

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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CONSUMERS ENERGY COMPANY

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42142

**REPLY TO CONSUMERS ENERGY COMPANY'S
PETITION FOR RECONSIDERATION**

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TABLE OF CONTENTS

	<u>Page</u>
I. PREFACE AND SUMMARY OF ARGUMENT	i
II. CONSUMERS’S PETITION DOES NOT ESTABLISH GROUNDS TO RECONSIDER ANY ISSUE.....	1
A. The Board Correctly Calculated the Mileage Operating Characteristic For The Issue Movement.	1
B. The Board’s Determination That K-300 Petroleum Coke Trains Do Not Traverse The CERR Network Is Supported By The Record Evidence.	2
C. The Board Did Not Materially Err In Calculating Intermodal Lift Costs.....	5
D. The Board Did Not Err In Rejecting Consumers Bridges That Dropped Piers in Traffic Lanes.	6
E. The Board Did Not Materially Err By Rejecting Consumers’s Equity Flotation Cost Evidence, and Consumers Has Not Presented New Evidence Warranting Reconsideration.....	7
F. The Board Did Not Err By Denying Consumers’s Revenue Adequacy Claim.	9
III. CONCLUSION.....	14

I. PREFACE AND SUMMARY OF ARGUMENT

None of the issues raised in Consumers's Petition for Reconsideration ("Petition") satisfy the Board's standards for granting reconsideration. *See* 49 C.F.R. § 1115.3(b). Rather than demonstrating "material error" in the *Decision*¹ or showing changed circumstances or new evidence that could materially affect the analysis, Consumers either repeats arguments that the Board has rejected or makes unwarranted criticisms of the *Decision*'s analysis. The Board should reject Consumers's argument on each of these issues.

First, Consumers argues that the Board's calculation of the loaded mileage operating characteristic for the issue traffic should exclude six miles of CSXT track that are used by BNSF crews transporting westbound issue traffic trains to an agreed handoff at 71st Street. Consumers's Petition makes arguments nearly identical to those that the Board rejected in the *Decision*. The *Decision* correctly concluded that Consumers's argument would bias the URCS calculations by excluding CSXT-owned facilities over which the issue movement is transported and that Consumers's approach was inconsistent with how Consumers itself treated this segment in its ATC calculations for non-issue traffic. The Board should adhere to that reasoning here.

Second, Consumers challenges the Board's determination that certain coke trains did not move over CERR lines and thus should be excluded from the SARR traffic group. Consumers's claim that a single milepost reference discussed in the Board's decision is sometimes associated with Barr Yard does not undermine the Board's conclusion. In fact, as demonstrated below, the evidence is overwhelming that the coke trains at issue did not traverse the SARR.

Third, Consumers claims that the Board miscalculated intermodal lift costs, but Consumers's criticism is based on a misreading of the *Decision*, which clearly and correctly held that Consumers omitted several categories of lift costs. According to Consumers, the *Decision*'s reference to the omission of "several operating expenses, including clerical support and utilities"

¹ *Consumers Energy Co. v. CSX Transp., Inc.*, STB Docket No. 42142 (STB served Jan. 11, 2018) ("*Decision*").

must only comprise clerical support and utilities. But this assertion cannot be squared with the basic meaning of the word “including.”

Fourth, Consumers claims that the Board erred by rejecting Consumers’s bridge designs that would require mid-bridge piers to be dropped over sidewalks or roadways. But the Board rightly determined that these designs were infeasible. Consumers’s generalized Rebuttal evidence that some railroad bridges in Chicago have piers in the median plainly failed to meet its specific burden here, which was to show that the particular bridge designs it proposed on Opening—and the particular piers that those designs assumed—would not obstruct traffic over the particular roads and sidewalks traversed by those bridges.

Fifth, the Board did not err by rejecting the equity flotation costs proposed by Consumers. Indeed, Consumers fails to address either of the Board’s grounds for finding that its evidence was unsupported. It offers no response to the Board’s reasoning that the Lehman Formula is “largely ignored today,” and it does not contest that it provided no real-world examples of the costs incurred in private placement. Consumers’s argument that a direct listing proposed by Spotify constitutes new evidence warranting reconsideration is equally meritless. Spotify’s exploration of an unproven mechanism in a unique transaction in which it is not actually raising any capital is not a reasonable model for the CERR’s equity flotation costs.

