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SERVICE DATE - NOVEMBER 24, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41989

POTOMAC ELECTRIC POWER COMPANY

v.

CSX TRANSPORTATION, INC.

Decided: November 12, 1997

Defendant, CSX Transportation, Inc. (CSXT), has filed a motion to strike portions of the rebuttal statement of complainant Potomac Electric Power Company (PEPCO), or alternatively for leave to file surrebuttal. CSXT also requests that a schedule for the filing of briefs be established. In a separate motion, CSXT seeks leave to submit errata. PEPCO replied separately in opposition to both motions. The motion to strike and the alternative motion for leave to file surrebuttal are denied. The motion for leave to submit errata is granted in part and denied in part. A schedule for the submission of briefs is established.

BACKGROUND

PEPCO challenges as unreasonably high CSXT's common carrier rates on coal moving in unit train service from origins in West Virginia to PEPCO's electric generating facility in Dickerson, MD. PEPCO requests that maximum reasonable rates be prescribed and that reparations be awarded. The parties submitted simultaneous opening presentations on May 5, 1997; replies on July 11, 1997; and rebuttal on August 11, 1997.

PEPCO's opening stand-alone cost (SAC) evidence presented a proposed hypothetical stand-alone railroad called the Dickerson Railroad ("DRR"). PEPCO identified the traffic and revenues that would be available to the DRR and described how the hypothetical railroad would be built and operated. Under PEPCO's hypothetical model, the DRR would replicate 358 miles of CSXT's system and transport most of the freight traffic that CSXT currently handles over these lines, including approximately 1.2 million tons of coal moving annually from seven West Virginia mines to PEPCO's Dickerson Station. The revenues this traffic would generate were developed from traffic tapes supplied by CSXT during discovery. PEPCO also hypothesized that the DRR would transport a large volume of coal traffic currently transported by Consolidated Rail Corporation ("Conrail") from Monongahela Railroad ("MGA") mines in Pennsylvania to Baltimore, MD. PEPCO's opening evidence assumed that this traffic would be diverted from Conrail's existing

single-line service to a three-carrier interline routing involving Conrail, the DRR and CSXT.¹ The volumes and revenues this traffic would generate were developed from our Waybill Sample.

In its July 11, 1997 reply evidence, CSXT challenged a number of the fundamental premises of PEPCO's SAC evidence. Of particular relevance to the two CSXT motions, CSXT contested the assumed diversion of MGA traffic from its existing Conrail routing to the hypothesized interline routing over the lines of the DRR. CSXT maintained that the inclusion of "non-defendant" traffic in a stand-alone model is improper as a policy matter, and also that the specific diversion hypothesized by PEPCO would be commercially infeasible. In addition, CSXT argued that estimating revenues for MGA traffic from our Waybill Sample overstates the revenues this traffic actually produced. CSXT also argued that PEPCO's estimates of the revenues that the DRR would earn from traffic currently moving on CSXT were overstated because PEPCO failed to take into account refunds paid to contract shippers and origination fees paid to smaller railroads in the Appalachian region.

In its rebuttal evidence, PEPCO explained in more detail why the DRR could divert the MGA traffic and how that traffic would be handled. PEPCO also explained that SAC principles do not preclude the inclusion of non-defendant traffic and that, in the Conrail Control proceeding, CSXT has asserted that it will handle 5.2 million tons of MGA traffic annually. PEPCO also pointed out that the revenue information furnished by CSXT during discovery, and used by PEPCO, reflected revenue adjustments for contract refunds and other allowances. Finally, PEPCO adjusted the Conrail revenues for the MGA traffic reported in the Waybill Sample in an attempt to more closely reflect actual revenues on that traffic.

CSXT's motion to strike contends that much of PEPCO's rebuttal evidence concerning the MGA traffic was new evidence and that PEPCO improperly changed the assumptions concerning operations of the DRR. CSXT's motion to file errata seeks, among other things, the opportunity to supply evidence on the amount of refunds paid to contract shippers, which differs from the information furnished to PEPCO during discovery. During discovery, CSXT represented to PEPCO that the list of refund payments it produced related to individual contracts, which often involve multiple origin-destination (O-D) pairs and even different commodities. Thus, CSXT asserted that it was not possible to develop refunds for traffic moving between individual O-D pairs. The information supplied with the errata filing, however, does indeed relate refunds to individual O-D pairs. Reply to Motion for Leave to Submit Errata Filing at 4-5.

DISCUSSION AND CONCLUSIONS

¹ If the applications of the Norfolk Southern Corporation and CSXT to acquire Conrail in CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail, Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, (Conrail Control proceeding) are approved, the traffic would follow a CSXT-DRR-CSXT routing.

Motion to Strike.

