

BEFORE THE SURFACE TRANSPORTATION BOARD

235238

TOTAL PETROCHEMICALS USA, INC.

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant

ENTERED

Office of Proceedings

December 26, 2013

Part of the Public Record

Docket No. NOR 42121

**CSXT'S PETITION FOR STAY OF THE BOARD'S
FINAL MARKET DOMINANCE DECISION AND TO HOLD THE
SECOND PHASE OF THIS CASE IN ABEYANCE PENDING JUDICIAL REVIEW**

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Dated: December 26, 2013

Pursuant to 49 U.S.C. § 721(b)(4), 49 C.F.R. § 1115.5 and other applicable laws, rules, and authority, Defendant CSX Transportation, Inc. (“CSXT”) respectfully submits this Petition for Stay Pending Appeal of the Board’s December 19 Decision denying the parties’ reconsideration petitions and rendering the Board’s Market Dominance Decisions final and effective. *See* Decision, *Total Petrochemicals & Refining, USA, Inc. v. CSX Transportation, Inc.* STB Docket No. NOR 42121 (served Dec. 19, 2013) (the “*Final Market Dominance Decision*”) (concluding first phase of the case and determining which rates would be considered in the second, rate reasonableness phase). CSXT intends to seek immediate, expedited judicial review of the *Final Market Dominance Decision* and its jurisdictional determinations. This Petition requests that the Board stay the *Final Market Dominance Decision* and hold in abeyance the rate reasonableness phase of the case pending that judicial review.

TPI has challenged the reasonableness of 84 separate CSXT rates for the transportation of carloads of chemical and plastics freight over 104 lanes. The Board’s initial decision addressing the market dominance phase of this bifurcated case applied a new market dominance test, dismissed the Complaint with respect to twelve of the challenged rates for lack of market dominance, and directed the parties to confer regarding a schedule for “the rate reasonableness phase of this proceeding.” *See TPI v. CSXT*, Decision at 29-30 (May 30, 2013) (the “*Initial Market Dominance Decision*”).¹ TPI and CSXT each filed petitions for reconsideration of the *Initial Market Dominance Decision*. *See TPI Petition for Reconsideration* (June 20, 2013);

¹ This Petition sometimes refers to the *Initial Market Dominance Decision* and the *Final Market Dominance Decision* collectively as the “*Market Dominance Decisions*.” The parties were unable to agree on a schedule for the future submission of rate reasonableness evidence and the Board established a schedule. *See TPI v. CSXT*, Decision (Sept. 26, 2013). Later, TPI sought and the Board granted an extension of that schedule. *TPI v. CSXT*, Decision (Nov. 12, 2013). CSXT did not oppose that extension, and has produced substantial supplemental discovery during the pendency of the Reconsideration Petitions.

CSXT's *Petition for Reconsideration* (June 21, 2013). Six months later, the Board issued a *Final Market Dominance Decision* denying the Petitions and concluding the market dominance phase.²

CSXT strongly believes the *Final Market Dominance Decision* – including the new “Limit Price” test it adopted – is arbitrary, capricious, and contrary to law. Because that *Decision* finally determines the scope and extent of the Board's jurisdiction to hear challenges to the reasonableness of CSXT common carrier rates in the second phase of this case, CSXT will seek immediate, expedited judicial review of the *Decision* in the United States Court of Appeals for the D.C. Circuit. If that Court were to hold the *Decision* and its jurisdictional findings unlawful, any rate reasonableness findings predicated on those jurisdictional findings necessarily would be null and void. To avoid expenditure of very substantial resources by CSXT, TPI, and the Board on the development and analysis of three rounds of SAC evidence, briefing, and rate reasonableness determinations that may well be rendered moot by judicial reversal of the *Market Dominance Decisions*, this Petition requests that the Board stay the final *Decision* and hold the rate reasonableness phase of this case in abeyance during judicial review.