Finally, the Board did not materially err by rejecting Consumers’s revenue adequacy complaint. The *Decision* offered ample support for the Board’s finding that CSXT is not revenue adequate at this time, and the Board should reject the Petition’s request to reweigh the evidence and revisit that finding.

II. CONSUMERS’S PETITION DOES NOT ESTABLISH GROUNDS TO RECONSIDER ANY ISSUE.

A. The Board Correctly Calculated the Mileage Operating Characteristic For The Issue Movement.

Consumers’s Petition first argues that the Board erred by calculating the loaded miles operating characteristic for the issue movement by beginning at 22nd Street (where Consumers trains enter CSXT’s network) instead of by beginning at 71st Street (the point at which BNSF crews hand loaded trains off to CSXT crews). Consumers Recon. Pet. at 1. But the Petition fails to acknowledge what the Board recognized, which is that Consumers’s approach would artificially bias the URCS calculations by ignoring the six miles of CSXT lines between 22nd Street and 71st Street over which loaded issue movements are transported (not to mention the movements of empty trains by CSXT crews that proceed both over that line and over three miles of BNSF track to Cicero).² The Board correctly concluded that because “the issue traffic and certain non-issue traffic move over six miles of CSXT’s facilities between 22nd Street and 71st Street[, b]oth the costs and revenues for those movements should be calculated from 22nd Street.” *Decision* at 282. And the Board further observed that including the 22nd Street-71st Street portion of CSXT’s network in the issue traffic distance calculations was consistent with how that segment was treated in Consumers’s ATC calculations. *Id.*; see CSXT Reply at II-A-5-6 (showing that Consumers gave the CERR ATC credit for the mileage between 22nd Street and 71st Street for nonissue trains that—like the issue traffic—were operated by BNSF crews over that segment and interchanged at 71st Street).

Consumers does not address the *Decision*’s reasoning—let alone show that it contains a material error. Consumers simply repeats its Rebuttal arguments that its approach is consistent

² One could easily imagine an opposite scenario, in which loaded trains were picked up by CSXT crews in BNSF’s Cicero Yard and empty trains were handed back to BNSF at 71st Street. If that were the case, Consumers surely would be arguing that the proper beginning point for the issue movement was at 22nd Street when it crossed onto CSXT’s lines and not at Cicero Yard. And it would be right.

with a 1989 URCS operating manual and that the Board can treat the 22nd Street-71st Street portion one way for issue traffic MMM calculations and another way for ATC calculations.³ The Board was right to reject these arguments and to hold that “traffic (whether issue or non-issue) should be handled consistently in the URCS Phase II program” whether “for ATC purposes or for MMM.” *Decision* at 282.

B. The Board’s Determination That K-300 Petroleum Coke Trains Do Not Traverse The CERR Network Is Supported By The Record Evidence.

Consumers asks the Board to reconsider its conclusion that 114 base-year petroleum coke trains should be removed from the CERR traffic group because those trains do not move over any lines replicated by the CERR. *Decision* at 28-33. Consumers claimed that those trains do, in fact, traverse the Barr Subdivision, based on certain CSXT train event data which (incorrectly) identified the destination as either “DD2” or “CHICBO.” *See Decision* at 29-30. Consumers asserts that the Board erroneously excluded the K-300 trains “on the grounds that ‘CHICBO’ and ‘DD2’ are not points in Barr Yard.” Consumers Recon. Pet. at 3.

Consumers is mistaken. The Board did not exclude the K-300 trains based on a finding that “DD2” and “CHICBO” are not, in fact, points in Barr Yard.⁴ Rather, the Board rejected Consumers’s claim that the K-300 trains actually terminate in Barr Yard. *See Decision* at 30 (citing “inconsistency between the intermediate station data and Consumers’s assumption that the destination is Barr Yard.”); *see also id.* at 31 (“the waybill data is correct, and it is Consumers’s assumption that the trains terminate at Barr Yard that is incorrect”). The Board’s finding in this regard was supported by the record evidence, including train event data

³ Compare Consumers Recon. Pet. at 1 & n.6 (claiming approach was consistent with instructions in 1989 URCS Phase III user’s manual) with Consumers Reb. at II-3 n.9 (same); compare Consumers Recon. Pet. at 2 (arguing that Consumers could treat 22nd-Street-to-71st-Street segment differently for issue traffic and for non-issue ATC calculations) with Consumers Reb. at II-4-5 (same).

