasons. First, the Board's clear policy is to use the net book value of rail assets for measuring return on net investment (ROI) in revenue adequacy determinations -- and the Board and the prior ICC have repeatedly rejected proposals for the use of replacement cost of assets in these calculations. CSXT has presented no new evidence in this case on why the Board should now reverse its decision. Second, CSXT has provided no specific evidence in this case about how the replacement cost of assets could be developed. Finally, CSXT does not even mention or provide any testimony on how the required real cost of capital would be computed in this case to match the requested use of the replacement cost of carrier assets. These three broad reasons and related matters are addressed more fully below.<sup>12</sup> I recommend that the Board continue to use the net book value of assets in all revenue adequacy determinations.

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<sup>11</sup> CSXT reply, pages IV-8-9.

<sup>12</sup> I have previously provided reply testimony in EP 722, Railroad Revenue Adequacy, on the continued use of net book value for valuing rail assets in railroad revenue adequacy determinations. That testimony reviewed the extensive history and decisions on the issues. My earlier testimony is included in my e-workpapers as RA-HenniganEP722Reply.pdf.

**1. The Board's clear policy is to use net book value for valuing rail assets.**

Consumers' rate complaint sought rate relief based on the revenue adequacy constraint and the stand-alone cost constraint, both established under the Coal Rate Guidelines. To make its case under the revenue adequacy constraint, Consumers provided, among numerous other items, ROI values for CSXT following previous Board and ICC decisions using the net book value of assets in the annual revenue adequacy determinations.

CSXT, on the other hand, asks the Board to reverse previous guidance and decisions and now use the replacement cost to value rail assets. Railroads have made this same request many times since passage of the Staggers Act. But each time the ICC, a government authority, or the Board, has evaluated the issue, they have recommended or affirmed that the net book value for railroad assets should continue to be used for revenue adequacy determinations.

To better understand the background and difficulty of the issues associated with replacement cost that the ICC and the Board and parties have addressed over the years, five important points are noted and discussed below.

First, the use of replacement or current cost, as proposed here by CSXT, is not the norm for accurate valuation and reporting of company assets. The norm for reporting on company assets, especially for public companies, is to follow generally accepted accounting principles

(GAAP). These rules and standards are mandated for the creation of uniform financial reports by publicly-traded companies, such as CSXT. The purpose of GAAP is to ensure that financial reporting is transparent and consistent from one organization to another. In the United States, the Securities and Exchange Commission (SEC) mandates that financial reports adhere to GAAP requirements. The Financial Accounting Standards Board (FASB) is responsible for developing and managing overall GAAP standards. Publicly traded companies must comply with both SEC and GAAP requirements. Further, if a company's stock is publicly traded, federal law requires the company's financial statements be audited by independent public accountants. Both the company's management and the independent accountant must certify that the financial statements and the related notes have been prepared in accordance with GAAP.

"Since GAAP is founded on basic accounting principles and guidelines, we can better understand GAAP if we understand those accounting principles."<sup>13</sup> The most relevant accounting principle for valuation of company assets is the Cost Principle. "From an accountant's point of view, the term 'cost' refers to the amount spent (cash or the cash equivalent) when an item was *originally* obtained, whether that purchase happened last year or thirty years ago. For this reason, the amounts shown on financial statements are referred to as *historical* cost amounts. Because of this accounting principle asset amounts are *not*

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<sup>13</sup> Part 1, Introduction to Accounting Principles, Basic Accounting Principles and Guidelines, Accounting Coach, <http://www.accountingcoach.com/accounting-principles/explanation>, p. 2. Accounting Coach is used as a source on basic GAAP concepts because of its ready accessibility. Excerpts are included as RA-AccountingCoach.pdf.

adjusted upwards for inflation.”<sup>14</sup> Thus, the real norm for asset valuation for public firms in the United States is historical cost, based on GAAP.

The clear value and simplicity of using commonly-followed GAAP accounting rules and having company standardized financial statements with asset values based on depreciated original cost greatly assisted regulatory agencies such as the ICC and the Board over the years to perform their regulatory duties and also helped investors in evaluating railroad and other investments.

The ICC and later the Board have never used the current value (replacement cost) of railroad assets for revenue adequacy determinations. Instead, the ICC and the Board have always relied on accurate data from railroad systems of accounts based on GAAP. It is logical to expect regulators to place great reliance on trusted accounting systems. There has, however, been an ongoing debate or tension in U.S. regulatory circles generally between the traditional accounting view of assets stated at original cost and the economic concept that assets should be stated at current values to reflect associated opportunity costs. This theoretical debate about what was the better measure of the value of assets was quickly joined by the practical debate involving the difficulty of computing the replacement cost for a company compared to the relative simplicity of using net book values taken from audited financial statements.

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<sup>14</sup> Part 1, Introduction to Accounting Principles, Basic Accounting Principles and Guidelines, Accounting Coach, <http://www.accountingcoach.com/accounting-principles/explanation> , p. 3

A few persistent problems troubled the ICC and later the Board about the use of replacement costs. Railroad balance sheets at the time of the Staggers Act were full of excess, redundant, and obsolete equipment and facilities that should be retired or eliminated; regulators were unsure whether many of the then current rail assets would be replaced; and there was no market data, in many cases, to evaluate the current cost of railroad's plant and equipment. Assets might also be replaced in a more efficient or productive fashion. In addition, use of replacement cost would require developing a real cost of capital for the railroad industry to avoid a double-count for inflation. By any measure, moving to replacement costs would be a huge undertaking with tremendous uncertainties and unresolved issues, including how to determine the replacement cost of all the assets of a railroad.