ARGUMENT

Where appropriate, the Board has stayed its decisions in rate cases and other proceedings. *See, e.g., Arizona Public Service Co. v. Atchison, Topeka & Santa Fe Ry*, STB Docket No. 41185

²CSXT could not seek judicial review of the *Initial Market Dominance Decision* and its new jurisdictional test and rule before now, because of the pending Reconsideration Petitions. A motion to reconsider an agency decision renders the decision “non-final” and thus non-reviewable, until the agency decides such a motion. *See, e.g., Stone v. INS*, 514 U.S. 386, 392 (1995) (“timely filing of a motion to reconsider renders the underlying order nonfinal for purposes of judicial review. In consequence, pendency of reconsideration renders the underlying decision not yet final, and . . . a party who has sought rehearing cannot seek judicial review until the rehearing has concluded.”); *Clifton Power Corp. v. FERC*, 294 F.3d 108 (D.C. Cir. 2002); *United Transp. Union v. ICC*, 871 F.2d 1114, 1116 (D.C. Cir. 1989).

(Aug. 21, 1997) (granting stay pending judicial review in rate case).³ In determining a petition for stay of a decision pending appeal, the Board considers: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. *See Stagecoach Group PLC and Coach US –Acquisition of Control – Twin America, LLC*, STB Dkt No. MC-F-21035 (Mar. 8, 2011). A tribunal considering a stay request should consider the factors flexibly in a balance of the equities. *See, e.g., Washington Metropolitan Area Transit Comm’n v. Holiday Tours*, 559 F.2d 841, 843-44 (D.C. Cir. 1977) (necessary showing on any factor “is governed by the balance of equities as revealed through an examination of the other three factors”). Because the elements are satisfied here, the Board should issue a stay to preserve the status quo pending judicial review.

I. The Parties Would Risk Irreparable Harm if a Stay is Not Granted.

If the rate reasonableness phase of this case is not stayed during the pendency of CSXT’s appeal of the Board’s *Market Dominance Decisions*, CSXT and TPI, as well as the Board itself, face a significant risk of irreparable harm for which there is no remedy at law. In its present form, the rate reasonableness phase of this case would involve evidentiary analysis of one of the largest and most complex Stand-Alone Railroads ever presented, covering 20 states and replicating much of the heart of the CSXT network. As the Board knows, the SAC evidence the parties, their experts, consultants, and lawyers must develop and submit in three separate rounds of evidence—including the design of a SARR network and operations plan and associated capital investments and expenses required to serve a huge and diverse body of traffic comprised of a

³ *See also Western Fuels Ass’n v BNSF Ry Co.*, STB Docket No. 42088 (decided Jan. 18, 2012) (holding rate prescription in abeyance pending appeal); *Duke Energy v Norfolk Southern Ry*, STB Docket No. 42069 (Feb. 3, 2004); *NYC Econ. Develop. Corp – Adverse Abandonment – N.Y. Cross-Harbor RR*, STB Docket AB-596 (Aug. 27, 2003) (granting stay pending appeal).

large volume of operationally complex merchandise and carload traffic moving over more than 100 lanes – would be exceptionally costly and time-consuming in this case. *See, e.g., TPI v. CSXT*, Bifurcation Decision at 7 (April 5, 2011) (describing this case as “extraordinarily complicated”). In order to develop, analyze, and respond to such evidence, CSXT will be required to expend large amounts of time, effort and resources, including diversion of a large number of CSXT employees and officers from their normal duties required to run the railroad and serve its customers effectively and safely, to developing SAC evidence; and the employment of a small army of consultants, experts, legal counsel, and others to assist in the development and support of that evidence. TPI will face a time-consuming and costly effort to develop SAC evidence and analyze and respond to CSXT’s evidence. The cost to the parties—in terms of money, time, and diverted resources—of any full SAC presentation is enormous. Because of the size and complexity of this case, however, CSXT fully anticipates that the cost to the parties of presenting SAC evidence in this case will be the largest of any rate case in which CSXT has ever been involved. Concomitantly, the time and resources the Board and its staff will be required to devote to analyzing the evidence, making decisions on myriad disputed issues, and developing and supporting a rate reasonableness decision will also be extraordinary.

Given the enormity of the effort and accompanying costs required to prepare and analyze SAC evidence in this case, it would be wasteful and imprudent for the parties and the Board to risk having to do it twice. Unless the Board stays the rate reasonableness phase during the pendency of CSXT’s appeal, however, there is a very real risk that they will be forced to engage in just such a wasteful and costly exercise of multiple serial SAC presentations.