The Rules of Practice limit “[r]ebuttal statements . . . to issues raised in the reply statements to which they are directed.” 49 CFR 1112.6. This standard has been broadly interpreted and does not bar the introduction in rebuttal of new, but responsive, evidence and argument.²

The proponent of a SAC model sets the general parameters by which the reasonableness of a rate will be judged in its opening submission. The opponent, on reply, has an opportunity to attack the fundamental premises underlying the SAC model. On rebuttal, the proponent of the model may not alter the basic configuration of the stand-alone system developed in its opening evidence.³ However, this restriction does not require the proponent to anticipate in its opening evidence every possible defense or criticism of the SAC model. Rather, on rebuttal, the proponent may respond to the defenses and criticisms raised by introducing evidence to bolster its initial assumptions. Whether rebuttal evidence merely responds to evidence introduced by the opponent, and therefore is admissible, or whether it impermissibly alters basic assumptions of the SAC model introduced in the opening evidence must be decided on a case-by-case basis.

CSXT objects that, on rebuttal, PEPCO impermissibly: (1) introduced additional evidence supporting inclusion of MGA traffic in the SAC model; (2) revised the estimates of the revenues MGA traffic would generate; and (3) revised DRR operations.

MGA traffic. CSXT argues that the rebuttal testimony of PEPCO witness Borts, to the effect that SAC principles permit the inclusion of traffic not currently handled by the defendant railroad on the hypothetical rail system, is additional evidence that misinterprets stand-alone costing principles. However, Borts’ testimony responded directly to CSXT’s argument that the DRR could not handle MGA traffic. Whether Borts misinterpreted SAC principles goes to the weight we will accord his testimony, not to its admissibility.

CSXT also assails the rebuttal testimony of PEPCO witness Crowley, who, in response to CSXT reply evidence, further explains the basis of his initial assumption that the MGA-origin traffic could be handled more efficiently over the DRR. In rebuttal, Crowley relied on a statement by a CSXT witness in the Conrail Control proceeding that at least some MGA-origin traffic could be routed via the lines encompassed by the DRR. PEPCO’s evidence responded to CSXT’s reply evidence. Again, CSXT’s objection goes more to the weight that should be accorded Crowley’s rebuttal testimony than to its admissibility.

² See, e.g., Bituminous Coal—Hiawatha, Utah to Moapa, Nevada, No. 37038 et al. (ICC served Dec. 7, 1988) (“Bituminous Coal”) (“There is no bar to the presentation of new evidence on rebuttal, however, as long as it is responsive to the reply.”) Id. at 4.

³ See, e.g., Bituminous Coal (ICC served Jan. 8, 1991) (disallowing expansion of a previously submitted stand-alone railroad).

In addition, CSXT objects to portions of the rebuttal evidence of PEPCO witnesses Morey and Reistrup and argues that their testimony, regarding the feasibility of including MGA-origin traffic on the DRR, should be stricken. In response to CSXT's testimony that it would be operationally infeasible to route MGA traffic in 130-car coal trains over the steep grades on the DRR, CSXT asserts that Reistrup added additional locomotive power to trains traversing steep grades. Even if CSXT is correct in this assertion,⁴ however, Reistrup's testimony is not necessarily objectionable. Additions or deletions of equipment have generally been accepted in the past because they merely affect the cost of operating the hypothetical railroad, not its basic operating parameters.⁵

CSXT argues that, on rebuttal, PEPCO impermissibly eliminated the 26.2-mile line between Grafton and Rivesville, WV. PEPCO points out that its preferred SAC model continues to include the Grafton-to-Rivesville segment. Only in response to CSXT's reply evidence that, if the Conrail Control proceeding is approved, CSXT would route MGA traffic through Cumberland, MD rather than Rivesville did PEPCO contend that the Grafton-to-Rivesville segment would be unnecessary. PEPCO's alternative scenarios are responsive to CSXT's reply evidence. Moreover, PEPCO has not abandoned its original network configuration. We find its rebuttal unobjectionable in this regard.

CSXT alleges that, on rebuttal, PEPCO changed its plan for interchanging MGA traffic with the destination carrier. However, in responding to CSXT's reply evidence, Reistrup and Morey merely noted that, as a bridge carrier, the DRR would not be responsible for delivery of the MGA traffic. Their rebuttal asserted that, if as a result of the Conrail Control proceeding CSXT becomes the destination carrier, CSXT will have numerous alternatives for delivery of this traffic. Because the rebuttal is responsive to the reply evidence, we fail to see how it is improper.⁶

Finally, CSXT argues that the rebuttal evidence of Morey pertaining to the type of contracts Conrail is likely to have on MGA-origin traffic is inappropriate rebuttal. However, Morey's testimony is directly responsive to CSXT's argument that MGA-origin traffic would not be available to the DRR because it is contractually committed to Conrail.

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included in the DRR traffic group, CSXT also questioned PEPCO's use of waybill data to develop revenues for the MGA traffic. CSXT argued that the inaccuracy of waybill revenues is well known, and that PEPCO should have sought discovery of actual revenues from Conrail. On rebuttal, PEPCO proposed two adjustments to waybill revenues which were intended to correct the deficiencies pointed out by CSXT. PEPCO argues that third party discovery from Conrail was unnecessary when data were available from other sources.

A party is free to use whatever data sources it believes are appropriate to develop its evidence. The fact that PEPCO adjusted its evidence in response to CSXT's criticisms does not make such evidence inadmissible. Again, CSXT's argument goes to the weight we will accord PEPCO's evidence and not to its admissibility.

