



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
202 736 8000
202 736 8711 FAX

phemmersbaugh@sidley.com
(202) 736-8538

BEIJING	GENEVA	SAN FRANCISCO
BRUSSELS	HONG KONG	SHANGHAI
CHICAGO	LONDON	SINGAPORE
DALLAS	LOS ANGELES	TOKYO
	NEW YORK	WASHINGTON, DC

FOUNDED 1866

October 2, 2006

HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

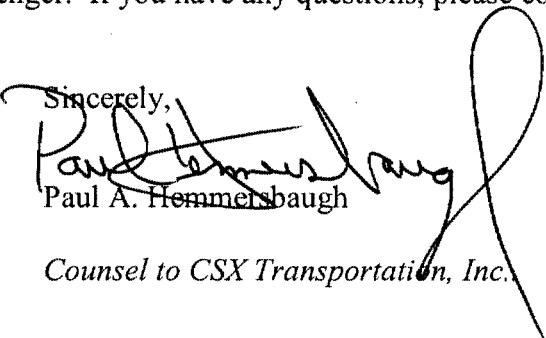
Re: Ex Parte No. 661, Rail Fuel Surcharges

Dear Secretary Williams:

Enclosed, for filing in the above-referenced proceeding, are an original and ten copies of CSX Transportation Incorporated's Comments in "Rail Fuel Surcharges," STB Ex Parte No. 661. A diskette containing an electronic version of that response is also enclosed.

Please acknowledge receipt of the enclosed CSX response by date-stamping the enclosed extra copies and returning them via our messenger. If you have any questions, please contact the undersigned counsel.

Sincerely,


Paul A. Hemmersbaugh

Counsel to CSX Transportation, Inc.

Enclosures

ENTERED
Office of Proceedings
OCT 2 - 2006
Part of
Public Record

**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 661

RAIL FUEL SURCHARGES

COMMENTS OF CSX TRANSPORTATION, INC.

Ellen M. Fitzsimmons
Peter J. Shudtz
Paul R. Hitchcock
Mark S. Hoffmann
Steven C. Armbrust
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202

G. Paul Moates
Paul A. Hemmersbaugh
Richard E. Young
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (Fax)

Attorneys for CSX Transportation, Inc.

Dated: October 2, 2006

EXECUTIVE SUMMARY

At the heart of these Comments of CSX Transportation, Inc. ("CSXT") is the fundamental understanding that customers and the public interest are best served when carriers responsibly seek financial returns that enable them to reinvest in their infrastructure so they may continue to provide efficient, economical and responsive service. As indicated in its earlier comments and presentation in this proceeding, CSXT's current fuel surcharge program serves these purposes well and permits CSXT to recover its additional fuel expenses in a market-based, practical manner that is clearly understood by its customers.

CSXT has carefully considered all of the comments presented at the hearing held by the Board on May 11, 2006 ("May 11th hearing") and the Board's August 3rd Decision. CSXT believes that its current fuel surcharge program results in fair and market-based rates for its transportation services. But, CSXT also understands the Board's proposals to change prospectively its longstanding policy on the way fuel surcharges are assessed for common carrier movements. In establishing any changes to its program, CSXT will fully consider the further comments of its customers and other parties to this proceeding, as well as the Board's further guidance on its prospective policy changes and, of course, the marketplace.

The Board's August 3rd proposals reflect a significant, and unanticipated, change in its policy regarding fuel surcharges. Since 1975, the ICC and the STB have authorized rail carriers to calculate fuel surcharges based on a percentage of revenue. In the face of an unprecedented run-up in oil prices, this longstanding policy is now being reviewed, and may well be changed for future common carrier rates. In CSXT's view, the Board has not issued – and need not issue – rules, regulations or requirements to implement this proposed policy change. It is sufficient that the Board make clear, after public comment, that it is changing its longstanding policy regarding acceptable fuel surcharge mechanisms for common carrier rates in the future.

The Comments that follow focus on potential changes to its fuel surcharge program that CSXT believes will be responsive to the Board's initial proposals for common carrier traffic. These comments also address areas where CSXT urges the Board's further reflection before it establishes new policies and guidance. As rail customers and the Board recognize, changes to the carriers' fuel surcharge program must be implemented in a manner that promotes both market-based pricing and the carriers' sustained revenue adequacy. CSXT also urges the Board to afford adequate time to both customers and carriers to implement any new guidelines. Finally, any policy change or guidelines must be consistent with principal goals of federal rail transportation policy since the Staggers Rail Act of 1980 ("the Staggers Act") – to promote the negotiation of market-based rates between the carriers and their customers, and to reduce the role of regulation in the establishment of rail rates. The Staggers Act was central to the regeneration of the railroad industry and its ability to fulfill its critical role in the nation's economic supply chain. Any change in policy that is not true to the deregulatory principles of the Staggers Act could have the unintended reverse effect.

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
I. THE BOARD SHOULD MAKE CLEAR THAT ITS FINAL ACTION IS AN ENTIRELY PROSPECTIVE POLICY STATEMENT THAT IS LIMITED TO REGULATED COMMON CARRIER TRAFFIC – NOT A RULE, REGULATION, OR DECLARATION.....	6
II. CSXT ACKNOWLEDGES THE BOARD’S PREFERENCE FOR A MILEAGE-BASED APPROACH TO FUEL SURCHARGES FOR COMMON CARRIER TRAFFIC, AND IT IS CONSIDERING THE DEVELOPMENT AND IMPLEMENTATION OF SUCH A MILEAGE-BASED METHODOLOGY.	8
A. Weight Considerations.....	9
B. Mileage	11
C. Intermodal	13
D. Pricing to the Current Market	13
III. CSXT DOES NOT OBJECT TO THE BOARD’S PROPOSAL TO REQUIRE CARRIERS TO IMPLEMENT PROCEDURES DESIGNED TO ELIMINATE POTENTIAL DOUBLE-CHARGING FOR FUEL COST INCREASES.	15
IV. CSXT DOES NOT OBJECT TO THE BOARD’S PROPOSAL TO USE THE EIA’S NO. 2 DIESEL FUEL (“HDF”) INDEX TO MEASURE INCREASES IN FUEL COSTS.	16
V. CSXT HAS NO OBJECTION TO THE BOARD’S REPORTING PROPOSAL IN PRINCIPLE, BUT HAS CONCERNS ABOUT ITS TECHNICAL AND ADMINISTRATIVE FEASIBILITY.	17
VI. ANY NEW POLICIES ADOPTED IN THIS PROCEEDING MUST SATISFY THE REQUIREMENT THAT THE REASONABLENESS OF A FUEL SURCHARGE FOR ANY PARTICULAR COMMON CARRIAGE MOVEMENT MAY BE DETERMINED ONLY IN A RATE REASONABLENESS PROCEEDING.	18
A. Several of the Board’s Proposals Might Be Interpreted to Constitute Prohibited Regulation of Rates Under the Board’s Rules and Practices Jurisdiction.	18
B. Any Fuel Surcharge Policies the Board Adopts Should Be Narrowly Tailored to Address Only Carrier Practices and to Allow Carriers and Their Customers Needed Flexibility in Implementation.	20

VII.	THE PROPOSED POLICIES MAY NOT APPLY TO CONTRACT TRAFFIC.	21
VIII.	THE PROPOSED POLICIES MUST BE PROSPECTIVE.	22
IX.	THE BOARD SHOULD NOT PARTIALLY REVOKE ANY EXEMPTION IN THIS PROCEEDING.	24
A.	The Proposal to Revoke Exemptions is Not Supported by the Record.	25
B.	If the Board Considers Revocation of A Specific Exemption, It Should Consider Only One Exemption at a Time, and Should Require a Well- Supported Evidentiary Showing That the Conditions that Supported the Granting of the Exemption Have Materially Changed.	26
C.	Board Action to Revoke Exemptions Is Also Unnecessary From a Commercial Perspective.	28
X.	THE BOARD SHOULD ALLOW ADDITIONAL TIME FOR CARRIERS TO IMPLEMENT PROCEDURES FOR APPLICATION OF NEW POLICIES TO INTER-LINE MOVEMENTS.	29
XI.	THE BOARD'S FINAL DECISION SHOULD BE FLEXIBLE AND PROVIDE ADEQUATE TIME FOR IMPLEMENTATION AND TRANSITION.	31

**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 661

RAIL FUEL SURCHARGES

COMMENTS OF CSX TRANSPORTATION, INC.

INTRODUCTION AND SUMMARY

CSX Transportation, Inc. ("CSXT"), hereby offers its Comments on the Board's August 3, 2006 Decision ("Decision") in the above-referenced proceeding. The Board's proposals regarding fuel surcharges represent a significant change in the Board's longstanding policy concerning mileage-based fuel surcharges – a change that could have far-reaching commercial and practical effects on rail carriers and their customers.

