

Dated: February 7, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**JOINT SUBMISSION OF PROPOSED
REDACTIONS TO MARKET DOMINANCE APPENDIX**

Complainant Consumers Energy Company (“Consumers”) and Defendant CSX Transportation, Inc. (“CSXT”) (collectively, the “Parties”) jointly submit these Proposed Redactions to the Surface Transportation Board’s (“STB” or “Board”) Market Dominance Appendix (“Appendix E”) to the Board’s final decision in the above-captioned proceeding, served January 11, 2018 (“*Decision*”). Because the market dominance analysis of the *Decision* contained competitively sensitive information, initially it was only provided to the Parties’ outside counsel in a highly confidential “Market Dominance Appendix”. *Decision* at 286-298. Pursuant to the Board’s instructions on page 3, footnote 4 of the *Decision*, the Parties’ have jointly prepared, and hereby submit for consideration, a proposed public version of Appendix E with confidential and highly confidential information redacted (attached hereto as Appendix A). The proposed joint redactions protect material designated by the Parties as

“confidential” (identified by single brackets) or “highly confidential” (identified by double brackets) in accordance with the Protective Order entered in this proceeding by the Board on March 18, 2015 and attached hereto as Exhibit 1. *See* Exhibit 1, §§ 1-2.

Accordingly, the Parties respectfully request that the Board release the Parties’ jointly proposed redacted version of the market dominance analysis, provided in the Appendix hereto, as the public version.

Respectfully submitted,


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Dated: February 7, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February 2018, I caused a copy of the foregoing Joint Submission of Proposed Redactions of Consumers Energy Company and CSX Transportation, Inc. to be served by first class mail or more expeditious means upon:

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A. Rebecca Williams

APPENDIX A

**PARTIES' JOINT PROPOSED REDACTED
VERSION OF MARKET DOMINANCE APPENDIX**

APPENDIX E—MARKET DOMINANCE

A. INTRODUCTION

The Board’s market dominance inquiry seeks to determine whether there is “effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.” 49 U.S.C. § 10707(a). This inquiry comprises two components, the first of which is quantitative. The statute establishes a conclusive presumption that a railroad does not have market dominance if the rate charged produces revenues that are less than 180% of its variable costs²¹³ of providing the service. *Id.* § 10707(d)(1)(A). If this quantitative threshold is met, the Board moves to the second component, a qualitative analysis. E.I. DuPont de Nemours & Co. v. Norfolk S. Ry., NOR 42125, slip op. at 16 (STB served Mar. 24, 2014), corrected and updated, NOR 42125 (STB served Oct. 3, 2014), reconsideration denied, NOR 42125 (STB served Dec. 23, 2015); Wis. Power & Light Co. v. Union Pac. R.R., 5 S.T.B. 955, 961 (2001), aff’d sub nom. Union Pac. R.R. v. STB, 62 F. App’x 354 (D.C. Cir. 2003). In this analysis, the Board determines whether there are any feasible transportation alternatives that are sufficient to constrain the railroad’s rates for the issue traffic to competitive levels, considering both intramodal competition—competition from other railroads—and intermodal competition—competition from other modes of transportation, such as trucks, transload arrangements, barges, or pipelines. DuPont, NOR 42125, slip op. at 16-17; M&G Polymers USA, LLC v. CSX Transp., Inc., NOR 42123, slip op. at 11 (STB served Sept. 27, 2012), corrected and updated, (STB served Dec. 7, 2012); E.I. DuPont de Nemours & Co. v. CSX Transp., Inc., NOR 42099, slip op. at 2 (STB served June 30, 2008).

The Board considers many factors in determining feasibility, including, for example, whether and to what extent such alternatives might involve potentially prohibitive transport distances, product integrity concerns, capacity/infrastructure constraints, and the presence of any transportation requirements imposed by the complaining shipper’s customers. M&G Polymers USA, NOR 42123, slip op. at 12. If an alternative is not feasible, it cannot bring market discipline to a carrier’s pricing adequate to restrain rates effectively. *Id.*

B. QUANTITATIVE EVIDENCE

The parties agree that CSXT’s R/VC ratio exceeds the 180% threshold for the challenged rate. (CSXT Reply II-A-1, Mar. 7, 2016; Consumers Rebuttal II-1, May 20, 2016.) Accordingly, the Board finds that the quantitative aspect of the market dominance inquiry is satisfied here.

²¹³ Variable costs are those railroad costs that vary with the level of output. The comparison of revenues to variable costs, reflected as a percentage figure, is known as a R/VC ratio.