Operational changes. CSXT also argues that, on rebuttal, PEPCO changed the location of a principal DRR yard from Cumberland to Mexico, MD. PEPCO contends, however, that the DRR yard has always been located at Mexico. Our initial review of the record discloses that PEPCO's initial SAC evidence included a yard at Mexico, a location adjacent to the existing Cumberland yard.

CSXT also notes that PEPCO has changed its coal car specification from aluminum gondolas to aluminum bottom-dump hoppers and contends that cars of the latter specification are too small to carry all of the DRR's coal traffic. If CSXT is correct, that fact will become apparent as we analyze the record and will be factored into the final SAC analysis. As in all SAC cases, if

the amount of equipment needed by the hypothetical carrier has been underestimated, we will make appropriate adjustments.⁷

CSXT also objects that PEPCO improperly shifted expenses associated with certain network changes to other parties. Specifically, PEPCO's rebuttal evidence assumed the addition at CSXT's expense of certain tracks and turnouts at Brunswick Yard for the staging of Baltimore-bound trains and modifications at PEPCO's expense of the track layout at the Dickerson Station to allow delivery of a loaded train and pickup of an empty train on the same trip. A stand-alone railroad must be designed to provide the service required by the shippers it would serve. If costs that the stand-alone railroad would have to incur have been improperly "assumed away," our analysis will add those costs to the cost of building and operating the hypothetical railroad.

Finally, CSXT complains about PEPCO's rebuttal response to other criticisms regarding the operations of the DRR. For example: (1) PEPCO assumed on opening that the mines served by the DRR would load coal around the clock, 7 days a week. CSXT contended that the mines operated on a 5-day week, that DRR would have no control over the operations of coal shippers, and that PEPCO had not accounted for additional costs of extended operations. On rebuttal, PEPCO pointed out that the mines currently load coal on weekends. (2) CSXT's reply evidence also criticized PEPCO for failure to provide sufficient capacity for peak volume periods. PEPCO in its rebuttal contended that a most efficient, least-cost carrier would elicit shipper cooperation to minimize traffic fluctuations. We do not regard PEPCO's rebuttal statements as inappropriate, as they are directed at criticisms raised in CSXT's reply evidence. Whether the rebuttal arguments are persuasive will be decided as we analyze the record.

2. Motion to File Errata.

In its Motion for Leave to Submit Errata Filing, CSXT revises quarterly coal tonnage data and the allocation of revenues to the originating carrier. The errata also adjust the revenues reported on CSXT's traffic tapes to reflect refunds on contracts. On October 6, 1997, PEPCO replied in opposition to the adjustment of the revenue data to reflect refunds, contending that the adjustment inappropriately introduces new evidence not produced during discovery and to which it does not have an opportunity to reply. PEPCO does not oppose the submission of the other errata data. We will deny CSXT's motion to submit corrected traffic tape revenues.⁸

PEPCO's objection to CSXT's attempt to adjust the estimate of refunds incorporated into its traffic tapes to reflect the actual refunds paid on the particular O-D traffic included in the DRR traffic group has merit. As PEPCO points out in its reply to CSXT's motion, during discovery,

⁷ See n.5, supra.

⁸ Because PEPCO does not oppose the errata concerning quarterly coal tonnage or the allocation of revenues to origin carriers, we accept those errata filings.

CSXT was requested to produce information on refunds, but CSXT responded that it was not possible to develop refund information for particular O-D shipments. CSXT makes no attempt to explain why, during the discovery phase of this proceeding, it contended that the information it now seeks to introduce could not be developed.⁹ Its unexplained reversal of course is not benign or without consequence. The record has closed, and because CSXT did not make the information it now seeks to introduce available during discovery when requested to do so, PEPCO has not had the opportunity to examine or verify the information. As we noted in Conrail Control, we look with disfavor upon the filing of errata that “curtail the ability of parties to respond fully and adequately to the record within the time frames we have established.”¹⁰

During the course of this proceeding, CSXT has reversed field several times on this issue. During discovery, it asserted that the traffic tapes contained an estimate of refunds paid to shippers but that it was not possible to determine the exact refunds paid on any particular O-D traffic.¹¹ In its reply evidence, CSXT contended that the traffic tapes did not reflect refund payments; it also criticized PEPCO for failing to use refund data produced during discovery (which did not contain refund data for particular O-D pairs) to adjust the traffic tape revenues. In its errata filing, CSXT acknowledges that the traffic tapes include an estimate of refunds, and that the actual refunds paid to particular O-D shippers exceeded the estimates on the traffic tapes.

Apparently, after the close of the evidentiary record, CSXT concluded that it was not as “burdensome” or “oppressive” as it had thought to compute the exact amount of refunds given to particular traffic. Thus, the errata filing purports to introduce data on the amount of refunds given on the traffic that PEPCO included on the DRR. However, CSXT has failed to demonstrate why we should accept the errata filing opposed by PEPCO. To accept that evidence, we would have to

⁹ Cf. Fed. R. Civ. Proc. 37(c)(1) (prohibiting a party from using information it failed to disclose during discovery).

