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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

NORFOLK SOUTHERN RAILWAY COMPANY'S
PETITION FOR RECONSIDERATION

James A. Hixon
John M. Scheib
David L. Coleman
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

G. Paul Moates
Paul A. Hemmersbaugh
Terence M. Hynes
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel to Norfolk Southern Railway Company

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I. PREFACE AND SUMMARY OF ARGUMENT

Pursuant to 49 C.F.R. § 1115.3(b) and other applicable authority, Defendant Norfolk Southern Railway Company ("NS") submits this Petition for Reconsideration of certain aspects of the Surface Transportation Board's ("Board's") June 20, 2014 Decision in this case. *See E.I. du Pont de Nemours & Co. v. Norfolk So. Ry. Co.,* STB Docket No. 42125 (S.T.B. served March 24, 2014) ("*Decision*").[1] While the Board correctly resolved many of the disputed issues in this case, NS believes that some of the Board's rulings were material errors that the Board should reconsider under § 1115.3(b).

Although NS prevailed by a substantial margin in the *Decision*, the errors challenged in this Petition could have a material effect on this case and could establish significant precedents for future cases. In addition, DuPont has indicated that it intends to file its own petition for reconsideration that, if granted in whole or in part, also could affect the Board's final SAC analysis. Given the size of this case, the number of issues presented, and the Board's expansion of the page limit for reconsideration petitions from 20 to 50 pages, NS anticipates that DuPont may take this opportunity to seek broad relief on a number of grounds. Under the Board's rules and its October 8, 2014 decision setting today as the deadline for petitions for reconsideration, NS cannot wait to review DuPont's reconsideration petition before deciding whether to file its own petition for reconsideration. Therefore, NS is filing this Petition today.

NS is not moving to reconsider every issue on which it disagrees with the Board's rulings. The Board has made clear that petitions for reconsideration will be granted only where a

[1] *See also DuPont v. Norfolk So. Ry. Co.,* STB Docket No. 42125 (S.T.B. served October 8, 2014) (extending time to file petitions for reconsideration until November 12, 2014). Separately, the parties are filing a joint supplemental petition for technical corrections, requesting correction of two errors in the Board's recent *Corrected Decision. See* Joint Supplemental Petition for Technical Corrections of NS and DuPont, STB Docket No. 42125 (November 12, 2014).

party demonstrates a "material error" and that such petitions are not an opportunity to present new evidence or arguments that could have been presented earlier.[2] In light of the restrictive standard of 49 C.F.R. § 1115.3(b), NS focuses this Petition on issues where the *Decision* clearly committed a material error when evaluating particular elements of the record evidence.

The *Decision* contains several categories of material errors. First, the Board materially erred by finding that DuPont's Stand Alone Railroad, the DRR, could take advantage of NS's operating rights over certain partially owned facilities without acquiring the NS ownership interests that confer those operating rights. Norfolk Southern Corporation ("NSC") has partial ownership interests in the Conrail Share Asset Areas ("SAA") and in the Indiana Harbor Belt Railway ("IHB") that allow NSC's wholly owned subsidiary, Norfolk Southern Railway, to operate over those facilities. The *Decision* erroneously found that the DRR could enjoy the rights of an owner of the SAA and the IHB without paying for the corresponding ownership interest, thereby allowing the DRR to operate on those lines without paying the full stand-alone costs of providing and maintaining the line, as required by Board precedent. *See, e.g., AEPCO v. BNSF et al,* STB Docket No. 42058 (S.T.B. served March 15, 2005) ("*AEPCO 2005*"). This material error caused an understatement of DRR capital investment requirements and a corresponding distortion of the SAC analysis and results. The Board should correct this material error.

Second, the Board materially erred in several instances by not accepting reasonable NS evidence of a legitimate cost that DuPont ignored entirely—in violation of longstanding

[2] *See Texas Mun. Power Agency v. BNSF Ry. Co.*, STB Docket No. 42056, at 2 (S.T.B. served Sept. 27, 2004).

precedent.[3] For example, NS's conservative evidence of equity flotation costs, which assumed that the DRR's costs would be at the extreme low end of the typical range of those costs, should have been accepted, particularly in light of the Board's correct recognition that the DRR would incur such costs. The *Decision* similarly erred by not accepting NS's evidence of the cost of transporting rail, which was the only evidence in the record that accounted for the DRR's costs to transport rail over residual NS lines from Harrisburg, PA to the DRR railheads, and by refusing to accept NS's reasonable estimate of the cost of lighting for construction (another cost for which DuPont submitted no evidence). And the Board likewise erred by rejecting NS's evidence that *Means* provides separately for transporting swelled volumes when calculating earthwork quantities and rejecting NS's reasonable adjustment to account for swelled quantities.

Third, in several instances the *Decision* resolved issues or assigned costs in a way that was inconsistent with the logic of the Board's other holdings. For example, the *Decision*'s correct conclusion that the DRR would have to pay ad valorem taxes in proportion to its relative profitability was not carried through in the Board's workpapers, which do not link in a way that assigns to the SARR a level of ad valorem taxes consistent with its profitability. And the Board's workpaper use of DuPont's evidence on the cost of fixed approach spans for movable

[3] The Board's settled rule is that where only one party presents evidence on a particular issue, that evidence will be accepted as the best evidence of record. *See Duke Energy Corp. v. Norfolk S. Ry. Co.*, 7 S.T.B. 89, 161 (2004) ("*Duke/NS*") ("As NS's evidence on travel expenses is the only evidence of record, NS's proposed travel allowance costs are accepted"); *McCarty Farms, Inc. v. Burlington N., Inc.*, 2 S.T.B. 460, 496 (1997) ("*McCarty Farms*") ("Because BN's data . . . is the only documented evidence, we use it as the best evidence of record"); *Bituminous Coal – Hiawatha, Utah, to Moapa, Nevada*, 6 I.C.C.2d 1, 55 (1989) ("*Nevada Power*") ("Since the railroads present the only evidence of record . . . we accept their estimates for the road property investment accounts"); *id.* at 62 (because UP did not include costs for trackage rights, Board accepted "NPC's cost as the only evidence of record"). *See also Duke/NS*, 7 S.T.B. at 100-01 (where a shipper's evidence on an issue is "infeasible and/or unsupported" and the railroad "offers feasible, realistic alternative evidence that avoids the infirmities in the shipper's evidence and that is itself supported, the Board will use the reply evidence for its SAC analysis.").

bridges (as opposed to the movable spans of those bridges) is inconsistent with its holdings for all other bridges, for which the Board accepted NS's evidence about bridge heights, length, and infrastructure. Finally, the Board's modification of the terminal value calculation creates an overstatement of projected DRR interest expenses in years 11-20 that is logically irreconcilable with the Board's recognition elsewhere that the interest portion of the DRR's debt would decrease over time.