The ICC and later the Board were at times sympathetic and supportive of the replacement cost concept in regulatory proceedings, but finally decided not to use replacement costs for railroad assets due to practical implementation difficulties. While there is a theoretical appeal to using a forward looking measure for the replacement cost of the rail assets, forward-looking measures are difficult to construct. In contrast, the book value of rail assets is based on known transaction costs of tangible equipment, with a proper paper trail and documentation in the rail accounting or asset system. In a recent Board decision about Simplified SAC cases, the Board again described how replacement cost would be theoretically preferable to original cost valuation, but concluded the discussion by stating it

did not use replacement cost “because it is impractical to update the book value of railroad assets to replacement costs on an annual basis.”<sup>15</sup>

All of these issues that troubled the ICC and the Board about changing to a replacement standard remain significant. Railroads continue to adjust to changing market realities by closing and consolidating facilities. It is still difficult to identify which rail assets will not be replaced over time and how they will be replaced. A workable, cost-effective and reliable solution to address the problem of repricing railroad assets annually for revenue adequacy purposes remains elusive.

Section 302 of the Staggers Act of 1980 established the Railroad Accounting Principles Board, implemented cost accounting principles for railroads, and also added a new section 11166, Accounting and Cost Reporting, to Subtitle IV of title 49, United States Code. That new section 11166 stated that the ICC “may promulgate reasonable rules for rail carriers..., prescribing expense and revenue accounting and reporting requirements **consistent with generally accepted accounting principles uniformly applied to carriers**” (emphasis added).

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<sup>15</sup> Rate Regulation Reforms, EP 715 at 15-16, n.24 (STB served July 18, 2013). The Board added, “We do not use replacement costs in our annual revenue adequacy determination or in our URCS model because it is impractical to update the book value of railroad assets to replacement costs on an annual basis. See Ass’n of Am. R.R.s—Petition Regarding Methodology for Determining R.R. Revenue Adequacy, EP 679, slip op. at 7 (STB served Oct. 24, 2008) (“the railroad proponents have failed to overcome the practical difficulties associated with using a replacement-cost approach to perform the annual revenue adequacy determination”); see also Standards for R.R. Revenue Adequacy, 3 I.C.C.2d 261, 277 (1986) (“[w]hile current cost accounting is theoretically preferable to original cost valuation, it cannot be practically implemented in a manner that we can be confident would produce accurate and reliable results.”).

In addition, the ICC Termination Act of 1995, which created the Surface Transportation Board, reaffirmed and increased the significance of accounting and cost accounting systems by requiring the new Board to: prescribe a uniform accounting system for classes of rail carriers (sec. 11142)<sup>16</sup> and periodically review its cost accounting rules (sec. 11161).<sup>17</sup> The legislation also provided that “the Board may promulgate reasonable rules for rail carriers providing transportation subject to the jurisdiction of the Board under this part, prescribing expense and revenue reporting requirements” (sec. 11164)<sup>18</sup>. For each of these new or slightly modified provisions, the Board was required at a minimum to adopt rules consistent with generally accepted accounting principles or, in the case of 11142 and 11161, to conform its rules to GAAP to the maximum extent practicable. This instruction from Congress to the ICC in 1980 and to the Board in 1995 puts additional focus on the expectation of the ICC and later the Board to adhere to GAAP principles in developing financial systems and financial reporting included in, for example, the required annual determination of railroad revenue adequacy.

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<sup>16</sup>“§ 11142. Uniform accounting system “The Board may prescribe a uniform accounting system for classes of rail carriers providing transportation subject to the jurisdiction of the Board under this part. To the maximum extent practicable, **the Board shall conform such system to generally accepted accounting principles, and shall administer this subchapter in accordance with such principles.**” (Emphasis added.)

<sup>17</sup> “§ 11161. Implementation of cost accounting principles “The Board shall periodically review its cost accounting rules and shall make such changes in those rules as are required to achieve the regulatory purposes of this part. The Board shall insure that the rules promulgated under this section are the most efficient and least burdensome means by which the required information may be developed for regulatory purposes. **To the maximum extent practicable, the Board shall conform such rules to generally accepted accounting principles.**” (Emphasis added.)

<sup>18</sup> “§ 11164. Accounting and cost reporting “To obtain expense and revenue information for regulatory purposes, the Board may promulgate reasonable rules for rail carriers providing transportation subject to the jurisdiction of the Board under this part, prescribing expense and revenue accounting and reporting requirements **consistent with generally accepted accounting principles uniformly applied to such carriers.** Such requirements shall be cost effective and compatible with and not duplicative of the managerial and responsibility accounting requirements of those carriers.” (Emphasis added.) Section 11164 replaced section 11166.

Second, CSXT references at page IV-9 of its reply the statement submitted in 1985 by 50 leading economists in support of the Staggers Rail Act, and use of replacement cost for determining revenue adequacy for railroad revenues. The economists' statement states in part:

“The appropriate standard for determining the adequacy of railroad revenues is a rate of return equal to the current cost of capital on the **replacement value of all rail assets that are required to meet the demands for railroad service**, regardless of the sources of funds used in investing in those assets (emphasis added).”<sup>19</sup>

Based on decisions on this issue over the years, neither the ICC nor the Board has disagreed as a matter of pure theory about the value of the replacement cost concept advocated by the economists. The ICC and the Board were concerned about the proper application of replacement costs. As the above passage clearly recognized, rail assets that will not be replaced should be eliminated from the asset base calculation (“replacement value of all rail assets that are required to meet the demands for railroad service”). Even today, the Board still appreciates the practical difficulty of identifying individual rail assets or larger parts of railroad systems that would not be replaced in the future, as well as the potential for replacement assets to be superior or have lower associated operating costs. While it is less of a concern today than it was in 1985 when the note was written by the economists, today's railroads are still assessing restructurings to accommodate market

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<sup>19</sup> Economists' Statement in Support of the Staggers Act, dated February 25, 1985



changes. Replacement cost is still a very difficult concept to apply properly. Replacement costs, such as the price of steel, are likely to fluctuate in value based on demand and supply conditions in the economy.

Third, while the ICC was considering the issue of using replacement cost in revenue adequacy determinations and in its rulemakings on Standards for Railroad Revenue Adequacy in the 1980's, and ultimately deciding to retain the net book value concept for rail assets, two other federal agencies reached the same conclusion.