C. QUALITATIVE EVIDENCE

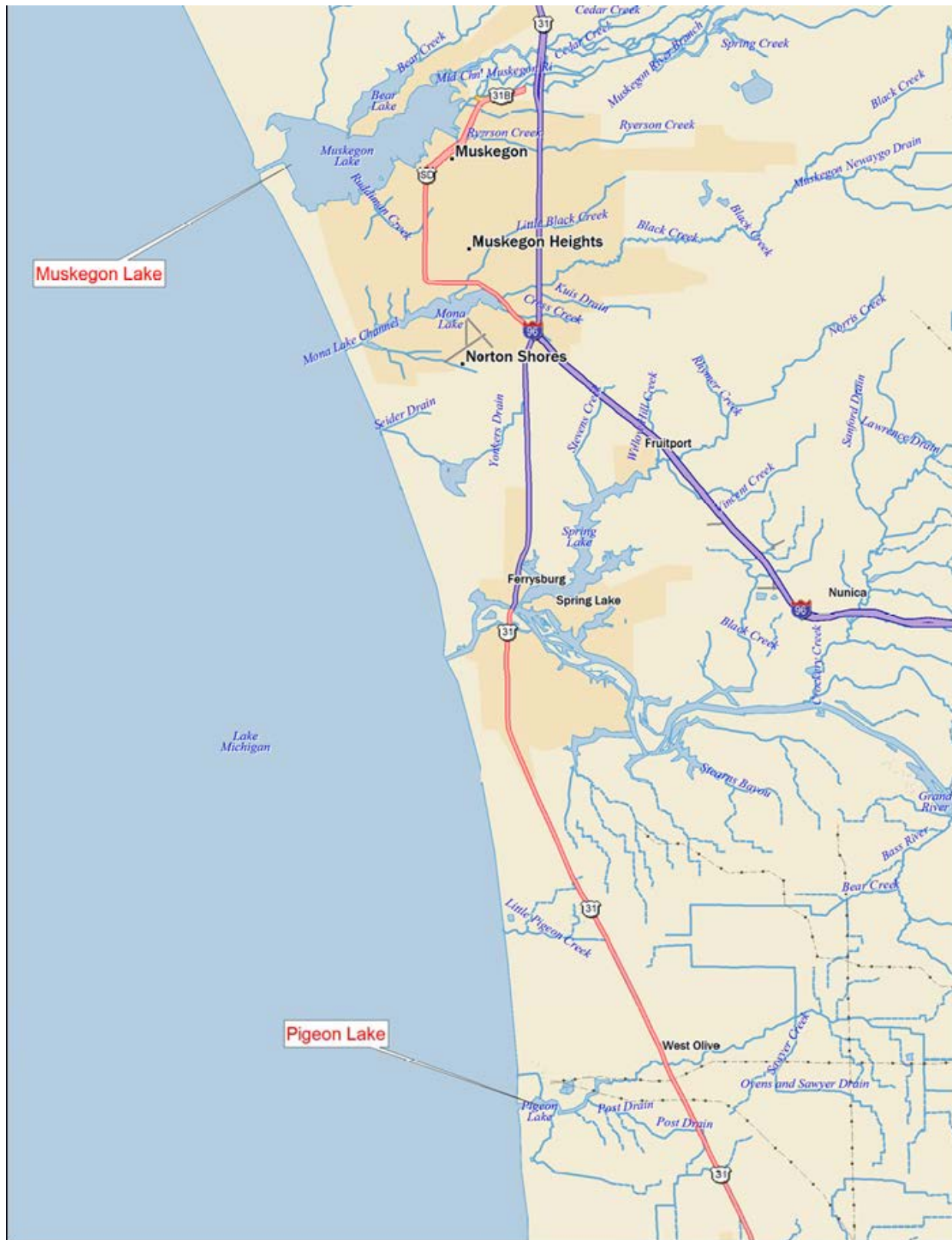
In the qualitative market dominance inquiry, the complainant bears the burden of establishing the absence of effective competition from other rail carriers or modes of transportation for the traffic to which the challenged rate applies. See DuPont, NOR 42125, slip op. at 29; see also 49 U.S.C. § 10707. Whether feasible alternatives to CSXT's current service to Consumers' Campbell plant exist is the central market dominance issue in this case.

Consumers argues on opening that, despite undertaking several investigative efforts to identify an effective alternative, no feasible, direct competitive alternatives to CSXT service are available. (Consumers Opening II-11.) The alternatives studied by Consumers include variations of transporting coal by vessel directly to Campbell, which is located on Pigeon Lake (an inlet on the eastern shore of Lake Michigan), and transporting coal by vessel to Consumers' Cobb plant, situated 25 miles north on Muskegon Lake (another inlet on the eastern shore of Lake Michigan), then transporting the coal by rail (via a shortline carrier) to Campbell.

In its reply, CSXT disputes Consumers' claim that these two alternatives are not feasible, arguing that both serve as viable options to receive coal at Consumers' Campbell plant. First, CSXT argues that Consumers could ship coal by water vessel from KCBX, a marine terminal in Chicago, directly to the Campbell plant (the Direct Water Alternative).²¹⁴ (CSXT Reply II-B-6, Mar. 7, 2016.) The Direct Water Alternative would require construction of an unloading dock in Pigeon Lake. (*Id.*) Second, CSXT argues that Consumers could ship coal by water vessel to Consumers' Cobb plant, which has an existing dock, where the coal could then be transferred to a short line railroad, the Michigan Shore Railroad (MSRR), and then transported by rail to Campbell (the Cobb-Rail Alternative).²¹⁵ (*Id.*) The Cobb-Rail Alternative would require building additional rail infrastructure. (*Id.*) Consumers argues that neither of these two alternatives is feasible. For the reasons discussed below, the Board finds that the alternatives are not feasible.