Fourth, the *Decision* materially erred by adopting, *sua sponte,* a new approach on Positive Train Control ("PTC") implementation that is not supported by either party's evidence or by the Board's workpapers.

Fifth, the *Decision* materially erred by accepting DuPont assumptions that are inconsistent with "the realities of real-world railroading."[4] The *Decision*'s acceptance of DuPont's position on bonus depreciation provides a unilateral benefit to the DRR that allows the SARR to claim tax benefits not useable by the real-world NS. Another instance of the *Decision* accepting an unreasonable assumption was in the Board's acceptance of DuPont's counts of failed equipment detectors without any evidence that its equipment detector spacing was sufficient to satisfy current industry standards. NS submits workpapers with this Petition that explain how the Board can correct the material errors described below.

[4] *See, e.g.*, *Western Fuels Ass'n & Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, at 15 (S.T.B. served Sept. 10, 2007) ("*WFA I*"); *Arizona Electric Power Coop., Inc. v. BNSF Ry. Co. & Union Pac. R.R. Co.*, STB Docket No. 42113, at 16 (S.T.B. served Nov. 16, 2011) ("*AEPCO 2011*").

II. THE BOARD SHOULD RECONSIDER THE FOLLOWING MATERIAL ERRORS IN THE *DECISION*.

A. The Decision Materially Erred by Allowing the DRR to Operate Over Partially-Owned NS Lines Without Accounting for Their Ownership Costs.

The Board found that the DRR could use NS's operating rights over certain partially-owned facilities without accounting for the ownership interest of Norfolk Southern Corporation in the entities that own those facilities. As a result, under the *Decision*, the DRR could enjoy the rights of an owner on Conrail Shared Asset Areas ("SAAs") and the Indiana Harbor Belt Railway ("IHB") without paying for the corresponding ownership rights. This ruling would allow the DRR to operate on the SAAs and on IHB's lines without paying "the full stand-alone costs of providing and maintaining the line." *AEPCO 2005* at 11. The resulting erroneous depression of DRR capital costs distorts the SAC results, and the Board should correct this material error.

The *Decision* correctly recognized that the DRR must account for construction costs proportional to NS's ownership interests in the Belt Railway Company ("BRC") and the Terminal Railroad Association of St. Louis ("TRRA"). *See Decision* at 47-48. Because these entities are partially owned by NS, the DRR could use NS's operating rights over their lines only if it also obtained ownership rights. *Id.* at 48. The Board rejected DuPont's claim that the DRR could use "trackage rights" to operate on these lines, reasoning that DuPont was required to replicate and account for NS's ownership costs. *Id.* This determination was consistent both with the Board's previous recognition that a SARR operating over defendant-owned lines must account for the "full stand-alone costs" of those lines[5] and with the common-sense conclusion that the DRR cannot step into NS's shoes as an operator on these lines unless it first steps into NS's shoes as a partial owner.

[5] *See AEPCO 2005* at 11.

The Board's rationale for why the BRC and TRRA assets should be treated differently than the SAAs and the assets of the IHB is not reasonable in the context of a SAC case. The Board grounded its different treatment of these assets on the fact that NSC, rather than NS, owns the interests in these entities and that "the SAA and IHB are not listed in NS's R-1 data." *Id.* at 49. In the first place, it is not accurate to say that the SAAs and IHB do not appear in NS's R-1. To the contrary, NS's R-1 discusses NS's operation over Conrail's lines and Conrail's ownership structure. *See* NS 2009 R-1 at 10 (explaining that NSC "has a 58% economic and 50% voting interest in the jointly owned [Conrail] entity"). NS's R-1 also explains that NS's operating rights over Conrail lines are a function of its ownership interest. *See id.* (explaining that the SAAs are operated "for the joint and exclusive benefit of NSR and CSX Transportation, Inc.").[6] And even if the partial interest in the SAAs and IHB were owned by NSR rather than NSC, this merely would result in these entities being included in Schedule 310 to NS's R-1, as is the case for BRC and TRRA, meaning that their assets would not be included in the R-1 in any event.

The *Decision*'s concerns that recognizing the ownership costs of the SAAs and IHB would require "ignoring [NS's corporate] structure" and that "the data used in the SAC analysis" needs to "accurately reflect[] the underlying corporate structure" are misplaced. *Decision* at 49. NS's corporate structure is not relevant to a SAC case—the only question is whether the DRR is fully accounting for all the stand alone costs of its service. For example, NS relies on NSC's employees to perform many essential functions for NS, such as providing its executive officers and its accounting, finance and law departments. The DRR is not entitled to ignore these necessary functions merely because NS relies on NSC to provide them. Instead, the DRR is

[6] Moreover, while specific investments in certain partially owned facilities may not be identified directly in the NS R-1, DuPont did not show that NSR does not compensate NS Corporation for their use. *See* NS R-1 Schedule 410 (2010) identifying substantial investment by NS Corp, in NS Railway Co.); *id* Schedule 410, Line 619 (purchased services payments by NSR to NS Corp).

required to replicate these functions as part of its SAC presentation. Further, NS's corporate headquarters buildings are owned by NSC rather than NS, but this does not excuse the DRR from having to construct similar structures. Nor should the DRR be permitted to ignore the costs of owning and operating the parts of the SAAs and IHB that its system traverses merely because these assets are held at the NSC level rather than the NS level.

Finally, the *Decision*'s claim that NS did not meet its burden to "demonstrate the relationship of the joint facility entity and the costs and revenue realized by the railroad as a result of that relationship" is a material error. *Decision* at 49. NS's Reply Evidence documented NSC's ownership interest and showed that the SAA and IHB operating agreements were not mere trackage rights agreements, but rather agreements among co-owners to establish their rights and responsibilities on a joint facility. *See* NS Reply at III-F-308-311. NS further demonstrated that its rights on these properties were acquired in the Conrail transaction and are a function of NSC's ownership of Conrail, and the *Decision* materially erred by not requiring the DRR to account for those ownership costs.

Not only is the Board's decision on partially-owned lines erroneous, it also would create bad precedent in SAC cases. The Board's form-over-substance finding that the positioning of assets within a railroad's corporate family tree determines the treatment of those assets in a SAC case may lead to unintended results when carried to its logical extreme. If, for example, a SARR were to replicate a defendant railroad's operations through a rail terminal owned by the defendant railroad's corporate parent, the Board's holding on partially-owned lines would imply that the SARR would not need to build the rail terminal, but would instead only need to pay to use the terminal in the manner in which the defendant railroad compensates its corporate parent for such use. Ignoring the substance of the railroad's ownership structure in favor of the form of such ownership distorts the SAC analysis and skews its results. The Board should reverse its decision with respect to partially-owned lines both because it is incorrect and as a means of avoiding such unintended results.