If the Court reviewing CSXT’s appeal of the *Market Dominance Decisions* agrees with any of CSXT’s several cogent arguments that those novel Decisions and the resulting

jurisdictional determinations are unlawful, the *Decisions* will be vacated and the case remanded to the Board. CSXT's evidence shows that if the Board applied its previous (pre-Limit Price) market dominance test on remand, only 26 of 84 challenged rates (31%) would be within the Board's rate reasonableness jurisdiction and thus subject to challenge. *See Initial Market Dominance Decision* at 28.⁴ The SAC evidence the parties would develop and present for a challenge to as few as 26 lanes would be substantially different from the evidence the parties would have submitted regarding a challenge to 69 lanes. The SARR configuration, operating plan and expenses, infrastructure, capital investment, equipment requirements, and revenues could be entirely different, necessitating the preparation and submission of entirely new and different SAC evidence and analysis. The Board's reasoning in deciding to bifurcate this case continues to apply during an expedited appeal of the *Market Dominance Decisions*:

[I]f the Board allowed stand-alone cost evidence to be filed now and later found some number of lanes of traffic to be outside our jurisdiction, the result could be an evidentiary record inconsistent with the assumptions underlying the complainant's selection of a traffic group and the facilities necessary to serve that group. That could warrant supplemental rounds of evidence that would ultimately drag out resolution of this case.

Bifurcation Decision at 7. Moreover, if the number of rates subject to the Board's jurisdiction under a lawful market dominance test were substantially lower -- as CSXT contends -- TPI might elect to pursue a challenge to the remaining rates under the SSAC methodology, or the parties might be able to reach a negotiated resolution of the case. In all events, much of the SAC evidence prepared at great cost to the parties would be wasted if a reviewing court reversed the Board's jurisdictional decision after the parties had filed that evidence.

⁴ If the Board's analysis on remand did not result in any changes to the 15 rates for transportation over which the *Market Dominance Decisions* found CSXT lacks market dominance, the potential reduction in rates at issue would be from 69 to 26, or a 62 percent reduction to 38% of the rates the Board found within its rate reasonableness jurisdiction under the Limit Price Test.

Thus, absent a stay pending judicial review, the parties risk expending several million dollars worth of time and resources to generate evidence that ultimately may be rendered useless or moot. Importantly, neither CSXT nor TPI nor the Board would have any right to recover funds and resources expended on preparation and analysis of SAC evidence rendered moot by judicial review of the novel and unorthodox – and, CSXT believes, arbitrary and unlawful—jurisdictional test and rules adopted without notice-and-comment rulemaking. Those resources, unnecessarily expended on rate reasonableness evidence based on a dubious jurisdictional decision, would be irretrievably lost by the parties, the Board and the public it serves.

Because there is no adequate remedy at law for such losses, the parties and the Board risk irreparable harm in the absence of a stay. While the general rule is that economic loss alone is insufficient to constitute irreparable harm, the reason for that rule is the assumption that a person erroneously deprived of money or its equivalent may recover compensation in monetary damages. Here, however, resources wasted on SAC evidence rendered irrelevant by judicial review are *not* recoverable in damages, because no one would be “liable” for monies expended based on an erroneous jurisdictional decision issued by the Board. Accordingly, unless the Board stays the *Market Dominance Decisions* and holds the rate reasonableness phase of this case in abeyance during judicial review, the parties will face significant risk of irretrievable loss of substantial resources and irreparable harm. *See Stagecoach Group*, slip op. at 2-3 (granting stay because “monetary damages would not be available to compensate” movant for potential losses in the absence of a stay).

II. CSXT Has a Substantial Likelihood of Success on the Merits.

CSXT’s Reconsideration Petition presented several strong arguments demonstrating that the new Limit Price Test the Board applied in this case is arbitrary, capricious, and contrary to law, both substantively and procedurally. *See generally*, CSXT Petition for Reconsideration

(June 20, 2013). The appeal that CSXT intends to file today will present difficult and novel legal questions regarding, *inter alia*, whether the Board has correctly interpreted and applied the Interstate Commerce Act; the nature of the new Limit Price rule and whether the Board complied with the requirements of the Administrative Procedure Act; and whether the new rule and methodology the Board applied is arbitrary and capricious for several independent reasons.⁵ Several of these issues are difficult, most present questions of first impression on judicial review, and all bear on the fundamental threshold question of the Board's jurisdiction to entertain challenges to rail rates, including the substantial majority of the rates challenged in this case.