In its 1987 report, the Railroad Accounting Principles Board (RAPB) concluded that while "current market valuation is preferable to historical valuation from a theoretical economic viewpoint," there are "serious practical problems" with such an approach. One practical concern identified by the RAPB is "the need to identify and revalue existing assets which will not be replaced."<sup>20</sup> In a contemporaneous study, the United States General Accounting Office (GAO) also expressed concern that a current cost approach could overstate the value of the investment base, observing that "[t]he cost of reproducing a particular asset . . . may not be a good measure of the value of the asset." After conducting its own inquiry, GAO concluded that it was "not able to identify an adequate solution for the potential problems of overstating asset values under a current cost approach."<sup>21</sup>

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<sup>20</sup> Railroad Accounting Principles, Final Report, Railroad Accounting Principles Board, Vol II at 60-61 (1987) (RAPB Final Report).

<sup>21</sup> Railroad Revenues: Analysis of Alternative Methods to Measure Revenue Adequacy, GAO/RCED-87-15BR at 109-10 (Oct. 1986) (GAO Report).

The RAPB, in its 1987 report, also specifically considered whether using GAAP costs rather than replacement costs would undermine the railroads' ability to attract needed capital, a critical concern expressed by railroad interests. The RAPB concluded that the use of GAAP costs was consistent with the revenue adequacy objective. It stated:

“Capital Attraction

A primary object of the [Staggers Rail Act] is to assist railroads in attaining revenue adequacy. To accomplish this objective, investors must be permitted to earn a market return on their investment. As long as investors can earn a rate of return comparable to their market rates of return for investments of comparable risk, they will continue to invest.

Use of GAAP cost is consistent with the objective of enabling railroad entities to attract capital for the replacement of necessary assets. Railroad assets will be replaced so long as competitive returns are allowed on the existing and new investments of the entity.... if investors reasonably can expect to earn a competitive return, capital can be attracted when it is required, and the accumulation of funds in advance of the reinvestment is not necessary.”<sup>22</sup>

Significantly, the Board's cost of capital purports to measure the opportunity cost of attracting capital to railroad investment, although in practice the Board overstates that opportunity cost substantially.

Fourth, the gap or discrepancy between the net book value and replacement cost of railroad assets, if it can be measured, has likely decreased since Staggers, particularly so in recent years. This development cannot be fully verified without actually computing the replacement costs of a complete railroad, which remains impractical. But from a qualitative standpoint, railroad GAAP-based balance sheets have been cleaned up and improved dramatically

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<sup>22</sup> RAPB Final Report, Vol II, Ch. 7, at p. 47.

since the passage of the Staggers Act in 1980. In the 35-plus years since Staggers, railroads have been given great flexibility, and they have used it to abandon unproductive rail routes, sell light density lines to short-line railroads, eliminate or retire old equipment and obsolete facilities, update equipment and track and other operations, install modern communication and operational controls, consolidate with other railroads at current market valuations, outsource certain non-core functions, and use differential pricing on captive shippers. The rail asset bases for the Class 1 railroads are now much more up to date with new equipment and facilities and have little remaining obsolete or unused assets.

In addition, some railroad assets, such as locomotives and other rolling stock, tend to have relatively shorter useful lives and can easily be sold. In addition, periodic additions and retirements to fleets mean the market and book values of such assets may not be far apart. In fact, some of these types of assets, particularly railcars, can be secured by lease arrangements, and shippers are now more frequently responsible for providing the railcars, removing these assets from the railroad asset base.

A more difficult concern that persists is how to find current costs for very long-lived railroad assets such as bridges, tunnels, land and track. The railroad investment in those assets is also complicated by public-private partnerships and federal grants to remedy bottlenecks or help replace critical older structures. Rail capital expenditures for replacement and capacity additions have also been at very high levels in recent years, indicating a faster addition to and turnover of rail assets. All these factors, plus the steady growth in rail traffic, and the

improved financial performance of railroads in recent years, should result in faster turnover and replacement or retirement of assets – overall younger capital assets. The net book value of a railroad's assets should now be much more in line with the replacement cost of those assets, decreasing any need to compute overall replacement costs.

The RAPB made a useful observation in 1987 which is also relevant to this issue. The RAPB stated:

To the extent that technology and inflation remain reasonably stable, historic cost measures also can serve as an accurate predictor of future costs; current asset value does not provide better matching of future prices to future reported expenses automatically. The expenses reported in subsequent years financial reports under GAAP will represent a combination of existing and new assets. The predictive accuracy of either the current cost or historical cost method is related to the timing and requirements of purchasing new assets.<sup>23</sup>

Fifth, a review of CSXT's GAAP-based balance sheet information in its financial statements show that its total properties have increased considerably from 2010-2014.<sup>24</sup> Increases in the rail asset base have been propelled by large capital expenditures by CSXT that averaged \$2.248 billion per year over the period.<sup>25</sup> For 2010-2014, the value of CSXT year-end rail properties increased from \$32.065 billion to \$39.343 billion, a 23.0% increase. Year-end accumulated depreciation grew from \$8.266 billion to \$10.759 billion in 2014, a 30.2% increase. Finally, the year-end net book value of CSXT's rail properties increased from

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<sup>23</sup> RAPB Final Report, Vol II, Ch. 7, at p. 43.

<sup>24</sup> Information on CSXT's rail properties is taken from Note 6 to the Financial Statements of CSX's Annual Reports for 2010 and 2014, included as e-workpaper RA-CSXTProperties.pdf. The data on rail properties excludes current assets, investments in Conrail and other affiliations, and certain other long-term assets.

<sup>25</sup> Hennigan Report, Table 6.

