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cross-over traffic rules to pending cases,<sup>1</sup> the NS Motion effectively is a petition to reconsider the *EP715* decision and should be held to the standards of such petitions. 49 C.F.R. § 1115.3. NS has made no effort to show changed circumstances, new evidence, or material error as required by that regulation, nor has NS presented any other compelling reason why the Board should reconsider its determination in *EP715*.

I. **SUMMARY OF ARGUMENT.**

The Board should deny the NS Motion to hold SunBelt's rate case in abeyance pending completion of the *EP715* rulemaking. The Board explicitly and soundly declined to apply any new cross-over traffic limitations or revenue allocation methodology that it might adopt in *EP715* to pending cases, including SunBelt's case, on the basis of fairness to the complainants.

In Part II, SunBelt explains why that determination was sound. Based upon current SAC standards, SunBelt already has spent more than a year and several million dollars developing Opening Evidence that it filed on August 1, 2012. The Board's proposed changes in *EP715* would require SunBelt to revisit every major facet of its SAC evidence, lengthen this proceeding by more than a year, and cost SunBelt several million more dollars. When a party has detrimentally relied upon the established legal regime, and planned its activities accordingly, the law disfavors retroactive modification or rescission of regulations. Retroactivity occurs when a new regulation is substantively inconsistent with a prior regulation. A rule also operates retroactively when it adversely affects a party's prospects for success on the merits of its claim. Because placing limits upon cross-over traffic is both inconsistent with long-established SAC rules and could adversely affect SunBelt's prospects for success on the merits, the Board should not apply such limits to SunBelt's pending case.

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<sup>1</sup> See *EP715*, pp. 17, n. 11 ("We do not propose to apply any new limitation...to any pending rate dispute that was filed with the agency before this decision was served."), 18 ("We therefore seek public comment on whether we should adopt this modification to ATC for use in all *future* SAC...proceedings...." [italics added]).

In Part III, SunBelt challenges multiple NS assertions that SunBelt has made excessive and abusive use of cross-over traffic in its Opening Evidence. First, SunBelt has used cross-over traffic consistent with the well-established purpose of making the SAC process more manageable and practicable. Second, SunBelt has not made proportionately greater use of cross-over traffic than most prior SAC complainants. Finally, SunBelt's Stand-Alone Railroad ("SARR") handles *less than 1%* of the "hook-and-haul" cross-over traffic that has concerned the Board in *EP715*.

In Part IV, SunBelt responds to the NS arguments for a stay based on an uncertain cross-over revenue allocation methodology. First, SunBelt shows that, in *EP715*, the Board clearly stated its intent to apply Modified-ATC<sup>2</sup> to pending cases, and thus there is no uncertainty. Second, SunBelt refutes the NS argument that, if the Board does not stay this case, it must apply Original-ATC because it did not use formal rulemaking procedures to adopt Modified-ATC. Because the refinements of Modified-ATC merely fulfilled the original intent and purpose of Original-ATC by addressing an unanticipated scenario, it was an interpretative rule that does not require formal rulemaking. Finally, SunBelt demonstrates that the foregoing debate is irrelevant because the difference in cross-over revenue allocations produced by Original-ATC, Modified-ATC, and Alternate-ATC are minor and do not affect the outcome of SunBelt's SAC analysis.

In Part V, SunBelt responds to the NS claims that allowing this case to proceed would be duplicative, wasteful, and create inconsistent rules. This simply is not true for all of the foregoing reasons. It would only be wasteful and duplicative to the extent that NS ignores the Board's clearly-stated intent not to apply the *EP715* rulemaking to pending cases. Although NS may choose to make wasteful and duplicative arguments, the Board should not be influenced by those threats.

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<sup>2</sup> The NS Motion, at 1, note 1, refers to this as the "Amended-ATC Methodology." However, because the Board's decisions refer to it as "Modified ATC," SunBelt adheres to the Board's chosen nomenclature.

II. **THE BOARD REASONABLY DECIDED NOT TO APPLY ANY CROSS-OVER TRAFFIC RULES ADOPTED IN EP715 TO PENDING CASES.**

NS spends much of its Motion arguing that the Board “may” apply any new cross-over traffic rules adopted in *EP715* to pending cases, such as this one. But that is not really the issue. The issues are whether the Board has in fact elected to apply its proposed cross-over traffic rules to pending cases, and if so, whether it should reconsider that decision. The answer to the first question is an unequivocal “yes,” and the answer to the second question is an unequivocal “no.”

A. **The Board Explicitly Declined To Apply Any Cross-Over Traffic Rules Adopted In EP715 To Pending Cases**

The Board expressly decided not to apply any new cross-over traffic rules adopted in *EP715* to pending cases. In the *EP715* Notice, the Board stated that “[w]e do not propose to apply any new limitation...to any pending rate dispute that was filed with the agency before this decision was served.” *EP715* at 17, n. 11. The Board reached the same conclusion as to any new methodology for allocating cross-over revenue, on page 18, when it asked for public comment “on whether we should adopt this modification to ATC for use in all *future* SAC... proceedings...” [italics added] NS erroneously contends that the foregoing statements were only “preliminary” determinations, upon which the Board has solicited public comment. Motion at 12-13. That contention stretches the bounds of credulity.

If the Board were considering whether to apply proposed cross-over rules to pending cases, it would have stayed those cases itself, until that determination was made, in order to avoid the potentially unnecessary waste of resources. For example, when the Board first proposed the “Average Total Cost,” or “ATC,” methodology for allocating cross-over revenue in 2006, it explicitly suspended the procedural schedule in one case and held the schedules of two other proceedings in abeyance, while inviting comment on “whether or to what extent it would be inequitable to apply the changes proposed herein, or parts thereof, to their pending cases.”

*Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 2 (served Feb. 27, 2006) (“*Major Issues NPRM*”). In addition, the Board explicitly stated its intent to apply whatever new methodology it might adopt to pending cases and invited comment upon that proposal. *Id.* Finally, the Board declared that “[t]he procedural schedule for this rulemaking proceeding will be expedited in the interest of fairness to the parties in the pending cases.” *Id.*, slip op. at 3.<sup>3</sup> In *EP715*, the Board has taken none of these actions precisely because it has decided not to apply any newly-adopted cross-over traffic rules to pending cases.<sup>4</sup>

**B. Retroactive Application To SunBelt Of Any Cross-Over Traffic Rules Adopted in EP715 Would Be Unfair and Highly Prejudicial.**

The SAC methodology is dauntingly complex, long, and expensive. When the Board’s *Coal Rate Guidelines* decision<sup>5</sup> was affirmed on appeal, these concerns were clearly on the mind of the Court. In a concurring opinion, Judge Becker cautioned:

Although I join the majority in upholding the Commission’s adoption of Stand Alone Cost modeling within its guidelines, I also write separately to identify the serious problems that I see developing if the Commission does not effectively minimize the costs incurred by shippers in challenging the carrier’s rates (either through a Stand Alone Cost model or through any other Constrained Market Pricing constraint) and maximize the discovery available to them when doing so. The shippers argue forcefully that rate challenges will be frustrated by the complexity of the Commission’s inhospitable rules and procedures. Because I agree that rules and regulation that produce such futility would violate the shipper’s statutory right to challenge rates, I write to note my belief that future courts may have to set aside the rules if the Commission does not resolve these problems.

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<sup>3</sup> NS erroneously asserts that the *Major Issues* rulemaking was not expedited. Motion at 3.

<sup>4</sup> The Board’s recent decision in Docket No. 42123, *M&G Polymers USA, LLC v. CSX Transp., Inc.* (served Sept. 27, 2012) confirms that it will not apply new cross-over rules to pending cases. That proceeding is one of five pending cases. In that decision, the Board concluded that CSXT possesses market dominance over 60 of 69 issue movements and directed the parties “to confer and submit a proposed procedural schedule to govern the rate reasonableness phase of this proceeding.” *Id.*, slip op. at 21. If the Board intended to apply cross-over rules adopted in the *EP715* proceeding, it would have held the proceeding in abeyance pending completion of the rulemaking and then asked for a proposed schedule. The Board did not even mention *EP715* in its decision.

<sup>5</sup> *Coal Rate Guidelines—Nationwide*, 1 I.C.C.2d 520 (1985).

*Consolidated Rail Corp. v. U.S.*, 812 F.2d 1444, 1457-58 (3rd Cir. 1987) (Becker, J. concurring in part and dissenting in part). The SAC process has only become more complex since Judge Becker expressed those concerns. The prejudice to SunBelt, which already has expended substantial time and money to bring this case and submit opening evidence in substantial reliance upon well-established precedent concerning the use of cross-over traffic, would be incalculable. In recognition of this fact, the Board has justifiably determined not to apply any new cross-over rules adopted in *EP715* to SunBelt's pending rate case.<sup>6</sup>

NS has asked the Board for an open-ended delay to this proceeding for whatever time is needed to complete the *EP715* rulemaking and to apply any new rules to this proceeding. Both the temporal delay and the application of any new limits on cross-over traffic would severely prejudice SunBelt. The Board's decision in *EP715* was a clear acknowledgment of this fact.

SunBelt filed its Complaint over 14 months ago, on July 26, 2011. It made the decision to initiate this proceeding only after an extensive review and evaluation of rate reasonableness pursuant to the existing SAC standards, which reflected decades of agency precedent. Since filing its Complaint, SunBelt has spent millions of dollars to conduct discovery and to develop evidence based upon existing SAC standards. SunBelt already has filed its Opening Evidence, on August 1, 2012, based upon current SAC standards, including those governing the use of cross-over traffic.

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<sup>6</sup> In this Part II.B., SunBelt contends that it would be substantially prejudiced by application of the proposed cross-over traffic limits in *EP715* and by any delay to this case pending the completion of *EP715* as to both cross-over traffic limits and the Alternate-ATC revenue allocation methodology. Although NS contends that SunBelt could not have reasonably relied upon Modified-ATC because the cross-over allocation methodology has been in a state of flux, Motion at 19-22, it makes no such assertion regarding cross-over traffic limitations, which would reverse nearly two decades of precedent. Even in the absence of reliance by SunBelt upon Modified-ATC, the consequences of a delay to this case pending conclusion of *EP715* still would be highly prejudicial for the reasons discussed in this Part II.B. As noted in Part IV.C, below, the small impact of using Alternate-ATC instead of Modified-ATC means that, even if the Board decided to apply Alternate-ATC to pending cases, contrary to what it has concluded in *EP715*, it need not hold those cases in abeyance to do so. For the record, however, SunBelt contends that its use of Modified-ATC was reasonable and proper, which is confirmed by the Board's own references to Modified-ATC, in *EP715* at page 18, as the "current" methodology.

If the STB were to make significant changes to the SAC methodology in *EP715* and apply those changes to this proceeding, most of SunBelt's time and effort to prepare and submit its Opening Evidence would be rendered nugatory. The changes regarding cross-over traffic currently proposed in *EP715* would require SunBelt to revisit every major facet of its SAC evidence, such as network configuration, investment, traffic group, and operations. *Crowley V.S. at 2*. SunBelt would incur substantial additional time and money on top of the full year and several million dollars already spent.

The temporal delay also would be financially costly to SunBelt. It is a reasonable presumption that this case would be delayed by approximately one year while awaiting conclusion of the *EP715* rulemaking followed by *at least* another six months to file supplemental opening evidence and to return to the current procedural status (*e.g.* 2 months past the filing of Opening Evidence), during which time SunBelt's cost for just the opportunity to pursue rate relief is growing. Because SunBelt must pay a tariff rate that is higher than the contract rates that SunBelt elected to forego in order to pursue this complaint, SunBelt has been paying, and will continue to pay, this tariff premium for the duration of this proceeding. Although SunBelt will receive reparations for any overpayments at the conclusion of this proceeding to the extent the Board finds the challenged tariff rate unreasonable, it will not receive *any* of this money back if the rate is not determined to be unreasonable. Consequently, the longer this case takes to reach conclusion, the more money that SunBelt must "ante" just for the opportunity to pursue regulatory relief. SunBelt estimates that this "ante" is upwards of \$4 million annually. NS, in contrast, has no similar "ante." Despite the increasing amount of money that SunBelt must place at risk over time, its potential monetary recovery over the 10 year rate prescription period remains unchanged.

NS also misguidedly attempts to justify a stay of this case because the Board had stayed the *Western Fuels* rate case<sup>7</sup> during the *Major Issues* rulemaking.<sup>8</sup> Motion at 32-33. In fact, the *Western Fuels* odyssey makes it the poster child for why the Board should not take the same action in this proceeding.