Where, as here, the movant makes a strong showing on the equities and an appeal presents difficult or novel legal questions, the Board may grant a stay without determining that the movant is likely to prevail on the merits. *See Stagecoach Group*, slip op at 3; *N.Y. Cross-Harbor R.R.*, STB Docket No. AB-596 (issuing stay pending judicial review even though petitioner unlikely to prevail on merits). Thus, even if CSXT had not demonstrated a strong likelihood of prevailing on the merits of its appeal, its showing of risk of irreparable harm to both parties and the public and the lack of harm to TPI from a stay would be sufficient to grant a stay.

The *Final Market Dominance Decision* rejected CSXT's arguments by a divided vote, and the Board must recognize there is a substantial chance that the Court of Appeals may view the issues differently. The repeated dissents of Vice Chairman Begeman attest to the vulnerability of the Board's *Decision* on appeal, and the strength of arguments concerning the

⁵ Space limits do not allow detailed discussion of those arguments, which are set forth in CSXT's Reconsideration Petition, its market dominance evidence, and in its reconsideration petition in *M&G v. CSXT*, and with which the Board is familiar. *See, e.g., CSXT's Petition for Reconsideration* (June 21, 2013); *M&G Polymers v. CSXT* STB Docket 42123, *CSXT Comments on the Proposed "Limit Price" Approach To Determining Qualitative Market Dominance* (Nov. 28, 2012). CSXT incorporates by reference hereto all of the arguments and authority set forth in its prior submissions described in this footnote.

economic infirmity and irrationality of the Limit Price test; the questionable injection of RSAM and revenue adequacy to a market dominance analysis; and the necessity of a notice-and-comment rulemaking to establish a new market dominance test and rule. *See Final Market Dominance Decision* at 24 (V.C. Begeman dissenting); *Initial Market Dominance Decision* at 30-31 (V.C. Begeman dissenting). Further demonstrating the infirmity of the Board's new rule, the only expert economic testimony in the record regarding the new Limit Price rule and its application is the testimony of three economists strongly opposing the new test and rule as economically unsound, fundamentally flawed in several respects, and inconsistent with other statutory and regulatory policies, goals, and duties of the Board. *See, e.g.,* CSXT Reconsideration Petition, Exhibit 1 (V.S. Professor Robert Willig); Exhibit 2 (J.V.S. B. Kelly Eakin and Mark E. Meitzen, Christensen Associates) (June 20, 2013). The *Market Dominance Decisions* offered no meaningful response to the expert economists' cogent criticisms and opposition to the new jurisdictional rule applied in this case. The length of time it took the Board to decide the reconsideration petitions, further attests to the difficult issues presented on judicial review of the *Market Dominance Decisions*. At a minimum, the Board's controversial new market dominance test and Decisions in this case present several close and difficult legal questions for the Court of Appeals to address.

The difficult and novel legal questions presented by the *Market Dominance Decisions* further militate in favor of a stay pending CSXT's appeal. Both the Board and the D.C. Circuit have held that "tribunals may properly stay their own orders when they have ruled on [] admittedly difficult legal question[s] and when the equities of the case suggest that the status quo should be maintained." *Stagecoach Group*, at 3. Moreover, the fact that the Board rejected CSXT's arguments in ruling on its Reconsideration Petition by no means dictates a finding that

CSXT lacks likelihood of success on the merits of its appeal. As the D.C. Circuit explained in rejecting the notion that a court may not stay its own order pending appeal, “prior recourse to the initial decisionmaker would hardly be required as a general matter if [that decisionmaker] could properly grant interim relief only on a prediction that it has rendered an erroneous decision.” *Holiday Tours*, 559 F.2d at 844. What is required is that the movant have a substantial likelihood of success on the merits, *not* that the agency concedes that the movant is correct or will prevail on appeal. CSXT’s arguments challenging the Limit Price test and the Board’s jurisdictional determinations readily satisfy that requirement.