⁴ The Board observed only that “neither milepost DD2 nor designation CHICBO can be confirmed as Barr Yard from the workpapers relied upon by Consumers.” *Decision* at 30.

documenting the intermediate points along the K-300 trains’ route of movement, waybill data identifying the actual destination as Indiana Harbor, IN (which is located on CSXT’s Lake Subdivision, not the Barr Subdivision replicated by CERR), and CSXT contracts governing the petroleum coke traffic. *Id.* at 31-33. Indeed, the notion that unit trains of petroleum coke would be “destined” to Barr Yard rather than to an industrial receiver is absurd.

The Board’s conclusion that “[i]t does not seem probable or likely” that K-300 trains would traverse the Barr Subdivision to reach Indiana Harbor (*id.* at 32) is confirmed by the train event data. Table 1 below identifies the number of base year K-300 trains and other westbound trains in the CERR traffic group that reported passing intermediate stations west of Curtis, IN on either the CSXT Lake Subdivision or the Barr Subdivision.⁵

TABLE 1
CSXT Trains Reporting Intermediate Stations West of Curtis

Station	Milepost	Westbound CERR Trains to/through Barr Yard ⁶	Excluded K-300 Trains
PINEJT	BIA248	3,100	106
Stations on Lake Subdivision Route			
YOUNGS	BIA262	0	106
WHITNG	BIA263	0	105
Stations on Barr Yard Route			
CLRKJC	DCC 0	3,170	0
CALTOW	DCC 2	3,227	0
REPUXB	DCC 3	3,309	0
STATLN	DCC 6	3,386	0
CALPAR	DCC 7	3,474	0
CPGROV	DCC 10	3,490	0

⁵ Table 1 updates CSXT Reply workpaper “Examining_CERR_TrainRoutings.xlsx” tabs “Data_OnSARR_Curtis-End” and “Summary_OnSARR_Curtis_LastOS” by expanding the number of stations reported for each train from 10 stations to 25 stations (by changing the SQL code in tab “SQL” row 33 from “a.Rk_Asc<=10” to “a.Rk_Asc <=25”). The train totals in Table 1 are based on Consumers Opening workpapers, SQL Tables “wTrainSheets,” “aSequencedTrainMovements,” “aTrainList_2014_V05,” and “aCerr03NetworkLocations.”

⁶ Includes trains moving Off-SARR at Barr Yard or a CERR point further west (*e.g.*, Blue Island IHB Connection, 59th Street, 22nd Street).

As Table 1 shows, virtually all of the approximately 3,500 non-coke CERR base year westbound trains reported passing at least one intermediate station west of Pine Junction on the Barr Subdivision—indeed, the vast majority of those trains reported passing each of the intermediate stations listed in Table 1. However, not a single base year K-300 train reported passing any intermediate station along the Barr Subdivision west of Pine Junction. Instead, as Table 1 indicates, upon reaching Pine Junction, every K-300 train reported further movement via stations located along CSXT's Lake Subdivision, which serves Indiana Harbor, IN. These data—which are found in Consumers' own Opening workpapers—flatly contradict Consumers' claim that the K-300 trains traversed the Barr Subdivision.

