



SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

kjd@sloverandloftus.com

March 12, 2018

245296

By Electronic Filing

Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
March 12, 2018
Part of
Public Record

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

Dear Ms. Brown:

Enclosed for filing in the referenced proceeding is Complainant's Reply to CSX Transportation Inc.'s Petition for Reconsideration.

Thank you for your attention to this matter.

Sincerely,

Kelvin J. Dowd
An Attorney for
Consumers Energy Company

KJD:lad
Enclosures
cc: Counsel for Defendant CSX Transportation, Inc.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**COMPLAINANT’S REPLY TO
CSX TRANSPORTATION INC.’S PETITION FOR RECONSIDERATION**

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
Katherine F. Waring
A. Rebecca Williams
Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036

Dated: March 12, 2018

(202) 347-7170

TABLE OF CONTENTS

PREFACE	i
SUMMARY	ii
ARGUMENT	1
I. CSXT's New Witness Statements Should Not Be Considered	1
II. CSXT's Individual Claims of "Material Error" Are Without Merit	3
A. Traffic and Revenue	3
1. The Board Did Not Err In Including Crude Oil Trains In the CERR Traffic Group	3
2. There Was No "Density Error" In Consumers' ATC Application	4
3. The Board Did Not Bias the Allocation of Cross-Over Traffic Revenue.....	6
4. Intermodal Revenues From 59 th Street Terminal Shipments Were Allocated Properly	7
B. Operating Expenses	9
1. There Was No Material Error In the Board's Approval of Consumers' Road Crew Assignments for the CERR.....	9
2. Consumers Did Not Understaff the CERR Police Force	10
3. The Board Did Not Err In Determining CERR Track Crews.....	11
4. There Is No "Disconnect" Between Crossing Repaving Expenses and Grade Crossing Construction Costs.....	11

C. Road Property Investment	12
1. The Board Correctly Resolved the Issue of Real Estate Acquisition Costs.....	12
2. There Was No Error In the Board’s Land Index Ruling	13
3. CSXT’s Challenge to the Board’s Acceptance of MDOT Costs Has No Merit	14
4. There Was No Error In Offline Ballast Costs.....	15
5. Rail Transportation Costs	16
6. Consumers’ Rebuttal Bridge Designs Were Feasible and Reasonable.....	16
CONCLUSION.....	19

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**COMPLAINANT’S REPLY TO
CSX TRANSPORTATION INC.’S PETITION FOR RECONSIDERATION**

Complainant, Consumers Energy Company (“Consumers”), pursuant to 49 C.F.R. Parts 1104.13 and 1115.3, hereby replies to the Petition for Reconsideration filed by Defendant, CSX Transportation, Inc., (“CSXT”), on February 20, 2018 (“Petition”). CSXT seeks reconsideration of various determinations made by the Surface Transportation Board (“STB” or “Board”) in its Decision served in this proceeding on January 11, 2018 (“*Decision*”).¹ For the reasons set forth herein, the Board should deny the Petition.

¹ For the Board’s convenience, in this Reply Consumers uses the same short form case citations and acronyms that CSXT employs in its Petition.

SUMMARY

In this Reply, Consumers demonstrates that each of CSXT's claims of "material error" lacks merit, and cannot support Board reconsideration of any of the assigned issues. While Consumers responds specifically to CSXT's individual arguments, there are five (5) general defects in the carrier's Petition.

First, in open defiance of the Board's December 9, 2016 ruling on CSXT's Motion to Strike, CSXT proffers two (2) new witness statements that amount to surrebuttals on the issues of CERR train crews and bridge design, in violation of Board rules and precedents. Notwithstanding the Board's pre-*Decision* determination that CSXT had not been deprived of a right to respond to Consumers' Rebuttal Evidence, CSXT took it upon itself to respond anyway through its Petition. The Board should recognize this affront to its rules and earlier ruling, and not consider the statements or admit them into the record.

Second, CSXT's Petition reflects a "seller's remorse" approach to certain Board rulings that were predicated on positions taken, or evidence produced by CSXT itself during the proceeding. These include the Board's acceptance of a CSXT-advocated correlation between crude oil prices and rail traffic volumes; Consumers' and the Board's reliance on a CSXT-developed density study; and the Board's use of a land value index that both parties endorsed. A claim of "material error" cannot be grounded on the agency's agreement to be guided by the objecting party's positions.