¹⁰ Furthermore, we note that Congress as well as the railroad and shipper industry have urged the Board to expedite the processing of rate cases. See Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527 (STB served Mar. 22, 1996).

¹¹ In its discovery responses, CSXT stated that its traffic tapes include “revenue adjustments made within 16 months of the affected shipment but do not necessarily reflect all revenue adjustments. . . earned on particular shipments after the shipment has been completed. Developing information reflecting all such revenue adjustments would involve an unduly burdensome and oppressive special study.” CSXT response to Request No. 5. On October 21, 1997, well after discovery was completed and the evidentiary record closed, CSXT supplemented its discovery response by informing PEPCO that the traffic tapes only reflect revenue adjustments made “during the first 16 weeks following the actual shipment’s move date.” See Supplemental Response of CSXT to Complainant’s First Request for Production of Documents.

either deprive PEPCO of the opportunity to respond, or reopen discovery, reopen the record, and allow the parties to relitigate this case. We will not do so. It is unfair gamesmanship and an abuse of the administrative process for a party to withhold information during discovery and then introduce that information, after the record has closed, in an errata filing only after it proves to be beneficial to its case.¹²

3. Briefing Schedule.

PEPCO submits that briefs are unnecessary in light of the extensive argument submitted during the evidentiary phase of this proceeding, but it does not oppose a briefing schedule that would call for simultaneous briefs. We believe that briefs, properly employed, can focus the issues and thereby contribute to greater efficiency in analyzing the record. Accordingly, we are providing for the submission of simultaneous briefs not to exceed 50 pages.

We do not intend to dictate the content of the briefs. However, it would be helpful to us if, in their briefs, the parties indicate if the record contains any evidence on: (1) the marginal cost of producing a megawatt hour of electricity for the Pennsylvania-New Jersey-Maryland (PJM) power pool generating plants other than PEPCO plants; (2) the marginal cost of producing a megawatt hour of electricity for the Virginia and Carolina Area Reliability pool and the Eastern Central Area Reliability pool plants; and (3) the PJM hourly dispatch rates for 1995 and 1996. In addition, CSXT should indicate what evidence supports its “plant weld” and “field weld” unit costs; if its evidence contains right-of-way land acreage by county and line segment; and where in the record final quantities and costs for “other grading quantities” are developed. PEPCO should indicate where its evidence enumerates bridge inventory by span length and bridge type; and why its unit cost for “station clerical” (of \$16.82428) differs from CSXT’s unit cost (of \$18.27937) when PEPCO witness Carroll’s rebuttal statement (at 12) claims to use the same “1996 CSXT URCS unit costs” as CSXT. Finally, in the rebuttal statement of Prescott (at 16-21), PEPCO states that CSXT’s WSAC presentation is flawed because it contains five input errors in the spreadsheet. PEPCO should identify the specific cell references in WSAC.WK4 where these input errors can be found.

¹² For this reason, we also will not accept as part of the record in this case CSXT's supplemental discovery response (see n. 11, supra), the introduction of which PEPCO opposed in a pleading filed November 5, 1997.

It is ordered:

1. The motion to strike and the motion for leave to file surrebuttal are denied.
2. The motion for leave to file errata is denied except to the extent discussed above.
3. Briefs not to exceed 50 pages in length are due December 24, 1997..
4. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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the amount of equipment needed by the hypothetical carrier has been underestimated, we will make appropriate adjustments.⁷

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Finally, CSXT complains about PEPCO's rebuttal response to other criticisms regarding the operations of the DRR. For example: (1) PEPCO assumed on opening that the mines served by the DRR would load coal around the clock, 7 days a week. CSXT contended that the mines operated on a 5-day week, that DRR would have no control over the operations of coal shippers, and that PEPCO had not accounted for additional costs of extended operations. On rebuttal, PEPCO pointed out that the mines currently load coal on weekends. (2) CSXT's reply evidence also criticized PEPCO for failure to provide sufficient capacity for peak volume periods. PEPCO in its rebuttal contended that a most efficient, least-cost carrier would elicit shipper cooperation to minimize traffic fluctuations. We do not regard PEPCO's rebuttal statements as inappropriate, as they are directed at criticisms raised in CSXT's reply evidence. Whether the rebuttal arguments are persuasive will be decided as we analyze the record.

2. Motion to File Errata.

In its Motion for Leave to Submit Errata Filing, CSXT revises quarterly coal tonnage data and the allocation of revenues to the originating carrier. The errata also adjust the revenues reported on CSXT's traffic tapes to reflect refunds on contracts. On October 6, 1997, PEPCO replied in opposition to the adjustment of the revenue data to reflect refunds, contending that the adjustment inappropriately introduces new evidence not produced during discovery and to which it does not have an opportunity to reply. PEPCO does not oppose the submission of the other errata data. We will deny CSXT's motion to submit corrected traffic tape revenues.⁸

PEPCO's objection to CSXT's attempt to adjust the estimate of refunds incorporated into its traffic tapes to reflect the actual refunds paid on the particular O-D traffic included in the DRR traffic group has merit. As PEPCO points out in its reply to CSXT's motion, during discovery,

⁷ See n.5, supra.

