

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

*PUBLIC VERSION*

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**SUNBELT CHLOR ALKALI PARTNERSHIP**

**Complainant,**

**v.**

**NORFOLK SOUTHERN RAILWAY COMPANY**

**Defendant.**

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**Docket No. NOR 42130**

**NORFOLK SOUTHERN RAILWAY COMPANY'S  
MOTION TO HOLD CASE IN ABEYANCE  
PENDING COMPLETION OF RULEMAKING**

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**Dated: September 21, 2012**

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	)	
<b>Defendant.</b>	)	

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**NORFOLK SOUTHERN RAILWAY COMPANY'S  
MOTION TO HOLD CASE IN ABEYANCE  
PENDING COMPLETION OF RULEMAKING**

Defendant Norfolk Southern Railway Company (“NS”) hereby moves the Board to hold this maximum reasonable rate case in abeyance pending the establishment – through notice-and-comment rulemaking – of critical standards for the Board’s Stand Alone Cost (“SAC”) test. *See* STB Ex Parte 715, *Rate Regulation Reforms*, NPRM at 6-8, 16-18 (served July 25, 2012) (hereinafter “*Rate Regulation Reforms*”). Recognizing that expanded use and contortion of the cross-over traffic device – particularly on networks carrying carload or multiple-car shipments such as SunBelt’s standalone railroad in this case – could increasingly distort SAC analyses, the Board has commenced a proceeding to establish rules limiting the use and manipulation of cross-over traffic. *See Rate Regulation Reforms* at 16-18. Complainant SunBelt Chlor Alkali Partnership (“SunBelt”) heavily relies on the very types of crossover traffic the Board proposes to disallow in the pending rulemaking. Moreover, SunBelt seeks to apply the invalid Amended Average Total Cost (“Amended ATC”) approach to allocating cross-over traffic.<sup>1</sup> Rather than

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<sup>1</sup> The new approach the Board applied in *Western Fuels Ass’n et al v. BNSF Railway Co.*, STB Dkt. No. 42088, has sometimes been referred to as “Modified ATC.” Because the approach is

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applying admittedly flawed rules to this rate reasonableness challenge, the Board should hold any further proceedings in this case in abeyance during the pending rulemaking, and apply the revised rules to this case.

Part I of this Motion explains why holding this case in abeyance pending establishment of new and revised rules is reasonable, necessary, and fair. It explains how Sunbelt relies heavily on the type of cross-over traffic that Board proposes to curtail in *Rate Regulation Reforms*.

Part II discusses reasons that holding this case in abeyance during the rulemaking is superior to attempting to establish cross-over traffic limits and rules by litigating the issues in this individual case. And Part III explains that, as a matter of law, the revenue allocation methodology used by SunBelt in its opening evidence cannot be applied to this case. Unless the Board addresses these issues through a rulemaking, it is certain to be presented with a complex record in this case that will require resolution of the very issues identified in *Rate Regulation Reforms*. Fairness to the parties and sound principles of administrative law require suspension of the procedural schedule herein pending the orderly and considered resolution of these issues.

### **I. FUNDAMENTAL FAIRNESS DICTATES THAT THE BOARD HOLD THIS CASE IN ABEYANCE PENDING THE ISSUANCE OF NEW CROSS-OVER TRAFFIC RULES BECAUSE CURRENT RULES ARE IN FLUX.**

The Board has indicated that its cross-over traffic rules are broken and need to be fixed. *Rate Regulation Reforms* at 16-18. Accordingly, it has initiated a rulemaking proceeding to revise those rules. *Id.* It would be unfair and irrational to apply to NS in this case rules that the Board believes require change. And it would be unwise and inefficient to attempt to create

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more accurately referred to as “Amended ATC,” NS uses that term in this Motion. *See* Part III *infra*.

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alternative rules in the context of this single case. Accordingly, the Board should hold this case in abeyance pending modifications to its rules on cross-over traffic and revenue allocation.

**A. SunBelt’s Extensive Use of Cross-over Traffic and an Invalid Revenue Allocation Method Exemplifies the Board’s Concerns, and the Board’s Pending Proposals Would Substantially Curtail the Amount of Cross-over Traffic in this Case.**

*Rate Regulation Reforms* discusses the Board’s concerns about the distorting effect of cross-over traffic as complainants increasingly expand its use and application. *See Rate Regulation Reforms* at 16-17. The Board has repeatedly admonished that cross-over traffic was intended only to be a “simplifying” device to allow SAC complainants a more manageable way to take advantage of economies enjoyed by the incumbent, *without introducing bias or distortion* to the SAC analysis. *See, e.g., Major Issues in Rail Rate Cases, STB Ex Parte 657 (“Major Issues”)* Decision at 24 (Oct. 30, 2006). Concerned that the expanded and diversified use of cross-over traffic has in fact led to such distortion, the Board now has proposed rules to limit the use of cross-over traffic. *Id.* at 17. Because this case exemplifies the Board’s concerns regarding cross-over traffic, it should hold this proceeding in abeyance pending the outcome of the proceeding it commenced to address those concerns, Ex Parte 715.

*Rate Regulation Reforms* also reviewed the recent history of methods for allocating cross-over traffic revenues between the SARR and the residual incumbent. *Id.* at 6-8, 16-18. The Board expressed dissatisfaction with both the ATC method adopted in a notice-and-comment rulemaking and Amended ATC, the *ad hoc* new method the Board applied in *Western Fuels*. The *Rate Regulation Reforms* NPRM proposes a third alternative method and solicits additional proposals. *Id.* at 17-18. The Board also essentially acknowledged that the *ad hoc* method it created and applied *sua sponte* in an individual rate case (*Western Fuels*) allocates crossover traffic revenues in a manner that inadequately accounts for economies of density. *See id.* Thus,

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despite the decision of a divided Board to apply Amended ATC in the long-running *Western Fuels* case, the unanimous Ex Parte 715 NPRM essentially concedes that this *ad hoc* method is not appropriate for other cases or for the longer term.<sup>2</sup> *Compare* Decision, *Western Fuels Ass'n et al v. BNSF Railway Co.*, STB Docket No. 42088 (served June 15, 2012) (“*STB Remand Decision*”) with *Rate Regulation Reforms* at 6-8, 16-18. Although the NPRM expressed concern about whether it would be fair to complainants to apply improved rules to pending cases, it plainly would be unfair to apply to NS cross-over traffic rules that the Board has acknowledged are flawed.

### **1. SunBelt Relies Heavily on the Types of Cross-over Traffic the Board Seeks to Limit in Ex Parte 715.**

This case exemplifies the Board’s concerns about expanded use of cross-over traffic, and either of the Board’s proposals would substantially curtail Sunbelt’s use of such traffic.

Describing concerns leading it to commence a rulemaking proposing to limit cross-over traffic, the Board stated,

[t]he inclusion of large amounts of carload and multi-carload cross-over traffic has revealed a significant and growing concern. There is a disconnect between the hypothetical cost of providing service to these movements over the segments replicated by the SARR and the revenue allocated to those facilities. . . . In recent cases, litigants have proposed SARRs that would simply hook up locomotives to the train, would haul it a few hundred miles without breaking the train apart, and then would deliver the train back to the residual defendant. All of the costs of handling that kind of traffic (meaning the costs of originating, terminating, and gathering the single cars into a single train heading in the same direction) would be borne by the residual railroad. . . . As a result, the SAC

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<sup>2</sup> As Commissioner Begeman cogently demonstrated in her dissent in the *Western Fuels* remand, it is not fair to SAC case parties (complainants or defendants) for the Board to apply an inferior cross-over traffic revenue allocation methodology in an ongoing case at the very same time the Board is conducting a notice-and-comment rulemaking to adopt a more considered, better, and sound replacement methodology. *See* Decision, *Western Fuels Ass'n et al v. BNSF Railway Co.*, STB Docket No. 42088 (“*STB Remand Decision*”), slip op at 13-14 (served June 15, 2012).

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analysis appears to allocate more revenue to the facilities replicated by the SARR than is warranted.

*Rate Regulation Reforms* at 16. To address this disconnect and resulting overstatement of SARR revenues, the Board has proposed to limit the use of cross-over traffic, either by: (1) requiring the SARR to originate or terminate any cross-over traffic movements, or by (2) limiting cross-over traffic to movements that are handled entirely in trainload service by the defendant railroad in the real world. *See id.* at 16-17. Either of those two proposed limits would disallow substantial volumes of Sunbelt's selected traffic.

According to SunBelt, approximately { } percent of its SARR traffic by revenue (generating more than over { } of all SARR revenue) is cross-over traffic. *See* SunBelt Open. at III-A-15, Table III-A-8.

