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February 20, 2018

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

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

Dear Ms. Brown:

Enclosed for filing in the referenced proceeding is an original and ten (10) copies of Complainant's Petition for Technical Corrections. Also enclosed are three (3) computer disks containing the Petition and workpapers illustrating the changes to the Board's January 11, 2018 Decision in this matter that are addressed in the Petition.

Thank you for your attention to this matter.

Sincerely,

Kelvin J. Dowd
An Attorney for
Consumers Energy Company

KFW: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 PETITION FOR TECHNICAL CORRECTIONS

CONSUMERS ENERGY COMPANY

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Dated: February 20, 2018

(202) 347-7170

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

COMPLAINANT’S PETITION FOR TECHNICAL CORRECTIONS

Complainant, Consumers Energy Company (“Consumers”), in accordance with the Board’s Order served January 19, 2018 in the captioned docket, submits this Petition for Technical Corrections to the Surface Transportation Board’s (“STB” or “Board”) Decision served in this proceeding on January 11, 2018 (“*Decision*”).

Consistent with the Board’s directions in *Xcel Energy* and following cases, this Petition addresses technical and/or computational errors, and the *Decision*’s failure to reflect tax law changes or source data (such as the 2016 railroad industry cost of capital) that were effective and/or available prior to issuance of the *Decision*, and routinely are applied in maximum rail rate cases. Consumers sought – but could not secure – CSXT’s

concurrence in each of the corrections described herein, which made this separate Petition necessary.¹

This Petition does not raise issues that properly should be addressed in a petition for reconsideration under 49 C.F.R. Part 1115.3.² See *Pub. Serv. Co. of Colorado d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry. Co.*, Docket NOR 42057 (STB served Dec. 14, 2004) at 1-2. The revisions proposed herein would correct errors and/or omissions in the Board's execution of various calculations relevant to application of the Stand-Alone Cost ("SAC") Constraint of the *Coal Rate Guidelines*,³ and in the Board's implementation of various rulings set out in the narrative text of the *Decision*.

Below, Consumers describes the technical errors along with the proposed corrections to those errors. The specific corrective steps are set out in Exhibit No. 1 to this Petition. The corrections generally are grouped so as to correspond to the Board-prescribed order of presentation for SAC evidence. They are not listed in order of importance or consequence vis-à-vis the calculation of SAC.

¹ The parties this date also are submitting a Joint Petition for Technical Corrections, which addresses corrections to the *Decision* that they were able to agree upon.

² Consumers has filed a Petition for Reconsideration this day as well, also pursuant to the Board's January 19 Order.

³ *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520 (1985), *aff'd. sub nom.*, *Consolidated Rail Corp. v. United States*, 812 F. 2d 1444 (3d Cir. 1987).

I. Technical Corrections

1. III.F.3: Turnout/Switch Heaters Corrections

In its Opening Supplemental Evidence at III-F-2 and n. 9, Consumers corrected various technical errors in the workpaper “2015 OTM Worksheet_Supplemental.xlsx,” including entries for switch heaters and propane tanks where the quantities in the OTM Worksheet did not match the quantities in the track quantities spreadsheet. CSXT did not reflect these corrections in its Supplemental Reply workpapers, and the *Decision* contained the same error. As a result, there is a disconnect between the Track Quantities and OTM Worksheets regarding switch heaters and propane tanks for #10 manual switches. Exhibit No. 1 illustrates how the Board should correct this error (Item #2).

2. III-F-3: Off Line Transportation for 115# Rail

The *Decision* accepted CSXT’s methodology for calculating off-line transportation costs for rail, which involved using the 2013 unmasked Carload Waybill Sample for the Steelton to Russell leg and a quote from a rail manufacturer for the leg from Russell to the CERR railheads (*Decision* at 210-211). However, the Board’s workpapers failed to fully apply either of these changes, and used the CWS rate for 136# rail for the entire move. The Board should have updated the 115# rail with the CWS rate, and applied the separate price quote for the Russell to CERR railhead leg. These corrections should be implemented in the manner described in Exhibit No. 1, Item #2.