\$23.799 billion in 2010 to \$28.584 billion in 2014, a 20.1% increase, indicating strong net replacements or additions to CSXT rail assets over the period.<sup>26</sup>

But, even if the Board wanted to utilize replacement costs to measure CSXT's revenue adequacy, CSXT has not offered any calculations or other quantitative evidence to compute the replacement cost of its assets or the difference between book value and replacement cost that CSXT asserts is so critical. While CSXT references values compiled by the Bureau of Economic Analysis, there is no attempt to identify those values or apply them to CSXT, only a general statement that the Board should commence a rulemaking to do so.

CSXT has also not offered a way to measure CSXT ROI based on replacement cost. In particular, if assets are going to be replaced on an ongoing basis, then the treatment of depreciation will also need to be reconsidered. CSXT has also not offered any guidance on how to compare CSXT's ROI based on replacement cost with a real cost of capital for the railroad industry, as CSXT did not mention the real cost of capital or provide any evidence on how to compute it.

Further, in response to a discovery request by Consumers, (Interrogatory No. 20) about whether CSXT calculates, tracks, and/or utilizes Replacement Costs in the regular course of its business, CSXT responded that "In the ordinary course of business CSXT does not maintain any database, spreadsheet, or other document that calculates the overall

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<sup>26</sup> E-workpaper RA-CSXTProperties.pdf.

replacement cost of the CSXT system.” CSXT’s own practices show the difficulty of measuring replacement costs and also indicate that the information is not needed or useful as a practical matter.

At page IV-8 of the reply statement, CSXT quotes from the Board’s Conrail Acquisition Order of 1998 as follows, “And the Agency has explained that ‘carriers cannot attract and retain capital unless they are given the opportunity to be compensated for the real value of property, not just the book value.’” However, CSXT has acknowledged, as noted above, that in the ordinary course business it does not maintain any database, spreadsheet, or other document that calculates the overall replacement cost of the CSXT system. So CSXT itself cannot know directly if it is being compensated for the real value of property it possesses. As my initial report in this case documents, CSXT has had no trouble attracting and retaining capital for at least the period 2010-2014. This view is shared by shareholders and industry financial advisors, and CSXT does not contend otherwise in its evidence, public statements, {

}. Clearly, CSXT does not need to calculate the replacement cost of capital and the appropriate level of return to attract and retain capital.

In fact, CSXT now uses a GAAP-based return on asset performance measure to incentivize its key executives and align company conduct with shareholder value. In 2013, CSXT modified its Long Term Incentive Compensation (LTIC) program for a select group of named executive officers (NEOs), including its Chief Executive Officer. Each NEO’s total

compensation is heavily weighted toward performance-based awards, as long term compensation comprises the majority of the compensation. For the 2013-2015 LTIC cycle, CSXT added a second performance measure, Return on Assets (ROA), to supplement Operating Ratio and further drive performance and value creation. According to CSXT, Operating Ratio and ROA have both demonstrated a high correlation to shareholder value over time.

CSXT measures ROA using tax-adjusted operating income, excluding non-recurring items as disclosed in the Company's financial statements, divided by net property. The tax-adjusted operating income uses a flat 38% tax rate to eliminate the volatility of one-time tax issues. Net property is calculated by subtracting accumulated depreciation from gross property. This is a GAAP-based measure that tracks the revenue adequacy performance measure used by the Board, which CSXT is demanding be computed using replacement costs.

The 2013-2015 LTIP cycle measured cumulative Operating Ratio and average ROA over an 11-quarter period from April 2013 to December 2015. The first quarter of 2013 was not included in the performance period due to timing of approval of the LTIP cycle. The awards were made under the plan in early 2016.<sup>27</sup>

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<sup>27</sup>The Operating Ratio and ROA each comprised 50% of the total payout opportunity for participants, and each is measured independently of the other. The Operating Ratio equals Operating Expenses divided by Operating Revenues, and Return on Assets (ROA) equals Tax-Adjusted Operating Income divided by Net Property. The threshold, target and maximum payouts for each measure are 10%, 50% and 100%, respectively, generating a target payout of 100% and a maximum possible payout of 200% for the 2013-2015 LTIP cycle.

Under the 2013-2015 LTIP cycle, the threshold (10%), target (50%), and maximum payout goals (100%) for Operating ratio were set at 72.6%, 71.1%, and 69.9%, respectively. For ROA, the threshold, target and maximum payout goals were set at 7.69%, 8.25 %, and 8.78%, respectively. For the 2013-2015 cycle, CSX achieved a cumulative Operating Ratio of 70.8% and average ROA of 7.86%, which resulted in a payout of 64% of target.

CSXT did not base its ROA goals for executive compensation on replacement cost of assets, yet CSXT achieved a sufficient ROA for executive awards to be triggered. Even the maximum ROA goal of 8.78% for achieving a 100% payout is considerably lower than the Board's annual railroad cost of capital calculation.<sup>28</sup>

This discussion in the CSXT 2016 Proxy statement recently sent to shareholders provides strong indirect evidence that the 2013-2015 target ROA payout goal ranging between 7.86 - 8.78% (over an eleven-quarter period) approximates CSXT's cost of capital, and it would make little sense to incentivize long-term performance falling below the COC. If CSXT's ROA target had been based on replacement cost, as CSXT requests of the Board, this measure would not have provided any incentive for executive performance, unless the threshold, target, and maximum returns were adjusted similarly.

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<sup>28</sup> Extracted from CSXT 2016 Proxy Statement, RA-CSX2016ProxyStatement.pdf, pp. 33-47.



**2. CSXT provided no evidence on the implementation of the replacement cost of its assets.**

CSXT's reply evidence discusses how railroads now manage their assets better, no longer have substantial excess capacity, and face capacity constraints at certain times and places. CSXT concludes that carriers are not likely to have unused or useless assets in their asset bases. CSXT argues that the lack of or decreases in these practical difficulties to the use of replacement cost, such as these previously cited by the Board and ICC, can no longer justify relying on accounting measures to measure revenue adequacy.