²¹⁴ Consumers refers to this option as the Direct Vessel Option or Alternative.

²¹⁵ Consumers refers to this option generally as the Vessel to Cobb/Rail to Campbell alternative.



1. Direct Water Alternative

It is undisputed that coal commonly moves by vessel across the Great Lakes, and specifically that Consumers has received coal by vessel at its Cobb plant at Muskegon Lake. (See CSXT Reply II-B-17, Mar. 7, 2016 (claiming that 28 coal facilities on the Great Lakes receive coal by vessel); Consumers Opening II-28 (stating that the Cobb plant received coal by vessel).) The question here is whether such a movement is feasible to the Campbell plant at Pigeon Lake. CSXT explains that, under the Direct Water Alternative, inbound coal shipments from the Powder River Basin that are currently interchanged to CSXT in Chicago could instead be delivered to the KCBX marine terminal, where the coal would be loaded into “articulated tug barges.” (CSXT Reply II-B-18 to II-B-19, Mar. 7, 2016.) CSXT describes the articulated tug barges as small vessels that are highly maneuverable and can accommodate a volume of coal similar to that of an average unit train. (*Id.* at II-B-19.) Additionally, Consumers would need to build a dock on Pigeon Lake under this alternative to accommodate the articulated tug barges, though CSXT argues this would entail significantly less dredging and environmental impact than a dock designed for other, larger vessels. (*Id.*) Lastly, under the Direct Water Alternative, CSXT concedes that docking and unloading facilities would need to be constructed at Campbell, but argues that such facilities are similar to the existing facilities at Cobb. (*Id.* at II-B-20.)

a. Positions of the Parties with Respect to Permitting a New Facility at Pigeon Lake

In its opening, Consumers states that, due to the rising price of CSXT rail service, it retained WorleyParsons Resources & Energy (WorleyParsons) and the Spicer Group (Spicer) in 2014 to study hypothetical lake vessel transportation alternatives to CSXT rail service. (Consumers Opening II-21.) Consumers argues that both reports identified numerous permitting and approval issues that could act as “complete barriers” to construction of the necessary unloading facilities in Pigeon Lake for the Direct Water Alternative. (*Id.* at II-22.) One concern is the nature of Pigeon Lake, which Consumers describes as an established recreational and pleasure boat site that is home to numerous private homes and docks. (*Id.* at II-23.) Consumers alleges that, due to the narrow width of Pigeon Lake’s access to Lake Michigan, essentially all recreational boating traffic seeking access to Lake Michigan would be obstructed every time a coal vessel entered or exited Pigeon Lake, approximately twice every three days. (*Id.* at II-23 to II-24.) {

Consumers argues that the “virtual taking” of Pigeon Lake that would result from coal vessel delivery would be opposed strongly by neighboring landowners, environmental groups, Native American tribes, and other adversely affected constituencies. (Consumers Opening II-24, II-39 to II-45.) }

Consumers argues that, in addition to the challenges of the permitting process itself, its consultants noted these legal contingencies and risks without specifically including them in their cost estimates. (Consumers Opening II-25; {

} CONSUMERS-001100” & { } However, Consumers notes that WorleyParsons concluded that legal challenges could entail { } (Consumers Opening II-25; see { } Consumers argues that, as presented by Spicer, other adverse environmental impacts, such as likely erosion caused by any construction and { } associated with coal movements, confirm the infeasibility of permitting the Direct Water Alternative. (Consumers Opening II-25 to II-26; see { } “CONSUMERS-007624.”)

On reply, CSXT argues that the Direct Water Alternative is feasible, stating that it is “a mirror image of the transportation that Consumers used to the Cobb plant for many years.” (CSXT Reply II-B-18, Mar. 7, 2016.) CSXT also alleges that, like Muskegon Lake, Pigeon Lake has been used regularly for commercial water transportation, including several barge deliveries to Campbell. (Id. at II-B-1; CSXT Reply WPs “2011 Environmental Equipment Delivery.pdf,” “2013 Barge Deliveries to Campbell.pdf,” & “2014 Barge Deliveries to Campbell.pdf,” Mar. 7, 2016.)

CSXT also claims that the internal Consumers’ studies establish the environmental and permitting feasibility of the Direct Water Alternative. In particular, CSXT points to several additional studies that Consumers conducted regarding transportation alternatives that CSXT claims demonstrate the feasibility of the Direct Water Alternative. First, CSXT notes that, in 1996, Consumers commissioned a consultant, Fieldston, to study various competitive options for the transportation of coal to Campbell, including vessel or barge transportation from KCBX to a dock on Pigeon Lake, and that the study concluded that {

} On opening, Consumers alleges that the Environmental Resources Management (ERM) study showed no feasible direct vessel alternative for Campbell. (Consumers Opening II-19.) Consumers states that ERM considered alternatives that involved building a new unloading dock facility on the shore of Pigeon Lake, but argues that it was unnecessary to consider the issue any further because subsequent federal regulations were incompatible with the installation of such a dock. (Id. at II-19 to II-20.) {

}

CSXT also includes in its a reply a report prepared by its expert witness, TransSystems, Inc. (TransSystems), in which TransSystems concludes that permitting for a Pigeon Lake dock would be even more manageable if certain design choices were made that would reduce dredging requirements and limit the environmental impacts of the dock. (CSXT Reply Ex. II-B-1, Mar. 7, 2016.)