3. III.G.1: Cost of Capital

Subsequent to the parties' final evidentiary submissions in this case, the Board issued its decision in *Railroad Cost of Capital – 2016*, Ex Parte No. 558 (Sub-No. 20) (STB served Aug. 7, 2017). The Board's precedents clearly establish that the average cost of capital for a SARR under the SAC Constraint's DCF model should include the most recently issued annual determination, including instances where the issuance comes after the close of the record but before a final decision in the case. *See, e.g., Western Fuels Ass'n., Inc., Et Al. v. BNSF Ry. Co.*, Docket NOR 42088 (STB served Feb. 18, 2009) at 23; *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, 7 S.T.B. 862, 878-879 (2004); *McCarty Farms, Et Al. v. Burlington Northern, Inc.*, 2 S.T.B. 460, 523 (1997); *Ariz. Pub. Serv. Co. v. Atchison T. & S.F. Ry. Co.*, 2 S.T.B. 367, 438 (1997).

The *Decision* in this proceeding did not incorporate the 2016 cost of capital and 2016 railroad cost of equity into the DCF model, as established precedent and practice requires. The Board's 2016 determination continued the longer term shift toward lower industry capital costs, and the 2016 values were available for several months before the *Decision* was served. The Board should correct this omission. Exhibit No. 1 illustrates how to perform this correction (Item #3).

4. III.G.3: Changes In Tax Law

The “Tax Cuts and Jobs Act”⁴ was signed into law by the president on December 22, 2017 and became effective (in large part) on January 1, 2018. Its terms were in effect and available to the Board prior to the *Decision*, and it made several changes to Federal tax law that directly impact the Board’s DCF model as applied in this case. First, the statutory corporate tax rate was reduced from 35% to 21%, starting in 2018. Second, the new law imposed limits on net operating loss (“NOL”) carry-forwards to 80% of taxable income, also effective in 2018. Third, the law eliminated NOL carry-backs beginning in 2018.⁵ Many elements of the SAC calculation rely on post-*Decision* tax rates and related provisions, including quarterly Investment SAC calculations, the calculation of the terminal or residual value of the CERR, and the calculation of CERR replacement assets. Board precedent clearly supports the application of tax law changes to a SARR, if they are effective during its construction or operating life. See *Ashley Creek Phosphate Co. v. Chevron Pipe Line Co.*, Docket NOR 40131 (Sub No. 1), 1996 WL 625471, at *14–15 (STB served Oct. 30, 1996); *McCarty Farms*, 2 S.T.B. at 527; *Bituminous Coal – Hiawatha, UT to Moapa, NV*, 10 I.C.C. 2d 259, 318 (1994); *Coal Trading Corp., Et Al. v. B&O Railroad Co., Et Al.*, 6 I.C.C. 2d 361, 430 (1990); *Annual*

⁴ Pub. L. No. 115-97, 131 Stat. 2054 (2017).

⁵ The new tax law’s corporate provisions also modified certain depreciation rules, but the new accelerated schedules do not apply to the CERR’s initial asset investments, and they phase out before any asset replacements would begin.

Volume Rates on Coal-Wyo. to Flint Creek, Ark., 361 I.C.C. 533, 578 (1979). The Board's DCF model should be updated to reflect the effects of the Tax Cuts and Jobs Act. Exhibit No. 1 illustrates how the update should be performed (Item #4).

5. III.G. and H.: Updated Indices

It is customary in cases applying the *Guidelines*' SAC Constraint for the Board to substitute actual, publicly available index and price data for previously forecasted data once the actual data has become available.⁶ This includes the updating of forecasted indices for the Rail Cost Adjustment Factor, the Rail Cost Recovery Index, the Producer Price Index, and the Highway Diesel Fuel ("HDF") values published after the close of the evidentiary record. A review of the Board's workpapers underlying the *Decision* shows that the workpapers were not updated for actual values (other than the 2015 index values for the HDF used to calculate fuel surcharge revenue) or pricing information. These omissions should be corrected in the manner illustrated in Exhibit No. 1 (Item #5).

⁶ See, e.g., *Sunbelt* (STB served June 30, 2016) at 24-25. The updating of indices is different from the updating or substitution of new *forecasts*, which is a more complex matter and not within the scope of these technical corrections. *Id.* See also, *Ariz. Elec. Power Co-op., Inc. v. BNSF Ry Co., Et Al.*, Docket NOR 42113 (STB served Nov. 22, 2011) at 22.

