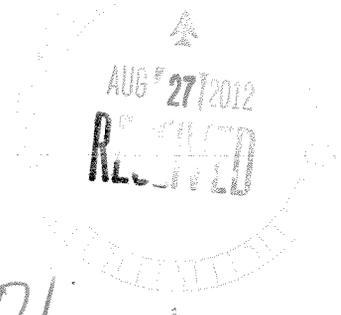


August 27, 2012

via hand delivery

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423



232871

RE: Docket No. NOR 42125, E.I. du Pont de Nemours and Company v. Norfolk Southern Railway Company

Dear Ms. Brown:

Enclosed for filing in the above-captioned case please find an original and ten (10) copies of the Reply of E.I. du Pont de Nemours and Company (“DuPont”) to the “Motion to Hold Case in Abeyance Pending Completion of Rulemaking” filed by Norfolk Southern Railway Company (“NS”) on August 6, 2012. Four (4) compact disks are also included: three CDs of the Reply itself, and one CD with the workpapers supporting the Verified Statement of Thomas D. Crowley.

The workpaper CD is password-protected because it contains Sensitive Security Information. The password is the same as that used for DuPont’s Opening Evidence filed April 30, 2012. If you experience any difficulties in accessing the material on this CD, please contact me or Jason Tutrone.

I have enclosed one additional paper copy of the Reply for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

David E. Benz

ENTERED
Office of Proceedings

AUG 27 2012

Part of
Public Record

Enclosures

cc: Counsel for defendant Norfolk Southern Railway Company

BEFORE THE
SURFACE TRANSPORTATION BOARD

E.I. DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v.)

NORFOLK SOUTHERN RAILWAY)
COMPANY)

Defendant.)

232871
Docket No. NOR 42125

ENTERED
Office of Proceedings

AUG 27 2012

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Public Record

REPLY OF E.I. DU PONT DE NEMOURS AND COMPANY TO
NORFOLK SOUTHERN RAILWAY COMPANY'S
MOTION TO HOLD CASE IN ABEYANCE PENDING
COMPLETION OF RULEMAKING

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August 27, 2012

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**REPLY OF E.I. DU PONT DE NEMOURS AND COMPANY TO
NORFOLK SOUTHERN RAILWAY COMPANY'S
MOTION TO HOLD CASE IN ABEYANCE PENDING
COMPLETION OF RULEMAKING**

E.I. du Pont de Nemours and Company (“DuPont”), hereby submits this Reply to the “Motion to Hold Case in Abeyance Pending Completion of Rulemaking” (“Motion”) filed by defendant, Norfolk Southern Railway Company (“NS”), in the above-captioned proceeding on August 6, 2012. This Reply is supported by the Verified Statement of Thomas D. Crowley, President of L. E. Peabody & Associates, Inc. (“Crowley V.S.”).

NS has requested that the Surface Transportation Board (“STB” or “Board”) hold this proceeding in abeyance pending completion of the Board’s recently announced rulemaking in Ex Parte No. 715, *Rate Regulation Reforms* (served July 25, 2012) (“EP715”), regarding the use of cross-over traffic and the allocation of cross-over traffic revenue in Stand-Alone Cost (“SAC”) proceedings. Because the Board explicitly determined in EP715 that it would not apply any new

cross-over traffic rules to pending cases,¹ 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 DuPont'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 DuPont's case, on the basis of fairness to the complainants.

In Part II, DuPont explains why that determination was sound. Based upon current SAC standards, DuPont already has spent several years and several million dollars developing Opening Evidence that it filed on April, 30, 2012. The Board's proposed changes in *EP715* would require DuPont to revisit every major facet of its SAC evidence, lengthen this proceeding by more than a year, and cost DuPont several million more dollars.

In Part III, DuPont shows that the very premise of the NS Motion asks the Board to engage in highly disfavored retroactive rulemaking by applying any cross-over traffic limits that the Board might adopt in *EP715* to pending cases. 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

¹ 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]).

limits upon cross-over traffic is both inconsistent with long-established SAC rules and could adversely affect DuPont's prospects for success on the merits, the Board should not apply such limits to DuPont's pending case.