This trend toward greater railroad operating efficiency results in substantial part from the regulatory flexibilities conferred under the Staggers Act. Railroads have become more financially stable by restructuring their operations, facilities, and equipment; better controlling costs by eliminating excess, obsolete or unproductive assets; and adding needed replacements or additional capacity. While CSXT's observations about railroad balance sheets and finances are generally correct and these points have been argued by others (including myself at pages 6-7 of in my Reply Verified Statement in EP 722), railroads continue to operate in a dynamic changing environment. In the current environment, railroads have been making needed cutbacks on facilities, assets, and labor resources in response to shifting levels of demand and shifting commodity movements. Such developments make it difficult to conclude that the current railroad asset configuration will

extend into perpetuity and that all existing assets will be replaced with similar assets. The greater likelihood is that traffic patterns will continue to shift, and assets will need to be redeployed and revised.

More important though, while CSXT argues that it is now potentially easier for the Board to calculate the replacement costs of railroad assets -- because rail asset bases are more in line with current service demand -- CSXT has provided no practical guidance for computing the replacement cost for a railroad's assets. CSXT mentions a BEA database that estimates the current value of industry assets for selected industry groups, but CSXT provides little practical discussion or testimony about the data, how the data would be used, or how calculating the replacement cost of a railroad would be accomplished, save that the Board should open a rulemaking to seek public input.

A rulemaking on this issue could not possibly result in a solution to determining CSXT's revenue adequacy in this rate case.

**3. CSXT provided no evidence on the real rate of return to be used with the replacement cost of assets.**

CSXT's request for the Board to use the replacement cost of assets for computing CSXT's return on investment (ROI) would require the development of the real (inflation-adjusted)

cost of capital for the railroad industry, so as not to count inflation twice, once in the asset base (replacement costs) and again in the nominal cost of capital. No such measure currently exists. Currently, the Board computes and uses (with considerable room for improvement) relatively simple and well-known methods to compute nominal industry cost of capital (COC). The industry COC is compared to the ROI for the carrier computed as carrier net income divided by the net book value of the asset base. This simple process provides the required data for the revenue adequacy determination ( $ROI=COC$ ). But the real (inflation adjusted) cost of capital for the rail industry has not been computed, would be very difficult to compute, and contributes further to the difficulty of computing the replacement cost of assets.

CSXT does not even acknowledge the need to use a real cost of capital in conjunction with replacement costs in its reply evidence. Nor does CSXT provide any evidence or discussion about how a real rate of return for railroads could be computed. Without a real cost of capital benchmark, a replacement cost analysis cannot possibly be utilized.

In the past, the Board has been very clear that suggestions for alternatives to the revenue adequacy determination should be accompanied by substantive analysis of how the proposal would be implemented. In this case, CSXT has completely ignored that requirement for a calculation of the real cost of capital, let alone provided any guidance of how it would be computed.

#### **4. Summary**

The Board is not required to use the replacement cost of railroad assets in revenue adequacy determinations, and doing so would be contrary to Board and ICC precedent, independent GAO and RAPB reviews, the Congressional directives to utilize GAAP, the practice of other regulatory agencies, and CSXT's own practices. CSXT has not provided any evidence that should alter the Board's prior conclusion that the calculation of replacement costs for railroads remains unworkable. CSXT has not followed Board direction to use net book value, CSXT has not offered evidence of support for how to compute replacement cost, and CSXT has not even mentioned the need for a real cost of capital measure and how it could be calculated and used in conjunction with CSXT's request. Replacement costs cannot possibly be used to apply the revenue adequacy constraint in Consumers' rate case.

#### **C. Based on an analysis of all available measures, CSXT is Revenue Adequate.**

CSXT's principal response to the analysis of its revenue adequacy in Consumers' Opening Evidence is that the Board has not found that CSXT's return on net investment exceeds the railroad industry current cost of capital under the ROI=COC test. CSXT believes the test must be applied using only the Board's COC, and no other information can be considered.

CSXT is incorrect. CSXT has already acknowledged at page 13 of its Motion to Dismiss filed on March 24, 2015 in this case that “Agency precedent does permit a party to challenge these annual [revenue adequacy] findings in a particular adjudication.” The Board denied CSXT’s motion in a decision decided June 11, 2015, ruling at page 2 that “Consumers has stated a claim under the constraint and may present other competent and probative evidence to make its case, should it so choose.”

CSXT did not present any evidence to challenge Consumers’ financial data, calculations using that data, presentation of the data, or the results of the analysis showing CSXT to be revenue adequate. CSXT also did not disagree with, or even address, Consumers’ evidence that showed that CSXT fulfilled all the statutory criteria for revenue adequacy specified by Congress in 49 U.S.C. § 10704(a)(2). CSXT did dispute the meaning and significance of multiple measures of financial evidence about CSXT’s revenue adequacy presented throughout the testimony. Significant points of disagreement are addressed below. The analysis in my testimony clearly demonstrates, based on multiple tests and analysis of financial measures and specified criteria, that CSXT has achieved long-term revenue adequacy.

### **1. Competent and probative evidence of CSXT’s revenue adequacy**

The following listing summarizes the analyses and tests of CSXT’s revenue adequacy that are performed and detailed in Consumers’ Opening Evidence and my initial report:

**a. Compare the financial performance of CSXT to the criteria for measuring revenue adequacy specified in 49 U.S.C. § 10704(a)(2).**

In 49 U.S.C. § 10704(a)(2), Congress specified the criteria for determining if a carrier is revenue adequate. A carrier that satisfies those criteria should be found to be revenue adequate. The evidence fully shows that CSXT meets each of the detailed criteria. If a railroad meets all of these enumerated criteria, then the railroad should not be deemed revenue inadequate based solely on the result of a single test historically used by the Board. Under these conditions, failure to meet the Board's ROI=COC test would indicate that the singular test is defective or its inputs are suspect.

**b. Perform an analysis of multiple financial ratios for CSXT financial performance.**

CSXT exhibited strong performance under all of the financial measures traditionally used to measure revenue adequacy. Since all the evaluations are favorable, there is no need to weigh one consideration against another. It is also appropriate to note that the financial ratios together present a more coherent and complete financial analysis. For example, CSXT's favorable dividend payout ratio might be less

significant if it were not accompanied by the favorable operating ratio (showing the cash flow and dividends were funded by operations) and the favorable debt to capital ratio (showing that the dividends and cashflow were not funded through increased leverage). The dividend payout ratios are more significant because they were achieved in the face of substantial capital expenditures and stock repurchases. The market to book value ratios, return on equity, and cash flow to equity also reflect the strong operating ratio performance that is more impressive because CSXT is able to fund dividends, buybacks, and capital expenditures while maintaining modest debt leverage in its capital structure. In contrast, CSXT's reply attempts to minimize each ratio by considering it in isolation, without considering the relationship to the other factors considered.

In that regard, single-factor tests, such as ROI=COC, may be attractive in theory because of their simplicity and clarity. However, the trade-off is that such tests may become inaccurate and misleading if the inputs are susceptible to distortions, gaming, or the equivalent. Even where a single-factor test is used, other evidence should be readily available to determine if it is being properly applied and is yielding plausible results. The various financial metrics for CSXT taken together over the period 2010-2014 present a very positive and attractive picture of CSXT's financial performance. This analysis presents a very positive view of CSXT as a mature, growing, profitable, future focused, and revenue adequate U.S. railroad, all of which are inconsistent with the results of the Board's ROI=COC test. CSXT does not fall short of any reasonable standard measure of railroad revenue adequacy.

**c. Correct the procedures for applying the Board's ROI=COC test, and show CSXT to be revenue adequate under that test as properly applied.**

The Board's ROI=COC test uses the Board's methodology for estimating the equity portion of the industry cost of capital. That methodology is flawed in three key respects that individually and collectively lead to cost of capital calculations that are unrealistically high. To correct these flaws, my testimony utilizes three modifications to the Board's methodology: eliminate the use of the Multi Stage Discounted Cash Flow model, compute the market risk premium (MRP) based on a 50-year historical period, and use a Blume adjustment to the estimated "beta" risk factor. These three modifications were explained in detail in the testimony. The resultant computed industry cost of capital is more realistic and in line with expressed investor expectations. As a result, CSXT ROI exceed the COC in each year, 2010-2014, and CSXT is revenue adequate, as shown by Tables 21 and 22 in my initial report.

**d. Analyze CSXT's revenue adequacy based on a CSXT-specific cost of capital.**

While the Board estimates an average cost of capital for the railroad industry as a whole based on a composite sample, it is also possible and desirable to estimate a cost of capital for just CSXT. Each railroad's cost of capital is likely to vary from the average, and an individual railroad and its investors are ultimately more interested



in the individual railroad's cost of capital rather than the industry average.

Ultimately, a railroad needs to have a good idea of its own cost of capital in order to make sound decisions and be a competent steward of its capital assets. Moreover, the composite sample used by the Board to calculate the industry average is not very large (only three or four carriers), excludes what is the largest carrier by some reasonable measures (BNSF), includes one carrier (KCS) that is substantially smaller than the others and that also has a substantial foreign exposure.

Furthermore, the largest carrier in the sample (UP) operates in the West, whereas CSXT operates in the East. The average is thus not representative of CSXT. Also, outside investment firms (such as Morgan Stanley, whose report is addressed later in this report) often present costs of capital for individual firms, as opposed to industries. Accordingly, I estimated a CSXT-specific cost of capital using the Board's CAPM methodology, making the appropriate adjustments noted earlier, for purposes of applying the ROI=COC test.

The results of this test show that CSXT's ROI exceeded its cost of capital and that CSXT is revenue adequate each year, 2010-2014. (See Tables 29 and 30 of my initial report.) The analysis also shows that a CSXT-specific cost of capital is lower than the industry average cost of capital using the Board's CAPM as modified.

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**f. Evaluate CSXT's revenue adequacy as perceived by the financial and investment community.**

A review of CSXT's revenue adequacy logically would consider analyses prepared by and relied upon in the financial and investment community. Those independent and informed analyses are particularly useful where they review CSXT's financial health and viability on a long-term basis, and its suitability or desirability as a long term investment. ValueLine, S&P, and Morningstar reports are particularly useful in this regard as they are independent, well-respected, and readily available. Retail investors typically can access these reports through their public libraries and on an online basis.

The ValueLine analysis regards CSXT as a desirable investment. It offers no indication that the company is revenue inadequate or faces any problems attracting needed capital.

Morningstar's evaluation states that CSXT, like the other major Class I railroads, is already outearning its cost of capital, is highly likely to continue doing so for the

next ten years, and “more likely than not” for the following ten years. Morningstar thus believes that CSXT passes the ROI=COC revenue adequacy test on a long-term basis.

Like ValueLine and Morningstar, S&P presents a very favorable long-term view of CSXT. There is no suggestion that CSXT’s revenues are inadequate to sustain the company on a long-term basis.

The information reviewed above demonstrates that CSXT has achieved revenue adequacy over a multi-year period through 2014 and is likely to remain revenue adequate on a long-term basis. CSXT’s revenue adequacy is not a short-term event. CSXT has shown the ability to tailor its railroad operations to demand, control its costs, make significant investments in capital assets, aggressively seek new business, earn increasing levels of profits, and achieve and maintain revenue adequacy. The stock market and its multitude of diverse participants continually appraise and evaluate the expected future performance of publicly traded companies such as CSXT. Future revenues, costs, profitability, and stock prices of companies with traded stock are constantly evaluated by individual and institutional investors, market researchers, brokers, other companies, and others. As shown in this Report, those sources and the metrics on which they rely confirm that CSXT’s multi-year, steady trend of progress will continue.