CSXT believes that surcharges based on a percentage of the base rate are appropriate and are well understood by its customers, and consistent with long-established government policy and market-based practices. Like all transportation providers and many other service providers, rail carriers have sought to recover the large increases in fuel costs they have incurred over the last several years. Fuel is one of CSXT's largest variable costs, and full recovery of those costs across a range of different types of traffic is essential to its economic success. CSXT nonetheless understands the concerns expressed in the Decision regarding the railroad industry's application of existing fuel surcharge mechanisms in an environment of volatile fuel prices. Accordingly, CSXT is considering the development of a mileage-based fuel surcharge (which

also generally takes weight into account based on broad groupings of traffic) to apply prospectively to common carrier traffic, although the design and parameters of that program and its implementation cannot be finally determined until CSXT assesses the comments filed in this proceeding and the final policies and guidance that the Board issues in its final decision.

Commercial considerations appear to favor applying the same common carrier surcharge methodology to public pricing of exempt commodities and, where mutually acceptable, to future transportation contracts. Consequently, CSXT is also considering a mileage-based approach for fuel surcharges in private contracts, a subject that it will be discussing with its contract customers. Indeed, CSXT is considering the possibility, once a new program is designed, of offering to renegotiate existing contracts with customers who might wish to agree to revised base prices that would simultaneously apply the new fuel surcharge program. Because adoption of a new fuel surcharge program will have significant effects on CSXT and its customers, it must be designed and implemented with care to avoid unintended negative consequences.

As an initial matter, before addressing the merits of the Board's proposals, CSXT urges the Board to consider issuing a statement of policy and guidance to carriers and customers, rather than formal rules or other binding legal findings or requirements regarding particular methods of calculating fuel surcharges.¹ The record in this proceeding, which is devoid of sworn statements

¹ In the narrative text of the Decision, prior to describing its proposals, the Board makes certain statements that might be construed as a binding rule or finding that any fuel surcharge calculated as a percentage of a base rate is a *per se* unreasonable practice. See, e.g., Decision at 4 (statement that the Board "believes" it is not a reasonable practice "for railroads to compute fuel surcharges as a percentage of existing rates," and similar statement of Board's belief in its discussion of a "linkage requirement"). Some party in a future proceeding might assert that those general statements could be interpreted as a final rule or declaration by the Board that railroads may not compute fuel surcharges as a percentage of existing rates on *any* movements within the Board's jurisdiction, or that such a surcharge mechanism is an unreasonable practice *per se*. CSXT does not believe the Board intended its general statements to constitute either a binding declaration or an administrative rule, nor that a contrary argument would be sustainable. The original hearing

and contains very little documented evidence, is simply not sufficient to allow the Board to craft specific rules and requirements that will achieve its lawful aims and objectives without imposing unnecessary and unintended consequences. The widely varying circumstances, conditions, and traffic to which such charges apply make specific rules problematic, both for carriers and for some customers.

To cite but one example, certain customers may actually prefer to be charged fuel surcharges as a percentage of their base rate, instead of a mileage-based surcharge. Understandably, customers who are satisfied with their current fuel surcharges generally were not moved to file comments in this proceeding or to appear at the May 11th hearing. If the Board adopts a rule that categorically prohibits the calculation of fuel surcharges as a percentage of revenue for all common carrier rates, however, carriers will not be allowed to continue to offer such a mechanism to those customers who may prefer it to a mileage-based surcharge.

Similarly, if the Board adopts an inflexible rule regarding the specific data and information that must be provided in carriers' fuel reports, and the precise timing and form of such reports, CSXT and other carriers may be required to expend significant time and resources to develop new systems to enable them to comply with those requirements. To avoid imposing such unnecessary costs and difficulties, the Board should consider the concerns explained in the Appendix to these Comments.

notice provided no indication that the Board was even considering such a rule or declaration, and there was therefore no meaningful opportunity to comment prior to the issuance of the Decision. Nor was there testimony or other evidence in the record that could support such a finding or declaration. To prevent unnecessary disputes and potential litigation regarding this question, CSXT asks the Board to consider expressly confirming that the Decision's statements regarding the Board's belief concerning fuel surcharges calculated as a percentage of a base rate were intended only as general guidance, not as a binding rule, regulation, or declaration.

In view of the willingness that CSXT expresses in these Comments to be guided by appropriate Board policies, inflexible regulations are unnecessary to accomplish the Board's desired goals. For example, CSXT does not object to the Board's proposal that railroads use the Energy Information Administration's ("EIA's") No. 2 diesel fuel index to measure increases in fuel costs, and CSXT is willing to incorporate that index into its surcharge mechanism for common carrier rates. CSXT is also willing to consider the adoption of a new mileage-based fuel surcharge as the Board's new policies or guidelines suggest.

However, as with other aspects of the Board's proposals, it will take time and resources for CSXT to adjust its systems for calculating, recording, billing and collecting fuel surcharges using a new, mileage-based surcharge methodology. CSXT therefore asks that the Board provide that any new policies or guidance that it may adopt in this proceeding take effect prospectively only, and no sooner than 120 days after they are issued. In this regard, CSXT understands that a number of its customers may also need time to adjust their systems to account for, record, pay, and audit fuel surcharges predicated upon a new system.

CSXT is also concerned that the Board's proposed policies might be used to regulate the *level* of rail transportation *rates* under the Board's authority to regulate common carrier *practices*. As the Decision acknowledges, the Board's authority and jurisdiction to consider the reasonableness of transportation rates is statutorily limited. *See, e.g.*, 49 U.S.C. § 10701(d)(1). Although the Decision states that its proposals do not seek to regulate rates, some of the proposals might be construed to impose rate regulation under the auspices of the Board's rules and practices authority. CSXT therefore requests that the Board take care to ensure that any new policies or requirements it ultimately adopts do not have the effect, individually or in combination, of regulating rail transportation rates without applying the statutory limitations on,

and regulatory requirements for, such rate regulation. In this area, it is particularly important that the Board recognize the prospective nature of its policy change – in order to avoid unnecessary disputes and litigation concerning past rates and practices.

CSXT opposes the Board's proposal for a generalized partial revocation of all exemptions for classes of traffic. CSXT believes that the proposed wholesale revocation of class exemptions – which the Notice of Public Hearing issued on March 14, 2006 ("Notice of Public Hearing") did not mention, and which no party requested in its written submissions – is not only unnecessary, but would constitute a significant change in the direction followed by national transportation policy in the last quarter century. Consistent with a primary objective of the Staggers Act, rail carriers have achieved substantial economies and efficiencies as a result of class exemptions. Changes to these exemptions should be made only if the evidence of record clearly demonstrates the need for such changes. Such changes should only be considered, if at all, in a full notice-and-comment rulemaking, in which all parties have adequate opportunity to submit evidence and argument regarding the effects and implications of revoking a particular class exemption, as well as an opportunity to respond to comments of others. Moreover, any exemption revocation proceeding should consider one specific exemption at a time.

Finally, CSXT asks that the Board reaffirm that whatever policies or rules it ultimately adopts in this proceeding will be (1) applicable only to common carrier traffic and (2) purely prospective in application. CSXT respectfully submits that, as a matter of law, the Board's jurisdiction over carrier practices is so limited. But it would be most helpful to all parties if the Board would clarify its August 3 Decision on this point, in order to avoid the possible confusion, contention, and even litigation about the scope of the Decision and of whatever policies or guidelines the Board may ultimately adopt in this proceeding.

I. THE BOARD SHOULD MAKE CLEAR THAT ITS FINAL ACTION IS AN ENTIRELY PROSPECTIVE POLICY STATEMENT THAT IS LIMITED TO REGULATED COMMON CARRIER TRAFFIC – NOT A RULE, REGULATION, OR DECLARATION.

The Board should make clear that any final decision it issues in this proceeding is only a policy statement, rather than a binding rule, regulation, declaration, or finding. There is no basis in the record for the adoption of an inflexible rule or regulation that requires railroads to eliminate their current method of calculating fuel surcharges, and adopt an entirely new method, for all classes of common carrier traffic. Furthermore, the Board should clarify that any new policies it may issue are purely prospective in nature and is limited to regulated common carrier traffic.

As the Decision acknowledges, the proposals regarding the methodology used to calculate fuel surcharges represent a dramatic change from previous ICC and Board policy, under which – since at least the mid-1970's – railroads were authorized to apply a revenue-based fuel surcharge, and were never mandated to apply a mileage-based fuel surcharge. *See* Decision at 5 (citing *Expedited Procedures for the Recovery of Fuel Costs*, 350 I.C.C. 563 (1975)). Although the Decision asserts that “[c]onditions . . . have changed since 1975” (*id.*), the fact remains that for more than 30 years railroads calculated their fuel surcharges in reliance on that policy. Only when the Board issued its Notice of Public Hearing earlier this year did the railroads receive any indication that the Board might be considering a policy change.

The need for caution in this area is reinforced by the objectives of the Staggers Act. The Rail Transportation Policy and other provisions of the Staggers Act established a federal policy that favors greater reliance on market forces and private negotiations between carriers and shippers, rather than federal regulation, as the means of setting rates. During the 25 years since the Staggers Act, Congress, the ICC and the Board have consistently promoted those policies.

Continued progress toward achieving the goals of the Staggers Act would be impeded if the Board now sought to turn back the clock by imposing binding, rigid rules requiring railroads to adhere to a particular method of calculating fuel surcharges.