FIGURE 1

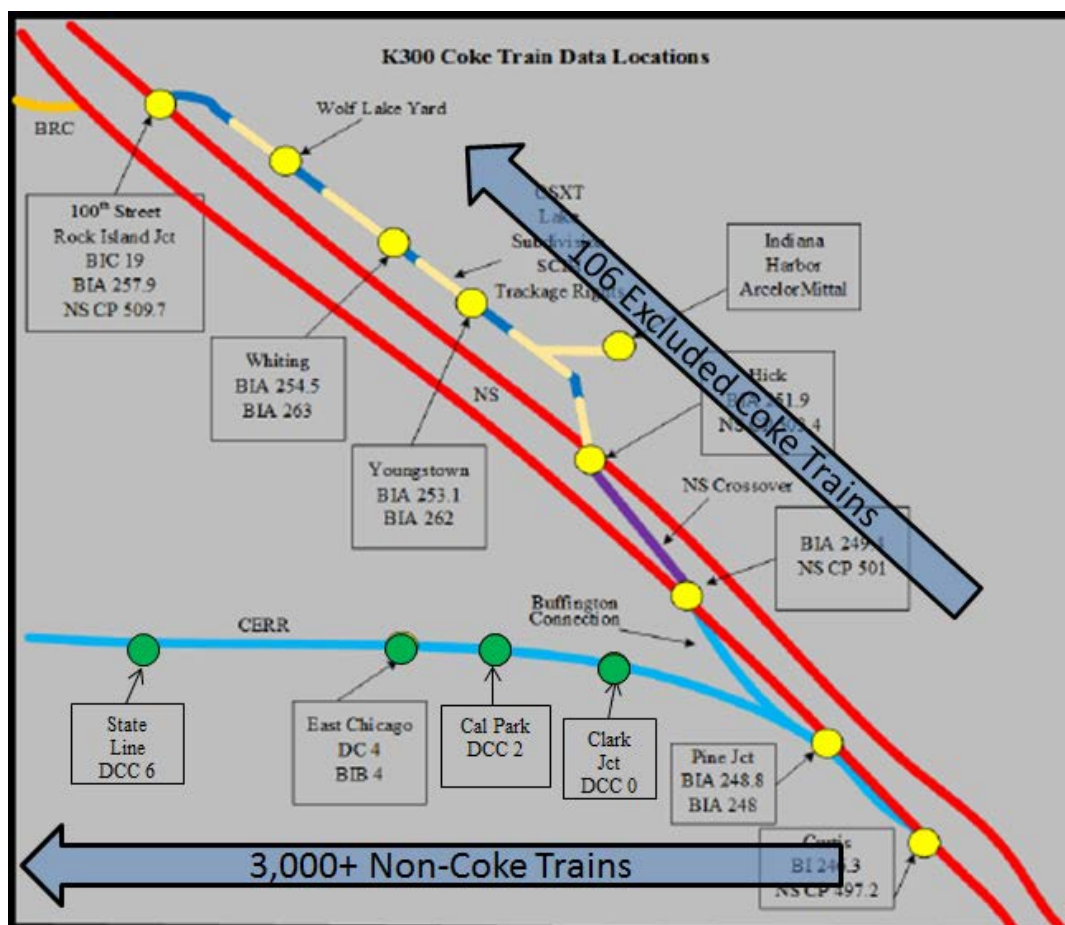


Figure 1 updates the diagram at page 33 of the *Decision*, by adding the stations along the Barr Subdivision listed on Table 1. As Figure 1 graphically demonstrates, none of the K-300 trains selected by Consumers as part of the CERR traffic group traversed any portion of the CERR. Figure 1 also refutes Consumers's suggestion (Consumers Recon. Pet. at 6-7) that the payment of trackage rights fees to NS for the K-300 trains proves that those trains could not have operated over CSXT's Lake Subdivision. As Figure 1 clearly shows, CSXT trains can access the Lake Subdivision via a crossover from the NS trackage rights line.

C. The Board Did Not Materially Err In Calculating Intermodal Lift Costs

Consumers failed to include all of the lift costs that would be incurred by the CERR, "including" clerical support and utilities that the agency added in the *TPI* case. *See Decision* at 71. The Board therefore added "CERR's proportional share of the excluded operating expenses incurred by CSXIT identified in CSXT's reply at Table III-A-3." *Id.* Consumers claims this was a material error, arguing that the Board "overstated the costs by including all expenses that were part of a CSXT adjustment that the Board rejected." Consumers Recon. Pet. at ii-iii.

Consumers is misreading the *Decision*. It wishes that the only lift costs the agency sought to add into the analysis were clerical support and utilities, the categories identified in the *TPI* case cited by the Board. *Id.* at 7-8. But the *Decision* said that Consumers excluded several operating expenses, "including clerical support and utilities." *Decision* at 71. Not to belabor the obvious, but if one said that "several toys were in the box, including a bat and a ball," it would be silly to claim that the only toys in the box must have been the bat and the ball. Moreover, in *TPI* the SAC analysis included all of the costs of the intermodal facility, so there was no reason to discuss anything other than missing costs for clerical support and utilities. The *Decision* stated unambiguously that it was including all of the missing lift costs identified in Table III-A-3 (not just two of ten categories) and Consumers is thus flatly wrong to claim that "workpaper

calculations conflict with the *Decision* itself, and are materially erroneous.” Consumers Recon. Pet. at 8.⁷

