

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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CONSUMERS ENERGY COMPANY

Complainant,

V.

Docket No. NOR 42142

CSX TRANSPORTATION, INC.

Defendant.

REPLY TO CONSUMERS ENERGY COMPANY'S PETITION FOR TECHNICAL CORRECTIONS

Peter J. Shudtz
John P. Patelli
Jason M. Marques
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

**Raymond A. Atkins
Matthew J. Warren
Terence M. Hynes
Hanna M. Chouest
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005**

Counsel to CSX Transportation, Inc.

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Simultaneous to its submission of a Petition for Reconsideration and the parties' Joint Petition for Technical Corrections, Consumers filed a separate "Complainant's Petition for Technical Corrections" ("Technical Petition") asking the Board to "correct" five issues in the Board's January 11 Decision.¹ At the outset, CSXT notes that technical corrections should be reserved for instances where the Board's workpapers either contain a calculation error or fail to carry through a conclusion made in the text of a decision.² None of the five issues raised by Consumers are technical corrections of this sort. These issues should be addressed under the reconsideration standard of 49 C.F.R. § 1115.3(d), should the Board decide to address them at all.

CSXT responds to the five issues raised in the Technical Petition as follows:

First, CSXT does not object to correction of Consumers's calculation error for switch heaters and propane tanks, so long as the Board applies a consistent standard to allow both parties to correct errors stemming from minor calculation errors. In particular, if Consumers is allowed to correct an error in the *Decision* that flowed from an inadvertent mistake in Consumers's original evidence, the Board should do the same for the crossing repaving error that flowed from an inadvertent mistake in CSXT's evidence.

Second, CSXT agrees with Consumers that the Board should correct workpaper errors related to off-line ballast transportation. Consumers has not proposed a complete fix to these errors, however, and the Board should adopt the complete fix set forth in CSXT's Reconsideration Petition rather than Consumers's partial fix.

Third, Consumers's suggestion that the Board should update the cost of equity forecast in the SAC analysis should be rejected. Consumers has not satisfied the *Sunbelt Reconsideration* standard for updating SAC forecasts after the close of the record, which only applies to

¹ *Consumers Energy Co. v. CSX Transp., Inc.*, STB Docket No. 42142 (STB served Jan. 11, 2018) ("*Decision*").

² *See Pub. Serv. Co. of Colo. d/b/a/ Xcel Energy v. BNSF Ry. Co.*, STB Docket No. 42057 (served Dec. 14, 2004).

“significant changes” that involve “important long-term shifts in indices and forecasts, not short-term, period-to-period fluctuations that do not undermine our long-term projections.” *SunBelt Chlor Alkali P’ship v. Norfolk S. Ry. Co.*, STB Docket No. 42130, at 25 (STB served Jun. 30, 2016) (“*Sunbelt Reconsideration*”). Indeed, other forecasts—like Consumers’s forecasts for its own traffic—have shifted since the close of the record in ways that offset the short-term fluctuation in the cost of equity. The Board should adhere to its precedent of limiting forecast updates to situations involving “important long-term shifts.”

Fourth, CSXT does not believe that changing the SAC analysis to account for 2017 changes in federal tax laws qualifies as a “technical correction.” CSXT does believe, however, that recent tax law revisions constitute a substantial change in circumstances that warrants reconsideration of this issue. If the Board grants reconsideration of the tax questions based on changed circumstances, however, it must apply the same standard to other substantially changed circumstances like the sea change in crude oil traffic.

Fifth, Consumers’s assertion that the Board was required to update various indices in the *Decision* is at odds with *Sunbelt Reconsideration*. The Board has recognized that continually updating indices and other forecasts could lead to a never-ending cycle of updates, and as a result that updates should only be made to reflect “important long-term shifts.” None of Consumers’s proposed changes involve shifts of that magnitude.

I. The Board Should Permit Correction of Calculation Errors Such as Those for Switch Heaters, Propane Tanks, and Grade Crossing Repaving.

Consumers’s Supplemental Evidence changed the counts for several switch heaters and propane tanks from the evidence that Consumers presented on Opening and Rebuttal. These changes were outside the narrow scope of Supplemental Evidence that the Board prescribed in its December 11, 2016 *Decision*. Instead, these changes were made to correct unrelated “minor technical calculation errors” in Consumers’s initial evidence. Consumers Supp. Open. at III-F-2. The *Decision* did not address this issue or hold that it was an appropriate error for Consumers to

correct in Supplemental Evidence, and therefore CSXT does not agree with Consumers that this is a technical correction.

