MARYLAND CRUDE OIL

CSX TRANSPORTATION

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June 27, 2014

Via Email: ellen.cohill@maryland.gov

Ellen W. Cohill, Esq.
Assistant Attorney General
Office of the Attorney General
Department of the Environment
1800 Washington Boulevard, Suite 6048
Baltimore, Maryland 21230

Re: Maryland Public Information Act Request

Dear Ms. Cohill:

This will reply to your letter of June 13, 2013 to CSXT Director Hazardous Materials, Romano De Simone.

Thank you for informing CSXT of the information request before acting. We appreciate the opportunity to constructively exchange views on the matter and protect CSXT's interests before release of our confidential information.

We do not propose to debate the enforceability of the non-disclosure agreement signed by the Maryland official with whom CSXT had been working in good faith, nor to debate issues such as authority. Suffice it to say that CSXT reserves all its legal rights with respect to the enforceability of that contract, but that we hope this letter will make any further debate over those issues in any forum unnecessary.

Rather, we intend here to demonstrate that the information submitted by CSXT pursuant to that contract is, in any case, not subject to disclosure under the Maryland Public Information Act (MPIA).

For your convenience, I will address each of your questions in turn:

1. All portions of Exhibit 2 were furnished under an agreement that they would be kept confidential, and CSXT believes Exhibit 2 in its entirety constitutes confidential commercial information under SG Sec. 10-617(d).

2. A common carrier by rail is entrusted with considerable information about its customers' businesses and is obligated to respect that confidentiality. Thus, under 49 USC Sec. 11904, a rail carrier cannot disclose information about the nature, kind, quantity,

destination, or routing of a customer's traffic where that would disclose improperly to a competitor the business transactions of a shipper or consignee. CSXT was able to provide the requested information to Maryland because it was acting in reliance on the contract of confidentiality. We were assured that this information would not become part of the public domain where our customers' competitors would be able to assess the volume of crude oil that they are purchasing and shipping by rail.

The DOT contemplated that the information shared with states would be treated as confidential and made subject to non-disclosure through confidentiality agreements. Thus, the DOT could issue its order without running afoul of Sec. 11904's prohibitions. In fact, DOT guidance regarding the May 7, 2014 Emergency Order states that DOT "expects the SERCs to treat this data as confidential, providing it only to those with a need-to-know, and with the understanding that recipients of the data will continue to treat it as confidential." DOT guidance also states that "railroads may require reasonable confidentiality agreements prior to providing this information." (See *DOT Frequently Asked Questions on DOT's May 7, 2014 Emergency Order Regarding Notification to Communities of Bakken Crude Oil Shipments* published on FRA's website on May 23, 2014 at http://www.fra.dot.gov/eLib/details/L05237).

Additionally, in letters DOT Secretary Foxx sent to 48 state governors regarding the emergency order, Secretary Foxx described the crude oil information as "sensitive information with security implications." DOT Secretary Foxx's letters also advised the states that they "must respect homeland security regulations regarding the widespread publication of this information." (See DOT's Letters published on FRA's website on May 12, 2014 at http://www.fra.dot.gov/eLib/details/L05234.)

Furthermore, in the February 2014 Agreement with DOT Secretary Foxx, DOT directs railroads to "apply any protocols developed by the rail industry to comply with the existing route analysis requirements of 49 C.F.R. § 172.820(c)-(f) and (i) to the movement of trains transporting 20 or more loaded railroad tank cars containing petroleum crude oil (Key Crude Oil Trains)" by no later than July 1, 2014.

Sections 172.820(e) and (i)(2) of the routing regulation require railroads to treat the commodity data, underlying analysis, and route selection information as SSI and restrict the disclosure to those with a "need-to-know" under the federal government's SSI regulations – 49 CFR parts 15 and 1520.

- Section 172.820(e) states, "The rail carrier must retain in writing all route review and selection decision documentation and restrict the distribution, disclosure, and availability of information contained in the route analysis to covered persons with a need-to-know, as described in parts 15 and 1520 of this title."

- Section 172.820(i)(2) states, "Each rail carrier must restrict the distribution, disclosure, and availability of information collected or developed in accordance

with paragraphs (c), (d), (e), and (f) of this section to covered persons with a need-to-know, as described in parts 15 and 1520 of this title."

By expressly including sections 172.820(e) and (i) in the February 2014 Agreement, DOT and Secretary Foxx contemplated that disclosures of railroads' crude oil routing information is not appropriate for broad disclosure to the public and must be restricted to those with a "need-to-know".

3. The understanding CSXT had before it provided this information to the State was that it would be kept confidential indefinitely. Accordingly, CSXT believes Maryland should keep the information confidential indefinitely.

4. CSXT does not share its customers' information with others. For example, if a customer wishes to have a third party act on its behalf to monitor its freight shipments, audit its bills, or otherwise, CSXT requires written permission from the customer itself. To prevent unauthorized parties from having access to data, CSXT uses state-of-the-art cyber security measures. Our code of ethics specifies that company information is to be safeguarded. Employees are trained to protect company information and the hardware that may give access to it, such as laptop computers and hand-held smart phones. And, of course, CSXT complies with 11904.

5. Exhibit 2 applies only to CSXT routes in Maryland and has not been shared with any other party.

6. Besides making information about our customers available to their competitors, CSXT's competitors would be very interested to see how much of the involved commodity is being moved by CSXT through Maryland. From that, our competitors can assess where CSXT has gained (or lost) market share, and could use that information to target present and future CSXT customers.

7. See above.

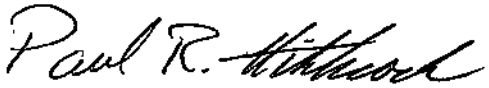
8. We do not understand this question. CSXT agreed that information in Exhibit 2 could be provided to first responders and emergency management officials on a need-to-know basis provided that confidentiality was maintained. We support providing this information to first responders and emergency management officials who have a need-to-know. That is part of CSXT's on-going commitment to work with first responders throughout the communities that we serve, subject only to the understanding that it will be kept confidential. For many years, CSXT has shared information about hazardous materials shipments through their communities with first responders – always with an understanding that the information was for their use in their official duties and was not to be made public. We cannot recall a single instance when a police or fire department violated that confidence.

In addition, CSXT notes that the state is entitled to maintain confidentiality of information under Section 618(j). Again, Secretary Foxx stated in his letter to Governor O'Malley that this information is "sensitive information with security implications." Given such a clear and unequivocal statement by the top official of the US Department of Transportation to the top official of the state, CSX urges Maryland to conclude that it should honor the Secretary's expectations by invoking Section 618(j).

Finally, CSXT urges the Attorney General's office to confer with other law enforcement and homeland security officials within the state to consider the potentially far-reaching ramifications of its decision in this matter. For many years, CSXT has entered into other arrangements within the State subject to other contractual confidentiality undertakings. A decision now that information submitted by CSXT under a written, signed confidentiality commitment will be released will inevitably affect CSXT's ability to continue to share confidential, proprietary business information with the state. This would be most regrettable in CSXT's view.

We would be happy to discuss this matter with you further or to answer any remaining questions you or others within the state may have.

Very truly yours,



Paul R. Hitchcock

PRH/pkw

cc: Romano De Simone