B. The Decision Materially Erred by Not Accepting Reasonable NS Evidence of Costs That DuPont Omitted.

1. The *Decision* Materially Erred By Refusing to Accept NS's Conservative Estimate of the DRR's Equity Flotation Costs.

The Board should reconsider its refusal to adopt NS's evidence of the equity flotation costs for the DRR, which was the best (and only) evidence of record. The *Decision* accepted that the DRR would be required to pay an equity flotation fee in order to raise $17.2 billion in equity capital, but concluded that NS had not adequately shown that its proposed equity flotation fee would be commensurate with the fees that the DRR would have had to pay. *See Decision* at 273-75. NS presented the only evidence in the record of what equity flotation fee the DRR would incur, and showed that its estimate was extremely conservative. The Board's rejection of that evidence is material error, for two reasons.

First, the Board should have accepted NS's evidence because it was the only evidence in the record of a cost that the DRR plainly would incur, as the Board found. The Board made clear that equity flotation costs were legitimate and appropriate, and that the DRR would incur such costs. *See Decision* at 274. Only NS offered evidence of this acknowledged cost. Where only one party offers relevant evidence of a necessary cost, the Board has adopted that evidence as the best evidence of record.[7] Indeed, the Board's omission of this legitimate cost means that its SAC

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[7] *See, e.g.*, *Duke/NS*, 7 S.T.B. at 161 ("As NS's evidence on travel expenses is the only evidence of record, NS's proposed travel allowance costs are accepted"); *McCarty Farms*, 2 S.T.B. at 496 ("Because BN's data . . . is the only documented evidence, we use it as the best evidence of record"); *Nevada Power*, 6 I.C.C.2d at 55 ("Since the railroads present the only evidence of record . . . we accept their estimates for the road property investment accounts"); *id.* at 62

analysis incorporates no equity flotation cost at all, which directly contradicts its express conclusion that "it would be unreasonable to assume that the SARR would raise . . . capital . . . without paying some form of equity flotation fee." *Id.*

Second, the Board's concern that the 2.1% equity flotation fee NS presented might not correlate to what a SARR would have to pay ignores the fact that the DRR's equity flotation costs would almost certainly be higher than 2.1%. NS presented evidence that equity flotation costs typically range between 2% and 7% of the total amount of equity raised. *See* NS Reply at III-G-3. And NS showed that equity flotation costs were 3.9% in the most recent instance of a railroad issuing large amounts of common stock. *See id.* at III-G-4-5. Assuming that the DRR would only pay 2.1%—rather than 3.9%—was thus extremely conservative. It is telling that DuPont pointed to no evidence suggesting that the DRR would likely pay an equity flotation fee lower than 2.1%.

The *Decision* is certainly correct that the Facebook IPO would be different from the DRR's capital-raising activities. But the only relevant differences are ones that would lead to lower equity flotation fees for Facebook. The Facebook IPO was subject to robust investor demand and underwriter interest that led to unusually low flotation fees. *See* NS Reply at III-G-5-6. And any comparison of "credit ratings" or "risk profiles" would surely favor an established company with worldwide recognition over a startup railroad seeking $17.2 billion dollars to fund greenfield construction three years before it realized a cent of income. But importantly, DuPont offered no evidence that the DRR would have a lower equity flotation cost than Facebook.

Having found that a SARR must pay some form of equity flotation fee, it would be patently unfair to require a defendant railroad to produce evidence of an equity flotation fee

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(because UP did not include costs for trackage rights, accepting "NPC's cost as the only evidence of record").

incurred by a railroad meeting the exact description of the SARR at issue, because no such evidence will ever exist. A reasonable and conservative approximation of SARR equity flotation costs based on companies that secured unusually low equity flotation fees is the best evidence that the Board can reasonably expect parties to submit, and that is exactly the evidence that NS submitted here.

For these reasons, the Board should reconsider its decision not to include any equity flotation costs for the DRR—despite its finding that the DRR would incur such costs—and adopt NS's evidence of a reasonable estimate of the DRR's equity flotation cost.

2. The *Decision* Materially Erred By Not Accounting for the DRR's Costs to Transport Rail Over the Residual NS.

The *Decision* incorrectly found that NS had not justified including all of the costs to transport rail required to construct the DRR from the manufacturer to the DRR railheads. *See Decision* at 201. As NS explained, the rail cost that DuPont advocated and the *Decision* accepted accounted only for the cost of moving rail 3.9 miles from the source to its connection with the residual NS. *See* NS Reply at III-F-139-41. It does not account for the cost to transport the rail over the residual NS system to the DRR. *See id.* at III-F-141-42. While the real-world NS transports much of its rail over its own lines, the DRR would not be able to transport rail over its own system during construction because the DRR lines would not yet exist. Consistent with Board precedent, the DRR must pay for the cost of transporting rail from the site where it is manufactured to DRR railheads.[8]

[8] *See, e.g., Otter Tail Power Co. v. BNSF Ry. Co.*, STB Docket No. 42071, at D-26 (S.T.B. served Jan. 27, 2006) ("*Otter Tail*") ("it would not be proper to assume that a SARR could transport materials over the very lines that the SARR would need to build"); *Public Serv. Co. of Col. d/b/a Xcel Energy v. BNSF Ry. Co.*, STB Docket No. 42057, at 17-18 (S.T.B. served Jan. 19, 2005).

DuPont offered no evidence at all of the costs to transport rail from the short line interchange with the NS system at Harrisburg, PA, *across the NS system, and to DRR railheads*—a necessary cost the Board has made clear a SARR must pay. *See, e.g., Otter Tail* at D-26.