Third, in several instances CSXT misapplies or simply invents Board precedent. These include its insistence that the Board's approach to ATC is contrary to

prior decisions that actually support the Board's action; its claim that the Board's rejection of CSXT's argument for intermodal terminal land costs violates precedent when none actually is identified; and its critique of the Board's resolution of CERR track crew and police staffing issues, both of which comport squarely with recent Board decisions.

Fourth, CSXT attempts to establish "material error" through the repetition of arguments advanced in its Reply Evidence, which the Board rejected in the *Decision*. Its challenges to the Board's resolution of issues related to the CERR's handling of shipments to and from the 59th Street Intermodal Terminal and its acceptance of costs based on MDOT projects both follow this pattern. The law is clear, however, that reconsideration cannot be predicated on a mere reiteration of failed claims.

Finally, CSXT's arguments regarding offline ballast transportation and crossing repaving costs simply misrepresent the Board's *Decision*. The determination to include all Waybill Sample movements in the determination of ballast transportation costs made no assumptions regarding private railcar supply, and the Board's conclusion that CSXT had accepted Consumers' repaving costs was logical and supported by CSXT's own narrative.

While CSXT's Petition presents a diversity of claims, there is commonality in the fact that no case is made that the Board materially erred in its resolution of any of the issues in question. As such, the Petition should be denied.

ARGUMENT

The Board's rules² and precedents are clear that to support reconsideration of a prior decision, a petitioner must demonstrate that the decision (or elements thereof) was based on clear error that was material to the outcome, or is contradicted by substantially changed circumstances or new evidence that did not exist or could not have been presented previously.³ As none of CSXT's challenges to the *Decision* meet this strict test, its Petition should be denied in its entirety.

I. CSXT's New Witness Statements Should Not Be Considered

Accompanying CSXT's Petition are two (2) new verified statements from Messrs. Kaustuv Chakrabarti of FTI Consulting, and David Magistro of George Butler Associates. CSXT claims that the statements are responsive to analyses or arguments presented by Consumers in its Rebuttal Evidence, to which CSXT allegedly had no opportunity to respond.⁴ However, neither qualifies as "new evidence" within the meaning of 49 C.F.R. Part 1115.3(b), and the Board previously rejected CSXT's challenges to the propriety of Consumers' Rebuttal Evidence on the very issues to which the statements are addressed.

First, it is clear that Messrs. Chakrabarti and Magistro are offering their own critiques (or in Mr. Chakabarti's case, a "re-run") of evidence that already is on the

² 49 C.F.R. Part 1115.3. *See also*, 49 U.S.C. § 722(c).

³ *See, e.g., Entergy Arkansas, Inc., Et Al. v. Union Pac. R.R.*, Docket No. NOR 42104 (STB served Nov. 26, 2012) at 3-4.

⁴ *See* Petition at 11, 20.

record in this case long after the close of that record. Neither purports to introduce any new facts that were not available prior to the close of the evidentiary phase of this proceeding; they merely offer arguments or analyses that are “newly raised” in response to Consumers’ Rebuttal Evidence. *TMPA II*, 7 S.T.B. at 821. These unauthorized surrebuttals do not qualify for admission under 49 C.F.R. Part 1115.3(b)(1). *TMPA II*, 7 S.T.B. at 804-805 (citing *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989)). See also, *Canadian Nat’l Ry. Co. – Control – Ill. Cent. Corp.*, Docket No. FD 33556 (STB served Aug. 27, 2002) at 6.

Second, the Rebuttal Evidence to which the statements are directed were among the subjects of a broad Motion to Strike filed by CSXT on June 24, 2016, which raised myriad issues related both to market dominance and to the stand-alone cost determination. Two of those issues were the number of train crews required by the CERR (the subject of Mr. Chakrabarti’s statement), and the design of certain CERR bridges (addressed by Mr. Magistro). In each case, the Board *rejected* CSXT’s claims, ruled that Consumers’ Rebuttal Evidence was proper and would not be stricken,⁵ and dismissed CSXT’s argument that it had a right to respond. Having lost the challenges presented by its Motion to Strike – which is the Board-sanctioned vehicle to respond to evidence that allegedly exceeds the proper scope of rebuttal⁶ – CSXT cannot be permitted to reprise its failed challenges now that it is unhappy with the outcome in the *Decision*.

⁵ See Decision served Dec. 9, 2016 at 8-9 (train crews) & 16-17 (bridge design).

⁶ *Id.* at 3, quoting *Duke Energy Corp. v. Norfolk S. Ry. Co.*, 7 S.T.B. 89, 101 (2003).

See Bituminous Coal – Hiawatha, UT to Moapa, NV, ICC Docket No. 37038, 1988 WL 225085 (Nov. 30, 1988) at *3.⁷ The Board should reject the Chakrabarti and Magistro statements and not admit them into the record.⁸

II. CSXT’s Individual Claims of “Material Error” Are Without Merit

A. Traffic and Revenue

1. The Board Did Not Err In Including Crude Oil Trains In the CERR Traffic Group

CSXT challenges the Board’s conclusion that the recent and ongoing rebound in crude oil prices made it reasonable for Consumers to continue to rely on CSXT’s own internal forecast of crude oil traffic volumes,⁹ arguing that it was wrong for the Board to correlate prices with expected traffic trends. Petition at 1-2. However, it was *CSXT itself* which argued for just such a correlation in its Reply Evidence, pointing to lower prices “with no forecast of a rebound” as a reason to lower the volume

⁷ If CSXT believed that the Board erred in its rulings on the Motion to Strike, it should have made a timely administrative appeal and moved for reconsideration of that decision within the time prescribed by 49 C.F.R. Part 1115.3(e); *i.e.*, on or before December 29, 2016. *See TMPA II*, 7 S.T.B. at 804 (a petition “filed within 20 days after the service date of the prior decision” is timely and “decision does not become administratively final. . .until the Board has acted”).

⁸ The Board’s rules (49 C.F.R. Part 1115.3(d)) set a 20-page limit on petitions for reconsideration, unless the Board grants a request to submit a longer pleading. While parties frequently append short exhibits to illustrate the effects of their reconsideration requests or afford easy access to cited examples from the record – as both Consumers and CSXT have done in this case – CSXT’s attempt to file new witness testimony that is nearly as long as its 20-page Petition without a prior request for leave clearly violates the rule.

⁹ *Decision* at 83.

projections.¹⁰ Having advocated that the Board adopt price trends as indicators of future traffic volumes, CSXT cannot now claim that it was “material error” for the Board to agree with the approach.

Additionally, recent and publicly available information vindicates the Board’s conclusion that higher domestic oil prices support CSXT’s own internal crude-by-rail volume projections. Data published by the U.S. Energy Information Administration and public reporting show both that domestic crude oil production is rising to record levels, and that forecasted crude oil shipments by rail are trending higher in 2018, as compared to the previous year.¹¹ The Board was right to reject CSXT’s argument that its forecast should be abandoned because of a temporary shift in oil prices and near-term volumes, especially since CSXT proposes to adjust only one of the many traffic forecasts relied on in the *Decision*. See *Sunbelt Reconsideration* at 24.

2. There Was No “Density Error” In Consumers’ ATC Application

Consumers and the Board both relied on a special study of CSXT traffic densities that CSXT itself represented was more reliable than its course-of-business train data. *Decision* at 89. While CSXT’s Petition attempts to claim otherwise,¹² its Exhibit 3

¹⁰ See CSXT Reply at III-A-25.

¹¹ See U.S. Energy Info. Admin., *Short-Term Energy Outlook (STEO)* (Mar. 2018), https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf at 1, 3-7, 11; U.S. Energy Info. Admin., *Movements of Crude Oil & Selected Products by Rail* (Feb. 28, 2018), https://www.eia.gov/dnav/pet/PET_MOVE_RAILNA_A_EPC0_RAIL_MBBL_M.htm.

¹² Petition at 4.

plainly states that the train data can “produce a figure that overstates the actual total ton-miles” due to “wrong[]” assumptions, and that the special study was prepared in order to address “the limitations of the gross tonnage data.”¹³ Consumers specifically objected to CSXT’s effort to impeach its special study, and showed that unlike the circumstances addressed in *Xcel II*, there was no “computational or technical error” at issue;¹⁴ just a move by CSXT to try to avoid an unfavorable result from the use of its own data.¹⁵ There was no material error committed by the Board in agreeing with Consumers. *AEPCO 2011* at 103.¹⁶

At base, CSXT’s complaint appears to be with ATC itself, which uses the *incumbent’s* traffic densities to allocate revenue irrespective of the traffic routing decisions made by the SARR’s sponsor.¹⁷ CSXT’s density study data produced in discovery showed the track between Milepost DC 15.00 and Milepost DC 15.35 to be a lighter density segment, perhaps because more traffic is routed over a parallel track in the real world.¹⁸ While that is the density that governs for ATC purposes, the CERR is not necessarily required to replicate CSXT’s routing pattern. ATC’s use of that CSXT

¹³ Petition, Exhibit 3.

¹⁴ Petition at 3 (citing *Xcel II*).

¹⁵ See Consumers Rebuttal at III-A-105.

¹⁶ Contrary to CSXT’s assertion (Petition at 5) Consumers did not have the option of developing its own density data. CSXT’s discovery production was limited to density information for select states, and full system densities are required to calculate ATC divisions.

¹⁷ See *Decision* at 89; *Rate Regulation Reforms* at 7.

¹⁸ See CSXT Reply at III-A-51-52.

density study data to allocate revenues on this segment no more “distorts the SAC analysis”¹⁹ than does the reliance on CSXT’s densities on other segments in the Chicago area, where the CERR carries *less* traffic relative to the real world CSXT.²⁰

CSXT has shown no valid basis to reconsider the Board’s ruling on cross-over revenue divisions.

3. The Board Did Not Bias the Allocation of Cross-Over Traffic Revenue

In the *Decision*, the Board properly rejected CSXT’s proposal to alter the ATC revenue divisions for *all* of the CERR’s merchandise traffic, because Consumers had demonstrated that for the majority of that traffic, CSXT itself did not expend time and expense to originate, terminate, gather or block the railcars into trains, and thus did not handle the traffic any differently than the CERR would. *Decision* at 38. In its Petition, CSXT curiously claims that this result was an “abrupt departure from precedent,”²¹ when in fact, in both of the precedents that it cites, the Board *declined* to modify ATC for application to cross-over merchandise traffic.²²

¹⁹ Petition at 3.

²⁰ Not surprisingly, CSXT has raised no objection to this equally likely result of the application of ATC, which occurs frequently on the CERR lines in the Chicago vicinity.

²¹ Petition at 6.

²² See *Rate Regulation Reforms* at 28; *AEPCO 2011* at 36. Also contrary to CSXT’s claim, the Board never agreed that the inclusion of merchandise traffic in a SARR system “creates a significant disconnect” between costs and revenues. The Board only noted that a disconnect could exist in some circumstances; it did not label the concern “significant.” *Decision* at 37.

While the Board did not find it necessary to rule on the point,²³ Consumers also showed on the record that even in those circumstances where CSXT did perform originating or terminating functions, ATC's use of the unadjusted URCS Phase III model ensured that the residual carrier received full compensation for its services through higher variable costs and, thus, higher total costs and a more generous revenue allocation.²⁴

CSXT's Petition continues to argue for a broad policy change without making the kind of showing that the Board repeatedly has stated is necessary to justify an adjustment to ATC.²⁵ On this issue, the *Decision* was consistent with precedent, and correct.

4. Intermodal Revenues From 59th Street Terminal Shipments Were Allocated Properly

For the most part, CSXT's argument for reconsideration of the Board's resolution of the 59th Street Intermodal Terminal issue is a mere repetition of the same claims that the Board previously rejected:

“What would plainly bias the results in Consumers' favor would be to include part of the costs but all of the revenue.”
Petition at 9.

“On reply, CSXT argues that Consumers' lift costs fail to account for all the expenses of providing intermodal terminal services and that CERR is therefore not entitled to the full

²³ *Decision* at 38 n. 44.

²⁴ See Consumers Rebuttal at III-A-82-84; *Major Issues* at 26. Consumers also noted that CSXT had argued the opposite of its current position in *TPI*, where it handled traffic as a bridge carrier. See Consumers Rebuttal at III-A-85 n. 191.

²⁵ *Decision* at 38, citing *Rail Regulation Reforms NPRM* at 16. See also, *Sunbelt Reconsideration* at 13; *AEPCO 2011* at 33.

ATC revenue allocation ... the Board finds CSXT's proposal ... to be unsupported." *Decision* at 70-71.

The law is well-settled that reconsideration cannot be grounded on a simple reiteration of previously addressed and rejected claims. *Sunbelt Reconsideration* at 15; *Duke/NS Reconsideration*, 7 S.T.B. at 882.

CSXT endeavors to advance a new argument regarding the Board's exclusion of land costs,²⁶ asserting that the Board's acceptance of Consumers' showing that CSXT's lease payments cover CSXT's land ownership was "contrary to agency precedent" and a "shell game" that somehow deprives investors in CSXT's parent company of some measure of return.²⁷ However, CSXT cites no precedent specific to the treatment of terminal land costs, and its "shell game" assertion simply is a variant on the discredited argument that a SARR should be responsible for costs incurred by the defendant's *affiliate* when the two have an arm's length relationship in the real world.²⁸ Even if CSXT's new claims did merit review, the carrier failed to raise them when it had the opportunity below,²⁹ and thus cannot now present them for the first time on reconsideration. *See Sunbelt Reconsideration* at 2; *TMPA II*, 7 S.T.B. at 804.

²⁶ *Decision* at 71.

²⁷ *Petition* at 9, 10.

²⁸ *Decision* at 68-69; *Dupont* at 48-49. *See also*, Consumers Rebuttal at III-A-99-102.

²⁹ *Decision* at 71.

B. Operating Expenses

1. There Was No Material Error In the Board's Approval of Consumers' Road Crew Assignments for the CERR

Ignoring entirely the Board's prior ruling that Consumers' Chicago road crew evidence did *not* constitute improper rebuttal,³⁰ CSXT claims a right to respond to Consumers' showing on reconsideration, through the proffered testimony of its witness Chakrabarti.³¹ As demonstrated in Part I, *supra*, the new witness statement violates the Board's rules and standards with respect to petitions for reconsideration, and should be rejected. Also, as the Board properly and reasonably found,³² Consumers' Rebuttal showed that CSXT's arguments for the addition of a 25% re-crew rate failed to account for crew assignment options that CSXT's own RTC model showed were available (*e.g.*, to shorten a crew's second turn), or to undermine Consumers' demonstration that total Chicago road crew times would conform to hours-of-service rules, even assuming significant taxi and interchange time.³³

CSXT lost its challenge to the legitimacy of Consumers' Rebuttal Evidence concerning road crews when the Board denied that portion of the carrier's Motion to Strike. Having subsequently failed to prevail on the issue on the merits, it cannot be

³⁰ *Decision* served December 9, 2016 at 8-9.

³¹ *Petition* at 11.

³² *Decision* at 101.

³³ *Id.* See also, *Consumers Rebuttal* at II-D-23 & Table III-D-2. It should be noted that the "example" offered by CSXT (*Petition* at 11) describes a scenario that was not modeled by either party, so CSXT's conclusion is meaningless.

permitted to resurrect its discredited challenge on reconsideration. *See Xcel II* at 11, 14; *TMPA II*, 7 S.T.B. at 805.

2. Consumers Did Not Understaff the CERR Police Force

The Board accepted Consumers' Rebuttal plan to deploy four (4) security agents under the supervision of a Chief of Security to protect the CERR's assets.³⁴ CSXT claims material error, based on an alleged inconsistency between this finding and the Board's rulings in *TPI* and *Dupont*.³⁵ In fact, however, the Board's determination in this case fits squarely within these precedents.

In *TPI*, where the SARR traversed 6,911 miles in 18 states,³⁶ and ran through multiple urban areas, the Board approved 50 active security agents, or one agent for every 138.2 route miles. In *Dupont*, the Board approved Norfolk Southern's proposed deployment of 130 active agents to cover 7,344 miles in 20 states (including several urban areas),³⁷ or one agent for every 56.5 route miles. The CERR force approved in the *Decision* (4 active agents covering 235 miles) averages one agent per 58.8 miles, very close to the *Dupont* force and well within the precedential range. There was no material error.

As it did on Reply, CSXT also appears to be taking the position in its Petition that the CERR would be operating the 59th Street Intermodal Terminal, which

³⁴ *Decision* at 120-121.

³⁵ Petition at 12.

³⁶ *TPI* at 90-91.

³⁷ *Dupont* at 5, 92-93; *see* Defendant's Reply Evidence, November 30, 2012 at III-D-141.

will require coverage by CERR's security agents.³⁸ However, this clearly is not the case, as the Board accepts that the Terminal is operated by CSXIT. *Decision* at 69.

3. The Board Did Not Err In Determining CERR Track Crews

CSXT challenges the Board's acceptance of Consumers' evidence that three (3) track crews comprised of four (4) members each could handle maintenance on the CERR,³⁹ arguing that the STB "did not address CSXT's arguments" that such staffing would be inadequate. Petition at 13. However, the Board did specifically acknowledge CSXT's objection;⁴⁰ it simply rejected it as unpersuasive. Reiteration of arguments previously rejected in a ruling on the merits is not grounds for reconsideration.⁴¹ Moreover, the maintenance force approved in this case, with a coverage ratio of 70 miles per track crew, was as robust as the 72:1 mileage/crew ratio for main line track approved in *TPI*.⁴²

4. There Is No "Disconnect" Between Crossing Repaving Expenses and Grade Crossing Construction Costs

In the *Decision*, the Board accepted Consumers' crossing repaving costs based on CSXT's representation in its Reply Narrative that it agreed with Consumers' calculations. *Decision* at 148. The Board noted that CSXT's workpapers reflected

³⁸ Petition at 12. *See also*, CSXT Reply at III-D-95.

³⁹ *Decision* at 138. The fourth crew member was added at CSXT's behest.

⁴⁰ *Id.* at 138.

⁴¹ *See, e.g., Sunbelt Reconsideration* at 15; *Xcel II* at 11, 14.

⁴² *See TPI* at 107.

different costs, but followed the established rule that a party's narrative controls over its workpapers. *Id.* See also, *AEPCO 2011* at 74.

CSXT now claims that its narrative was unclear because of what it says the Board describes as a “scrivener’s error,” and advocates for reconsideration and reliance on its workpapers. Petition at 14. However, the “scrivener’s error” referred to by the Board was CSXT’s use of the term “track geometry testing” when it apparently meant “crossing repaving,” and the Board *accepted* CSXT’s intended meaning,⁴³ which was to agree with Consumers’ repaving costs. CSXT’s reconsideration request again seeks to elevate a workpaper over its narrative, which is contrary to Board precedent.⁴⁴

C. Road Property Investment

1. The Board Correctly Resolved the Issue of Real Estate Acquisition Costs

CSXT wrongly claims that the Board’s agreement with Consumers’ position on real estate acquisition costs in preference to the exorbitant 17.3% cost that CSXT proposed amounted to rejection of “the only evidence in the record as to a cost the SARR would incur.”⁴⁵ Consumers stated in its Opening Evidence that a separate acquisition cost was not included, because there was no evidence that CSXT actually had incurred such a cost.⁴⁶ Consumers reiterated the point on Rebuttal,⁴⁷ in addition to

⁴³ *Decision* at 149 n. 110.

⁴⁴ See, e.g., *Sunbelt Reconsideration* at 18.

⁴⁵ Petition at 14.

⁴⁶ Consumers Opening at III-F-9; Smith Report at 3-5.

⁴⁷ Consumers Rebuttal at III-F-20.

demonstrating that CSXT's one-size-fits-all approach to costs, like CSXT's statistical applications, defied common sense.⁴⁸

While the Board was not persuaded that Consumers had proved that acquisition costs already were reflected in the land values,⁴⁹ it was certain that CSXT's proposed costs were "wholly unrealistic."⁵⁰ Faced with a choice between 0% and 17.3%, and considering precedent that showed costs never exceeded 3.7%,⁵¹ the Board plainly was justified in determining that Consumers' position was the more reasonable one.⁵²

2. There Was No Error In the Board's Land Index Ruling

Contrary to CSXT's assertion,⁵³ the *principal* reason why the Board adopted Consumers' proposed land value deflator for 2012-213 is that the very same index (derived from USDA, Moody's and Standard & Poor's data) was used by *both parties* to project land values from 2015 through the end of the 10-year DCF period. *Decision* at 270. That ruling was reasonable, as was the Board's overruling of CSXT's objection, which plainly was result-oriented given the carrier's acceptance of Consumers' index for 2015-2024.

⁴⁸ *Id.* at III-F-19-22.

⁴⁹ *Decision* at 175.

⁵⁰ *Id.*

⁵¹ *Id.*, citing *Sunbelt* at 103-104 and *TPI* at 133, 136.

⁵² The Board has accepted evidence that "may be flawed" when it was the better evidence of record for which support had been provided. *WFA* at 69. Here, there was evidence in the record that acquisition costs already were included in the land values.

⁵³ *Petition* at 15.

CSXT's claim that its proposed substitute approach to 2012-2013 land values was not predicated on the larger land valuation report that had been rejected by the Board in the road property analysis⁵⁴ likewise does not pass scrutiny. CSXT's Reply Narrative clearly states that its proffered expert's valuation analysis was the source for its proposed 2012-2013 deflator,⁵⁵ and this valuation was based on the flawed methodology rejected by the Board.⁵⁶

3. CSXT's Challenge to the Board's Acceptance of MDOT Costs Has No Merit

CSXT's arguments for reconsideration of the Board's acceptance of MDOT costs are little more than repetitions of its Reply claims, which the Board already rejected. CSXT misconstrues the need to adjust the MDOT unit costs for quantities implicit in the Engineering Requests,⁵⁷ for as the Board recognized, the 64.9%/35.1% ratio of the excavation to "embankment, CIP" quantities shown in Consumers' Rebuttal workpapers⁵⁸ is a much more accurate reflection of the Engineering Reports' 70/30 ratio than CSXT's additive method.⁵⁹

⁵⁴ Petition at 16. *See Decision* at 271.

⁵⁵ CSXT Reply at III-G-12.

⁵⁶ CSXT Reply Exhibits III-F-155 (Figure 118).

⁵⁷ Petition at 16.

⁵⁸ *See* Rebuttal Workpaper "MDOT Excavation Unit Costs _ Reply Analysis_Consumers.xlsx" tab "Exc-Emb Weight Aug," Column (13) and Column (14) values for "Tier I & II."

⁵⁹ *Decision* at 185.

Similarly, CSXT's basis for claiming material error in the Board's acceptance of MDOT-derived borrow costs – that Consumers' sample size was too small⁶⁰ – is *identical* to the argument that the Board turned away in the *Decision*:

Although CSXT argues that these four projects involved only 6,370 cubic yards does not provide a rationale or evidence showing that the unit price of borrow would depend on the amount of borrow purchased. With respect to whether the MDOT data is geographically representative of CERR, Consumers adjusts the MDOT unit cost by the *Means* location factors, which sufficiently adjusts the unit cost for CERR borrow located in Illinois and Indiana.

Id. at 190. Where, as here, a petitioner offers nothing more in support of reconsideration than a rehash of claims rejected in the decision on the merits, the petition must be denied. *Sunbelt Reconsideration* at 15; *Xcel II* at 11, 14.

4. There Was No Error In Offline Ballast Costs

CSXT claims that the Board materially erred in calculating offline ballast transportation costs by using all movement data in the 2013 Waybill Sample – which includes shipments in private cars⁶¹ – when “Consumers did not propose that the CERR would own any cars for transporting ballast...”. Petition at 18. However, nowhere in its *Decision* did the Board suggest that *Consumers* would be the source of any private ballast cars. Private car shipments just as easily could be made in railcars provided by the product supplier or other non-railroad party. In looking to determine an average cost for

⁶⁰ Petition at 17.

⁶¹ *Decision* at 207.

offline ballast transportation, it was quite reasonable – and certainly not materially erroneous – for the Board to rely on the broadest Waybill Sample data available.

5. Rail Transportation Costs

Consumers agrees with CSXT that the *Decision* includes a technical error in the calculation of costs for the transportation of 115-pound rail,⁶² and in fact included this correction in its February 20 Petition for Technical Corrections (at page 3). However, CSXT’s second proposed “correction” is without merit. As its note describing the correction shows,⁶³ CSXT would have the Board rely on CSXT’s rail train costs, costs that the Board specifically *rejected* in the *Decision*.⁶⁴ As CSXT offers no reason at all why the Board should reverse that determination (much less a persuasive one), that portion of its Petition must be denied.

