



# SLOVER & LOFTUS LLP

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March 20, 2018

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**Via 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 20, 2018  
Part of  
Public Record

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

Dear Ms. Brown:

On behalf of Complainant, Consumers Energy Company (“Consumers”), this letter is submitted in response to the March 19, 2018 letter (“Letter”) filed by Defendant, CSX Transportation, Inc. (“CSXT”) in reply to Consumers’ March 12, 2018 Reply to CSX Transportation Inc.’s Petition for Reconsideration (“Reply”).<sup>1</sup>

CSXT argues that it is “common practice” for parties to append extensive exhibits “totaling up to 225 pages” to petitions for reconsideration under 49 C.F.R. Part 1115.3, and that this justified its submission of verified statements from two (2) new witnesses with its Petition for Reconsideration. However, of the several purported examples of the “practice” cited by CSXT, only one case involved verified witness

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<sup>1</sup> CSXT’s Letter squarely conflicts with the Board’s prohibition on “replies to replies” (49 C.F.R. Part 1104.13(c)) as it plainly “replies” to an argument raised by Consumers in opposition to CSXT’s Petition for Reconsideration. The submission of this response should not be interpreted as concurrence that CSXT’s Letter should be accepted as part of the record.

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statements,<sup>2</sup> and the opposing party in that case did not object. CSXT's citations are inapposite here.<sup>3</sup>

Equally important, and contrary to CSXT's claim in its Letter, the verified statements to which Consumers objected were not "new evidence" within the meaning of 49 C.F.R. Part 1115.3(b)(1). As Consumers showed in its Reply, CSXT's new witnesses simply offered "newly raised" arguments or analyses related to evidence that was on the record long before it closed in 2016, not new facts that were not available previously. Reply at 2, citing *TMPA II*, 7 S.T.B. at 804-805. Moreover, the Board previously had ruled in its December 9, 2016 Decision on CSXT's Motion to Strike that CSXT was *not* entitled to respond to the elements of Consumers' Rebuttal Evidence that the new verified statements specifically address.<sup>4</sup>

Consumers' objections to the Chakrabarti and Magistro verified statements were valid, and should be sustained.

Respectfully,

A handwritten signature in black ink, appearing to read 'Kelvin J. Dowd', with a stylized, cursive script.

Kelvin J. Dowd  
An Attorney for  
Consumers Energy Company

KJD:lad

cc: Counsel for Defendant

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<sup>2</sup> *Total Petrochemicals & Ref. USA, LLC v. CSX Transp. Inc.*, STB Docket NOR 42121 (Petition for Reconsideration filed June 20, 2013).

<sup>3</sup> See STB Docket NOR 42142 (STB served December 9, 2016) at 2 (the fact that the timeliness of motions to strike had not been challenged in previous cases did not imply Board approval of violations of its rules).

<sup>4</sup> Decision served December 9, 2016 at 8-9, 16-17.