This omission occurred because DuPont relied solely on NS's R-1 costs for transporting rail, which only include costs incurred by NS for transporting rail over the network of a carrier other than NS. *See* NS Reply at III-F-140-41. NS's costs to transport rail across its own network are not shown in the R-1. *See id.* The costs for the DRR to transport rail over NS from Harrisburg, PA to the DRR railheads therefore are not accounted for in the R-1 costs DuPont used.[9] To fill the void left by DuPont's SAC presentation, NS developed and supported evidence of the cost of transporting rail from the DRR source in Steelton, over NS lines, and to DRR railheads.[10] NS's evidence was the only evidence of record that accounted for the costs of moving the rail all the way from the source to the DRR railheads. Board precedent makes clear that a SARR must account for the full cost of transporting rail—including "haulage" over the lines of the residual incumbent.[11] Because only NS presented evidence of the cost of such transportation that is not reported in the NS R-1 (*i.e.*, the cost of haulage over the lines of the

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[9] Thus, DuPont's "double-counting" argument is incorrect. Accounting for the cost of transportation of rail from the interchange with foreign lines to the DRR railheads would not "double-count" foreign line transportation costs. Rather, it would simply account for the full DRR cost of transporting rail from its source to the DRR railheads. To the extent that rail used by NS in the real world is transported over foreign lines, that portion of the rail transportation cost is included in the R-1 rail cost reported in Schedule 724 and included in the agreed portion of DRR rail costs. NS calculated and supported a reasonable estimate of the cost of transporting rail over the residual NS to the DRR railheads. *See* NS Reply at III-F-142. The combined cost of transportation of rail developed by NS therefore fully accounts for DRR rail material and transportation cost, but does not double count.

[10] *See Decision* at 134 (summarizing NS's rail transportation cost evidence); NS Reply at III-F-141-42.

[11] *Otter Tail* at D-26.

residual NS), the Board should accept NS's evidence as the best—and only—evidence of record regarding that significant road property investment.[12]

Contrary to the *Decision*'s ruling, NS fully justified inclusion of costs for DRR to transport rail on the residual NS. As discussed above, DuPont did not claim that DRR rail transportation costs not captured by the NS R-1 (*i.e.* for the cost of transportation of rail over the NS system) would not be incurred by the DRR, just that it disagreed with how NS calculated those costs. Thus, while the parties disagreed as to the appropriate amount of those transportation costs, there was no dispute that under clear Board precedent, the accurate amount of those costs was "justified" and properly included as a necessary DRR capital investment. The Board's complete omission of these costs is material error.

Although DuPont vaguely complained about certain other aspects of NS's non-R-1 rail transportation cost calculations and evidence, it offered *no* alternative evidence regarding the amount of those real and essential costs or how they should be accounted for or calculated. *See* DuPont Reb. at III-F-82. Where, as in this case, one party presents reasonable and supported evidence of a necessary cost or investment and the other party presents no evidence, the Board accepts the only reasonable evidence proffered as the best evidence of record.[13] The Board should reconsider its ruling and adopt NS's evidence of the cost of transportation of rail because it is the only evidence that includes the necessary costs of moving rail from its source all the way to the DRR railheads.

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[12] *See, e.g.*, *Duke/NS*, 7 S.T.B. at 161; *McCarty Farms*, 2 S.T.B. at 496; *Nevada Power*, 6 I.C.C.2d at 55, 62.

[13] *See Duke/NS*, 7 S.T.B. at 161; *McCarty Farms*, 2 S.T.B. at 496; *Nevada Power*, 6 I.C.C.2d at 55, 62.

3. The *Decision* Materially Erred by Excluding Necessary Costs of Lighting for Construction of the DRR.

The *Decision* made a material error by rejecting the inclusion in DRR road property investment of costs of lighting that would be necessary to complete the construction of the DRR on the compressed time scheduled posited by DuPont. *See Decision* at 172-23. In order to complete construction of the DRR roadbed in the short seven months posited by DuPont, it would be necessary for DRR construction crews to work at night. Accordingly, NS developed reasonable costs for lighting necessary to allow construction crews to work at night and to complete DRR roadbed construction within DuPont's aggressive schedule. *See* NS Reply at III-F-115-16. The Board made two material errors in rejecting these necessary costs.

First, the Board provided no rationale or support for its one sentence rejection of NS's lighting evidence stating only that it "believes that night work would not be necessary to meet the construction schedule." *Decision* at 173. And DuPont's response on rebuttal simply asserted, without support or analysis, that the hours of daylight in Danville, Kentucky would be "sufficient" for crews to complete their work.[14] The Board's conclusory and unexplained finding of its "belief" that night work would not be necessary is thus unsupported by substantial evidence.

Second, the Board stated that any lighting costs the DRR might incur would be covered by the contingency factor. *See Decision* at 173. By definition, however, a contingency factor

[14] The Board also repeated but did not assess or accept, DuPont's erroneous claim that requiring the DRR to pay lighting costs would constitute a barrier to entry and would be inconsistent with the theory of unconstrained resources. *See Decision* at 173. But NS did not claim that resources would be constrained or that the DRR would be unable to procure the necessary resources, it only demonstrated that the DRR should required to pay the same costs that it—or any other carrier (including NS)—would necessarily incur to purchase and deploy those resources.

accounts for costs that are unknown and unanticipated at the outset, but arise unexpectedly during the construction project.[15] As the Board has previously explained,

> contingencies provide funds for *unknown* events that typically occur during the construction of a project . . . [A] contingency fund would be needed only to fund *unforeseen* costs (such as increased costs due to bad weather) that might occur during construction.

FMC Wyoming v. Union Pacific Railroad, 4 S.T.B. 699, 823 (2000) (emphasis added). The need for light to allow night work is entirely foreseeable and would not be considered an unexpected contingency. The facts that the sun sets every day and that there are hours of daylight and of darkness in a given geographic region in a given period are known, foreseeable, and can be accurately predicted and accounted for in advance.[16] The Board materially erred when it excluded reasonable costs for such lighting, and it should revise the *Decision* to include such costs. *See* NS Reply at III-F-115-16.

4. The *Decision* Materially Erred By Not Accounting For Swell in a Manner Consistent With *Means* Engineering Costs.

The Board committed a material error by not accounting for the indisputable fact that excavated material quantities "swell" (*i.e.,* expand) when calculating the unit costs applied to earthwork quantities. Regardless of whether the ICC Engineering Reports record earthwork quantities in Bank Cubic Yards ("BCY"), each party's evidence was predicated on the *Means*

[15] *See, e.g., McCarty Farms,* 2 S.T.B. at 521 ("A contingency factor is included to cover *unexpected* costs caused by various *unknown factors* encountered during the construction process.") (emphasis added); *Arizona Pub. Serv. Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 2 S.T.B. 367, 402 (1997) ("A contingency factor is included to cover unexpected costs encountered during construction.").

[16] In contrast to the time the sun rises and sets each day, *weather* is not accurately predictable in the short- and medium-term. The Board found in this case that weather-related delays and costs should be assumed to be included in the contingency factor, a finding to which NS does not take exception in this Petition. *See Decision* at 167-68.

unit cost for excavation of earthwork quantities in BCY.[17] And the Board adopted that approach.[18] NS demonstrated that *Means* calculates the unit cost for hauling excavated material by converting BCY excavation quantities into expanded Loose Cubic Yard ("LCY") quantities.[19] Specifically, NS demonstrated that *Means* develops costs for earthwork excavation using a composite sum of unit costs for: (i) excavating, measured in BCY; and (ii) hauling the resulting swelled volume, measured in LCY.[20]

Accordingly, proper and accurate application of *Means* earthwork costs must account for excavation using BCY and hauling costs based on swelled volumes measured in LCY. The only evidence that presented these calculations consistent with the way they are developed and compiled by *Means* is NS's evidence, which the Board should adopt on reconsideration.

In rejecting NS's evidence, the Board erroneously relied on an unsupported, broad-brush claim presented by DuPont for the first time in rebuttal that some unidentified contractors take additional hauling due to swell into account when they make bids for excavation.[21] Even if accurate and supported (which it was not), this claim would be irrelevant. The Board adopted and relied upon *Means* earthwork unit costs—which account for excavated quantities and swelled hauling quantities separately—and combined them (along with compacted quantities for placement and backfilling) into a composite earthwork excavation and fill unit cost. Whether or not some contractors may include swell-related hauling costs in earthwork bids is irrelevant to

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[17] Contrary to the Board's assumption, the units the ICC used to report these *quantities* in the Engineering Reports is not directly relevant to the question of unit <u>*costs*</u> at issue here, which depends on *Means* cost data that both parties used and the Board accepted.

[18] *See Decision* at 158-164, 185.

[19] *See, e.g.* NS Brief Ex. 7.

[20] *See* NS Reply WP "RS *Means* Site Prep Worksheet-swell and shrinkage factor.pdf"; NS Brief at 141-43 and Ex. 7 (mark up of Reply workpaper showing more specifically how *Means* accounts for swell and shrinkage contrary to DuPont's argument raised or rebuttal).

[21] *See* DuPont Reb. at III-F-50.

the proper development of earthwork unit costs using *Means*. The critical and dispositive point is that *Means* accounts for hauling of swelled quantities as a separate component of its earthwork unit costs. Failure to include that component in a *Means*-based cost calculation would result in an incomplete and erroneous cost calculation. The Board should reconsider its analysis of this issue and adjust the parties' earthwork unit costs recorded in BCY to account properly for the application of *Means* haulage costs measured in LCY.

C. The Decision Includes Material Errors That Are Inconsistent With the Logic of the Board's Other Holdings.

1. The Board Erroneously Applied Its Correct Decision About How to Calculate Ad Valorem Taxes.

The *Decision* correctly recognized that each of the states in which the DRR would operate assesses ad valorem taxes using the unit method and thus that the DRR's total ad valorem taxes would be a function of its relative profitability.[22] The Board also accepted NS's approach of using a "unit value modifier" to estimate ad valorem taxation. However, the Board did not update ad valorem tax calculations in its *Decision*, and did not include an ad valorem tax spreadsheet in its *Decision* workpapers. Rather, the Board's final SAC analysis incorporated ad valorem tax calculations based on NS's Reply SAC evidence and not the Board's final SAC determination. In other words, the *Decision* assumes that the DRR would pay taxes based on the profitability of the NS Reply DRR and not the increased profitability of the *Decision*'s version of the DRR. This disconnect is a material error (and likely an unintentional one), because it results in ad valorem taxation levels that are not commensurate with the profitability of the *Decision*'s DRR.

This material error can be corrected by updating NS's Reply ad valorem workpaper and linking it to the Board's DCF. First, NS's ad valorem tax workpaper "DRR Ad Valorem

[22] *See Decision* at 67; NS Reply at III-D-210-219.

Tax_Reply.xlsx" needs to be updated with the Board's final operating expense amount. This can be done by changing the value in cell C5 of the "Modifier_Reply" tab to $3,015,571,160, which is the Total Annual Operating Expenses value in the Board's DCF. Second, the ad valorem tax workpaper needs to be updated to reflect the Board's final construction costs. This can be done by updating costs in NS's Reply workpaper DRR Ad Valorem Tax_Reply.xlsx so that the investment amounts in cells C32:C54 on tab "Construction" reflect the final construction amounts in tab IIIF Totals NS Reply of the Board's workpaper "STB_TC-III-F Total NS Reply STB No2.xls." To flow these changes through the DCF, the spreadsheet links between "DRR Ad Valorem Tax_Reply.xlsx" and "DRR Operating Expense-STB Technical Corrections.xlsx" and between "DRR Operating Expense-STB Technical Corrections.xlsx" and the Board's DCF would need to be updated.

2. The *Decision* Materially Erred By Accepting DuPont's Evidence of Movable Bridge Approach Spans.

The Board should reconsider its decision to accept DuPont's evidence regarding the approach spans and structures for movable bridges.[23] The *Decision* held that NS submitted the best evidence of record as to bridge heights and lengths, and thus accepted NS's evidence relating to approach span design and costs (which includes bridge abutments, piers, superstructure, substructure, and other components) for every type of DRR bridge other than movable bridges.[24] But while the *Decision* explained that it was adopting DuPont's evidence on

[23] NS seeks reconsideration of only that portion of the *Decision* accepting DuPont's evidence on *approach spans* for bridges also having movable spans. The Board accepted DuPont's evidence regarding DRR movable structures, and this Petition does not seek reconsideration of the Board's acceptance of DuPont's position regarding the design and costs of those movable spans themselves.

[24] *Compare Decision* at 220, 224-25 (adopting NS's evidence for approach spans for Types I, II, III, IV bridges, tall bridges, and non-movable bridges, because DuPont evidence failed to

the cost of movable spans, its workpapers also adopted DuPont's evidence on the fixed approach spans for bridges that have moveable spans—with no explanation of why DuPont's approach span evidence was the better evidence of record. The *Decision*'s adoption of DuPont's evidence for the fixed approach spans for movable bridges is irreconcilable with the Board's rulings on approach spans for other bridges—indeed, it may have been unintentional. Regardless, this is a material error that the Board should reconsider.

The cost of fixed approach spans for movable bridges are analytically distinct from the cost of the movable span itself.[25] For that reason, the Board's decision to adopt DuPont's evidence of the cost of moveable spans on DRR bridges does not support the Board's use of DuPont's cost evidence for fixed approach spans in its workpapers. See *Decision* at 223. Because the *Decision* does not separately discuss movable spans and approach spans for movable bridge structures, it does not provide any rationale for treating approach spans for one type of bridge differently from all others. NS submits that there is no logical rationale for doing so.

The Board's analysis and conclusions regarding approach spans and structures for all other DRR bridges applies equally to approach spans for movable bridges. DuPont's methodology for approach spans for movable bridges is the same flawed approach it used for approach spans for all other bridges, which the Board rejected.[26] And DuPont provided no

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demonstrate geographic and systemic fit) *with id.* at 223 (accepting DuPont evidence for movable bridge structures).

[25] *See* NS Reply at III-F-211-213 (explaining NS's development of costs for fixed approach spans for bridges also having moveable spans).

[26] DuPont's method for approach spans for all bridges was to assign pier heights unrelated to the specific maximum height of the bridge, thus assuming a bridge design and structure that does not satisfy the fundamental requirement that a SARR's "bridges must be able to fit geographically" and topographically (including "the area between the span and the topographic feature from which the bridge will extend") "into the system they are replacing." *Decision* at 220, 224-225.

evidence sufficient to distinguish its movable bridge approach spans or to justify different treatment of those approach spans. Because NS's bridge approach span evidence is the best evidence of record for such spans for all major bridges (including exceptionally tall bridges, movable bridges, and non-movable bridges over navigable waters), the Board should amend the *Decision* to accept NS's approach span evidence for movable bridges.[27]

3. The *Decision* Materially Erred By Modifying the Terminal Value Calculation.

The Board committed a material error by accepting DuPont's argument regarding the terminal value adjustment to correct the mismatch between the capital structure implicit in the DRR cost of capital and the treatment of the DRR's tax benefits. The Board corrected DuPont's interest related tax deductions to reflect its holding that DuPont must pay down the principal on its capital investments by substituting the straight-line average of the interest payments over the 20-year debt amortization period. *See Decision* at 282-83. But while the Board stated its intent to reconcile its acceptance of DuPont's terminal value adjustment with its correct holding that the DRR would be required to pay down the principal on its debt (and thus that interest payments on that dwindling debt would steadily decrease over time), the *Decision*'s terminal value calculations actually assume that the DRR's interest payments would remain constant after Year 10. Thus the *Decision* substantially overstates the DRR's interest tax benefits for Years 11 through 20.

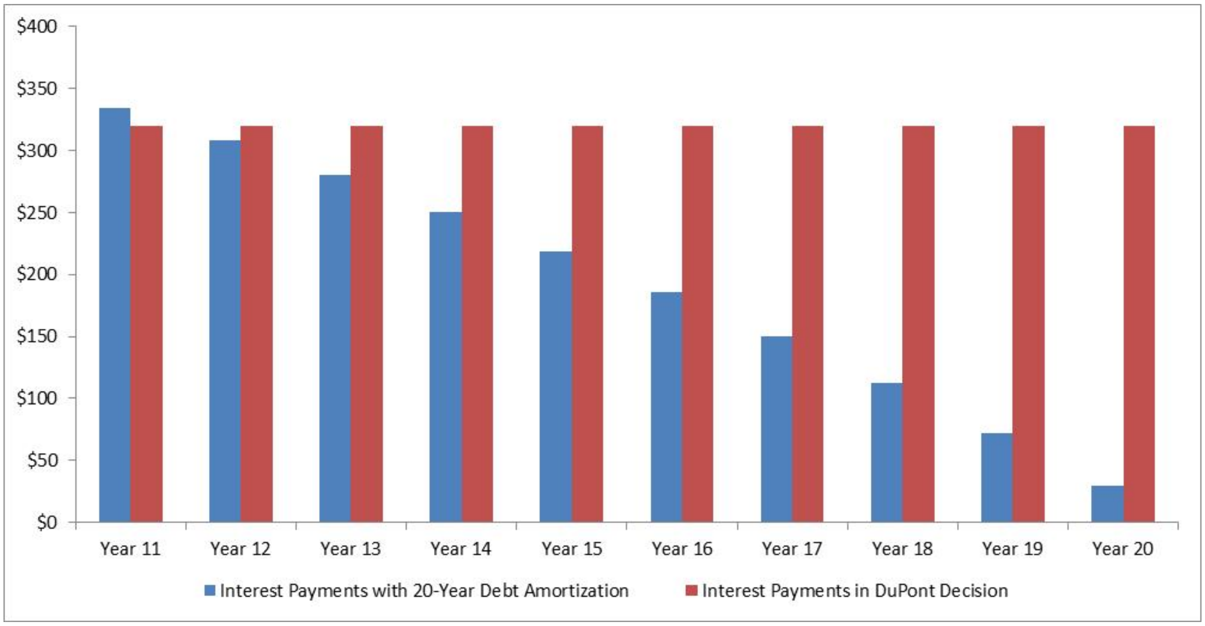
For all types of bridge approach spans and their components—including those for bridges also having movable spans—NS's Reply Evidence is the only evidence that satisfies the geographic fit requirement.

[27] *See AEPCO 2011*, STB Docket No. 42113, at 20 (Board's "role is to decide which party's . . . [evidence is] the best evidence of record"); *see also Decision* at 229, 224-25 (accepting NS's designs and costs for other types of bridges, including approach spans, "because it is the best evidence of record").

There are two significant problems with the Board's modifications to the DCF terminal value calculations. The first is conceptual. If implemented, the Board's acceptance of DuPont's proposed adjustment to the terminal value calculation would introduce a new, unwarranted, and problematic inconsistency into the already complex DCF model by explicitly applying different financial assumptions to a SARR's initial acquisition of assets and its subsequent replacement of assets as they are assumed to wear out. Specifically, before any changes to the terminal value calculations, the DCF was configured to apply the same financial assumptions to the SARR's initial investment and to the subsequent replacement of assets as they are projected to wear out. For example, the DCF assumed that the SARR's initial debt and the debt incurred as part of the replacement of worn out assets would be amortized over 20 years. Now the Board assumes that the initial debt would still be amortized over 20 years, but there would be no amortization of debt for assets in the subsequent replacement cycles. Instead there would be an interest-related adjustment for tax purposes based on the average of the interest over the initial 20 year amortization. The Board provided no explanation of how or why the financial assumptions surrounding the prospective acquisition of SARR assets should differ from those applied to the initial acquisition.

The second problem is a mathematical one that flows from the Board's failure to allow the DRR's debt to amortize over its full 20-year term. Instead of allowing amortization, the *Decision* overrides the scheduled interest payments in years 11 to 20 of the DCF model with the average interest rate over the 20-year amortization period. Because interest payments are lower than average in the later years of the amortization period as the amount of outstanding principal declines, the Board's substitution of the higher average interest rate over the years 11 through 20 time frame overstates interest. The chart below depicts the interest payment schedule for years 11 through 20 over the 20-year amortization period determined by the Board and shows the amount by which the *Decision* overstates interest.

SARR INTEREST PAYMENTS ($ MILLIONS)



NS submits that the Board erred by needlessly modifying its long-standing DCF structure and that the Board should adopt the approach to terminal value calculations set forth in NS's Reply.[28] But if the Board intends to adhere to its changed approach, at the very least its formulas should be corrected to eliminate the interest overstatement. This can be done by using the remaining year 11 through 20 interest payments and then applying the 20-year average interest payments beyond year 20.

