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Cynthia T. Brown, Chief
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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 Reconsideration, together with a check in the amount of \$300.00 to cover the requisite filing fee. Also enclosed are three (3) computer disks containing the Petition and workpapers illustrating changes to the Board's January 11, 2018 Decision in this matter that are addressed in the Petition. Please note that the electronic version of the Petition contains a color image.

Thank you for your attention to this matter.

Sincerely,

Kelvin J. Dowd
An Attorney for
Consumers Energy Company

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February 20, 2018
SURFACE
TRANSPORTATION BOARD

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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

COMPLAINANT’S PETITION FOR RECONSIDERATION

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**BEFORE THE
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COMPLAINANT’S PETITION FOR RECONSIDERATION

Complainant, Consumers Energy Company (“Consumers”), pursuant to 49 C.F.R. Part 1115.3, petitions the Surface Transportation Board (“STB” or “Board”) to reconsider elements of its Decision served January 11, 2018 in this proceeding (“*Decision*”), on grounds of material error and, in the case of the treatment of equity flotation costs, new evidence.¹ In support hereof, Consumers states as follows:²

¹ By Order served January 19, 2018, the Board extended the due date for Petitions for Reconsideration in this case to February 20, 2018.

² Exhibit No. 1 to this Petition details the steps the Board should take in order to correct the errors addressed in Parts II.1 through II.5. The remedy for reversal of the Board’s ruling on the Revenue Adequacy Constraint (Part II.6) would be the granting of the relief described by Consumers, *e.g.*, in its Rebuttal Supplemental Evidence at I-15-17.

I. SUMMARY

The *Decision* contains six (6) specific and clearly identifiable material errors, which justify reconsideration under 49 U.S.C. § 722(c) and 49 C.F.R. Part 1115.3(b)(2). Taken together, they result in a significant overstatement of the maximum reasonable rate levels for the transportation of coal by CSX Transportation, Inc. (“CSXT”) between Chicago and Consumers’ J.H. Campbell Generating Station, under the Board’s *Coal Rate Guidelines*.³ As explained in further detail below, and by reference to the prescribed order of evidentiary presentation in cases brought under the *Guidelines*, the errors that should be corrected on reconsideration are as follows:

1. Variable Costs. In determining variable costs for Consumers’ coal traffic, the Board added six (6) miles to the “loaded miles” operating characteristic, even though CSXT does not handle the Campbell trains over these miles. The Board’s justifications for this adjustment – the terms of CSXT’s tariff and Consumers’ application of ATC to non-issue traffic in the Chicago area – are materially erroneous. See Part II.1.
2. K300 Petcoke Trains. The Board excluded 114 base year trains from the CERR traffic group based on a finding that they move over CSXT’s Lake Subdivision, which is not part of the CERR route in the real world. This was material error, as reliable evidence on the record and data produced by CSXT confirm that the trains move past railroad mileposts that are located in Barr Yard near Chicago, or over the NS via trackage rights, both of which are on the CERR route. See Part II.2.
3. Intermodal Lift Costs. The Board accepted Consumers’ approach to the calculation of intermodal lift costs, but erroneously over-stated the costs by including all expenses

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).

that were part of a CSXT adjustment that the Board rejected. See Part II.3.

4. Bridge Costs. The Board materially erred in accepting CSXT's design for 24 CERR bridges based on an alleged failure by Consumers to address CSXT's criticisms, when in fact Consumers not only addressed them on Rebuttal, but disproved CSXT's key claims. See Part II.4.
5. Equity Flotation Costs. The Board imposed a 5% equity flotation cost on the CERR's cost of capital, when unrebutted expert testimony, new evidence and the Board's own precedents clearly showed that the CERR could raise the needed equity at a significantly lower cost. This was material error. See Part II.5.
6. Revenue Adequacy. After ruling early in this proceeding that the Board's annual industry determinations under 49 U.S.C. § 10704(a)(3) would not be dispositive under the Revenue Adequacy Constraint of the *Guidelines*, the Board converted that determination into a presumption, and dismissed Consumers' unrebutted evidence of CSXT's revenue adequacy under the specific criteria of 49 U.S.C. § 10704(a)(2). This rejection of Consumers' claim was materially erroneous.

Upon reconsideration, the Board should revise its *Decision*⁴ as described in Exhibit No. 1, and in Consumers' Rebuttal Supplemental Evidence at I-15-17.

⁴ The *Decision*'s calculations of maximum reasonable rates also should be adjusted in accordance with Consumers' Petition for Technical Corrections, and the parties' Joint Petition for Technical Corrections, both of which are being filed this date.