NS's preliminary analysis of the effect the two cross-over traffic proposals in *Rate Regulation Reforms* would have on the SunBelt SARR's traffic group shows that a large portion of that traffic would be excluded if the Board were to adopt either proposal.<sup>3</sup> *First*, if the Board limited cross-over traffic to movements for which the SARR would either originate or terminate the rail portion of the movement, 63% (sixty-three) —or nearly two-thirds—of the SARR's traffic would be eliminated. *Rate Regulation Reforms* at 16-17; *see* Exhibit (Verified Statement of witness Robert Fisher explaining crossover traffic analysis, attached hereto).<sup>4</sup> If two-thirds of

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<sup>3</sup> These calculations are based upon SunBelt's opening evidence and workpapers, and do not take into account cross-over traffic revenue allocations. NS is still in the process of analyzing SunBelt's evidence. NS uses SunBelt's calculations in this Motion solely to illustrate the substantial proportion of SARR traffic that is cross-over and how the traffic group would be affected by the Board's reform options. NS does not concede that SunBelt's methods, and calculations are correct or accurate —it is simply using SunBelt's own evidence to illustrate its overwhelming use of crossover traffic and the application of proposed limits and reforms.

<sup>4</sup> For purposes of this analysis, NS treated all existing real-world interchanges with other carriers as originations or terminations. Thus, where SunBelt's evidence posits that the SBRR would interchange traffic with a non-NS carrier on the on-SARR or off-SARR point, NS treats that

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SunBelt's traffic group were eliminated, it is highly doubtful that the SARR would be viable or could approach the revenue requirement needed to cover its stand-alone costs, even under the doubtful assumption that the Board would accept wholesale all of the rest of Sunbelt's evidence. This demonstrates the fundamental unfairness of allowing SunBelt to prosecute this case based upon a traffic group that is dependent on types of cross-over traffic that the Board has proposed to eliminate because it believes use of such traffic is flawed and distorts the SAC analysis.

For the 63% percent of SBRR traffic that it does not originate or terminate, SunBelt generally assumes that residual incumbent NS would perform most of the time-and-resource intensive work of building local trains to deliver empties to the origins for loading; picking up loaded cars; servicing and inspecting equipment; assembling and moving trains to an interchange with the SARR; receiving shipments from the SARR and moving them to a serving yard; and building local trains to deliver the shipments to their destinations and returning to pick-up the empties. As the Board aptly summarized, “[a]ll of the costs of handling that kind of traffic (meaning the costs of originating, terminating, and gathering the single cars into a single train heading in the same direction) would be borne by the residual railroad. . . . As a result, the SAC analysis appears to allocate more revenue to the facilities replicated by the SARR than is warranted.” *See Rate Regulation Reforms* at 16.

If alternatively, the Board were to adopt its second proposal, to restrict the use of cross-over traffic to movements where the entire service by the defendant railroad is trainload or unit train, 44% of the SARR's traffic group – accounting for 76 % of all SBRR revenues -- would be eliminated. *Rate Regulation Reforms* at 17; *see* Exhibit (V.S. R. Fisher). NS's analysis conservatively treats all intermodal traffic as trainload, meaning no intermodal traffic would be

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interchange as SBRR origination or termination, depending on whether the traffic is coming on the SARR or leaving the SARR.

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eliminated, even though not all NS intermodal traffic moves in trainload service. Certainly, eliminating more than three-quarters of SBRR revenues would have a dramatic effect on the SAC analysis and outcome. Thus, based on DuPont's opening evidence, it appears that two-fifths to two-thirds of the SBRR traffic group, accounting for as much as three-quarters of SBRR revenue, would be disallowed under the Board's proposal to limit crossover traffic. The Board should not allow this case to go forward before it determines whether these types of cross-over traffic are appropriate for a SAC analysis.

The Board's Notice in *Rate Regulation Reforms* expressed concern about the fairness to complainants of applying the proposed rules to pending cases. But fairness is a two-way street. Given the Board's acknowledgement of the problems with some cross-over traffic, and its pending proposal to adjust its rules to address those problems, it would be neither fair nor reasonable for this case to proceed using the very types of crossover traffic the pending rulemaking proposes to eliminate. The most direct and efficient way to address this problem is for the Board to hold this case in abeyance while it completes the pending rulemaking and establishes new crossover traffic rules and limits.<sup>5</sup>

### **2. It Would Be Arbitrary, Capricious, and Unfair to Allow SunBelt to Employ the Distorting Practices and Assumptions the Board Seeks to Curtail in the Pending Ex Parte 715 Rulemaking.**

It would be unfair and arbitrary for the Board to acknowledge flaws and distortions in the use of cross-over traffic and develop rules to eliminate those problems, while simultaneously permitting SunBelt to pursue a case founded on the very types of cross-over traffic that the Board's rulemaking has identified as problematic and distorting. *See Rate Regulation Reforms.*

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<sup>5</sup> If, once the rule amendments are promulgated, SunBelt determines that it wishes to submit new or supplemental evidence (beyond the rebuttal evidence to which it is already entitled) in light of the amended rules, the Board could entertain a request for permission for the complainant to submit such evidence.

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Effectively, the Board has acknowledged a significant and growing problem undermining SAC analyses, announced a plan to limit the distortions and abuses it has identified, and then suggested it does not intend to apply those limitations and remedies to ongoing cases relying on the very traffic the Board proposes to eliminate. *See Rate Regulation Reforms*, at 16-17; *id.* at n.11. Allowing SunBelt to employ cross-over traffic in a way the Board believes is significantly flawed could yield an indefensible, arbitrary and capricious maximum reasonable rate decision.

Where an agency adopts a new substantive rule – such as new crossover traffic limits and rules – the *presumption* is that such substance-altering rules “will be given retroactive application” to pending cases. *See Consolidated Edison v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003); *see also Maxcell Telecom Plus, Inc. et al v. FCC et al*, 815 F.2d 1551, 1554 (retroactive application of a rule is improper “only if ‘the ill effect of the retroactive application’ outweighs the ‘mischief’ of frustrating the interests the rule promotes.”(quoting *SEC v. Chenery*, 332 U.S. 194 (1947))<sup>6</sup> Thus, regardless of whether the Board holds this case in abeyance pending the completion of the *Rate Regulation Reforms* rulemaking, or requires the case to proceed based upon Sunbelt’s opening traffic selection, the presumption is that the Board will apply any new crossover traffic rules to pending cases, including this case.<sup>7</sup>

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<sup>6</sup> *Cf. Georgetown University Hospital v. Bowen*, 821 F.2d 750 (D.C. Cir., 1987) (rejecting retroactive application of new rule to matters concluded and decided several years earlier under a different rule, in part because retroactive application of a rule to conduct or adjudications completed before a new rule was proposed is impermissible, absent some contrary statutory command); *aff’d on other grounds*, 488 U.S. 204 (1988). It is important to distinguish between: (i) cases such as *Bowen*, which proscribe retroactive application of a new legislative or substantive rule to conduct, adjudications, or orders that have been completed before the new rule is proposed; and (ii) cases such as this case and *BNSF v. STB*, 526 F.3d 770, in which a new rule is proposed during the pendency of an adjudication, *i.e.* before the adjudication is completed or a final order or decision has been issued. The former generally is impermissible, while the latter is allowed.

<sup>7</sup> The *Consolidated Edison* court mentioned two additional considerations that may be taken into account in determining whether to apply a new rule to pending cases. *First*, the parties to the

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In *Con. Edison*, the D.C. Circuit rejected petitioners' argument that new rules *must* be applied to pending cases, despite that Court's general presumption that substantive rules will be given "retroactive application" to pending cases. *Id.* However, neither of the two factors the Court relied upon to overcome the presumption is present in this case. *First*, the Court found the rule at issue was a policy statement that did "not purport to carry the force of law" and thus was not a substantive rule change. *Id.* at 324. In the Ex Parte 715 rulemaking, there is no doubt that the Board proposes to make substantive changes to, *inter alia*, crossover traffic rules and revenue allocation, or that it intends such changes to have the force of law. Indeed, it is doubtful that the Board would conduct a notice-and-comment rulemaking to announce a "non-binding policy statement" like that at issue in *Consolidated Edison*. *Second*, the *Con Edison* Court noted that the adjudication in question had been "fully litigated" and "completed"—including the submission of a full evidentiary record by all parties—before the agency even announced its new policy. *Id.* at 325. Reopening the case and requiring the parties to submit new evidence under a standard not even announced until after the underlying case had been completed would impose substantial unnecessary burdens on the parties. *Id.* Such a situation is exactly what NS seeks to avoid by requesting that the Board hold this case in abeyance before the parties submit any additional evidence. Because each party has a full round of evidence remaining in this case (and

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case should be given adequate notice of the rule and an opportunity to present evidence under the new standard. *Con. Edison*, 315 F.3d 316, 323-24. Here, holding this case in abeyance while the Board develops its new substantive rules would give both parties fair notice, and afford each an opportunity to adjust its evidence in response to rules adopted in Ex Parte 715. *Second*, the agency should assess possible detrimental reliance considerations. *Id.* at 324. As NS has previously explained, there is no legitimate or appropriate interest in relying on unlimited use of types of cross-over traffic that the Board has proposed to eliminate. a device that – particularly for SARR traffic groups including substantial volumes of non-unit train traffic like the SBRR—undermines the core validity, logic and reliability of the SAC analysis itself.

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briefing), the Board could temporarily suspend this case, and then direct the parties to submit their further evidence in conformity with new rules the Board adopts in Ex Parte 715.