⁸ Because PEPCO does not oppose the errata concerning quarterly coal tonnage or the allocation of revenues to origin carriers, we accept those errata filings.

CSXT was requested to produce information on refunds, but CSXT responded that it was not possible to develop refund information for particular O-D shipments. CSXT makes no attempt to explain why, during the discovery phase of this proceeding, it contended that the information it now seeks to introduce could not be developed.⁹ Its unexplained reversal of course is not benign or without consequence. The record has closed, and because CSXT did not make the information it now seeks to introduce available during discovery when requested to do so, PEPCO has not had the opportunity to examine or verify the information. As we noted in Conrail Control, we look with disfavor upon the filing of errata that “curtail the ability of parties to respond fully and adequately to the record within the time frames we have established.”¹⁰

During the course of this proceeding, CSXT has reversed field several times on this issue. During discovery, it asserted that the traffic tapes contained an estimate of refunds paid to shippers but that it was not possible to determine the exact refunds paid on any particular O-D traffic.¹¹ In its reply evidence, CSXT contended that the traffic tapes did not reflect refund payments; it also criticized PEPCO for failing to use refund data produced during discovery (which did not contain refund data for particular O-D pairs) to adjust the traffic tape revenues. In its errata filing, CSXT acknowledges that the traffic tapes include an estimate of refunds, and that the actual refunds paid to particular O-D shippers exceeded the estimates on the traffic tapes.

Apparently, after the close of the evidentiary record, CSXT concluded that it was not as “burdensome” or “oppressive” as it had thought to compute the exact amount of refunds given to particular traffic. Thus, the errata filing purports to introduce data on the amount of refunds given on the traffic that PEPCO included on the DRR. However, CSXT has failed to demonstrate why we should accept the errata filing opposed by PEPCO. To accept that evidence, we would have to

⁹ Cf. Fed. R. Civ. Proc. 37(c)(1) (prohibiting a party from using information it failed to disclose during discovery).

¹⁰ Furthermore, we note that Congress as well as the railroad and shipper industry have urged the Board to expedite the processing of rate cases. See Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527 (STB served Mar. 22, 1996).

¹¹ In its discovery responses, CSXT stated that its traffic tapes include “revenue adjustments made within 16 months of the affected shipment but do not necessarily reflect all revenue adjustments. . . earned on particular shipments after the shipment has been completed. Developing information reflecting all such revenue adjustments would involve an unduly burdensome and oppressive special study.” CSXT response to Request No. 5. On October 21, 1997, well after discovery was completed and the evidentiary record closed, CSXT supplemented its discovery response by informing PEPCO that the traffic tapes only reflect revenue adjustments made “during the first 16 weeks following the actual shipment’s move date.” See Supplemental Response of CSXT to Complainant’s First Request for Production of Documents.

either deprive PEPCO of the opportunity to respond, or reopen discovery, reopen the record, and allow the parties to relitigate this case. We will not do so. It is unfair gamesmanship and an abuse of the administrative process for a party to withhold information during discovery and then introduce that information, after the record has closed, in an errata filing only after it proves to be beneficial to its case.¹²

3. Briefing Schedule.

PEPCO submits that briefs are unnecessary in light of the extensive argument submitted during the evidentiary phase of this proceeding, but it does not oppose a briefing schedule that would call for simultaneous briefs. We believe that briefs, properly employed, can focus the issues and thereby contribute to greater efficiency in analyzing the record. Accordingly, we are providing for the submission of simultaneous briefs not to exceed 50 pages.

We do not intend to dictate the content of the briefs. However, it would be helpful to us if, in their briefs, the parties indicate if the record contains any evidence on: (1) the marginal cost of producing a megawatt hour of electricity for the Pennsylvania-New Jersey-Maryland (PJM) power pool generating plants other than PEPCO plants; (2) the marginal cost of producing a megawatt hour of electricity for the Virginia and Carolina Area Reliability pool and the Eastern Central Area Reliability pool plants; and (3) the PJM hourly dispatch rates for 1995 and 1996. In addition, CSXT should indicate what evidence supports its “plant weld” and “field weld” unit costs; if its evidence contains right-of-way land acreage by county and line segment; and where in the record final quantities and costs for “other grading quantities” are developed. PEPCO should indicate where its evidence enumerates bridge inventory by span length and bridge type; and why its unit cost for “station clerical” (of \$16.82428) differs from CSXT’s unit cost (of \$18.27937) when PEPCO witness Carroll’s rebuttal statement (at 12) claims to use the same “1996 CSXT URCS unit costs” as CSXT. Finally, in the rebuttal statement of Prescott (at 16-21), PEPCO states that CSXT’s WSAC presentation is flawed because it contains five input errors in the spreadsheet. PEPCO should identify the specific cell references in WSAC.WK4 where these input errors can be found.