For these and other reasons discussed in more detail below, the Board's final decision in this proceeding should expressly state that it is only a policy statement or guidance. A sweeping rule that unequivocally required railroads to change to a particular methodology, after more than 30 years of reliance by the railroads on the ICC/STB's preexisting policy, would be wholly unwarranted, and unsupported by the evidence in this proceeding.²

Moreover, particularly in view of the railroads' reliance on previous ICC/STB policy, any guidelines or policy statement should apply only prospectively. CSXT, for example, determined its fuel surcharges for more than three decades in reliance on ICC and Board policy that expressly rejected a mileage-based methodology requirement. It would be arbitrary and fundamentally unfair to hold railroads retroactively liable in connection with surcharges that they computed on the basis of that policy.

Finally, the Board should make clear that its final decision in this proceeding applies only to common carrier traffic that is regulated by the Board. The Decision, understandably, did not discuss traffic that is governed by rail transportation contracts, because such traffic is not subject to the Board's jurisdiction. *See* 49 U.S.C. § 10709(c)(1). The Board should make explicit what

² In addition, the Decision cannot be deemed to contain a formal "rule" with respect to fuel surcharges because it contains no analysis of the impact of its pronouncements on small businesses, including shortline and regional railroads. As the comments of the Small Railroad Owners Association of America make clear, there is concern among at least some shortline and regional railroads that the Board's intervention in this area may harm their businesses, yet the Decision contains no discussion of these concerns. Moreover, because the Decision omits the certification required by the Regulatory Flexibility Act that the proposed action would not have "a significant economic impact on a substantial number of small entities" (5 U.S.C. § 605(b)), it appears that the Board did not intend the Decision to constitute the issuance of rules.

was implicit in the Decision – *i.e.*, its final decision will apply only to traffic not subject to rail transportation contracts.

Clarifying that the Board's decision is a policy statement applicable only to regulated common carrier traffic on a prospective basis will avoid the myriad problems that could occur if the Board issued binding rules. At the same time, a policy statement will promote the Board's objectives in this proceeding. A policy statement will “advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power” and thus “announce[] the agency's tentative intentions for the future,” but will not “establish a ‘binding norm.’” *See, e.g., Cleveland-Cliffs Iron Co. v. ICC*, 664 F.2d 568, 575 (6th Cir. 1981); *Iowa Power & Light Co. v. Burlington Northern Inc.*, 647 F.2d 796, 811 (8th Cir. 1981).

II. CSXT ACKNOWLEDGES THE BOARD'S PREFERENCE FOR A MILEAGE-BASED APPROACH TO FUEL SURCHARGES FOR COMMON CARRIER TRAFFIC, AND IT IS CONSIDERING THE DEVELOPMENT AND IMPLEMENTATION OF SUCH A MILEAGE-BASED METHODOLOGY.

CSXT appreciates at least some of the reasons for the Board's expressed preference for mileage-based fuel surcharges for common carrier traffic, and CSXT is working toward developing such a methodology. However, the Board should understand that CSXT, and a number of its customers, will be required to devote considerable resources to developing and implementing systems to calculate, record, bill, collect and audit a new mileage-based surcharge, and the Board should accordingly afford sufficient time for that purpose following adoption of whatever approach it ultimately chooses to take in this proceeding. The Board should provide a transition period of at least 120 days to allow CSXT, other railroads, and our customers to develop and implement the necessary systems and computer programs.

CSXT is also concerned that, in its zeal to respond to the expressed concerns of certain segments of the shipper community about existing fuel surcharge methodologies, the Board may

be moving more rapidly than is necessary or appropriate, given both the intent and direction of rail transportation policy and regulation since the Staggers Act and the Board's consistent policy of encouraging contracting and private negotiation of rate and rate-related matters. Although CSXT has heeded the Board's "admoni[tion] [to] carriers to reexamine their method of calculating fuel surcharges" (Decision at 5), the record compiled at the May 11th hearing – a hearing that was described by the Board as informational and at which no sworn testimony or evidence was submitted – simply does not provide the requisite basis for a finding that any particular existing fuel surcharge constitutes an "unreasonable practice." Nor has the Board been presented with a formal complaint as required by 49 U.S.C. § 10704(b) to support such a finding with respect to any specific movement or practice.

CSXT understands the Decision to contain an expression of the Board's changed views about the manner in which fuel surcharges should generally be designed. CSXT is acting on those expressions of the Board's views, both in working to develop a mileage-based fuel surcharge for application to its common carrier traffic, and in discussing the issue with its contract customers.

A. Weight Considerations

CSXT understands that some customers believe that fuel surcharges should be linked to the weight of each specific carload, and CSXT is considering an approach that would take into account weight factors for some broad groupings of traffic. After careful review, CSXT believes that any attempt to link a fuel surcharge program to actual weights of *all* individual cars and lading would be both impractical and of little ultimate financial consequence to customers.

First, CSXT does not weigh the majority of the shipments it carries. Over the years, the commercial trend has increasingly been to quote rates on a per-car basis. This does not mean

that weight is irrelevant, only that the *precise* weight is not the primary factor in market-based pricing.

Second, the individual weighing of cars for rating purposes is a costly operation that has largely been phased out. The marketplace has demanded reduced costs from the carriers and reduced transit times for the customers, and weighing individual cars at a scale is inconsistent with those goals.

Third, even using some per-car average weight based on commodity would not result in a major difference in surcharge levels paid by customers. CSXT is mindful of the comments of parties at the May 11th hearing who took great exception to one railroad's implementation of differential surcharge levels based on commodity categories. No doubt, there will be a few customers who routinely ship significantly lighter-than-average loads. But these customers often have truck options available for their shipments, and the competitiveness of those options affects the total transportation charge that the railroad can obtain for the services it provides. Base rate plus fuel surcharge defines the total transportation charge, and must be market-competitive if the railroad is to win and retain the business.

Finally, despite the philosophical discussions of commenters at the May 11th hearing, CSXT does not think that customers who ship different goods would favor a surcharge program that applies different standards for one or more raw materials, and one or more finished or intermediate products. The impact on operations of weighing *all* of the approximately 7 million units that CSXT handles per year would significantly impact CSXT's service, and the administrative burden of such weighing on carriers and customers alike would be intolerable in modern times. As noted elsewhere in these comments, CSXT is concerned that its fuel surcharge

program be simple enough to be administered readily both by our own accounting, billing, and collection departments and by our customers' accounts payable departments.

B. Mileage

Pending final guidance from the Board, CSXT is considering a mileage-based fuel surcharge program that (at least for some classes of common carrier rates) will consider some weight factors. Although its analysis is still ongoing, CSXT would like to offer its current thinking on this subject with the expectation that the Board's guidance and general direction will further inform the company's evolving approach.

CSXT has not developed a comprehensive mileage table that links its 7 million individual annual shipments to actual rail-mile distances, which vary significantly even between the same origins and destinations based on capacity and operating conditions. And the number of individual shipper Freight Station Accounting Codes would make the construction of such a table a difficult, time-consuming effort, whose result would be unwieldy for billing purposes and for our customers.

One possibility that the Board might consider would be developing its own, official railroad mileage table for carriers and customers to use in establishing and managing fuel surcharges. Under this approach (in which CSXT would fully participate), the Board's staff, presumably the Office of Economics, Environmental Analysis, and Administration ("OEEAA") could convene a technical conference with large and small carriers and customers, consider developing a suggested format for mileage data to be submitted between station pairs, and assemble an STB-approved data base. With a single mileage master available, customers who use multiple rail carriers would not have to program their systems to accommodate the inevitable

multiplicity of railroad mileage tables that would otherwise be developed independently by each carrier.³

CSXT, however, recognizes that the Board may elect not to take this approach, and each carrier may need to develop its own mileage matrix to be used whenever its fuel surcharge is to be applied, including on interline movements. Although CSXT is still studying the matter, and will develop its final approach after reviewing the policies the Board adopts in this proceeding, CSXT's current view is that it may develop a mileage matrix that has a manageable number of origin/destination zones. Approximate mileage between zones will give a mileage to be applied to all moves from zone to zone. CSXT has used such an approach for base freight rates with its public pricing on a variety of commodities, with great success. Limiting the number of origin and destination zones to approximately 400 on CSXT, and 1,700 overall in North America, would keep the matrix manageable. This is particularly important given that every interchanging carrier that bills customers will need the capability to compute and apply CSXT's fuel surcharge on interline traffic to which the surcharge applies.

CSXT's plan is to group zip codes across the lower 48 states, Canadian provinces, and Mexico into three-digit zones. CSXT would then apply publicly available highway mileage data to build the mileage matrix. It is CSXT's belief that highway miles and rail miles will generally correlate well, and will be useful in comparing truck-competitive fuel surcharges. Public availability of highway mileages is still being reviewed, but CSXT hopes that its customers will prefer this approach to a newly developed CSXT mileage matrix based on CSXT's own mileage determinations.

³ For interline movements, of course, railroads would need to negotiate with one another the actual divisions of rates. *See, e.g., Baltimore & Ohio R.R. Co. v. United States*, 277 U.S. 291, 300 (1928) (holding that the ICC's jurisdiction over railroad practices did not give it the power to regulate divisions of rates).

C. Intermodal

CSXT provides rail transportation services to an affiliated company, CSX Intermodal, Inc. ("CSXI"). CSXI is a non-carrier that functions as, among other things, an intermodal marketing company ("IMC") to market the services it purchases from CSXT and other major rail carriers, including Union Pacific ("UP") and Burlington Northern Santa Fe ("BNSF"). This structure allows CSXI to offer coast-to-coast intermodal service packages, both in customer-provided containers and in containers which it owns and provides, either itself or with other entities.