In Part IV, DuPont challenges, on four separate grounds, multiple NS assertions that DuPont has made excessive and abusive use of cross-over traffic in its Opening Evidence:

- DuPont has used cross-over traffic consistent with the well-established purpose of making the SAC process more manageable and practicable, which is especially important when dealing with the largest and most complex stand-alone railroad ("SARR") ever presented to the Board.
- Contrary to NS's assertions, DuPont has not made proportionately greater use of cross-over traffic than most prior SAC complainants.
- Because the issue of so-called "leapfrog" trains is not encompassed by *EP715*, nothing would be gained by staying this case until completion of that rulemaking. Neither has DuPont used so-called "leapfrog" trains to avoid difficult or costly segments. Rather, "leapfrog" trains are the inevitable result of a very large SARR that has been designed to handle 138 issue movements. The gaps that result in "leapfrog" trains are happenstance, not manipulation. In addition, rather than being prejudicial to NS, "leapfrog" trains favor NS because NS receives more of the cross-over revenue as a "bridge" carrier. In any event, "leapfrog" trains account for less than 10% of the line haul trains carrying cross-over traffic in DuPont's Opening Evidence.
- DuPont's Opening Evidence presents few of the cross-over traffic issues that have concerned the Board in *EP715*. The DuPont SARR handles less than 10% of the type of cross-over traffic that has troubled the Board (*i.e.* non-trainload traffic moving in hook-and-haul overhead trainload service over the SARR). Moreover, to the extent this type of cross-over traffic creates a "bias" in favor of the bridge carrier (although DuPont does not agree that there is any bias), the alleged bias favors NS when it is providing "leapfrog" train service.

In Part V, DuPont responds to the NS arguments for a stay based on an uncertain cross-over revenue allocation methodology. First, DuPont shows that, in *EP715*, the Board clearly stated its intent to apply Modified-ATC to pending cases, and thus there is no uncertainty. Second, DuPont 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, DuPont 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 DuPont's SAC analysis.

In Part VI, DuPont 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 and the legal hostility to retroactive application of any cross-over traffic limits. Although NS may choose to make wasteful and duplicative arguments, the Board should not be influenced by those threats.

II. **DELAY WOULD BE HIGHLY PREJUDICIAL TO DUPONT.**

NS has asked the Board for an open-ended delay to this proceeding for whatever time is needed for the Board to complete the *EP715* rulemaking and to apply any new rules to this proceeding. Both the temporal delay and the application of any new rules on cross-over traffic would severely prejudice DuPont. The Board's decision in *EP715* not to apply any new rules pertaining to cross-over traffic to pending cases was a clear acknowledgment of this fact.

DuPont filed its Complaint nearly two years ago, on October 7, 2010. 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, DuPont has spent millions of dollars over the past two years to conduct discovery and to develop evidence based upon existing SAC standards. DuPont already has filed its Opening Evidence, on April 30, 2012, based upon current SAC standards, including those governing the use of cross-over traffic.

If the STB were to make significant changes to the SAC methodology in *EP715* and apply those changes to this proceeding, most of DuPont'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 DuPont to revisit every major facet of its SAC evidence, such as network configuration, investment, traffic group, and operations. Crowley V.S. at 2. DuPont would incur substantial additional time and money on top of the two years and several million dollars already spent. That extreme prejudice in and of itself would be compounded by the fact that the DuPont Railroad ("DRR") is the largest and most complex SARR ever presented to the Board.

The temporal delay also would be financially costly to DuPont. Until the Board issues a final decision holding that the challenged NS tariff rates are unreasonable, DuPont must pay those tariff rates. Because tariff rates typically are higher than the contract rates that DuPont elected to forego in order to pursue this complaint, DuPont has been paying, and will continue to pay, this tariff premium for the duration of this proceeding. Although DuPont will receive reparations for any overpayments at the conclusion of this proceeding to the extent the Board finds the challenged tariff rates unreasonable, it will not receive *any* of this money back if the rates are not determined to be unreasonable. Consequently, the longer this case takes to reach conclusion, the more money that DuPont must "ante" into the pot just for the opportunity to pursue regulatory relief. Despite the increasing amount of money that DuPont must place at risk over time, its potential monetary recovery over the 10 year rate prescription period remains unchanged. 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 6-8

months to file supplemental opening evidence and to return to the current procedural status (e.g. 4 months past the filing of Opening Evidence).

That delay would be above and beyond two delays already in this proceeding totaling six months. Although NS attempts to ascribe both delays to DuPont, neither was of DuPont's making. The first delay was required because NS objected to producing traffic data on grounds that it was Sensitive Security Information ("SSI"). This foreclosed discovery of the most critical information needed for a SAC case, until the Federal Railroad Administration issued a decision permitting disclosure to DuPont. The second delay was required by a combination of key omissions from NS's initial traffic data production and NS's belated production of additional key data needed to link much of the traffic data produced to DuPont in order to make such data useful. Therefore, it is disingenuous for NS to contend that, because of these prior delays, DuPont "should not be heard to complain about what effectively would be another scheduled extension." Motion at 22. If anything, those prior delays compound the prejudice to DuPont.