II. ARGUMENT

1. **The Addition of 6 Miles to the Issue Traffic's Loaded Route Was Material Error**

In determining CSXT's variable costs for handling Consumers' coal traffic, the Board added six (6) miles to the loaded movement even though CSXT does not operate the trains over those miles. The Board based its ruling on the terms of CSXT's tariff, and on its finding that "Consumers allocated revenue for certain non-issue traffic for ATC purposes as if it had been interchanged at 22nd Street, when in practice it was interchanged at 71st Street, just like the issue traffic."⁵ The Board's ruling on the Part II-A loaded miles issue was in error.

In the first place, the URCS program specifies the actual miles that the railroad handles the train as the valid "loaded miles" input.⁶ The fact that a tariff identifies 22nd Street as the point where CSXT's operation is intended to commence is irrelevant when the actual interchange takes place at 71st Street.⁷

⁵ *Decision* at 282.

⁶ See ICC Uniform Rail Costing System, Phase III Movement Costing Program User's Manual, October 1989 at 4.

⁷ CSXT has acknowledged that the actual route of movement based on CSXT's traffic data is the best source for determining miles. See *Total Petrochem. Ref. USA, Inc. v. CSX Transportation, Inc.*, Docket NOR 42121, CSXT Reply Market Dominance Evidence, filed August 5, 2011 at II-11, where CSXT stated "[a]nd indeed there can be little dispute that real-world movement records are the best source to determine the actual mileage of the movements at issue." In this case, CSXT's traffic data as well as documents produced in discovery confirm that the actual CSXT mileage for the Consumers issue traffic begins at 71st St. See Consumers Opening at II-4-5 and workpaper "Consumers INT 3 & 4 Response (CSX-CNSMR-C-19328 to 19336).pdf" produced by CSXT in discovery.

Second, the supposed inconsistency between Consumers' variable cost evidence and its application of ATC to non-issue traffic in Chicago⁸ mischaracterizes the evidence. Consumers did not allocate revenue to non-issue movements that were known to enter the CERR at 71st Street as if they had come on-SARR at 22nd Street. In contrast to the issue movement – which CSXT described in detail in discovery⁹ – the data produced for non-issue traffic was marked by inconsistencies and data gaps that made it impossible for Consumers to precisely identify on-SARR points and miles, a problem that Consumers noted on the record.¹⁰ Without objection from CSXT, Consumers employed a simplifying convention that assumed the traffic entered the CERR at 22nd Street, then assigned all investment costs and operating expenses consistent with that assumption to the CERR.¹¹ Revenue divisions under ATC were calculated accordingly. By conflating this simplifying convention and the detailed, location-specific routing of the issue traffic, the Board compared apples to oranges and distorted the variable cost calculation by assigning costs to CSXT that the carrier does not actually incur (*i.e.*, operating costs between 22nd Street and 71st Street).

⁸ *Decision* at 282.

⁹ *See* CSXT Reply at II-A-3.

¹⁰ *See* Consumers Opening at III-A-16, and cited discovery letter “CSXT 7-1-2015 Traffic Letter.pdf.”.

¹¹ *See* Consumers Opening at III-A-16-17 for movement miles for variable cost discussion, and III-A-22-25 for movement allocation of fixed costs.

2. The Exclusion of K300 Coke Trains Was Material Error

Consumers' Opening Evidence included 114 base-year petroleum coke trains in the CERR traffic group. CSXT excluded these trains, arguing that certain incomplete train event records pertaining to intermediate stations showed movements over CSXT's Lake Subdivision.¹² Consumers' Rebuttal presented a detailed analysis, showing that (1) the trains did belong in the CERR traffic group based on train sheet data identifying terminal points "CHICBO" and "DD 2," which are in Barr Yard;¹³ (2) CSXT's intermediate station claims inaccurately were based train event records with no valid timestamps;¹⁴ and (3) records of trackage rights payments from CSXT to Norfolk Southern Railway ("NS") confirmed that coke trains which CSXT claimed moved over the Lake Subdivision actually moved over the NS lines that are part of the CERR.¹⁵

In the *Decision*, the Board excluded the K300 coke trains on grounds that (1) "CHICBO" and "DD 2" are not points in Barr Yard;¹⁶ (2) the NS trackage rights payment data do not refer to Barr Yard;¹⁷ and (3) certain contracts show ultimate origins and destinations that are inconsistent with travel through Barr Yard.¹⁸ The first finding is

¹² See CSXT Reply at III-A-11 and n. 9.

¹³ Consumers Reb. at III-A-18-24.

¹⁴ *Id.* at III-A-25-26.

¹⁵ *Id.* at III-A-27-31.

¹⁶ *Decision* at 30.

¹⁷ *Id.* at 31.