CSXT understands that CSXI is considering a surcharge mechanism that will take into account competition from motor and other rail carriers, and that is based on highway mileage between 48 intermodal terminals that it markets to and from points across the country. CSXT also understands that CSXI will link its fuel surcharge program to Highway Diesel Fuel (HDF), as it does today. CSXI, of course, will make its decisions independently.

D. Pricing to the Current Market

CSXT had several representatives in attendance at the May 11th hearing, and it took careful note of comments made by customers. Several customers observed that some rail fuel surcharge programs were established years ago, when oil prices were in the \$20-30 per barrel range. They expressed dissatisfaction with a surcharge based on older base fuel costs, and suggested that freight rates ought to be quoted closer to the current market. Although these customers advocated rates "based on" or "incorporating" current costs, they overlooked the fact that cost is not the only factor in CSXT's pricing decisions.

What was also not widely acknowledged at the May 11th hearing was the economic truism that the total cost of transportation – composed of the total of the base rate and fuel surcharge – is the price paid for the service. That total price must meet the market, and CSXT's

pricing managers know that they will drive away traffic by setting a base rate today which, when combined with today's fuel surcharge, would result in "above-market" pricing. Accordingly, any base rate quoted today, including fuel surcharges, reflects a competitive level in the marketplace. CSXT's customers, of course, fully understand that the total freight charges include both the base rate and fuel surcharges. Accordingly, as CSXT considers changes to its fuel surcharge program, it will likely need to adjust its base rates to reflect current market rates. As in the past, CSXT will continue to monitor its fuel surcharge program and will make appropriate adjustments so that the program recovers increased fuel costs to ensure adequate earnings.

Virtually all of CSXT's existing transportation contracts incorporate tariff items by reference. CSXT does not read the Decision, or the Board's longstanding policies with respect to contracts, to suggest in any way that the Board intends its actions in this proceeding to affect the carriers' right to apply existing fuel surcharge programs in tariffs to existing rail transportation contracts. Indeed, as previously stated, the Board lacks jurisdiction under Section 10709(c)(1) of the ICCTA to regulate such private contractual provisions.

CSXT's current fuel surcharge program is published in Item 12000-A of tariffs CSXT 8100 and 8200. That item today applies to most CSXT public regulated prices and is incorporated in CSXT transportation contracts by reference. While CSXT is considering publication of a new surcharge program in appropriate regulated pricing documents, CSXT does not understand that the Board intended that its new policies prohibit the continued or future incorporation or modification of any existing railroad fuel surcharge provisions into private transportation contracts. Accordingly, although the current Item 12000-A in tariffs CSXT 8100

and 8200 will continue to appear in publications, it may not apply to common carrier rates published after the implementation of the new program.

III. CSXT DOES NOT OBJECT TO THE BOARD'S PROPOSAL TO REQUIRE CARRIERS TO IMPLEMENT PROCEDURES DESIGNED TO ELIMINATE POTENTIAL DOUBLE-CHARGING FOR FUEL COST INCREASES.

The Decision expressed concern that "some carriers have been charging twice for the same fuel cost increases, by both escalating the base rate using [an index like the RCAF] (without first subtracting out the fuel cost component) and applying a fuel surcharge." Decision at 5. CSXT believes that few, if any, of its common carrier rates contain both escalation indices that include recovery of increased fuel costs and a fuel surcharge. However, CSXT certainly does not object to the Board's proposal to require carriers to implement prospective procedures designed to avoid that result.

The "double-dipping" issue is different, of course with respect to contract rates. The parties to such rate contracts are free to negotiate whatever arrangements they desire, including contract terms that deal with fuel and other cost increases. Nonetheless, CSXT is prepared to discuss these issues with the few affected contract customers and, if the parties are mutually agreeable, CSXT will consider possible ways to implement a similar mileage-based surcharge mechanism for contract traffic for those customers who wish to renegotiate their transportation agreements. Accordingly, even though the Board has no jurisdiction over the rates and practices applicable to contract traffic, CSXT can assure the Board that the views expressed by the Board in its August 3 Decision will be given full consideration by CSXT in its private negotiations with contract customers.

IV. CSXT DOES NOT OBJECT TO THE BOARD'S PROPOSAL TO USE THE EIA'S NO. 2 DIESEL FUEL ("HDF") INDEX TO MEASURE INCREASES IN FUEL COSTS.

The Board proposes that all Class I railroads use the same index to measure increases in fuel costs, namely EIA's "U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon)". Decision at 6. Numerous commenting shippers expressed a preference for the use of highway diesel fuel over other fuel costs indices, such as West Texas Intermediate Fuel Oil, the index in CSXT's surcharge program. Whatever the Board's ruling, however, CSXT asks that – as with other elements of the Board's proposals – the Board afford a reasonable period of time for the implementation of this and other proposed changes to the methodology used to determine fuel surcharges.

As with the Board's expressed preference for mileage-based fuel surcharges, CSXT is considering the Board's views on the EIA index with respect to the railroad's contract traffic, and CSXT is prepared to discuss that issue with its potentially affected contract customers. If it can be done without undue disruption and is consistent with the preferences of its customers, CSXT will work to implement a transition to use of the EIA index for purposes of fuel surcharges applicable to contract traffic as well. Although CSXT's decision as to its approach must necessarily await the Board's final decision in this proceeding, it is likely that CSXT will implement at one time an entirely new fuel surcharge program that is based on HDF and mileage. This new program would apply to regulated common carrier traffic and most likely to public prices for exempt traffic as well. Future contracts could adopt the new fuel surcharge program, although CSXT and its contracting customers would be free to seek a different approach.

V. CSXT HAS NO OBJECTION TO THE BOARD'S REPORTING PROPOSAL IN PRINCIPLE, BUT HAS CONCERNS ABOUT ITS TECHNICAL AND ADMINISTRATIVE FEASIBILITY.

It is clear from the May 11 hearing that shippers strongly desire greater "visibility" of information about carriers' fuel surcharges, including fuel costs, and the Board's proposed reporting requirement is designed to provide that information. CSXT submits that its fuel surcharge mechanism itself – which is explained in detail in its tariffs and on its internet web site – is and always has been visible and understandable to its customers. As the Board has recognized, however, much of the criticism of the fuel surcharges has little to do with the formula, index, or even the specific level of a fuel surcharge. Rather, shippers question how much actual costs the carriers are incurring and how much coverage has been achieved by individual railroads. CSXT supports the goals of the Board's fuel data reporting proposal. For technical reasons, however, CSXT is not currently able to provide the data in the form the Board has proposed. CSXT therefore suggests slightly different approaches that would provide equivalent or better information to the Board and to CSXT's customers.

CSXT's specific concerns with the Board's proposal, and suggested alternative approaches, are described in detail in the Appendix hereto. In general, CSXT believes that data should be reported on a quarterly, rather than monthly, basis; that data should be reported on a carload basis, rather than on a revenue ton-mile basis; and that, in establishing final reporting requirements, the Board should take into account that CSXT does not collect or maintain some of the data that the Decision would require the carriers to report.

VI. ANY NEW POLICIES ADOPTED IN THIS PROCEEDING MUST SATISFY THE REQUIREMENT THAT THE REASONABLENESS OF A FUEL SURCHARGE FOR ANY PARTICULAR COMMON CARRIAGE MOVEMENT MAY BE DETERMINED ONLY IN A RATE REASONABLENESS PROCEEDING.

A. Several of the Board's Proposals Might Be Interpreted to Constitute Prohibited Regulation of Rates Under the Board's Rules and Practices Jurisdiction.

The law is clear that the Board may not regulate rates, or make a determination of the reasonableness of the level of a rate, under its jurisdiction over carrier rules and practices. *See, e.g., Union Pacific R.R. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989). In the “Discussion and Conclusions,” section of the Decision, the Board acknowledges this fundamental legal limitation. *See* Decision at 3. In light of this proscription against regulating the level of rates – including fuel surcharges – under the Board’s authority to regulate practices, the Decision states that its proposals are not aimed at limiting “the total amount that a carrier can charge, through a combination of base rates and surcharges, for providing rail transportation.” *Id.* at 4. Rather, the Board suggests that its proposals are in the nature of what might be characterized as “truth in labeling,” *i.e.*, carriers should not refer to a charge as a “fuel surcharge” if it is “not limited to recouping increased fuel costs that are not reflected in the base rate.” *Id.*

Contrary to the Decision’s suggestion, however, CSXT’s fuel surcharge program does not constitute “mislabeling” – a characterization which is clearly unsupported by the record and to which CSXT takes strong exception. As CSXT made clear at the May 11th hearing, its program is designed to recoup CSXT’s increased overall fuel expenses to ensure adequate revenues. Moreover, CSXT’s program is fully explained on its website and its tariffs, and has been clearly understood in the market.