II. Reconsideration

As noted *supra*, Consumers sought CSXT's concurrence in each of the corrections described herein, but was unable to secure it, thereby necessitating this Petition. With respect to (1) inclusion of the 2016 cost of capital; (2) application of the changes in corporate tax law enacted as part of the Tax Cuts and Jobs Act; and (3) updating published indices to reflect actual values, CSXT based its opposition in part on the argument that these adjustments more appropriately should be sought through a petition for reconsideration under 49 C.F.R. Part 1115.3. Consumers disagrees, as the *Decision* did not make specific determinations as to any of these issues, and the 2016 cost of capital values, the provisions of the new tax law, and the index updates all were available to the Board prior to its finalization and release of the *Decision*. Consumers is not requesting that the Board reconsider and change an adverse ruling; rather, it is seeking correction of the *Decision* to include and/or reflect data that Board precedent confirms should have been part of the SAC analysis in the first place.

Notwithstanding the foregoing, and out of an abundance of caution, should CSXT argue and the Board be persuaded that the points raised in Parts I.3-5, *supra*, are better addressed through reconsideration of the *Decision*, then Consumers respectfully requests that they be deemed part of and considered under Consumers' Petition for Reconsideration, also filed this date, and that the 20-page limit otherwise applicable to

that Petition⁷ be extended accordingly. All three (3) of the adjustments easily qualify as material to the outcome of the *Decision*, and the information and data in question constitute either new evidence or changed circumstances arising after the close of the evidentiary record in this case.⁸

III. Conclusion

For the reasons set forth herein, the Board should adopt the technical corrections presented by Consumers, as set out in Exhibit No. 1, and revise the *Decision* and supporting workpapers accordingly.

⁷ See 49 C.F.R. Part 1115.3(d).

⁸ See 49 C.F.R. Part 1115.3(b)(1); *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 75 S.T.B. 803, 804 (2004).

Respectfully submitted,

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Dated: February 20, 2018

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**Exhibit No. 1: Consumers Description of Steps to Correct Technical Errors in STB Decision,
Consumers Energy v. CSX Transportation, STB No. NOR 42142 (served January 11, 2018).**

1. **III.F.3: Turnout/Switch Heaters Corrections** – Make the following corrections:
 - a. In “2015 OTM Worksheet_Supp_Reply_Alt1_Alt2_STB.xlsx:”
 1. At worksheet “TOTAL COST SUMMARY:”
 - a. Change cell C194 from “=IF([III - F TOTAL - 2015_Supp_Reply_Alt1_Alt2_STB.xlsx]Reply Summary!\$B\$61="yes",[Track Quantities- 2015_Supp_Reply_Alt1_Alt2_STB.xls]Track Quantities !\$D\$55,46)” to “0”.
2. **III.F.3: Off-Line Transportation Cost for 115# Rail** – Make the following correction:
 - a. In “Rail Worksheet - 2015_Supp_Reply_Alt1_Alt2_STB.xls:”
 1. At worksheet “Rail Cost per LF:”
 - a. Change cell E33 from “=IF([III - F TOTAL - 2015_Supp_Reply_Alt1_Alt2_STB.xlsx]Reply Summary!\$B\$50="Yes",0,0.035)” to “=[2013 Unmasked Waybill Analysis WP_STB_.xlsx]Waybill Analysis!\$P\$3”.
3. **III.G.1: Cost of Capital** - Make the following corrections:
 - a. In “Exhibit III-H-1_Supp_Reply STB.xlsm:”
 1. At worksheet, “Inputs:”
 - a. Add “3.43%” to cell C65.
 - b. Add "3.64%" to cell C95.
 - c. Add “10.31%” to cell C128
 - d. Add "20.75%" to cell C158.
 2. At worksheet, “Cost of Capital:”
 - a. Change the formula in cell D14 to “=+Inputs!C95”.
4. **III.G.3: Changes In Tax Law** - Make the following corrections:
 - a. In "Exhibit III-H-1_Supp_Reply STB.xlsm:"
 1. At worksheet, "Replacement:"
 - a. Change the value in cell K22 to "21%" for the new tax rate.
 2. At worksheet, "Investment SAC:"