¹⁸ *Id.* at 32-33.

factually erroneous, and the other two (2) reflect a misunderstanding of Consumers' evidence.

The record evidence confirms that both "CHICBO" and "DD 2" are points within Barr Yard. For example, the workpaper "Yard Matrix_Consumers Open.xlsx" was described in the workpaper directory as an "Evaluation of yard train activity ... provided by CSXT in discovery and comparison to yard train operations recorded in CSXT historical event and train profiles operating plan data." That file places Milepost DD 2 in Barr Yard.¹⁹ Another example is Consumers' workpaper "P3 Blocks Org or Term at BARR.xlsx," also derived from CSXT's own data, which contains "all records from TrainProfile 3 Table in the Train_Profiles.accdb where blocks originated or terminated at Chicago BARR Yard (Milepost DD 2 or BIC3)."²⁰

The Board acknowledged that CHICBO and DD 2 are in the Chicago area, but read the database as indicating that Barr Yard was identified solely with Milepost JJJ 36.²¹ This is factually incorrect, as Barr is a very sizeable yard and counts multiple mileposts within its boundaries, *including* JJJ 36 and DD 2, as shown in Figure 1 below.

¹⁹ See Opening e-workpaper "Yard Matrix_Consumers Open.xlsx" at the level "Matrix" row 5, columns A, B, and E, and level "Yard_Data", row 86, column D. Likewise, in the workpaper "CERR TRAIN LIST DEVELOPMENT 2015 v.3.xlsx," which identified trains moving on the CERR system,¹⁹ Barr Yard was identified as Milepost DD 2.

²⁰ See e-workpaper "P3 Blocks Org or Term at BARR.xlsx" at level "Notes," and level "Blocks O_T at Barr," columns I and K.

²¹ *Decision* at 30.

Figure No. 1



Chicago Barr Yard²²

²² Figure No. 1 was prepared for this Petition, based on data in the record in e-workpapers “CERR Route Miles Opening.xlsx,” “Consumers Route File_with Flagged Links 08152015.xlsx,” “CERR. Track Charts.pdf.” and “CERR. Timetables.pdf.” It was created using the program ArcMap, which allows users to create a visual display of tabular data. Because the location of CHICBO and DD 2 within Barr Yard had not arisen prior to the *Decision*, there was no reason for Consumers to anticipate the need to include a map until now.

The e-workpaper “CERR Route Miles Opening.xlsx,” tab “CERR Miles” details each segment of the CERR. This file was relied upon by both parties to define the CERR route. The milepost “DD 2” is included at row 78. Columns F-P contain the Engineering Milepost (DC 12.76), the Transportation Milepost (DD 2), the city and state name, SPLC, and FSAC for each location. The source of this information, as shown in Footnote 1/ in that document, is e-workpaper “Consumers Route File_with Flagged Links 08152015.xlsx.” Columns S-T contain the corresponding GIS coordinate (lat. 41.65015/long-87.6449) for Milepost DD 2. These coordinates place Milepost DD 2 squarely in Barr Yard. The source of this information, as shown in Footnote 3/ of the e-workpaper, is “data.gdb” produced on May 1, 2015 on DVD-007, in response to RFP #20. Columns V-AF contain the corresponding track chart information, including Bates number of the Track Charts including the e-workpaper “CERR Track Charts.pdf.”

Shown on the map inside the circled outline is Chicago Barr Yard, with Mileposts DD 2 and JJJ 36 both shown as clearly within the yard. Figure 1 displays the same geographic location that is represented in Consumers' Opening and Rebuttal workpaper, "CERR Timetables.pdf," a collection of CSXT Timetables that correspond to the locations replicated by the CERR.²³ In the timetables, within "Barr Yard" there are multiple tracks and engineering mileposts, including DC 11.7, DC 12.9, DC 13.0 and DC 13.1 and D Yard Switch. Engineering Milepost DC 12.76, which corresponds with Milepost DD 2, clearly is between Engineering Mileposts DC 11.7 and DC 12.9.

The Board rejected Consumers' argument regarding the NS trackage rights payments with the observation that "a review of the invoices for NSR's trackage rights payments reflect that there are no references to Barr Yard."²⁴ This misunderstands Consumers' presentation. Consumers' analysis showed that CSXT paid trackage rights fees to NS for K300-Series trains to move over the NS line between Milepost CD 501.0

Columns AL-AN contain the corresponding Timetable information, including Bates number of the Timetables including e-workpaper "CERR Timetables.pdf."