CSXT claims that not only is the Direct Water Alternative feasible, but that the potential of this option has been a “constant feature” of the parties’ commercial relationship that has served as a constraint on CSXT’s rates. (CSXT Reply II-B-25, Mar. 7, 2016.) {

}

Specifically, {

}

{{

}} CSXT thus asserts that the record demonstrates that Consumers cited its potential competitive options when negotiating with CSXT in 2014 and that “CSXT took those threats seriously.” (CSXT Reply II-B-27, Mar. 7, 2016.)

On rebuttal, Consumers rejects CSXT's arguments that the Direct Water Alternative is feasible. Consumers argues that, despite CSXT's claim that the two are similar, there would in fact be significant differences between the Direct Water Alternative to Campbell and the historical transportation of coal by vessel to the Cobb plant. First, Consumers alleges that the physical characteristics of Pigeon Lake are in fact "radically" different from Muskegon Lake. (Consumers Rebuttal II-31, May 20, 2016.) Consumers notes that, while Muskegon Lake is 6.48 square miles and open to Lake Michigan via a wide channel, Pigeon Lake is less than 0.40 square miles and must be accessed by a narrow channel. (Consumers Rebuttal II-31, May 20, 2016; Consumers Rebuttal Ex. II-2 at 30-31, May 20, 2016.) It also notes that Muskegon Lake has a maximum depth of 79 feet, while Pigeon Lake has a maximum depth of 27 feet. (Consumers Rebuttal Ex. II-2 at 31, May 20, 2016.) Consumers also argues that Pigeon Lake—which is characterized by vacation homes, private docks, and nature parks around its shoreline—has seen only four barge shipments of heavy specialty equipment over four years, and the rest of the time has been exclusively used for recreational purposes. (Consumers Rebuttal II-32, May 20, 2016; see also CSXT Reply WPs "2011 Environmental Equipment Delivery.pdf," "2013 Barge Deliveries to Campbell.pdf," "2014 Barge Deliveries to Campbell.pdf," Mar. 7, 2016.) In contrast, Consumers argues that the Port of Muskegon has been an active commercial and industrial port facility since the early 20th century, handling vessels of all sizes. (Consumers Rebuttal II-34, May 20, 2016; Consumers Rebuttal Ex. II-2 at 31-32, 34-35, May 20, 2016.) Consumers notes that the legal and regulatory hurdles facing the Direct Water Alternative are far more rigorous than those in place when the Port of Muskegon was built in 1949,²¹⁶ making a comparison between the two inapt. (Consumers Rebuttal II-32 to II-33, May 20, 2016; see Consumers Rebuttal Ex. II-2 at 42-46, May 20, 2016.)

Consumers also argues that the Direct Water Alternative does not properly account for the significant permitting challenges at the local, state, federal, and international level. (Consumers Rebuttal II-43 to II-46, May 20, 2016.) In particular, Consumers argues that CSXT ignores permitting challenges with respect to the environmental impacts of dredging to construct the unloading platform, maintenance dredging, and the introduction of regular commercial traffic. (*Id.* at II-45 to II-46; Consumers Rebuttal Ex. II-2 at 29-34, May 20, 2016.) Consumers points out that the unloading platform in particular would be subject to many federal, state, and international environmental protection statutes and rules that did not exist when the coal dock at Cobb was constructed, most notably section 404 of the Clean Water Act, 33 U.S.C. § 1344, which mandates that any proposal to discharge dredged or fill materials into navigable waters must secure a permit from the U.S. Army Corps of Engineers. (Consumers Rebuttal II-44 to II-

²¹⁶ Consumers identifies several statutes and an Executive Order that a new development at Pigeon Lake would face that were not in effect when the Cobb plant was built: Water Quality Act of 1965, National Historic Preservation Act of 1966, National Environmental Policy Act, Clean Water Act, Federal Water Pollution Control Act Amendments, Great Lakes Water Quality Amendments of 1972, Endangered Species Act, Great Lakes Critical Programs Act, and Executive Order 12,898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (1994). (Consumers Rebuttal II-33, May 20, 2016; see Consumers Rebuttal Ex. II-2 at 42-46, May 20, 2016.)