More specifically, the D.C. Circuit addressed precisely this issue in rejecting a retroactive rule application challenge involving one of the cross-over traffic rules the Board proposes to revise. In *BNSF Railway Co. v. Surface Transportation Board et al.*, shippers challenged the Board's application of the ATC cross-over traffic revenue allocation methodology to a pending rate case, asserting that applying a new rule to an adjudication commenced before the rulemaking would constitute impermissible retroactive rulemaking. 526 F.3d 770, 784 (D.C. Cir. 2008). The D.C. Circuit rejected this argument, quoting *Consolidated Edison* for the proposition that

*[a] new rule may be applied retroactively to the parties in an ongoing adjudication, so long as the parties before the agency are given notice and an opportunity to offer evidence bearing on the new standards, and the affected parties have not detrimentally relied on the established legal regime."*

*Id.* (emphasis added).<sup>8</sup> Reviewing the history of cross-over traffic revenue allocation methods, the Court found that "there was no *established* legal regime on which the parties litigating before

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<sup>8</sup> Reviewing another Board decision in 2010, the D.C. Circuit held that the Board's refusal to apply a new cost of capital rule (adopted in notice-and-comment rulemaking) retroactively was appropriate for all but one year, because railroads and investors had reasonably relied on the prior rule in every year but one. See *AEP Texas North Co. v. Surface Transportation Board et al.*, 609 F.3d 432 (D.C. Cir. 2010). Implicit in the decision's analysis is the principle that notice-and-comment rules may be applied retroactively to pending cases (in this case, a re-opened adjudication). For the single exceptional year, the Court found that the Board's two-factor test for determining whether a rule should be applied retroactively (balancing the "degree of reliance" by parties on the prior standard and whether the existing calculations were reasonable compared to calculations under the new rule), had been inadequately applied and the Board's analysis was too general. Therefore, the Court vacated and remanded the Board's decision with respect to that year. *Id.*, 609 F.3d 432, 440-443 (questioning the Board's finding of reasonable reliance because the governing rule was in flux: the Board had announced a proceeding to consider a new rule and in a separate appeal of that rule, the Board had acknowledged it might be appropriate to reconsider its findings for the year in question). Here, similarly, the Board's method for allocating cross-over traffic revenues remains very much in flux and neither Sunbelt

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the Board could have reasonably relied,” and further noted that the parties had notice that “[t]he appropriate allocation of revenue from cross-over traffic is a perennial issue in [SAC] proceedings and one the Board even now [in 2006] has not resolved definitively.” *Id.* (emphasis in original, second quotation from *BNSF v. STB*, 453 F.3d 473 (D.C. Cir. 2006)). Thus, the Court concluded that the parties to the adjudication in question had ample notice that the question of an appropriate revenue allocation methodology was not settled, and that the Board might adopt a different methodology than those it had applied in previous cases. *Id.*

Today, there still is no well-established cross-over traffic revenue allocation approach. After adopting ATC in notice-and-comment rulemaking, the Board declined to apply it in the first adjudication in which it had the opportunity. Instead, the Board, acting *sua sponte*, developed and applied an *ad hoc* alternative approach, Amended ATC. See *Western Fuels v. BNSF*, Decision at 14, STB Doc. No. 42088 (served Sept. 10, 2007) (“*Western Fuels I*”); *id.*, Decision at 12-13 (Feb. 18, 2009) (“*Western Fuels II*”). On appeal, the Court of Appeals for the D.C. Circuit rejected Amended ATC and remanded it to the Board. See *BNSF Railway Co. v. Surface Transp. Board*, 604 F.3d 602, 613 (D.C. Cir. 2010). Last summer, the Board issued a new decision on remand, explaining its application of Amended ATC in the *Western Fuels* case, and announcing its intention to commence a rulemaking to consider alternative approaches. See in the *Western Fuels Ass’n v. BNSF* STB Docket No. 42088, Decision (served June 15, 2012). BNSF has appealed the *STB Remand Decision* to the Court of Appeals for the D.C. Circuit. See *id.*, Notice (served July 27, 2012). Plainly, the Board’s cross-over traffic revenue allocation approach remains in flux and a shipper could not credibly claim it reasonably relied upon any particular allocation approach in bringing a rate case.

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nor any other party could reasonably rely on Amended ATC as an established approach the Board would apply to new, pending, or future rate cases.

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The second reason the D.C. Circuit rejected the claim that application of the ATC cross-over traffic revenue allocation method to a pending rate case was impermissibly retroactive was that the ATC approach was intended to improve the reliability of the SAC process, stating:

Given that the new methodology [ATC] was “designed in large part to improve the reliability of [the Stand Alone Cost] analysis . . .” it was reasonable for the Board to immediately discard the flawed procedure and apply its new rule to pending cases when the parties were on notice of the potential change.

*BNSF v. STB*, 526 F.3d 770, 778 (D.C. Cir. 2008). Here, similarly, the Board has commenced a rulemaking intended to improve the reliability of the SAC analysis by developing a superior cross-over traffic revenue allocation methodology and proposing other new crossover traffic rules. See Ex Parte 715, *Rate Regulation Reforms*, NPRM at 6-8, 16-18. Consistent with the Board’s position and the D.C. Circuit’s decision in *Western Fuels*, application of new improved crossover traffic rules (including an improved revenue allocation approach) adopted in Ex Parte 715 to this case would be appropriate and would not constitute retroactive rulemaking.

Moreover, the Board has not necessarily closed the door on applying new cross-over traffic limitations to pending cases. See *Rate Regulation Reforms*, NPRM at 17, n.11 (preliminarily noting in footnote that Board does not propose to apply new limits “retroactively” to existing rate prescriptions or cases filed before rulemaking commenced). NS intends to make arguments set forth in this Motion in greater depth and detail in its comments in the *Rate Regulation Reforms* proceeding. A primary purpose of notice-and-comment rulemaking is for the proposing agency to take into account comments and input of interested parties, and to revise its proposed actions or rules if comments persuade it that changes are appropriate. As the D.C. Circuit has explained, “[a]gencies, are free - indeed, they are encouraged - to modify proposed rules as a result of the comments they receive.” *Northeast Maryland Waste Disposal Auth. v. E.P.A.*, 358 F.3d 936, 951 (D.C. Cir. 2004). It is “an elementary principle of rulemaking that a

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final rule need not match the rule proposed, indeed must not if the record demands a change.” *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (further advising that “agencies should be free to adjust or abandon their proposals in light of public comments or internal agency reconsideration . . .”); *see Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1300 (D.C. Cir. 2000); (“the Agency's change of heart ... only demonstrates the value of the comments it received”). *City of Waukesha v. E.P.A.*, 320 F.3d 228, 245 (D.C. Cir. 2003) (an agency “undoubtedly has authority to promulgate a final rule that differs in some particulars from its proposed rule”). Based on all of the comments submitted in Ex Parte 715, the Board may well decide to apply any cross-over traffic limits it adopts in that proceeding to pending cases.

Further, despite the Board’s preliminary statement in footnote 11 that it does not “propose” to apply new cross-over traffic limits to pending cases, the Board is free to alter or amend that proposal during the rulemaking process so long as the final rule is a “logical outgrowth” of the proposed rule. *See, e.g., Northeast MD. Waste Disposal*, 358 F.3d 936 (D.C. Cir. 2004) (finding “logical outgrowth” where EPA announced that it proposed to distinguish between two types of municipal waste combustion units, and thereby “invited comments on both the pros and cons of that distinction.”). Here, by raising the issue of application of the proposed rules to pending cases, the Board has invited comment on that proposal. Under *Northeast MD Waste Disposal*, a decision to apply amended rules to pending cases may very well be a “logical outgrowth” of the rulemaking. Based on a full record, the Board may well determine that applying a more accurate and analytically sound revenue allocation methodology to current cases is appropriate and will reduce the complexity of multiple methodologies in similar cases and the potential for substantial additional litigation regarding those methods.

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Not only would moving this case forward under existing cross-over traffic rules be arbitrary and fundamentally unfair to NS, it would mean that the questions of proper limits on cross-over traffic and tactics likely would be litigated in this individual case (and on appeal) at the same time the Board is conducting a rulemaking designed to address, for all future cases, the same issue. Such duplicative proceedings would be wasteful. Equally important, they would pose a risk of divergent or inconsistent rules and outcomes, which would create more confusion and uncertainty about applicable rules, and likely lead to more litigation by parties who prefer one set of rules to another. In sum, sound policy, avoidance of unnecessary additional litigation, and fundamental fairness all militate in favor of the Board holding this case in abeyance, conducting an expedited rulemaking, and then applying new cross-over traffic and revenue allocation rules to this pending case.

### **B. The Pending Rulemaking Also Proposes to Change the Board's Cross-Over Traffic Revenue Allocation Method.**

The Board has further proposed in *Rate Regulation Reforms* to change the manner in which it allocates cross-over traffic revenue, an approach it indicates may better account for economies of density. Because cross-over traffic revenue allocation is very much in flux, and the Board has proposed an alternative allocation approach in the pending rulemaking, the Board should hold this adjudication in abeyance pending the completion of the rulemaking.

#### **1. Future Use of the *Western Fuels* Amended ATC Methodology Is Doubtful.**

The Board adopted the “Average Total Cost” revenue allocation methodology in an extensive rulemaking. *See generally, Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (October 30, 2006). A number of shippers and rail carriers sought judicial review of the rules adopted in *Major Issues*. The Court of Appeals for the District of Columbia Circuit denied the petitions for review and upheld those final rules – including the ATC revenue allocation

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methodology – in their entirety. *See BNSF Railway Co. v. STB*, 526 F.3d 770 (D.C. Cir. 2008). The ATC methodology is the only cross-over traffic revenue allocation methodology adopted in notice-and-comment rulemaking and judicially affirmed.

Subsequently, the Board attempted to amend the ATC methodology in an adjudication in which neither NS nor other interested parties had an opportunity to participate. *See Western Fuels I*, Decision at 14; *Western Fuels II*, Decision at 12-13. The D.C. Circuit granted BNSF's petition for review with respect to the Board's *ad hoc* creation and application of a different cross-over traffic revenue allocation methodology (Amended ATC), and remanded the case to the Board. *See BNSF Railway Co. v. Surface Transp. Board*, 604 F.3d 602, 613 (D.C. Cir. 2010). Recently, by a 2-1 vote, the Board issued a new decision defending its application of Amended ATC in the *Western Fuels* case. *See in the Western Fuels Ass'n v. BNSF STB Docket No. 42088*, Decision (served June 15, 2012 "*STB Remand Decision*"). The remand decision modestly expanded the Board's rationale for creating and applying a new revenue allocation method, and made an unpersuasive attempt to address the method's disproportionate allocation of revenue to the SARR and its diluted accounting for economies of density. *See STB Remand Decision*. In that very same decision, the Board acknowledged that other revenue allocation methodologies may be superior to its *ad hoc* Amended ATC, and announced that it would commence a rulemaking to consider other alternative revenue allocation methods and proposals, including that proposed by BNSF in *Western Fuels Ass'n*. *See STB Remand Decision*, slip op at 12. Defendant BNSF appealed the *STB Remand Decision* to the Court of Appeals for the D.C. Circuit, and that appeal is pending. *See BNSF v. STB*, D.C. Circuit No. 12-1327 (July 23, 2012).

For several reasons, any further application of Amended ATC is very much in doubt.

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First, it is not clear that Amended ATC, which the Board created to address a perceived problem in an individual case, was even *intended* to apply to future cases.<sup>9</sup> *See, e.g., Western Fuels I* at 14 (creating new method to address Board’s concern in that particular case that the on-SARR revenue allocation for some low R/VC movements the complainant had selected would be insufficient to cover the defendant’s URCS variable costs for the SARR segment); *STB Remand Decision* at 12 (“[Amended] ATC was the Board’s solution to accommodate [] two competing principles . . . We do not suggest that this is the only solution or that there may not be other approaches that could better accommodate the two competing principles.”). Indeed, Commissioner Begeman dissented from the decision and advocated applying an approach developed through notice-and-comment rulemaking to the *Western Fuels* case itself, stating

I cannot support maintaining a *questionable allocation methodology for this case*, while at the same time announcing plans to begin a rulemaking proceeding to develop a *superior alternative . . . that would only be applied to future cases*.

*STB Remand Decision* at 14 (Begeman, dissenting) (emphasis added).

Second, the Board’s remand decision is vulnerable to reversal on appeal. NS will not describe here the legal infirmities it has identified in the *STB Remand Decision*, as it is not a party to the appeal. Note, however, that in both the Board’s remand decision in *Western Fuels*, and in the NPRM issued five weeks later, the Board essentially endorsed BNSF’s proposed alternative revenue allocation method. *See STB Remand Decision* at 12; *Rate Regulation*

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<sup>9</sup> The Board created and applied Amended ATC in two parallel cases decided on the same day. Because the Board had adopted this new revenue allocation methodology late in those cases, the Board offered complainants (Western Fuels Association and AEP Texas North) an opportunity to select a new traffic group and present new SAC evidence to be evaluated using Amended ATC. Western Fuels accepted the invitation and filed new evidence, but AEP Texas North declined. Thus, while the Board applied Amended ATC in two individual adjudications simultaneously, the only case in which the Amended ATC method was meaningfully contested or appealed was *Western Fuels*.

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*Reforms*, at 17-18. And, the Board’s rationale for refusing to consider BNSF’s proposal on remand is questionable. *See STB Remand Decision* at 11-14. If Amended ATC were rejected on appeal, then any rate case decision that relied upon that invalid methodology would be subject to reversal (or possibly re-opening by the Board to allow the parties to submit new evidence and apply the valid revenue allocation method, be it ATC or an alternative adopted in the *Rate Regulation Reforms* rulemaking).

Third, while the NPRM is not entirely clear on this point, it appears that the Board may intend to apply any new revenue allocation methodology it adopts in this rulemaking to pending cases. Footnote 11 to the NPRM does suggest that the Board does not propose to “apply any new *limitation* retroactively” to rate cases filed before the NPRM was served, but the text to which this footnote applies discusses the cross-over traffic group, not allocation of cross-over traffic revenue. That discussion comes later in the NPRM, after the text to which footnote 11 is appended. *See Rate Regulation Reforms*, NPRM at 17, n.11 (stating that the Board does not propose to apply proposed new limitations on nature of cross-over traffic itself in pending cases, but making no similar statement with respect to any new cross-over traffic revenue allocation methodology it might adopt). Moreover, a cross-over traffic revenue allocation approach is not a “limitation” on cross-over traffic, it is a methodology for allocating revenues regardless of what type of cross-over traffic is allowed or proscribed. Further, the NPRM proposes to eliminate Amended ATC in favor of a different revenue allocation method that would properly “giv[e] more weight to the important role that economies of density should play in any cost-based revenue allocation approach.” *Rate Regulation Reforms*, NPRM at 18. Thus, even if the Board were to prevail in the renewed appeal of its application of Amended ATC in *Western Fuels*, it appears probable that it would apply that flawed method only to that single specific case.

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Fourth, the Board has effectively acknowledged that the Amended ATC approach is inferior to at least one other available approach. Amended ATC was an *ad hoc* attempt by the Board to create a compromise methodology that would both account for economies of density and address the perceived problem of allocations of revenue to segments of a SARR that are lower than the real world incumbent's URCS system average variable costs for those segments. However, the Board has now proposed an alternative revenue allocation method that addresses that perceived problem without doing as much harm to a primary goal of the Board's cost-based allocation approach – accounting for economies of density. *See Rate Regulation Reforms NPRM* at 17-18 (proposed approach better accounts for economies of density than Amended ATC). As Commissioner Begeman correctly pointed out, it would not be fair to apply an inferior revenue allocation methodology (which disadvantages the defendant carrier) when the Board is in the process of developing a superior method. *See STB Remand Decision* at 13-14.

Fifth, arguments against holding the present case in abeyance while the Board's ATC rulemaking proceeds and applying a refined ATC method are unpersuasive. Based on complainants' arguments in other cases, Sunbelt may express concern that applying cross-over traffic limits and an improved revenue allocation approach to this case may constitute impermissible "retroactive" rulemaking. As previously explained, however, the D.C. Circuit has established a presumption favoring application of new substantive rules to pending adjudications. *See generally, Con. Edison Co. v. FERC*, 315 F.3d 316; *see also id.* at 323 ("A new rule may be applied retroactively to the parties in an ongoing adjudication, so long as the parties before the agency are given notice and an opportunity to offer evidence bearing on the new standard."); *BNSF v. STB*, 526 F.3d 770, 774 (D.C. Cir. 2008). If the present case is not held in abeyance during the *Rate Regulation Reforms* rulemaking, NS will explain in its Reply evidence and other

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filings in this adjudication that the Board should apply improved crossover traffic rules and limits to this case.

At minimum, there is presently substantial uncertainty concerning the cross-over traffic revenue allocation methodology that the Board will apply in this case. Because of the uncertainty over the cross-over traffic revenue allocation method that will apply at the time this case is scheduled to be decided, the best course for the parties and the Board is to hold this case in abeyance until the Board promulgates a uniform final cross-over traffic revenue allocation methodology.

**2. If this Case Proceeds Without Clarification of the Applicable Cross-Over Revenue Allocation Methodology, the Parties' Revenue Evidence May Be Like "Ships Passing in the Night."**

Despite the fact that Amended ATC had been rejected by the D.C. Circuit and any future resuscitation of that method is dependent on the result of ongoing litigation, SunBelt chose – at its own peril – to apply that dubious methodology in its opening evidence. Because Amended ATC may not be applied in the present case under governing law, NS intends to apply ATC in its Reply evidence. By holding this case in abeyance during the pendency of the *Rate Regulation Reforms* rulemaking, the Board could avoid presentation of evidence by the parties that does not meet, but rather passes like “ships in the night.”

**a. SunBelt Erroneously Used Amended ATC to Allocate Cross-Over Traffic Revenues.**

In its opening evidence, SunBelt applied the Amended ATC method the Board had applied in *Western Fuels*. See, e.g. SunBelt Open. at III-B-20. SunBelt knew the status of Amended ATC when it filed its evidence. Because it was clear that Amended ATC was not a valid, permissible methodology when SunBelt filed its complaint, took discovery or during most of the period in which it drafted its opening evidence, the Complainant's use of that approach

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was inappropriate and at SunBelt's own risk.<sup>10</sup> Similarly, SunBelt cannot contend that, in determining whether to bring this rate case and evaluating the potential outcome, it relied on the notion that Amended ATC would be used to allocate crossover traffic revenue—the court decision rejecting that method issued before SunBelt filed this case. Moreover, as the D.C. Circuit made clear in rejecting shippers' claim that application of ATC to a pending case was impermissible retroactive application of a new rule, all parties bringing rate cases before the Board have been on notice for years that the Board has not finally settled on any single method for allocating crossover traffic revenue. *See BNSF Railway Co. v. STB et al*, 526 F.3d 770, 784 (D.C. Cir. 2008). The Court concluded that because parties could not have reasonably relied on the application of any particular cross-over traffic revenue allocation method, “retroactive” application of the ATC method adopted in a rulemaking to a pending case was permissible and appropriate. *See id.*

On May 11, 2010, the D.C. Circuit issued its decision in BNSF's challenge to the Board's *Western Fuels II* decision. *See BNSF v. STB*, 604 F.3d 602 (D.C. Cir. 2010). That decision granted BNSF's petition for review with respect to the Board's application of the revenue allocation methodology it created in that case, Amended ATC. *See id.* at 613. The D.C. Circuit rejected Amended ATC as explained by the Board, and remanded the case to the Board for further consideration. *See id.* Unless and until the Board developed and presented a complete, sound, and non-arbitrary explanation and justification for creating and applying Amended ATC

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<sup>10</sup> Although Sunbelt advocates the use of Amended ATC, it included “alternative ATC” calculations in its Opening Evidence, effectively acknowledging that cross-over revenue allocation methodology remains in flux and that substantial uncertainty surrounds which approach will apply in this case. Moreover, Sunbelt failed to calculate revenue allocations using the original ATC approach, which presently is the only lawful approach.

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and judicial challenges to that method had been exhausted, Amended ATC was not a valid method and could not be applied in a SAC case.

Fourteen months later, SunBelt filed the present rate case against Norfolk Southern. *See* Complaint, *SunBelt v. NS*, STB No. NOR 42130 (July 26, 2011). There can be no dispute that SunBelt knew or should have known of the D.C. Circuit decision and remand of *Western Fuels* at the time it filed this case. Thus, during the time SunBelt and NS were conducting transportation contract negotiations and when SunBelt was evaluating a possible rate case, Amended ATC was invalid and inapplicable to STB rate cases. Discovery in this case closed on February 6, 2012, so during the full discovery period SunBelt was aware of the status of *Western Fuels*, and that Amended ATC had been rejected on judicial review.<sup>11</sup>

Thus, during virtually the entire relevant time period – including the time in which SunBelt conducted its pre-complaint investigation and case assessment; when it filed its Complaint; during extensive discovery; when SunBelt selected its SARR traffic group and designed the SBRR to include large volumes of cross-over traffic; when it selected interchange points between the SARR and the residual NS; and during most of its preparation of its opening evidence and case-in-chief – SunBelt reasonably *could not have relied* on the notion that Amended ATC was the governing method of allocating cross-over traffic revenue. To the contrary, during the overwhelming majority of that time, the only valid, judicially approved

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<sup>11</sup> SunBelt filed its opening evidence on August 1, 2012. SunBelt presumably developed its opening evidence from February 2012 through July 2012. When SunBelt filed its opening submission, the Board had only recently issued its decision in the remanded *Western Fuels II* case. *See STB Remand Decision* (served June 15, 2012). Because of the temporal proximity of the *STB Remand Decision* and SunBelt's submission of evidence, it is quite unlikely SunBelt waited until that late date to select its cross-over traffic and determine revenue allocations. Moreover, before SunBelt filed, BNSF had filed an appeal of the *STB Remand Decision*, so SunBelt knew the Board's re-issuance of Amended ATC – already rejected once by the same court – was again under challenge. *See BNSF v. STB*, D.C. Cir. No. 12-1237 (filed July 23, 2012).

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revenue allocation method was original ATC. Moreover, in the very same remand decision in which the Board decided it would apply the Amended ATC allocation approach to the individual *Western Fuels* adjudication, it announced it would initiate a rulemaking designed to adopt an improved crossover traffic revenue allocation methodology. *See STB Remand Decision* at 12. Therefore, even during the single month during the last 2 ½ years in which Amended ATC was arguably applicable (to a single unique individual adjudication), Sunbelt knew that the Board planned to initiate a rulemaking in the very near future, for the purpose of identifying a superior cross-over traffic revenue allocation methodology. Thus, at all relevant times, Sunbelt and its counsel knew that Amended ATC was either invalid (for the overwhelming majority of the relevant time) or very tenuous and likely to be stricken by the courts, replaced by the Board, or both. Any reliance by Sunbelt on anticipated application Amended ATC in evaluating and developing its case would have been unsound and unwise. Accordingly, SunBelt would not be unduly prejudiced if the Board were to decline to apply Amended ATC, and instead applied a new revenue allocation approach adopted in *Rate Regulation Reform*.

In sum, the Board should not be concerned that holding this case in abeyance while it develops cross-over limits and rules in the *Rate Regulation Reform* rulemaking would be unfair to SunBelt. The Complainant applied a revenue allocation methodology that was not developed in notice-and-comment rulemaking, that was rejected on judicial review, and that SunBelt therefore knew was not valid and lawfully could not be applied during most of the time it was developing its evidence. SunBelt made this decision with its eyes open and at its own peril. No reliance-based unfairness to SunBelt will result if the Board applies a revenue allocation method promulgated in the *Rate Regulation Reform* rulemaking.

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**b. If the Board Does Not Hold This Case in Abeyance Pending Promulgation of New Cross-over Traffic Rules, NS Intends to Apply ATC in its Reply.**

As discussed, the only lawful cross-over traffic revenue allocation approach in existence today is original ATC. Accordingly, NS intends to apply that original ATC method to allocate crossover revenues in its Reply evidence. Because SunBelt did not apply ATC in its evidence, the parties' evidence will likely be based on different revenue allocation methodologies. Thus, the Board is likely to be presented with Opening and Reply SAC presentations whose traffic and revenue evidence cannot be reconciled or readily compared. The Board can and should avoid this undesirable result by holding this case in abeyance pending the outcome of *Rate Regulation Reforms*.

In another pending case, the Complainant argued that the Board should not be concerned about which revenue allocation approach it applied, claiming that revenue differences would not make a difference to the ultimate outcome of the case. *See DuPont v. NS*, STB No. 42125, *DuPont Reply to NS Motion to Hold in Abeyance* at 30-31 (contending that application of ATC or alternative ATC would reduce SARR revenues by "only" 5-6 percent). For several reasons, the Board should reject such an argument if Sunbelt repeats it in this case. First, other significant errors in DuPont's cross-over traffic revenue allocation approach result in allocations that are substantially erroneous under all three methodologies, thus rendering its comparisons meaningless. More important, what DuPont neglected to acknowledge is that its analysis only considered its estimate of cross-over revenue allocation differences in isolation, without considering the myriad other issues presented by its deeply flawed evidence. That is, DuPont's conclusion depended on the very dubious assumption that the Board will accept all of DuPont's other fatally flawed evidence, which serves to inflate SARR revenues and understate SARR investment costs and expenses very substantially. It is thus neither surprising nor probative that

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DuPont concluded that correcting only one of its errors would not change the outcome it proffered in its opening evidence. Under DuPont's reasoning, the Board would not correct any error in a complainant's submission unless that correction alone resulted in a finding that the challenged rates did not exceed a maximum reasonable rate. For the foregoing reasons, if Sunbelt asserts a similar argument or comparison in its response to this Motion, the Board should reject any such isolated and incomplete comparison as a meaningless diversion.

### **II. THE BEST COURSE IS TO HOLD THIS CASE IN ABEYANCE AND CONDUCT A RULEMAKING TO DEVELOP SOUND RULES FOR CROSS-OVER TRAFFIC AND REVENUE ALLOCATION, AND APPLY THOSE RULES TO THIS AND FUTURE CASES ALIKE.**

The Board should hold this case in abeyance while it develops sound, well-considered rules to govern cross-over traffic revenue allocation and other issues. There are several important, related reasons why holding this case in abeyance is appropriate.

First, the Board has essentially acknowledged that under existing rules, cross-over traffic has not operated as intended and instead has been used to distort SAC analyses and results. *See Rate Regulation Reforms* at 6-8, 15-18. It would be arbitrary and unfairly prejudice NS if the Board were to allow SunBelt to take advantage of cross-over traffic rules that the Board believes are flawed and has undertaken to fix.

Second, a rulemaking is a more appropriate forum for the rule changes addressed in *Rate Regulation Reforms*. Both governing law and good regulatory policy require that, when the Board adopts a rule through notice-and-comment rulemaking, any substantial changes or amendments to that rule should also be undertaken only in such a rulemaking, not in an individual adjudication. *See* III, *infra*. The Board appears to have implicitly acknowledged this principle in two recent decisions.

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In the *Western Fuels STB Remand Decision*, the Board announced that it planned to initiate a rulemaking to develop a better methodology to allocate cross-over traffic revenue, and suggested that in the normal course it may have been appropriate to hold the final *Western Fuels* decision in abeyance pending the completion of that rulemaking and the establishment of an improved revenue allocation method. *See STB Remand Decision* at 12. However, a majority of the Board determined that the extraordinary circumstances of that case – including the fact that the case had already been held in abeyance once and had been pending for eight years – compelled it to issue its revenue allocation decision in the context of that individual case rather than waiting to apply a new rule developed in a rulemaking proceeding. *See id.* at 12-13.

In late July, the Board initiated a rulemaking process to address cross-over traffic rules and other significant matters. *See Rate Regulation Reforms*. Significantly, the Board chose to address these issues in a rulemaking, *not* in individual adjudications. For major issues and changes to existing rules that may have broad effect on the regulated community and its customers, the Board recognized that the best way to proceed is in a rulemaking proceeding that obtains input from all interested persons. There is no reason to depart from those sound principles in this case.

Third, holding the case in abeyance will save the Board and the parties time and money. If the Board adopts new cross-over traffic rules and revenue allocation methodology during the pendency of this case, presumably NS and/or SunBelt would be entitled to an opportunity to submit new evidence, just as Complainants were allowed to submit new evidence in *Western Fuels* when the Board adopted ATC during the pendency of that case. *See Con. Edison Co. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) (new rule applied retroactively to the parties in an ongoing adjudication where opportunity was given to offer evidence on the new standard). The

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parties would have invested substantial time and resources to develop three sets of SAC evidence, only to have to duplicate that effort and spend more time and money to present new evidence based on the changed rules.

Finally, holding this case in abeyance would minimize the potential for inconsistent rules and irreconcilable results. Particularly if the Board decided not to allow the parties to submit new evidence after it adopts new rules, the results in this case and the results in cases adjudicated under the new rules could be very different. If the Board does not hold this case in abeyance while it develops revised rules, it may find itself simultaneously defending multiple appeals and cross-appeals of different sets of potentially inconsistent cross-over traffic rules and revenue allocation methods. Moreover, if rules applied by the Board in this case and other cases are not consistent or treat similarly situated litigants differently, it may be necessary for the Board to re-open this case (either as a result of judicial remand or at the request of a party), take new evidence, and revise its decision. The additional costs of such re-litigation would substantially outweigh any cost or inconvenience to the parties of a temporary suspension of this case while the Board expeditiously develops sound rules that can be applied to all pending and future cases.

### **III. IF THE BOARD DOES NOT HOLD THIS CASE IN ABEYANCE, AS A MATTER OF ADMINISTRATIVE LAW, THE BOARD MUST APPLY ATC IN THIS AND ALL SAC CASES UNTIL IT HAS CONDUCTED A RULEMAKING TO ADOPT A DIFFERENT METHODOLOGY.**

Because the Board adopted ATC in notice-and-comment rulemaking, it may amend that methodology only through a notice-and-comment rulemaking. Any substantial change to ATC made in an individual adjudication would be unlawful and subject to reversal for violation of the Administrative Procedure Act. As a matter of administrative law, therefore, if the Board does not hold this case in abeyance, it must apply ATC in this case.

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### A. Establishment of ATC and Status of Board's *Sua Sponte* Application of a Different Approach in *Western Fuels*, an Individual Rate Case.

The Board adopted the ATC cross-over traffic revenue allocation methodology in an extensive notice-and-comment rulemaking proceeding that included three full rounds of extensive comments comprised of thousands of pages of argument and expert testimony; the submission of written and live witness testimony; and a full hearing before the Board. *See* STB Ex Parte 657 (Sub-No. 1), *Major Issues in Rail Rate Cases* (served October 30, 2006) (“*Major Issues*”). NS actively participated in the *Major Issues* rulemaking, and SunBelt’s interests were represented by its trade association, the National Industrial Transportation League.<sup>12</sup> During the proceeding, all interested parties had more than ample opportunity to comment and provide input. Based on its evaluation of the extensive rulemaking record, the Board adopted ATC as the best method for allocating cross-over traffic revenue. *See Major Issues*, Decision at 31.

Several parties challenged the rules adopted in *Major Issues* – including ATC – before the D.C. Circuit. The Court denied all petitions for review, upholding the new rules in their entirety. *See BNSF et al v. Surface Transportation Board et al*, 526 F.3d 770 (2008). With respect to ATC, the Court concluded that the Board had developed a reasonable method to allocate cross-over traffic revenues while properly taking into account economies of density. *See id.*

In *Western Fuels*, both complainant and defendant submitted evidence applying the ATC revenue allocation approach adopted in *Major Issues*. But the Board *sua sponte* applied a substantially changed approach that deviated from the judicially approved ATC methodology and significantly diluted the effect of economies of density, the critical feature and innovation of

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<sup>12</sup> SunBelt’s parent company, Olin Corporation, is a member of the National Industrial Transportation League.

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ATC. NS was not a party to the *Western Fuels* litigation, and thus had no opportunity to comment on the Board's attempted amendment of the ATC rule. Because Amended ATC was rejected on appeal<sup>13</sup>, today original ATC remains the only valid cross-over traffic revenue allocation methodology that has been adopted in notice and comment rulemaking and judicially affirmed.<sup>14</sup>

### **B. A Substantive Rule Adopted in Notice and Comment Rulemaking – Such as ATC – May be Amended Only in a Notice and Comment Rulemaking.**

Regardless of the Board's rationale or justification for creating and applying a new revenue allocation methodology in *Western Fuels II*, an agency may not amend through an adjudication a rule adopted through notice and comment. A federal administrative agency like the Board may make a substantial change or amendment to a substantive rule adopted through a rulemaking proceeding *only* in another rulemaking proceeding, and not in an individual adjudication. *See* Administrative Procedure Act, 5 U.S.C. §§ 551(5), 553(b)(3)(A).

Applying the APA, the D.C. Circuit has consistently held that an amendment to a legislative rule requires a notice-and-comment rulemaking proceeding. *See, e.g., American Mining Congress v. Mine Safety & Health Administration et al*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). A rule that “effectively amends a prior legislative rule” is itself a legislative rule

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<sup>13</sup> As discussed, on appeal the D.C. Circuit affirmed the Board's *Western Fuels* decision on all issues except one – the Board's creation and application of a new revenue methodology (Amended ATC). *See BNSF Railway Co. v. STB*, 604 F.3d 602 (D.C. Cir. May 11, 2010). On that issue, the Court granted the Petition for review, rejecting Amended ATC as inadequately explained and supported, and remanded the case to the Board. *Id.*

<sup>14</sup> The Board nominally applied Amended ATC in the *AEPCO* decision, but only because the parties agreed it made no difference in that case. *See AEPCO v. BNSF Railway & Union Pacific Railroad*, STB Docket No. 42113 (served Nov. 22, 2011). Moreover, the Board re-opened that proceeding and is presently holding it in abeyance. *See id.*, STB Docket No. 42113 (served Jan. 20, 2012). To be clear, NS does not agree to the use of any revenue allocation methodology other than a method adopted by rule. Today, ATC is the only method that meets that requirement.

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requiring notice-and-comment rulemaking under the APA. *See United States Telecom Ass'n v. FCC*, 400 F.3d 29, 34-35 (new rules that make substantive changes to existing rules or regulations are legislative rules, subject to APA notice and comment requirements); *Sprint Corp v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003); *American Mining Congress*, 995 F.2d 1106 at 1112-13.

Both ATC and Amended ATC are legislative rules<sup>15</sup> (as opposed to interpretive or procedural rules) because they have the force and effect of law and do not fit into the APA's narrow exception to the notice and comment requirement that applies to "rules of agency organization, procedure, or practice." *See James V. Hurson Assocs. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000) (quoting 5 U.S.C. § 553(b)(3)(A)). The *Western Fuels* change to ATC was an amendment because it sought to make a substantive change to the ATC rule. *See Sprint*, 315 F.3d 369, 374. And, the new rule adopted in *Western Fuels* modified the Board's revenue allocation rule in a manner that is inconsistent with the original ATC. *See American Mining Congress*, 995 F.2d at 1109 ("[i]f a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first," subject to notice and comment requirements); *See National Organization of Veterans Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001) (legislative or substantive rules "make new law or modify existing law").

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<sup>15</sup> Some federal courts, including the Federal Circuit, use the term "substantive rule" instead of legislative rule. The terms are interchangeable. *See National Organization of Veterans Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001) ("Substantive rules [are] those that effect a change in existing law or policy or which affect individual rights or obligations. 'Interpretative rules,' on the other hand, clarify or explain existing law or regulation and are exempt from notice and comment under Section 553(b)(3)(A). An interpretative statement . . . does not intend to create new rights or duties, but only reminds affected parties of existing duties.").

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Sunbelt may assert that Amended ATC is not a legislative rule. Such an argument cannot withstand scrutiny, because Amended ATC very substantially altered the applicable methodology. The Original ATC and Amended ATC formulas are based on two different measures – average total costs versus variable costs. ATC uses a single step process, while Amended ATC separates costs of a cross-over movement into variable costs and fixed costs, and treats each differently in a separate step. Indeed, the term “average total costs” does not accurately describe the new formula the Board adopted *sua sponte* in the *Western Fuels* case, as that method does not apply average total costs (fixed costs plus variable costs) to allocate cross-over revenue.<sup>16</sup> The *Western Fuels* formula does not purport to allocate the total revenues generated by a movement based on average total cost. Rather, it allocates only revenue *contribution* – revenues in excess of URCS variable costs – on that basis. *See, e.g., Rate Regulation Reforms*, NPRM at 8. Further, as the Board has effectively acknowledged, the modified formula it adopted in *Western Fuels* substantially reduces the effect of economies of density on its allocation of revenues, a primary aim of a cost-based allocation method. *See id.* at 18. In sum, the *Western Fuels* change to the cross-over traffic revenue allocation method was plainly substantive, *not* “rules of agency organization, procedure, or practice.” *See Hurson v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000); 5 U.S.C. § 553(b)(3)(A).

The D.C. Circuit has further established that an agency may not adopt a new position that is inconsistent with an existing rule adopted in a rulemaking without conducting a notice-and-comment rulemaking. As the Court admonished, “an administrative agency may not slip by the notice and comment rule-making requirements needed to amend a rule by merely adopting a *de facto* amendment to its regulation through adjudication.” *Marseilles Land and Water Co. v.*

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<sup>16</sup> Thus, the terms “Modified ATC” and Amended ATC are misnomers, as the two-step formula used in *Western Fuels* does not use unified average total costs to allocate revenue.

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*FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003); *see Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (an agency interpretation that “adopt[s] a new position inconsistent with . . . existing regulations” must follow APA notice and comment procedures). As demonstrated, the *Western Fuels* decision *amended* and *substantially changed* the ATC methodology in a manner inconsistent with the existing rule, in part by substantially reducing the effect of economies of density on the allocation of cross-over revenues, which in most instances will result in over-allocation of those revenues to the SARR. Under the APA, the Board’s attempted amendment of the ATC rule was invalid and ineffective, because a legislative rule may not be amended in an individual adjudication such as *Western Fuels*.

The dissenting Board member in the recent *STB Remand Decision* recognized the basic rule that amendment of a legislative rule must be undertaken in a rulemaking proceeding, stating, “I do not believe that [Amended] ATC, which was developed *after* the conclusion of *Major Issues*, and without an opportunity for public comment, provides for the unbiased revenue allocation approach that was intended.” *STB Remand Decision* at 13. The full Board now appears to have recognized that in order to amend the cross-over traffic revenue allocation rule, it must conduct a rulemaking proceeding that gives all interested parties an opportunity to comment. *See Rate Regulation Reform* (commencing rulemaking to address, *inter alia*, cross-over traffic limits and revenue allocation rule).

Under the APA, the Board could not amend the ATC methodology – a legislative rule adopted through the *Major Issues* notice-and-comment rulemaking – without conducting another rulemaking. Thus, even if the D.C. Circuit found in the pending *Western Fuels* appeal that on remand the Board has offered an adequate justification for amending and substantively changing ATC by adopting Amended ATC, making that change in an adjudication would nonetheless be

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invalid. The APA requires notice and comment rulemaking to amend a legislative rule.<sup>17</sup>

Because the Board failed to comply with that requirement, Amended ATC is invalid. It cannot be applied in this or any other case unless and until it is adopted in notice-and-comment rulemaking.

## CONCLUSION

NS's motion to modify the procedural schedule is modest. It asks that the Board hold this case in abeyance for the time it will take to promulgate new cross-over traffic rules and a new revenue allocation methodology in an expedited rulemaking. This is essentially the same sound approach advocated by Board member Begeman in *Western Fuels*:

I believe the Board should initiate a fast-track proceeding to take public comment from interested parties in an effort to determine the best methodology, based on economic principles for allocating cross-over traffic revenues, to the extent that such traffic is appropriate in rate cases. The methodology that results should then be applied to this case.

*STB Remand Decision* at 13 (C. Begeman, dissenting). She advocated this approach even though the *Western Fuels* case had already been held in abeyance earlier and despite the fact that the case had already taken eight years. *See id.* This case has been pending for fourteen months, less time than *Western Fuels* had been pending when the Board held that case in abeyance for the *Major Issues* rulemaking. That proceeding, which was not conducted on an expedited basis, concluded in eight months. What NS is asking is that the Board hold this case in abeyance for a

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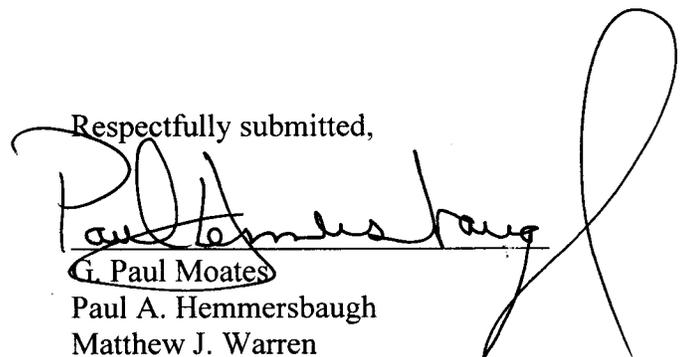
<sup>17</sup> Assuming *arguendo* that Amended ATC were deemed not to be a legislative rule and cross-over revenue allocation methodologies may be changed in an individual case adjudication, NS would litigate crossover traffic limits and revenue allocation methods in individual rate cases, including this one. Given the Board's own concern with Amended ATC, there is a significant prospect that the methodology will again be rejected by the courts. An individual litigation approach will consume more resources of all the parties and the Board and create significant risk of divergent outcomes and decisions. A single, expedited rulemaking is more sensible and efficient. *See Part I.A.2 supra.*

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relatively short period in order to allow the Board to develop “the best methodology, based on economic principles for allocating cross-over traffic revenues, to the extent such traffic is appropriate in rate cases,” and then to apply the new limits and methodology in this case. *See STB Remand Decision* at 13.

The Board should grant NS’s Motion and hold all further proceedings in this case in abeyance until the completion of the *Rate Regulation Reform* rulemaking, STB Ex Parte No. 715, and apply new cross-over traffic and revenue allocation rules promulgated in the rulemaking to this case.

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Respectfully submitted,  


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*Counsel to Norfolk Southern Railway Company.*

Dated: September 21, 2012

## EXHIBIT: VERIFIED STATEMENT OF ROBERT O. FISHER

### Determination of Effect of Proposed Cross-Over Traffic Limits on SARR Traffic Group Selected by Complainant in *Sunbelt v. Norfolk Southern Railway*, STB Dkt. No. NOR 42130

I am Robert O. Fisher. I am Senior Director at FTI Consulting, Inc, and I provide financial and economic consulting services to the transportation, energy and telecommunications industries. I direct analyses for railroad clients in litigation disputes and in rate reasonableness cases before the Surface Transportation Board (“STB”).<sup>1</sup> I have sponsored evidence regarding the calculation of traffic volumes and revenues in prior stand-alone cost (“SAC”) cases. Defendant Norfolk Southern Railway Company asked me to examine the volumes selected by Complainant Sunbelt for the traffic group underlying the stand-alone railroad analysis in STB Docket No. NOR 42130, in order to determine the impact of the STB’s recently proposed limits to the inclusion of “cross-over” traffic,<sup>2</sup> as set forth in Ex Parte 715, *Rate Regulation Reforms* (EP 715) served July 25, 2012. Following is a description of my methodology and results.

I used the workpapers supporting Sunbelt’s Opening evidence to calculate the impact of the STB’s proposed limitations. All units and revenues in this analysis reflect 1Q-3Q 2012 shipments from SunBelt’s waybill file (ttWaybills\_Lead\_Unit\_with\_TOTALS), which I then limited to those movements that SunBelt selected for its SARR. In EP 715, the STB offered two proposals to restrict the use of crossover traffic in Full SAC cases. The first – “Proposal 1” – would limit cross-over traffic to movements for which the SARR would either originate or terminate the rail portion of the movement. The second – “Proposal 2” – would limit cross-over traffic to movements where the entire service provided by the defendant railroad in the real world moves in trainload service.

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<sup>1</sup> My qualifications are set forth in Attachment A.

<sup>2</sup> Cross-over traffic is defined as “those movements included in the traffic group that would be routed over the SARR for only a part of their trip from origin to destination. In such circumstances, the SARR would not replicate all of the defendant railroad’s service.” (EP 715 Decision at 6)

**STB Limitation Proposal 1: Restricting the use of cross-over traffic to movements for which the SARR would either originate or terminate the rail portion of the movement**

In order to identify the traffic that would be impacted by this proposal, I first classified the traffic based on the movement type identified by SunBelt to determine which traffic the SBRR would originate and/or terminate. The following chart presents the results of that analysis.

**Table 1: Traffic Originated and/or Terminated on the SBRR**

<b>SBRR Move Type</b>	<b>Units (000s)</b>	<b>% of SBRR Traffic</b>
<b>Originate and Deliver (OD)</b>	51.5	11%
<b>Originate and Terminate (OT)</b>	3.4	1%
Receive and <b>Terminate (RT)</b>	36.7	8%
Receive and Deliver (RD)	370.2	80%

As the chart shows, using the SBRR movement type designation, the SBRR would originate or terminate only 20% of the units. However the “RD” (Receive/Deliver) movement type includes interline traffic that the SARR would receive or deliver at locations where Norfolk Southern interchanges with other railroads, such as New Orleans. For purposes of this analysis, I assumed that the STB’s proposal would not limit those types of movements because those interchanges represent the origination or termination point for the NS system and the SARR is replacing the incumbent NS all the way to or from these real-world interchange points.

I used the Full\_Route field from the waybill file to identify those interline moves for which the SBRR on or off point was also the location where NS interchanges with another carrier, and reclassified this interline traffic accordingly.<sup>3</sup> The following chart summarizes these moves. The 77,100 units that the SBRR receives or delivers at NS interchanges represent another 17% of total SARR volumes that would not be excluded under the STB’s proposed limitation.

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<sup>3</sup> I did not treat Meridian, MS, as an NS interchange because NS has haulage rights over the Meridian Speedway, and therefore does not “interchange” traffic at Meridian.

**Table 2: Identification of SBRR Received and Delivered Traffic Handled at an NS Interchange**

Units (000s)	NS Move Type				Total
	Originate/ Deliver (OD)	Originate/ Terminate (OT)	Receive/ Deliver (RD)	Receive/ Terminate (RT)	
<b>Total SBRR Receive and Deliver (RD)</b>	126.6	28.6	9.6	205.4	370.2
NS Interchange Point is <u>on</u> the SARR	17.6		7.2	52.3	77.1
NS Interchange Point is <u>not</u> on the SARR	109.0	28.6	2.4	153.1	293.1

The summary table below shows that the Board’s Proposal 1 in Ex Parte 715 would exclude from Complainant’s SARR traffic group approximately 63% of the volumes that SunBelt selected.

**Table 3: SBRR Traffic that would be Disallowed under EP 715 Proposal 1**

SARR Traffic Class	Units (000s)	% of Total SBRR Traffic
Local	3.4	1%
Originate and Deliver (OD)	51.5	11%
Receive and Terminate (RT)	36.7	8%
Receive or Deliver at NS Interchange	77.1	17%
<b>SARR Overhead</b>	<b>293.1</b>	<b>63%</b>
Total	461.9	100%

**STB Limitation Proposal 2: Restricting the use of cross-over traffic to movements where the entire service provided by the defendant railroad in the real world is in trainload service**

The first step in identifying the traffic that would be excluded in the STB’s second proposal is to distinguish cross-over traffic from interline traffic. Interline traffic for which the SARR fully replaces NS for the entirety of the move (for example, issue moves that NS and the SARR originate at McIntosh and are delivered to Union Pacific at New Orleans) is not considered cross-over. I used a process similar to that used for Proposal 1 to identify SBRR Originate/Deliver moves that are delivered to an NS interchange point and SBRR Receive/Terminate moves that are received at an NS interchange point. This approach identified 9,800 units for which the SBRR fully replaces NS on an interline move.

For the remaining overhead traffic, I calculated the number of shipments per waybill, and applied the standard URCS definition that identifies waybills with 50 carloads or more as trainload shipments.

Although intermodal shipments are waybilled at the individual container level, for the purposes of this analysis I treated all intermodal traffic as trainload. This serves to understate the amount of traffic implicated by the STB’s Proposal 2, as such shipments can be handled by multiple trains.

Using this approach, I determined that the STB’s second crossover traffic limitation proposal would exclude approximately 44% of the SBRR traffic as summarized in the following table.

**Table 4: SBRR Traffic that would be Disallowed under EP 715 Proposal 2**

<u>Move/Waybill Type</u>	<b>Units (000s)</b>	<b>% of Total SBRR Traffic</b>
Local	3.4	1%
SBRR Fully Replaces NS	9.8	2%
Overhead		
- Intermodal	224.9	49%
- Other Trainload	18.8	4%
- <b>Carload &amp; Multi-Carload</b>	<b>205.0</b>	<b>44%</b>
Grand Total	461.9	100%

**Revenues**

I followed the same approach to calculate the impact of the STB’s EP 715 proposals on SBRR revenues. I used NS through revenues from the waybill file (ttWaybills\_Lead\_Unit\_with\_TOTALS) including appropriate adjustments. A smaller percentage of stand-alone revenues (38%) would be excluded than the 63% of carload volume under STB’s Proposal 1. See Table 3 above.

**Table 5: NS Through Revenues for SBRR Traffic that would be Disallowed under EP 715 Proposal 1**

	<b>Revenues (millions)</b>	<b>% of Total Through Revenues</b>
Local	\$ 4.1	0%
Originate/Deliver	147.7	16%
Receive/Terminate	91.2	10%
Receive or Deliver at NS Interchange	334.6	36%
<b>SARR Overhead</b>	<b>359.1</b>	<b>38%</b>
Total	\$936.7	

The reverse is true for Proposal 2, however, as a much larger percentage of stand-alone revenue (77%) would be excluded under the STB’s Proposal 2, compared to 44% of the carload volume (from Table 4 above).

**Table 6: NS Through Revenues for SBRR Traffic that would be Disallowed under EP 715 Proposal 2**

<u>Move/Waybill Type</u>	<b>Revenues (millions)</b>	<b>% of Total Through Revenues<sup>4</sup></b>
Local	\$ 4.1	0%
SBRR Fully Replaces NS	29.6	3%
Overhead		
- Intermodal	138.2	15%
- Other Trainload	51.0	5%
- <b>Carload &amp; Multi-Carload</b>	<b>713.7</b>	<b>76%</b>
Grand Total	936.7	100%

The STB’s two proposals implicate different proportions of carloads and revenues in this case because of intermodal traffic. The intermodal traffic that SunBelt selected for its SARR traffic group represents a large percentage of SARR carloads and a smaller percentage of revenues. As SunBelt posited that its SARR would not originate or terminate many of the intermodal shipments, most intermodal traffic is included in the traffic that would be disallowed under Proposal 1. Because I conservatively treated all intermodal shipments as “trainload” shipments, however, no intermodal traffic is included in the estimate of the traffic that would be disallowed under Proposal 2.

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<sup>4</sup> Does not total 100% due to rounding.

**Summary**

Below is a summary of the impact of each of the two proposals, in terms of the traffic volume and revenue that would be excluded from Sunbelt's selected traffic group.

**Table 7: Summary of the Volume and Revenue Reductions under Each EP 715 Proposal**

	<b>Proposal 1</b>	<b>Proposal 2</b>
<b>Units</b>	-63%	-44%
<b>Revenue</b>	-38%	-76%

**VERIFICATION**

I Robert O. Fisher, hereby verify that, to the best of my knowledge and ability, the foregoing statement and calculations are true and correct. I further certify that I am qualified and authorized to file this statement.

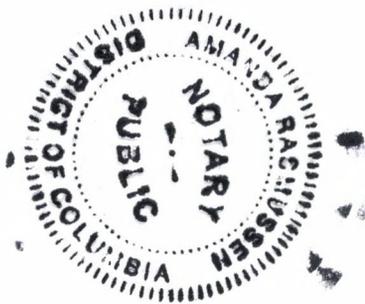
*Robert O. Fisher*

Robert O. Fisher

Sworn and subscribed to me this  
21<sup>st</sup> day of September, 2012

*[Signature]*

Notary Public for the District of Columbia



## ATTACHMENT A

### Rob Fisher

Senior Director – Economic Consulting

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#### Education

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BS from School of  
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**Rob Fisher** is a senior director in the Network Industries Strategies group of the FTI Economic Consulting practice and is based in Washington, D.C. Mr. Fisher provides financial and economic consulting services to the transportation, energy and telecommunications industries.

Mr. Fisher has developed expert testimony for railroad clients in litigation disputes involving the delivery of large coal shipments to energy customers. He also has directed financial analysis to demonstrate the reasonableness of railroad rates before the Surface Transportation Board, including leading the analysis for the first small-shipper case before the Board.

In addition, Mr. Fisher has supported a consortium of manufacturers to gain anti-leakage provisions in the pending greenhouse gas legislation. His report, which measured the energy and trade intensity and the emissions of each industry, has been entered into Congressional testimony.

Prior to joining FTI, Mr. Fisher worked for two technology companies, most recently as Vice President of Strategic Marketing, where he held P&L responsibility for the company's largest product. Before that, he spent 10 years as a strategy consultant, working with dozens of telecom clients on financial analysis, marketing strategy and operational improvement.

Mr. Fisher holds an M.B.A. (with distinction) from the University of Michigan and a B.S. from the School of Foreign Service at Georgetown University.

### TESTIMONY

#### Surface Transportation Board

May 7, 2010 Docket No. 42113 Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company, Joint Reply Evidence of BNSF Railway Company and Union Pacific Railroad Company

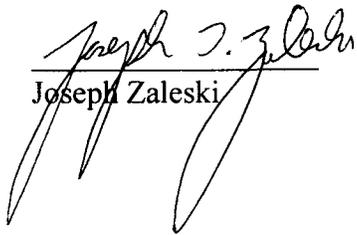
November 10, 2011 Docket No. 42127 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of September 2012, I caused a copy of the foregoing Norfolk Southern Railway Company's Motion to Hold Case in Abeyance Pending Completion of Rulemaking to be served by email and U.S. Mail upon:

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

  
\_\_\_\_\_  
Joseph Zaleski