NS also misguidedly attempts to justify a stay of this case because the Board had stayed the *Western Fuels* rate case² during the *Major Issues* rulemaking³ after *Western Fuels* had been pending for "roughly the same amount of time" as DuPont's case. Motion at 27. 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.

² 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.

³ STB Ex Parte No. 657, *Major Issues in Rail Rate Cases* (served Feb. 27, 2006).

- The Board stayed the case in February 2006 after the parties had nearly completed the submission of evidence.⁴
- 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.

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

⁴ It is worth noting that the parties in *Western Fuels* had completed the submission of opening, reply and rebuttal evidence by October 3, 2005, which was less than a year after the complaint was filed. See *Western Fuels II*, slip op. at 3-4. In contrast, 18 months had passed before DuPont even submitted opening evidence in this proceeding and NS reply evidence is currently scheduled to be filed just one week shy of the 2 year anniversary, although NS recently has requested a 60 day extension of its reply due date. See Motion for Modification of Procedural Schedule (filed Aug. 16, 2012). The longer duration of rate cases today is yet another reason why additional delay is unreasonable.

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 game.

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 DuPont if the Board were to grant the NS Motion shows the wisdom of that conclusion. 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).

III. **THE LAW STRONGLY DISFAVORS THE RETROACTIVE APPLICATION OF ANY CROSS-OVER TRAFFIC LIMITATIONS ADOPTED IN EP715 TO PENDING CASES.**

The principal premise of the NS Motion is that the Board should stay this proceeding until completion of the *EP715* rulemaking so that it can apply any new rules that limit the use of cross-over traffic to this case. But that very premise would require the Board to engage in retroactive rulemaking, which the law strongly disfavors.

It is important to distinguish retroactive application of a new rule adopted by rulemaking versus adjudication. While more commonly accepted in the former context, it is highly disfavored in the latter.

In an adjudication, an agency may apply the new rule retroactively to the parties in that adjudication. *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).⁵

In contrast, 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

⁵ Even if the Board were to adopt limits upon cross-over traffic in an adjudication, this five factor test 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) DuPont has relied extensively upon the current rule in pursuing its claims and developing its evidence; (4) the burden upon DuPont 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 DuPont’s substantial reliance upon the current standard.

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. 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, 199.⁶ 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).

⁶ 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.

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.

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*, 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.”⁷ In *EP715*, the Board for the first time 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.⁸ This would be the very definition of a “retroactive” rule if the Board were to apply such limits to DuPont.

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). DuPont’s case has been ongoing for almost two years, during which time DuPont 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 the rules governing the use of cross-over traffic. To impose upon DuPont any new

⁷ *Bituminous Coal—Hiawatha, UT to Moapa, NV*, 10 I.C.C.2d 259, 265, n. 12 (1994).

⁸ This is what distinguishes the Board’s ability to retroactively apply limits on cross-over traffic as opposed to a new ATC methodology, which the Board applied retroactively in *Western Fuels*. The former is substantively inconsistent with prior rules permitting the use of cross-over traffic without limits because excluding such traffic “would weaken the SAC test.” By contrast, the Board’s attempts to refine the ATC methodology have been with the objective of strengthening its original purpose and intent. *See Part V, infra*.

limits upon cross-over traffic that might result from *EP715* would cause great mischief by adding a year or more to the procedural schedule, requiring a “re-do” of DuPont’s Opening Evidence, potentially requiring additional discovery, and adding millions to the legal and consultant fees DuPont must pay.

Similarly, under the APA, rules are defined as agency statements that have “future effect.” 5 U.S.C. § 551(4). Because most of the common carrier rates challenged by DuPont in this case have been in effect for over three years, DuPont’s case substantially addresses NS’s past conduct. To apply future rules to NS’s past conduct also would be the very definition of retroactivity. *See e.g., National Petrochemical & Refiners Association v. EPA*, 630 F.3d 145, 159 (D.C. Cir. 2010); *Boston Edison Company v. FERC*, 557 F.2d 845, 848-849 (D.C. Cir. 1977) (Data required in rate increase schedule must be determined by regulations at time of filing despite announcement of new policy prior to agency decision.). *Cf. Landgraf*, 511 U.S. at 280 (Absent “clear congressional intent,” a newly-enacted statute should not “impair rights” or affect transactions that occurred prior to the statute’s effectiveness.)