III. A Stay Pending Appeal Would Not Harm TPI and Would Serve the Public Interest.

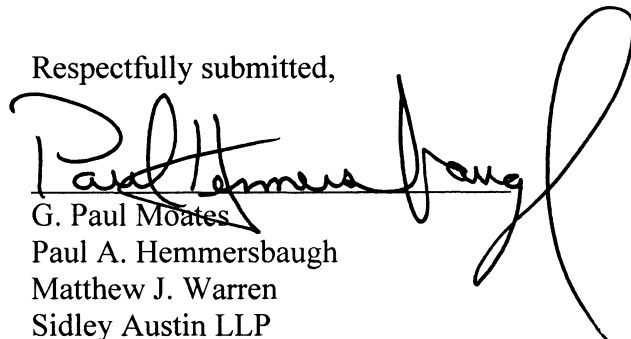
A stay holding this case in abeyance would benefit all parties by ensuring that the jurisdictional determinations the Board makes in this case are lawful before the parties go to the great expense of developing and analyzing three rounds of SAC evidence. As discussed, a court decision reversing the *Market Dominance Decisions* might render moot SAC evidence and analysis the parties conduct prior to judicial review, and force them to develop new SAC evidence. In that event, TPI would have wasted resources it expended to develop SAC evidence. A stay pending judicial review would eliminate the risk to TPI of such a costly waste of time and resources. Moreover, a stay would not deprive TPI of any rate relief to which it may be entitled for rates properly within the Board’s jurisdiction. Regardless of whether the Court of Appeals upholds or strikes down the *Market Dominance Decisions*, TPI will be entitled to a rate reasonableness determination (potentially including rate prescriptions and reparations) with respect to the challenged rates held to be within the Board’s jurisdiction under a lawful market dominance test. And, if TPI ultimately were to obtain a rate prescription and reparations, it would be entitled to interest on any overpayments it made during the pendency of this case. *See* 49 C.F.R. § 1141.1. Thus, a stay would protect TPI from the risk of wasting substantial

resources on evidence that may be rendered moot, while at the same time holding it harmless with respect to any rate relief to which it may be entitled.

Carriers and shippers that are not party to this case have a strong interest in stable, lawful, and certain regulatory rules. Stable and settled jurisdictional rules are important to allow railroads and their customers to plan and conduct their businesses (including rate negotiations) based on settled and reliable expectations. The market dominance test applied by the Board in this single adjudication without adequate participation by most interested persons has created great uncertainty about what rules will apply to future rate challenges. The Board itself has indicated that it does not necessarily intend the test applied in this case to be binding on other parties in other cases, but has provided no further guidance. *See Final Market Dominance Decision* at 9. Even if the Board were to apply the same Limit Price jurisdictional test in other pending and future rate cases, its decisions in those cases will be at substantial risk until a lawful rule is established and upheld on judicial review. Thus, carriers and shippers are faced with instability in an important regulatory area and forced to make business and investment plans and decisions in an uncertain and potentially shifting rate regulation environment. Such regulatory uncertainty and instability is detrimental not only to the parties to this case but to all regulated carriers, shippers, and other stakeholders. Finally, unless this case is stayed pending appeal, the Board risks loss of substantial public resources on the evaluation and analysis of voluminous SAC evidence. Deciding a large complex rate case is a major undertaking that places substantial demands on scarce public resources. It is not in the interest of the Board, its staff, or the public they serve to knowingly run a substantial risk of such a costly and wasteful “do-over.” Accordingly, the Board should stay further proceedings and hold this case in abeyance until the Court of Appeals has an opportunity to review the *Market Dominance Decisions*.

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Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read "Paul A. Hemmersbaugh". The signature is written over a horizontal line.

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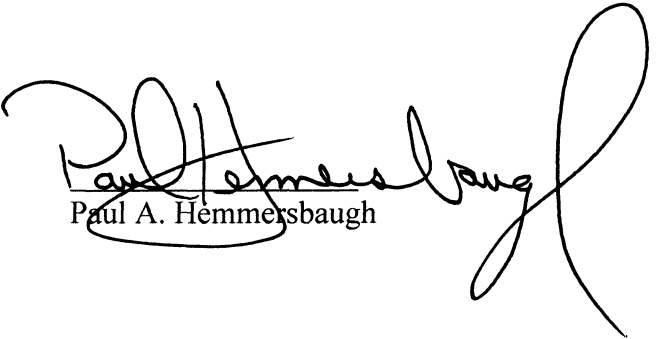
Counsel to CSX Transportation, Inc.

Dated: December 26, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of December, 2013, I served a copy of the foregoing **CSXT'S PETITION FOR STAY OF THE BOARD'S FINAL MARKET DOMINANCE DECISION AND TO HOLD THE SECOND PHASE OF THIS CASE IN ABEYANCE PENDING JUDICIAL REVIEW** by email and first-class mail upon:

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