¹² For this reason, we also will not accept as part of the record in this case CSXT's supplemental discovery response (see n. 11, supra), the introduction of which PEPCO opposed in a pleading filed November 5, 1997.

It is ordered:

1. The motion to strike and the motion for leave to file surrebuttal are denied.
2. The motion for leave to file errata is denied except to the extent discussed above.
3. Briefs not to exceed 50 pages in length are due December 24, 1997..
4. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

28352
EB

SERVICE DATE - NOVEMBER 24, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41989

POTOMAC ELECTRIC POWER COMPANY

v.

CSX TRANSPORTATION, INC.

Decided: November 12, 1997

Defendant, CSX Transportation, Inc. (CSXT), has filed a motion to strike portions of the rebuttal statement of complainant Potomac Electric Power Company (PEPCO), or alternatively for leave to file surrebuttal. CSXT also requests that a schedule for the filing of briefs be established. In a separate motion, CSXT seeks leave to submit errata. PEPCO replied separately in opposition to both motions. The motion to strike and the alternative motion for leave to file surrebuttal are denied. The motion for leave to submit errata is granted in part and denied in part. A schedule for the submission of briefs is established.

BACKGROUND

PEPCO challenges as unreasonably high CSXT's common carrier rates on coal moving in unit train service from origins in West Virginia to PEPCO's electric generating facility in Dickerson, MD. PEPCO requests that maximum reasonable rates be prescribed and that reparations be awarded. The parties submitted simultaneous opening presentations on May 5, 1997; replies on July 11, 1997; and rebuttal on August 11, 1997.

PEPCO's opening stand-alone cost (SAC) evidence presented a proposed hypothetical stand-alone railroad called the Dickerson Railroad ("DRR"). PEPCO identified the traffic and revenues that would be available to the DRR and described how the hypothetical railroad would be built and operated. Under PEPCO's hypothetical model, the DRR would replicate 358 miles of CSXT's system and transport most of the freight traffic that CSXT currently handles over these lines, including approximately 1.2 million tons of coal moving annually from seven West Virginia mines to PEPCO's Dickerson Station. The revenues this traffic would generate were developed from traffic tapes supplied by CSXT during discovery. PEPCO also hypothesized that the DRR would transport a large volume of coal traffic currently transported by Consolidated Rail Corporation ("Conrail") from Monongahela Railroad ("MGA") mines in Pennsylvania to Baltimore, MD. PEPCO's opening evidence assumed that this traffic would be diverted from Conrail's existing

single-line service to a three-carrier interline routing involving Conrail, the DRR and CSXT.¹ The volumes and revenues this traffic would generate were developed from our Waybill Sample.

In its July 11, 1997 reply evidence, CSXT challenged a number of the fundamental premises of PEPCO's SAC evidence. Of particular relevance to the two CSXT motions, CSXT contested the assumed diversion of MGA traffic from its existing Conrail routing to the hypothesized interline routing over the lines of the DRR. CSXT maintained that the inclusion of "non-defendant" traffic in a stand-alone model is improper as a policy matter, and also that the specific diversion hypothesized by PEPCO would be commercially infeasible. In addition, CSXT argued that estimating revenues for MGA traffic from our Waybill Sample overstates the revenues this traffic actually produced. CSXT also argued that PEPCO's estimates of the revenues that the DRR would earn from traffic currently moving on CSXT were overstated because PEPCO failed to take into account refunds paid to contract shippers and origination fees paid to smaller railroads in the Appalachian region.

In its rebuttal evidence, PEPCO explained in more detail why the DRR could divert the MGA traffic and how that traffic would be handled. PEPCO also explained that SAC principles do not preclude the inclusion of non-defendant traffic and that, in the Conrail Control proceeding, CSXT has asserted that it will handle 5.2 million tons of MGA traffic annually. PEPCO also pointed out that the revenue information furnished by CSXT during discovery, and used by PEPCO, reflected revenue adjustments for contract refunds and other allowances. Finally, PEPCO adjusted the Conrail revenues for the MGA traffic reported in the Waybill Sample in an attempt to more closely reflect actual revenues on that traffic.

CSXT's motion to strike contends that much of PEPCO's rebuttal evidence concerning the MGA traffic was new evidence and that PEPCO improperly changed the assumptions concerning operations of the DRR. CSXT's motion to file errata seeks, among other things, the opportunity to supply evidence on the amount of refunds paid to contract shippers, which differs from the information furnished to PEPCO during discovery. During discovery, CSXT represented to PEPCO that the list of refund payments it produced related to individual contracts, which often involve multiple origin-destination (O-D) pairs and even different commodities. Thus, CSXT asserted that it was not possible to develop refunds for traffic moving between individual O-D pairs. The information supplied with the errata filing, however, does indeed relate refunds to individual O-D pairs. Reply to Motion for Leave to Submit Errata Filing at 4-5.

DISCUSSION AND CONCLUSIONS

¹ If the applications of the Norfolk Southern Corporation and CSXT to acquire Conrail in CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail, Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, (Conrail Control proceeding) are approved, the traffic would follow a CSXT-DRR-CSXT routing.

Motion to Strike.