45, May 20, 2016.) Consumers notes that 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 ecosystems” (Consumers Rebuttal II-45, May 20, 2016; 40 C.F.R. § 230.10(a).) Consumers argues that the “practicable alternative” in this case is the CSXT rail service on which Campbell currently depends. (Consumers Rebuttal II-45, May 20, 2016.) In addition, Consumers argues that the unloading structure CSXT proposed {

} (Id. at II-44;

{ }

Consumers also argues that CSXT misrepresents the work performed by Consumers’ consultants, particularly the claim that the WorleyParsons and Spicer analyses concluded that vessel transportation to Campbell was a “feasible option.” (Consumers Rebuttal II-41 to II-42, May 20, 2016.)²¹⁷ Consumers submits the verified statement of Mr. Petro and Mr. Bovitz, authors of the WorleyParsons report, who state that they did not describe any alternative as “permissible” or offer an opinion as to whether any alternative was economically feasible or competitive. (See Consumers Rebuttal Ex. II-2 at 15-18, 25-28, May 20, 2016.) Mr. Petro and Mr. Bovitz state that they did not provide a detailed timetable or cost estimate for the necessary permitting phases, that their report pointed to significant possible barriers to permitting, and that the permitting process could end in denial. (Consumers Rebuttal Ex. II-2 at 27, May 20, 2016.)

Lastly, Consumers rejects CSXT’s claim that the threat of the Direct Water Alternative has acted as a constraint on CSXT’s rates. Specifically, Consumers refutes CSXT’s reliance on the parties’ earlier contract, { } and that none of the agreements that followed { } (Consumers Rebuttal II-19, May 20, 2016.)

Furthermore, Consumers argues that while CSXT may have considered whether Consumers might pursue some of the actions discussed in negotiations, documents related to negotiations over the past decade show that CSXT never made any meaningful rate concessions in response to the apparent prospect of losing Campbell business to another carrier or mode, and that the {{ }} CSXT. (Id. at II-19 to II-20; {{

}} Consumers further asserts that discussions of Consumers’ investigation of possible transport “options” during the parties’ contract negotiations is irrelevant, given that the Board has acknowledged the “significant difference between statements

²¹⁷ Consumers characterizes the work performed in 1996 as a “powerpoint” that { } (Consumers Rebuttal II-42, May 20, 2016; see also CSXT Reply WP “Fieldston Study.pdf,” Mar. 7, 2016.)

made in the course of negotiations and concrete pricing actions taken by a railroad in response to genuine competition.” (Consumers Rebuttal II-20 to II-21, May 20, 2016 (citing FMC Wyo. Corp. v. Union Pac. R.R., 4 S.T.B 699, 718 (2000)).)

b. Board Analysis

On the surface, Consumers’ Cobb and Campbell plants—merely 25 miles apart on Lake Michigan—appear similarly situated. However, the significant physical differences between Pigeon Lake and Muskegon Lake and the serious permitting issues raised in the record establish that the proposed Direct Water Alternative for Campbell is not feasible.

The record establishes that, compared to Pigeon Lake, Muskegon Lake is significantly larger, deeper, and has a wider channel to Lake Michigan, making it a more suitable destination for industrial vessel traffic. (Consumers Rebuttal Ex. II-2 at 30-31, May 20, 2016.) Indeed, while Muskegon Lake has a long history of use by commercial vessels, Pigeon Lake is surrounded by vacation homes and is used almost exclusively by recreation craft and for other non-industrial uses. (*Id.* at 34-35.) Although Pigeon Lake has occasionally hosted barge shipments, the record demonstrates that those have been infrequent and disruptive events. (*Id.* at 35; CSXT Reply WPs “2011 Environmental Equipment Delivery.pdf,” “2013 Barge Deliveries to Campbell.pdf,” “2014 Barge Deliveries to Campbell.pdf,” Mar. 7, 2016.) It appears that the reason that Muskegon Lake has had a long history of commercial vessels while Pigeon Lake has not is due in large part to the different characteristics between the two. For these reasons, the Board finds that delivery of coal to Campbell via Pigeon Lake would be significantly more difficult than delivery of coal to Cobb via Muskegon Lake.

In addition to these substantial physical differences, the permitting issues raised cast doubts as to whether Consumers would be able to obtain the necessary permits to receive coal by water at the Campbell plant. {

} The authors of the

report, Mr. Petro and Mr. Bovitz, expressly explain that their “preliminary permit and environmental review was performed without contacting any regulatory agencies,” and that they “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.” (Consumers Rebuttal Ex. II-2 at 11, May 20, 2016.) The report concluded that {

} Similarly, the Spicer Study itself identified

several permitting and mitigation issues with the Direct Water Alternative (described as Option E in the Spicer Study), and {

}

{

} The record demonstrates that TranSystems agrees with the research conducted by Consumers’ consultant relating to the environmental and sociological impacts of the Direct Water Alternative. (See CSXT Reply Ex. II-B-1 at 16, Mar. 7, 2016.) That study details the permits that would be required to proceed with the Direct Water Alternative, but does not conclude that the permitting process would be successful. Furthermore, while CSXT suggests that the TranSystems plan would reduce dredging requirements and limit the environmental impact of a dock at Pigeon Lake, it fails to adequately explain precisely how its plan would render permitting the dock “more manageable.” Having found that the Direct Water Alternative faces such significant permitting challenges, the Board is not persuaded that the limited design choices made by TranSystems would overcome those challenges.