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- a. Change the formula in cell F33 to "`=IF('Supp_Reply Summary'!$G$18="yes",'Interest 20 Year Amort'!AT34,Interest!D30+Interest!I30+Interest!N30)`" to "`=IF(AND('Supp_Reply Summary'!G18="yes",'Interest 20 Year Amort'!AT34<E33*0.3),'Interest 20 Year Amort'!AT34,IF(AND('Supp_Reply Summary'!G18="yes",'Interest 20 Year Amort'!AT34>E33*0.3),E33*0.3,IF(AND('Supp_Reply Summary'!G18="no',(Interest!D30+Interest!I30+Interest!N30)<E33*0.3),Interest!D30+Interest!I30+Interest!N30,E33*0.3)))`". Once the formula is changed copy the formula in cell F33 and paste it through cells F34 to F60.
 - b. Change the formula in cell F63 from "`=Interest 20 Year Amort'!AU114`" to "`=IF(Interest 20 Year Amort'!AU114>(E63-G63)*0.3,(E63-G63)*0.3,Interest 20 Year Amort'!AU114)`".
3. At worksheet, "Federal Taxes:"
- a. Change the formula in cell G25 from "`=IF(F25<0,IF(D25>0,IF(D25+F25<0,D25,-F25),0),0)`" to "`=IF(F25<0,IF(D25>0,IF(D25+F25<0,D25*0.8,-F25),0),0)`". Once the formula is changed copy the formula in cell G25 and paste it through cells G26 to G52.
 - b. Remove the formulas in cells J25 to J52 and insert zero (0) into those cells.
 - c. Change the formula in cell M25 from "`=L25*Investment SAC!$K$7`" to "`=L25*0.21`". Once the formula is changed copy the formula in cell M25 and paste it through cells M26 to M55.

5. III.G. and H.: Updated Indices - Make the following corrections:

- a. In "Exhibit III-H-1_Supp_Reply STB.xlsm:"
 1. At worksheet, "Inputs RCAF_RCR:"
 - a. Change cells C74 to C80 from "Forecast" to "Actual".
 - b. Update cells G74:I80 for December 2017 Association of American Railroads Cost Indexes, Table C Quarterly

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- Indexes of Chargeout Prices and Wage Rates (1977=100) (East).
- c. Update cells K74:M80 for December 2017 Association of American Railroads Cost Indexes, Table C Quarterly Indexes of Chargeout Prices and Wage Rates (1977=100) (West).
 - d. Change cells S75 to S81 from "Forecast" to "Actual".
 - e. Copy the formulas from cell T74 and paste it through cells T75 to T81.
 - f. Copy the formulas from cell U74 and paste it through cells U75 to U81.
 - g. Updated cells W75 to W81 for December 2017 Association of American Railroads Cost Indexes, Rail Cost Adjustment Factor (4Q/2012=100) (Table M) for the RCAF-U.
 - h. Updated cells X75 to C81 for December 2017 Association of American Railroads Cost Indexes, Rail Cost Adjustment Factor (4Q/2012=100) (Table M) for the RCAF-A.
- b. In "MMM CSXT URCS Index_Reb_STB.xlsx:"
- 1. Create a worksheet titled "BLS Data Series Updated". Use the Bureau of Labor Statistics website to download the latest PPI Commodity Data for All Commodities including annual average, by using the check box "include annual averages".
 - 2. At worksheet, "CSX Index Forecast:"
 - a. Update cells C9:E10 for the December 2017 AAR Railroad Cost Indexes Annual Indexes of Chargeout Prices and Wage Rates (Table A) for "Wage rates" in C9:C10, "Wage supplements" in D9:D10, and "Materials and supplies" in E9:E10.
 - b. Change the formula in cell F8 from "="+BLS Data Series Rebuttal'!N21" to "="+BLS Data Series Updated'!N21". Once the formula is changed copy the formula in cell F8 and paste it through cells F9 and F10.

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- c. Update cells G9 and G10 for the December 2017 AAR
Railroad Cost Indexes Annual Indexes of Chargeout
Prices and Wage Rates (Table A) for “Fuel”.

CERTIFICATE OF SERVICE

I hereby certify that this 20th day of February, 2018, I caused copies of
Complainant's Petition for Technical Corrections to be served by hand upon counsel for
Defendant CSX Transportation, Inc. as follows:

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