The Rules of Practice limit “[r]ebuttal statements . . . to issues raised in the reply statements to which they are directed.” 49 CFR 1112.6. This standard has been broadly interpreted and does not bar the introduction in rebuttal of new, but responsive, evidence and argument.²

The proponent of a SAC model sets the general parameters by which the reasonableness of a rate will be judged in its opening submission. The opponent, on reply, has an opportunity to attack the fundamental premises underlying the SAC model. On rebuttal, the proponent of the model may not alter the basic configuration of the stand-alone system developed in its opening evidence.³ However, this restriction does not require the proponent to anticipate in its opening evidence every possible defense or criticism of the SAC model. Rather, on rebuttal, the proponent may respond to the defenses and criticisms raised by introducing evidence to bolster its initial assumptions. Whether rebuttal evidence merely responds to evidence introduced by the opponent, and therefore is admissible, or whether it impermissibly alters basic assumptions of the SAC model introduced in the opening evidence must be decided on a case-by-case basis.

CSXT objects that, on rebuttal, PEPCO impermissibly: (1) introduced additional evidence supporting inclusion of MGA traffic in the SAC model; (2) revised the estimates of the revenues MGA traffic would generate; and (3) revised DRR operations.

MGA traffic. CSXT argues that the rebuttal testimony of PEPCO witness Borts, to the effect that SAC principles permit the inclusion of traffic not currently handled by the defendant railroad on the hypothetical rail system, is additional evidence that misinterprets stand-alone costing principles. However, Borts’ testimony responded directly to CSXT’s argument that the DRR could not handle MGA traffic. Whether Borts misinterpreted SAC principles goes to the weight we will accord his testimony, not to its admissibility.

CSXT also assails the rebuttal testimony of PEPCO witness Crowley, who, in response to CSXT reply evidence, further explains the basis of his initial assumption that the MGA-origin traffic could be handled more efficiently over the DRR. In rebuttal, Crowley relied on a statement by a CSXT witness in the Conrail Control proceeding that at least some MGA-origin traffic could be routed via the lines encompassed by the DRR. PEPCO’s evidence responded to CSXT’s reply evidence. Again, CSXT’s objection goes more to the weight that should be accorded Crowley’s rebuttal testimony than to its admissibility.

² See, e.g., Bituminous Coal—Hiawatha, Utah to Moapa, Nevada, No. 37038 et al. (ICC served Dec. 7, 1988) (“Bituminous Coal”) (“There is no bar to the presentation of new evidence on rebuttal, however, as long as it is responsive to the reply.”) Id. at 4.

³ See, e.g., Bituminous Coal (ICC served Jan. 8, 1991) (disallowing expansion of a previously submitted stand-alone railroad).

In addition, CSXT objects to portions of the rebuttal evidence of PEPCO witnesses Morey and Reistrup and argues that their testimony, regarding the feasibility of including MGA-origin traffic on the DRR, should be stricken. In response to CSXT's testimony that it would be operationally infeasible to route MGA traffic in 130-car coal trains over the steep grades on the DRR, CSXT asserts that Reistrup added additional locomotive power to trains traversing steep grades. Even if CSXT is correct in this assertion,⁴ however, Reistrup's testimony is not necessarily objectionable. Additions or deletions of equipment have generally been accepted in the past because they merely affect the cost of operating the hypothetical railroad, not its basic operating parameters.⁵

CSXT argues that, on rebuttal, PEPCO impermissibly eliminated the 26.2-mile line between Grafton and Rivesville, WV. PEPCO points out that its preferred SAC model continues to include the Grafton-to-Rivesville segment. Only in response to CSXT's reply evidence that, if the Conrail Control proceeding is approved, CSXT would route MGA traffic through Cumberland, MD rather than Rivesville did PEPCO contend that the Grafton-to-Rivesville segment would be unnecessary. PEPCO's alternative scenarios are responsive to CSXT's reply evidence. Moreover, PEPCO has not abandoned its original network configuration. We find its rebuttal unobjectionable in this regard.

CSXT alleges that, on rebuttal, PEPCO changed its plan for interchanging MGA traffic with the destination carrier. However, in responding to CSXT's reply evidence, Reistrup and Morey merely noted that, as a bridge carrier, the DRR would not be responsible for delivery of the MGA traffic. Their rebuttal asserted that, if as a result of the Conrail Control proceeding CSXT becomes the destination carrier, CSXT will have numerous alternatives for delivery of this traffic. Because the rebuttal is responsive to the reply evidence, we fail to see how it is improper.⁶

Finally, CSXT argues that the rebuttal evidence of Morey pertaining to the type of contracts Conrail is likely to have on MGA-origin traffic is inappropriate rebuttal. However, Morey's testimony is directly responsive to CSXT's argument that MGA-origin traffic would not be available to the DRR because it is contractually committed to Conrail.

MGA revenues. In addition to its primary argument that MGA traffic should not be

⁴ It is not at all clear, however, that CSXT is correct. PEPCO contends in reply to the motion to strike that Reistrup simply provided for helper locomotives to stay with the loaded trains for some additional distance to assist with dynamic braking on one downgrade.

