

EXPEDITED CONSIDERATION REQUESTED

235726

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
March 31, 2014
Part of
Public Record

E.I. DUPONT DE NEMOURS AND COMPANY)	
)	
Complainant,)	
)	
v.)	Docket No. NOR 42125
)	
NORFOLK SOUTHERN RAILWAY COMPANY)	
)	
Defendant.)	

**MOTION FOR EXTENSION OF TIME TO FILE
PETITIONS FOR RECONSIDERATION**

E.I. du Pont de Nemours and Company (“DuPont”), hereby submits this “Motion for Extension of Time to File Petitions for Reconsideration” (“Motion”). On March 24, 2014, the Board served a final merits decision (“Decision”) on DuPont’s Complaint in this proceeding against Norfolk Southern Railway Company (“NS”). Pursuant to 49 C.F.R. § 1115.3(e), Petitions for Reconsideration are due within 20 days, which would be on April 14, 2014. By this Motion, DuPont requests that the Board defer the due date for such Petitions until 20 days after the Board issues a “corrected” decision addressing a multitude of technical errors in the Decision. **DuPont requests that the Board direct NS to reply to this Motion within three days so that the Board may grant expedited consideration of this Motion.** In support hereof, DuPont states as follows:

In Public Serv. Co. of Col. d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Ry. Co., STB Docket No. 42057, 2004 STB LEXIS 790, *2-4 (served Dec. 14, 2004), the Board provided procedural guidance for bringing computational or technical errors to the Board’s

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attention. Such errors are to be submitted in a joint filing within the same 20 day period as Petitions for Reconsideration. DuPont proposes that the parties still jointly submit technical corrections within this 20 day period. However, through this motion, DuPont requests that the due date for filing petitions for reconsideration be extended until 20 days after the Board issues a “corrected” Decision that reflects the full impact of those technical corrections that are adopted.

In this case, the technical errors are so significant as to influence the contours of a petition for reconsideration. Although technical errors typically only have a slight impact on a case when corrected, the technical errors in this case have a dramatic impact on the size of the present value deficit in the Board’s DCF model. Indeed, DuPont has identified a single error that, by itself, would increase the present value deficit by over \$7.5 billion.¹ That error is an incorrect operating expense volume index. Because the car-miles index used to project operating expenses throughout the DCF model is calibrated incorrectly for the 2009-10 adjustment, it vastly understates operating expenses for 2010 and all subsequent years.² In addition to this \$7.5 billion error, DuPont also preliminarily has identified numerous other errors, of which six have dollar consequences on the present value deficit of at least – and sometimes well over -- \$100 million each in the DCF model.

DuPont has not yet completed its review of the Board’s work papers to identify all technical errors, nor has DuPont yet been able to quantify the full impact of those errors it has

¹ The magnitude of this error dwarfs the \$447.8 million error corrected by DuPont’s Rebuttal Errata which the Board struck from the record on grounds that the “cumulative significance” of DuPont’s error was too great to constitute a mere technical correction. Decision at 23-24. DuPont’s error was only 6% of the magnitude of the Board’s “technical” error.

² Specifically, in the NS Reply DCF model on which the Board’s model is based, the 2009 car-miles data included in the netting level of the worksheet represents only 7 months of 2009 traffic. In the indexing formula, this number is annualized before being compared to the 2010 full year data to develop the index. However, rather than including 7 months of car-miles, the Board’s update includes a full 12 months of car-miles in the netting level. Therefore, when this number is annualized (under the false presumption that it represents only 7 months of data), the 2009 figure used to index is actually equal to 1.71 years of data (12 months ÷ 7 months = 1.71). When compared to the 2010 annual car-miles number, the year-over-year index shows a significant decline in car-miles and all related operating expense categories from 2009-2010. The net impact is to increase the cumulative present value of underpayments by \$7.5 billion over the 10 year DCF period.

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identified. Establishing the types and amounts of these errors in a final decision on the record is important to DuPont's ability to determine how it may approach a petition for reconsideration, the issues that it may raise, and potentially whether even to seek reconsideration at all.

Therefore, it is important that a petition for reconsideration in this case be based upon a "corrected" Decision.

In some instances, it also is not clear how to correct the technical error. For example, the Board may have stated that it accepts one party's evidence in the narrative, but used the other party's evidence in its work papers. The Board will need to clarify its intent before the parties can determine whether that is a potential issue for reconsideration.

The process of identifying technical errors in the Board's work papers has been complicated by the nature of the work papers themselves. Because many of the spreadsheet links are broken or hard-coded without directions to supporting worksheets, DuPont must manually trace many of the Board's calculations to reconstruct what it has done. This process continues even as DuPont files this Motion. Consequently, it will be challenging enough just to complete the process of identifying technical errors and preparing a joint petition to correct such errors within 20 days, much less also prepare petitions for reconsideration.

Even if there were no technical errors in the Decision, an extension of time to file Petitions for Reconsideration would be warranted. As the Board knows, SAC cases are very complex, and this case is the largest and most complex SAC case ever presented. The Decision is 335 pages long, and the portion dealing just with rate reasonableness comprises 255 of those pages, which is more than twice the length of most prior SAC decisions. Moreover, the technical calculations in the Decision are the subject of a complex set of electronic work papers and the underlying pre-Decision record is immense. In light of the need for a corrected Decision prior to

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filing a petition for reconsideration and the need for additional time to prepare a petition for reconsideration, DuPont proposes that the due date for reconsideration petitions be pegged to the Board's issuance of a corrected Decision.³

For the reasons set forth above, DuPont requests that the Board grant this Motion. DuPont also requests expedited consideration because the current due date for both technical corrections and reconsideration petitions is less than two weeks away.

Respectfully submitted,



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³ The Board has granted extensions to the deadline for filing petitions for reconsideration in previous proceedings on similar grounds. See *AEP Texas North Company v. BNSF Ry. Co.*, STB Docket No. 41191 (Sub-No. 1) (served Sept. 26, 2007) (citing complexity of the case, volume of evidence, and time needed to review work papers); *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) (served Sept. 21, 2007) (citing extensive record).

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CERTIFICATE OF SERVICE

I hereby certify that this 31st day of March 2014, I served a copy of the foregoing via e-mail and hand delivery upon:

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