D. The Board Did Not Err In Rejecting Consumers Bridges That Dropped Piers in Traffic Lanes.

Consumers also challenges the Board’s decision that a number of Consumers’s bridge designs were infeasible because they would require mid-bridge piers to be dropped in ways that obstruct sidewalks or roadways. *Id.* at 8-9. Consumers claims that the Board failed to consider Rebuttal evidence “demonstrating how the bridges could be constructed to not obstruct traffic,” but the evidence to which Consumers points shows nothing of the kind. *Id.* at 8.

Consumers never provided evidence that the particular bridge designs it proposed on Opening—and the particular piers that those designs assumed—would not obstruct traffic over roadways. What Consumers presented on Rebuttal was generic evidence that some railroad bridges in Chicago have piers in the median and that it is possible to design roadways and bridges in a way that piers do not interfere with traffic. But that misses the point. At issue here are particular CSXT bridges over roadways that the CERR would replicate and that do not have piers in the same places that Consumers proposes. Consumers thus had the responsibility to show that its designs for these particular bridges would not place piers in a way that would obstruct vehicle or pedestrian traffic over roadways and sidewalks. But Consumers provided no evidence on Opening or on Rebuttal that made such a particularized showing.

Indeed, Consumers’s Petition only illustrates its failure to provide specific support for its bridge design. The only narrative evidence that the Petition can cite are a few sentences making the general point that many railroad bridges over roadways and sidewalks have columns on the edge of the road and median. *See* Consumers Recon. Pet. at 9 n.38 (citing Consumers Reb. III-F-

⁷ Consumers also points to the general lift fee on the CSX website, but it failed to present this evidence in its Rebuttal when CSX challenged the lift fees (and the new evidence is thus inadmissible on reconsideration), offers no explanation for why that figure is relevant, and cannot change its entire theory on reconsideration. It claimed to be stepping into the shoes of CSXT and must therefore pay what CSXT pays.

100-02). But Consumers could point to no narrative evidence explaining why its particular proposed designs would place piers in a way that would not interfere with the flow of pedestrian or vehicle traffic. Its workpapers do not rescue its argument either. Consumers cites two cell entries in its Rebuttal bridge spreadsheet, but these entries show only that Consumers made conclusory assertions about the feasibility of its bridges (*e.g.*, “Proposed arrangement will work”) that the Board specifically rejected in its workpaper. Similarly unconvincing are the two pdf workpapers Consumers cites that supposedly show possible locations for placing piers for two bridges. In “Layout DC27.45.pdf,” Consumers simply drew lines between traffic lanes at varying angles in an apparent attempt to show where piers could be dropped. The resulting crazy quilt of 13 differently-shaped spans patched together at odd angles is absurd, and it proposes dropping multiple piers in the midst of multilane highways. “Layout DC24.97.pdf” similarly shows that Consumers proposes to drop piers on sidewalks on either side of the bridge where none exist today.

It of course is possible to design bridges over roadways that place piers in medians in a way that allows an acceptable flow of vehicle and pedestrian traffic. But such bridges often have more complex designs and higher costs, and they require careful coordination with localities maintaining the roadway being crossed. Consumers provided no evidence from which the Board could conclude that its CERR bridges over these roadways were designed in a way that could accommodate existing patterns of vehicle and pedestrian traffic, and the Board did not materially err by rejecting Consumers’s designs for those bridges.

E. The Board Did Not Materially Err By Rejecting Consumers’s Equity Flotation Cost Evidence, and Consumers Has Not Presented New Evidence Warranting Reconsideration.