The e-workpaper "Consumers Route File_with Flagged Links 08152015.xlsx" combines data from CSXT Node and Link data, CSXT Train Sheets and Train Event data, and GIS data provided by CSXT in discovery. As indicated at the "NOTES" tab of that file, Columns A-H of tab "Nodes" contain the data as provided by CSXT. Rows 2127 and 2018 of tab "Network Links" shows the CSXT link encompassing Engineering Milepost DC 12.76 and all of Barr Yard (*Bidirectional Segments DC11.54_ and DC 14.08 and DC 14.08_ DC 11.54). This is flagged with a "1" in column G, indicating the link is on the CERR. This definition was used by both parties.

²³ See The Barr Subdivision_MS, at pages 7 and 8 of the e-worksheet (labeled with the Bates numbers CSX-CNSMR-C-00017 and CSX-CNSMR-C-000018).

²⁴ *Decision* at 31.

and Milepost CD 509-7.²⁵ Since CSXT paid NS to move the trains over the NS track (as the CERR would do), it is not “feasible, supported and realistic” that CSXT would be transporting the same trains over the Lake Subdivision. The selected grouping of contracts referenced in the *Decision*²⁶ should be considered similarly: it is “probable and likely”²⁷ that this traffic moved over the NS track as indicated by the trackage rights payments and customer contracts,²⁸ and thus properly would be included in the CERR traffic group.

3. The Board’s Overstatement of Intermodal Lift Costs was Based on Material Error

The Board accepted Consumers’ methodology for calculating lift fees for the 59th Street Intermodal Facility,²⁹ subject to the addition of selected costs for certain functions based on its prior ruling in *Total*.³⁰ By reference to that decision, the costs in question related to clerical support and utilities.³¹ However, the Board’s workpapers reflect an 82% increase in Consumers’ costs by virtue of the inclusion of *all* terminal

²⁵ See Consumers Rebuttal e-workpaper “Rebuttal NS trackcharts from CORA 2011 p 28-29.pdf,” and CSXT Reply e-workpaper “CSX Time_Tables_Pine_Junction.pdf.”

²⁶ *Decision* at 32.

²⁷ *Id.*

²⁸ See Consumers Reb. at III-A-18-20.

²⁹ *Decision* at 71.

³⁰ *Total Petrochemicals & Refining USA, Inc. v. CSX Transp. Inc.*, Docket NOR 42121 (STB served Sept. 14, 2016) at 128-129.

³¹ *Id.*

costs proposed by CSXT in its Reply.³² The workpaper calculations conflict with the *Decision* itself, and are materially erroneous.

Obviously, the incorporation of 100% of the costs sponsored by CSXT is not consistent with the acceptance of Consumers' evidence with select adjustments. *Inter alia*, the CSXT costs cover much more than the lifting of containers onto and off of railcars,³³ and the resulting per lift charge of \$62.18³⁴ is 24% higher than the published CSXIT charge for its customers generally.³⁵ The Board should reconsider and correct its erroneous lift fee calculations.

4. The Board Erred In Accepting CSXT's High-Cost Designs for 24 Bridges

The Board committed material error by rejecting Consumers' bridge design in 24 instances, as the Board failed to consider Consumers' Rebuttal Evidence demonstrating how the bridges could be constructed to not obstruct traffic.³⁶ Consumers' Rebuttal directly dispelled CSXT's claim that the CERR bridges would

³² CSXT Reply at III-A-45.

³³ See Consumers Reb. at III-D-162-163.

³⁴ Compare Consumers Opening workpaper "CERR CSXIT Lift Charge __ Open.xlsx" cell C26, and *Decision* workpaper "CERR CSXIT Lift Charge __ Open-STB.xlsx," tab "Sheet 1," cell C36.

³⁵ See https://shipcsx.com/pub_sx_mainpagepublic_jct/sx.shipcsxpublic/Main, option "Intermodal Lift Payment" under Public Tools.

³⁶ See *Decision*, at 227. The Board rejected a total of 24 bridges citing "slopes and piers reduce horizontal clearance." While the Board in its *Decision* indicates that it rejected only 13 of Consumers' bridge designs, a greater number is supported by the STB workpapers. See STB WP "Bridge Costs_Supp_Reply _Alt1 _Alt2 _STB.xlsx," Tab "Route Bridges," Columns L, N, AI & AJ.

result in piers in the middle of traffic lanes,³⁷ by: (1) introducing a Chicago bridge survey showing that having piers in traffic medians and/or sidewalks would not be atypical;³⁸ (2) submitting a “Typical Chicago Street.pdf” illustrating how the CERR bridge piers could be placed within roadways safely and without obstructing traffic; and (3) providing aerial maps of key, sample bridges.