D. The Decision's Assignment of Positive Train Control ("PTC") Costs and Investments is Materially Erroneous and Unsupported by Substantial Evidence.

The *Decision* assumed that the DRR could implement "an initial system" in 2009, and that subsequently the DRR would upgrade that initial system "to [comply with] RSIA

[28] *See* NS Reply at III-H-9.

requirements" from 2010 through 2015. *Decision* at 229-30. However, the evidence submitted by the parties did not allow such a hybrid approach. DuPont's evidence assumed the DRR would install a fully interoperable, RSIA-2015-compliant PTC system before it commenced operations in 2009. *See id*. at 228-29; DuPont Opening at III-F-39. NS's evidence demonstrated the flaws in DuPont's approach and assumed that the DRR would install a CTC system in 2009 and overlay that system with a PTC system by the end of 2015—consistent with the still-ongoing development and evolution of PTC-related technology and components and the interoperability challenges experienced by U.S. rail carriers. *See* NS Reply at III-F-236-246.

Because the Board adopted a third, separate and distinct approach that neither party advocated, the parties did not present evidence that addressed which PTC system development, deployment, and testing costs would be incurred in 2009 and which would be incurred from 2010 through 2015 (some for a second time) as interoperability standards solidify, technological solutions are found, and new RSIA-compliant components are developed. Not surprisingly, neither the *Decision* nor the Board's workpapers provided a rational or consistent explanation of how its hybrid approach would be implemented. Although the *Decision* ruled that the DRR would implement an initial "PTC" system in 2009, the Board's workpapers include no PTC-related development, deployment, back office or testing expenditures as part of the initial DRR investments.

In their technical corrections petition, the parties agreed that the Board's workpapers did not "phase-in" the costs that the DRR would incur to upgrade its PTC system to meet RSIA standards from 2010 through 2015. *See* Joint Technical Corrections Petition at 13 (April 14, 2014). The two parties disagreed about the appropriate correction for that error and its quantification. *See id.*

The Board's technical corrections decision simply moved certain PTC development costs from the 2009 time period to the 2010 to 2015 time period. *See DuPont v. NS Decision*, STB Docket No. 42125, at 5 (S.T.B. served Oct. 3, 2014) ("*Technical Corrections Decision*"). But this solution fails the Board's own SAC feasibility standard by erroneously assuming, among other things, that: (1) although DuPont never identified the type of PTC system it would have installed in 2009, all of wayside components it installed in 2009 somehow would meet 2015 interoperability standards; (2) although the record is unambiguous that locomotive radios meeting interoperability standards were not available in 2009, that the locomotive radios installed by the DRR in 2009 somehow would meet 2015 interoperability standards; and (3) that no development or testing costs would be incurred by the DRR in (or before) 2009 to implement a fully functioning (but not interoperable) PTC system. As it stands, therefore, the Board's assignment of PTC system costs is arbitrary, capricious, and unsupported by the evidence.

In this reconsideration petition, NS proffers two alternative approaches to correct the erroneous PTC upgrade cost computed in the *Technical Corrections Decision*. Each of these alternatives would allow the Board to implement the *Decsion*'s finding that the DRR would install an initial unspecified, non-RSIA-compliant PTC system in 2009 and then upgrade that systme to RSIA standards and requirements by the end of 2015.[29] The first option would rely on evidence in the record and assume that the DRR would incur full PTC system costs prior to its commencement of operations in 2009 and then incur many of those costs again from 2010

[29] NS continues to believe that the approach of the Board followed in *AEPCO 2011* is more reasonable, feasible, and consistent with the real world and the state of the PTC-related technology during the relevant period. *See e.g.*, NS Reply at III-F-205. Assuming, however, that the Board does not intend to change its ruling that assumes a SARR could implement some sort of PTC-like system in 2010 or 2011 and then upgrade it to an RSIA-compliant PTC system by the end of 2015, the two options NS proposes in this Petition provide rational ways to implement that ruling.

through 2015 (when necessary technology came into existence) to upgrade the system to comply with RSIA-2015 standards and requirements.[30] NS has provided workpapers to illustrate how that approach could be implemented using existing evidence submitted before the record closed.

The advantage of the approach described above is that it would not require any new evidence. Instead, this approach would rely on evidence that was both produced in discovery in this case and submitted to the Board before it issued the *Decision*. Following this approach should not cause significant further delay and would allow the Board to make a reasoned and supported decision on this issue without additional complexity or imposing further costs on the parties. At the same time, the resulting PTC cost assignment would be rational, defensible, and supported by evidence in the record.

Should the Board determine not to follow the first option, a second alternative approach would be to re-open the evidence in this case for the limited purpose of allowing the parties to submit evidence that directly addresses the hybrid paradigm adopted by the *Decision*. That is, the Board could allow the parties to submit evidence regarding the implementation of a PTC system under the two-phase approach hypothesized by the *Decision*, including evidence regarding the costs the DRR would incur in each phase. Thus, for example, the parties could

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[30] It is possible that some PTC components initially installed in 2009 might not require upgrading or replacement between 2010 and 2015 to meet RSIA 2015 standards and requirements. However, the evidence submitted by the parties (prior to the Board's hybrid ruling) provides no way to determine which components installed in 2009 could continue to be used to meet 2015 RSIA standards, including interoperability. Because the record contains no indication of which of the myriad of still-developing PTC technologies would be deployed initially, NS believes that only the antennas and towers installed in 2011 likely would not require replacement in order to upgrade the initial PTC system to RSIA 2015 standards. Even excluding those components from the upgrade is conservative because there is no way of knowing if the initial installation would use the 220mhz spectrum planned for the 2015 deployment. NS's illustrative workpapers assume towers and antennae would not be replaced and excludes the costs of those components from the PTC upgrade the DRR would undertake to meet RSIA standards and requirements between mid-2010 and the end of 2015.

address which PTC research and development costs, components, and technology they contend could have been implemented by 2009, and which would be implemented in the second period from 2010 through 2015. The parties' evidence could assign system components, technology, costs, and investments directly to the two periods and provide evidence and argument to support their positions. Based on that evidence—developed and presented to address the paradigm established by the *Decision* rather than the parties' positions before the Board announced the paradigm—the Board could develop a rational and more accurate assignment of PTC costs that would be based on evidence tailored to the approach it announced in the *Decision*.

E. The Decision Materially Erred by Accepting DuPont Assumptions That Are Inconsistent With the Realities of Real-World Railroading.