## **2. Other Public Information on Railroad Cost of Capital**

A recent indication from the investment community about the cost of capital for individual railroads, including CSXT, was provided in the February 23, 2016 edition of Freight Transportation, a detailed periodic report on the transportation industry and financial performance and estimates prepared by Morgan Stanley. The Morgan Stanley report includes an estimate of the prospective WACC (weighted average cost of capital) for each of the main railroads (except for NS and CP). Morgan Stanley identifies a WACC for CSXT of 6.7%. Morgan Stanley also estimates the WACCs for Union Pacific (7.2%), Kansas City Southern (7.4%), and Canadian National (6.5%). (See excerpts at RA-MorganStanley.pdf)

That Morgan Stanley's published cost of capital values for CSXT and other railroads are so much lower than the values estimated by the Board, provides a strong indication that the Board's values are substantially overstated. Morgan Stanley is a respected investment banking firm with much expertise and experience in corporate finance matters such as the cost of capital. The Board should not be using a cost of capital that is so much higher than that perceived by the financial and investment community.

## **3. Further CSXT Information on own Cost of Capital**

As discussed earlier, CSXT issued its 2016 Proxy Statement on March, 25, 2016. The statement specifies the threshold, target, and maximum figures for long term incentive

compensation based on ROA (return on assets) at 7.69%, 8.25%, and 8.78%, respectively. As explained earlier, it would not make sense for CSXT to reward ROA performance that is below its cost of capital. CSXT issued its 2016 Proxy Statement to shareholders. Public companies send their proxy statements to shareholders before their annual meetings. This public document, posted on the company's website and filed with the SEC, provides information on matters to be voted on at the meeting as well as other useful information for stockholders.

As discussed earlier, the 2016 Proxy Statement explains that CSXT bases half of its long term incentive plan (LTIP) compensation for Named Executive Officers (NEOs) on Return on Assets ("ROA"), reflecting income divided by net property, representing an investment base very similar or identical to that used for revenue adequacy purposes.

This discussion in the CSXT 2016 Proxy statement provides strong indirect evidence that the 2013-2015 target ROA payout goal ranging between 7.86 - 8.78% (over an eleven-quarter period) approximates CSXT's cost of capital, and it would make little sense to incentivize long-term performance falling below the COC.

This new publicly available information on a return on asset measure by CSXT set for a maximum executive payout at 8.78% over a three year period, is still lower than the Board's cost of capital. {

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**D. CSXT is a revenue adequate railroad that annually covers its costs, invests heavily in improving its plant and equipment, provides for its shareholders - and is not a “cash cow”.**

At page IV- 57-61 of its reply statement, CSXT claims that Consumers has asserted that CSXT is a “cash cow”, recycling an argument that shippers supposedly made against railroads from the 1980’s. CSXT’s characterization is inaccurate. Nowhere in Consumers’ narrative or in my testimony is CSXT directly or indirectly called a “cash cow.” The term is simply not used, and no such meaning is implied. Beyond that, CSXT uses the term to describe a railroad company that earns less than the cost of capital or is otherwise unable to sustain its operation, yet directs funds away from railroad infrastructure in favor of large investments outside the railroad industry, payment of large cash dividends, or large stock repurchase programs, etc., like the Southern Pacific Railroad, the single example used by CSXT.

The concept of being or behaving like a “cash cow” is clearly inconsistent with CSXT’s plans, actions, actual performance, or communications to public investors. It is also clearly inconsistent with Consumers’ view of CSXT. For example, Consumers reviewed the favorable operating ratio progress already achieved by CSXT and the further progress that is projected. In contrast, SP had operating ratios of 100.7% in 1993, 92.6% in 1994, and

100.4% in 1995 before it was merged with the Union Pacific railroad.<sup>30</sup> CSXT's efforts to equate its condition with SP, or to assert that Consumers has done so, are pure fantasy.

Consumers' testimony and narrative demonstrate very clearly that CSXT is a viable and revenue adequate railroad, earning the cost of capital from 2010-2014, and that in addition to covering all its costs, including capital costs, CSXT also makes substantial investments in needed improvements and expansion of its rail system. For example, I explain at page 24 of my initial report that, "CSXT also has been able to devote approximately 19% of its revenues over the past 5 years to capital expenditures, so as to maintain and expand its operations."<sup>31</sup> CSXT itself professes to have the same view of its own performance and reinvestment in its rail operations. CSXT's Chairman stated in his letter to shareholders in the 2014 Annual Report at p. 11: "Since 2003, CSX has invested an astonishing amount – nearly \$21 billion – in its network and equipment. A record capital investment in 2014 of more than \$2.4 billion supported safe, reliable service upon which our customers rely."<sup>32</sup>

My initial testimony shows in detail how CSXT meets the standards for revenue adequacy based on numerous and varied criteria. I show that CSXT meets the legal definitions of revenue adequacy, as supported by numerous financial measures of CSXT's cost of capital, other financial indicators, and the views of rail transportation investment advisors. I believe that CSXT earned the cost of capital (properly calculated) over at least 2010-2014, that its revenues were adequate to meet all of the legal requirements specified in Section

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<sup>30</sup> The figures are taken from Southern Pacific Railway Company's 10-K for 1996, available at <http://www.sec.gov/Archives/edgar/data/92259/0000898430-96-001043.txt>, and included as e-workpaper RA-SP-1995-10K.pdf (p. 2 of the report and p. 4 of the pdf).

<sup>31</sup> Consumers Op. at IV-24, also see Table IV-6 at IV-16 and IV-16-17.

<sup>32</sup> E-workpaper RA-CSX-2014-AnnualReport.pdf.



10704(a)(2), and that CSXT exercised its flexibility to choose where to invest its earnings, whether in plant and equipment, additional dividends, a stock reinvestment programs, or other programs. Achieving revenue adequacy enables a carrier to fulfill all of the probative criteria specified in Section 10704(a)(2).

CSXT references Consumers' statement on Opening at IV-14 that "...the repurchases (of stock) are another reflection of revenues sufficient to meet capital needs." Consumers further noted at IV-19-20 that, "CSXT could devote even more of its resources to capital expenditures if it needed additional investment." Consumers showed that buybacks during 2010-2014 totaled \$4.7 billion. As shown in Table IV-10 from Consumers Opening Evidence at IV-19, CSXT has devoted substantial resources to buying back its own stock, a clear indicator that CSXT does not suffer from a capital shortfall.