As the specific examples below illustrate, the Board failed to consider Consumers’ Rebuttal Evidence showing that CSXT’s depiction of piers bisecting lanes of traffic was not a realistic illustration of Consumers’ designs:

DC 24.97: CSXT’s Reply did not include any evidence specific to the placement of piers for this bridge. On Rebuttal, Consumers provided an aerial map that had an overlay of the bridge, and explained “[p]roposed arrangement will work. Very wide grass median will easily accomdate [sic] additional piers.”³⁹ Despite this, the Board’s workpaper found “CEC 7 #3 spans not shown to be able to span roadway.”

DC 27.45: CSXT’s Reply did not include any evidence specific to the piers for this bridge. Consumers provided an explanation and additional evidence.⁴⁰ The Board in its workpaper stated “Impossible [sic] to tell that additional piers will not block traffic using submitted phtos [sic] & G'earth. #3 span short, CSX TPG needed.” However, the Board incorrectly measured the total length based on Google Earth, as Consumers’ bridge design does not require any of the Type 3 spans to exceed 50 feet, and each of these spans can

³⁷ CSXT Reply WP “Unacceptable Bridge Layout.pdf.”

³⁸ See Consumers Reb. At III-F-100-102.

³⁹ See STB WP “Bridge Costs_Supp_Reply_Alt1_Alt2_STB.xlsx,” Tab “Route Bridges,” cell AJ55 and Consumers Rebuttal workpaper “Layout DC24.97.pdf.”

⁴⁰ See STB WP “Bridge Costs_Supp_Reply_Alt1_Alt2_STB.xlsx,” Tab “Route Bridges,” cell AJ59 and Consumers Rebuttal workpapers “Layout DC27.45.pdf” and “Pershing Photos.pdf.”

accommodate upwards of four lanes of traffic.⁴¹ As the image below of the existing bridge illustrates, the bridge piers co-exist with the roadways.

Figure No. 2



Existing Bridge at DC 27.45⁴²

Based on the Board's failure to consider Consumers' Rebuttal Evidence regarding additional piers, the Board should reconsider its adoption of CSXT's design for the following 24 bridges:

CG 113.50; DC __ (Row 41); DC __ (Row 60); DC 13.23; DC 15.46; DC 21.36; DC 21.65; DC 23.50; DC 24.97; DC 27.45; DC 27.55; DC 27.75; DC 28.20; DC 28.64; DC 29.96; DC 30.19; BRC 13.61; BRC 16.36; BRC 16.90; BRC 16.93; BRC 14.48; BRC 17.72; BRC 18.03; BRC 18.57.⁴³

⁴¹ Consumers Rebuttal WP "Typical Chicago Street.pdf" (two lanes of traffic requires a clearance of 24 feet).

⁴² Bing Maps, www.bing.com/maps (accessed Feb. 8, 2018).

⁴³ STB WP "Bridge Costs_Supp_Reply_Alt1_Alt2_STB.xlsx," Tab "Route Bridges," Columns L, N, AI & AJ.

5. The Board's Treatment of Equity Flotation Costs Should Be Reconsidered On Grounds of Material Error and New Evidence

In addressing equity flotation costs, the *Decision* found that:

(1) Consumers' evidence for the costs of a private placement was "unsupported," and (2) a 5% flotation cost reflected in a CSXT IPO survey represented "the lowest equity flotation fee incurred by an entity of comparable size."⁴⁴ Both rulings constitute material error, and new evidence supports Consumers' cost estimate.

Consumers supported its 0.95% flotation fee with the testimony of David Maughan, an investment banker with decades of experience in private placements, IPOs and mergers and acquisitions ("M&A"). He explained why the fee was reasonable, and showed that an investment banker would net more compensation with that fee than with an IPO. CSXT did not challenge the feasibility or direct cost of a private placement, so the Board's dismissal of this unchallenged testimony as "unsupported" was clear error.

The *Decision* also focused on data for public M&A, but M&A data hardly undermine Mr. Maughan's analysis. A 2014 New York Times article reported that "[t]ypically, the advisory fee is between 1 and 2 percent of a deal's value, but in recent years it has been moving toward 1 percent."⁴⁵ Nor is 1% a floor. The publicly available Amendment No. 3 to SEC Form S-4 for Capital Bank Financial Corp's 2016 acquisition

⁴⁴ *Decision* at 269-270.

⁴⁵ Anita Rhagavan, *Big Deals, Not Such Rich Fees for Bankers*, N.Y. Times, Aug. 20, 2014, <https://dealbook.nytimes.com/2014/08/20/big-deals-not-such-rich-fees-for-bankers/> (accessed Jan. 23, 2018).

of CommunityOne Bancorp⁴⁶ shows that CommunityOne’s investment banker was to receive a transaction fee of 0.625% of the value.⁴⁷ If public M&A fees provide an appropriate benchmark, the 0.625% CommunityOne fee clearly shows the soundness of Consumers’ 0.95% fee.

The *Decision* selected a 5% flotation cost from a range of what the Board deemed IPOs of “comparable size.”⁴⁸ Consumers agrees that stand-alone cost theory requires selecting “the lowest feasible cost,” but the *Decision* erred in considering only IPOs of a certain size. It is fundamental that the SARR can take advantage of all economies of scale, scope, and density, at least to the extent they are available to the defendant.⁴⁹ By considering IPOs only of a comparable size to the CERR, the *Decision* imposed an impermissible entry barrier. If the flotation cost is to be determined by reference to an IPO, established SAC principles at least require that the CERR be able to take advantage of the 2.1% flotation cost that the Board accepted in the *Sunbelt* case.⁵⁰

New evidence that only became available after the *Decision* demonstrates that 2.1% overstates the lowest feasible IPO cost available for the CERR. A recent Wall Street Journal article reports that Spotify is preparing an IPO that will be a direct listing,

⁴⁶ See <https://www.sec.gov/Archives/edgar/data/1479750/000104746916011057/a2227701zs-4a.htm> (accessed Jan. 24, 2018), page 85.

⁴⁷ *Id.*, page 93.

⁴⁸ *Decision* at 270.

⁴⁹ See, e.g., *Decision* at 94-95. CSXT agreed. See CSXT Supp. Reply at I-12-13.

⁵⁰ *Decision* at 269, n. 205. See *Sunbelt Chlor Alkalai Partnership v. Norfolk Southern Ry. Co.*, Docket No. NOR 42130 (STB served June 30, 2016) at 31-32.

not a conventional underwriting.⁵¹ The investment banks only will help guide the market to a price and connect buyers and sellers, a role similar to that of the investment banker in the private placement described by Mr. Maughan. The contemplated flotation fee for Spotify is roughly \$30 million. If it is conservatively assumed that the size of the offering is similar to the Snap IPO to which the Spotify IPO is compared (\$3.4 billion), the flotation fee would equate to 0.9%.⁵²

The Board's 5% fee does not represent the equity flotation cost that a least-cost, most-efficient entity such as the CERR would incur. The Board should correct this aspect of its *Decision*.

6. The Board's Denial Of Consumers' Revenue Adequacy Claim Constitutes Material Error

The *Decision* rejected Consumers' showing that the challenged rates were unreasonable under the *Guidelines*' Revenue Adequacy Constraint, solely because the Board previously had found that CSXT's return on investment ("ROI") had not exceeded the industry cost of capital ("COC") under the ROI=COC test that the Board employs under 49 U.S.C. § 10704 (a)(3). The *Decision* cited no other affirmative support, CSXT

⁵¹ Maureen Farrell, *Spotify Disrupted the Music World, Now It's Doing the Same to Wall Street*, Wall St. J. (Jan. 15, 2018), <https://www.wsj.com/articles/spotify-disrupted-the-music-world-now-its-doing-the-same-to-wall-street-1516024778> (accessed Jan. 23, 2018). Similar articles have appeared in the N.Y. Times, Fortune, etc.

⁵² Spotify's direct listing does not entail any lock-up period, so the value of the listing could be the entire company, estimated to be between \$14.4 and \$21.5 billion. See <https://www.wsj.com/articles/spotify-like-google-wants-to-reinvent-the-tech-ipo-1512476451>.

presented none, and the *Decision* dismissed the robust and diverse evidence from Consumers that demonstrated CSXT's revenue adequacy. This constitutes material error.

In reply to CSXT's 2015 motion to dismiss the Revenue Adequacy Constraint claim, Consumers described some of the evidence that it would present under the *Guidelines*, and why the ROI=COC test alone should not govern.⁵³ The Board denied CSXT's motion, ruling that while the annual determinations "suggest that CSXT is revenue inadequate," they "are not necessarily conclusive" under the *Guidelines*, and confirming that Consumers "may present other competent and probative evidence."⁵⁴ The Board thus represented that such evidence would receive meaningful consideration.

Despite this assurance, the *Decision* treated the annual snapshot determinations as presumptions, and afforded no weight to Consumers' contrary evidence, even that previewed in its reply to the motion to dismiss.⁵⁵ The Board denied CSXT's motion to dismiss on grounds that the annual determinations were not dispositive, and then made the opposite ruling on the merits. Its actions "create[d] an illusion of access to the regulatory review process" that Consumers followed to its detriment. *Arizona Elec. Power Co-op., Inc. v. U.S.*, 816 F.2d 1366, 1372 (9th Cir. 1987). At a minimum, the Board should have described any apparent deficiencies in

⁵³ *Complainant's Reply to Motion to Dismiss Revenue Adequacy Claim*, April 13, 2015.

⁵⁴ *June 15, 2015 Decision* at 2 (quoting *R.R. Adequacy—1987 Determination*, 4 I.C.C.2d 731, 734 (1988); *Bituminous Coal—Hiawatha, Utah, to Moapa, Nev.*, 6 I.C.C.2d 1, 7 n.24 (1989)).

⁵⁵ *Decision* at 16-21.

Consumers' planned approach, so that Consumers would have fair notice as to what evidence might suffice. *E.g., General Electric Co. v. EPA*, 53 F.3d 1324, 1328, 1333 (D.C. Cir. 1995). Space limitations preclude Consumers from detailing all the ways in which the *Decision* gave short shrift to Consumers' evidence, but a few points are key.

First, the Board should have addressed the specific revenue adequacy criteria specified in 49 U.S.C. § 10704(a)(2). The *Decision* acknowledged that Consumers submitted evidence showing that CSXT met each criterion, and CSXT did not dispute that showing. CSXT's only response was that the criteria somehow are subsumed within the ROI=COC test.⁵⁶ In refusing to give the criteria any independent consideration, the *Decision* "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Board exacerbated its error by relying solely on the industry COC developed under Section 10704, despite its acknowledgment that the COC is an elusive value that is never fully known.⁵⁷ This difficulty should support greater openness to alternative measures of revenue adequacy under the *Guidelines*, or at least require some

⁵⁶ *Decision* at 9 and 21, nn. 25, 26.

⁵⁷ "[T]here is no single, correct way to calculate the railroad industry's COE (because the true COE is never revealed).... Like determining the overall COE, there is no single correct method for determining MRP." *Decision* at 17. Indeed, the Board currently relies on a blend of two models in its annual industry determination. *See Pet. of the W. Coal Traffic League*, Ex Parte No. 664 (Sub-No. 2) (STB served Oct. 31, 2016) at 11.

corroboration of inadequacy. Yet, the *Decision* relied on the ROI=COC test exclusively, and rejected Consumers' other evidence.⁵⁸

The dismissal of CSXT's own COC figures (*Decision* at 18) is particularly troubling. CSXT's officers and directors utilize those values to make vital decisions regarding dividends, share buybacks, the level of debt and associated debt ratings, and capital expenditures. They go to the heart of the Section 10704 criteria, yet the *Decision* found the same figures used by CSXT's management to be unreliable. CSXT did not challenge the provenance of its internal COC figures, as to do so would have been inconsistent with the resolution of Consumers' discovery requests for CSXT's revenue adequacy material.⁵⁹

The Board should have ceded at least some significance to Consumers' unchallenged demonstration that for years CSXT's revenues have been adequate to provide healthy dividends and support generous shareholder buybacks, while also covering all necessary and ambitious capital expenditures. These expenditures, funded from operating profits and cashflow, relate directly to the Section 10704 criteria (flow of net income plus depreciation to support prudent capital outlays, repay debt, raise needed equity, cover inflation, and attract and retain capital). The *Decision* dismissed this evidence by viewing each element in isolation rather than as a whole, as contemplated Congress. For example, the Board rejected Consumers' evidence of share buybacks with

⁵⁸ *Decision* at 17 and n.15 (rejecting the notion of any margin of error in application of the ROI=COC test).

⁵⁹ See Unopposed Mot. to Withdraw & Defer Second Mot. to Compel (filed Aug. 5, 2015).

the broad assertion that “all firms (even revenue inadequate ones) must return money to their shareholders,”⁶⁰ a false linkage boldly illustrated by the fact that Berkshire Hathaway, an indisputably sound and financially successful firm that is parent to BNSF Railway, has not paid a dividend in some 50 years and has engaged only sporadically in stock buybacks. The notion that CSXT lacks adequate revenues to support capital planning also flies in the face of its recent announcement that it will repurchase over \$5 *billion* worth of shares over the coming years, and increase its dividend on the same timeline.⁶¹ The repurchase figure is more than double CSXT’s average annual capital expenditure budget over the 2010-2014 time period, and exceeds its total repurchase account over that same timespan.⁶² If \$5 billion in near-term available expendable net revenue is not enough to show that CSXT is revenue adequate, then it is incumbent upon the Board to explain just what level of earnings would qualify.

The Board’s analysis in this case devolved to total reliance on the ROI=COC snapshot test; there is no other cited evidence that CSXT is revenue inadequate. On reconsideration, the Board should reverse its ruling on Consumers’ claim under the Revenue Adequacy Constraint.