1. The *Decision* Materially Erred by Allowing the DRR to Obtain Bonus Depreciation Benefits Not Available to NS.

The Board should reconsider its decision to allow the DRR to obtain bonus depreciation benefits that were not available to incumbent NS. The *Decision* rejected NS's proposal to limit the amount of the DRR bonus depreciation benefits to the levels available to NS itself as a result of this temporary income tax shield. Responding to the Board's skepticism as to the validity of allowing the full benefits of bonus depreciation in a SAC proceeding, expressed in *AEPCO 2011*, NS explained that DuPont's treatment of bonus depreciation would place the DRR at a distinct and unfair financial advantage over the real-world NS. *See* NS Reply at III-H-5-7. Under the SAC assumption of unconstrained resources, the entire DRR is assumed to be built during a short time frame. In this case, that artificially short construction period happened to coincide with the period in which Congress provided a temporary bonus depreciation tax benefit. The Board rejected NS's argument that DuPont's treatment of bonus depreciation would produce an effective "reverse barrier to entry" that would distort the SAC analysis by conferring a large benefit on the SARR that was not available to the incumbent. Instead, the Board found that NS's approach would require DRR to "bear any disadvantages" of its construction timing while denying it the tax advantages available during that same period. *Decision* at 278 (citing *Coal Trading* and *McCarty Farms*).[31]

The Board should reconsider its rejection of NS's position that permitting the DRR to enjoy the full benefits of temporary bonus depreciation—benefits exceeding those that were available to NS in the real world—introduces a reverse barrier to entry conferring an unfair advantage on the new entrant, is inconsistent with prior SAC precedent, and distorts the SAC analysis and results. *See* NS Reply at III-5-7. The prior decisions cited by the Board in this case addressed the assumption of unconstrained resources as the basis for assuming the SARR could be constructed in an impossible (in the real world) three-year window. *See Decision* at 278. As the Board recognizes, this assumption allows the SARR to obtain substantial "efficiencies unavailable to the incumbent" in the real world. *See id.* Those decisions do not hold that the SARR is also entitled to claim any and all additional benefits and advantages that might be available to it solely as a byproduct of the artificially short construction period assumption. Such a ruling would inappropriately compound the advantages the SARR has over the incumbent by assuming cost savings that would not be available to even a least-cost most efficient carrier. This in turn would distort the SAC analysis by driving certain SARR investment costs below levels feasible or attainable in the real world. The Board should allow the SARR to assume it would obtain the same tax benefits obtained by the incumbent carrier (or even tax benefits that would be available to a similarly situated real world carrier at the time of SARR construction),

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[31] The *Decision* did not identify any disadvantages a SARR would face as a result of the SAC assumption of unconstrained resources and the resulting short construction period. To the contrary, the Board acknowledged that the short construction period "may result in efficiencies unavailable to the incumbent." *Decision* at 278.

but should not allow the unrelated assumption of unconstrained resources to confer tax benefits on the SARR that were not enjoyed by the incumbent.

In *West Texas Utilities*, the Board accepted the complaint's definition of barriers to entry as any costs that the new entrant must incur that were not also incurred by the incumbent, and explained that the definition is consistent with its regulatory purpose of constraining a railroad from monopoly pricing. *West Texas Utilities Company v. Burlington Northern R.R. Co.,* 1 S.T.B. 638, 670 (1996). The Board observed that its interpretation of barriers to entry is consistent with its view of the SARR as a replacement carrier that steps into the shoes of the incumbent carrier for the segment of the rail system that the SARR would replicate. *Id.* Because NS did not enjoy the full benefits of the limited-time bonus depreciation provision, a replacement carrier stepping into NS's shoes should not be assumed to uniquely and unilaterally enjoy such additional benefits. The Board should reconsider its finding regarding bonus depreciation and limit the bonus depreciation credited to the DRR to the amount available to incumbent NS.

2. The *Decision* Materially Erred By Accepting DuPont's Quantities of Failed Equipment Detectors and Dragging Equipment Detectors.

The Board should reconsider its decision to accept DuPont's proffered quantities of Failed Equipment Detectors ("FED") and Dragging Equipment Detectors ("DED"), because DuPont did not demonstrate that the FED and DED placement quantities used in the real world to meet industry standards are inefficient. *Decision* at 227. The detector spacing[32] proffered by NS is the spacing it uses in the real world, developed to comply with current AREMA industry standards and the location-specific factors they establish for a proper balance of safety and

[32] The spacing between detectors determines the quantities of detectors that must be installed for a given length of rail line.

efficient use of the equipment. *See* NS Reply III-247-48. DuPont's proffered detector quantities, in contrast, relied upon 2001 AREMA standards that NS showed have been superseded. *See id.* Thus, only NS's detector spacing and resulting quantities would meet current industry engineering and safety standards. DuPont failed to demonstrate either that its FED and DED quantities were sufficient to satisfy current industry standards or that the standard-compliant quantities proposed by NS were inefficient.[33] Contrary to the Board's finding (*Decision* at 227), NS *did* "explain why its evidence is better"—DuPont relied on outdated and superseded standards, and only NS provided evidence of detector spacing that would meet current industry standards. *See* NS Reply III-F-246-48. Accordingly, the Board should reconsider its adoption of DuPont's evidence and instead adopt the evidence presented by NS regarding FED and DED spacing and the FED and DED quantities required to maintain that spacing.

[33] In rebuttal, DuPont argued that NS had not shown that the FED and DED spacing and quantities DuPont had proposed were not "feasible." DuPont Reb. III-B-20. This misses the point, as any quantity of detectors down to zero would in some limited sense be "feasible." What NS showed was that the quantities posited by DuPont would not be sufficient to satisfy current, safety-based industry standards and criteria. DuPont ignored NS's showing that DuPont had relied on a superseded standard and made no attempt to show that its detector quantities would be sufficient to satisfy applicable standards necessary for safe and efficient train equipment operations and maintenance. Contrary to DuPont's "feasibility" assertion, it did not show that its FED and DED quantities would be sufficient to ensure DRR complied with industry safety and efficiency standards. Only NS's evidence made that showing.

CONCLUSION

For the reasons stated above, the Board should grant NS's Petition for Reconsideration and reconsider certain aspects of its *Decision*.

Respectfully submitted,

G. Paul Moates
Paul A. Hemmersbaugh
Terence M. Hynes
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

James A. Hixon
John M. Scheib
David L. Coleman
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510.

Counsel to Norfolk Southern Railway Company

Dated: November 12, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, I caused a copy of the foregoing Norfolk Southern Railway Company's Petition for Reconsideration to be served by email and hand delivery upon:

Jeffrey O. Moreno
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036

Paul A. Hemmersbaugh