That said, CSXT agrees with Consumers that the switch heater and propane tank counts in the Board's Decision are based on a calculation error in Consumers's evidence, and that the correction proposed in Consumers's Technical Petition appropriately addresses the issue. CSXT has no objection to the Board's correction of Consumers's calculation error, so long as the Board likewise corrects the calculation error for grade crossing repaving expenses that derived from a minor error in CSXT's Reply Evidence. *See* CSXT Recon. Pet. at 13-14. "The Board routinely allows the correction of minor technical errors in SAC rate cases," *TPI* at 185, and it should not hesitate to do so where an inadvertent error by a party causes the Board's workpapers to diverge from its substantive conclusions. That is true for the switch heater and propane tank count corrections that Consumers proposes here, and it is equally true for the grade crossing repaving correction described in CSXT's Petition.

II. The Board Should Correct Its Miscalculation of Off-Line Rail Transportation Costs.

CSXT and Consumers agree that the Board's workpapers failed to implement the *Decision's* acceptance of CSXT's methodology for calculating off-line transportation costs for rail. *Decision* at 210-11. The *Decision* rejected Consumers's proposed \$0.035 rate for off-line rail transportation costs in favor of CSXT's "feasible approach," which used a rate derived from the 2013 CWS for transportation costs between Steelton, PA and Russell, KY, and then used a rate derived from a rail manufacturer quote for transportation between Russell, KY, and the CERR railheads. *Id.* But the Board's workpapers made two errors in implementing this change. As Consumers explains, "[t]he Board should have updated the [transportation costs for] 115# rail with the CWS rate," and it should have "applied the separate price quote for the Russell to CERR railhead leg." Technical Petition at 3.

CSXT agrees that the workpapers made these two errors. *See* CSXT Recon. Pet. at 18-19. Where the parties differ is on how to correct them. Consumers's proposed correction would only address the error for 115# rail costs, but do nothing to correct the workpapers' failure to include

the “quote from a rail manufacturer” accepted in the *Decision*.³ Consumers does not explain its decision not to correct an error that it acknowledges in the text of its Technical Corrections Petition, and it is not clear what justification there could be for ignoring the Board’s clear decision to accept CSXT’s methodology, including the “quote from a rail manufacturer” for the last leg of transportation to the CERR railheads. *Decision* at 211.

In contrast, CSXT’s proposed corrections address both issues. See CSXT Recon. Pet. at 19 n.22. The Board should accept the corrections set forth in CSXT’s Reconsideration Petition as the only evidence in the record that corrects the two acknowledged technical errors in the *Decision*’s calculation of off-line rail transportation costs.

III. The Board Should Not Update The Cost-of-Equity Forecasts Based On A Period-To-Period Fluctuation.

Consumers argues that the Board committed a technical error by not updating the cost of equity forecast used in the SAC analysis for the years 2016 to 2024. Technical Petition at 4. In particular, Consumers states it was a technical error not to swap in the new 2016 figure, published well after the close of the record, and then to update the remaining 8 years of cost-of-equity forecast. It claims that “[t]he Board’s precedents clearly establish” use of the most recent cost of equity figures and also updating the forecast cost-of-equity figures.

Regardless of whether or not the Board’s precedents on the matter were “clearly establish[ed]” in earlier cases, in 2016 the Board wiped the slate clean and established a uniform standard for updating all forecasts in the SAC analysis after the close of the record. In *Sunbelt Reconsideration*, the Board observed that “forecasts are continually shifting, and implementing changes can create moving and confusing targets. Attempting to use only the most recent data available, even data released after the close of the evidentiary record, can unreasonably and unnecessarily delay the issuance of a decision as the Board’s staff works to integrate the new data into the SAC model.” *Sunbelt Reconsideration* at 24. To resolve the “varying treatment” by

³ See Technical Petition Ex.1 at 2.a.1.a. (only proposing a correction to a single cell to use the CWS rate for 115# rail).

the Board with regard to updating forecasts, the agency announced a uniform, heightened standard: it would update a forecast only for “significant changes” that involve “important long-term shifts in indices and forecasts, not short-term, period-to-period fluctuations that do not undermine our long-term projections.” *Id.* at 25. And because the Board concluded that “this is the best approach with regard to updating forecasts and indices after the close of the evidentiary record (including post-Decision), [the Board] expressly decline[d] to follow prior cases that may suggest a different approach.” *Id.* n.24.