Finally, the parties’ discussion of Consumers’ earlier contract with CSXT is irrelevant to the Board’s determination of whether CSXT possesses market dominance today. While the provisions of that contract {

} could have resulted from the competitive options available at that time, the question before the Board here is whether CSXT possesses market dominance under current market conditions. Therefore, the Board need not consider the terms of the earlier contract in determining the implications of the threat of delivery of coal by the Direct Water Alternative. Indeed, the record demonstrates that both parties acknowledge that none of their subsequent agreements contain similar language {

} (Consumers Rebuttal II-19, May 20, 2016.)

Consumers demonstrates such significant differences between Pigeon Lake and Muskegon Lake, and such significant uncertainties about the ability to successfully permit the Direct Water Alternative, that the Board finds that the Direct Water Alternative is infeasible.²¹⁸

2. Cobb-Rail Alternative

Under the Cobb-Rail Alternative, CSXT explains that inbound coal shipments from the Powder River Basin would be delivered to KCBX, loaded onto articulated tug barges or larger vessels, and transported to the existing Cobb dock on Lake Muskegon. (CSXT Reply II-B-38 to II-B-39, Mar. 7, 2016.) At Cobb, the coal would be unloaded and transported via conveyor to the MSRR, a shortline railroad that CSXT describes as within sight of the Cobb plant and 3.7 miles from Campbell. (Id. at II-B-39.) CSXT claims that, with a modest buildout to the

²¹⁸ Because the Board has reached this conclusion, it need not reach the parties’ additional feasibility arguments.

MSRR at both Cobb and Campbell, rail could be used to transport coal between the two plants. (*Id.*) It is undisputed that certain build-outs and improvements on the MSRR would be necessary to facilitate the Cobb-Rail Alternative. For the reasons described below, the Board finds that the Cobb-Rail Alternative is infeasible.

a. Positions of the Parties with Respect to CSXT's Relationship to the MSRR

On opening, Consumers argues that the Cobb-Rail Alternative is infeasible in light of the relationship between CSXT and MSRR. Consumers notes that while WorleyParsons examined the feasibility of this alternative, the study assumed {{

}} (Consumers Opening II-30, {{
}} However, as Consumers explains, the
MSRR leases the tracks over which it operates from CSXT, and {{

}} Accordingly, Consumers argues that {{

}} Consumers {{ }} for all capital costs. (Consumers Opening II-30.)
Consumers notes that {{

(*Id.* at II-31.) Additionally, Consumers argues that because the MSRR is a subsidiary of Genesee & Wyoming, Inc. (GWI)—which controls several shortline and regional railroads that interchange traffic with CSXT and depends on CSXT for much of their revenue streams—it is reasonable to expect that the MSRR would decline “to cooperate in challenging a monopoly held by one of its parent company’s major commercial partners.” (*Id.*)

In its reply, { } CSXT also challenges Consumers’ characterization of the relationship between the MSRR and GWI, arguing that there is no reason to think that the MSRR “would not jump at the opportunity to handle 3.5 million tons of coal annually.” (Id. at II-B-41.) CSXT further argues that Consumers does not specify any business relationship or loss that would cause the MSRR to reject millions of dollars in annual revenue. (Id.)

On rebuttal, Consumers continues to argue that the nature of the terms of the lease between CSXT and MSRR renders the Cobb-Rail Alternative wholly infeasible as an effective competitive alternative to CSXT. (Consumers Rebuttal II-54, May 20, 2016.) First, Consumers reiterates that CSXT's plan would necessitate {{

}} Consumers {{ }} without having any control over or ownership interest in the assets. (Id. at II-54 to II-55.) Second, Consumers {{

}} coal traffic. (Id. at II-55 to II-56.) Third, Consumers explains further that the lease {{

}} (Id. at II-56.) Finally, Consumers claims that the nature of the commercial relationships between GWI (MSRR's parent company) and CSXT, and the dependence of many of members of the GWI corporate family on CSXT for traffic and revenue, makes it unlikely that MSRR would be a willing competitor with CSXT for coal traffic to Campbell. (Id.)

b. Board Analysis

The Board concludes that the Cobb-Rail Alternative is infeasible because the terms of the lease between MSRR and CSXT would prevent the necessary improvements to the line in order to handle the movement of coal from Cobb to Campbell. The Board is not persuaded by CSXT's argument that "[t]here is zero reason to think that the [MSRR] would not jump at the opportunity to handle 3.5 million tons of coal annually," particularly when CSXT has not addressed Consumers' arguments that the lease terms are a barrier to the feasibility of the Cobb-Rail Alternative. (CSXT Reply II-B-41, Mar. 7, 2016.)

The record demonstrates that the nature of the lease gives Consumers little incentive to invest in the line, given that Consumers {{ }} As Consumers notes, {{

}} (Consumers Opening II-30; {{ }} The Board is persuaded by Consumers' argument that it is unlikely that either MSRR or Consumers would make such an investment under these conditions. The Board also agrees with Consumers' argument that the lease {{ }} is a legitimate obstacle to the Cobb-Rail Alternative. (Consumers Rebuttal II-55, May 20, 2016; Consumers Rebuttal WP "CSX-CNSMR-HC-018965," May 20, 2016.) As Consumers points out, much of the new trackage and connecting facilities would be built on CSXT property, and all of the fixtures would be permanent installations {{ }} (Consumers Rebuttal II-55, May 20, 2016.) The Board is persuaded that CSXT could exercise its rights under the lease {{ }} (Id. at II-55 to II-56.) {{

}} (Consumers Opening II-30 to II-31, citing {{ }} The Board agrees with Consumers' argument that the Cobb-Rail Alternative would require {{ }} Consumers points out that {{

}} (Consumers Rebuttal II-56, May 20, 2016; CSXT Reply Ex. II-B-1 at 83, Mar. 7, 2016.)