In any event, although the Decision disclaims any intent to regulate rate levels, the Board’s proposals appear to go much further than prohibiting perceived “mislabeling.” Unless

clarified and limited, the Board's proposals would violate the clear limitations and requirements of the ICCTA and the *Union Pacific* court's holding that railroad rates cannot be regulated (even indirectly) through the Board's jurisdiction over the reasonableness of railroad practices. For example, the Board's proposals might be interpreted to impose a cap on carriers' recoverable cost of fuel (the EIA fuel cost index times the amount of fuel consumed) and simultaneously, an inflexible requirement that those fuel costs be allocated to each movement based solely upon the movement's mileage or a combination of its mileage and weight, further limited by the requirement that a carrier may not recover more than its increased fuel costs attributable to any movement covered by the fuel surcharge. *See* Decision at 4-6.⁴

Such requirements not only would impermissibly regulate rates under the auspices of the Board's authority to regulate carrier practices, but also would effectively prescribe a fuel surcharge "rate" level for every movement covered by a fuel surcharge. As the D.C. Circuit admonished in *Union Pacific*, "labeling notwithstanding, form must yield to substance." 867 F.2d. 646 at 649. Regulation of the level of rates without regard to statutory jurisdictional requirements (or application of a Stand-Alone Cost analysis or other rate reasonableness regulations and analyses the Board has established to implement statutory rate reasonableness requirements) – whether direct or indirect – would be contrary to law and impermissible.

Moreover, an inflexible presumption that fuel surcharges must be based on mileage or mileage-and-weight would not necessarily achieve the Board's aim (which itself may not be a permissible exercise of the Board's unreasonable practice authority) of ensuring that the amount

⁴ Stated differently the Decision appears to suggest that the *only* fuel surcharge methodology that the Board would find reasonable would be one that: (i) uses the EIA Index of diesel fuel cost to measure fuel costs; (ii) allocates fuel costs to car movement based solely on mileage, or mileage and weight; and (iii) limits the fuel surcharge for each movement to the carrier's additional cost of fuel for each movement. In practice, such a formulation would constitute a Board prescription of the maximum level of fuel surcharge for each movement.

of a fuel charge is closely tailored to a specific movement's actual additional fuel cost.⁵ As testimony at the hearing demonstrated, a number of other factors and parameters affect the amount (and cost) of fuel consumed by a given movement, including, for example, train speed, terrain, amount of switching, whether the traffic moves in unit trains or single-car movements, and actual fuel cost. *See, e.g.*, Hrg. Tr. at 263-64, 291-93. Any policy issued by the Board should therefore make clear that mileage and weight are only some of the parameters that carriers may use to develop a fuel surcharge formula, and should allow carriers flexibility to develop more effective fuel surcharges by indicating that carriers are not required to base fuel surcharges on mileage, weight, or both.

B. Any Fuel Surcharge Policies the Board Adopts Should Be Narrowly Tailored to Address Only Carrier Practices and to Allow Carriers and Their Customers Needed Flexibility in Implementation.

Although the Board may not have intended its proposals to regulate rates, the foregoing examples illustrate that they could readily be interpreted to propose prohibited rate regulation. It is important that the Board proceed with caution in adopting any new fuel surcharge policies, and that any new policies or guidance be carefully and narrowly circumscribed to avoid rate regulation or other unintended consequences. In addition, to reduce the likelihood of confusion and unnecessary litigation, CSXT requests that the Board expressly reiterate that any final policies or guidelines issued in this proceeding are not intended, and may not be used, to

⁵ The Decision states that carriers would be allowed to develop alternative methodologies, "so long as [they] have a reasonable nexus to the fuel consumption for the movement involved." Decision at 5. Such a flexible statement of policy is highly appropriate. It gives guidance to carriers regarding the Board's overall policy goal, while allowing carriers necessary latitude to develop and implement specific measures aimed at that goal.

determine the reasonableness of the level or amount of a fuel surcharge for any specific common carrier movement.⁶

Although CSXT is concerned about language in the Decision that could be read to suggest that the Board “is largely focused on the reasonableness of the added costs on which the railroads’ [surcharge] rates are predicated” (*Union Pacific*, 867 F.2d at 649), CSXT is considering revisions to its fuel surcharge methodology, including possible measures to enhance the transparency of such surcharges to its customers and to the Board. CSXT looks forward to the Board’s promulgation of fair and reasonable policies or guidelines directed toward achieving greater transparency. In addition to avoiding rate regulation under its rules and practices authority, the Board should continue to allow carriers substantial flexibility in the design and implementation of fuel surcharge methodologies and reporting, in order to avoid unnecessary burdens or other unintended consequences.

VII. THE PROPOSED POLICIES MAY NOT APPLY TO CONTRACT TRAFFIC.

Although it would appear to be so clear as not to require discussion, CSXT is concerned about reported statements by certain shippers and consultants suggesting that the Board’s proposals might be applicable to contract rates. Certainly, there is no question that the terms and conditions of rail transportation rate contracts are outside the Board’s jurisdiction for all purposes. *See* 49 U.S.C. § 10709(c). And the Board has made manifestly clear that it has no jurisdiction to determine whether common carrier rate provisions, including provisions that might otherwise be unlawful under ICCTA, are unenforceable if incorporated in a Section 10709

⁶ Thus, a fuel surcharge mechanism’s failure to comply with new policies or guidelines issued in this proceeding could not constitute a finding that the level of the fuel surcharge in question is unreasonably high. Rather, as the Board has recognized, any challenge to the level of the fuel surcharge could be brought only in a maximum rate reasonableness challenge to the entire common carrier rate charged for that movement, pursuant to Section 10704 and other governing statutes and regulations. *See, e.g.,* Decision at 5, n. 11.

contract rate agreement. *See, e.g., H.B. Fuller Company v. Southern Pacific Transportation Co.*, STB Dkt. No. 41510 (served Aug. 22, 1997); *Cross Oil Refining & Marketing, Inc. v. Union Pacific Railroad Co.*, STB Dkt. No. 33582, at 3 (served Oct. 27, 1998); *Wisconsin Central Ltd. – Petition for Declaratory Order Certain Rates and Practices of the B& O Chicago Terminal Railroad Company and CSX Transportation, Inc.*, STB Dkt. No. 41995 at 4-5 (served June 20, 2001). Nonetheless, because virtually all of CSXT’s contracts incorporate or otherwise make reference to common carrier rate provisions, including fuel surcharge provisions, CSXT asks the Board to clarify that any policies or guidelines it may adopt with respect to fuel surcharges for common carrier traffic cannot, and do not, apply to contract rate traffic (over which it has no jurisdiction).

VIII. THE PROPOSED POLICIES MUST BE PROSPECTIVE.

As the Board appears to acknowledge, any new policies regarding fuel surcharges must be entirely prospective in nature, and may not apply to any activity, conduct, or practice occurring prior to their effective date. *See, e.g.,* Decision at 1, 4, n.9 (using prospective language to discuss what the proposals “would” require, and noting that the Board may adopt rules of general applicability to govern *future conduct*). Providing that any new policies the Board adopts in this proceeding will be prospective only is entirely consistent with the well-established presumption against retroactive agency policies or rules. As the Supreme Court has summarized governing law, “a statutory grant of legislative rulemaking authority [to an agency] will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that

power is conveyed by Congress in express terms.” *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988).⁷

Neither the statutes providing the substantive authority for the Board’s proposals nor the governing provision of the Administrative Procedure Act (“APA”) contains any express statement conferring authority on the Board to make policies or guidelines retroactive. *See* 49 U.S.C. § 10701(a), 10702 (no provision conferring retroactive rulemaking power). Indeed, the APA expressly confines an agency rule to prospective effect, defining such a rule as:

the whole or a part of an agency statement of general or particular applicability and *future effect*, designed to implement, interpret, or prescribe law or policy

5 U. S. C. § 551(4) (emphasis added). Thus, any binding rule or policy established through notice-and-comment rulemaking may only have legal consequences for the future, not for the past. *See Bowen*, 488 U.S. at 217 (Scalia, J., concurring).

Moreover, because the Board’s proposals would change existing policies and settled practice upon which carriers have reasonably relied, fundamental fairness requires that any new policies or guidelines be applied prospectively only. As the Decision notes, the existing policy regarding fuel surcharges considered and rejected a requirement that such charges be calculated based on mileage. *See Expedited Procedures for the Recovery of Fuel Costs*, 350 I.C.C. 563, 570-71 (1975). Although the ICC acknowledged that “fuel costs are for the most part related to miles and not to revenues,” it nonetheless rejected a mileage-based fuel surcharge as likely to “cause more problems than it would solve.” *Id.* In a conclusion that has resonance today, the ICC found that “the adoption of a mileage related scheme would add complexities making the

⁷ CSXT does not understand the Decision to be proposing to apply any new fuel surcharge policy retroactively. CSXT makes these comments only to emphasize that it is essential that any such policy apply only prospectively.

expedited procedures either unworkable or so confusing as to frustrate the intent” of a fuel surcharge. *Id.* at 571.

The Decision suggests that conditions have changed since 1975 such that a new policy may be appropriate. *See* Decision at 5. As CSXT has stated, it is willing to accept, on a going-forward basis, a Board determination that fuel surcharges generally should be based on mileage rather than as a percentage of the “base rate.” CSXT’s existing fuel surcharge is consistent with the policies established by the ICC, however, and it was entirely reasonable and appropriate for CSXT to rely upon existing policies in establishing and administering its existing fuel surcharge program. For these reasons, any change in the policy regarding the calculation of fuel surcharges must operate prospectively.