Consumers’s assertion that the Board materially erred by rejecting its evidence on equity flotation costs lacks any merit. Consumers criticizes the Board for finding that the equity flotation costs proposed by Consumers were “unsupported,” *Decision* at 268-69, but it fails to address either of the reasons for the Board’s conclusion. The Board first observed that the “Lehman Formula” Consumers relied on to support its evidence “is largely ignored today.” *Id.* at

268. It then held that Consumers failed to “provide real-world costs incurred in private placements or M&A transaction fees as evidence to support its argument.” *Id.*

Consumers fails to address either of the Board’s grounds for finding that its evidence was unsupported. It offers no response to the Board’s reasoning that the Lehman Formula is “largely ignored today,” and it does not contest that it provided no real-world examples of the costs incurred in private placement. This failure to address the grounds for the Board’s decision dooms Consumers’s claim that the Board committed a “clear error.” And Consumers’s efforts to bolster the record now with additional evidence about M&A transaction fees—after the Board already gave it a second chance to submit equity flotation cost evidence⁸—should be rejected. The 2014 *New York Times* article about fees for mergers and acquisitions that Consumers cites should be disregarded, both because such fees are irrelevant to a new SARR that is raising cash for initial operations and because this evidence was plainly available to Consumers when it filed both its original and its supplemental evidence.

In the same vein, Consumers’s argument that a direct listing proposed by Spotify constitutes new evidence that warrants reconsideration is meritless. The only cited new evidence is a *Wall Street Journal* article about a direct listing that Spotify is exploring in an attempt to avoid regular IPO fees, which the article itself states are typically as much as 7%. Not only is Spotify far larger than the CERR (Spotify was recently valued at roughly \$20 billion), but the company also will not be raising any cash in the direct listing. The CERR, of course, would very much need to raise capital to finance construction. Spotify’s exploration of an unproven mechanism to serve its unique needs is not a reasonable model for the CERR.

Perhaps more fundamentally, Consumers’s approach was flawed because it sought to combine a low equity flotation cost from a private placement with the low cost of equity from a public placement. CSXT Supp. Reply Ex. III-G-1, III-G-2. The Board chose not to address this

⁸ See *Consumers Energy Co. v. CSX Transp. Inc.*, STB Docket No. 42142, at 15-16 (served Dec. 9, 2016).

defect because the 0.95% figure was unsupported. But this profound flaw provides an independent ground to deny this request for reconsideration and would also simplify future cases by directing the dispute to publicly available information of the cost of public placements.

Consumers further argues that the Board materially erred by adopting a 5% figure for equity flotation costs rather than by using the 2.1% figure accepted in the Sunbelt case. Consumers Recon. Pet. at 12-13. But the Board already rejected this argument, reasoning that the equity flotation fee accepted in *Sunbelt* was conservatively low and that the evidence presented in this case supported a higher fee. *Decision* at 269 & n.205. Consumers does not address the Board's reasoning or provide any reason why the Board erred by basing its decision on evidence in the record.

F. The Board Did Not Err By Denying Consumers's Revenue Adequacy Claim.

In addition to pursuing relief under the SAC constraint, Consumers chose to seek relief under the revenue adequacy constraint, notwithstanding the fact that CSXT has been found revenue *inadequate* for 29 consecutive years. After reviewing all the evidence submitted by Consumers, the Board dismissed this claim for relief because "CSXT has not been shown to be revenue adequate." *Decision* at 21. Of note, it concluded that "the other evidence submitted by Consumers here was not persuasive enough to outweigh the conclusion drawn from the Board's annual determinations." *Id.*

Because Consumers failed to establish that CSXT was revenue adequate, the Board did not address CSXT's arguments detailing multiple problems with any "revenue adequacy constraint." Those problems include:

- The D.C. Circuit has declared that the system-wide revenue needs of a railroad provide "no guidance" on the rates a shipper should be charged for the particular facilities and services it uses. CSXT Reply at IV-4–8.
- The Board already has a targeted "revenue adequacy" test in its SAC and Simplified-SAC standards, the very purpose of which is to determine what a railroad needs to charge to earn "adequate" revenues on the portion of its system used by the shipper. *Id.* at IV-3.

- Any relief below the rate prescribed by the SAC test would create an impermissible cross subsidy, violating the core economic principles of federal regulation of the railroad industry, which requires a shipper to cover its own attributable costs and not to seek a subsidy from others. *Id.* at IV-26–29.
- The cost of capital is a floor on earnings, not a ceiling, as unregulated firms routinely earn more than their cost of capital in competitive markets. *Id.* at IV-61–66. Therefore, earning a return on investment equal to the cost of capital is the *minimum* adequate revenue level and “is not necessarily appropriate for the determination of the maximum fair revenue issues involved in individual rate proceedings.” *Id.* at 63 n.148 (quoting court and agency precedent).
- Serious measurement errors make the annual revenue adequacy findings an unsuitable foundation to set maximum lawful rates. *Id.* at IV-8–26.
- The Nixon-era price freeze proposed by Consumers would create unlawful presumptions of unreasonableness. *Id.* at IV-69–73.