For these reasons, the Board finds that the Cobb-Rail Alternative is not feasible; the terms of the lease between the MSRR and CSXT give Consumers little incentive to invest in the alternative, and give the railroad purportedly subject to potential competitive pressure from that alternative {{ }}.²¹⁹

D. CONCLUSION

Because CSXT's R/VC ratio exceeds the 180% threshold for the challenged rate, and the Board finds that Consumers has shown both the Direct Water and Cobb-Rail Alternatives to be infeasible, the Board concludes that CSXT possesses market dominance over the challenged transportation.

²¹⁹ Given this conclusion, the Board need not reach the parties' additional feasibility arguments.

EXHIBIT 1

**PROTECTIVE ORDER
ENTERED BY THE BOARD ON MARCH 18, 2015**

237820

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
February 27, 2015
Part of
Public Record

CONSUMERS ENERGY COMPANY,

Complainant,

vs.

CSX TRANSPORTATION, INC.,

Defendant.

DOCKET NO. NOR 42142

JOINT MOTION FOR PROTECTIVE ORDER

Complainant Consumers Energy Company ("Consumers") and Defendant CSX Transportation, Inc. ("CSXT") (collectively, the "Parties"), respectfully request that the Surface Transportation Board ("STB" or "Board") enter a protective order for the above-referenced proceeding, in the form provided in the Appendix A to this Motion. The proposed order will facilitate discovery in this proceeding by protecting the confidentiality of material reflecting the terms of contracts, financial information, Sensitive Security Information, and other confidential and proprietary information, in the event that such materials are produced by the Parties. The proposed order, which has been agreed to by the Parties, generally follows the format of the protective orders that the Board approved in STB Docket NOR 42130, *SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Company* (decision served September 6, 2011); and NOR 42125, *E.I. du Pont de Nemours and Company v. Norfolk Southern Railway Company* (decision served January 11, 2011).

Accordingly, the Parties respectfully request that the Board enter the protective order in this proceeding in the form provided in the Appendix hereto, including the forms of undertaking

 GRANTED Office of Proceedings	DECISION ID NO.: <u>44374</u>
	DECIDED DATE: <u>3/17/15</u>
	SERVICE DATE: <u>3/18/15</u>
	APPROVED: <u>Rachel Campbell</u> Director

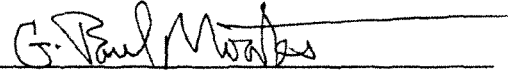
that accompany it. The Parties request that the Board enter the proposed order on an expedited basis to facilitate discovery.

Respectfully submitted,



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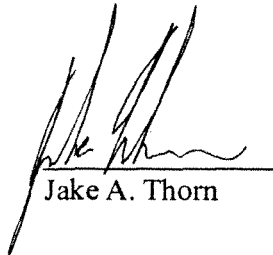
Counsel for CSXT Transportation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February 2015, I served a copy of the foregoing upon the following counsel for complainant Consumers Energy Company via U.S. first-class mail or more expeditious means of delivery:

Catherine M. Reynolds
Senior Vice President and General Counsel
Kimberly C. Wilson
Supervisory Assistant General Counsel
Consumers Energy Company
One Energy Plaza
Jackson, Michigan 49201

Kelvin J. Dowd
Daniel M. Jaffe
Christopher A. Mills
Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036



Jake A. Thorn

APPENDIX

PROTECTIVE ORDER

1. Any party producing information, data, documents, or other material (hereinafter collectively referred to as “material”) in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:
 - (a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.
 - (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising herefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.
 - (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings which they were authorized to review under this Protective Order, including Paragraph 10.
 - (d) If contained in any pleading filed with the Board, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” See 49 C.F.R. § 1104.14.
2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data, or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board. Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising herefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, and execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as “HIGHLY CONFIDENTIAL”

and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1.

3. Any party producing in discovery railroad traffic data that has been designated Sensitive Security Information ("SSI") by the United States Department of Transportation ("DOT") or the United States Department of Homeland Security ("DHS") shall produce such material in accordance with governing DOT and DHS regulations, rules and policies, including but not necessarily limited to 49 C.F.R. pts. 15 and 1520, and the terms and conditions set forth in the FRA Administrator's "Authorization to Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings," (July 29, 2011), and SSI Order 2011-06-FRA-01 (July 29, 2011).^{*} In addition to other applicable conditions and requirements, rail traffic SSI shall be produced only to those outside counsel or consultants to a Party who, prior to production, have (i) reviewed and executed an **Undertaking for Highly Confidential Material**; and (ii) reviewed and executed an "Undertaking for SSI Material." Executed copies of Undertakings for Highly Confidential Material and Undertakings for SSI Material must be provided to the producing party before that SSI material may be produced to representatives of a requesting Party.
4. In the event that a party produces material which should have been designated as "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "SSI" and inadvertently fails to designate the material as "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "SSI," the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.
5. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim,