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These statements do not claim that making capital expenditures or engaging in stock buybacks is sufficient, in isolation, to demonstrate that a carrier is revenue adequate. But they are things that revenue adequate carriers normally do or consider doing, especially

when it is shown that the funds are generated from operations, that the carrier has not taken on excessive or increased debt to generate those funds, that the carrier is earning its cost of capital as reasonably estimated, that the carrier has favorable credit ratings, {

} Consumers has not created a “modern variation on the “cash cow” argument” as CSXT alleges at page IV-57-58 of its reply.

On the contrary, Consumer’s testimony shows that CSXT is viable and revenue adequate, and has been heavily investing in equipment and facilities for the future. CSXT has been providing for its stockholders in terms of earnings, adequate dividends, and through stock repurchase plans when it chooses. Throughout this period CSXT stock price has responded favorably to CSXT’s performance. CSXT today is not like the former Southern Pacific Railroad.

#### **E. CSXT Traffic Growth and Changes**

In its reply statement at page IV-19-20, CSXT notes recent shipper testimony before the Board that railroad excess capacity is a feature of the industry’s past and now shippers are concerned with tightening capacity. CSXT points out that Congress also shares this view and concern. Studies of forecasts of future transportation demand are referenced, some

predicting “massive increases in freight movements over the next 20 years.”<sup>33</sup> CSXT states “The modern railroad industry is no longer burdened by substantial excess capacity. Indeed, the industry now faces the opposite situation of strained rail capacity.”<sup>34</sup>

The reality is more nuanced. The railroads have experienced significant growth in a number of areas, but by some measures traffic levels are only slightly above, or still below, the peaks achieved before the recession. These relationships and patterns are shown in my e-workpapers and include various tables that present data for CSXT and the Class I railroad industry as a whole that show measures of railroad traffic over time.<sup>35</sup> The data show that the concepts of excess capacity and capacity constraints are not static in the railroad industry and can change quickly. The railroad industry, as well as the underlying economy that drives its demand, is dynamic and responsive.

#### **F. CSXT’s historical revenue shortfall estimate remains meaningless and incorrect.**

In Section IV-C-2 of its reply statement, CSXT returns to and updates an analysis of revenue adequacy shortfalls that it previously presented in the motion to dismiss Consumers’ revenue adequacy claim, which the Board denied. CSXT has now added one additional year of data, 2014, to the spreadsheet. However, the additional year does not

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<sup>33</sup> CSXT Reply, pp. IV-19-20.

<sup>34</sup> CSXT Reply, pp. IV-19 - IV-20, including footnotes 41 and 42, pp. IV-9 - IV-10 including footnote 20.

<sup>35</sup> See e-workpapers RA-RRVolumeData.xlsx and RA-RRvolumeData.pdf.

make the analysis any more meaningful, and the analysis remains deficient for the reasons that Consumers noted in opposing the motion to dismiss.

The Staggers Act of 1980 partially deregulated the railroad industry. The legislation and ICC and Board implementation of its provisions afforded the railroads great flexibility in terms of operations, abandonments, and overall ratesetting, and other areas, except where there is an absence of effective competition (and agency intervention has been very limited in that regard). Since the Staggers Act, and even before, government regulation has been supplanted by reliance on market forces.

If CSXT had actually experienced escalating losses over the period 1999-2014 of the magnitude CSXT depicts, investors would be quick to recognize the situation and would shun CSXT's stock, causing it to trade at a massive discount as the enterprise headed towards bankruptcy. Nothing of the sort happened. Table 34, below, present's year-end data on CSXT's stock price, shareholdings, and market capitalization as well as the year-end values of the Standard & Poor's 500 Index of stocks.

Date	Shares Outstanding (000)	Last Price (\$)	Historical Market_Cap (Millions of \$)	S+P 500 Index
12/31/1998	1302.714	6.9167	9010.48	1229.23
12/31/1999	1310.664	5.2292	6853.72	1469.25
12/29/2000	1276.428	4.3229	5517.87	1320.28
12/31/2001	1282.128	5.8417	7489.81	1148.08
12/31/2002	1288.122	4.7183	6077.75	879.82
12/31/2003	1290.426	5.99	7729.65	1111.92
12/31/2004	1293.174	6.68	8638.40	1211.92
12/30/2005	1309.218	8.4617	11078.21	1248.29
12/29/2006	1313.292	11.4767	15072.26	1418.3
12/31/2007	1223.592	14.66	17937.86	1468.36
12/31/2008	1171.578	10.8233	12680.34	903.25
12/31/2009	1180.38	16.1633	19078.84	1115.1
12/31/2010	1111.026	21.5367	23927.83	1257.64
12/30/2011	1049.157	21.06	22095.25	1257.6
12/31/2012	1020.485	19.73	20134.17	1426.19
12/31/2013	1008.86	28.77	29024.90	1848.36
12/31/2014	991.591	36.23	35925.34	2058.9

Source: Bloomberg Finance; e-workpapers RA-Table34.xlsx.

The data in Table 34 shows that CSXT's shareholders have had an extremely favorable experience during the period covered by CSXT's claimed revenue shortfall. As of December 31, 1998, CSXT had a split-adjusted share price of \$6.91 and a market capitalization of \$9.01 billion. As of December 31, 2014, CSXT's share price had risen to \$36.23, representing a 424% increase, and its market capitalization had grown to \$35.93 billion, representing a 299% increase. By comparison, the S&P 500 index over the same period

began at a value 1229.23 and ended at a value of 2058.9 on December 31, 2014, amounting to an increase of 67%. If CSXT had really experienced a \$33 billion shortfall the funds needed for its long-term survival over this period, it would not have experienced a concurrent \$27 billion growth in its market capitalization.

There is no evidence that CSXT actually experienced any massive revenue shortfall as presented in CSXT's Reply Evidence.