The history of the *Western Fuels* case is described in the following bullets:

- The complaint was filed in October 2004.
- The Board stayed the case in February 2006 after the parties had nearly completed the submission of evidence.
- Both parties expended significant resources through three rounds of comments in the *Major Issues* rulemaking.
- Both parties resubmitted all three rounds of SAC evidence based upon the new rules adopted in *Major Issues*.
- When the Board issued a final decision in *Western Fuels II* in September 2007, it denied the complainant any relief, but noted that “WFA argues strenuously, and persuasively, that had it known that the Board would change the revenue allocation methodology for cross-over traffic, it would have offered a different case.” *Western Fuels II*, slip op. at 3. Therefore, the Board granted the complainant the option to resubmit its evidence, which then required three more rounds of supplemental evidence. The Board also made a “refinement” to the ATC cross-over revenue allocation methodology that it had adopted in *Major Issues* in order to avoid “an illogical and unintended result.” *Western Fuels II*, slip op. at 14.
- In *Western Fuels III*, served on Feb. 15, 2009, the Board found the challenged rates to be unreasonable. But BNSF successfully appealed that decision based upon the refinement that the Board had made to the ATC methodology originally adopted in *Major Issues*.
- Most recently, in *Western Fuels IV*, which was served in June 2012, the STB reaffirmed *Western Fuels III* on remand. However, BNSF once again has appealed that decision.

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<sup>7</sup> STB Docket No. 42088, *Western Fuels Ass'n v. BNSF Railway Co. Western Fuels I*, which stayed the case, was served on Feb. 27, 2006; *Western Fuels II*, which denied relief under the newly-adopted ATC methodology for allocating cross-over revenue, was served on Sept. 10, 2007; *Western Fuels III*, which granted relief after permitting the complainant to resubmit evidence, was served on Feb. 17, 2009; and *Western Fuels IV*, which reaffirmed *Western Fuels III* after a judicial remand, was served on June 15, 2012.

<sup>8</sup> STB Ex Parte No. 657, *Major Issues in Rail Rate Cases* (served Feb. 27, 2006).

Consequently, eight years after Western Fuels filed its Complaint, and six and a half years after the STB held the case in abeyance pending the *Major Issues* rulemaking, Western Fuels still does not have a final non-appealable decision due *solely* to unresolved “fall-out” from the *Major Issues* rulemaking. If the Board back in 2006 had excluded pending rate cases from the *Major Issues* rulemaking, just as it has decided to do in *EP715*, Western Fuels would have been spared this arduous ordeal, which serves no purpose except to punish shippers who have expended substantial time, money and effort to seek regulatory remedies based upon established rate reasonableness standards only to have the Board change the rules in the middle of the process.

The Board clearly applied the lessons learned from the *Western Fuels* ordeal in *EP715*, at page 17, note 11, when it declined to apply any new limitation on cross-over traffic to pending rate cases because “[w]e do not believe it would be fair to those complainants who relied on our prior precedent in litigating those cases.” The Board reached the same conclusion as to any new methodology for allocating cross-over revenue, on page 18, when it asked for public comment “on whether we should adopt this modification to ATC for use in all *future* SAC... proceedings....” [italics added] The foregoing discussion of the extreme prejudice to SunBelt if the Board were to grant the NS Motion shows the wisdom of those conclusions. NS has not given the Board a compelling reason to reconsider that decision.

Finally, there is a strong practical consideration that the Board cannot ignore. The Board currently has five pending SAC rate cases. If all five were held in abeyance pending completion of *EP715*, all five would be restarting at exactly the same point in the procedural schedule (*e.g.*, the filing of new opening evidence). In four of the five cases, counsel for the complainants and the defendants are the same, and the consultants are the same in all five cases. Of even greater

significance, the same STB must review, analyze, and decide all five cases. Preparing evidence and deciding these complex cases on parallel tracks would tax the resources of all the parties and the Board to the breaking point. To resolve this issue, these cases would have to be staggered over the course of a year or more, resulting in delays that would be far longer than just the time needed to conclude *EP715*. Such lengthy additional delays would contravene the national rail transportation policy “to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under [the ICC Termination Act].” 49 U.S.C. § 10101(15).

C. **The Board Exercised Reasonable Discretion In Deciding Not To Apply Any New Cross-Over Traffic Rules To Pending Cases.**

For all of its discussion of cases *permitting* an agency to apply a new rule retroactively, NS does not cite to a single case that *requires* an agency to do so. That is because there is no such requirement. Thus, the Board’s decision not to apply any new cross-over traffic rules adopted in *EP715* to pending cases is discretionary.

The Board’s decision reflects a balancing of the equities. Both SunBelt and NS submit opposing claims of unfairness. The Board has concluded that the equities favor SunBelt’s position. This is precisely the sort of judgment that the Board is designated by Congress to make. *See, e.g., Alabama Power Co. v. ICC*, 852 F.2d 1361, 1371 (D.C. Cir. 1988) (affirming ICC decision not to apply a correction to the RCAF retroactively after balancing the inequities to shippers and carriers); *Methodist Hospital of Sacramento v. Shalala*, 38 F.3d. 1225, 1235 (D.C. Cir. 1994) (affirming HHS refusal to apply wage index revisions retroactively as a reasonable choice between competing values).

If the Board were to apply new cross-over rules adopted in *EP715* to pending cases, that decision would be subject to stricter constraints than its decision not to do so. Such a decision could be reversed “if ‘the ill effect of the retroactive application’ of the rule outweighs the

‘mischief’ of frustrating the interests the rule promotes.” *Maxcell Telecon Plus, Inc. v. FCC*, 815 F.2d 1551, 1554-55 (D.C. Cir. 1987), quoting *SEC v. Chenery Corp.* 332 U.S. 194 (1947). The “ill effect” of retroactive application requires the agency to consider whether the affected parties have detrimentally relied on the established legal regime. See, e.g., *Consolidated Edison Company v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) (“A new rule may be applied retroactively to the parties in an ongoing adjudication, so long as the parties...are given notice and an opportunity to offer evidence bearing on the new standard...and the affected parties have not detrimentally relied on the established legal regime...”); *Retail, Wholesale & Dept. Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (adopting five factor test for deciding whether new rules adopted in an adjudication should *not* be applied retroactively).<sup>9</sup>

The case law in the preceding paragraph—and all the cases cited by NS—address retroactive application of new rules adopted in an adjudicatory proceeding, as opposed to a notice and comment rulemaking. This distinction is instructive. While retroactive application of new rules is more commonly accepted in adjudications, it is less common in formal rulemakings. New rules adopted in an Administrative Procedure Act (“APA”) notice and comment rulemaking are presumed to have only future effect. *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 (D.C. Cir. 1987) (“[T]he [APA] generally contemplates that when an agency proceeds by adjudication, it will apply its ruling to the case at hand; when on the other hand, it employs rulemaking procedures, its orders ordinarily are to have only prospective effect.”), citing 5 U.S.C. 551 (4)-(7), 553, 554.

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<sup>9</sup> The five factor test, which is applied to determine if a new rule adopted in an adjudication should not be applied retroactively, would weigh heavily against retroactive application. Specifically, (1) the use of cross-over traffic is not a case of first impression; (2) limits upon the use of cross-over traffic would constitute an abrupt departure from well-established practice; (3) SunBelt has relied extensively upon the current rule in pursuing its claims and developing its evidence; (4) the burden upon SunBelt in terms of time and expense would be enormous; and (5) there is no compelling statutory interest in applying new cross-over traffic limits to this case despite SunBelt’s substantial reliance upon the current standard.

Indeed, the first rule of statutory construction, which also applies to regulations, is that “legislation must be considered as addressed to the future, not to the past....” *Greene v. U.S.*, 376 U.S. 149, 160 (1964), quoting *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199.<sup>10</sup> As noted by the D.C. Circuit:

[C]ourts have long hesitated to permit retroactive rulemaking and have noted its troubling nature. When parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief.

*Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 745-746 (D.C. Cir. 1986).

In *National Mining Assoc. v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002), the D.C. Circuit rejected the Department of Labor’s decision to apply a new rule to pending claims by coal miners for disability benefits. According to the court, determining whether a rule operates retroactively requires the following inquiry:

Rather than rely on “procedural” and “substantive” labels, a court must “ask whether the [regulation] operates retroactively.” [*Martin v. Hadix*, 527 U.S. 343, 359 (1999)] This inquiry involves a “commonsense, functional judgment about ‘whether the new provision attaches new legal consequences to events completed before its enactment.’” *Id.* at 357-58, 119 S.Ct. 1998 (quoting *Landgraff*, 511 U.S. at 270, 114 S.Ct. 1483). Thus, where a rule “changes the law in a way that adversely affects [a party’s] prospects for success on the merits on the claim,” it may operate retroactively even if designated “procedural” by [the agency]. *Ibrahim v. District of Columbia*, 208 F.3d 1032, 1036 (D.C. Cir. 2000).

*Id.* at 859-60. Furthermore, “[i]f a new regulation is substantively inconsistent with a prior regulation, prior agency practice, or any Court of Appeals decision rejecting a prior regulation or agency practice, it is retroactive as applied to pending claims.” *Id.* at 860.

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<sup>10</sup> In *Greene*, the Supreme Court rejected the application of a new regulation promulgated by the Department of Defense to a pending claim that was filed when the prior regulation, since repealed, was effective. This would be analogous to applying rules adopted in *EP715* to pending rate cases.

There can be no doubt that the limitations upon the use of cross-over traffic proposed in *EP715* are inconsistent with prior agency practice and would change the law in a way that adversely affects a party's prospects for success on the merits. The Board first approved the use of cross-over traffic in *Nevada Power II*,<sup>11</sup> in 1994, because excluding cross-over traffic "would weaken the SAC test" by "depriv[ing] the SARR of the ability to take advantage of the same economies of scale, scope and density that the incumbents enjoy over the identical route of movement."<sup>12</sup> In *EP715*, the Board now is proposing to impose limits upon cross-over traffic that would in fact deprive the SARR of the same economies enjoyed by the incumbent, which could adversely affect a complainant's prospects for success on the merits. This would be the very definition of a "retroactive" rule if the Board were to apply such limits to SunBelt.

The APA also mandates that a person involved in an agency adjudication "shall be timely informed of...the...law asserted." 5 U.S.C. § 554(b)(3). SunBelt's case has been ongoing for over 14 months, during which time SunBelt has developed its strategy, engaged in discovery, hired numerous experts, prepared and filed its Opening Evidence, and spent millions on legal and consultant fees. These actions were all taken based upon the existing SAC legal regime, including rules governing the use of cross-over traffic that have been well-established for nearly two decades. To impose upon SunBelt any new limits upon cross-over traffic that might result from *EP715* would cause great mischief by adding more than a year to the procedural schedule, requiring a "re-do" of SunBelt's Opening Evidence, potentially requiring additional discovery, and adding millions to the legal and consultant fees SunBelt must pay.

Thus, not only is the Board *permitted* to apply any new cross-over rules only prospectively (a fact that NS does not contest), it has compelling reasons for doing so that are

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<sup>11</sup> *Bituminous Coal—Hiawatha, UT to Moapa, NV*, 10 I.C.C.2d 259, 265, n. 12 (1994).

<sup>12</sup> See *Crowley V.S.* at 3-7 for a full discussion of *Nevada Power II* and the essential nature of cross-over traffic to the SAC analysis.

consistent with precedent that prohibits retroactive application of a new rule. When a party has detrimentally relied upon the established legal regime, and planned its activities accordingly, the law disfavors retroactive modification or rescission of regulations. Because placing limits upon cross-over traffic is both inconsistent with long-established SAC rules and could adversely affect SunBelt's prospects for success on the merits, the Board reasonably decided not to apply such limits to SunBelt's pending case. Therefore, the Board's decision not to apply any new cross-over traffic rules that may be adopted in *EP715*, besides being fundamentally fair, is legally proper and factually defensible.

III. **SUNBELT HAS NOT MADE EXCESSIVE OR ABUSIVE USE OF CROSS-OVER TRAFFIC.**

In a transparent effort to allay the Board's concern over the substantial prejudice of a stay to SunBelt, NS claims that SunBelt "heavily relies on the very types of crossover traffic the Board proposes to disallow" in *EP715*. Motion at 1, 7. That simply is not true. In this section, SunBelt shows that:

1. SunBelt has used cross-over traffic consistent with the objective to make the SAC process more manageable and practical;
2. SunBelt has not used proportionately more cross-over traffic than other recent complainants; and
3. the SBRR presents few of the concerns raised in *EP715* regarding cross-over traffic.

A. **SunBelt Has Used Cross-Over Traffic Consistent With STB Precedent.**

Cross-over traffic has been an essential tool in making the SAC analysis manageable for nearly 20 years. The Board first approved the use of cross-over traffic in *Nevada Power II* because excluding cross-over traffic "would weaken the SAC test" by "depriv[ing] the SARR of the ability to take advantage of the same economies of scale, scope and density that the

incumbents enjoy over the identical route of movement.”<sup>13</sup> SunBelt has used cross-over traffic in its SAC analysis consistent with the long line of STB precedent on this issue.<sup>14</sup>

In 2004, the STB, citing to this long line of precedent, confirmed that “[t]he use of cross-over traffic to simplify the SAC presentation is a well-established practice.” *Pub. Serv. Co. of Colo. v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 589, 601 (2004) (“*Xcel*”) [citations omitted] [underline added]. That was more than 9 years ago during which the practice has become even more entrenched. The STB pointed to multiple reasons why cross-over traffic is both necessary and desirable:

- “Permitting [the complainant] to use cross-over traffic in its SAC presentation... keeps the SAC analysis properly focused on the core inquiry—whether the defendant railroad is earning adequate revenues on the portion of its rail system that serves the complaining shipper.” *Id.*
- “Creating a SARR to serve the same traffic group without using the cross-over traffic device would dramatically enlarge the geographic scope of a SARR” by requiring a complainant to build a SARR capable of handling the cross-over traffic from its origin to its destination, thus including far more facilities than those needed to handle the issue movement. *Id.*
- Because each such extension of the SARR to handle one group of cross-over traffic from origin to destination would create a new group of cross-over traffic in order “to generate the same economies of density” that the defendant railroad enjoys over the extended SARR, “[t]he cascading analysis could result eventually in a complainant having to replicate almost all of [the defendant’s] system. The scope and complexity of the proceeding would expand exponentially.” *Id.* at 602.
- “The use of cross-over traffic thus provides a reasonable measure of simplification that allows SAC presentations to be more manageable. Curtailing the geographic scope of the SARR greatly simplifies the operating plans that must be developed, thus limiting the complexity of what is nevertheless still a dauntingly large and detailed task. Without cross-over traffic, captive shippers might be deprived of a practicable means by which to present their rate complaints to the agency.” *Id.* at 603.

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<sup>13</sup> *Nevada Power II*, 10 I.C.C.2d at 265, n. 12.

<sup>14</sup> See, e.g., STB Docket No. 42071, *Otter Tail Power Company v. BNSF Railway Company*, slip op. at 13 (served January 27, 2006) (“Accordingly, we affirm the ability of a complainant to use cross-over traffic, *which is now a bedrock feature of the SAC test*” [emphasis added]).

The SBRR, which is 581 miles long, would be even larger and more complex if the Board were to require SunBelt to include more facilities than those needed to handle the issue movements. Moreover, as the Board noted in *Xcel*, at 602, each expansion of the SARR to include the facilities needed to handle one group of cross-over traffic would create a new group of cross-over traffic requiring another expansion, until the SARR has replicated the entire NS network. When the Board described the objective of cross-over traffic as “limiting the complexity of what is nevertheless still a dauntingly large and detailed task,” *Xcel* at 603, it was referring to a SARR that had only 396.2 route miles. *Id.* at 632. The SBRR, which is nearly 190 miles longer, presents an even more compelling argument for the use of cross-over traffic.

SunBelt has used cross-over traffic to accomplish the very objectives that underlie the Board’s long-established precedent permitting such traffic. *Crowley V.S.* at 3-7. SunBelt is trying to limit the complexity of an already “dauntingly large and detailed task.” Without the cross-over traffic device, SunBelt could be deprived of a practicable means by which to present its rate complaint to the Board.

B. **SunBelt Has Not Used Proportionately More Cross-Over Traffic Than Other Recent Complainants.**

SunBelt has not used more cross-over traffic than any prior SAC cases. SunBelt’s Opening Evidence shows that 93% of the traffic on the SBRR is cross-over traffic. *Crowley V.S.* at 8. SunBelt Witness Crowley was able to ascertain from publicly available data the percentage of cross-over traffic in 12 other SAC cases. *Id.*, Ex. 1. At least four of those SAC cases used cross-over traffic constituting 90-99% of total traffic. *Id.* In 9 of the 12 cases evaluated, cross-over traffic comprised at least 74% of total traffic. *Id.* Thus, contrary to NS’s claims, the amount of cross-over traffic used by SunBelt is on par with most prior SAC cases.

Just like prior complainants, SunBelt has used cross-over traffic as intended by the STB to make the SAC process more manageable and practical.

C. **The SBRR Does Not Implicate The Concerns With Cross-Over Traffic Expressed in EP715.**

NS inaccurately accuses SunBelt of pursuing “a case founded on the very type of cross-over traffic that the Board’s [EP715] rulemaking has identified as problematic and distorting.”

Motion at 7. In fact, nothing could be further from the truth.

In EP715, the Board explained that its new-found concern with cross-over traffic has arisen due to a shift in recent cases from cross-over traffic that is predominantly trainload service to cross-over traffic that includes large amounts of carload and multi-carload movements.<sup>15</sup> The Board noted that:

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. However when it comes time to allocate revenue to the facilities replicated by the SARR, URCS treats those movements as single car or multi-car movements, rather than the more efficient, lower cost trainload movements that they would be. As a result, the SAC analysis *appears* to allocate more revenue to the facilities replicated by the SARR than is warranted.

EP715, slip op. at 16 [italics added].<sup>16</sup> The Board has proposed new limits upon the use of cross-over traffic, because of this perceived “disconnect between the hypothetical cost of providing service to these movements over the segments replicated by the SARR and the revenue allocated

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<sup>15</sup> EP715, slip op. at 16 and n. 10

<sup>16</sup> Because the Board has suggested only that there “appears” to be a bias, NS’s attempt to characterize the proposed rules in EP715 as a *fait accompli* could not be further from the truth. Motion at 1-2, 24. It is entirely possible that no new rules will result from EP715. See, e.g., *Interpretation of the Term “Contract” in 49 U.S.C. 10709*, STB Ex Parte No. 669 (served March 12, 2008) (declining to adopt previously proposed rules).

to those facilities.” *Id.* According to the Board, “[w]ithout a means of correcting or minimizing the bias..., we need to address the use of cross-over traffic in Full-SAC cases.” *Id.*

Because the Board has expressed concern with the nature of cross-over traffic, not the amount, handled by a SARR, NS’s focus upon how much cross-over traffic the SBRR handles is irrelevant. Specifically, the Board is concerned with SARRs that construct a short segment over a high-density line and primarily serve as a bridge carrier that handles most of its traffic (a significant portion of which is single car and multiple car traffic) in hook-and-haul overhead trainload service, leaving the residual incumbent to perform more costly terminal activities. *Crowley V.S.* at 9. The SBRR handles very little cross-over traffic of this type that underlies the concerns expressed by the Board in *EP715*.

SunBelt’s Opening Evidence shows that less than 1% of the SBRR’s cross-over traffic constitutes the type of “hook-an-haul overhead trainload service” traffic that concerned the Board in *EP715*. *Crowley V.S.* at 9-10. This is because the SBRR performs inter- and intra-train switching on most of its overhead cross-over traffic at Birmingham, AL, and other yards. This means that the SBRR incurs comparable costs to those incurred by NS for intermediate handling. Furthermore, much of the SBRR’s cross-over traffic is interchanged to western railroads – not NS – at New Orleans, and therefore is not overhead traffic interchanged to the residual incumbent on both ends. *Id.* In other words, the SBRR cross-over traffic is not predominantly hook-and-haul overhead movements. For other cross-over movements where the SBRR acts only as a bridge carrier, NS also is only a bridge carrier, but over a larger geographic footprint, which means that neither the SBRR nor the residual NS provides more costly terminal services. *Id.* at 10. Rather, they are both providing hook-and-haul service.

NS's contradictory claims are based upon the analysis of Robert O. Fisher. Mr. Fisher's analysis is flawed in two respects.

First, Mr. Fisher's analysis is based solely upon applying the Board's "strawman" proposals in *EP715*. The Board presented those proposals as starting points for comments upon how to limit single and multi-car cross-over traffic when the SARR primarily handles such traffic in hook-and-haul trains, leaving the residual incumbent to perform more costly terminal activities. Even a cursory review of the Board's proposed limits, however, reveals that those limits would have a far broader impact than the alleged problem that they are intended to address. The SBRR is a prime example because, as noted above, it does perform costly and time-consuming intermediate switching activity on nearly all of its cross-over traffic. *Crowley V.S.* at 11-12. The SBRR is not engaged in the hook-and-haul service that concerns the Board; rather, it engages in the same types of costly terminal activities as the residual incumbent. *Id.* Consequently, there is no justification for excluding that type of cross-over traffic.

Second, Mr. Fisher has not properly applied the Board's first strawman proposal to identify SBRR cross-over traffic that would be excluded if that proposal were adopted. He claims that the first proposal would eliminate 63% of the SBRR volume and 38% of net revenue. *Fisher V.S.*, Tables 3 and 5. However, Mr. Fisher improperly excluded all of the traffic that NS interchanges with the Kansas City Southern Railroad ("KCS") at Meridian, MS, on the inaccurate assumption that NS does not interchange with KCS at Meridian. *Id.*, p. 2, n. 3. As Mr. Crowley demonstrates, however, Mr. Fisher's assumption is directly contradicted by the NS traffic data produced to SunBelt in discovery, which shows KCS as the handling railroad for all car events reported west of Meridian for the SunBelt cross-over traffic. *Crowley V.S.* at 12-13. Correcting for this error, the Board's first proposal (which is overbroad for the reasons stated in

the preceding paragraph) would only exclude 36% of the SBRR volume and 22% of net revenue. *Id.* at 13.

Assuming, *arguendo*, that the Board has identified a genuine bias from certain types of cross-over traffic, only a small portion of the SBRR's cross-over traffic is the type that creates this alleged bias.<sup>17</sup> Therefore, NS's contention that the SBRR is "founded on the very types of cross-over traffic that the Board's rulemaking has identified as problematic and distorting," Motion at 7, is itself an inaccurate distortion designed to mislead the Board into reversing its decision not to apply any limits upon cross-over traffic to pending cases.

IV. **MODIFIED ATC IS THE APPLICABLE STANDARD FOR ALLOCATING CROSS-OVER REVENUE IN THIS CASE.**

In a strained effort to find additional support for its Motion, NS attempts to cast doubt as to whether the applicable methodology for allocating cross-over revenue is the "Original-ATC" adopted in *Major Issues*, the "Modified-ATC" adopted in *Western Fuels II* and confirmed on remand in *Western Fuels IV*, or the "Alternate-ATC" proposed in *EP715*. First, NS attempts to conjure up doubt, based upon the Board's recent decisions in *Western Fuels* and *EP715*, as to whether the Board intends to apply the Modified-ATC approach that SunBelt has used in its Opening Evidence. Second, NS asserts that, if the Board declines to stay this proceeding until the completion of the *EP715* rulemaking, the Board must use the Original-ATC approach, because Modified-ATC was improperly adopted in an adjudicatory, rather than a rulemaking, proceeding. Therefore, NS urges the Board to side-step this issue by staying this case until the

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<sup>17</sup> As numerous parties undoubtedly will show in *EP715*, the Board's current rules for cross-over traffic do not create much, if any, bias because the various revenue allocation methodologies adopted by the Board over the years have accounted for the costs of originating and terminating cross-over traffic. Instead, the Board's proposals would create a significant anti-shipper bias. In the absence of any bias that cannot be addressed through the cross-over revenue allocation methodology, there is no basis for adopting any limits upon cross-over traffic. This provides yet another reason to deny the NS Motion.

conclusion of *EP715* so that the Board can apply Alternate-ATC or whatever other revenue allocation methodology may be promulgated through *EP715*.

There is no doubt, however, that the applicable methodology in this proceeding is the Modified-ATC approach. The Board clearly has expressed its intent to apply Modified-ATC to pending cases and to apply any replacement methodology adopted in *EP715* to future cases. Moreover, contrary to NS's assertions, the Board properly adopted Modified-ATC in an adjudicatory, rather than a rulemaking, proceeding. Finally, even if there were a reasonable debate over which cross-over revenue allocation methodology applies to SunBelt's case, the answer would make very little difference, if any, to the outcome.

A. **The STB Has Expressed Its Clear Intent To Apply Modified-ATC To Pending Rate Cases.**

NS claims that the Board has not expressed a clear intent as to the currently applicable ATC methodology or whether it intends to apply any new ATC methodology adopted in *EP715* to pending cases. Motion at 14-19. Although NS attempts to find doubt in the *Western Fuels II and IV* decisions and in *EP715*, the Board in fact has clearly stated that Modified-ATC is the current methodology and that it intends to apply Modified-ATC to all pending rate cases. In *EP715*, at page 18, the Board twice refers to its "*current modified ATC approach.*" [italics added] In the very same paragraph, the Board requests comments on "whether we should adopt this modification to ATC for use in all *future SAC...proceedings...*" [italics added]. NS's attempt to portray the Board's intent as unclear flies directly in the face of these explicit statements. Motion at 16, 17.

NS also suggests that the Board should stay this proceeding because the reconfirmation of Modified-ATC in *Western Fuels IV* "is vulnerable to reversal on appeal." Motion at 16-17. Of course, this is merely NS's opinion, which the Board presumably does not share because it

would not intentionally issue an infirm decision. Furthermore, if the Board were to stay every pending case that shares issues with a prior case that is under appeal, the Board could never decide any case so long as another one was pending appeal; nor could it consider more than one case at a time. It is hard to recall any past SAC decision adverse to a railroad that was not appealed. Thus, given the already long SAC process, cases could be pending for decades if the Board were to adopt NS's rationale.

B. **The STB Properly Adopted Modified-ATC In An Adjudicatory Proceeding.**

In an argument out of left-field, NS asserts that, if the Board denies the NS request for stay, it must apply Original-ATC rather than Modified-ATC to this case because Modified-ATC was not properly adopted via the same notice and comment rulemaking procedures as Original-ATC. Motion at 26-32. This argument has little to do with NS's request for a stay, and seemingly is more appropriate for NS's reply evidence. Nevertheless, the adoption of Modified-ATC in *Western Fuels II* did not require a public rulemaking proceeding because Modified-ATC was a refinement of Original-ATC necessitated by the objectives of both ATC and *Guidelines*. Furthermore, because administrative agencies are permitted, via adjudication, to refine their application of so-called "legislative" or "substantive" rules adopted in rulemaking proceedings, there was nothing improper about the STB's adoption of Modified-ATC in the *Western Fuels* adjudication.

1. **The refinement of ATC did not require notice and comment rulemaking procedures.**

NS tries to make this issue appear cut and dried, that the refinement, which clarified how to apply ATC, was an undisputed amendment of a legislative rule and, therefore, itself a legislative rule requiring adherence to APA procedures. Motion at 28-32. However, the Motion is far off base. The courts have repeatedly found the distinction between legislative rules and

interpretive rules to be “notoriously hazy”<sup>18</sup> and “enshrouded in considerable smog.”<sup>19</sup> The Board’s action in *Western Fuels II* was a reasonable clarification of an existing rule to accomplish the stated goals and intent of ATC; hence, it was a permissible interpretive rule.

The APA does not apply to interpretive rules, procedural rules, policy statements, and certain other rule-related agency actions. 5 U.S.C. § 553(b)(3)(A). In its attempt to anticipate SunBelt’s reply based upon DuPont’s reply to a similar NS motion in Docket No. 42125, NS completely ignores the interpretive rule exception to the APA’s notice and comment rulemaking requirement. NS Motion at 29 & 30 (only partially quoting 5 U.S.C. 553(b)(3)(A)). Nowhere in its Motion does NS acknowledge, much less address, the interpretative rule exception despite that being the focal point of the DuPont reply.

The fundamental question is whether the refinement of ATC in *Western Fuels II* was an amendment of the ATC methodology adopted in *Major Issues* or an interpretation.

A rule does not...become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted. If that were so, no rule could pass as an interpretation of a legislative rule unless it were confined to parroting the rule or replacing the original vagueness with another.

*American Mining Congress*, 995 F.2d at 1112. An interpretive rule can do more than simply paraphrase a legislative rule or statute. “Indeed, a mere paraphrase would hardly be interpretive at all.” *Orengo*, 11 F.3d at 195. Thus, “agencies possess the authority in some instances to clarify...existing rules without issuing a new NPRM and engaging in a new round of notice and comment.” *Sprint Corporation v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003). “Especially in the

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<sup>18</sup> *Orengo Caraballo v. Reich*, 11 F.3d 186, 194-195 (D.C. Cir. 1993) (“*Orengo*”).

<sup>19</sup> *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1108 (D.C. Cir. 1993) (citations omitted) (“*American Mining Congress*”).

course of an adjudication, the agency will give its understanding of the regulations with whose enforcement it is entrusted.” *Orengo*, 11 F.3d at 195.<sup>20</sup>

The Board adopted Original-ATC in the *Major Issues* proceeding, which followed notice and comment rulemaking procedures. The Board commenced *Major Issues* because the evolution and application of the *Coal Rate Guidelines* “have drifted away from what Congress intended in some important respects.” *Major Issues* at 3. The goal when allocating cross-over revenue, as stated by the Board, should be to “ensure that a truncated SAC analysis using cross-over traffic will approximate the outcome of a full SAC analysis.” *Id.* at 24. The Board intended Original-ATC to take account of the economies of scale, scope, and density, principles ignored by the prior Modified Straight Mileage Prorate method. *Id.* at 25. Thus, the fundamental objective of ATC was “to equitably distribute [cross-over] revenues in relation to the cost incurred to generate those revenues....” *Id.*

In the first application of Original-ATC in a specific case, however, the Board encountered a set of facts that it had not contemplated in *Major Issues*. Specifically, the cross-over traffic in that case included “considerable traffic with total revenue either below or barely above variable cost,” which had the practical effect of allocating revenue to the on-SARR segment that would be insufficient even to cover variable costs. *Western Fuels II*, slip op. at 14. This was an “illogical and unintended result” (*id.*) that was contrary to the fundamental ATC

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<sup>20</sup> NS conclusively asserts that Modified-ATC is a legislative rule because it has the “force and effect of law.” Motion at 29. NS appears to have mistakenly interpreted the fact that Modified-ATC may impact the results of a SAC analysis to mean that it is a legislative rule when that fact is actually immaterial. *American Hospital Association v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (“the mere fact that a rule may have a substantial impact does not transform it into a legislative rule”) (quotation omitted). Modified ATC is simply Original-ATC with a refinement regarding the exact portion of revenue to which it applies. NS has ignored voluminous precedent holding that agencies can clarify how their rules apply in order to give effect to the intent and purpose of those rules, as well as clarification warranted by the particular details of an adjudication. Moreover, NS ignores other precedent holding that an agency “pronouncement” other than a regulation adopted in notice-and-comment rulemaking “can, as a practical matter, have a binding effect.” *Appalachian Power Company v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

objective “to equitably distribute [cross-over] revenues in relation to the cost incurred to generate those revenues....” *Major Issues* at 25. In order to avoid this unintended result and fulfill the fundamental objective of ATC, the Board declared that ATC should be applied to the allocation of total revenue contribution rather than total revenue, in order to ensure that each segment received sufficient revenue to at least cover its variable costs before applying ATC.<sup>21</sup> *Id.* (“This refinement is reasonable and consistent with our objective in Major Issues.”) The actual ATC methodology adopted in *Major Issues* did not change, just the revenue to which it was applied.

Because “notice is not required before every clarification or extension of an agency’s principles to novel scenarios,” it was appropriate for the Board to adopt Modified-ATC to address this concern. *PPL Montana, LLC v. Surface Transportation Board*, 437 F.3d 1240, 1247 (D.C. Cir. 2006).

In refining application of ATC to fulfill the previously-stated intent and objectives, the Board’s decision in *Western Fuels II* is on solid ground. Refinements to rules that are made to preserve consistency with the purpose of the rule are interpretive rules that do not require notice and comment rulemaking. *See, e.g., Central Texas Telephone Co-Operative, Inc. v. FCC*, 402 F.3d 205, 212-214 (D.C. Cir. 2005) (finding agency action to be an interpretive rule where agency justified action by reference to the “purpose” of the regulation at issue); *Northern Indiana Public Service Company v. Porter County Chapter of the Izaak Walton League of America*, 423 U.S. 12, 15 (1975) (affirming agency adjudication that “sensibly conform[ed] to the purpose and wording of the regulations”); *Air Transport Association of America, Inc. v. Federal Aviation Administration*, 291 F.3d 49, 55-56 (D.C. Cir. 2002) (if the duties in the agency decision are “fairly encompassed” within an existing regulation, the decision is merely an

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<sup>21</sup> As the Board has observed in *EP715*, “it had not contemplated this situation and that such a result (a revenue allocation below variable cost) ‘would plainly conflict with our express purpose to find a non-biased, cost-based method.’” *EP715*, slip op. at 8 (quoting *Western Fuels II*, slip op. at 14).

interpretation); *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1375-77 (Fed. Cir. 2001) (Agency's revision of a published regulation was an interpretive rule, and therefore exempt from APA requirements, because the revision was prompted by court decisions that had deviated from the agency's intent in originally issuing the regulation.). In *Western Fuels II*, the Board did not create new duties; it simply ensured that ATC was applied consistent with its objective. *Cf. The Fertilizer Institute v. EPA*, 935 F.2d 1306, 1308 (D.C. Cir. 1991) (agency action is a legislative rule if agency intends to create new duties) (internal quotation omitted).

In short, the Board's refinement of ATC in *Western Fuels II* was done in order to ensure that ATC fulfilled the Board's original intent, as described in *Major Issues*. The only difference between Original-ATC and Modified-ATC was the Board's interpretation that the ATC methodology, which the Board did not change, should be applied to allocate total revenue contribution rather than total revenue. In all substantive respects, the ATC methodology itself remained unchanged. Under established precedent, this was, at most, an interpretive rule exempt from APA procedures, not to mention an entirely permissible use of the Board's adjudicatory authority.

2. **Agencies are permitted to refine existing legislative rules through adjudication.**

*Guidelines* – which was issued using notice-and-comment rulemaking – has been developed, refined, and augmented in virtually every case since its adoption. Not only is this permissible under precedent interpreting the APA, but it is absolutely necessary if the Board is to be able to actually decide individual cases. Indeed, in *Guidelines*, 1 I.C.C.2d at 542-543, the Interstate Commerce Commission (“ICC”) noted that:

In view of the many potential variables involved, we cannot prescribe a single precise mathematical formula for developing

SAC. Instead, we will identify here the primary factors that must be considered in any SAC presentation and comment on some methods for quantifying them. The exact computation will be left to the parties to make in each case.

Otherwise, endless notice and comment rulemaking would prevent the Board from ever implementing *Guidelines*.

Indeed, many fundamental aspects of the SAC constraint adopted in *Guidelines* were developed in individual case adjudication. The use of cross-over traffic by a SARR was first accepted by the ICC in 1994. *Nevada Power II*, 10 ICC2d at 265-68. Its use was later affirmed on appeal. *BNSF Railway Company v. STB*, 453 F.3d 473, 482-483 (D.C. Cir. 2006). If the Board can refine *Guidelines* by adopting the use of cross-over traffic in an adjudication, it can surely also use an adjudication to make a minor refinement to the ATC method adopted in *Major Issues* by which the Board allocates SARR revenues for such cross-over traffic. Whether or not cross-over traffic is included in a SARR has a far greater effect on the litigation of a SAC case than a minor refinement to the ATC method.

The minor refinement of ATC in *Western Fuels II* easily fits within accepted agency practice outside the APA. “If we were to require an agency to promulgate every regulatory or statutory interpretation arrived at in the course of adjudicating specific cases, agencies would be condemned to inactivity, since interpretation of the statutory and regulatory framework under which an agency must act is the *sine qua non* of reasoned agency action.” *Orengo*, 11 F.3d at 195. “[N]otice is not required before every clarification or extension of an agency’s principles to novel scenarios.” *PPL Montana*, 437 F.3d at 1247.

C. **The Choice of ATC Methodologies Does Not Affect The Outcome Of This Case.**

At the end of the day, the foregoing debate is largely moot. Whether the Board applies Original-ATC, Modified-ATC, or the Alternate-ATC proposed in *EP715*, the impact upon this

proceeding will be minimal.<sup>22</sup> Thus, there is no reason to stay this proceeding in order to obtain clarity from the *EP715* rulemaking as to the proper cross-over revenue allocation methodology.

Because the SBRR has both high density and low density segments, one revenue allocation methodology may favor certain SARR movements, while another methodology favors different movements. On net, however, there is no systematic bias in this proceeding because different SARR movements will benefit from each variation of the ATC methodology, whether it be Original-ATC, Modified-ATC, or the recently proposed Alternate-ATC. *Crowley V.S.* at 16.

To demonstrate this fact, SunBelt has applied all three ATC variants to its Opening Evidence, filed on August 1, 2012. First, SunBelt determined the impact upon the SBRR's revenue, and second, upon the final revenue to variable cost ("R/VC") ratios produced by the Maximum Markup Methodology ("MMM"). The results are shown in Tables 1 and 2, respectively, at pages 18-19 of the *Crowley V.S.* *See also, Id.*, Ex. 2.

Original ATC, compared against Modified-ATC, reduces the SBRR revenues between 4.5 and 4.8 percent annually. Alternate-ATC, from *EP715*, would reduce SBRR revenues between 2.5 and 2.6 percent annually. This is a very small impact.

The more significant question, however, is what would be the impact upon prescribed R/VC ratios generated by the MMM methodology. Compared against Modified-ATC, the R/VC ratios using Original-ATC revenue allocations would range from 11.3 percentage points higher in Year 1 to 2.6 percentage points higher in the final year of the DCF analysis. Using Alternate-ATC would increase the R/VC ratios by just 3.3 percentage points in Year 1 and 0.6 percentage points in the final year of the DCF analysis. In all cases, the highest R/VC ratios of 142.2% and

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<sup>22</sup> In fact, SunBelt's Opening Evidence in this case presented SAC results predicated on both Modified-ATC and the version of Alternate-ATC that BNSF had advocated in *Western Fuels IV*. *See SunBelt Op. Ev.* at p. III-H-21, n. 44. Because *EP715* was issued just one week prior to the filing of Opening Evidence, SunBelt did not have sufficient time to apply the version of Alternate-ATC actually proposed. As discussed herein, however, SunBelt has made that calculation in this Reply to the NS Motion.

134.2% for Original-ATC and Alternate-ATC, respectively, are well below the jurisdictional floor of 180%.

NS contends that the foregoing analysis is a “meaningless diversion” due to multiple unspecified “errors” and “myriad other issues presented by [SunBelt’s] deeply flawed evidence.” Motion at 23-24. That sort of “trust me now, I’ll prove it later” argument cannot carry any weight. Moreover, the Board has a long history of isolating particular elements of a SAC analysis and determining their treatment based upon the extent to which they affect the outcome of the case. *See AEPCO v. BNSF Ry. and Union Pac. R.R. Co.*, STB Docket No. 42113 (served Nov. 22, 2011) (applying Modified-ATC because it made no difference in the result). Absent an evaluation of the impact of an issue that NS itself has raised in isolation in its Motion, the Board cannot possibly determine whether the issue warrants deep exploration. Finally, SunBelt has shown that the MMM R/VC ratios are so far below 180% that there is abundant room for NS to identify numerous flaws in SunBelt’s evidence without having any impact upon the maximum prescribed rate.

Because the application of all three variants of the ATC methodology result in the same maximum reasonable rate determination, the NS arguments over which methodology to apply are irrelevant. The Board could proceed to apply any of the three ATC methodologies in this proceeding without there being a meaningful difference in the result. Moreover, as SunBelt has demonstrated in this Reply, it is not difficult or time-consuming to adjust the Modified-ATC results to reflect either the Original or Alternate-ATC approaches. Thus, there is no need or reason to create unnecessary delay by holding this case in abeyance solely to complete the rulemaking on Alternate-ATC.

V. **ALLOWING THIS CASE TO PROCEED WILL NOT BE DUPLICATIVE OR WASTEFUL, OR CREATE INCONSISTENT RULES.**

NS incorrectly contends that allowing this case to proceed parallel with *EP715* would be duplicative and wasteful, and pose a risk of inconsistent rules and outcomes. Motion at 14, 26. This argument is based upon faulty assumptions and logic.

First, there is no risk of inconsistent rules or outcomes. The Board, in *EP715*, has clearly stated that it will not apply any new cross-over traffic rules that it may adopt in that rulemaking to pending cases. Thus, there is a clear delineation as to which rules apply to which cases. Furthermore, agency rules, including those applicable to SAC, have changed before without creating confusion.

Second, NS misleadingly claims that “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.” Motion at 14 [italics added]. The same issues would not be posed in both this case and *EP715*, unless NS simply chooses to disregard the Board’s missive in *EP715* that any new cross-over traffic rules will not apply to pending cases. Moreover, as discussed in Part IV.C, above, this case does not substantially implicate the cross-over traffic issues raised in *EP715*.

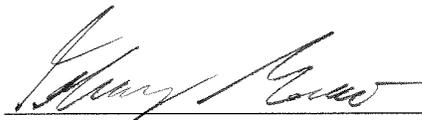
At bottom, this NS argument is tantamount to a threat that, if the Board does not stay this proceeding, NS will litigate the same issues in this case and *EP715* in complete disregard of both the Board’s explicit intent not to apply any cross-over traffic rules adopted in *EP715* to pending cases and the legal prohibition against retroactive application of new cross-over traffic limitations. While the Board cannot control what NS chooses to argue in this proceeding or in *EP715*, it should not be influenced by NS’s litigation threats.

VI. **CONCLUSION.**

Although NS describes its Motion as “fairly modest,” it is anything but modest. Motion at 32. It has substantial prejudicial ramifications for SunBelt and it asks the Board to violate a fundamental tenet of administrative law that disfavors retroactive rulemaking in such situations. Moreover, contrary to NS’s contention that the proposed rules in *EP715* are designed to curtail the very type of abuse and manipulation found in SunBelt’s Opening Evidence, that Evidence presents few such concerns. Furthermore, the NS attempts to undermine the applicability of Modified-ATC to this proceeding are not based upon sound law or fact. Nor does the choice of ATC revenue allocation methodology affect the outcome of this case. Thus, there is no compelling reason for the Board to hold this case in abeyance pending completion of *EP715*.

The Board, in *EP715*, already has clearly stated that it will not apply either of the proposed rules governing cross-over traffic to pending proceedings. NS has not provided any compelling basis to reconsider that determination. For the foregoing reasons, the Board should deny the NS Motion.

Respectfully submitted,



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October 11, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that this 11th day of October 2012, I served a copy of the foregoing via e-mail and hand delivery upon:

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**LIST OF EXHIBITS**

<b><u>EXHIBIT NO.</u></b> (1)	<b><u>EXHIBIT DESCRIPTION</u></b> (2)
1	Cross-Over Traffic As A Percentage of Total Traffic In All SAC Cases Decided By the ICC/STB Since The Standard Was Adopted in Nevada Power
2	SunBelt MMM R/VC Ratios Based on Modified ATC, Original ATC and EP 715 ATC

## I. INTRODUCTION

I am Thomas D. Crowley, economist and President of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, transportation, marketing, financial, accounting and fuel supply problems. I am the same Thomas D. Crowley that sponsored certain economic evidence as part of SunBelt Chlor Alkali Partnership's ("SunBelt") Opening Evidence in this proceeding. A copy of my credentials is included in Part IV of SunBelt's Opening Evidence.

I have been requested by Counsel for SunBelt to address certain portions of Norfolk Southern Railway Company's ("NS") motion to hold this case in abeyance, which was filed on September 21, 2012 ("Motion"). NS requested that the Surface Transportation Board ("STB" or "Board") hold this case in abeyance until the STB issues a decision in Docket No. EP 715, *Rate Regulation Reforms*, released on July 25, 2012 ("*EP 715*").

*EP 715* is unambiguous with respect to the potential for application of new cross-over rules promulgated as a result of that proceeding to pending rate cases. Specifically, the Board stated:

"We do not propose to apply any new limitation retroactively to existing rate prescriptions that were premised on the use of cross-over traffic or to any pending rate dispute that was filed with the agency before this decision was served. We do not believe it would be fair to those complainants, who relied on our prior precedent in litigating those cases."<sup>1/</sup>

The Board's statement is logical and straight-forward. The complainants in pending rate cases relied on prior precedent in forming their positions and developing their evidence and should not be penalized. SunBelt has expended significant time and money developing its Opening Evidence, which complies with the precedent that has been set through Board action

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<sup>1/</sup> See, *EP 715*, p. 17, footnote 11.

over the last several decades. Holding this case in abeyance and potentially requiring SunBelt to revisit every major facet of its stand-alone cost (“SAC”) evidence (network configuration, investment, traffic group, and operations) would be anything but fair to the complainant.

NS’s Motion argues that “fundamental fairness” dictates that the Board should hold the SunBelt case in abeyance and that any new rules developed in *EP 715* should be applied to this case. NS misses the point. The Board should apply existing precedent in this and all other pending cases and should apply any new rules to all new cases after the new rules are promulgated. There is nothing unfair about this course of action. In fact, if future rules were applied to past cases there would be no end to the regulatory cycle. The Board expressly recognized this fact in *EP 715*.

NS relies on two technical arguments to support its position: (1) that SunBelt’s reliance on cross-over traffic, as prior complainants have for years, is somehow distorting and should be disallowed; and (2) that SunBelt cannot employ the only revenue division methodology that has been employed in other rate cases decided by the Board since *Major Issues*.<sup>2/</sup> Both of NS’s arguments are fatally flawed and are discussed below under the following topical headings:

II. SunBelt’s Reliance on Cross-Over Traffic Is Not “Distorting”

III. Modified ATC Is the Appropriate Standard for Allocating Cross-Over Revenue

IV. Conclusions

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<sup>2/</sup> See, STB Ex Parte No. 657 (Sub No. 1), *Major Issues in Rail Rate Cases*, decided October 30, 2006 (“*Major Issues*”).

## II. SUNBELT'S RELIANCE ON CROSS-OVER TRAFFIC IS NOT "DISTORTING"

Throughout its Motion, NS mischaracterizes SunBelt's use of cross-over traffic in its stand-alone railroad ("SARR") traffic group as a "contortion" or "distortion" of the cross-over traffic device.<sup>3/</sup> These descriptions are inaccurate and misleading.

NS presents the following two general complaints about SunBelt's use of cross-over traffic: (1) that SunBelt included too much cross-over traffic in its traffic group; and (2) that *EP 715* will prohibit most of SunBelt's traffic selection methods. Neither of these complaints have any merit as discussed below.

### A. SUNBELT HAS USED CROSS-OVER TRAFFIC AS INTENDED BY THE STB TO MAKE THE SAC PROCESS MORE MANAGEABLE AND PRACTICAL

SunBelt relies on the inclusion of cross-over traffic for precisely the reasons first considered by the ICC<sup>4/</sup> in 1994 when it advocated the use of cross-over traffic. It allows the SAC analysis to "focus on the facilities and services that are used by the complainant shipper and prevents Full-SAC cases from becoming unmanageable."<sup>5/</sup>

The ICC fostered the concept of cross-over traffic by its decisions in *Nevada Power*.<sup>6/</sup> Nevada Power Company ("NPC"), the shipper in the *Nevada Power* proceeding, originally designed a SARR to carry coal from mines in Utah and Colorado to NPC's generating station at Moapa, NV, as well as to carry coal and non-coal traffic moving over line-segments in California, Colorado, Nevada and Utah.<sup>7/</sup> The ICC found, however, that the defendant railroads

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<sup>3/</sup> See, e.g., Motion pp. 1 and 3.

<sup>4/</sup> Interstate Commerce Commission ("ICC") is the predecessor to the STB.

<sup>5/</sup> See, *EP 715*, p. 16.

<sup>6/</sup> Docket No. 37038, *Bituminous Coal – Hiawatha, Utah to Moapa, Nevada*, ("Nevada Power").

<sup>7/</sup> See, 6 ICC 2d 1, 46 (1989) ("*1989 Nevada Power Decision*").

in the case had not provided NPC with the data necessary to develop meaningful estimates of the type and amount of traffic that might be available on NPC's SARR.<sup>8/</sup> The ICC reopened the proceeding and directed the railroads to provide NPC with the traffic data necessary to determine "... the traffic which may be diverted to the stand-alone facility and the revenues which may be earned from that traffic."<sup>9/</sup>

Upon receiving the additional data from the railroads, NPC took two actions to redesign its SAC presentation. First, NPC sought to replace its original SARR configuration with an expanded SARR model incorporating a larger portion of the incumbent railroads' systems, including extending the SARR to the states of Wyoming, Nebraska, Kansas and Iowa.<sup>10/</sup> This expansion would have allowed the SARR to reach interchange points used by the incumbent carriers to interchange traffic with other non-incumbent railroads, and to increase the amount of traffic available to the SARR. Second, NPC identified additional traffic that moved over the line-segments of its original SARR, but was not included in the original traffic data provided by the railroads.<sup>11/</sup> The Union Pacific Railroad Company ("UP"), the remaining defendant in the case,<sup>12/</sup> objected to the expanded system designed by NPC, because expanding the system to reach existing interchange points with other carriers would unnecessarily prolong the proceeding without providing additional information to improve the analysis.<sup>13/</sup> UP also objected to the inclusion of additional traffic indicating that this action exceeded the scope of the reopening. The ICC partially agreed with the UP and restricted the footprint of the updated SARR to that of

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<sup>8/</sup> See, *1989 Nevada Power Decision*, p. 17.

<sup>9/</sup> Id.

<sup>10/</sup> See, 10 ICC 2d 259, 263 (1994) ("*1994 Nevada Power Decision*").

<sup>11/</sup> See, *1994 Nevada Power Decision*, p. 262.

<sup>12/</sup> NPC originally brought its rate dispute against the UP, the Denver and Rio Grande Western Railroad ("DRGW") and the Utah Railway ("UR"), but the latter two railroads later settled with NPC.

<sup>13/</sup> See, *1994 Nevada Power Decision*, p. 265, note 12.

NPC's original SARR, that is the states of Utah, Colorado, Nevada and California, but allowed NPC to include the additional identified traffic that moved over the lines of the original SARR.<sup>14/</sup>

Based on the ICC's rulings in limiting the scope of NPC's SARR,<sup>15/</sup> but including the universe of all shippers utilizing the line segments that are common both to the SARR and the incumbent railroad,<sup>16/</sup> NPC revised its SARR traffic group to include three types of traffic: (1) local traffic, defined as traffic that would both originate and terminate on the SARR route; (2) interline traffic, defined as traffic that the SARR would receive from/or tender to railroads other than the incumbent at an existing interchange point; and (3) cross-over traffic,<sup>17/</sup> defined as traffic the SARR would interchange with the incumbent railroad at a hypothetical interchange point on the incumbent railroad's system.<sup>18/</sup> The UP agreed that the first two types of traffic are appropriately included in a SARR's traffic group, but suggested that cross-over traffic should be excluded from the SARR's traffic group.<sup>19/</sup>

The ICC rejected UP's position and allowed the use of cross-over traffic for two primary reasons. First, the ICC stated that disallowing cross-over traffic would deprive a shipper of the ability to efficiently group profitable traffic:

“In any event, in disallowing expansion of the SARR to the 2,800-mile size, we did not intend to deprive NPC of the critical ability efficiently to (sic.) group profitable traffic which could have been included had the larger system been adopted. Excluding the cross-over traffic would weaken the SAC test because it would deprive the SARR of the ability to take advantage of the same economies of scale, scope and density that the incumbents enjoy over the identical route of movement.”<sup>20/</sup>

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<sup>14/</sup> See, 1994 Nevada Power Decision, p. 265 and the ICC's unpublished consolidated decision in Docket No. 37038, *Bituminous Coal – Hiawatha, Utah, to Moapa, Nevada* and Docket No. 37409, *Aggregate Volume Rates on Coal – Acco, Utah, to Moapa, Nevada*, served January 8, 1991 (“1991 Nevada Power Decision”).

<sup>15/</sup> See, 1991 Nevada Power Decision, p. 3.

<sup>16/</sup> See, 1989 Nevada Power Decision, p. 44.

<sup>17/</sup> The term “cross-over traffic” was coined by the UP in the *Nevada Power* proceeding and adopted by the ICC.

<sup>18/</sup> See, 1994 Nevada Power Decision, p. 265.

<sup>19/</sup> See, 1994 Nevada Power Decision, p. 265. The UP had originally argued that interline traffic should also be excluded from a SARR's traffic group, but the ICC rejected this notion. See, 1989 Nevada Power Decision, p. 45.

<sup>20/</sup> See, 1994 Nevada Power Decision, p. 265, footnote 12.

Second, the ICC stated that the nature and purpose of the SAC constraint requires that the SARR be viewed as a replacement for the incumbent railroad and not as a competitor, and thus requiring the inclusion of cross-over traffic. The objective of the SAC constraint is to simulate a competitive rate standard for non-competitive rail movements by determining the rate that would be available to shippers in a contestable market environment.<sup>21/</sup> A contestable market is one into which entry is absolutely free and exit absolutely costless, and where the new entrant suffers no disadvantages relative to the incumbent. The elimination of entry and exit barriers logically disallows any post-entry responses from the incumbent carrier, and instead requires the view that the SARR is a replacement for the incumbent over the lines served by the SARR. As stated by the ICC:

“In sum, to determine the rates that would be available to shippers if rail markets were contestable, we cannot take account of any post-entry responses by the incumbents. Instead, we view the entrant (SARR) as if it were a replacement for that segment of the rail system whose services the entrant would be offering. Accordingly, the cross-over traffic should be included in the SARR and treated as if it would be interchanged with the incumbent carriers at the appropriate endpoints of the SARR.”<sup>22/</sup>

The reasons the ICC originally decided to include cross-over traffic in a SAC presentation, to efficiently group profitable traffic available to a SARR and to support the purpose of SAC by viewing the SARR as a replacement for the incumbent rather than a competitor, are as equally applicable today as they were when the ICC issued its *1994 Nevada Power Decision*. Cross-over traffic allows a shipper to group traffic that moves over specific segments of a railroad’s network without having to replicate all of the incumbent’s line segments on which the traffic moves. This allows shippers to effectively hypothesize smaller SARR networks, and prevents unnecessarily prolonged proceedings which force all parties, including

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<sup>21/</sup> See, *1994 Nevada Power Decision*, p. 266.

<sup>22/</sup> See, *1994 Nevada Power Decision*, p. 267.

the STB, to analyze data that does not significantly add value to the analysis. Additionally, excluding cross-over traffic, or even a subset of cross-over traffic, would effectively position the SARR as a competitor for the incumbent carrier and not its replacement. Restricting traffic in this manner would effectively create a barrier to entry into the market, and defeat the underlying logic of creating a contestable market. The only way to ensure a contestable market is to allow a SARR complete and unfettered access to all traffic moving on a particular line segment regardless of the ultimate origin or destination on the incumbent's system.

The ICC initially described cross-over traffic as traffic that the SARR would interchange with an incumbent carrier at a hypothetical interchange point on the incumbent's network.<sup>23/</sup> Based on the ICC's initial description and the ICC's view that the SARR is a replacement for the incumbent railroad and not a competitor, one can more definitively define cross-over traffic as traffic where the SARR handles a portion of the incumbent railroad's entire movement that the incumbent either originates or receives in interchange to the incumbent's destination or delivered in interchange location.

When selecting SARR traffic, SunBelt may include traffic that shares the facilities used by the issue traffic in order to defray costs. This is a bedrock principle of a SAC analysis and completely consistent with the definition of cross-over traffic described above. If the inclusion of cross-over traffic were restricted in this case, SunBelt would be artificially restricted from access to the scale economies inherent in the railroad industry and enjoyed by NS today. SunBelt strictly adhered to the Board's rules and prior precedent regarding the selection of traffic for the SARR traffic group. NS may not like SunBelt's inclusion of cross-over traffic but NS cannot demonstrate that SunBelt violated any rules when it defined its traffic group.

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<sup>23/</sup> See, *1994 Nevada Power Decision*, at page 265.

**B. SUNBELT HAS NOT USED PROPORTIONATELY MORE CROSS-OVER TRAFFIC THAN OTHER RECENT COMPLAINANTS**

NS states that SunBelt's opening presentation "exemplifies the Board's concerns about expanded use of cross-over traffic."<sup>24/</sup> However, the amount of cross-over traffic included in SunBelt's traffic group is within the normal range of cross-over traffic used in SAC presentations when measured as a percentage of total SARR traffic.

SunBelt's Opening work papers show that approximately 93 percent of the traffic transported on the SBRR moves in cross-over service, and accounts for approximately 86 percent of the SARR's revenue.<sup>25/</sup> Compared to the amount of cross-over traffic reviewed and accepted by the STB in recent SAC presentations, SunBelt relied on *less* cross-over traffic than another complainant. Exhibit No. 1 to this verified statement shows the amount of cross-over traffic by percentage from prior and one current SAC presentations to the cross-over traffic included in SunBelt's Opening evidence.<sup>26/</sup>

As Exhibit No. 1 shows, cross-over traffic has accounted for over 90 percent of the SARR's traffic in several recent cases, including the most recent case decided by the STB, i.e., *AEPCO*.<sup>27/</sup> Cross-over movements accounted for 93 percent of SunBelt's total traffic by units. There is simply no truth to NS's position that SunBelt's use of cross-over traffic in developing its SAC evidence is "distorting."

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<sup>24/</sup> See, Motion, p. 4.

<sup>25/</sup> See SunBelt opening e-workpapers "III-A-Tables.xlsx."

<sup>26/</sup> The percentages included in Exhibit No. 1 either came directly from the ICC's or STB's decisions in the listed cases, or were developed from publicly available information based on the STB's decisions, the parties' publicly available narratives and other publicly available data. See e-workpaper "Sunbelt Motion Exhibits.xlsx."

<sup>27/</sup> See, *Arizona Electric Power Cooperative, Inc. v. BNSF Railway and Union Pacific Railroad* STB Docket No. 42113, slip op. (STB served June 27, 2011) ("*AEPCO*").

**C. THE SUNBELT STAND-ALONE RAILROAD  
("SBRR") DOES NOT PRESENT THE  
SAME CROSS-OVER TRAFFIC ISSUE  
THAT CONCERNS THE STB IN *EP 715***

The Board's concern over the use of cross-over traffic is largely focused on one main issue that arose in the recent *AEPCO* case and was articulated in *EP 715*. Specifically, the Board stated:

"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. However, when it comes time to allocate revenue to the facilities replicated by the SARR, URCS treats those movements as single-car or multi-car movements, rather than the more efficient, lower cost trainload movements that they would be. As a result, the SAC analysis appears to allocate more revenue to the facilities replicated by the SARR than is warranted."<sup>28/</sup>

The STB is concerned with SARRs that construct a short segment over a high-density line and primarily serve as a bridge carrier that handles most of its traffic in hook-and-haul overhead trainload service on traffic for which the residual incumbent performs the costly terminal and gathering activities.

This is simply not the case in SunBelt. As shown in SunBelt's opening work papers, less than 1 percent of the SBRR cross-over traffic<sup>29/</sup> is of the type of moves about which the Board expressed concern in *AEPCO*.<sup>30/</sup> In fact, most of the SBRR cross-over traffic is not overhead

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<sup>28/</sup> See, *EP 715*, p. 16.

<sup>29/</sup> See: SunBelt Opening work paper "Sunbelt2011 Traffic Groups and Train Summary with added lines 06202012.accdb" at data field "MMM\_OVH\_TL\_VC". Data records flagged with "TL" in this data field are the types of movements about which the Board expressed concern in *AEPCO*. The data field was populated per the code included at "Step 15.5" in SunBelt opening work paper "SRR Traffic Selection Methodology v5.docx".

<sup>30/</sup> Single-car and multiple car movements that are originated/terminated by the residual incumbent and that move in hook-and-haul overhead trainload service over the SARR and are interchanged from/to the residual incumbent in the same intact train on both ends of the overhead SARR segment.

traffic in the first place, and the SBRR performs inter-and intra-train switching on much of the overhead carload traffic (e.g. at Birmingham) that it does handle.

In developing SAC evidence, the complainant must construct the services required to serve its traffic. It may then include other traffic that shares those facilities. SunBelt's issue traffic moves in carload service over NS lines in the real-world. The SBRR constructed the lines required to serve the issue traffic, selected other traffic that used the constructed facilities, including traffic that originated and terminated on those lines, and performed the origin and termination switching for the selected traffic that required those services.

As noted in NS's Motion, approximately 86 percent of the SBRR traffic is cross-over traffic (as measured by revenue). The SBRR originates and/or terminates a significant portion of its cross-over traffic. In addition, for many cross-over movements where SBRR acts as an overhead carrier, NS also acts as an overhead carrier, but over a larger geographic footprint. For example, NS receives metals shipments from Birmingham Southern Railroad ("BS") at Ensley, AL that it moves over its lines to Hattiesburg, MS and New Orleans, LA, where it interchanges the traffic to CN and UP, respectively, for delivery to destinations beyond NS' footprint. The SBRR receives the same metals shipments from NS at Birmingham and delivers them to the CN and UP at the same locations NS interchanges the traffic to those railroads in the real world. The SBRR simply replicates part of the NS's bridge operations for these moves. In other words, the revenues that are divided between the NS and the SBRR are not intended to cover any terminal operations and reflect only interchange<sup>31/</sup> and line-haul costs.

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<sup>31/</sup> In STB Docket No. 42088, *Western Fuels Association, Inc. and Basin Electric Power Cooperative v. BNSF Railway Company*, decided September 7, 2007 (*Western Fuels*), the STB clarified what interchange costs would be included in Average Total Cost ("ATC") revenue division calculations. The hypothetical interchange costs between the SARR and the residual railroad would not be included but actual interchange costs between the residual railroad and another real-world railroad would be included (p. 12).

Through its witness Robert O. Fisher, NS claims to show that if either of the proposed limitations on cross-over traffic articulated by the Board in *EP 715* were applied to this case, the SunBelt traffic group would be drastically reduced in size. First, as discussed above, the Board clearly and unambiguously stated that no rules developed or promulgated through *EP 715* would be applicable to any rate case that was active at the time *EP 715* was decided.

Second, there are large and serious disconnects between the perceived problem with the use of cross-over traffic under very specific circumstances as articulated by the Board and the two straw-man<sup>32/</sup> limitations the Board discussed in *EP 715*. In fact, the disconnects are so clear and obvious to even a casual observer that NS' failure to recognize the straw-man proposals for what they are must be regarded as disingenuous. The Board first expressed concern with a specific scenario in *AEPSCO* wherein the SARR's traffic group consisted largely of traffic billed as single-and multiple-car shipments that moved in overhead trainload service on the SARR and was interchanged from/to the residual incumbent on both ends of the overhead SARR segment, and for which the SARR performed no intermediate switching while the residual incumbent was assumed to have performed costly terminal switching and gathering operations. Both of the Board's proposals for addressing the cross-over issue in *EP 715* are clearly intended to be discussion starting points and not refined solutions to the perceived problem.<sup>33/</sup>

The Board's first straw-man limitation would unfairly restrict a SARR from carrying shipments on which it performed costly intermediate switching, simply because the traffic was not originated or terminated by the SARR. For example, NS receives chemical and agricultural carload traffic in interchange from UP at Memphis and moves the traffic to Birmingham where it

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<sup>32/</sup> A "straw-man proposal" is a brainstormed simple business proposal intended to generate discussion of its disadvantages and to provoke the generation of new and better proposals. ([http://www.reference.com/browse/Straw\\_man\\_proposal](http://www.reference.com/browse/Straw_man_proposal)).

<sup>33/</sup> Although this is not the proper forum for a debate over the merits of the Board's proposals in *EP 715*, there are serious theoretical and practical problems with the Board's proposed restrictions on cross-over traffic. Those issues will be discussed and debated in the proper forum, the *EP 715* proceeding.

switches the traffic to other NS trains for furtherance to Mobile, AL. Although the costly and time-consuming intermediate switching activity occurs on and would be replicated by the SBRR, the Board's first straw-man limitation would unfairly restrict the SBRR from access to this traffic. There are also instances where NS receives metals carload traffic in interchange from UP at Memphis and moves the traffic to Birmingham where it switches the traffic to other NS trains for furtherance to interchange with CSX Transportation ("CSXT") at Mobile, and CSXT terminates the traffic beyond NS' footprint. The Board's first limitation would restrict the SARR from including this traffic ostensibly based on an incorrect presumption that NS incurred origination/termination costs but the SARR would not.

Witness Fisher claims that imposition of the Board's first proposed restriction on cross-over traffic would result in the elimination of 64 percent of the SBRR volume (and 38 percent of the NS net revenue) from the SAC analysis. In a footnote, Mr. Fisher explains that he included in his quantification of excluded traffic all traffic NS interchanges with the Kansas City Southern Railway Company ("KCS") at Meridian, MS ("Meridian traffic"). He claims that this is the correct treatment of the Meridian traffic because, "NS has haulage rights over the Meridian Speedway, and therefore does not 'interchange' traffic at Meridian."<sup>34/</sup> However, NS provided traffic data lists KCS as the origin/destination road serving most of the traffic in question.<sup>35</sup> NS provided traffic data shows Meridian as the interchange location between KCS and NS and also shows KCS as the handling railroad for car events reported west of Meridian. In short, Mr. Fisher's assertion regarding the Meridian traffic is clearly and fundamentally at odds with the traffic data provided by NS. If Mr. Fisher's assertion is in fact correct, NS' entire traffic database on which SunBelt's evidence is based must be called into question. I have corrected

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<sup>34/</sup> Fisher, page 2, footnote 3.

<sup>35/</sup> According to the traffic data, KCS interchanges some of the traffic in question with other railroads for delivery from/to origin/destination west of Meridian. For example, some of the traffic is interchanged to/from KCSM at Laredo, TX.

Mr. Fisher's improper classification of Meridian traffic and reclassified the traffic based on the provided NS traffic data. Imposition of the Board's first proposed restriction on cross-over traffic would actually result in the elimination of 36 percent of the SBRR volume (and 22 percent of the NS net revenue) from the SAC analysis.<sup>36</sup>

The Board's second straw-man limitation would unfairly restrict a SARR from carrying any single- or multiple-car cross-over shipments simply because they were not billed or costed as unit train shipments. For example, NS receives carload traffic in interchange from UP at New Orleans and moves the traffic to Hilton, GA where it interchanges the traffic to the Chattahoochee Industrial Railroad ("CIRR") for furtherance to Cedar Springs, GA. The NS performed no costly and time-consuming terminal switching or gathering operations on the traffic. In fact, NS moved the traffic in hook-and-haul overhead trainload service. However, the Board's second straw-man limitation would unfairly restrict the SBRR from access to this traffic based on the false presumption that the incumbent must have incurred switching costs at origin, destination, or classification yard to move the traffic that the SARR would avoid.

Witness Fisher claims that imposition of the Board's second proposed restriction on cross-over traffic would result in the elimination of 44 percent of the SBRR volume (and 76 percent of the NS net revenue) from the SAC analysis. This statement highlights some of the major problems with the Board's proposed restrictions on cross-over traffic. The lion's share of NS traffic over the corridor used to move the issue traffic in this case simply does not move in unit train service. And yet, the traffic still generates sufficient revenue for NS to move it. This is because the movement revenue reflects the relatively higher handling costs associated with moving this general freight traffic. Whatever revenue division methodology is used, it will result

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<sup>36/</sup> See work paper "EP 715 Impact SunBelt v NS (Highly Confidential) (2) corr merid.xlsx" at level "Summary" and at level "Units" range F28:F353.

in significant revenues being allocated to all segments of the incumbent's movements (on-SARR and off-SARR).

### **III. MODIFIED ATC IS THE APPROPRIATE STANDARD FOR ALLOCATING CROSS-OVER REVENUE**

NS asserts that Modified ATC,<sup>37/</sup> as developed and applied by the Board in *Western Fuels* subsequent to its adoption of ATC in *Major Issues* (which is referred to as “Original ATC”), is not applicable to this or any case, and that the Board must require Original ATC in this and all other cases until *EP 715* is completed.

NS goes to great lengths in an attempt to support its claim that there is no precedent for Modified ATC as applied by SunBelt in its Opening Evidence. However, NS’s claims are contradicted by its acknowledgement at footnote 14 that the Board and the parties used Modified ATC in *AEPCO*,<sup>38/</sup> which was the last case ruled upon by the Board prior to SunBelt’s filing of its Opening Evidence. Even if the most recent *Western Fuels* decision that employed Modified ATC (on remand) was not published prior to SunBelt filing its Opening Evidence, that decision simply upheld the Board’s prior decision in *Western Fuels*. Therefore, *Western Fuels* does provide an appropriate “prior precedent.” In addition, the Board relied on Modified ATC in *AEP Texas*.<sup>39/</sup> The Board has never applied Original ATC in any case. The Board has applied Modified ATC to all cases decided since *Major Issues*.

NS claims that *EP 715* was not clear as to whether the ATC methodology it settled upon in that proceeding would be retroactively applicable to pending rate cases.<sup>40/</sup> NS is wrong.

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<sup>37/</sup> This is the Board’s nomenclature. For unexplained reasons, NS uses the term “Amended ATC” to refer to Modified ATC.

<sup>38/</sup> NS notes in its footnote that *AEPCO* is being held in abeyance. While this is technically true, the case is being held in abeyance for reasons completely unrelated to the issues the Board raised in *EP 715*. The Board stated: “we are reopening this proceeding and holding it in abeyance, on a limited basis, until the issue in FD 35506 is resolved.” FD 35506 is a proceeding to determine whether the Board should exclude the increase in BNSF’s investment base from BNSF’s URCS data that is currently under review (See *W. Coal Traffic League—Petition for Declaratory Order, FD 35506* (STB served Sept. 28, 2011)). While *AEPCO* is final and reparations for past overcharges have been ordered, future rates calculated at 180% of variable cost cannot be finalized until a decision on the Berkshire premium and BNSF URCS has been made.

<sup>39/</sup> See, STB’s decision in STB Docket No. 41191 (Sub-No. 1), *AEP Texas North Company v. BNSF Railway Company*, served September 10, 2007 (“*AEP Texas*”).

<sup>40/</sup> See, Motion, p. 17.

It is absolutely clear that the Board is developing modifications for future cases. In *EP 715*, the STB solicited comment on “alternative approaches that would better accommodate these two competing principles than the *current modified ATC approach* or the alternative described above” [emphasis added].<sup>41/</sup> Additionally, in *EP 715*, the Board stated that it seeks comment on whether it “should adopt this modification to ATC for use in all *future SAC...proceedings*” [emphasis added].<sup>42/</sup>

Regardless which ATC methodology is applied to the SBRR cross-over traffic, it does not affect the ultimate case outcome. There is no systematic bias because certain SARR movements will benefit from each version. SARR revenues are high because NS revenues are high, not because of the choice of an ATC formula.

It is well known and thoroughly documented that NS’s revenues are high by industry standards. Under the Board’s annual determination of railroad revenue adequacy procedures,<sup>43/</sup> NS is consistently among the best performing Class I railroads. Therefore, any revenue division methodology will result in significant revenues being allocated to both the SARR and the residual NS. SARR revenues are high in this case because NS revenues are high to begin with, not because of the ATC formula used to allocate the revenues.

The particular form of ATC revenue divisions applied to the SARR traffic in this case will have little bearing on the results of the SAC analysis. Certain SARR movements will benefit from the use of Modified ATC and others will benefit from the use of Original ATC. There is no systemic bias.

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<sup>41/</sup> See, *EP 715*, p. 18.

<sup>42/</sup> *Id.*

<sup>43/</sup> See, Annual EP 552 Decisions. A railroad is considered revenue adequate under 49 U.S.C. 10704(a) if it achieves a rate of return on net investment (“ROI”) equal to at least the current cost of capital for the railroad industry.

NS focuses its discussion almost exclusively on SunBelt’s use of Modified ATC in calculating its revenue divisions on cross-over traffic. NS does not mention the impact of SunBelt’s use of Modified ATC on the calculation of the maximum reasonable rate under SAC, which is the only purpose of developing revenue divisions. NS’ statements on the subject make little sense. NS tacitly acknowledges that the impact of using any one version of ATC in this case rather than another will have a minimal impact on the resulting reasonable rate determination. NS argues, however, that an “estimate of cross-over revenue allocation differences in isolation” is somehow “meaningless” and that the Board should “reject any... isolated... comparison as a meaningless diversion.”<sup>44/</sup> First, NS presented a lengthy argument related to a single issue – the propriety of using a particular version of the ATC formula in this case. It then argues that an evaluation of the impact of the application of its preferred version is meaningless and should be rejected out of hand by the Board. Absent an evaluation of the impact of an issue that NS itself isolated in its Motion, the Board could not possibly determine whether the issue warrants deep exploration. As NS acknowledged in its Motion, the Board has a long history of isolating particular elements of SAC analysis and determining their treatment on a case-by case basis exclusively based on the extent to which they affect the outcome of the case. In fact, the Board recently did just this with respect to the version of ATC (Modified ATC) it applied in the *AEPCO* case. “The Board nominally applied Amended ATC in the *AEPCO* decision, but only because the parties agreed it made no difference in that case.”<sup>45/</sup>

I tested the impact of applying the three forms of the ATC formula to the cross-over traffic in the SunBelt case. Table 1 below compares the SBRR revenues used in SunBelt’s Opening Evidence based on the STB’s preferred Modified ATC methodology to the SBRR

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<sup>44/</sup> NS Motion at pp. 23-24.

<sup>45/</sup> NS Motion at p. 28, footnote 14 (emphasis added).

revenues developed using the STB’s Original ATC division methodology discussed in *Major Issues* and the Alternative ATC methodology discussed in *EP 715*.

Table 1  
**SBRR Revenues Calculated Using  
Alternative Average Total Cost Revenue Division Methodologies**

<u>Time Period</u>	<u>SBRR REVENUES</u>			<u>Percent Change In Revenues From Modified ATC to Original ATC 1/</u>	<u>Percent Change In Revenues From Modified ATC to EP 715 ATC 2/</u>
	<u>STB Modified ATC</u>	<u>STB Original ATC</u>	<u>EP715 ATC</u>		
(1)	(2)	(3)	(4)	(5)	(6)
1. July 30-Dec ‘11	\$182,414,098	\$173,573,831	\$177,653,883	-4.8%	-2.6%
2. 2012	457,956,942	437,368,595	446,672,415	-4.5%	-2.5%
3. 2013	496,038,547	473,791,236	483,797,466	-4.5%	-2.5%
4. 2014	549,148,773	524,559,011	535,609,853	-4.5%	-2.5%
5. 2015	613,098,105	585,652,542	598,005,784	-4.5%	-2.5%
6. 2016	680,688,426	650,352,841	663,967,737	-4.5%	-2.5%
7. 2017	745,619,011	712,216,161	727,247,784	-4.5%	-2.5%
8. 2018	812,105,979	775,571,267	792,100,274	-4.5%	-2.5%
9. 2019	883,667,528	843,727,858	861,877,717	-4.5%	-2.5%
10. 2020	961,149,180	917,490,536	937,413,245	-4.5%	-2.5%
11. Jan-July 29, ‘21	603,765,318	576,216,732	588,854,646	-4.6%	-2.5%

1/ [Column (3) ÷ Column (2)] -1x100.

2/ [Column (4) ÷ Column (2)] -1x100.

Sources: e-workpapers “Revenue and MMM Summary for Different ATC Revenues.xlsx.”

As shown in Table 1 above, moving from the STB’s Modified ATC methodology to the Original ATC approach outlined in *Major Issues* reduces the SBRR revenues between 4.5 and 4.8 percent per year. Similarly, using the STB’s proposed *EP 715* ATC methodology reduces SBRR revenues between 2.5 and 2.6 percent per year.

I next tested the impact that these revised revenues would have on the Maximum Markup Methodologies (“MMM”) revenue to variable cost (“R/VC”) ratios. As shown in Table 2, these alternative revenue streams had minimal impact on the MMM R/VC ratios.

Table 2  
**Comparison of SunBelt's MMM Revenue to Variable Cost Ratios  
Based On Cross-Over Traffic Revenues Calculated Using  
Alternative Average Total Cost Revenue Division Methodologies**

<u>Year</u> (1)	<u>STB Modified ATC</u> (2)	<u>STB Original ATC</u> (3)	<u>EP 715 ATC</u> (4)
1. 2011	130.9%	142.2%	134.2%
2. 2012	124.9%	133.7%	127.4%
3. 2013	122.6%	131.0%	124.9%
4. 2014	117.1%	124.2%	118.7%
5. 2015	113.3%	119.2%	114.5%
6. 2016	110.6%	115.4%	111.5%
7. 2017	107.3%	111.5%	108.2%
8. 2018	104.4%	108.1%	105.1%
9. 2019	101.7%	105.1%	102.5%
10. 2020	99.0%	102.0%	99.7%
11. 2021	96.1%	98.7%	96.7%

Source: Exhibit No. 2

As shown in Table 2 above, using SBRR revenues based on the STB Original ATC division methodology instead of the STB’s preferred Modified ATC approach increases the MMM R/VC ratios by between 2.6 and 11.3 percentage points, while using the STB’s proposed EP 715 ATC formula increases the R/VC ratios between 0.6 and 3.3 percentage points over using Modified ATC revenues.

NS argues at length that Modified ATC “very substantially altered”<sup>46/</sup> Original ATC, yet NS also argues that any “estimate of cross-over revenue allocation differences in isolation” is “meaningless.”<sup>47/</sup> Both statements cannot be true. Above we demonstrated that the impact of using any of the three versions of ATC that have been discussed by the parties and the Board since *Major Issues* was first decided will have minimal (and inconsequential) impact on the outcome of the case. NS’ argument is much ado about nothing.

<sup>46/</sup> NS Motion at p. 30.

<sup>47/</sup> NS Motion at pp. 23-24.

#### IV. CONCLUSIONS

The Board clearly articulated its position regarding all pending rate reasonableness cases in *EP 715*. New rules promulgated as a result of *EP 715* are simply not applicable to “any pending rate dispute that was filed with the agency before [the] decision was served.”<sup>48/</sup>

The Board’s position is the only reasonable position. The complainants in pending rate cases relied on prior precedent in forming their positions and developing their evidence and should not be penalized. SunBelt’s Opening Evidence complies with the precedent that has been set through Board action over the last several decades.

The Board’s logical policy of applying existing precedent in this and all other pending cases, and applying any new rules to all new cases should be above rebuke. This is the only fair solution. If future rules were applied to past cases there would be no end to the regulatory cycle.

NS’s two technical positions supporting its request both fail. NS first takes the position that SunBelt’s reliance on cross-over traffic, as prior complainants have for decades, is somehow distorting. The ICC’s reasons for introducing cross-over traffic to rate reasonableness cases are as sound today as when they were first articulated. Specifically, the ICC recognized that disallowing cross-over traffic would deprive a shipper of the ability to efficiently group profitable traffic and would “weaken the SAC test because it would deprive the SARR of the ability to take advantage of the same economies of scale, scope and density that the incumbents enjoy over the identical route of movement.”<sup>49/</sup> The ICC also stated that the nature and purpose of the SAC constraint requires a view of the SARR as a replacement for the incumbent railroad and not as a competitor, which requires the inclusion of cross-over traffic. Exclusion of cross-

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<sup>48/</sup> See, *EP 715*, p. 17, footnote 11.

<sup>49/</sup> See, *1994 Nevada Power Decision*, p. 265, footnote 12.

over traffic would be “distorting” to the SAC analysis because it would result in the analysis of a market that is different from the market in which the incumbent operates in the real world.

NS’s claim that SunBelt’s use of cross-over traffic was more egregious than in other recent SAC presentations is also without merit. As shown in Exhibit No. 1, SunBelt’s traffic group is in line with those of complainants in most recent cases with respect to cross-over traffic levels.

NS has exploited the Board’s stated concerns regarding cross-over traffic in *EP 715*. Specifically, the Board indicated that it is concerned with cross-over carload shipments that are originated and/or terminated by the incumbent and that move over the SARR in hook-and-haul overhead trainload service because the Board believes the ATC methodology may allocate too much revenue to the overhead segment of the affected movements. Because less than 1 percent of the SBRR traffic falls into this category, the Board’s concern is basically irrelevant to this case.

NS also argues that SunBelt cannot employ Modified ATC, the only revenue division methodology that has been employed in other rate cases decided by the Board since *Major Issues*. Application of Original ATC – NS’s preferred revenue division formula – has very little effect on the SAC analysis results and no impact on the maximum reasonable rate determination.<sup>50/</sup>

NS simultaneously argues that: (1) the change from Original ATC to Modified ATC was so substantial that the Board is legally precluded from applying anything but Original ATC absent a notice-and-comment rulemaking; and (2) a demonstration that applying Modified ATC

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<sup>50/</sup> See, Exhibit No. 2.

rather than Original ATC has minimal impact on this case is meaningless and irrelevant. These two arguments simply cannot be reconciled.

NS claims there is no precedent for SunBelt's use of Modified ATC. This assertion is clearly inaccurate. Both the Board and the parties used Modified ATC in *AEPCO*, which was the last case decided by the Board prior to SunBelt's filing of its Opening Evidence. Furthermore, the most recent *Western Fuels* decision that employed Modified ATC (on remand) upheld the Board's prior decision in *Western Fuels*. The Board has never applied Original ATC in any case.

The Board also clearly stated that Modified ATC is the current default methodology in *EP 715*. Specifically, the STB's discussion of possible future methodologies made comparative reference to "the current modified ATC approach."<sup>51/</sup>

Finally, while NS attempts to raise doubt over whether the Board's directive that rules promulgated as a result of *EP 715* apply to the revenue division methodology, the Board clearly states that it seeks comment on whether it "should adopt this modification to ATC for use in all *future SAC...proceedings*" [emphasis added].<sup>52/</sup>

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<sup>51/</sup> See, *EP 715*, p. 18.

<sup>52/</sup> Id.



**Cross-Over Traffic As A Percentage of Total Traffic In All SAC Cases  
Decided By The ICC/STB Since The Standard Was Adopted In Nevada Power**

<u>STB Case</u> (1)	<u>Percentage of Traffic That is Cross-Over Traffic 1/</u> (2)
1. STB Docket No. 42071, <i>Otter Tail Power Company v. BNSF Railway Company</i> , January 25, 2006	99%
2. <b><u>Docket No. 42130, <i>SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Company</i></u></b>	<b>93%</b>
3. Docket No. 42113, <i>Arizona Electric Power Cooperative v. BNSF Railway Company and Union Pacific Railroad Company</i> , November 22, 2011	91%
4. STB Docket No. 42057, <i>Public Service Company of Colorado D/B/A Excel Energy v. The Burlington Northern And Santa Fe Railway Company</i> , June 7, 2004	90%
5. STB Docket No. 42070 <i>Duke Energy Corporation v. CSX Transportation, Inc.</i> , February 4, 2004	90%
6. STB Docket No. 42072, <i>Carolina Power &amp; Light Company v. Norfolk Southern Railway Company</i> , December 22, 2003	85%
7. Docket No. 42125, <i>E. I. du Pont de Nemours &amp; Co. v. Norfolk Southern Railway Company</i>	82%
8. STB Docket No. 42069, <i>Duke Energy Corporation v. Norfolk Southern Railway Company</i> , November 5, 2003	79%
9. STB Docket No. 42056, <i>Texas Municipal Power Agency v. The Burlington Northern And Santa Fe Railway Company</i> , March 21, 2003	75%
10. STB Docket No. 42088, <i>Western Fuels, Inc., and Basin Electric Power Cooperative v. BNSF Railway Company</i> , February 17, 2009	74%
11. No. 30738, <i>Bituminous Coal - Hiawatha, Utah to Mopa, Nevada</i> , October 12, 1994	60%
12. No. 41191, <i>West Texas Utilities Company v. Burlington Northern Railroad Company</i> , April 26, 1996	33%
13. No. 41185, <i>Arizona Public Service Company and PacifiCorp v. The Atchison, Topeka and Santa Fe Railway Company</i> , July 21, 1997	0%

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1/ Publicly available data does not allow for the calculation of the amount of cross-over traffic in the following cases decided since the cross-over standard was adopted in Nevada Power --STB Docket No. 42054, *PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Company*, August 20, 2002; STB Docket No. 41191 (Sub-No. 1), *AEP Texas North Company v. BNSF Railway*, May 15, 2009; STB Docket No. 42051, *Wisconsin Power and Light Company v. Union Pacific Railroad Company*, September 12, 2001; STB Docket No. 42022, *FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company*, May 10, 2000; and No. 37809, *McCarty Farms, Inc., et al v. Burlington Northern, Inc.*, August 14, 1997.

**SunBelt MMM R/VC Ratios**  
**Based On Modified ATC, Original ATC and EP 715 ATC**

	<u>Year</u> (1)	<u>Modified ATC 1/</u> (2)	<u>Original ATC 2/</u> (3)	<u>Ex Parte 715 ATC 3/</u> (4)
1.	July 30-Dec 31, 2011	130.9%	142.2%	134.2%
2.	2012	124.9%	133.7%	127.4%
3.	2013	122.6%	131.0%	124.9%
4.	2014	117.1%	124.2%	118.7%
5.	2015	113.3%	119.2%	114.5%
6.	2016	110.6%	115.4%	111.5%
7.	2017	107.3%	111.5%	108.2%
8.	2018	104.4%	108.1%	105.1%
9.	2019	101.7%	105.1%	102.5%
10.	2020	99.0%	102.0%	99.7%
11.	Jan 1-July 29, 2021	96.1%	98.7%	96.7%

1/ Calculated using revenues based on the STB's Modified ATC Division approach. See "SBRR MMM Model.xlsm."

2/ Calculated using revenues based on the STB's Original ATC Division approach. See "SBRR MMM Model (Original ATC).xlsm."

3/ Calculated using revenues based on the STB's proposed EP 715 Division approach. See "SBRR MMM Model (EP 715 ATC).xlsm."