⁶⁰ *Decision* at 20.

⁶¹ <https://www.csx.com/index.cfm/investors/news-releases/?rptyr=2013&article=2331857>.

⁶² Consumers Op. at IV-18-19.

III. CONCLUSION

For all of the foregoing reasons, Consumers requests that the Board reconsider the *Decision* as served on January 11, 2018, on grounds of material error and new evidence, and correct the relevant aspects of the *Decision* in the manner described in Exhibit No. 1.

Respectfully submitted,

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**Corrections On Reconsideration in STB Decision,
Consumers Energy v. CSX Transportation, STB No. NOR 42142 (served January 11, 2018).**

1. **Variable Cost Mileage** – Make the following corrections:
 - a. In “CERR MMM_Reb_Supp_STB.xlsm:”
 1. At worksheet, “2015 to 2024:”
 - a. Change the formula in cell AB7 from “=[Consumers Rebuttal VC_JT_STB.xlsx]1Q15!\$I\$29*AB1” to “=[Consumers Rebuttal VC_JT_STB.xlsx]1Q15!\$M\$29*AB1”;
 - b. Copy the formula from cell AB7 and paste it through cells AC7 to AK7.
2. **K300 Petcoke Trains** – Make the following corrections:
 - a. In “CERR Car Traffic Forecast - Supplemental_STB.xlsx:”
 1. At worksheet, “STB Decisions:”
 - a. Change the drop down menu in cell B2 from “CSXT” to “Consumers”.
 - b. In “CERR Base Year Trains_Supp_Reply_Alt1stb.xlsx:”
 1. At worksheet, “Trains:”
 - a. In column AJ, change all cells with value of 1 (there are 114) from 1 to 0.
3. **Intermodal Lift Costs** - Make the following correction:
 - a. In “CERR CSXIT Lift Charge_Open – STB.xlsx:”
 1. At worksheet, “sheet1:”
 - a. Replace the amounts in cells C22 through C28 and C30 with zero.
4. **Bridge Costs** - Make the following corrections:
 - a. In " Bridge Costs_Supp_Reply_Alt1_Alt2_STB.xlsx:"
 1. At worksheet, " Route Bridges:"
 - a. Change cell L27 from “CSX (TPG)” to “CEC”.
 - b. Change cell L41 from “CSX 2-TPG-2” to “CEC”.
 - c. Change cell L42 from “CSX 2-TPG-2” to “CEC”.
 - d. Change cell L45 from “CSX 2-3-2” to “CEC”.
 - e. Change cell L46 from “CSX” to “CEC”.
 - f. Change cell L47 from “CSX 1-3-3-1” to “CEC”.

**Corrections On Reconsideration in STB Decision,
Consumers Energy v. CSX Transportation, STB No. NOR 42142 (served January 11, 2018).**

- g. Change cell L51 from “CSX (TPG)” to “CEC”.
- h. Change cell L55 from “CSX (3 TPG)” to “CEC”.
- i. Change cell L59 from “CSX (9 TPG)” to “CEC”.
- j. Change cell L60 from “CSX (TPG)” to “CEC”.
- k. Change cell L61 from “CSX (TPG)” to “CEC”.
- l. Change cell L62 from “CSX (TPG)” to “CEC”.
- m. Change cell L64 from “CSX (2 TPG)” to “CEC”.
- n. Change cell L65 from “CSX 2-2-3” to “CEC”.
- o. Change cell L73 from “CSX 2-3-3-3-2” to “CEC”.
- p. Change cell L74 from “CSX 3-3-3-3” to “CEC”.
- q. Change cell L86 from “CSX (1-TPG-1)” to “CEC”.
- r. Change cell L100 from “CSX 2-3-3-2” to “CEC”.
- s. Change cell L101 from “CSX 2-3-3-2” to “CEC”.
- t. Change cell L102 from “CSX 2-3-3-2” to “CEC”.
- u. Change cell L103 from “CSX (3)TPG-3-TPG-2-2-3-3-2” to “CEC”.
- v. Change cell L104 from “CSX 2-3-3-2” to “CEC”.
- w. Change cell L105 from “CSX 2-3-3-2” to “CEC”.
- x. Change cell L107 from “CSX 2 TPG 2” to “CEC”.

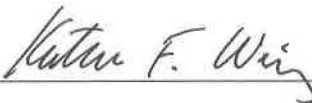
5. Equity Flotation Costs - Make the following correction:

- a. In "Exhibit III-H-1_Supp_Reply STB.xlsm:"
 - 1. At worksheet, "Inputs:"
 - a. Change cell C175 to 0.95%.

CERTIFICATE OF SERVICE

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

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