⁵ See, e.g., McCarty Farms, Inc. v. Burlington N., No. 37809, et al. (STB served Aug. 20, 1997) (including additional equipment to correct for complainants' underestimation of equipment).

⁶ CSXT also assails as misleading Reistrup's testimony that MGA coal has previously utilized a four-carrier routing because the witness failed to describe the competing routing. The objection goes to the weight, not the admissibility, of the evidence.

included in the DRR traffic group, CSXT also questioned PEPCO's use of waybill data to develop revenues for the MGA traffic. CSXT argued that the inaccuracy of waybill revenues is well known, and that PEPCO should have sought discovery of actual revenues from Conrail. On rebuttal, PEPCO proposed two adjustments to waybill revenues which were intended to correct the deficiencies pointed out by CSXT. PEPCO argues that third party discovery from Conrail was unnecessary when data were available from other sources.

A party is free to use whatever data sources it believes are appropriate to develop its evidence. The fact that PEPCO adjusted its evidence in response to CSXT's criticisms does not make such evidence inadmissible. Again, CSXT's argument goes to the weight we will accord PEPCO's evidence and not to its admissibility.

Operational changes. CSXT also argues that, on rebuttal, PEPCO changed the location of a principal DRR yard from Cumberland to Mexico, MD. PEPCO contends, however, that the DRR yard has always been located at Mexico. Our initial review of the record discloses that PEPCO's initial SAC evidence included a yard at Mexico, a location adjacent to the existing Cumberland yard.

CSXT also notes that PEPCO has changed its coal car specification from aluminum gondolas to aluminum bottom-dump hoppers and contends that cars of the latter specification are too small to carry all of the DRR's coal traffic. If CSXT is correct, that fact will become apparent as we analyze the record and will be factored into the final SAC analysis. As in all SAC cases, if

the amount of equipment needed by the hypothetical carrier has been underestimated, we will make appropriate adjustments.⁷

CSXT also objects that PEPCO improperly shifted expenses associated with certain network changes to other parties. Specifically, PEPCO's rebuttal evidence assumed the addition at CSXT's expense of certain tracks and turnouts at Brunswick Yard for the staging of Baltimore-bound trains and modifications at PEPCO's expense of the track layout at the Dickerson Station to allow delivery of a loaded train and pickup of an empty train on the same trip. A stand-alone railroad must be designed to provide the service required by the shippers it would serve. If costs that the stand-alone railroad would have to incur have been improperly "assumed away," our analysis will add those costs to the cost of building and operating the hypothetical railroad.

Finally, CSXT complains about PEPCO's rebuttal response to other criticisms regarding the operations of the DRR. For example: (1) PEPCO assumed on opening that the mines served by the DRR would load coal around the clock, 7 days a week. CSXT contended that the mines operated on a 5-day week, that DRR would have no control over the operations of coal shippers, and that PEPCO had not accounted for additional costs of extended operations. On rebuttal, PEPCO pointed out that the mines currently load coal on weekends. (2) CSXT's reply evidence also criticized PEPCO for failure to provide sufficient capacity for peak volume periods. PEPCO in its rebuttal contended that a most efficient, least-cost carrier would elicit shipper cooperation to minimize traffic fluctuations. We do not regard PEPCO's rebuttal statements as inappropriate, as they are directed at criticisms raised in CSXT's reply evidence. Whether the rebuttal arguments are persuasive will be decided as we analyze the record.

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PEPCO's objection to CSXT's attempt to adjust the estimate of refunds incorporated into its traffic tapes to reflect the actual refunds paid on the particular O-D traffic included in the DRR traffic group has merit. As PEPCO points out in its reply to CSXT's motion, during discovery,

⁷ See n.5, supra.

⁸ Because PEPCO does not oppose the errata concerning quarterly coal tonnage or the allocation of revenues to origin carriers, we accept those errata filings.

CSXT was requested to produce information on refunds, but CSXT responded that it was not possible to develop refund information for particular O-D shipments. CSXT makes no attempt to explain why, during the discovery phase of this proceeding, it contended that the information it now seeks to introduce could not be developed.⁹ Its unexplained reversal of course is not benign or without consequence. The record has closed, and because CSXT did not make the information it now seeks to introduce available during discovery when requested to do so, PEPCO has not had the opportunity to examine or verify the information. As we noted in Conrail Control, we look with disfavor upon the filing of errata that “curtail the ability of parties to respond fully and adequately to the record within the time frames we have established.”¹⁰

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¹⁰ Furthermore, we note that Congress as well as the railroad and shipper industry have urged the Board to expedite the processing of rate cases. See Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527 (STB served Mar. 22, 1996).

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¹² For this reason, we also will not accept as part of the record in this case CSXT's supplemental discovery response (see n. 11, supra), the introduction of which PEPCO opposed in a pleading filed November 5, 1997.

It is ordered:

1. The motion to strike and the motion for leave to file surrebuttal are denied.
2. The motion for leave to file errata is denied except to the extent discussed above.
3. Briefs not to exceed 50 pages in length are due December 24, 1997..
4. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary