

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**SUNBELT CHLOR ALKALI PARTNERSHIP** )  
 )  
**Complainant,** )  
 )  
 v. )  
 )  
**NORFOLK SOUTHERN RAILWAY COMPANY** )  
 )  
**Defendant.** )

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**Docket No. NOR 42130**

**BRIEF OF NORFOLK SOUTHERN RAILWAY COMPANY**

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**Dated: July 26, 2013**

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TABLE OF CONTENTS

	Page
SHORT FORMS FOR FREQUENTLY CITED CASES .....	ii
INTRODUCTION.....	1
I. THE BOARD SHOULD REJECT SUNBELT’S FATALLY DEFICIENT OPERATING PLAN AND ADOPT NS’S WELL-SUPPORTED PLAN. ....	3
II. SUNBELT MUST ACCOUNT FOR THE FULL COSTS OF TIH TRAFFIC. ....	17
III. NS’S ROAD PROPERTY INVESTMENT EVIDENCE SHOULD BE ADOPTED. ....	20
A. NS’s Real Estate Valuation Should Be Adopted.....	20
B. The Board Should Follow Longstanding Precedent and Apply Means Data to Develop Earthwork Costs, and Reject the Inapposite Trestle Hollow Project.....	21
C. Other Earthwork .....	23
D. Bridges.....	28
E. SBRR Would Need Significant Undercutting and Fill to Construct a Stable Roadbed Through Wetlands of Alabama, Mississippi, and Louisiana. ....	31
F. Materials Transportation Costs. ....	33
G. Other Road Property Investment Items. ....	35
IV. TRAFFIC AND REVENUES.....	39
A. The ATC Rule Adopted in <i>Major Issues</i> Should Be Applied in This Case.....	39
B. SunBelt Impermissibly Treated TDIS Revenues as SBRR Revenues. ....	46
C. SunBelt Used Inflated Growth Rates For Later-Year SARR Volumes. ....	46
D. SunBelt Used Different Fuel Price Indexes For Fuel Costs And Surcharges. ....	47
E. SunBelt’s Rebuttal Continues to Include Revenues from Duplicate Waybills. ....	47
V. NS’S OTHER EVIDENCE SHOULD BE ADOPTED.....	47
A. NS’s Operating Expense Evidence Should Be Adopted.....	47
B. NS’s Evidence of SBRR G&A Expenses Is the Best Evidence of Record.....	49
C. NS’s Maintenance of Way Evidence Should Be Adopted.....	52
D. NS’s Fringe Benefits Evidence Should Be Adopted.....	56
E. NS’s Discounted Cash Flow Evidence Should Be Adopted.....	56
F. NS’s Refinement of the MMM Model Is Necessary and Appropriate.....	58
G. The Board Must Conduct a Cross-Subsidy Analysis If it Finds the SBRR’s Revenues Exceed Its Costs.....	59

## SHORT FORMS FOR FREQUENTLY CITED CASES

The following short form case citations are used herein:

<i>AEPCO 2003</i>	<i>Arizona Electric Power Coop., Inc. v. Burlington N. &amp; Santa Fe Ry. Co. &amp; Union Pac. R.R. Co.</i> , 7 S.T.B. 224 (2003)
<i>AEPCO 2011</i>	<i>Arizona Electric Power Coop., Inc. v. Burlington N. &amp; Santa Fe Ry. Co. &amp; Union Pac. R.R. Co.</i> , STB Docket No. 42113, (served Nov. 16, 2011)
<i>AEP Texas</i>	<i>AEP Texas North Co. v. Burlington N. &amp; Santa Fe Ry. Co.</i> , STB Docket No. 41191, (Sub-No. 1) (served Sept. 10, 2007)
<i>CP&amp;L</i>	<i>Carolina Power &amp; Light Co. v. Norfolk S. Ry. Co.</i> , 7 S.T.B. 235 (2003)
<i>Duke/CSXT</i>	<i>Duke Energy Corp. v. CSX Transp., Inc.</i> , 7 S.T.B. 402 (2004)
<i>Duke/NS</i>	<i>Duke Energy Corp. v. Norfolk S. Ry. Co.</i> , 7 S.T.B. 89 (2003)
<i>DuPont v. CSXT</i>	<i>E.I. du Pont de Nemours &amp; Co. v. CSX Transp., Inc.</i> , STB Docket No. 42099 (served June 30, 2008)
<i>DuPont v. NS</i>	<i>E.I. du Pont de Nemours &amp; Co. v. Norfolk S. Ry. Co.</i> , STB Docket No. 42125
<i>FMC</i>	<i>FMC Wyoming Corp. v. Union Pac. R.R. Co.</i> , 4 S.T.B. 699 (2000)
<i>Major Issues</i>	<i>Major Issues in Rail Rate Cases</i> , STB Ex Parte No. 657 (Sub-No. 1) (served Oct. 30, 2006), aff'd sub nom. <i>Burlington N. &amp; Santa Fe Ry. Co. v. Surface Transp. Bd.</i> , 526 F.3d 770 (D.C. Cir. 2008)
<i>McCarty Farms</i>	<i>McCarty Farms, Inc. v. Burlington N., Inc.</i> , 2 S.T.B. 460 (1997)
<i>Otter Tail</i>	<i>Otter Tail Power Co. v. Burlington N. &amp; Santa Fe Ry. Co.</i> , STB Docket No. 42071 (served Jan. 27, 2006)
<i>PPL Montana</i>	<i>PPL Montana, LLC v. Burlington N. &amp; Santa Fe Ry. Co.</i> , 6 S.T.B. 286 (2002)
<i>RRR Proposal</i>	<i>Rate Regulation Reforms</i> , STB Ex Parte No. 715 (served July 25, 2012)
<i>RRR Rules</i>	<i>Rate Regulation Reforms</i> , STB Ex Parte No. 715 (served July 18, 2013)

<i>Seminole</i>	<i>Seminole Elec. Coop., Inc. v. CSX Transp., Inc.</i> , STB Docket No. 42110, Opening Evidence (Aug. 31, 2009)
<i>SunBelt/DuPont Abeyance Decision</i>	<i>E.I. du Pont de Nemours &amp; Co. v. Norfolk S. Ry. Co.</i> , STB Docket No. 42125; <i>SunBelt Chlor Alkali Partnership v. Norfolk S. Ry. Co.</i> , STB Docket No. 42130 (served Nov. 29, 2012)
<i>TMPA I</i>	<i>Texas Municipal Power Agency v. Burlington N. &amp; Santa Fe Ry. Co.</i> , 6 S.T.B. 573 (2003)
<i>WFA I</i>	<i>Western Fuels Ass'n &amp; Basin Elec. Power Coop. v. Burlington N. &amp; Santa Fe Ry. Co.</i> , STB Docket No. 42088 (served Sept. 10, 2007)
<i>WFA II</i>	<i>Western Fuels Ass'n, Inc. v. Burlington N. &amp; Santa Fe Ry. Co.</i> , STB Docket No. 42088 (served Feb. 17, 2009)
<i>Xcel</i>	<i>Public Serv. Co. of Colorado d/b/a Xcel Energy v. Burlington N. &amp; Santa Fe Ry. Co.</i> , 7 S.T.B. 589 (2004)

## INTRODUCTION

The SBRR posited by SunBelt would be a 578-mile railroad handling 98% carload and intermodal traffic, including 7,300 cars of chlorine annually, on a network traversing the wetlands and rivers of Alabama, Mississippi, and Louisiana. Remarkably, SunBelt seeks a rate prescription that would generate an R/VC ratio at the jurisdictional threshold of 180% for transportation of the largest volume rail movement of chlorine in the United States. Not only would such a prescription be indefensible as a matter of sound transportation policy, it cannot be sustained by a sound and coherent SAC analysis. The Board has recognized that carload traffic “is more expensive for the railroad industry to handle than . . . trainload traffic” and it rightly has “reservations” about the potential “bias” that complainant’s reliance on such traffic could have on the SAC analysis. *RRR Rules* at 27. NS submits that the best way to “accurate[ly] allocat[e] the costs” of the SBRR’s carload traffic is to ensure that the SBRR is performing all the services required by its carload traffic—including an operating plan that fully accounts for classification switching and blocking; road property investment that includes all the serving tracks and yard facilities necessary for carload traffic; and a G&A staff that has revenue accounting and marketing staff sufficient for a general freight traffic group. *Id.* A proper analysis shows that the SBRR’s costs would exceed its revenues and the challenged rates are reasonable.

In this brief, NS summarizes some of the many significant errors, unsupported assumptions, and deviations from Board precedent that underlie SunBelt’s SAC presentation.<sup>1</sup> Section I addresses major flaws in SunBelt’s operating evidence. SunBelt’s Opening operating plan was so deficient that it failed to provide complete train service for 91% of the issue traffic.

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<sup>1</sup> Space limitations do not allow NS to address here all of the new evidence and arguments SunBelt presented in Rebuttal, and lack of discussion in this Brief does not mean NS has conceded any previously disputed issue. NS has submitted simultaneously with this Brief a Motion To Strike some of that improper Rebuttal. Except where otherwise noted, NS stands by its Reply Evidence, and does not accept any of SunBelt’s contrary positions or arguments.

This failure to provide basic train service for its own traffic is a failure of proof warranting dismissal. In the alternative, the Board must adopt NS's operating plan as the only plan that provides complete service to the SBRR traffic group.

Section II explains that this case squarely confronts the Board with important questions regarding how its rate regulatory regime will address cases in which the sole issue commodity is a dangerous TIH commodity, whose compelled carriage exposes rail carriers to enormous potential liability. SunBelt prefers not to mention the issue commodity in the hope that the Board will think it should be priced like coal. NS's Reply showed that the SBRR must account fully for the significantly higher operational, compliance, security, insurance, and excess risk costs associated with its selected traffic. And, in the event the Board were to determine that an MMM analysis were appropriate, the Board's MMM analysis must allocate these costs to TIH traffic.

Section III addresses SunBelt's road property investment evidence. SunBelt refused to use available cost evidence from the only two sources the Board has accepted—the R.S. Means construction costs manual or costs from representative construction projects conducted by the incumbent rail carrier on lines replicated by the SARR—in favor of extrapolating costs from an unrepresentative 1.3-mile short line realignment hundreds of miles from the SBRR. Although the SBRR would traverse more swamps and wetlands than any previous SARR, SunBelt refused to account for the substantial additional construction costs necessary to build a sound, stable roadbed through such territory. SunBelt's bridge evidence is unsupported and contrary to basic principles of engineering and physics, and assumes that the SBRR would receive a 90% government subsidy for movable bridges under a program that by its express terms does not apply to those bridges. NS's road property investment cost evidence, in contrast, is based on sound engineering practices and standards, and documented calculations, and is well supported

by applicable real-world evidence. Section IV summarizes major flaws in SunBelt's traffic and revenue evidence, and Section V addresses operating expense, MOW, G&A, and DCF evidence.

**I. THE BOARD SHOULD REJECT SUNBELT'S FATALLY DEFICIENT OPERATING PLAN AND ADOPT NS'S WELL-SUPPORTED PLAN.**

SunBelt's operating plan for the SBRR is fatally deficient in numerous respects, and must be rejected. *See, e.g., CP&L* at 259 (complainant has burden to submit feasible operating plan).

**Methodology.** SunBelt asserts that its operating plan, which is based almost exclusively on "automated" selections of data from historical train and car event files, is feasible simply because parties have applied a similar approach in prior SAC cases. *Reb. III-C-52-53*. But the traffic group at issue in this case is fundamentally different than in any prior case decided by the Board. The SBRR would handle almost 450,000 individual carload shipments over a 578-mile rail network. Individual cars must be classified, blocked, and switched between trains at intermediate yards, and picked up and/or set off at 336 unique customer locations. *Reply III-C-3*. By contrast, virtually every previously decided SAC case involved a traffic group consisting primarily of trainload movements of coal, grain and/or intermodal traffic. Such unit train operations bear little resemblance to carload railroading.

NS's historical event data do not accurately portray the operations that the SBRR would be required to perform, for several reasons. First, the SBRR's Peak Year carload volume is 52% higher than NS's historical volume. The train service, car classification, and blocking plans that NS employed in 2010-2011, which SunBelt purports to "adopt" without modification (*Reb. III-C-9-10*), were not designed to handle such traffic levels. The massive increase in traffic posited by SunBelt would unquestionably require substantial changes to NS's historical operations, including adjustments in the number and size of blocks built at particular yards, reassignment of blocks to trains (to avoid excessive train lengths), and changes in local train assignments.

Second, SunBelt did not provide the SBRR with NS's efficient hump yard at its Birmingham hub, nor did it replicate the entire NS routes over which the selected traffic moved (choosing instead to convert most of that traffic to "crossover" traffic). The differences between NS's actual facilities and lengths of haul and those posited by SunBelt would likewise generate differences in their carload operations. Finally, a railroad's operating plan is by no means carved in stone—real-world railroads make frequent adjustments to their train and yard operations in response to changes in traffic patterns and operating conditions. In short, the methodology underlying SunBelt's operating plan is premised on a fallacy—that a least-cost, most efficient railroad doing business in 2020-2021 with a much larger traffic base, fewer physical facilities and different lengths of haul would operate in exactly the same manner as NS did in 2010-2011. That assumption is simply not consistent with reality.

In any event, SunBelt's assertion that the SBRR "operate[s] the same trains as NS operates in its real-world operations in the same basic fashion" is not true. *See* Reb. III-C-3 (emphasis added). SunBelt's operating plan did not include nearly 600 of the trains in which NS handled the selected traffic. Reply III-C-12-19. SunBelt also increased the size of SBRR trains to match the longest train (by symbol) operated by NS. Op. III-C-9, n.6. Conversely, SunBelt did not replicate the yards, locomotives, and crews that NS employed in handling the selected traffic. Reply III-C-30-37. And SunBelt admits that it did not account for the time that NS incurred in serving the SBRR's 336 customers. Reb. III-C-1-2. *See* Reply III-C-65-67.

**Missing Trains.** The "automated" train selection process that SunBelt used to create its Opening train service plan failed to capture 1,622 trains that are necessary to provide complete on-SARR service. Reply III-C-13-19. The exclusion of those trains was conscious and intentional—the computer programming instructions created by SunBelt's experts explicitly required that a train report movement at multiple operating stations in order to be included in the

SBRR train list.<sup>2</sup> But local trains—including virtually all of the NS local trains that serve SunBelt’s McIntosh plant—frequently work in or around a single station, picking up and/or setting off cars at customer facilities within the boundaries of that reporting location. Reply III-C-25.<sup>3</sup> On Rebuttal, SunBelt tried to “cure” this fatal deficiency by “adopting” 1,031 of the 1,622 missing trains identified by NS. Reb. III-C-25–30. There is no rational basis or methodology that would justify SunBelt’s selective inclusion of some of the missing trains but not the others. The trains added by SunBelt do not eliminate the gaps in SBRR service—SunBelt’s plan is still missing 592 trains that are essential to provide complete on-SARR service for the SBRR’s traffic, including issue traffic—and their absence constitutes a failure of proof.<sup>4</sup>

Figure 1 depicts two NS A32 local trains that originated “issue” traffic at SunBelt’s McIntosh plant during the Base Year. While those trains constituted an essential element of the

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<sup>2</sup> See Reply WP “SunBelt Base Year Trains—Response.xlsx,” Tab “Sql,” row 142 (“Requiring >1 Milepost from Train Sheet Data OnSARR” in order for a train to be included). SunBelt’s workpaper explained that “[t]hese trains were removed from the list because they only (sic) the SARR system at one of the SARR end points, or only move a few miles on the SARR system before exiting the system.” See Op. WP “SunBelt Base Year Trains.xlsx,” Tab “Removed.”