Indeed, when the Board issued its reconsideration decision in *Sunbelt*, the agency had published two cost-of-equity figures since its original decision. Yet there is no whisper in the *Sunbelt* decision that on reconsideration the Board updated the cost-of-equity forecasts, which is hardly surprising given the just announced uniform, heightened standard for updating forecasts.

Consumers cannot satisfy the *Sunbelt* standard to show a “significant long-term shift” in the forecasts for the cost of equity. Indeed, it made no effort to show that the 2016 cost-of-equity figure is not just an expected “period-to-period” fluctuation. As the Board observed, “forecasts, by their very nature, will almost always fail to match exactly with prior estimates.” *Id.* Having failed to address (let alone satisfy) the *Sunbelt* standard, the Board should reject the request to update the 2016-2024 forecast based on a single-year fluctuation.

Indeed, the period-to-period fluctuations in the cost of equity are the same as the period-to-period fluctuations in the amount of coal that Consumers shipped to the Campbell facility (and its 2017 public forecasts). In this case, the Board accepted as the best evidence of record the forecast coal shipments that Consumers filed with its own state regulator in 2015. Following the close of the evidentiary record, however, Consumers submitted two more forecasts in 2016 and 2017 to its own regulator.⁴ Each publicly available forecast by Consumers predicted increasingly

⁴ See Consumers Energy Company’s Application for Approval of a Power Supply Cost Recovery Plan and for Authorization of Monthly Power Supply Cost Recovery Factors for the Year 2018, Michigan Pub. Serv. Comm. Case No. U-18402, at Ex. A-8 and A-10 (filed Sept. 29, 2017) (includes gross-up for Unit 3 to reflect Consumers’ ownership; excludes eastern coal traffic).

lower and lower coal shipments, and the actual shipments in 2016 and 2017 fell well below the forecast level used in the *Decision*.

Table 1 contrasts the updated forecasts sought by Consumers against the actual and new forecasts for coal shipments to Campbell. On the left-hand side are the cost-of-equity figures used in the *Decision* and the updated forecasts proposed by Consumers. On the right-hand side are the issue traffic forecasts used in the *Decision* (in millions) and the updated forecasts (in millions), which include the actual shipments (2015-2017), the 2017 five-year forecast by Consumers to its state regulator (2018-2022), and forecasts for 2023 and 2024 using the methodology accepted in the *Decision*. Finally, the total average percent change is calculated. For the cost of equity, the average is calculated for the period from 2016 to 2024 (the updated figures), in order to not understate the total percent change to the forecasts used in the *Decision*.

Table 1

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As **Table 1** reveals, these two sets of forecasts are indistinguishable. Both portray the unremarkable fact that actual results will always differ from forecasts. The difference between the published and forecast 2016 cost-of-equity figures (16.5%) {

} Moreover, if both the forecasts were updated, this would have an almost perfectly offsetting impact on the SAC analysis. And, most importantly, neither change satisfies the standard announced in *Sunbelt* to update forecasts, as neither change reflects a significant, long-term shift, but rather is a classic example of a “period-to-period” fluctuation. Because these changes do not satisfy the *Sunbelt* standard, CSXT did not seek reconsideration of the forecasts for the issue traffic. This is also why the Board should reject Consumers’s request to update the cost-of-equity forecasts for the years 2016 to 2024.

Both current Board members have expressed concerns about the complexity of SAC cases. Acting Chairman Begeman has “often voiced [her] concerns about the Board’s rate review processes, and in particular SAC, which is costly, time consuming, and unpredictable.” *Decision* at 74. Vice Chairman Miller has echoed these “concerns about the complexity of the test itself and the fact that this complexity causes the process to be cost- and time-prohibitive.” *Sunbelt Reconsideration* at 42-43. To control complexity and improve predictability, the Board must stand behind its decision in *Sunbelt* to not reopen to update forecasts unless it observes a significant change reflecting a long-term market shift. Otherwise, it will have to continuously restate the maximum lawful rates as new published cost-of-equity figures are released. The agency is not expected to “behave like Penelope, unraveling each day’s work to start the web again the next day.” *Western Coal Traffic League v. ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984).

IV. The Board Should Account For Substantially Changed Circumstances Like the 2017 Tax Cuts and Jobs Act and the Dramatic Drop in Crude Oil Traffic.

Consumers contends that the changes to federal tax law made by the December 22, 2017 “Tax Cuts and Jobs Act,” Pub. L. No. 115-97, 113 Stat. 2054 (2017), should be incorporated as “technical corrections” to the SAC analysis. This was no technical error. Major changes to

federal law that are made long after the close of the record and that were never addressed by the parties are not the sort of computational or technical errors that are appropriately addressed as a petition for technical correction.

Rather, this sort of change in the legal landscape should be addressed as a reconsideration item and specifically as a “changed circumstance” under 49 U.S.C. § 1115.3(b)(1). Under that standard, CSXT agrees that the changes in federal tax law made by the “Tax Cuts and Jobs Act” are a changed circumstance that materially affects the SAC analysis, which includes assumptions about the tax rates that the CERR would pay over the SAC analysis period. CSXT does not object to the Board altering its *Decision* to incorporate recent changes in federal tax law, so long as the Board similarly adjusts its *Decision* to reflect other substantially changed circumstances.

In particular, it would be arbitrary to adjust the *Decision* to reflect the change in federal tax laws without also correcting its plainly wrong assumption that the CERR could benefit from thousands of annual tank cars of crude oil traffic that no longer exist. As CSXT explained in its Petition for Reconsideration, the *Decision* erred by ignoring substantial evidence in the record of a precipitous drop in crude oil traffic, not to mention public QCS reports showing a 99% drop in CSXT crude oil shipments between 2015 and 2017. Not only was the *Decision*’s failure to acknowledge this evidence a significant material error in the *Decision*, the almost complete disappearance of the crude oil traffic assumed by the *Decision* constitutes a substantially changed circumstance under any definition of the term.

The Board cannot rationally make Consumers’s requested change to reflect changed circumstances in corporate taxation without also changing the *Decision*’s plainly incorrect assumption about crude oil volumes to reflect changed circumstances in crude oil traffic. Just as the CERR should not be assumed to pay federal income taxes higher than it would pay in today’s environment, it should not be assumed to receive contributions from crude oil trains that no longer exist.

V. The Board Should Not Update Indices Based On A Period-To-Period Fluctuations.

Consumers claims it was a technical error for the Board not to have *sua sponte* updated the indices used in the *Decision*, including the Rail Cost Adjustment Factor, Rail Cost Recovery Factor, and the Highway Diesel Fuel index. Technical Petition at 6. Consumers claims it is “customary” in SAC cases to substitute actual, publicly available index and price data for previously forecast data once the actual data has become available. *Id.*

Consumers’s position is baffling. The Board rejected its prior practice of updating indices in *Sunbelt Reconsideration* (at 24-25). Perhaps Consumers is hoping to split hairs by suggesting that substituting actual data for forecast data falls outside the *Sunbelt* decision. Technical Petition at 6 n.6. But the Board drew no such distinction in *Sunbelt*. Replacing forecast indices for actual indices is no different than replacing the actual shipments of traffic for those forecast. Indeed, when it issued the reconsideration decision in *Sunbelt*, two years had passed since the original decision, providing the Board two years of additional actual indices. Yet there is no suggestion that it substituted those figures in the SAC analysis.

The fine distinction sought by Consumers would also be irrational and unreasonable. For example, if the EIA were forecasting a large decrease to occur in the HDF index in 2017, but that decrease instead occurred in 2016, then updating only the 2016 price would create an improper double-count. The decrease in fuel costs would be reflected in 2016 and then using the now outdated forecast would apply the same decrease again in 2017.

Moreover, updating indices and other forecasts every year (as actual figures become available) would mean SAC cases would never end—just as the agency finishes writing one decision another party (or the same party) would demand another update, even if the differences between actual and forecast figures are nothing more than period-to-period fluctuations. For all these reasons, the Board should reject this requested update to the indices used in the *Decision*.

Peter J. Shudtz
John P. Patelli
Jason M. Marques
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Respectfully submitted,


Raymond A. Atkins
Matthew J. Warren
Terence M. Hynes
Hanna M. Chouest
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Counsel to CSX Transportation, Inc.

Dated: March 12, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2018, I caused a copy of the foregoing
Reply to Consumers's Petition for Technical Corrections to be served by hand delivery upon:

Kelvin J. Dowd
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036



Alec Weingart