IX. THE BOARD SHOULD NOT PARTIALLY REVOKE ANY EXEMPTION IN THIS PROCEEDING.

The Board’s sweeping proposal to “partially revoke” exemptions for the purpose of applying its new fuel surcharge proposals to such traffic is unprecedented, inconsistent with the exemption policies and processes, and not supported by the record. Since at least the adoption of the Staggers Act a quarter century ago, federal policy regarding rail carriers has steadily progressed toward greater reliance on markets, privately negotiated rates, and other market-based solutions to various rail transportation issues, and away from regulatory intervention in the marketplace. By nearly any account, this shift away from intrusive government regulation and intervention in business and commercial decisions and practices has been very successful, conferring substantial benefits on rail shippers, consumers, the transportation and logistics system, and commerce throughout the Nation. The sweeping proposal to revoke exemptions across the board, without any evidence that such revocations are necessary or appropriate, would be an unwarranted and unwise reversal of an important element of that successful policy.

It is not an exaggeration to describe the exemption of intermodal traffic as one of the greatest deregulatory successes in surface transportation policy. Anything that can move by truck, can move via intermodal service. By freeing railroads to find creative ways to compete in this intensely competitive market, the ICC ushered in tremendous growth in bi-modalism. With an over-crowded highway network that is in some places approaching gridlock, the Board's policies should continue to allow railroads the regulatory freedom needed to invest and compete. CSXT urges the Board to act very cautiously before creating further uncertainty in the marketplace about the regulatory future of the intermodal exemption.

CSXT urges the Board not to adopt its proposed revocation, or any policy providing for summary revocation of exemptions. The record clearly is insufficient for the Board to conclude that the requirements of Section 10505(d) of the ICCTA have been met. Instead, the Board should consider, on a case-by-case basis, any petition(s) filed by affected parties seeking to revoke specific exemptions. And, it should evaluate and determine such petitions based upon thorough consideration of a full record regarding the proposed revocation, its costs, benefits, and potential effects.

A. The Proposal to Revoke Exemptions is Not Supported by the Record.

The Board's proposal has no meaningful basis in the record of this proceeding. The Notice of Public Hearing that initiated this proceeding gave no indication that the Board was considering revoking exemptions, and did not seek testimony on that subject. The written comments submitted for the Board's consideration contained no request for a general revocation of exemptions, nor any evidence supporting such revocation.⁸ The record of the hearing itself is

⁸ Approximately 65 firms, companies, and associations filed written testimony or statements with the Board prior to the May 11th hearing. Only one of those filings even mentioned the possibility of revoking an exemption. *See* Comments of Cemex at 4. Even that testimony did not request that the Board revoke an exemption in this proceeding. *Compare id.* at 4 *with id.* at

similarly devoid of any meaningful request for, or discussion of, revocation of exemptions. The sole witness who arguably suggested revocation of an exemption at the hearing mentioned exemptions very briefly at the end of her oral remarks, and offered no justification whatsoever for revocation. *See* Hrg. Tr. at 380.⁹

Thus, the Board did not request testimony regarding the revocation of exemptions, and no party submitted any meaningful request for revocation of exemptions. Because the record of this proceeding was devoid of support for general revocation of exemptions, it is surprising that the Board proposed, in its Decision, a wholesale revocation of exemptions. *See* Decision at 7. There simply was no significant request or support for broad revocation of exemptions, and the Board's *sua sponte* proposal seeks to address a "problem" that does not exist. The Board should reject the proposal to revoke exemptions in this proceeding. *See id.*

B. If the Board Considers Revocation of A Specific Exemption, It Should Consider Only One Exemption at a Time, and Should Require a Well-Supported Evidentiary Showing That the Conditions that Supported the Granting of the Exemption Have Materially Changed.

Even if the Board were to consider revocation of an exemption in this proceeding – which it should not – there is no record to support such a revocation. The exemption provision of the statute requires that the Board *shall* issue an exemption when it finds, with respect to specific traffic or service that: (1) the regulation in question is not necessary to carry out the transportation policy; and (2) either the service in question is of limited scope, or the regulation

24 (discussion of exemption used to request that the Board consider Cemex's comments, even though one of the commodities it shipped is exempt; specific recommendations and requests for Board action did not include revocation of exemption).

⁹ The witness who mentioned revocation was a consultant, whose entire oral testimony on the issue consisted of a single clause of one sentence: "Also, as Awan suggested, the fuel cost should be reported as a separate line item in the URCS data and also I'd like to request that any actions that come out of this proceeding also apply on exempt traffic." Hrg. Tr. at 380 (testimony of S. Dearden).

in question is not necessary to protect shippers from the abuse of market power. *See* 49 U.S.C. § 10502(a). Thus, whenever the Board exempts certain traffic or service, it is following its mandatory duty to make such exemptions when a showing is made, on the basis of specific record evidence, that the predicate conditions are satisfied.

Given that the Board has a mandatory duty to exempt traffic and services that satisfy specified statutory criteria, it should revoke an exemption *only* when it finds those criteria are no longer satisfied for the exemption in question.¹⁰ Here, no party to this proceeding submitted *any* evidence in support of a request for revocation of a specific class exemption, and no party even suggested that *all* exemptions for classes of traffic be revoked.¹¹ Thus, there is no evidence in the record of this proceeding sufficient to support findings that the national Rail Transportation Policy requires revocation of a specific exemption, or that such revocation is necessary because the service is no longer of limited scope, or that shippers subject to the exemption are suffering from an abuse of market power.¹²

Moreover, the proposal would partially revoke *all* exemptions for classes of traffic, without any exemption-specific findings or determinations. Revoking all such class exemptions

¹⁰ The revocation provision states that the Board “may” revoke an exemption when it finds the application of a regulation is necessary to carry out the national transportation policy. 49 U.S.C. § 10502(d). Given the statute’s mandatory directive to grant exemptions “to the maximum extent consistent with [ICCTA],” however, the Board should exercise its discretionary revocation authority with caution and careful attention to the conditions and findings that required it to issue the exemption in question.

¹¹ The fact that no shipper has filed a petition to revoke a class exemption in order to challenge fuel surcharges or to seek a determination that existing rail fuel surcharges constitute unreasonable practices lends further support to the conclusion that broad-gauge revocation of class exemptions is not necessary. *See* Section 10502(d) (authorizing the Board to commence a revocation proceeding upon request of an affected party).

¹² The generalized findings in the final paragraph of the Decision’s discussion of its exemption proposal are not supported by evidence in the record, and are insufficient to support the revocation of any specific exemption, let alone all class exemptions.

at the same time without specific individualized analysis and findings regarding each exemption makes no more sense than exempting all traffic at once without specific analysis. Such a generalized revocation would be arbitrary, capricious, and contrary to law.

If the Board believes, with respect to a specific class exemption, that partial revocation might be appropriate, it may convene a proceeding to consider such revocation. Alternatively, if a customer believes a class exemption should be revoked in order to apply new fuel surcharge policies to its traffic, it may file a petition for revocation. Interested parties would then have an opportunity to submit evidence and argument, and the Board could make an exemption-specific determination, based on a full evidentiary record, whether revocation would be appropriate.¹³ For the reasons stated herein, however, the Board should not revoke any exemptions in this proceeding.

C. Board Action to Revoke Exemptions Is Also Unnecessary From a Commercial Perspective.

As a practical matter, there may be no need to revoke exemptions. Application of similar fuel surcharge programs to both regulated and exempt traffic has considerable merit. From a commercial standpoint, there would be advantages to CSXT customers who ship both regulated and exempt traffic if the same CSXT fuel surcharge program applied to both regulated and exempt commodities. As a purely commercial matter, CSXT will seriously consider applying a similar fuel surcharge to its public pricing of exempt and non-exempt traffic. CSXT urges the Board to monitor carrier actions following the issuance of its final decision to observe whether new fuel surcharge programs are adopted, and whether they are applied to exempt traffic.

¹³ Of course, any revocation necessarily could apply only prospectively. Retroactive application of an exemption revocation to conduct occurring during the period in which the exemption was in force would be unlawful and fundamentally unfair, and would render exemptions meaningless.

With respect to CSXT's existing contracts – virtually all of which incorporate tariff items by reference – CSXT does not read the Decision, or its longstanding policy with respect to contracts, to suggest in any way that the Board intends its actions in this proceeding to affect the carriers' rights to apply existing fuel surcharge programs to contracts.

By the same token, in the interest of informing the Board of CSXT's current planning, CSXT presently expects that its new fuel surcharge program will be based on more current prices of energy. As a result of re-basing to current HDF prices, the new program will result in lower fuel surcharges being added to reach the total transportation charges, which, as pointed out above, will be tailored to the market. As CSXT negotiates new contracts, it hopes to reach agreement with customers to apply its new fuel surcharge program, with adjusted base rates and other terms consistent with the level of the new fuel surcharge.

X. THE BOARD SHOULD ALLOW ADDITIONAL TIME FOR CARRIERS TO IMPLEMENT PROCEDURES FOR APPLICATION OF NEW POLICIES TO INTER-LINE MOVEMENTS.

As a network industry, the railroads must work together to establish joint rates for movements over two or more carriers' lines. Customers on CSXT east of the Mississippi River want to buy and sell their products from and to suppliers and customers in the West. Shippers served by CSXT in Ohio may wish to sell their goods to customers served only by Norfolk Southern in Alabama. Most shippers do not relish the prospect of two, three or more freight bills from the railroads for a single shipment. When the railroads establish a joint rate for a movement, the revenues are divided by their established accounting systems based on their agreed upon revenue divisions. This system generally works well to the benefit of railroads and shippers alike.

Today, with each railroad independently establishing its own fuel surcharge, accounting protocols (and the commercial reality that fuel surcharge is just one element of the total freight

rate) provide that the surcharge of the carrier that “publishes” the joint rate applies. The fuel surcharge is thus applied to the joint rate and is divided among the participating railroads in accordance with the respective divisions of the base freight rate.

If adopted, the Board’s proposed change in policy on calculating fuel surcharges as a percentage of base rate will change the mechanism of each carrier’s independently set fuel surcharge. However, it is not clear how the Board anticipates that carriers will divide fuel surcharges on joint line moves. Of course, if the Board adopts a policy statement allowing carriers flexibility to adopt their own independent programs consistent with that policy guidance, the industry might well adopt an accounting convention that would divide fuel surcharge revenues among roads participating in a joint line movement on some basis other than mileage. CSXT currently favors continuing the system of dividing whatever fuel surcharge is applied according to revenues. However, it may not be workable or appropriate for the Board to require mileage-based surcharges, and at the same time require percent-of-revenue divisions. To do so would enrich some carriers at the expense of others, with no rational basis for such bias.

From CSXT’s perspective, extending some commercial benefit to our short line partners might well make sense. But, CSXT submits, a private commercial decision made on a case-by-case basis is fundamentally different from, and preferable to, an imposed regulatory standard.

If the Board issues its final decision in the form of a policy statement, CSXT suggests that the Board allow the rail industry 60 days to report on whether an accounting convention for inter-line movements can be reached. On the other hand, if the Board elects to issue rules mandating specific regulatory requirements, CSXT submits that at least 120 days will be required to assess whether a system of mileage-based divisions of fuel surcharge can be developed. The Board should stay the effective date of application of any new requirements to

inter-line movements until appropriate and effective new information systems can be agreed-upon, designed and tested.

XI. THE BOARD'S FINAL DECISION SHOULD BE FLEXIBLE AND PROVIDE ADEQUATE TIME FOR IMPLEMENTATION AND TRANSITION.

CSXT believes that the Board is attempting to strike a balance between conveying a message to the rail industry that the time has come to change direction with respect to the calculation of fuel surcharges, and at the same time avoiding a mandate of specific steps that destroy individual carrier commercial flexibility. CSXT appreciates both the difficulty of striking this balance, and the Board's willingness to approach this critical area of commercial activity without imposing inflexible regulatory mandates.

As CSXT has explained, development and implementation of a new mileage-based fuel surcharge program will require many changes and revisions to CSXT's systems and processes, as well as the design and implementation of some entirely new processes. Similarly, the Board's proposed reporting requirements would require CSXT to develop new processes for collecting, capturing, and analyzing data and information. The challenges of implementing some of the Board's proposals would be significant, and should not be underestimated. Indeed, as discussed above, it may not be feasible for CSXT to fully comply with some of the proposed requirements. In all events, designing and implementing systems to comply with the Board's proposals will take significant time and resources. *See Appendix* (explaining CSXT's concerns about reporting proposals and suggesting that Board convene technical conference to address related issues and concerns).

Similarly, CSXT's customers may require time to adjust their accounting, payment, and auditing systems to accommodate new fuel surcharge calculation methodologies. Particularly for

smaller customers, such systems modification and adjustments may require significant time and effort.

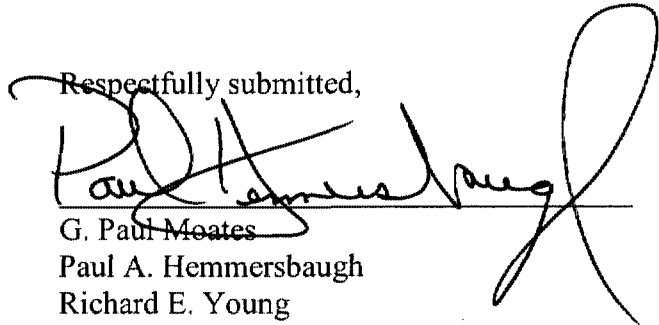
Because of the time, effort, and uncertainty involved in implementing the type of measures the Board has proposed, the Board should provide a reasonable transition period for carriers and their customers to comply with any new policies and requirements. CSXT suggests that a minimum reasonable time would be 120 days from the date of issuance of the Board's final decision, and therefore requests that the Board provide that the effective date of new fuel surcharge requirements will be at least 120 days after the final requirements are published in the Federal Register.

CSXT also requests that any new fuel surcharge policies provide for sufficient flexibility to allow carriers to satisfy the concerns and policies underlying those requirements in the manner that best suits their individual circumstances. Any new policies should focus on function, not on form. A carrier's fuel surcharge program should be evaluated based upon whether it satisfies the Board's policy objectives and not upon the specific methodology used to meet those objectives. If, for example, certain reporting requirements prove technologically impracticable or infeasible for a carrier, the Board's fuel surcharge guidelines and policies should allow that carrier to develop alternative reports that serve the underlying purpose of the reporting requirements. To take another example, if, despite reasonable efforts, carriers are not able to develop compatible methods for calculating and billing fuel surcharges on inter-line movements by the effective date of the new policies, the Board should be prepared to postpone the effective date of those policies until a workable system can be implemented.

In sum, CSXT requests that the Board proceed cautiously in adopting any new policies or guidelines and take care to minimize potential unintended consequences of any such new

policies or guidelines for carriers, their customers, and the rail and intermodal transportation system; and that any new policies or guidelines the Board finally adopts in this proceeding be flexible and practical in design, and applied pragmatically.

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.

G. Paul Moates

Paul A. Hemmersbaugh

Richard E. Young

Sidley Austin LLP

1501 K Street, N.W.

Washington, D.C. 20005

(202) 736-8000

(202) 736-8711 (Fax)

Ellen M. Fitzsimmons
Peter J. Shudtz
Paul R. Hitchcock
Mark S. Hoffmann
Steven C. Armbrust
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202

Attorneys for CSX Transportation, Inc.

Dated: October 2, 2006

APPENDIX

CSXT'S CONCERNS REGARDING THE BOARD'S REPORTING PROPOSALS

CSXT¹ agrees with the Board that fuel surcharge reporting is in the best interest of the industry and its customers, and CSXT will make every effort to comply with the Board's final reporting requirements. However, CSXT has a number of specific concerns about the technical and administrative feasibility of the Board's proposal, which it describes in this Appendix. CSXT suggests that the Board convene a Technical Conference among interested parties to discuss reporting requirements, data systems capabilities, and other technical issues such as those discussed in this Appendix. An open discussion among knowledgeable representatives of all interested parties would facilitate a more rapid implementation of useful reports to the benefit of all concerned.

A. Reporting Periods

As an initial matter, CSXT believes that monthly reporting will create inconsistencies among the reports of the Class I railroads, and generate data that are not comparable. Therefore, CSXT respectfully requests that the Board consider quarterly reporting, which it believes would better correlate with reporting requirements imposed by the Securities Exchange Commission (the "SEC"). The SEC requires most large publicly held companies to file financial information within 40 days of its quarter-end. CSXT believes that providing fuel surcharge information requested by the Board in conformance with the SEC's reporting schedule will allow this important public information to be readily available simultaneously, and would greatly reduce the inconsistencies between Class I's that would follow from a monthly reporting requirement.

¹ Capitalized terms have the same meanings as in our Comments.

The reason for this potential inconsistency is that under Generally Accepted Accounting Principles (“GAAP”), there are two types of reporting periods – calendar and fiscal. CSXT follows a fiscal period end, while the other Class I railroads follow a calendar period end. This disparity often results in a different number of days in a given fiscal month/period for CSXT versus the other Class I’s. For example, in August 2006, CSXT expenses and revenues would be reported on a 4-week fiscal period ending August 25. All other Class I railroads’ information was reported for the 5-week calendar period ending August 31. Although both reporting methods are acceptable under GAAP, CSXT believes the disparity among Class I railroads’ data created by a monthly reporting requirement could result in confusion and difficult comparisons for all outside parties. However, if the Class I’s were permitted to report this information quarterly, the information provided by CSXT would be much more consistent with the other Class I’s (regardless of calendar versus fiscal period).

In addition, fuel costs and surcharge revenues represent potentially material financial information that is currently reported to the SEC, and thereby to the investing public, on a quarterly basis. Making this information publicly available on a monthly basis as proposed by the Board would effectively disclose portions of costs and revenues in piecemeal fashion, which could create confusion and possibly even misinform investors and analysts, who are making investment decisions and generating earnings estimates.

For example, CSX Corporation, the parent of CSXT,² reports on a consolidated basis actual total fuel costs and estimated fuel consumption (per millions of gallons) in quarterly SEC

² As the Board knows, CSX Corporation is a holding company. Rail transportation services are provided only through CSX Corporation’s wholly-owned subsidiary CSXT, with intermodal services being provided through CSX Corporation’s wholly-owned subsidiary CSX Intermodal, Inc. It should be noted that CSX Corporation does not publicly file separate financial statements for these two entities, but instead files consolidated financial statements with the SEC.

filings. Also, CSX Corporation discloses the percentage increase in revenue per unit which was attributable to fuel surcharge during each quarter. If CSXT were required to report monthly fuel surcharge revenue, an investor might use the reported monthly fuel surcharge figures to attempt to “back into” total revenue for that month, thus attempting to project future financial performance for that quarter. For example, assume that CSX Corporation reported to the SEC that fuel surcharges were 15% of revenue per unit growth for Quarter 1 of some year. An investor might attempt to infer total revenue for each month of Quarter 2 from the 15% figure and reported monthly fuel surcharge revenue. We are concerned that this kind of practice might well lead to incorrect assumptions about future corporate earnings performance. This could result in inaccurate consensus estimates published by Wall Street analysts on what the company’s future earnings per share might be. This is of concern, not just to CSXT and the Board, but to customers as well; any confusion in the investment community might affect access to the capital markets that are so necessary to needed infrastructure investment in the rail network.

CSXT understands the Board’s interest in detailed reporting of fuel-related information, and it supports the Board’s intentions and goals to increase understanding of the fuel costs that CSXT and other railroads are facing. We respectfully request that the nature and format of reports required should allow comparability among the railroads, and believe that quarterly disclosure on the SEC’s reporting schedule would solve these issues.

B. Fuel Surcharge Data

CSXT does not currently collect fuel surcharge data in the aggregated and separated categories apparently contemplated by the Decision, and we believe we would need to develop new systems to collect and report that data in the proposed form. CSXT’s systems are designed to extract and report on its portions of fuel surcharge revenues on joint line movements. The

company does not currently have the ability to identify total fuel surcharge amounts billed on interline traffic, although it is likely that such data could be compiled if CSXT's systems were redesigned.³ Further, CSXT does not have a program in place to extract, from interline settlements with smaller carriers, the portion that is attributable to divisions of fuel surcharges. Again, CSXT's information systems would have to be redesigned to develop and report this information, and we ask that the Board give the industry 120 days to accomplish this task once the Board's reporting requirements are finalized.⁴

C. Clarification of Requested Revenue Information

After careful review of the Appendix to the Decision, and supplementing its filing with the Board on September 20, 2006 (the "September 20th Filing"), CSXT also respectfully requests the Board to (i) clarify the requested revenue information sought in lines 3, 4 and 5 of the Appendix to the Decision and (ii) discuss in a Technical Conference the specific information sought in light of the Board's goals.

CSXT will not repeat the issues raised in its September 20th Filing regarding the difficulties it currently has with the Board's proposed reporting requirements. For clarity, however, CSXT is asking the Board to explain what specifically it would like the railroads to report as fuel surcharge "revenue." The terms "revenue" and "total revenue" (used in lines 3, 4, and 5) are subject to different possible interpretations. GAAP, CSXT's internal management reporting, and arrangements with smaller railroads (with line haul vs. switching status) would suggest different data that might be contemplated. For example, consider a UP-CSXT-Short

³ As discussed in Item C. to this Appendix, reporting all fuel surcharge revenue on interline movements would result in a double-counting of such revenue on interline movements with one or more other Class I railroads.

⁴ If it would be helpful to the Board, CSXT would be quite willing to make periodic progress reports to the Board, or to inform the Board's staff informally on our progress during this time period.

Line movement where CSXT is the billing carrier. CSXT's accounting systems capture the CSXT portion of the freight charges, including both (a) CSXT's division of the joint rate and (b) CSXT's share of the fuel surcharge, and treat that as "revenue." Clearly, (a) is not to be included in the Reports. However, the Board may be intending that CSXT report the entire portion of the freight charges attributable to fuel surcharge – not just (b). It would take considerable systems redesign to do this. But more fundamentally, this interpretation would result in CSXT reporting the UP portion of revenue attributable to fuel surcharge – and in UP reporting the CSXT portion of revenue attributable to fuel surcharge (a double count). Depending upon the purpose of the report, either approach might be considered useful. CSXT wants to meet the Board's goals here, so further clarification would be very helpful.

An additional concern is month-to-month comparability between fuel costs and fuel surcharge revenues. CSXT's fuel surcharge tariffs (which are incorporated in most customer contracts) calculate the then-current month's fuel surcharge based on two months-old West Texas Intermediate Crude ("WTI") data.⁵ This two month "lag" is acceptable accounting according to GAAP, but could cause confusion and incorrect comparisons with other information available to various parties. For example, under its tariffs and customer contracts, CSXT bases its fuel surcharge for September on WTI prices for July. As a result, requiring month-by-month reporting of fuel surcharges and fuel expenses would give a misleading picture of the degree of correlation between the two, because the surcharges are not based on the expenses for the same month. Converting from WTI to HDF will not change this "lag".

⁵ CSXT publishes separate fuel surcharge items in its two tariffs of general application for Coal and for all other regulated traffic. However, please note these fuel surcharge items are identical.

D. Coverage By Ton-Miles

One of the Board's proposed reporting requirements is based on Revenue Ton Miles ("RTMs"). CSXT suggests that alternative measures of fuel surcharge coverage be used instead. Because most cars are not weighed for pricing purposes, CSXT does not have precise revenue ton-mile data like that apparently contemplated in the Decision. While CSXT develops RTMs for R-1 reports using estimated tons per car by commodity, this is not done by actual car weight. Nevertheless, CSXT believes that those estimated car weights, which are based on solid statistical study and analysis, provide an accurate assessment for a multiplicity of purposes. But matching RTM data on a car-by-car basis to a data base indicating whether or not a fuel surcharge was applied is a daunting task.

Below, CSXT suggests alternative measures of coverage that should be equally, or more informative, and suggests that the Board approve them for use in place of RTMs.

CSXT suggests that reporting either car miles subject to fuel surcharges or carloads subject to fuel surcharges would be as effective in evaluating fuel surcharge coverage as RTMs. All three offer a measure of volume and -- intermodal aside -- the average tonnage per car on CSXT is not markedly different across commodity groups at the macro level.

CSXT has preliminarily determined that it would be more manageable and workable to use carloads to monitor and report fuel surcharge coverage. Car miles would be more difficult to collect. CSXT does not currently track whether a fuel surcharge is payable in a database that can be matched to a mileage per car record. Compliance with this proposal would require potentially significant systems and technology development. Car miles, if defined as the mileage applied for the calculation of that portion of the total freight charges attributable to fuel surcharge, could probably be developed. CSXT is currently considering a highway mileage master table between zones, and CSXT hopes that the Board will permit that approach. Fuel surcharges must be

calculated by billing systems between the time shipping instructions are received and the time the freight bill is prepared and sent to the customer. The mileages from the new table would be available and could be used to develop a car mile report.⁶

Moreover, CSXT submits that attempting to track fuel surcharge “coverage” by RTMs or even car miles would not materially improve the Board’s ability to track the percentage of traffic “covered” by its fuel surcharge. Administratively, carload information is an effective measurement against which to gauge coverage. With fuel surcharge calculated as part of the freight billing process, CSXT’s systems already identify carloads to which fuel surcharge is to be applied.

If, despite these considerations, the Board decides to require RTM reporting for fuel surcharge purposes, CSXT urges the Board to make it clear that estimates used for R-1 reports may also be used as a basis for the contemplated fuel surcharge reports.

E. Timing of Availability of Data

CSXT’s systems follow a settlement process to complete and correct data from each period. This process ensures that data applicable to movements still in transit at period’s end are correctly accounted for. It also permits correction of errors that inevitably creep into the massive amounts of data collected. For example, movement-specific information for a shipment that begins late in Period 1, but that does not arrive at destination until Period 2, is estimated in Period 1 reporting according to established protocols that conform to GAAP. The movement is completed in Period 2, the actual data is reconciled against the estimate, and corrections are made. This, of course, occurs up to 4 or 5 weeks later as data is processed for Period 2. A

⁶ Obviously, however, there would be some discrepancy between an approach that uses zone-to-zone highway mileages as applied for fuel surcharge purposes and reporting of mileage-derived data in other contexts.

corrections process is applied during Period 3 to correct any identified errors for Periods 1 and 2. Thus, only after the passage of approximately six weeks after the end of Period 1 can the Period 1 information be considered final, or essentially final.

If the Board were to adopt a quarterly reporting process with reports due 40 days after quarter's end, the maximum reliability of the reports could be assumed.

F. Technical Conference

Regardless of how the Board decides to move ahead with technical issues with respect to reporting requirements, CSXT suggests that the Office of Economics, Environmental Analysis and Administration convene a Technical Conference of information systems experts to discuss what data is available, in what formats the data is available, and how to ensure consistency in reporting this information. Possible agenda items for such a Technical Conference might include: data availability, systems capabilities, detailed definitions of data to be reported, customer needs and uses, addressing lag times between fuel cost changes and fuel surcharge changes, and other issues the Board's staff identifies as it reviews the comments of all parties in this proceeding.