<sup>3</sup> SunBelt’s claim that its Opening operating plan “included 323 local trains servicing McIntosh in the Base Year” (Reb. III-C-13) is, at best, highly misleading. While 40 of the 323 trains referenced by SunBelt are the A32, A33, and A34 trains that NS identified as servicing SunBelt (Reply III-C-19, Figure III-C-3), SunBelt’s own data show that only 5 of the remaining 283 trains performed local service for SunBelt. Specifically, 181 of those trains were A11 locals that reported movement (e.g. reporting on or off-duty) at McIntosh—but only three of those A11 trains picked up or set out cars at any customer at McIntosh, and none served SunBelt. Only five of the 99 A13 trains included in SunBelt’s count of 323 trains actually served industries (including SunBelt) at McIntosh, and none of the 3 A48 trains served any customer at McIntosh.

<sup>4</sup> The trains that remain unaccounted for can be identified by comparing Reply WP “Dropped\_Trains\_Traffic.xlsx” (which identified the 1,622 trains missing from SunBelt’s Opening train list) with Reb. WP “SRR Train Selection Reconciliation V06.xlsx,” Tab “Rebuttal Additions” (which lists the 1,031 trains added by SunBelt on Rebuttal).

rail service performed at SunBelt's facility, neither is listed among the 1,031 trains added by SunBelt on Rebuttal.<sup>5</sup>

**Figure 1**

{{

*Source*

}}

SunBelt's continued failure on Rebuttal to provide complete train service also affected non-issue traffic. For example, Figure 2 shows that NS train A11 originated six cars at {{  
}} SunBelt elected to include those shipments in the SBRR's selected traffic group, and took revenue credit for originating them. However, SunBelt did not add this A11 to the SBRR's Rebuttal train list, even though NS had identified it as a train required to provide complete on-SARR service.<sup>6</sup>

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<sup>5</sup> See Reb. WP "SRR Train Selection Reconciliation V06.xlsx," Tab "Rebuttal Additions."

<sup>6</sup> See Reb. WP "SRR Train Selection Reconciliation V06.xlsx," Tab "Rebuttal Additions;" Reply WP "Dropped\_Trains\_Traffic.xlsx."

Figure 2

{{

}}

SunBelt’s suggestion that this fundamental failure of proof is attributable to the quality of NS’s data (Reb. III-C-26–29) ignores the fact that every one of the missing trains appears in the “Car/Train Database” that SunBelt itself compiled for purposes of developing its traffic and revenue evidence. See Reply III-C-19–26. NS even provided SunBelt (and the Board) a workpaper that identified all of those missing trains in SunBelt’s Car/Train Database.<sup>7</sup>

SunBelt cannot posit an operating plan based on a methodology that purportedly “operate[s] the same trains as NS operates in its real-world operations” (Reb. III-C-3) and fail to include all of NS’s actual trains. SunBelt’s failure to account for all trains needed to serve the SBRR’s traffic—including issue traffic—renders its operating plan infeasible on its face.<sup>8</sup>

**Car Classification and Blocking.** SunBelt’s Opening operating plan contained no car classification or blocking plan for the SBRR’s nearly 450,000 carload shipments. Indeed, a word search of SunBelt’s Opening reveals no mention whatsoever of “car classification” or “blocking.” On Rebuttal, SunBelt proffered for the first time an analysis of the SBRR’s car

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<sup>7</sup> See Reply WP “SUNBELT 2010.dbo.ttWaybill\_Leadt\_Unit\_full\_NS\_event.txt;” “SUNBELT 2011.dbo.ttWaybill\_Leadt\_Unit\_full\_NS\_event.txt.”

<sup>8</sup> See, e.g., *FMC*, 4 S.T.B. at 736 (rejecting complainant’s operating plan in part because FMC “understated the number of trains, and in turn the locomotive and crew requirements”).

classification requirements. SunBelt developed its car counts by identifying from the NS car event data “all cars moving through yards that changed train symbols . . . unless the block name remained the same.” Reb. III-C-101, n.214 (emphasis added). That methodology was flawed—by requiring that cars change blocks in order to be counted, SunBelt categorically excluded any car received (unblocked) by NS in interchange and assigned to a block for the first time by NS at the interchange point. In other words, SunBelt assumed that every car received by the SBRR would arrive “pre-blocked” by the forwarding carrier. That assumption is demonstrably incorrect—both the NS car event data and SunBelt’s own Car/Train Database clearly show that NS receives unblocked cars from connecting railroads. Figure 3 below is a screenshot from SunBelt’s 2011 SQL database for Waybill {{

}}

**Figure 3**

{{

}}

As SunBelt’s own database shows, the car was handled several times by NS (event code “TKMV” means “track move,” denoting switching between tracks within a yard) before departing New Orleans. The data also show that the car was not moving in a block when it

arrived at {{ }} but was assigned by NS to block {{ }}. The multiple “track moves,” assignment of the car to a block, and the overall dwell time of more than 24 hours shown in the data all indicate that the car was classified at {{ }}. SunBelt’s methodological error—relying exclusively on a computer to “count” classification events—resulted in an understatement of the cars to be classified at every SBRR yard except Birmingham. At Birmingham, SunBelt’s automated methodology overstated the number of cars requiring classification by counting every car that “changed blocks” on NS, even if the car immediately moved off-SARR. SunBelt’s 2011 SQL database for Waybill {{ }}. The Board should reject SBRR’s untimely and inaccurate car classification evidence, and accept NS’s well-documented car classification plan.

**Yards.** The SBRR yards posited by SunBelt are unsupported. SunBelt presented no explanation (on Opening or Rebuttal) of the methodology it employed to determine the required yard track capacity, nor did it otherwise establish any nexus between its (inaccurate) car counts and the number and length of the yard tracks it posited. Even a cursory examination of SunBelt’s Rebuttal shows that there is no discernible relationship between SunBelt’s car counts and its proposed classification tracks. For example, SunBelt assigned seven classification tracks totaling 18,500 feet at New Orleans even though it asserted that the SBRR would classify only 37 cars/day at that yard.<sup>9</sup> Yet SunBelt assigned only four tracks totaling 3,600 feet at Hattiesburg, MS, where it assumed the SBRR would classify 42 cars/day. *Id.* And SunBelt provided no classification tracks at Vance, AL, where its car count is 36 cars/day (virtually the

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<sup>9</sup> See Reb. WP “SBRR Yard Matrix Rebuttal Grading.xlsx, Tab “UTILITY TRK LENGTH;” Reb. WP “SBRR Yard Crews\_Rebuttal.xlsx,” Tab “Classification.”

same number it posits would require seven tracks at New Orleans). *Id.* There is no rhyme or reason to SunBelt's yard sizing and configuration evidence.

Moreover, SunBelt's insistence that the SBRR could handle nearly half a million carloads of merchandise traffic without a hump yard at Birmingham is not consistent with the "realities of real world railroading." *See, e.g., WFA I* at 15; *see also AEPCO 2011* at 16; *Xcel Reconsideration*, Docket No. 42057 (Jan. 19, 2005) at 8. NS presented strong evidence, based on real-world experience, that an efficient railroad would construct a hump yard where the daily classification workload exceeds 900 cars. Reply III-C-137–38.<sup>10</sup> SunBelt did not question that premise, but claimed it "can elect to add yard crew assignments when classification car count exceeds this threshold rather than to expend the capital resources to construct a hump yard." Reb. III-C-102. Introducing more locomotives and crews into a busy flat switching yard as volumes increase would exacerbate operating congestion. More than a century of railroad experience teaches that it is unrealistic to assume the SBRR could handle hundreds of thousands of carloads efficiently without a single hump yard.<sup>11</sup>

**RTC Simulation.** SunBelt's claim that its RTC evidence "proves the feasibility of the SBRR operating plan" is mistaken. Reb. III-C-37. An RTC Model simulation alone does not—and cannot—prove that an operating plan is "feasible." Indeed, the converse is true—a "feasible"

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<sup>10</sup> *See Joint Line Cancellation on Soda Ash by Union Pacific R.R. Co.*, 365 I.C.C. 951 (1982). A hump yard takes advantage of its design (a "hump" track connected to multiple classification tracks) and gravity to switch cars quickly and efficiently. A single locomotive and crew working the hump track can push groups of cars "over the hump," while the person operating the hump (and the forces of gravity) direct each car onto the proper classification track. Absent a hump track, cars removed from an inbound train would have to be individually flat-switched onto the correct classification track, a process that would require far more crews, locomotives and time.

<sup>11</sup> SunBelt's suggestion that "NS's own RTC simulation" proves that the yards posited by SunBelt are adequate is, at best, disingenuous. Reb. III-C-93. The RTC Model does not simulate yard operations, let alone measure the track capacity required for car classification. The physical network input to an RTC Model does not include classification tracks within a yard—indeed, the "screenshots" upon which SunBelt relies do not depict any classification tracks.

operating plan is a necessary prerequisite for a credible RTC simulation. Reply III-C-89–90. SunBelt’s RTC Model is based on an operating plan that failed to account for nearly 600 Base Year trains. Moreover, while SunBelt represented that it corrected the failure of its RTC Model to limit trains carrying TIH commodities to 50 MPH (Reb. III-C-36), SunBelt’s RTC workpapers show that more than 40% the 111 trains carrying TIH commodities in SunBelt’s Rebuttal RTC simulation still operate at 60 MPH.<sup>12</sup> An RTC simulation that permits trains to violate federal law precludes a finding that SunBelt’s operating plan is “feasible.”

SunBelt’s RTC simulation also adhered to its nonsensical dwell time of “30 minutes per location” for industry switching. Reb. III-C-23 (emphasis added). NS presented a location-specific analysis of the time required to serve the SBRR’s customers based on the particular tasks that local trains must perform at each location. Reply Ex. III-C-13. For example, NS showed that A11 local trains average three hours at Jackson, AL, because they serve five different customers at that location. The crew must assemble outbound cars from those multiple industries, and perform a brake test, before departing Jackson. *Id.* at 1. A49 local trains incur four hours at Dragon, MS, where they serve seven customers. *Id.* at 3. SunBelt’s assumption that the SBRR could pick up and set off cars at multiple customer facilities, build an outbound train, and perform the required pre-departure brake test all within 30 minutes is not credible.

While SunBelt purported to adopt the two 4-hour main line dwell periods assigned by NS’s RTC simulation to account for service to the McIntosh plant, SunBelt disingenuously converted them to “switching dwells in the McIntosh yard.” Reb. III-C-48.<sup>13</sup> This sleight-of-

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<sup>12</sup> Compare Reply WP “Key Trains in NS Reply RTC Simulation.xls” (identifying the 111 trains with TIH cars) with Reb. RTC WP “SunBelt REBUT.TRAIN” (identifying speed limit by train).

<sup>13</sup> Tellingly, SunBelt’s evidence and workpapers contain no reference to, or documentation of, a site visit by its operating witness, Mr. McDonald, to McIntosh—the sole origin of the issue traffic. By contrast, notwithstanding their prior knowledge of NS’s operations, NS operating witnesses both visited McIntosh and Birmingham. See Reply WP “Site Visits” folder.

hand must be rejected. Because SunBelt located the SBRR's yard on the opposite side of the main line from the plant, movements between the yard and the plant would necessarily cross (and block) the main line, an operational impedance for which SunBelt did not account.

Moreover, because SunBelt chose not to include traffic moving south from the McIntosh plant in the SBRR's traffic group, the residual NS would also access the plant (and block SBRR's access to the SunBelt facility) for several hours every day as well. Reply III-C-103-04. In any event, the plant switching required to meet SunBelt's needs—which occupies NS crews for up to 12 hours each day (Reply III-C-52-55)—could not feasibly be handled by the single yard crew, working only one shift five days per week, provided by SunBelt at the SBRR's McIntosh yard. Reb. WP “SBRR Yard Crews\_Rebuttal,” Tab “Yard Crew.” In short, SunBelt's RTC simulation does not comport with “the realities of real world railroading” and should be rejected.

**NS Operating Plan.** By contrast, NS presented an operating plan and RTC simulation that include all of the trains the SBRR would need to operate; local train service based on realistic dwell time estimates; and physical plant (including main line and secondary track, yards, and intermodal, and automotive facilities) optimally sized for the SBRR's operations. NS's operating evidence is supported by well-documented, location-specific analyses, and complies with applicable laws, real-world operating practices, and the needs of the SBRR's customers.

SunBelt's attack on NS's operating plan centered on the MultiRail software, which SunBelt characterized as an “untried” program that produces “made for litigation . . . results.” Reb. III-C-31. SunBelt also claimed that NS's MultiRail analysis is “utterly divorced from real world NS operations” and that its outputs are “unsupported.” *Id.* at I-21. SunBelt's criticisms of NS's MultiRail evidence are meritless. But MultiRail is neither “untried” nor “made for

litigation.” It is used by railroads throughout the world to plan their day-to-day operations,<sup>14</sup> and has been used and accepted in prior Board proceedings.<sup>15</sup> Nor is MultiRail a “black box” that generates a computerized operating plan. Indeed, SunBelt itself described MultiRail as a “tool” that performs a function similar to a “calculator.” Reb. III-C-60, 85. SunBelt also acknowledged that the blocks to which MultiRail assigned cars were “the actual NS blocks used in the real-world over the SBRR” and that “the NS witness[es], not MultiRail, determined the vast majority of the train schedules in the NS operating plan.” Reb. III-C-55, 62 (emphasis added). These admissions refute the claim that NS’s operating plan is “divorced from NS’s real-world operations.”

SunBelt’s effort to discredit the outputs of NS’s MultiRail analysis is equally unavailing. Reb. III-C-52–87. For example, SunBelt criticized NS for failing to include unit trains in its MultiRail analysis. Reb. III-C-70. NS used MultiRail to assign cars to blocks and assign those blocks to trains. Cars moving in unit trains do not need to be classified, blocked, or transferred between trains.<sup>16</sup> SunBelt also claimed that NS’s MultiRail evidence is flawed because it is based upon an “average” week (rather than the “peak week”) in the Peak Year. Reb. III-C-59–60. But real-world railroads do not design carload operating plans based on the single highest-

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<sup>14</sup> See, e.g., *Ultimate Technology – Software That Made the Uncontrollable Controllable*, TRAINS MAGAZINE, Nov. 2010, <http://bit.ly/13TptAE>; *This is How to Run a Railroad*, FORBES, Feb. 13, 2006, <http://onforb.es/12T0oON>; *Getting on Schedule*, TRAFFIC WORLD, June 14, 2004, at 25–26; see also Brief of NS, *DuPont v. NS*, at 41–42 & Ex. 5 (filed June 14, 2013).

<sup>15</sup> See, e.g., (Reply Evidence of CSXT), *Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.*, STB Docket No. 42110; *Canadian Nat’l Ry. Co., Grand Trunk Corp. and Grand Trunk Western R.R. Inc.—Control—Illinois Central Corp., Illinois Central R.R. Co., Chicago, Central and Pac. R.R. Co. and Cedar River R.R. Co.*, STB Fin. Docket No. 33556 (May 25, 1999).

<sup>16</sup> By contrast, NS’s RTC simulation—whose purpose was to evaluate the SBRR’s mainline capacity requirements—did include all carload, intermodal, and unit trains.

volume week in a year. Rather, they plan for a “typical” week and adjust actual operations as necessary in response to fluctuations in traffic.<sup>17</sup>

SunBelt’s assertion that MultiRail improperly substituted alternate routings for “the actual route of movement” is incorrect. The only “example” of this alleged flaw cited by SunBelt involved a movement of 62 intermodal containers from Dallas to Charlotte, which MultiRail routed via Meridian, MS (instead of via New Orleans, as shown in the car event data). Reb. III-C-62–67. Those containers were detoured from their customary route via Meridian due to a derailment that shut down KCS’s line between Shreveport and Meridian for several days in September 2011.<sup>18</sup> SunBelt’s suggestion that NS’s operating plan is flawed because NS did not apply a “detour” route more than 200 miles longer than the route specified by the customer illustrates the fundamental problem with SunBelt’s sole reliance on “what the data says.”<sup>19</sup>

SunBelt’s claim that MultiRail failed to block cars to off-SARR points (Reb. III-C-69) is patently false. Reply III-C-124 (list of blocks input to MultiRail included both “internal” and “external” blocks). SunBelt’s assertion (Reb. III-C-72–74) that MultiRail failed to assign all blocks to trains—based on a single block in NS’s 2011 and 2021 MultiRail runs—is likewise incorrect. While an interim MultiRail report generated by SunBelt showed that cars in that block

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<sup>17</sup> Of course, the same is not true of a railroad’s physical plant—main line tracks, yard capacity, and other physical facilities cannot be added or subtracted from week to week in response to changes in traffic volume. That is why the physical configuration of a SARR must be measured (and built) based upon “peak week” traffic. NS’s RTC simulation, which serves the entirely different purpose of testing the ability of the SBRR’s physical plant to accommodate its Peak Year traffic, is based on the “peak week.”

<sup>18</sup> See <http://tinyurl.com/KCSStatement>. SunBelt’s own workpaper shows that all but one of the SBRR’s 10,000 other Dallas-Charlotte intermodal shipments moved via Meridian. See Reb. WP “Dallas TX\_CharlotteNC\_Reroute\_Example.xlsx.”

<sup>19</sup> SunBelt’s claim that NS improperly “alter[ed] the interchange location” of 12,575 (annualized) cars from NS’s New Orleans Yard to CN’s Mays Yard is likewise wrong. Reb. III-C-80–81. NS’s Interline Service Agreement with CN—which SunBelt purported to adopt (Op. III-C-5)—clearly specifies CN’s Mays Yard as the interchange point for both forwarded and received traffic at New Orleans.

stalled at one point in their journey, all of those cars were ultimately assigned to, and moved in, alternate trains. *See* Reply WP “tripplans.txt”; Reply III-C-122–30.

Finally, SunBelt’s assertion that the car classification counts that NS used in developing its operating plan are “unsupported and unreliable” because the car counts generated by MultiRail (supposedly) “did not match” the counts shown in another NS workpaper is easily refuted. *Reb.* III-C-97. SunBelt bases this claim on a report generated from MultiRail by SunBelt’s experts, which purported to show a Base Year count of 597.6 cars/day at New Orleans, while Reply WP “SBRR Reply Yard Operations.xlsx” reflected a count of 296.4 cars.<sup>20</sup> However, a closer inspection of the report reveals that SunBelt’s query for “cars handled” included five categories of cars: Originated, Interchange Received, Through Traffic, Terminated, and Interchange Delivered. While the first three categories of cars are properly included in a count of cars requiring “classification,” the latter two categories (Terminated and Interchange Delivered) are not. Cars terminating in New Orleans would not be classified by a SBRR yard crew—rather, they would be assembled by a local train crew into an outbound local train for delivery to local industries. Likewise, “interchange delivered” cars would not undergo classification, but would instead be picked up by the receiving carrier or delivered directly to that carrier. SunBelt’s total of 597.6 cars also included 6.8 Intermodal units, which are not classified. When those cars (and intermodal units) are subtracted from SunBelt’s tally of 597.6 cars/day, the resulting car count is 296.4 cars/day—precisely the total shown in Reply WP “SBRR Reply Yard Operations.xlsx.”

Indeed, the Peak Year (2021) MultiRail report prepared by SunBelt’s consultants confirms that the Peak Year car classification counts upon which NS’s operating plan is based

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<sup>20</sup> *See* *Reb.* WP “SunBelt Yard Volume by Traffic 2011-mmNdc.rpt.pdf” at 19; Reply WP “SBRR Reply Yard Operations.xlsx.”

match exactly the car counts generated by NS's 2021 MultiRail analysis at all SBRR yard locations.<sup>21</sup> In sum, SunBelt's attack on MultiRail and the analyses NS performed with that software have no merit.

SunBelt's criticism of the methodology that NS applied in developing the SBRR's yards is likewise unpersuasive. As NS demonstrated above (at pp. 14–15), SunBelt's claim that the car classification counts underlying NS's yard capacity analysis are "unsupported" is simply incorrect. Reb. III-C-97. Moreover, SunBelt's argument that NS's methodology "buil[t] a church for Easter Sunday" by focusing on the average "peak hour" car inventory, and adding a "fluidity factor" to the static capacity requirement at each yard, is both factually and conceptually wrong. Reb. III-C-98. NS's yard sizing analysis is based on an average week—not the peak week—in the Peak Year. Reply III-C-139, 143–44. Using the average week yields smaller yards than if NS had used the peak week because the average is, by definition, less than the peak. Moreover, in evaluating a yard's capacity requirement, the relevant issue is how many cars will be present in the yard—*i.e.*, the maximum number of cars that the yard will be required to hold—at any given time. Failing to provide adequate track capacity to hold the number of cars on hand at the busiest time of day would virtually guarantee that a railroad would experience congestion on a daily basis. By focusing on average peak hour inventory, NS's evidence "right sized" the SBRR's yards, providing sufficient trackage to avoid congestion that would otherwise impair the SBRR's operating efficiency during the busiest hours of operation.

SunBelt's criticism of the "fluidity factor" applied by NS flies in the face of logic. Reb. III-C-98–99. If a yard's track capacity were limited strictly to its "static" capacity (*i.e.*, the number of track feet required just to "park" cars end-to-end), a railroad would have no track

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<sup>21</sup> Compare Reb. WP "SunBelt Yard Volume by Traffic 2021-mmNdc.rpt.pdf" with Reply WP "SBRR Reply Yard Operations.xlsx."

whatsoever on which to perform switching operations. The 0.6 fluidity factor applied by NS has been endorsed by independent analyses (including a study conducted by the U.S. Army) as an appropriate adjustment to “static” capacity to ensure that cars can be moved around a yard.<sup>22</sup>

In any event, SunBelt’s vociferous criticism of NS’s yard capacity evidence is belied by the fact that SunBelt itself adopted (without explanation) the classification tracks posited by NS at several locations. For example, SunBelt increased the number of classification tracks at Birmingham from five on Opening to 26—the same number posited by NS—on Rebuttal. Reb. WP “SBRR Yard Crews\_Rebuttal.xlsx,” Tab “Classification.” Likewise, SunBelt’s Rebuttal increased the number of classification tracks at Meridian from three to five (the same number proposed by NS). *Id.* And at Selma, AL—the yard touted by SunBelt as an “example” of the propensity of NS’s approach to “[b]uild[ ] a church for Easter Sunday” (Reb. III-C-98–99)—SunBelt’s Rebuttal adopted the same eight tracks that NS demonstrated would be required at that location. *Id.* These (unexplained) adjustments by SunBelt thoroughly undermine its claim that NS’s yard capacity methodology produced “artificially inflated” or “unrealistic” results.

## II. SUNBELT MUST ACCOUNT FOR THE FULL COSTS OF TIH TRAFFIC.

The SBRR aptly could be called the first TIH SARR. While SunBelt selected just 9% of NS’s total 2011 traffic, it selected 46% of NS’s total TIH carloads. *See* Reply III-D-205–06. As a result, 2.5% of the SBRR’s carloads are TIHs, over six times the percentage of TIH on NS. *Id.* The ubiquity of TIH on the SBRR network is demonstrated by the fact that fully 20% of the trains in SunBelt’s Rebuttal RTC simulation—111 out of 558—include TIH cars. SunBelt’s selection of such an unprecedented amount of TIH traffic requires the Board to decide several novel issues. But while the issues are novel, the principle that controls them is well-settled: the

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<sup>22</sup> *See* Reply WP “Army Rail Operations.pdf” at 10–10. The 0.6 fluidity factor has likewise been endorsed by the State of Washington Department of Transportation. *See* Reply III-C-140; Reply WP “Statewide Rail Capacity and System Needs Study.pdf” at A-27.

SBRR must “cover[] the full costs of providing service” for the traffic it selects. *AEPCO 2003*, 7 S.T.B. at 228. SunBelt ignored that principle by claiming the revenues from highly-rated TIH traffic, but significantly understating the costs of that traffic. Those costs include additional operational, compliance,<sup>23</sup> security,<sup>24</sup> insurance, and PTC costs, as well as the quantified risk of a catastrophic accident that would exceed available insurance. These costs should be factored into both the SAC analysis and any MMM analysis that the Board performs. *See infra* at 59.

**Insurance.** SunBelt does not dispute NS’s evidence that the Providence & Worcester, on which SunBelt based its insurance costs, did not carry insurance for liabilities over \$200 million, Reply III-D-207–08;<sup>25</sup> that a TIH release could result in liability far above that limit, *id.* at 237–238; or that NS incurs substantial costs for insurance over \$200 million and {{

}} *Id.* at 208–09. Nor can SunBelt dispute that

the percentage of TIH traffic on the SBRR far exceeds that on the NS or any real-world railroad.

SunBelt instead attempts to excuse its insufficient insurance costs by claiming that the total

amount of TIH it transports is less than the total transported by NS. Reb. III-D-49. But the

question is not how the SBRR’s total insurance spending would compare to that of NS or other

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<sup>23</sup> NS proposed a small environmental staff to help the SBRR comply with TIH regulations and coordinate responses to any hazmat or TIH releases. *See* Reply III-D-100–08. SunBelt rejected this staffing, laughably claiming that compliance issues would be “one-time” or “occasional” and that releases could be handled with “[o]utside assistance.” Reb. Ex. III-D-1 at 40–41. Moreover, SunBelt provides no funds for “[o]utside assistance” and no staff save a single manager who supposedly would handle all environmental compliance, monitoring, and training, as well as vegetation control. Op. Ex. III-D-3, 15. No single person could perform all those duties.

<sup>24</sup> SunBelt claims that the SBRR would have a small police force because it would simply “call in local public police forces” to deal with incidents after they occur. Reb. Ex. III-D-1, 37. But the most valuable role of railroad police is to provide security to prevent incidents from occurring in the first place. *See* Reply III-D-113. Adequate security is part of the inherent costs of transporting the risky TIH traffic SunBelt selected.

<sup>25</sup> SunBelt’s citation of RailAmerica as an alternative comparable is irrelevant, because like P&W, RailAmerica did not carry catastrophic insurance. *See* RailAmerica 2011 10-K at 13, <http://tinyurl.com/RailAmerica-2011-10-K>.

Class I railroads, but rather about how to estimate relative insurance expenses based on the risk of the subset of traffic SunBelt has selected. Indeed, NS's estimate of catastrophic insurance costs for the SBRR assumed it would pay significantly less than NS pays for such insurance,

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Reply III-D-209-10. SunBelt cannot design a SARR with an unprecedentedly high percentage of TIH traffic and refuse to account for the insurance costs that a real-world railroad would incur as a result of including TIH cars on one out of every five of its trains.<sup>26</sup>

**Excess Risk.** SunBelt does not dispute NS's evidence of the massive liability in excess of insurance coverage that could result from a significant TIH release, which was supported by a leading expert on risk. Instead, SunBelt objected on theoretical grounds. First, SunBelt argued that accounting for excess risk costs creates "a barrier to exit" because the SBRR should be allowed to declare bankruptcy in the event of a TIH disaster. Reb. III-D-53-54. But the SBRR cannot use the prospect of declaring bankruptcy as an excuse to ignore the costs of quantifiable risks, just as a SARR could not use the prospect of bankruptcy as an excuse to ignore all insurance costs. SunBelt's bankruptcy argument ignores the fact that the SBRR could not use bankruptcy to escape all excess liability scot-free. Because it is impossible to accurately model what fraction of excess liability claims the SBRR would have to settle in bankruptcy, the best estimate of potentially bankrupting liability is NS's excess risk analysis. Indeed, excess risk could be viewed as the measurable cost to the SBRR of the possibility that its risky traffic selection could cause such bankrupting liability.

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<sup>26</sup> SunBelt's recognition that some events other than TIH releases could result in liability over \$200 million does not excuse the SBRR from accounting for catastrophic insurance coverage. SunBelt does not dispute NS's evidence that {{ }} and SunBelt's selection of 46% of NS's TIH traffic creates a pressing need for it to provide adequate insurance.

Second, SunBelt’s claim that the industry cost of capital already accounts for excess risk is disproven by NS’s evidence that SBRR’s relative risk is much greater than that of the Class I carriers included in the STB’s cost of capital determinations. Reb. III-D-54–55. The market would require higher returns for a railroad like the SBRR that carried far more TIH as a percentage of its traffic than the market would for an otherwise identical railroad with a more conventional traffic mix.

In addition to these theoretical objections, SunBelt claims that NS overstates the SBRR’s risk. *See* Reb. III-D-55–56. SunBelt first claims that the SBRR would have lower risk because it would use PTC. But it is not possible for the SBRR to have PTC available from its inception. *See* Reply III-F-200–06. And once installed, PTC would not prevent all potential TIH releases. *See id.* at III-D-195, n.353 (only 30% of derailments due to human error). SunBelt also objects to NS’s reliance on FRA testimony calculating the number of chlorine accidents since 1965, claiming that this data does not account for recent safety improvements. But the three most noteworthy TIH accidents—Minot, Macdona, and Graniteville—all occurred since 2002. A railroad on which one out of every five trains would carry TIH cannot ignore that risk.

### **III. NS’S ROAD PROPERTY INVESTMENT EVIDENCE SHOULD BE ADOPTED.**

#### **A. NS’s Real Estate Valuation Should Be Adopted.**

SunBelt devotes much space in its Rebuttal to attacking NS’s real estate appraisal methodology, but those methodological differences are ultimately irrelevant. The \$23 million difference between the land valuations in the parties’ DCF models is entirely attributable to two factors that have nothing to do with disputes about whether a “weighted average” is superior to a

“simple average.”<sup>27</sup> First, NS’s appraisal includes the value of 200 acres of yards that SunBelt erroneously chose not to build—this accounts for \$18.8 million of the difference.<sup>28</sup> Second, SunBelt valued the SBRR’s real estate as of 2011 rather than as of the acquisition date in 2009, and in so doing significantly depressed its 2011 appraisal. *See* Reply III-F-7–8 (noting 3.6% reduction in comparable sale values from SunBelt’s valuation date adjustments). SunBelt claims that it rectified its use of a 2011 valuation date by indexing its appraisal in the DCF, but its DCF indexing only compounded the problem. *See* Reb. I-71–72. SunBelt’s appraisers used an index to decrease the values of comparable sales for their 2011 appraisal below where they would have been for a 2009 appraisal, Reply III-F-7–8, but SunBelt’s cost consultants used a different index in the DCF model that decreased the 2011 valuation again for a purported “2009” value. *See* Reb. Ex. III-H-1, 3 (indexing \$215,563,000 down to \$194,806,740). So SunBelt’s claimed “correction” to its appraisers’ error only made the problem worse. Moreover, indexing cannot cure the problem from using post-2009 sales and events as value evidence for property that would be acquired in 2009. *See* Reply III-F-7 & n.7.

**B. The Board Should Follow Longstanding Precedent and Apply Means Data to Develop Earthwork Costs, and Reject the Inapposite Trestle Hollow Project.**

The Board has long relied upon Means, which provides current, comprehensive cost data based on national construction cost surveys, as the authoritative source for SARR earthwork costs. *See* Reply III-F-34 & n.21. SunBelt instead used the small, atypical Trestle Hollow project as the basis for positing unachievable roadbed preparation costs. *See, e.g.,* Op. III-F-9, 19–24. Contrary to SunBelt’s suggestion, the Board has not favored data from an individual

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<sup>27</sup> While space does not permit a discussion of the real estate valuation methodological differences between NS and SunBelt, the major issues are the same as those discussed in the evidence and Final Briefs in *DuPont v. NS*.

<sup>28</sup> *Compare* Reply Ex. III-F-3 (valuing 378 acres of yards at \$35.3 million) *with* Reb. Ex. III-F-2 at 103 (valuing 175 acres of yards at \$16.5 million).

project over Means cost data without regard to that project's comparability to the SARR. In the overwhelming majority of SAC cases, the Board has used Means construction cost data as the basis for earthwork unit costs. In two individual western cases, *WFA I* and *AEPCO 2011*, the Board accepted certain construction cost data from projects conducted by the defendant carrier on substantial portions of the very rail lines replicated by the SARR. *See* Op. III-F-12. But the Board announced no new rule regarding construction cost data or sources in those cases.

For several reasons, SunBelt's attempt to extrapolate bid costs from the Trestle Hollow project is much different from the Board's acceptance of the defendant carrier's construction cost data in *WFA I* and *AEPCO 2011*. The 1.3 mile Trestle Hollow short line realignment project is not representative of the 578 route-mile SBRR. For example, the density of material to be excavated in the short linear distance of the Trestle Hollow project made available economies that would not be available to the SBRR. *See* Reply III-F-37. By contrast, the projects used in *WFA* and *AEPCO* constituted a significant and substantial portion of the lines replicated by the SARR. *See WFA I* at 25–26; Reply III-F-36. Unlike Trestle Hollow, the *WFA* and *AEPCO* projects were conducted by the incumbent on the actual lines replicated, meaning not only that they were representative of the SARR, but that their costs were verifiable by the defendant carriers. *See WFA I* at 81; *AEPCO 2011* at 86. NS and the Board cannot verify or evaluate many of the broad, undefined Trestle Hollow cost categories because the only supporting “evidence” is a few incomplete and inconsistent bid and project documents, and the recollection of witness Crouch. *See, e.g.,* Reb. III-F-55. Moreover, unlike the present case, the Board accepted the defendant carrier's own earthwork costs in *WFA* because the parties agreed to use it. *See* Reply III-F-36, n.27.

SunBelt attempted to disguise its motivation for using Trestle Hollow project costs—to depress roadbed preparation costs below the level that could be attained in the real world for a

railroad construction project of the size and scope of the SBRR—by alleging that NS “broke this trend” of defendant carriers producing information from real-world projects for use in developing earthwork costs in SAC cases. *See, e.g.*, Reb. I-72–74, III-F-15. However, it was SunBelt that broke the trend when it decided not to use NS’s real-world project costs. Like defendants in *AEPCO* and *WFA*, NS made available in discovery its AFEs for recent projects. As in those cases, SunBelt selected from a list provided by the defendant (here, NS) the specific AFEs that it wished to review, and NS produced those AFEs. *See id.* at III-F-24–25. At this point SunBelt’s tactics diverged from those of complainants in *WFA* and *AEPCO*. As SunBelt’s consultants know, in those cases the complainants next requested documents underlying and supporting the project costs summarized in selected AFEs, such as bid documents and construction invoices. In this case, in contrast, SunBelt did not request such information from NS. Thus it is SunBelt that “broke the trend” by deciding, once it had reviewed summaries of the actual costs of real-world NS projects, that it would avoid inquiring any further about costs it regarded as unfavorable to its case and instead rely on inapposite costs from the unrepresentative Trestle Hollow project.<sup>29</sup> SunBelt’s strategic decision not to seek supporting documents and data regarding NS construction projects precludes it from arguing that NS project data was insufficient for the development of SBRR roadbed preparation costs. *See, e.g.*, Reb. III-F-24–26.

### C. Other Earthwork

**Swell**. Accounting for swell is a simple matter of correctly interpreting and applying Means. In prior cases, parties have confused the issue, and SunBelt’s Rebuttal added to the confusion.

However, NS showed in its Reply that Means reports unit costs in Bank, Loose, and

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<sup>29</sup> Moreover, complainants and their consultants have used the same Trestle Hollow project to attempt to drive down road property investment costs in every Eastern SAC presentation in recent years. *See, e.g., Seminole, DuPont v. NS*. This consistent strategy is driven by complainants’ transparent desire to present unit costs that are far lower than the defendant carriers’ real-world costs and the construction costs reported by Means.

Embankment Cubic Yards measures. The Means manual provides clear instructions for applying those unit costs to the correct quantity measures. NS followed those instructions when developing Means unit costs.<sup>30</sup> SunBelt did not.

The Reports record earthwork quantities in bank cubic yards (“BCY”). For those cost categories for which Means uses units of measure other than BCY, the Reports’ quantities must be converted to allow an accurate cost calculation. With respect to hauling costs, the BCY quantities used by the Reports must be converted to Loose Cubic Yards (“LCY”) in order to apply the Means unit costs, which are expressed in cost per LCY. NS properly converted the BCY to LCY to allow calculation of hauling costs. *See* Reply III-F-85.

**Soil Preparation.** Both NS and SunBelt provided evidence showing that soil preparation—including wetting and drying—is an integral step in the earthwork process.<sup>31</sup> SunBelt excluded separate costs for this necessary work because it contended, without meaningful support, that Trestle Hollow project costs should adequately cover “water for compaction [if] necessary.” Op. III-F-20. NS’s Reply analyzed regional data to determine which SBRR soils would require preparation before placement as embankment.<sup>32</sup> On Rebuttal, SunBelt was conspicuously silent

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<sup>30</sup> Means uses actual project bids to develop unit costs using different quantity measures, including but not limited to BCY. Logically, unit costs should be applied to corresponding quantity measures to calculate the cost of a given quantity of material or work. Because different quantity measures (units) may be used in different circumstances, Means provides instructions for conversions between different units. If all unit prices could be applied directly regardless of the quantity measure, Means would not provide conversion formulas.

<sup>31</sup> *See* Op. WP “Trestle Hollow Project Specifications.doc” at 169, Spec 3.5.10.A and B and Reply WP “NS Grading Spec.pdf,” “NS Reply WP “Compaction Standard Compaction Curve.docx,” and “Railroad\_Engineering\_William\_Hay-Water and Compaction.pdf.”

<sup>32</sup> SunBelt claims to be confused by the fact that the NS study evaluated data for 10 separate locations proximate to the SBRR route and based on its analysis of that data identified 10 corresponding soil types. *Id.* at III-F-52–53. All of NS’s assumptions are laid out in its workpapers. *See* Reply III-F-86–95. The NS study method is straightforward: record the natural moisture content (NMC) readings at one of 10 sites identified along or near the SBRR right of way, assign an optimum moisture content (OMC) based on referencing the predominant soil type

about its own dubious assumption for soil preparation: that soil conditions on the SBRR system, which traverses significant wetland areas, would uniformly mirror the optimal soil conditions encountered at the Trestle Hollow project in Tennessee, hundreds of miles from the SBRR route.

SunBelt asserted that the ten locations used by NS may not be representative, complaining that it could not determine how the locations were selected. Reb. III-F-53.

SunBelt's claim does not withstand scrutiny. First, SunBelt's own evidence relied on only one sample location—the Trestle Hollow project—for the entire 578-mile SBRR. NS's analysis is ten times more specific. Moreover, SunBelt's Rebuttal concession that the Trestle Hollow project required water for compaction confirms that NS's method is conservative. Although Trestle Hollow is not on the SBRR route, application of NS's method using data from the nearest soil station would conclude that it would *not* be necessary to wet the soil in that location. *See* Reply WP "SBRR Soil Moisture Content R1.xlsx," Line 25. Second, the NS analysis included documented references and links to the SCAN and WSS resources it used. Third, although SunBelt portrays the components of the NS soil analysis as disjointed, the interactive map NS provided clearly demonstrates their integration. *See* Reply WP "SBRR\_Geo\_Loc.pdf." The map shows that various physiographic regions have multiple SCAN and WSS sites near the SBRR route, and NS engineers selected those sites for use in their estimating process. The NS approach provides at least the same level of support as the Ecosystem Domain Maps that the Board accepted in the *TMPA* decision, and buttresses that support with location-specific soil moisture measurements. *See TMPA*, 6 S.T.B. at 707.

SunBelt also criticized NS's unit costs for soil preparation. To develop unit costs for water for compaction, NS used the cost that SunBelt selected from Means in its grading

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at the site in the cited tables, and then add wetting or drying to the soil to the extent those two numbers significantly differ.

spreadsheet. NS simply corrected that cost to eliminate SunBelt's unsupported assertion that the Means handbook mistakenly listed a cost per embankment cubic yard when it intended to list a cost per cubic yard of water. *See* Op. WP "SBRR Open Grading.xlsx," Tab "Unit Costs," Rows 142–145. SunBelt provided no evidence to justify its departure, which is implausible given that Means grading does not list any other prices denominated in cubic yards of water and that all other Means items listed in cubic yards refer to soil quantities.

**Waste Pits and Haul Distance.** NS developed a series of consistent, inter-related parameters and assumptions regarding the spacing of waste pits, the selection of hauler distances, and the calculation of the area of land needed for waste pits. Recognizing the substantial expense of hauling excavated materials along the right of way; that the cut-off for re-using common excavation for fill is 5,000 feet; and giving deference to SunBelt's Opening assumptions, NS engineers made the reasonable assumption that waste pits would be located one mile apart. SunBelt provided no support on Opening for any assumption regarding those parameters and did not even appear to recognize they were interconnected. On Rebuttal, SunBelt introduced several new and unsupported assumptions that are inconsistent with each other.

First, SunBelt claimed that waste pits would not be needed in urban areas because they tend to be flat and contractors would make concerted efforts to balance cuts and fills. But SunBelt provided no evidence to support those assertions or to distinguish either topography or contractor effort in urban versus rural settings. *See* Reb. III-F-57. Second, SunBelt rejected NS's assumption that waste pits would be spaced every mile, but failed to provide an alternative assumption specifying the spacing of those pits. *See id.* Third, SunBelt spaced waste pits such that common excavation is on average hauled farther than all other types of excavation. Because only common excavation material is re-used as fill, however, it would have shorter average hauling distances than other excavated materials, especially if waste pits are spaced more than a

mile apart. The numerous internal contradictions in SunBelt's hauling distance and waste pit assumptions render its evidence incoherent. The Board should adopt NS's integrated and consistent evidence concerning those items.

**Treating Slag and Team Overhaul as Borrow.** SunBelt understated borrow quantities for the SBRR by ignoring Team Overhaul quantities and treating slag as common excavation. First, SunBelt misleadingly suggested NS erroneously "converted" Team Overhaul quantities hauled between 500 and 5,000 feet from the borrow source to the point of placement, when SunBelt did not include these quantities at all. Contrary to SunBelt's claim that it "include[d] the cost to move the material even greater distances," in fact it did not apply *any* unit cost to the team overhaul quantities.<sup>33</sup> Consistent with long-standing treatment of Report quantities, overhaul quantities reflect that outside material must be hauled in as fill to supplement the nearby common excavation that may be re-used as embankment. *See* Reply III-F-54. For this reason, overhaul quantities are reported in hauled cubic yards units, and parties should convert them into cubic yards of borrow. These quantities bear a cost in the original Reports and cannot be ignored. As long as quantities are reported as overhaul instead of common excavation, it is appropriate to treat them as borrow.

Second, SunBelt erroneously rejected NS's correction of classifying 332,600 cubic yards of slag as borrow instead of common excavation for the valuation section AGS-2-AL. *See* Reply III-F-58; Reb. III-F-33. SunBelt's basis for doing this is that slag is listed under "Excavation" on the Report. *See* Reb. III-F-33. SunBelt suggests that slag could have been encountered during common excavation. *Id.* But slag does not occur naturally. By definition, slag is waste from

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<sup>33</sup> *See* Reb. III-F-34. *Compare* Op. WP "SBRR Open Grading.xlsx" with Reply WP "SBRR Open Grading NS Reply," Tab "Eng Rep Input", at column H. SunBelt does not add in the "Team Overhaul" quantities identified by NS on the ICC Engineering Reports to common excavation.

steel mills. *See* Reply III-F-58. SunBelt's arguments do not justify classifying slag as excavation.

#### D. Bridges

**Movable Bridges.** SunBelt applied a 90% reduction to SBRR movable bridges costs in its Opening workpapers without disclosing that discount in its narrative and without any explanation or support. *See* Reply III-F-187. On Rebuttal, SunBelt argued for the first time that such discounted costs were justified by the Truman-Hobbs Act. But funding under that Act is limited to alterations or replacement of pre-existing bridges. *See* 33 C.F.R. § 116.01(e)(1); 33 U.S.C. § 512 *et seq*; Reply III-F-191–93. Because the SBRR must construct the original bridges, it would be required to pay the full cost of new construction, and would not be eligible for Truman-Hobbs Act funding.

SunBelt argued that the SBRR would get Truman-Hobbs Act funding even though NS did not obtain such a subsidy for constructing the bridges at issue. *See* Reb. III-F-102–05. But a SAC presentation must include costs for all necessary capital investment incurred by the incumbent carrier. *See, e.g., FMC*, 4 S.T.B. at 797, n.161. Here, that includes the cost of the original construction of movable bridges, not simply costs to renovate or replace them. SunBelt argued for the first time on Rebuttal that requiring a SARR to pay to construct movable bridges constitutes a barrier to entry. *See* Reb. III-F-104. But barriers to entry are “those ‘costs that a new entrant must incur that were not incurred by the incumbent.’” *Burlington N. R.R. Co. v. STB*, 114 F.3d 206, 214 (D.C. Cir. 1997). The evidence shows that NS or its predecessors paid the costs of the movable bridges on the SBRR. *See* Reply III-F-194.

SunBelt also contends that the SARR should pay only those costs the incumbent would pay in the current market and, because NS already owns the movable bridges and might be eligible for Truman-Hobbs Act funds to replace them, the SBRR must also be eligible for

Truman-Hobbs funds to replace them. *See* Reb. III-F-106–07. But a SARR must pay the cost of constructing necessary infrastructure, *not* merely the cost of replacing it. *See Metrop. Edison Co. v. Conrail*, 5 I.C.C. 2d 385, 417, n.41 (1989). Otherwise, a SARR could lay rail without incurring roadbed preparation costs by merely “replacing” the rail.

Further, SunBelt’s rationale is founded on the premise that all movable bridges are “entitled” to Truman-Hobbs Act funding. Reb. III-F-103. But the program is discretionary and has received very limited funding that would be grossly insufficient to pay for construction of SBRR moveable bridges. *See* Reply III-F-192. And, those few bridge projects selected for funding are not guaranteed any particular percentage contribution. *See* 33 C.F.R. § 116.50.

**Other Bridge Elements.** SunBelt disregarded the real-world maximum bridge height data produced by NS in discovery in favor of what it described as “estimated” or “average” bridge heights. But SunBelt did not calculate “averages” or “estimates” using the NS bridge height data—it fabricated arbitrary bridge heights and components without any basis in NS bridge data or other meaningful support. Because SunBelt’s evidence is infeasible and unsupported, the only adequate bridge design and cost evidence of record is that in NS’s Reply Evidence. For example, SunBelt’s assignment of a “standard” height to each bridge category ignores the need for sufficient height to clear terrain features. *See, e.g.,* Reply III-F-163–66. On Rebuttal, SunBelt made no real effort to defend, support, or adjust its faulty bridge height categories. Instead, SunBelt simply complained that NS had not provided “evidence that all piers are always placed at the location of the maximum height.” *See* Reb. III-F-91 (emphasis added).<sup>34</sup> NS’s assumption that single bridge piers are centered is far more reasonable and likely to produce

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<sup>34</sup> On Rebuttal, SunBelt also alleged that the NS maximum bridge height data represents the height not of the bridge, but of the top of the rail on the bridge. *See* Reb. III-F-90. But SunBelt is wrong—it has confused bridge height with track elevation.

accurate cost estimates than SunBelt's arbitrary and infeasible one-height-fits-all assumption. NS has presented the only feasible bridge height evidence founded in real-world data.

For bridge substructure, SunBelt used a single identical pier and abutment design to support all bridge spans ranging from 20 feet to 92.5 feet in length.<sup>35</sup> If a particular pier were actually strong enough to support a 92.5 foot span, using the same pier to support a 20 foot span would be a gross waste. As NS has demonstrated, however, SunBelt's proposed piers are *not* strong enough for 92.5 foot spans. *See* Reply III-F-181. Instead of SunBelt's unworkable short-cut, NS designed piers and abutments tailored to the specific burdens borne by each span type based on their weight per foot, the horizontal loads of passing trains, and the required lengths of the spans. *See* Reply III-F-178-84.

SunBelt claimed NS did not apply different pier and abutment types to different types of spans. This is false.<sup>36</sup> SunBelt also claimed NS reduced stress limits below AREMA recommendations. But those guidelines recommend "due allowance" for horizontal load stress to prevent column buckling, precisely what NS did. SunBelt's claim that NS adjusted the steel type in certain abutments to increase quantities fails to recognize that this adjustment has no effect on quantities. *See* Reb. III-F-98. Finally, SunBelt's claims that NS over-designed piers is wrong because SunBelt only took into account that piers are subject to lateral bending, but ignored the more substantial effects of axial compression.<sup>37</sup>

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<sup>35</sup> *See* Reb. WP "Bridge Construction Costs Rebuttal.xlsx," Tab "Only Active Bridges," Columns AH and AJ *See id.* at III-F-95-97.

<sup>36</sup> Reply workpapers show that different piers and abutments are used for different span types and heights. *See* Reply WP "SBRR Bridge Construction Costs NS Reply.xlsx," Tab "Type I Spans Only," Cells BB10:BC20 and column AD and tab "Type III Spans Only," Cells BC12:BD20 and column AE.

<sup>37</sup> *Compare* SunBelt Reb. WP "Examples of NS Over-designed Piers.pdf" with Reply WP "NS Type III Bridge.pdf" at 24, 30, 215, 221, 309, 313, 315 and with Reply WP "NS Type IV Bridge.pdf" at 20, 26.

**E. SBRR Would Need Significant Undercutting and Fill to Construct a Stable Roadbed Through Wetlands of Alabama, Mississippi, and Louisiana.**

More than 15% of the SBRR route traverses wetlands, a higher percentage than any previous SARR. *See* Reply III-F-73. A stable, safe, rail roadbed cannot be built in wetlands without undercutting. Importantly, SunBelt does not dispute NS's identification of wetlands along the SBRR route nor NS's explanation of why undercutting is of critical importance to building a stable roadbed. In fact, SunBelt concedes that undercutting is necessary work.<sup>38</sup> Instead, SunBelt's exclusion of separate undercutting cost is based only on its speculation that the Reports silently included undercutting but reported them simply as common excavation and borrow quantities.<sup>39</sup> SunBelt's position is unsupported and implausible. The Reports do not record the amount of undercutting because they were based on post-construction observations that did not allow assessment of pre-construction conditions. *See* Reply III-F-71. SunBelt's contention that the Reports tacitly include quantities attributable to undercutting activities would require that, after construction, ICC surveyors observed nearby unsuitable soils at the surface level, guessed the depth and quantities that previously existed *below* the surface, and then

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<sup>38</sup> On Opening, SunBelt stated that the Trestle Hollow project, even though it is not in a wetland, included costs for undercutting and on Rebuttal it maintained that the Trestle Hollow project used the equipment necessary for undercutting. *See* Op. III-F-8-9 and Reb. III-F-46.

<sup>39</sup> SunBelt attempted to shirk its burden of proof by asserting that "NS has no way of demonstrating that the ICC Engineering Reports do not include undercutting quantities." Reb. III-F-44. Of course, it is nearly impossible to prove a negative. NS presented substantial evidence and argument supporting the conclusion that undercutting activities were not included in the Reports. NS demonstrated that undercutting work is done on the very lines the SBRR is replicating, and proposed to do this for similar wetlands on the SBRR. NS further offered numerous sound reasons that the Reports likely do not include this work. In order for SunBelt to prevail in its argument that undercutting activity was tacitly included in other Report quantities, it must offer affirmative evidence, rather than merely asserting that NS had not conclusively proved a negative. SunBelt failed to meet its burden and the Board should adopt NS's evidence.

lumped the resulting guesswork quantities into different line items for other types of excavation, all without noting, describing, or explaining the entire process. *See* Reply III-F-71.<sup>40</sup>

SunBelt's arguments actually support NS's position. SunBelt faults NS's two-foot depth assumption because it is based on an intermodal facility project. But this project consisted of two miles of railroad running track and four miles of side track in SBRR wetlands.<sup>41</sup> SunBelt claimed NS must show undercutting was performed post-construction (*see* Reb. III-F-44), which itself implies that the Reports do not include undercutting. SunBelt criticizes NS's assumption that fill height is eight feet through wetlands, but does not propose an alternative. *See* Reb. III-F-46. Because track traversing wetlands is elevated above the water level, NS's average fill height assumption is conservative. *See* Reply WP "Undercutting PE write up.pdf."

SunBelt's new Rebuttal claim that Trestle Hollow costs included scraper and excavator equipment is irrelevant because those costs could not capture lower equipment production rates of wetland construction. *Compare* Reb. III-F-46 *with* Reply III-F-78. Swamp mats are required for construction in wetlands, but are not reflected in the Reports because they are removed when construction is completed and thus are not observable post-construction.

Finally, NS submits that rip rap is best for backfill when weighing all life-cycle costs and benefits, as evidenced by its own use of rip rap for the McCalla project. However, borrow materials also have been used successfully in some areas under certain conditions. If the Board disagreed with the use of rip rap, it could accept NS's method—including the estimated

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<sup>40</sup> The Board has never rejected undercutting in a SAC case based on its presence or absence in the Reports, but only based on the defendant's railroad's failure to prove it is needed. *See, e.g., AEPSCO 2011* at 85; *WFA I* at 83; *AEP Texas* at 79; *Duke/NS*, 7 S.T.B. at 176; *CP&L*, 7 S.T.B. at 313; *Duke/CSXT*, 7 S.T.B. at 479-80. In *AEPSCO 2011*, the Board rejected undercutting costs, finding that "[t]o warrant a separate line item, the necessary undercutting would have to be more extensive than what defendants have shown is necessary." *Id.* at 85. Here, there is no dispute about the need for undercutting.

<sup>41</sup> *See* Reply WP "Undercutting Field Engineer Statement.pdf."

quantities of unsuitable soil under the roadbed in wetlands requiring replacement—but substitute the unit cost of borrow for the unit cost of rip rap.

**F. Materials Transportation Costs.**

**Ballast and Subballast.** SAC evidence must account for the costs of transporting construction materials from their source to construction railheads. *See, e.g., Otter Tail* at D-26. SunBelt based its ballast transportation unit cost on a transportation cost from *AEPCO 2011*, where the cost was for on-line transportation rather than the off-line transportation at issue here. *See AEPCO 2011* at 99. Further, SunBelt’s proffered cost is based on 1994 cost data. *See* Reb. III-F-82. SunBelt claims that if the RCAF-A were applied, this 1994 cost would not change significantly. *See id.* But RCAF applies to a rail carrier’s variable costs, *not* to changes in rail materials transportation pricing charged by another carrier. NS obtained actual price quotes for off-line ballast transportation to the SBRR railheads that are unrefuted. Reply III-F-132.

SunBelt’s ballast transportation cost also ignored the actual locations of suppliers, erroneously relying on the theory of unconstrained resources to assume rail-served ballast sources exist within an average of 100 miles of each SBRR railhead. If the theory allowed that assumption, SunBelt could assume every mile of the SBRR has its own ballast supplier and its transportation costs would approach zero. SunBelt cannot assume ballast suppliers exist where they do not. SunBelt next alleges that, because NS made the simplifying assumption that SBRR subballast suppliers exist within an average of 40 miles, SunBelt may assume that ballast suppliers exist within an average of 100 miles.<sup>42</sup> But a reasonable simplifying assumption in one part of SAC evidence does not justify a different, unreasonable and unsupported assumption to disregard reality and trump real-world evidence.

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<sup>42</sup> Unlike ballast, subballast is typically transported by truck. This vastly expands the number of sites available for subballast in comparison to rail-served ballast sources.

SunBelt did not specify a ballast distribution plan, so NS designed one using SunBelt's ballast suppliers. On Rebuttal, SunBelt's sole criticism of the NS plan is that it included a supplier in Dallas, GA, with a higher material price. But SunBelt ignored the fact that the closer proximity of that supplier to the SBRR results in a lower delivered cost.

SunBelt used a price for subballast from the Trestle Hollow project. But subballast material and transportation costs vary with region and distance, making the Trestle Hollow project costs inapplicable. SunBelt's assumption that other suppliers would match the Trestle Hollow price is misplaced because transportation costs from the distant Trestle Hollow supplier (250-plus miles from SBRR rail heads) would render its delivered cost non-competitive.

**Rail Transportation Cost.** SunBelt's use of unadjusted rail costs reported in the Annual Report R-1 understated SBRR rail costs because it assumed free transportation over the residual NS system. NS added transportation costs based on the distance between NS's connection and the SBRR railheads. *See* Reply III-F-141-42. As SunBelt acknowledged, any rail NS purchased from the Steelton plant and reported in the R-1 would only include transportation costs for the 3.9 mile transportation on the foreign short line. *See* Reb. III-F-84. Because SunBelt did not specify a rail source in its Opening, NS assumed the SBRR would source all of its rail from Steelton, the only rail plant then operating in the Eastern United States.<sup>43</sup> Including rail transportation costs over the residual NS system is not "double counting" because those costs are not accounted for in the R-1 costs for rail. On Rebuttal, SunBelt speculated that the R-1 may reflect purchases from other rail plants and thus include sufficient transportation costs to distribute rail over NS's network to the SBRR railheads. But NS's added transportation costs to

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<sup>43</sup> *See* <http://bit.ly/15RiQKF> (noting there are only three rail plants in the U.S.). A Steel Dynamics rail production plant began operating in Columbia City, IN in 2010, but NS did not buy any rail in 2010 from this plant, and thus it is not included in 2010 R1 prices. *See* "Purchase Orders 1-1-10 thru 12-23-10.xlsx," Tab "2010," column F. *See also* <http://bit.ly/1989bVz>.

the R-1 price is conservative because it assumed all rail would come from Steelton rather than more distant suppliers. Finally, even though the actual average distance from the NS connection near Steelton to the SBRR railheads would be 1,128 miles, NS conservatively applied a cost for only an 847-mile rail shipment.<sup>44</sup>

**G. Other Road Property Investment Items.**

**Retaining Walls.** SunBelt assumed the SBRR would replace all masonry, timber wall and retaining walls made from ties and timber pilings recorded in the ICC Engineering Reports with gabions. Op. III-F-19. On Reply, NS explained that SunBelt's workpapers replaced masonry, timber wall and retaining walls made from timber ties with gabions, but replaced timber piling retaining walls in kind. Reply III-F-109. NS further explained that SunBelt's understated SBRR gabions and related quantities by failing to take into account that gabions are lighter and therefore do not resist the same amount of force as masonry walls; by incorrectly converting timber retaining wall quantities to gabion quantities; by failing to provide for necessary foundation; and by failing to adjust gabion quantities to reflect the SBRR's wider roadbed. Reply III-F-109-15. NS also corrected SunBelt's pilings to use treated lumber. Reply III-F-116. Although NS provided detailed workpapers documenting its development of SBRR retaining wall quantities, SunBelt rejected NS's Reply principally on the ground that NS has not demonstrated that the reasoned assumptions it made regarding standard retaining wall configurations are exactly the same as the retaining walls recorded in the Reports. Reb. III-F-61-67. SunBelt's attempt to hold NS to an impossible standard of first proving unspecified parameters of the Reports before making any reasoned estimates of SBRR retaining wall quantities should be rejected and NS retaining wall quantities accepted.

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<sup>44</sup> See Reply WP "SBRR Track Construction NS Reply.xls," Tab "RAIL REPLY COSTS," cell C10 and Reply WP "SBRR Steelton PA to Railheads on Non SBRR Routes.pdf."

**Yard Lighting.** SunBelt's yard lighting submission constitutes a failure of proof, and NS provided the only adequate yard lighting system evidence. SunBelt presented yard lights using unexplained types of poles and fixtures placed in unexplained and unsupported configurations. On Reply, NS presented yard lighting systems based on analyses and calculations of the lighting needs of the yards. On Rebuttal, SunBelt again failed to provide any explanation or support for its lighting costs and instead merely complained that NS used "stadium lighting" and installed too many lights. But SunBelt failed to articulate, let alone apply, any standard for yard light coverage. *See* Reb. III-F-132. SunBelt merely complained that it could not see such lights in its limited resolution aerial photos of older NS yards. SunBelt misses the point. Whether or not existing NS yards use stadium lights is irrelevant. SunBelt does not dispute that stadium lighting is the least cost, most efficient means of lighting yards using today's technology. The SBRR would use the least cost most efficient available lighting system.

SunBelt's Rebuttal treatment of conduit and duct banks, the most significant cost item, is unsupported. Three-phase power is standard and NS developed costs for four inch conduit and corresponding cables rather than SunBelt's unsupported costs for conduit without cable. *See* Reply III-F-256. On Rebuttal, SunBelt neither added cable nor showed its conduit would be sufficient. In some instances, SunBelt accepted NS costs for conduit and cable, but inexplicably assumed installation of a pro-rated share of the length equal to the share of lights it proposes, despite the fact that necessary cable and conduit lengths do not vary with light pole spacing.<sup>45</sup>

**Yard Pavement.** SunBelt assumed all major yards require pavement but did not support its proffered quantities, merely presenting hard-coded tonnages without explanation. *See* Reb. III-F-131. In contrast, NS developed pavement quantities from actual yards, including parking lots,

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<sup>45</sup> *See* Reb. WP "SBRR Facilities Cost Rebuttal.xlsx," Tab "Auto Yards Small," cell D7. *See* Reply WP "09 Yard Lighting and Roadway Quantities.pdf."

access roads, and perimeter roads and supported its calculations with workpapers. Without support, SunBelt claimed on Rebuttal that NS's quantities were "overstated and unrealistic." *See* Reb. III-F-131. But SunBelt provided no specifications or calculations that could form the basis of reasoned quantities estimates. Further, SunBelt raised the notion of substituting gravel or dirt for pavement for the first time in its Rebuttal, but failed to include any new costs for such gravel or dirt. Although SunBelt nominally disputed NS's unit costs,<sup>46</sup> it provided no support for its proffered costs other than spreadsheet entries.<sup>47</sup> NS has presented the only viable evidence.

**PTC.** SunBelt failed to demonstrate it could install a PTC system in 2011 because the necessary technology did not exist. *See* Reply III-F-199–206. SunBelt's Rebuttal raised—but utterly failed to support—a new theory that the SBRR could use a different (unspecified) technology than it costed. SunBelt's new position lacks any support, and constitutes a failure of proof. NS presented the only viable evidence of a feasible signals system (CTC with 2015 PTC overlay).

**Rip Rap Berm.** NS replicated a necessary, existing rip rap berm along 11.3 miles of SBRR track running directly alongside the shore of Lake Pontchartrain. *See* Reply III-F-116; Reb. III-F-69. SunBelt rejected the berm because it claimed NS failed to "disclose" it in discovery, but the berm is displayed clearly in aerial photographs provided in discovery at NS-SB-HC-EHD-024, folder '090319f2.' SunBelt's argument that the berm must be included only if it was part of original construction is contrary to the requirement that a SARR account for all relevant costs. *See, e.g., Xcel*, 7 S.T.B. at 674, 689–90. (SARR must incur cost of road bridge over daylighted tunnel incurred by incumbent). Without the berm, the SBRR would incur continuous, substantial costs to repair the roadbed along the Lake, which SunBelt did not include.

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<sup>46</sup> *See* Reply WP "01 Agg Base Class 2 and Class 3.pdf" and "02 Asphalt Concrete.pdf."

<sup>47</sup> *See* Reb. WP "SBRR Facilities Cost Rebuttal.xlsx," Tab "Bulk Transfer," rows 4 and 5.

**Ballast and Subballast Quantities.** SunBelt proposed a standard weight of 1.5 tons/CY for subballast and ballast, but its calculations erroneously applied a different weight. *Compare* Op. III-F-23 *with* Reply III-F-123. On Reply, NS accepted SunBelt’s specified standard weight and corrected SunBelt’s calculations to reflect that weight. In Rebuttal, SunBelt changed its position, asserting that ballast and subballast weigh 1.35 ton/CY instead of 1.5 tons/CY, while taking the internally inconsistent approach of continuing to use 1.5 tons/CY for subballast calculations. Its engineering diagrams also show the standard 1.5 tons/CY weight for subballast. *See* Op. WP “Typical Sub-Ballast.pdf.” SunBelt also applied a cost *per track foot* of subballast to *tons* rather than to track feet, which excluded necessary subballast costs for over three hundred track miles.<sup>48</sup>

**Cable Lengths at Control Points.** SunBelt changed the cable lengths at control points specified in NS’s Reply based solely on the experience of its signals engineer. *See* Reb. III-F-114. Because SunBelt accepted NS’s signal system design and failed to explain how different cable lengths could apply to that design, NS’s cable lengths should be accepted.

**Nighttime Lighting.** SunBelt claimed that its 36 proposed grading crews would be able to grade the 578-mile SBRR roadbed in just seven months, but rejected NS’s added lighting costs for night work necessary to meet that schedule. *See* Op. III-F-46; Reply III-F-118; Reb. III-F-72. Generously assuming 25 working days per month, each crew would have to build almost 500 feet of roadbed per day.<sup>49</sup> To avoid night work, this work would need to be performed in less than 75 seconds per foot,<sup>50</sup> which is impossible. The theory of unconstrained resources allows SunBelt to assume it could find resources to work at night, not to avoid the attendant costs.

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<sup>48</sup> *Compare* Reb. WP “Track Construction Costs Rebuttal.xls,” Tab “Summary”, cells E57 to E60 *with* Tab “User Input,” cell D50. SunBelt’s subballast cost is only applied to 500.4 miles of track, although SunBelt posited that the SBRR has 806 miles of track.

<sup>49</sup> 578 miles/(25 days X 7 months X 36 crews) = 0.09 miles per day per crew X 5,280 = 484 feet.

<sup>50</sup> 10 hours daylight X 60 minutes / 484 feet = 1.24 minutes per foot = 74 seconds per foot.

**Real Estate Acquisition Costs.** NS's Reply showed that the SBRR would incur real estate transaction costs over and above the raw value of the land, including costs for surveying, title confirmation, contract negotiation, closing, and recordation. Reply III-F-268–72. SunBelt does not dispute that real-world real estate acquisitions have transaction costs, and it does not challenge NS's estimate of those costs. Instead, SunBelt argues that including real estate acquisition costs would be a "barrier to entry," citing the Board's refusal in past cases to include an "assemblage factor" for real estate. Reb. III-F-141. SunBelt misses the critical distinction between an assemblage factor and acquisition costs, which is that an assemblage factor assumes that the SARR would pay a cost (*i.e.*, premium prices for a corridor of land) that the incumbent may not have paid. Real estate acquisition costs, in contrast, are an inevitable part of any real estate transaction, whether it occurred in the 19th, 20th, or 21st centuries. Documents that NS provided SunBelt in discovery (some of which were included in Open. WP folder "Deed Documents") show that NS and its predecessors incurred transaction costs such as negotiating land sale contracts and recording land interests, just as the SBRR would have to do today.<sup>51</sup>

#### IV. TRAFFIC AND REVENUES

##### A. The ATC Rule Adopted in *Major Issues* Should Be Applied in This Case.

The Board should apply the Average Total Cost ("ATC") rule it adopted in the *Major Issues* rulemaking ("Original ATC") to allocate cross-over traffic revenues in this case, and should reject SunBelt's effort to apply the method used in *WFA* ("Modified ATC"). As a matter of law, Original ATC is—and has been at all times relevant to SunBelt's development of its case

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<sup>51</sup> SunBelt's claim that some of the SBRR right of way was built on "federally granted land" is misleadingly incomplete. The beneficiaries of the land grants cited by SunBelt—the Northeast and Southwest Alabama RR and the Wills Valley RR—went bankrupt in 1871. See *Southern Ry. Co.*, 37 I.C.C. Valuation Rep. 1, 968 (1931). Their successor the Alabama Great Southern Railroad (an NS predecessor) acquired its real estate interests in that land not through "land grant" but rather "partly through purchase after foreclosure and partly by direct purchase." *Id.*

and both parties' submission of SAC evidence—the only valid cross-over traffic revenue allocation methodology, adopted in a notice-and-comment rulemaking and judicially affirmed. *See* Reply III-A-27–31; Reply Ex. III-A-4.<sup>52</sup> As a policy matter, Original ATC plainly better achieves the Board's stated goals for a cost-based cross-over traffic revenue allocation method.

Because Modified ATC sought to amend, in an individual adjudication, a legislative rule adopted in notice-and-comment rulemaking, the attempted amendment violated the Administrative Procedure Act and therefore is invalid and unenforceable. *See* Reply III-A-28–32. Moreover, the Modified ATC approach was rejected by the D.C. Circuit. *See Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 604 F.3d 602 (D.C. Cir 2010).<sup>53</sup> NS was not a party to that case, had no opportunity to comment on the Board's attempted modifications to Original ATC, and is not bound by the *ad hoc* modifications applied in an individual case. The Board has recognized that the proper way to amend the Original ATC rule is through notice-and-comment rulemaking. *See RRR Proposal* at 17–18. And, just last week, the Board adopted a new prospective rule that recognized the infirmity of Modified ATC and rejected commenters' request that the Board adopt Modified ATC. *See RRR Rule* at 30–32.

SunBelt cannot claim any reasonable reliance on the Modified ATC approach applied in the *Western Fuels* case. As discussed, at all relevant times, Original ATC has been the only valid, lawfully adopted cross-over traffic revenue allocation methodology. *See* Reply at III-A-

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<sup>52</sup> On Rebuttal, SunBelt did not contest NS's conclusion that Modified ATC could not be applied in this case because it was not adopted through a rulemaking, instead arguing only that Modified ATC is substantively superior to Original ATC. *See generally*, Reb. III-A-9–10. Thus, SunBelt essentially has conceded that Original ATC is the only legally valid method of allocating cross-over revenues. Moreover, SunBelt had ample opportunity to address Original ATC during the *Major Issues* rulemaking, and its belated Rebuttal criticisms are an impermissible collateral attack that should not be considered in this case. *See DuPont v. CSXT* at 1.

<sup>53</sup> On remand, the Board again applied the same flawed approach, and that ruling is pending on appeal. If the Board were to apply Modified ATC in this case, it would face a substantial risk of reversal for applying a method that is both substantively and procedurally infirm.

27–31; Reply Ex. III-A-4. In fact, *Norfolk Southern* is the party that reasonably relied on the applicability of a certain cross-over revenue allocation method to this case—Original ATC. The Board adopted the Original ATC rule so that litigants in cases would not further litigate in individual rate cases the issue of which method should be used to allocate cross-over revenues. *Major Issues*, at 31 (“We will therefore adopt the ATC methodology and *will apply it in all pending and future rail rate cases.*”) (emphasis added).<sup>54</sup> NS relied on the Board’s adoption of Original ATC in a rulemaking, its affirmance on appeal by the D.C. Circuit, and the Board’s express statement in *Major Issues* that the Original ATC rule would apply to all pending and future cases. The D.C. Circuit’s rejection of the Board’s attempt to use Modified ATC in an individual case further solidified the position of the Original ATC rule as the only valid and lawful cross-over revenue allocation method.

During the pendency of this case the Board advised that it “will address any arguments related to cross-over traffic and cost allocation raised in the pending adjudications, even as it completes its consideration of those issues more broadly in Rate Regulation Reforms.”

*SunBelt/DuPont Abeyance Decision* at 5. NS does not agree that any cross-over revenue allocation method other than Original ATC may be applied in this case but—in accordance with the *Abeyance Decision* and in light of SunBelt’s Rebuttal substantive arguments for Modified ATC—feels compelled to address the superiority of Original ATC to Modified ATC.

Original ATC is logical, fair, and more consistent with SAC principles than Modified ATC. *See, e.g.*, Reply III-A-32–34, Reply Ex. III-A-4. The Board adopted ATC to allocate cross-over revenues “in proportion to the average total cost of the movement on- and off-

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<sup>54</sup> *See also Major Issues* at 3 (“Moreover, in the last few years, there have been major issues in large rail rate cases that were being litigated again and again, with the parties in individual cases unable to develop acceptable solutions to problems that they had identified with the existing approach. It was therefore important to correct these problems and resolve these issues before continuing with the rate docket that was pending before the Board.”).

SARR.” *Major Issues* at 26, 31. Allocating more revenues to a high density segment than its proportion of the average total cost of the full movement would defeat the goal of cross-over revenue allocation and introduce bias to the SAC analysis.<sup>55</sup>

The concern that led the Board to apply Modified ATC in *Western Fuels* was that, in some circumstances, Original ATC may allocate to the SARR revenues not covering the incumbent’s variable costs on certain segments. But this concern is not consistent with the principles underlying ATC. *See generally* Reply III-A-32–34; Reply Ex. III-A-4. A SAC complainant possesses full control over the design of its SARR, and sole discretion to select whatever traffic it desires. *See* Reply III-A-28 to 35. The reason a complainant selects cross-over traffic is its determination that the selected traffic generates more net revenue for the SARR—after allocating revenues between the SARR and the residual incumbent—than the SARR would generate without that traffic. *See id.* at III-A-34–35. The fact that a SARR’s revenue division for an individual cross-over movement may not cover the *incumbent’s* system average URCS variable costs does *not* mean that traffic makes no contribution to SARR fixed costs. Because the SARR is optimally efficient, its variable costs for a given segment are substantially lower than the incumbent’s system average URCS variable costs.<sup>56</sup> In fact, the through revenues for 24% of the SBRR traffic intentionally selected by SunBelt would not cover

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<sup>55</sup> Allocation of revenues in a manner that would result in higher per-unit profit for high-density segments, as SunBelt advocates, would prevent the low-density segment from sharing equally in the recovery of the movement’s total costs. That, in turn, would systematically defeat the purpose of allowing cross-over traffic—to allow a simplified truncated analysis that replicates the result of full SAC modeling of a movement without introducing bias. *See Major Issues* at 24.

<sup>56</sup> Thus, as NS has explained, the concern the Board raised in *Western Fuels* is based on a mistaken premise – that the appropriate measure for determining whether a SARR’s revenue division covers its variable costs is the incumbent’s URCS system average variable costs. To determine if a particular cross-over movement contributes to SARR fixed costs or profits, the relevant measure would be the least-cost optimally efficient SARR’s variable costs.

NS's URCS variable costs. *See* Reply III-A-34. Any self-interested complainant simply would not select traffic whose revenues would not cover the SARR's variable costs.<sup>57</sup>

On Rebuttal, SunBelt presented hypothetical examples attempting to support its claim that Modified ATC better allocates cross-over revenue than Original ATC and Alternative ATC. These are the exact same examples that the "Coal Shippers" group offered in its Opening Comments in *Rate Regulation Reforms*. *See* EP 715 Coal Shipper Opening 52-58; V.S. Crowley and Fapp at 18-32. And, in the *Rate Regulation Reform* rules and decision, the Board dismissed the same arguments and hypothetical examples SunBelt advances here. *See RRR Rules* at 31-32.<sup>58</sup> The Board correctly pointed out that these arguments simply recycled previous arguments about profitability on higher density segments that the Board addressed and rejected in *Major Issues*, in which the Board adopted Original ATC, which allocates revenues based on the average total costs of providing service over each segment. *See id.* Thus, the arguments SunBelt made on Rebuttal have already been thoroughly considered and rejected by the Board in two full notice-and-comment rulemakings. SunBelt offers no basis for the Board to reconsider its analysis of the same arguments that it made in *Major Issues* and reiterated in *RRR Rules*.

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<sup>57</sup> The Board has expressed concern that it might be "illogical" for a revenue allocation methodology to allocate to the on-SARR segment revenues that would be less than the incumbent's URCS variable costs. As explained, an economically rational SARR would carry any traffic that contributes to its fixed costs. Any seeming "illogic" is the result of the artificial division of a single movement into segments due to the use of the cross-over traffic shortcut instead of modeling the entire movement, combined with the use of the incumbent's URCS system average costs rather than the lower costs of the optimally efficient SARR.

<sup>58</sup> While the Board addresses the arguments in relation to Alternative ATC, the Coal Shippers' examples apply both to Original ATC and to Alternative ATC. SunBelt's other hypothetical examples compare R/VC ratios for movements across segments of different densities. But the Board has flatly rejected the use of R/VC ratios for this purpose as "fail[ing] to take into account the defining characteristic of the railroad industry—economies of scale, scope, and density." *Major Issues* at 25.

**The New RRR Rules.** NS explained in its comments in *Rate Regulation Reforms* that if the Board were to decide not to limit use of cross-over traffic, it would be critical that the Board's revenue allocation method implements SAC principles as closely as possible and does not allow the use of cross-over traffic to distort the SAC analysis or results. *See, e.g., CSXT/NS Open. Comments at 16-18 (Oct. 23, 2012).* In deciding not to limit cross-over traffic for the time-being, the Board expressed its continuing concern about the use of cross-over traffic in cases involving large volumes of carload traffic—such as this case. *See RRR Rules at 27–28.* Indeed, the Board predicated its decision to defer consideration of limits on cross-over traffic on the application of a revenue allocation methodology that accurately allocates costs between the SARR and the residual incumbent and does not create bias. *See id.*

Neither Modified ATC nor the method the Board recently adopted in *Rate Regulation Reforms* (Alternative ATC) satisfies those criteria. Among the three ATC variants, Original ATC is most consistent with contestable markets theory and SAC principles; with the goals in allocating cross-over traffic revenues the Board articulated in *Major Issues*; and with the criteria articulated in *RRR Rules*. If the Board permits unlimited cross-over traffic in this case, then Original ATC is the only methodology that would approach a fair and adequate allocation of revenue for carload traffic. *See, e.g., Reply at III-A-32; CSX/NS Open. Comments at 16–19; CSX/NS Reply Comments at 21–24; CSX/NS Reb. Comments at 8–14.* It would be indefensible for the Board to allow carload cross-over traffic in this or any other SAC case if revenues were allocated using Alternative ATC or the Modified ATC approach.<sup>59</sup>

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<sup>59</sup>In the Ex Parte 715 NPRM, the Board proposed two limitations on the use of cross-over traffic. *See RRR Proposal at 17.* Accordingly, NS included traffic and revenue calculations in its Reply Evidence for each of the proposed traffic limitations and demonstrated the significant effects of crossover traffic on the SBRR outcomes. *See Reply WP “SBRR Traffic and Revenue Summary Reply.xlsx.”* If the Board were to determine that Modified ATC or Alternative ATC should apply in this case without URCS cost adjustments, then it should limit SunBelt's use of

Although the Board relied on CSXT/NS comments in its determination not to limit cross-over traffic in the recent rulemaking, it failed to adopt adjustments to its revenue allocation methodology that were a precondition to NS's acceptance of continued use of cross-over traffic. *See RRR Rules* at 27.<sup>60</sup> But the Board invited parties in pending cases such as this to advocate ways to address this issue in their individual proceedings. *Id.* at 28.

In response to the Board's invitation, NS submits that, absent limits on crossover traffic in this case, the Board must apply the URCS trainload adjustment to the ATC revenue allocation in this case. This adjustment would better match the URCS variable cost with the SARR's handling of most crossover traffic as intact trainloads. While such an adjustment would not alleviate entirely the disconnect and distortion the Board has identified, it would mitigate some of the inequities and is a readily applied, straightforward alternative in the context of this proceeding.<sup>61</sup>

Second-best among the options discussed in this case would be for the Board to apply Alternative ATC with the URCS trainload adjustment. Although NS strongly advocates the application of Original ATC to this case as a matter of both law and sound policy, if the Board were to apply another method in this case, Alternative ATC would be far superior to Modified

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cross-over traffic in accordance with the limitations. *See id.*; *see also RRR Rules* at 27 (citing NS position that proposed cross-over limits would be necessary if Board did not make revenue allocation improvements—including URCS adjustments—NS proposed).

<sup>60</sup> Specifically, CSX and NS stated that unless the Board applied Original ATC and made certain adjustments to URCS costs to mitigate the bias otherwise introduced by the use of cross-over traffic, then the Board should limit the use of cross-over traffic as it proposed. *See CSX/NS Open. Comments* at 16-19; *CSX/NS Reply* at 21-24; *CSX/NS Reb.* at 8-14; *RRR Rules* at 27. Instead of immediately imposing proposed limits on cross-over traffic, the Board announced that it will initiate a separate proceeding to explore alternatives "requir[ing] adjustments to our costing model" to address the disconnect between the SARR's costs of handling cross-over traffic and the revenues allocated to the SARR. *See RRR Rules* at 28.

<sup>61</sup> In order to properly account for the costs of trainload service, it is critical that the Board also accept NS's use of the actual empty return ratios in URCS. *See Reply* at III-H-28-29.

ATC.<sup>62</sup> Therefore, if the Board were to apply any of the ATC methods other than Original ATC in this case, it should apply the new “Alternative ATC” rule using the URCS trainload adjustment.

**B. SunBelt Impermissibly Treated TDIS Revenues as SBRR Revenues.**

SunBelt overstated SARR revenues in its Opening by impermissibly including revenues earned by Thoroughbred Direct Intermodal Services (“TDIS”) without providing for either the operations or the expenses necessary to generate those revenues. On Rebuttal, SunBelt merely subtracted some TDIS operations costs from SBRR revenues, and continued to erroneously allocate all of the TDIS contribution to the SARR and none to NS. *See* Reply III-A-10–12. SunBelt’s approach violates fundamental SAC principles and precedent. Accordingly, the TDIS revenues SunBelt included in its SAC presentation should be excluded. *See id.* at III-A-1–12.

**C. SunBelt Used Inflated Growth Rates For Later-Year SARR Volumes.**

On Rebuttal, SunBelt continued to rely on an unprecedented “CAGR” approach to forecast SBRR non-coal traffic volumes in the later years of the SAC analysis period, claiming that it “smooth[es] out varying or anomalous annual changes” in traffic volumes. *See* Reb. III-A-6. In fact, NS’s volume growth rates are forecast to decline, falling from 12.4% in 2011-2012, to 9.8% in 2012-2013, and leveling off between 5% to 6% from 2013-2016. *See* Reb. WP “SBRR States Forecast - Rebuttal.xlsx.” Thus, SunBelt’s CAGR approach includes anomalous years rather than smoothing them out. NS’s use of the 2015-16 growth rate for later SARR periods is more representative of growth rates NS has forecast in the longer term and is

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<sup>62</sup> Both Original ATC and Alternative ATC properly maintain the same profit margins for high-density and low-density segments of a cross-over movement. Modified ATC, in contrast, would distort that relationship and inappropriately bias the cost-based revenue allocation. Alternative ATC as adopted in *Rate Regulation Reforms* would at least retain some of the Original ATC approach and would not distort the application of ATC nearly as much as Modified ATC.

consistent with Board precedent. SunBelt offers no reason for the Board to reject established precedent beyond its desire to generate higher projected SARR volumes.

**D. SunBelt Used Different Fuel Price Indexes For Fuel Costs And Surcharges.**

On Opening, SunBelt used a forecast projecting *rising* fuel prices as the basis for future SBRR fuel surcharge revenues. *See* Op. WP “WTI & FSC Calc.xls.” But for SBRR operating expenses—including fuel costs—SunBelt used a forecast showing declining fuel prices over the same period. *See* Op. WP “rcaf0612.pdf.” Logic dictates that there cannot be two different prices for the same fuel at the same time. Because *Major Issues* requires SARR operating expenses (including fuel costs) to be escalated by RCAF, consistency requires the use of that index to forecast fuel prices for both fuel costs and fuel surcharge revenues.

**E. SunBelt’s Rebuttal Continues to Include Revenues from Duplicate Waybills.**

On Opening, SunBelt erroneously included certain waybills twice for the third quarter of 2011. *See* Reply III-A-1–3. In its Rebuttal evidence, SunBelt claimed to have removed these waybills. However, SunBelt’s process failed to correct overstated revenues for multi-car shipments, which SunBelt’s Rebuttal continued to double count.<sup>63</sup> NS addressed this issue on Reply by calculating the initial waybill revenues without the duplicate waybills (SunBelt’s Steps 1.2 to 1.5). *See* Reply WP “NS ATC SQL Scripts.xlsx,” Tab “Correcting WB Revenues.”

**V. NS’S OTHER EVIDENCE SHOULD BE ADOPTED.**

**A. NS’s Operating Expense Evidence Should Be Adopted.**

**Crew Shifts.** SunBelt’s position that SBRR crews would work 270 shifts per year (considerably more than average NS crews), while earning a lower salary than the average NS crew (Reply III-

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<sup>63</sup> *See* Reb. WPs “SRR Traffic Selection Methodology v5 rebuttal.docx” Step 17.5 and “SRR 2011 Traffic Selection Methodology Scripts and Tables\_v1 (rebuttal).xlsx.” Although SunBelt’s Step 17.5 removed duplicate waybills from the final traffic group, the revenues for multi-car shipments already included revenues from duplicate waybills through Step 1.2 of its traffic selection process.

D-3, 37) flies in the face of reality. In order to achieve that level of productivity and cost, the SBRR would have to be able to hire only the most inexperienced, lowest paid crewpersons, and they would all have to agree to work 270+ shifts. The Board has repeatedly rejected that patently unreasonable assumption. *WFA I* at 47; *AEP Texas* at 58, 77; *Xcel 7 S.T.B.* at 51.

**Crew Deadheading.** SunBelt's two percent adjustment for crew deadheading costs is unrealistic. For example, it relies on an assumption that crew needs at New Orleans could be met by crews arriving in Birmingham, more than 350 miles away. Reb. WP "Crew Rebalancing Diagram.pdf" at 1. Moreover, SunBelt included no costs for taxiing crews between the locations it lumped together, despite its assumption that SBRR crews would work to/from different on- and off-duty points. SunBelt proffered no evidence showing that the SBRR could achieve its ambitious level of crew utilization under its proposed deadheading plan, or that there would always be SBRR trains available for crews to work at times consistent with their Hours of Service and rest-period requirements.

**Fuel Consumption.** Sunbelt assumes that SBRR road locomotives would consume fuel at NS's system-average rate of 2.48 gallons per unit-mile. This assumption is incorrect. The NS system average is the product of the mix of locomotive types in the NS fleet, the number of locomotives on NS trains and the speed at which those trains operate. The relevant operating characteristics posited by SunBelt are quite different from NS's real world experience. The SBRR road locomotive fleet consists entirely of 4,400-HP ES44AC locomotives, whereas 97% of the NS fleet consists of lower horsepower units. *See* NS WP "ES44AC Locomotive Fuel Consumption SBRR.xlsx." Moreover, Sunbelt did not adopt NS's fuel-saving practice of operating trains at 50 MPH, but rather posits that most SunBelt trains would operate at 60 MPH. Reply at III-D-22. Higher-horsepower ES44AC locomotives operating at higher speeds than NS locomotives indisputably would consume more fuel.

The use of ES44AC units enabled Sunbelt to power SBRR road trains with fewer locomotives than NS does. By applying its unrealistic fuel consumption rate per unit mile to that smaller fleet, SunBelt significantly understated the SBRR's overall fuel cost. In order to account for the fact that ES44AC units on SBRR trains would consume fuel at a higher rate than the average NS locomotive, NS adjusted its historical system-average by ten percent. This adjustment reflects the difference between the average horsepower of SBRR locomotives (4,400hp) and for NS's high-horsepower units (3,997hp). Reply III-D-22.<sup>64</sup>

**Locomotives.** Finally, SunBelt's locomotive fleet estimate does not reflect the realities of merchandise railroading. Based on SunBelt's estimate, locomotives on SBRR general freight trains would achieve a level of utilization 60% greater than those on SBRR unit trains. Reb. WP "SBRR Operating Statistics\_Rebuttal.xls." That fact alone demonstrates the nonsensical nature of SunBelt's estimate, as the STB has long recognized that unit train service is more efficient. See, e.g., *PPL Montana*, STB docket No. 42054 at 2, n.4 (decided Aug. 19, 2002); *Major Issues* at 55.

**B. NS's Evidence of SBRR G&A Expenses Is the Best Evidence of Record.**

SunBelt's proposed G&A staffing is inconsistent with both past SARRs and real-world railroads. Although SunBelt claims its Rebuttal staffing is "very similar" to the staffing approved in *Xcel* and *WFA*, it is actually 40% smaller than those cases when adjusting for revenues. Compare Reb. III-A-8, III-D-39 (.90 G&A staff per \$10 million of revenue), with Reply III-D-43, Table III-D-15 (1.49 and 1.78 G&A staff per \$10 million of revenue for *Xcel*

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<sup>64</sup> In its Rebuttal, Sunbelt attempted to refute NS's point that a locomotive's fuel consumption will vary with its horsepower by referencing a website that lists fuel consumption rates for several locomotive models. See SunBelt Rebuttal WP "Fuel Consumption.pdf." In fact, the cited information confirms NS's position. Tables at <http://www.alkrug.vcn.com/rrfacts/fueluse.htm> show that a linear relationship exists between horsepower and fuel consumption across higher horsepower locomotive models.

and *WFA*, respectively).<sup>65</sup> SunBelt's reliance on *Duke/NS*, *Duke/CSXT*, and *CP&L* is also misplaced, as the staffing approved in those decisions was nearly double SunBelt's 34-person G&A staff. *See Duke/NS*, 7 S.T.B. at 156 (staff of 63); *Duke/CSXT*, 7 S.T.B. at 460 (staff of 59); *CP&L*, 7 S.T.B. at 294 (staff of 63). Furthermore, the coal-only railroads on which SunBelt relies had less extensive G&A needs than the SBRR, which requires additional staff for its general freight traffic and unprecedented amount of TIH traffic. When one sets aside the revenue accounting, environmental, and police staffing required by SBRR's unique traffic mix, NS proposed 59 G&A staff for the SBRR, a number well in line with past decisions. *See Reply III-D-43*, Table III-D-15.

SunBelt's claim that the SBRR would operate with G&A spending at only 1.4% of revenue—three times more efficient than the average Class I—is not supported by any evidence of how it would achieve such massive efficiency improvements over real-world railroads. *See Reply III-D-44*. SunBelt's principal support for its paltry staffing—its purported benchmarking to “management levels” from contact lists for Class II railroads—is deceptive because: (i) the contact lists do not include all management employees;<sup>66</sup> and (ii) the benchmark railroads are much smaller than the SBRR on a revenue basis and would have smaller G&A needs.<sup>67</sup>

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<sup>65</sup> SunBelt's claim that “[o]n a revenue basis these two SARRs are similar in size to the SBRR” is misleading. *Reb. Ex. III-D-1* at 11. SunBelt bases this assertion on 2011 projected revenues for those SARRs, but it uses staffing counts from the base year of those SARRs (2004 for *WFA* and 2001 for *Xcel*). Because G&A staffing in a SAC case is only calculated for the base year, the only relevant G&A staffing comparison is to base year revenues.

<sup>66</sup> *See Reb. WP “Peer Railroad G&A Staff Comparison.xlsx”* (showing four railroads with no IT and two with no HR employees).

<sup>67</sup> *See P&W 2012 10-K* at II-4 (<http://tinyurl.com/14pnuc>) (reporting 2011 revenues of \$31.7 million – less than a tenth of the SBRR's); *see also* <http://bit.ly/13N8uQg> (estimating W&LE revenues at \$35.3 million); <http://bit.ly/12TtKO2> (estimating MRL revenues at \$132 million); <http://bit.ly/1aMOBeL> (estimating IAIS revenues at \$22 million).

**Marketing.** SunBelt’s claim that the SBRR could reduce expenses by relying on the residual NS to perform marketing and customer service in its place is inconsistent with SAC theory and was directly rejected by the Board in *AEPCO 2011*. See Reply III-D-68–72. If SunBelt intends the SBRR to collect its full ATC share of crossover traffic revenues, it cannot assume that it could push its share of crossover traffic costs onto other railroads.

**Revenue Accounting.** SunBelt’s assumption that a railroad with \$357 million in revenues could operate with a single revenue accounting employee is utterly inconsistent with the reality that even railroads with extensive software support need revenue accounting staff to operate, monitor, and correct that software and to manage exceptions. SunBelt maintains that the 10% of waybills that cannot be automatically rated by RMI might not be “errors.” Reb. Ex. III-D-1, 25. But the important point is that when a waybill cannot be rated automatically by RMI software, human staff would be required to intervene. See Reply III-D-80–81. And SunBelt’s claim that the SBRR would rely on connecting carriers for revenue accounting on overhead traffic is the sort of cost-shifting assumption the Board has rejected. See *AEPCO 2011* at 57.<sup>68</sup>

**Attrition.** SunBelt depressed HR and restaffing costs by using an absurd attrition rate of 1.8%—the quit rate of a particular union—that implies that the average tenure of an employee would be 55 years. See Reply III-D-93–94. NS’s real-world attrition rates are the best evidence.

**IT.** A SunBelt witness’s recollection of a 50-person IT staff at KCS proves how reasonable NS’s 13-person IT staffing is, for it suggests that a railroad with 35% of KCS’s revenues would employ 17 IT employees. Compare AAR, *Railroad Facts* at 73 (2011) (2011 KCS revenues of \$1.016 billion) with Reply Ex. III-A-1 (2011 SBRR revenues of \$353 million).

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<sup>68</sup> SunBelt’s argument that NS’s proposed finance staff is inconsistent with *AEPCO 2011* ignores the fact that in *AEPCO 2011* the Board was dissatisfied with both parties’ evidence and pledged to consider future “arguments that higher levels are warranted.” *AEPCO 2011* at 58-59.

**Outside Counsel Spending.** SunBelt’s proposal to “discount” SBRR legal spending by the difference between Birmingham rates and Washington rates makes little sense, for NS’s proposal was based on a study of legal costs for the United States as a whole and not prevailing rates for Washington, DC. *See* Reb. Ex. III-D-1, 34.

**Executive Compensation.** SunBelt essentially concedes on Rebuttal that stock awards to executives are now included as expenses by railroads, but nevertheless claims that it can offer below-market compensation because the SBRR would be a “startup” offering the prospect of future “salary increases, stock awards, and other incentives.” Reb. Ex. III-D-1, 47–48. SunBelt cannot assume that the SBRR would pay below-market compensation for the SAC analysis period and then increase executive compensation at some point in the future.

**C. NS’s Maintenance of Way Evidence Should Be Adopted.**

SunBelt’s Rebuttal proposal of 106 MOW staff for 702 track miles results in a ratio of 6.6 track miles per MOW staff—far higher than the ratios in *WFA*, *AEP Texas*, *Otter Tail*, and *Xcel*, which ranged between 3.3 and 4.0. *See* Reply III-D-139, Table III-D-31. NS’s proposal of 3.9, on the other hand, falls well within the range that the Board has found reasonable. *See id.*

SunBelt attempts to distract from this inconsistency by arguing that NS’s MOW plan has more MOW staff per track mile than the Board accepted for the SARR in *AEPCO 2011*. *See* Reb. Ex. III-D-2, 11. But the SBRR has more complex facilities to maintain per track mile than did the *AEPCO 2011* SARR, including a large bridge inventory, more yard tracks, and a hump yard. *See* Reply III-D-141–42. The SBRR MOW staff also would face more challenging environmental factors than in *AEPCO 2011*. *See id.* at III-D-142, III-D-152–54.<sup>69</sup>

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<sup>69</sup> SunBelt also accuses the NS MOW experts of not accounting for the impact of a non-union workforce. *See* Reb. Ex. III-D-2 at 12. But prior SARRs also had non-union labor forces, and SunBelt does not show how a non-union workforce would make the SBRR more efficient.

SunBelt's other attempts to justify the extraordinary efficiencies it assumes do not come close to explaining its departure from past decisions. First, SunBelt claimed that "the relatively small size of the SARR" allows it to have "fewer upper level managers." Reb. III-D-47. But SunBelt's claim that the SBRR would have less staff than other SARRs because it is "small" is the precise reverse of the claim its expert made in *DuPont v. NS*, where he asserted that the reason the *DuPont* SARR's MOW force would be more efficient than other SARRs is that it was larger than those SARRs.<sup>70</sup> See *DuPont* Reb. Ex. III-D-2, *DuPont v. NS* at 9 (filed Apr. 15, 2013). And just like when he made the opposite representation in *DuPont v. NS*, Mr. Crouch did not point to any specific evidence that would support his claim.

Second, SunBelt asserts that the SBRR will achieve efficiencies because "capital work [is] to be completed by contractors." Reb. III-D-47. But SunBelt's approach is no different from that taken in prior SAC cases, which similarly proposed to contract for much MOW capital work. See, e.g., *AEPCO 2011* at 75–77, *WFA I* at 69–75; *AEP Texas* at 69–73. Third, SunBelt repeatedly uses "the ten year life of the SBRR" to justify reducing or eliminating maintenance costs that SunBelt claims could be deferred for the first ten years of the SBRR. See, e.g., Reb. Ex. III-D-2, 5, 23, 36, 49, 50, 51. But the SBRR is operated as a going concern that will exist in perpetuity, and it would defeat the purpose of the SAC test if a SARR could avoid maintenance during the SAC analysis period by "deferring" it to the future.

Fourth, SunBelt's argument that the SBRR would be "new" ignores the fact that every SARR has newly-built track. Being new does not change the fact that from the first day of the SBRR's operations its high traffic volume will cause wear and tear that will require regular

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<sup>70</sup> Indeed, the SBRR is not particularly small for a SARR, for it has more track miles than the SARRs in *WFA* and *Xcel*. Moreover, SunBelt's MOW proposal does not have "fewer upper level managers" as a percentage of its workforce than prior SARRs. See, e.g., *Xcel* 7 S.T.B. at 662 (13 managers in MOW workforce of 179).

maintenance. The Board previously has rejected arguments that a SARR “could get by with a smaller MOW force because it would be a newer system and would therefore experience fewer maintenance problems.” *Otter Tail* at C-20–21.<sup>71</sup> Like the complainant in *Otter Tail*, SunBelt has not quantified any particular savings it would realize from being “new,” and it has not explained why its MOW staff would be more efficient than those from other SARRs that also maintained newly constructed track.<sup>72</sup>

While it is not possible for NS to address on brief all the specific disputes between the parties regarding MOW costs, NS addresses some of the most significant differences below.

**Track Workforce** SunBelt proposes three roadmaster districts that average 234 main track miles and seven track crew districts averaging over 100 main track miles—far larger than the roadmaster and track crew districts accepted in *AEPCO 2011*. See *AEPCO 2011* at 66–67. But SunBelt does not explain how the SBRR’s track workforce could maintain larger districts than those of the *AEPCO 2011* track workforce, particularly when the SBRR’s MOW workforce will have to maintain far more yard tracks than the *AEPCO 2011* MOW staff did and do so in more challenging environmental conditions. See Reply III-D-142, III-D-152–54. And SunBelt’s claim that its district sizes were consistent with current practice is predicated on a single anecdote that is both improper rebuttal and untrue. See Reb. Ex. III-D-2, 24; Motion to Strike at 15. In contrast, the NS MOW experts’ roadmaster and track districts were developed after extensive inspection of the relevant territory and anticipated traffic volumes.<sup>73</sup>

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<sup>71</sup> See, e.g., *AEPCO 2011* at 66 (recognizing that “substantial welding work would be required from the outset” of a newly-built SARR); *AEP Texas* at 71 (“We cannot simply assume . . . that only minimal repairs would be required throughout the entire SAC analysis period.”).

<sup>72</sup> Contrary to SunBelt’s claim, NS’s MOW experts did account for the effect that new construction would have on SBRR maintenance needs. See, e.g., Reply III-D-161, 194–95.

<sup>73</sup> Mr. Crouch’s Amtrak ride between Birmingham and New Orleans cannot compare with the extensive inspections that NS’s experts performed to develop their conclusions. See Reply WPs

**Signals Workforce** NS's assumption that each SBRR signal maintainer could maintain 1,100 AREMA units was supported by a detailed special study showing that the number of AREMA units serviced by NS maintainers on a diverse set of territories ranged between 896 and 1,045 units. *See* Reply III-D-168–69; Reply WP “Signal Maintainer Productivity.xlsx.” In contrast, SunBelt claims that each SBRR signal maintainer would maintain 2,000 AREMA units each, and supports that figure with nothing except a citation to an expert’s “experience.” Reb. Ex. III-D-2, 34. A bare assertion from an expert supported by no documentation cannot stand in the face of a detailed study showing that his assertion is unrealistic.<sup>74</sup>

**Bridge Tenders** SunBelt objects to bridge tenders, claiming that the SBRR “would provide for remote control of such bridges.” Reb. Ex. III-D-2, 40. But SunBelt’s evidence includes neither construction costs for remote control of movable bridges nor maintenance costs for remote control operations. Bridge tenders are thus necessary. *See McCarty Farms*, 2 S.T.B. at 498.

**Contract Costs.** SunBelt’s MOW contract cost estimates are based on unrealistic assumptions and a refusal to acknowledge data that contradicts its position. For example, SunBelt argues that the SBRR can ignore the costs of shoulder ballast cleaning and brush cutting by deferring that maintenance until after the SAC analysis period. *See* Reb. Ex. III-D-2, 49, 51. As discussed above, this approach is inconsistent with SAC theory. *See supra* at 53. And SunBelt’s response to detailed NS evidence proving that the FRA database used by SunBelt omitted many derailment costs is that its data set allows the selection of geographic-specific data. *See* Reply

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“SBRR Inspection Trip Notes and Photos.docx” & “SBRR Inspection Trip Notes and Photos.pdf.”

<sup>74</sup> NS’s evidence also showed that SunBelt was wrong to exclude signal inspectors and signal technicians, who perform important functions not performed by signal maintainers and whose necessity has been recognized by the Board. *See* Reply III-D-170; *AEPCO 2011* at 73.

III-D-195–96; Reb. Ex. III-D-2, 56. But there is no advantage to selecting geographic-specific data from data that indisputably does not include all derailment costs.<sup>75</sup>

**D. NS’s Fringe Benefits Evidence Should Be Adopted.**

On Opening SunBelt proposed to base the SBRR’s fringe benefit ratio on the average Class I ratio, which it claimed was 37.5%. *See Op.* III-D-11–12. Upon learning that the actual average fringe benefit ratio for Class Is in 2011 was 45.6%, Reply III-D-40, SunBelt switched tactics on Rebuttal and claimed that it would use 37.5% because it was the average ratio of the two Class Is with the lowest fringe benefit ratios—BNSF and KCS. *See Reb.* III-D-25. SunBelt provides no evidence that these two carriers are better proxies for SBRR fringe benefit ratios than an industry average, and it is not permitted to change theories on Rebuttal.

**E. NS’s Discounted Cash Flow Evidence Should Be Adopted.**

**Land Inflation Index.** Both the urban and the rural components of the land inflation index SunBelt created significantly overstate likely inflation in land values over the DCF period. Indeed, the land inflation SunBelt uses for the DCF is irreconcilable with the index that its own real estate appraisers used. *See supra* at 21.<sup>76</sup> For urban land, NS’s Reply showed that the commercial property index SunBelt used measures the total rate of return on institutional investments in high-quality real estate in top-tier markets, and thus was an inaccurate measure of inflation for unimproved SBRR land. *See Reply WP “NS SUNBELT Inflation Indices.docx” at*

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<sup>75</sup> Moreover, SunBelt’s claim that R-1 data might be overinclusive because it includes expenses from repairing “collision, fire, explosions, sabotage, and other casualties” is a red herring. *See Reb. Ex. III-D-2 at 56.* The SBRR would not be able to limit its unplanned maintenance to “derailments,” and to the extent that NS’s R-1 data includes repair costs from incidents other than derailments, those repairs are appropriately included in the cost calculations.

<sup>76</sup> SunBelt’s Rebuttal criticism of the indices used by NS ignores that SunBelt’s real estate appraisers utilized the same Moody’s index used by NS to index the value of real estate purchases for the SBRR. *See Op. WP “SunBelt SAR Land Valuation - 2012.pdf” at 31–32.*

6–9.<sup>77</sup> Indices measuring unimproved land show much more modest appreciation. *See id.* For rural land, SunBelt’s assumption of continuing increases to farm land values is inconsistent with future USDA projections that farm income would likely decline or stay flat over the SAC analysis period. *See id.* at 1–5. SunBelt’s Rebuttal claim that there is “little correlation between land values and farm income” is contradicted by the very study it cites, which concedes that “[c]hanges in farm earnings will determine whether farmland values will continue recent patterns and remain affordable.” *See* Reb. I-78; *Farmland Values on the Rise: 2000-2010*, USDA ERS, <http://1.usa.gov/15MYsN0>. NS uses the consumer price index as the best forecast of future land inflation for both urban and rural real estate.<sup>78</sup>

**Equity Flotation Costs.** The SBRR would directly bear a cost to raise equity, just like other direct costs associated with construction of the SBRR. NS’s Reply satisfied the *AEPCO 2011* requirement that arguments for equity flotation fees be supported by evidence of equity flotation fees for stock issuances of similar size as that needed by the SARR. *See* Reply at III-G-1–4. SunBelt’s argument that the issuances cited by NS were not for railroads is irrelevant—what matters is the size of equity flotation fees for transactions where the amount of capital being raised approximates the amount the SBRR would have to raise. NS’s projected flotation fees of 2.1% for the SBRR are supported and reasonable.<sup>79</sup>

**Debt Amortization.** SunBelt’s assumption that the SBRR would only pay the interest on its debt and not amortize it departs from how debt amortization has been treated in SAC cases since

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<sup>77</sup> The total rate of return measured by the NCREIF index includes net operating income and capital return. *See* <http://www.ncreif.org/faqsproperty.aspx>.

<sup>78</sup> NS’s DCF model mistakenly applied a discount to SBRR land investment, which NS already valued as of July 2009.

<sup>79</sup> Equity flotation costs are not included in the Board’s 2006-2012 cost of capital determinations, as evidenced by the AAR’s detailed filings in STB Ex Parte No. 558. *See, e.g.*, Comments of AAR (filed Apr. 19, 2013).

1990. *See* Reply III-H-2–4. And SunBelt’s claim that the SBRR would continually roll over its debt while only paying interest is inconsistent with its assumption that the SBRR’s cost of debt would be locked in at the average cost of debt over its construction period. *Id.*<sup>80</sup>

**F. NS’s Refinement of the MMM Model Is Necessary and Appropriate.**

The Board should also account for the unique costs of TIH traffic in the MMM analysis, should application of MMM become necessary.<sup>81</sup> The Board should do so by applying MMM in a two-step process that distributes costs attributable to handling TIH traffic only to the SBRR TIH traffic, and then allocates the remaining non-TIH costs to the entire SBRR traffic group. The Board developed MMM to allocate the total SAC costs among all of the movements that defendants select on the SARR according to the URCS variable costs of those movements. In *AEPCO 2011*, the Board recognized a mismatch between the URCS variable costs and the trainload service provided on the SARR for certain crossover moves. In this case, a similar mismatch occurs because the URCS variable costs do not properly capture the unique TIH-related costs that the SBRR would be required to incur to support the traffic SunBelt selected.

The Board has acknowledged “unique operating costs associated with the transportation of hazardous materials . . . that URCS does not attribute to those movements” and is considering ways to better allocate those unique costs to TIH and other hazmat traffic. *See* STB Ex Parte 681 “Class I Railroad Accounting and Financial Reporting – Transportation of Hazardous Materials, ANPRM at 2 (2009). Until the Board adopts an appropriate correction to the URCS

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<sup>80</sup> Space does not permit discussion of SunBelt’s terminal value “correction,” its overstated bonus depreciation assumptions, its incorrect use of 15-year depreciation lives for assets with 20-year tax lives, its improper capitalization of MOW expenses, and the need to escalate operating costs using car-miles to reflect SunBelt’s diverse carload traffic. The Board should adopt NS’s Reply Evidence on these issues.

<sup>81</sup> The Board also should apply the trainload adjustment to all SBRR overhead traffic that traversed the SARR on a single train and should reject SunBelt’s attempt to change the indexing methodology from RCAF-A. *See* Reply III-H-28–29.

misallocation of TIH costs, it is necessary to make the adjustment NS has proposed in order to properly account for the unique costs of transporting TIH traffic.

None of SunBelt's criticisms of NS's approach have merit. First, SunBelt claims that adjusting MMM to account for the unique TIH costs in this case requires a formal rulemaking. *See* Reb. III-H-24. However, this modification does not alter the fundamental MMM methodology of allocating SAC costs to the SBRR traffic group. Rather, it merely refines the MMM methodology to more accurately align SAC costs to the costs of handling that traffic. Second, SunBelt claims that this approach is a prohibited movement-specific adjustment to URCS. But the Board's purpose in limiting movement-specific adjustments was "to expedite and reduce the expense of the jurisdictional inquiry." *Major Issues* at 59. MMM is not a threshold jurisdictional test; it determines the level of any rate prescription, and NS's proposal to assign TIH-specific costs to TIH traffic is essential if MMM is to accurately allocate SAC costs to the traffic that incurred those costs. Third, SunBelt's attempt to equate NS's TIH cost refinement to the MMM revision proposed by the defendant in *WFA II* ignores the fact that, unlike that defendant, NS is not arguing that there is a "flaw in MMM" and has not proposed the sort of thoroughgoing revisions to the model that were proposed in *WFA II*. *Id.* at 7. Rather, NS proposes a refinement that accords with the basic purpose of MMM to identify "the part of the total SAC costs that each shipper is responsible for covering." *Id.* at 8.<sup>82</sup>

**G. The Board Must Conduct a Cross-Subsidy Analysis If it Finds the SBRR's Revenues Exceed Its Costs.**

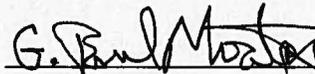
If the Board were to find that the SBRR's revenues exceed its costs, it would be necessary to conduct an analysis to determine whether that result was the product of

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<sup>82</sup> SunBelt incorrectly states that NS assigned all PTC costs to TIH traffic. *Compare* Reb. III-H-28–30 *with* Reply III-H-26. TIH-related catastrophic insurance costs and excess risk costs also should be assigned to the TIH traffic.

impermissible internal cross-subsidies. While it is impossible to perform a meaningful internal cross-subsidy analysis before the Board makes findings regarding SBRR costs and revenues, NS believes that the relatively low-density line from the issue traffic origin at McIntosh, AL, to just south of Burstall, AL, may fail the Board's internal cross-subsidy test. In that event the Board should dismiss this case. *See PPL Montana*, 6 S.T.B. at 295-96; *Otter Tail* at 23; Reply I-6-9.

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Dated: July 26, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of July 2013, I caused a copy of the foregoing Brief of Norfolk Southern Railway Company to be served by hand-delivery upon:

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