^{*} A party producing rail traffic information containing or constituting SSI in discovery or submitting such material in pleadings should also comply with other applicable requirements of DOT and DHS SSI regulations governing the use and handling of SSI, including the SSI marking requirements set forth in 49 C.F.R. § 15.13 or, if that is not practicable, the marking requirements of July 29, 2011 memorandum from Federal Railroad Administration Administrator Joseph C. Szabo titled "Authorization to Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings."

provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

6. If any party intends to use "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "SSI" material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "SSI" material to the Board, or the court, as appropriate, with a written request that the Board or the court: (a) restrict attendance at the hearings during discussion of such "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "SSI" material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "SSI" material in accordance with the terms of this Protective Order.
7. If any party intends to use "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "SSI" material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "SSI" material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "SSI" material shall be kept under seal and treated as such material in accordance with the terms of this Protective Order.
8. Each party is ordered to produce to the other party rail transportation contracts or other documents or information which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the documents be produced in discovery, and (2) the parties agree that the requested documents would be properly discoverable in this proceeding but for the confidentiality provision(s). Such documents shall be required to be produced only after the other party(ies) to a contract (or other document subject to a confidentiality provision) who are entitled to prior notice have been provided written notice and a reasonable opportunity to object to that production and obtain a ruling from the Board on that objection. Any documents or contracts produced pursuant to this Section 8 shall be treated as "HIGHLY CONFIDENTIAL" and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904.
9. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "SSI" material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so

required shall notify the producing party in writing within 3 business days of the determination that such material is to be released, or within 3 business days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.

10. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.
11. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as "HIGHLY CONFIDENTIAL" or "SSI" by a producing party, without securing prior permission from the producing party. If a party (the "filing party") files and serves upon the other party (the "reviewing party") a pleading or evidence containing the "HIGHLY CONFIDENTIAL" or "SSI" material of the filing party, the filing party shall also contemporaneously provide to outside counsel for the reviewing party a "CONFIDENTIAL" version of such filing that redacts any "HIGHLY CONFIDENTIAL" or "SSI" information of the filing party that cannot be viewed by the in-house personnel of the reviewing party. Such Confidential Version may be provided in a pdf or other electronic format.
12. Any party filing with the Board a "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "SSI" pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on _____, 2015, governing the production of confidential documents in STB Docket No. NOR 42142, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. NOR 42142 or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel and consultants may retain copies of pleadings which they were authorized to review under the Protective Order.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: _____

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on _____, 2015, governing the production of confidential documents in STB Docket No. NOR 42142, understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated "HIGHLY CONFIDENTIAL" to any person or entity who: (i) is not eligible for access to "HIGHLY CONFIDENTIAL" material under the terms of the Protective Order, or (ii) has not executed a "HIGHLY CONFIDENTIAL" undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____

UNDERTAKING HIGHLY CONFIDENTIAL MATERIAL

HIGHLY CONFIDENTIAL SECURITY SENSITIVE INFORMATION AND MATERIAL

I _____ have read FRA Order 2011-06-FRA-01 designating certain railroad traffic information as Sensitive Security Information ("SSI") and the July 29, 2011 memorandum from FRA Administrator Joseph C. Szabo titled "Authorization to Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings" (hereafter "July 29 Memorandum"). I agree to be bound by the terms of FRA Order 2011-06-FRA-01 and the July 29 Memorandum for rail traffic SSI data or information produced in discovery or submitted as evidence (including evidence or materials derived or compiled from SSI produced in this proceeding) in STB Docket No. NOR 42142. I have also executed an Undertaking for Highly Confidential Material, and acknowledge that all SSI produced in this proceeding is also designated HIGHLY CONFIDENTIAL and is subject to all of the requirements and limitations that apply to HIGHLY CONFIDENTIAL material, as well as the additional requirements set forth in this undertaking.

I have been advised and hereby acknowledge that CSX Transportation, Inc.'s conditional disclosure of SSI data or information in STB Docket No. NOR 42142 pursuant to FRA Order 2011-06-FRA-01 and the July 29 Memorandum makes me a "covered person" within the meaning of 49 C.F.R. §§ 15.7(m) and 1520.7 as to any such SSI information I receive, access, review, and/or use. I understand my duties and responsibilities as a "covered person" under federal law and applicable regulations (including but not limited to 49 C.F.R. pts. 15 and 1520), and will comply with those responsibilities. I understand that unauthorized disclosure of SSI may result in civil penalty or other action. Pursuant to 49 C.F.R. §§ 15.19 and 1520.19, I agree to destroy all SSI data or information in my possession, custody, or control after the conclusion of STB Docket No. NOR 42142, including the final disposition of any appeals of the STB final decision in that docket.

OUTSIDE [COUNSEL] [CONSULTANT] TO

[Party name]

Dated: _____