6. Consumers’ Rebuttal Bridge Designs Were Feasible and Reasonable

CSXT raises two arguments concerning the Board’s acceptance of the feasibility of Consumers’ bridge design, including Consumers’ reliance on average bridge designs with costs allowing for wing walls to vary by location.⁶⁵ Neither has merit.

CSXT’s first claim, that the Board mistakenly found that “neither Consumers’ narrative nor its workpapers show that CERR would employ spill slopes,” takes the Board’s *Decision* out of context. The Board made this statement in response to

⁶² Petition at 18-19.

⁶³ *Id.* at 19 n. 22.

⁶⁴ *Decision* at 211-212.

⁶⁵ Consumers Rebuttal at III-F-101.

CSXT’s “assum[ption] that Consumers’ design places spill slopes in the water,” which was unfounded. *Decision* at 224. This conclusion by the Board was reasonable, as Consumers explained in its Rebuttal Evidence that spill slopes were not required because its Opening Evidence included costs for wing walls,⁶⁶ and that “[t]he size and design of the wing wall will vary depending on the conditions under the bridge.”⁶⁷ CSXT also never challenged Consumers’ costs for wing walls,⁶⁸ and several of the actual bridges replicated by the CERR use perpendicular wing walls.⁶⁹ Instead, CSXT took a calculated risk to only include alternative bridge designs with higher costs, a gambit which ultimately failed as the Board found that with a few exceptions, Consumers’ over-water bridge design was “feasible and supported.” *Decision* at 224. The Board’s conclusions were reasonably explained, and supported by detailed record evidence. There was no error to be reconsidered.

CSXT also argues that the Board erred by not commenting in the *Decision* on CSXT’s complaint that Consumers’ Rebuttal Evidence on bridge design “denied CSXT the opportunity to show the engineering flaws” in that Evidence.⁷⁰ The simple

⁶⁶ Consumers Opening Workpaper “Coreslab Precast Components Cost.pdf” listed costs for both abutment caps and wing walls.

⁶⁷ Consumers Rebuttal at III-F-101. *See also*, Consumers Rebuttal Workpaper “Typical Chicago Street.pdf,” which includes images of railroad bridges with vertical, pre-cast wing walls.

⁶⁸ “Pre-Cast wing wall panels costs presented in opening and not challenged in reply, are \$1,000 each plus \$2,500 per lift.” Consumers Rebuttal at III-F-102.

⁶⁹ *See e.g.* CERR bridges at mileposts DC 28.20, DC 28.76, and DC 28.89.

⁷⁰ Petition at 20.

answer here is that there was no need for the Board to comment, as it previously had *rejected* CSXT’s argument in its December 9, 2016 ruling on the Motion to Strike. Responding specifically to CSXT’s claim of unfair rebuttal, the Board found that Consumers was entitled to defend the feasibility of its Opening Evidence, and to “offer corrective evidence to demonstrate that CSXT’s reply evidence was unsupported, infeasible, or unrealistic.” *Decision* served December 9, 2016 at 16-17, citing *Duke Energy*, 7 S.T.B. at 101. There was no need for the Board to repeat itself in the subsequent *Decision*, and CSXT’s repetition of a previously rejected argument cannot support reconsideration. *Sunbelt Reconsideration* at 14.⁷¹

The Board was correct in finding that “Consumers’ design is feasible and supported” as “neither of CSXT’s arguments that the bridges provide insufficient water flow is persuasive.” *Decision* at 224.

⁷¹ In defiance of the Board’s ruling on its Motion to Strike, CSXT offers new testimony by its witness Magistro in surrebuttal of Consumers’ Rebuttal Evidence. *Petition* at 19. For the reasons stated in Part I, *supra*, Mr. Magistro’s verified statement should not be considered or accepted into the record.

CONCLUSION

For all of the foregoing reasons, CSXT's Petition for Reconsideration should be denied.

Respectfully submitted,

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 /s/
Robert D. Rosenberg
Katherine F. Waring
A. Rebecca Williams
Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036

Dated: March 12, 2018

(202) 347-7170

CERTIFICATE OF SERVICE

I hereby certify that this 12th day of March, 2018, I caused copies of
Complainant's Reply to CSX Transportation Inc.'s Petition for Reconsideration to be
served by hand upon counsel for Defendant, as follows:

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

/s/

Katherine F. Waring