Consumers nevertheless seeks reconsideration of the *Decision* on four grounds. First, Consumers protests that the Board rested “solely” on the prior findings that CSXT was not revenue adequate, cited no other affirmative support, and gave no “meaningful consideration” to the other evidence submitted by Consumers. Consumers Recon. Pet. at 13-14. This claim is baffling. No other single issue received as much attention from the Board. It first addressed challenges to the reliability of the annual determinations and then the other evidence submitted by Consumers. *Decision* at 16-21. In the end, the Board “concluded that the evidence presented by Consumers does not satisfactorily rebut the railroad’s prima facie showing—based on the Board’s consistent annual determination—that it has not achieved revenue adequacy.” *Id.* at 21. Dissatisfaction with how the Board weighed the evidence cannot justify a false claim that the Board gave that evidence no meaningful consideration.

Second, Consumers faults the Board for not addressing the specific revenue adequacy criteria in 49 U.S.C. § 10704(a)(2). Consumers Recon. Pet. at 15. Again, this accusation is misguided. The Board addressed the criteria, stating that the “annual determination was specifically developed to try to best incorporate the elements of the statutory definition of revenue adequacy in § 10704 through an objective methodology” and that CSXT was “permitted

to rely on the Board’s revenue adequacy annual determination, which are generated by a methodology that is specifically designed to incorporate the § 10704 factors.” *Id.* at 21 n.25 & 26. This was reasonable.⁹ Because the legislative rules adopted in *Standards for Railroad Revenue Adequacy*, 3 I.C.C.2d 261 (1986) were designed to address the § 10704 factors, this claim of material error lacks any merit.

Third, Consumers is dissatisfied with how the Board weighed its evidence, particularly its evidence of share repurchases and alternative cost-of-equity figures. Consumers Recon. Pet. at 15–16. However, the Board’s decision to reject the alternative cost-of-equity figures was compelled by basic principles of administrative law. “[I]t is hornbook administrative law that an agency need not—[and] indeed should not—entertain a challenge to a regulation, adopted pursuant to notice and comment, in an adjudication or licensing proceeding.”¹⁰ As CSXT explained, this principle prevents Consumers from challenging the use of the industry average cost of capital. *See* CSXT Reply at IV-41–46. Indeed, if CSXT had come forward with a “rigorously developed internal COC” that was materially higher than the industry average cost of capital—because the internal figure used only the MSDCF model or a forward-looking market risk premium—neither Consumers nor the STB would agree to use a higher estimate based on an approach rejected by the agency.¹¹ Using the industry average cost of capital is not just the agency’s consistent practice, it is a legislative rule binding equally on the parties and the agency.

Nor did the Board err in its treatment of stock repurchases or dividend payments. Consumers suffers from “confirmation bias,” the tendency to interpret information in a way that confirms one’s preexisting beliefs. Firms in every section of the U.S. economy routinely use—

⁹ *See Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. BNSF Ry. Co.*, STB Docket No. 42057, at 6 (STB served Jan. 19, 2005) (rejecting claim it had to address section 10701(d)(2) because the SAC test inherently addresses the revenue adequacy needs of the railroad).

¹⁰ *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998).

¹¹ *See, e.g., Methodology to be Employed in Determining the Railroad Industry’s Cost of Capital*, STB Ex Parte No. 664 at 17 (served Jan. 17, 2008) (rejecting KCS’s argument to use its higher individual cost of capital).

and are expected to use—dividends and stock repurchases to return value to shareholders. CSXT Reply IV-57–61. This does not mean, as Consumers posits, that every firm in America is earning a return on investment above its cost of capital. Rather, the firm may be changing its debt-equity ratio to improve its overall cost of capital, or the firm may be returning excess earnings to investors who can invest in other more profitable industries. The Board correctly observed that “even companies that are revenue inadequate or financially unhealthy return money to their shareholders.” *Decision* at 18-19. Consumers’s observation that Berkshire Hathaway does not make dividend payments only bolsters the Board’s reasoning, showing that the financial strength of a company is independent of its stock repurchases or dividend payments.

Moreover, the worst possible regulatory reaction to capital exiting the industry in the form of dividend payments or stock repurchases would be to impose a rate cap under a revenue adequacy constraint. Such a cap would accelerate capital flight with bigger dividend payments or larger stock repurchases. CSXT Reply IV-60. The accelerated capital flight would in turn prompt the Board to cap railroad earnings at progressively lower and lower levels. Fortunately, the Board rejected the fallacy advanced by Consumers and should do so again.

Even if evidence of share repurchases is relevant (and it is not), a 2018 announcement of plans to repurchase \$6 billion worth of shares in the future cannot support a finding that CSXT was revenue adequate in 2015, when this case began. Consumers alleged that CSXT violated the revenue adequacy constraint in January 2015 by increasing the rate to the challenged level from an expired contract, on the theory that because CSXT was revenue adequate at the time it did not need to engage in further differential pricing. Consumers’s revenue adequacy argument was a challenge to the rate increase, not the rate level. Therefore, the relief it sought was to roll back the rate increase to the level in the expired contract, adjusted for inflation. Consumers Reb. at IV-68 (the relief “limits the exercise of further differential pricing”).

Under Consumers’s proposed revenue adequacy constraint, therefore, if CSXT becomes revenue adequate in the future, then the only relief Consumers can receive is to curtail future rate increases. But as the challenged movement is governed by a rate prescription until the end of

2024, there will be no such increases above the levels pre-approved by the *Decision*. (If, on reconsideration, the Board concludes the challenged rate is reasonable, then a new rate case can be filed if CSXT increases the challenged rate beyond inflation.) So in addition to being irrelevant, the evidence of a plan to acquire \$6 billion shares in the future cannot support the relief Consumers sought, which rested on the revenue adequacy of CSXT in 2015, when the challenged rate increase transpired.

The fourth and final ground for reconsideration raised by Consumers is a belated claim that the Board's denial of the motion to dismiss the revenue adequacy claim did not give Consumers an adequate roadmap for presenting evidence. CSXT filed a motion to dismiss this claim because the agency had found CSXT revenue inadequate for (at the time) 28 consecutive years. In response, Consumers previewed its revenue adequacy submissions to survive the motion to dismiss with many of the same arguments rejected by the Board at the merits stage. The Board denied the motion to dismiss, noting that "although the annual determinations suggest that CSXT is revenue inadequate, Consumers has stated a claim under the constraint and may present other competent and probative evidence to make its case, should it so choose."¹²

Now, Consumers argues that the Board "should have described any apparent deficiencies in Consumers' planned approach, so that Consumers would have fair notice as to what evidence might suffice." Consumers Recon. Pet. at 14-15. But at the motions stage, Consumers forcefully declared that it "is not conceding that it was required [to preview its case], or that it is appropriate to argue or consider the weight of the evidence at this stage. Consumers reserves the right to submit other information regarding CSXT's revenue adequacy in its actual evidentiary presentation."¹³ Consumers cannot now blame the Board for not addressing the deficiencies of its foreshadowed case after having insisted it would be inappropriate to do so.

¹² *Consumers Energy Co. v. CSX Transp., Inc.*, STB Docket No. 42142, slip op. at 1 (STB served June 15, 2015).

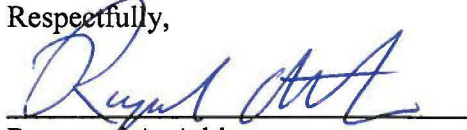
¹³ Complainant's Reply to Motion to Dismiss Revenue Adequacy Claim, *Consumers Energy Co. v. CSX Transp., Inc.*, STB Docket No. 42142, at 7 n.5 (filed Apr. 13, 2015).

In sum, the *Decision* offered ample support for its finding that CSXT is not revenue adequate at this time, and the Board should therefore reject Consumers's request to reweigh the evidence and revisit that finding.

III. CONCLUSION

The Board should deny Consumers's Petition for Reconsideration in all respects.

Respectfully,



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Dated: March 12, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2018, I caused a copy of the foregoing
Reply to Consumers's Petition for Reconsideration to be served by hand delivery upon:

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Alec Weingart