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 DuPont’s prospects for success on the merits, the Board should not apply such limits to DuPont’s pending case. Therefore, the Board’s decision not to apply any new limits upon cross-over traffic that may be adopted in *EP715*, besides being fundamentally fair, is legally correct and defensible.

IV. **DUPONT 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 DuPont, NS accuses DuPont of "excessive and abusive use of cross-over traffic" and "present[ing] more extensive and more egregious cross-over traffic distortions than any case the Board has previously considered." Motion at 1, 11. That simply is not true and NS makes no comparison to prior SAC proceedings to support its claims. In this section, DuPont shows that:

1. DuPont has used cross-over traffic consistent with the objective to make the SAC process more manageable and practical;
2. DuPont has not used proportionately more cross-over traffic than other recent complainants;
3. so-called "leap-frog" cross-over segments are neither abusive nor manipulative; and
4. the DRR presents even fewer of the concerns raised in *EP715* regarding cross-over traffic than past SARRs.

A. **DuPont 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."⁹ DuPont has used cross-over traffic in its SAC analysis consistent with the long line of STB precedent on this issue.¹⁰

In response to a renewed railroad assault on cross-over traffic ten years after *Nevada Power II*, the STB, citing to a long line of precedent, confirmed that "The use of cross-over

⁹ *Nevada Power II*, 10 I.C.C.2d at 265, n. 12.

¹⁰ 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]).

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]. 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.

If there were ever a case where the simplifying objectives of the cross-over traffic device were justified, it would be this one. NS itself has acknowledged that the DRR is “the largest and most complex SARR network ever presented.” Motion at 5, n. 4. The DRR’s unprecedented 8091 route miles replicate the core of the NS system that is needed to handle the 138 issue movements. This unprecedented SARR would be even larger and more complex if the Board were to require DuPont 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 single issue movement and a SARR that had only 396.2 route miles. *Id.* at 632. The prospect of expanding the DRR’s 8091 route miles to include all the facilities needed to handle the cross-over traffic associated with 138 issue movements is substantially more daunting.

DuPont 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 3-8. DuPont is trying to limit the complexity of an already “dauntingly large and detailed task.” Without the cross-over traffic device, DuPont could be deprived of a practicable means by which to present its rate complaint to the Board.

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

Despite all of NS’s embellishments alleging that DuPont has presented “more extensive and more egregious cross-over traffic distortions than *any* case the Board has previously considered,” and has engaged in “cross-over traffic gimmickry and manipulation of the evidence,” NS presents very little supporting evidence because the facts do not support its contentions. Motion at 11-12 [italics added]. DuPont has not used more cross-over traffic than any prior SAC cases.

Indeed, DuPont’s use of cross-over traffic, as a proportion of total SARR traffic, is less than most recent SAC cases and is right at the median of all SAC cases for which cross-over traffic information is publicly available. DuPont’s Opening Evidence shows that 82% of the traffic on the DRR is cross-over traffic. *Crowley V.S.* at 8. DuPont 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 five of those SAC cases used *more* cross-over traffic than DuPont, ranging from 85-99% 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 DuPont is on par with most prior SAC cases and is far from constituting the most cross-over traffic of any SAC case. Rather, just like prior complainants, DuPont has used cross-over traffic as intended by the STB to make the SAC process more manageable and practical.

C. **“Leapfrog” Cross-Over Trains Are Neither Abusive Nor Manipulative.**

As part of its attempt to paint DuPont's use of cross-over traffic as abusive and manipulative, NS portrays the concept of so-called “leapfrog” trains, whereby the DRR interchanges cross-over traffic with the residual NS, which acts as an intermediate overhead carrier, to be a radical expansion of cross-over traffic that is designed to “avoid the costs of building, maintaining, and operating expensive segments of what should be the SARR network.” Motion at 7. This is a trumped up argument that should not be afforded any credence for two independent reasons.

1. **The “leapfrog” argument is a “red-herring” because it would not be resolved by the proposals in EP715.**

First, the NS “leapfrog” argument is a “red-herring.” Because this type of cross-over traffic is not the subject of *EP715*, staying this case while *EP715* proceeds will not serve any purpose. Even if the Board were to adopt the proposed limits upon cross-over traffic in *EP715*, the Board still would need to address NS's arguments in this proceeding, because the DRR handles cross-over traffic that would not be excluded by the proposed *EP715* limits and that still

would be handled in “leapfrog” segments. Crowley V.S. at 14. Therefore, NS should make this argument in its Reply Evidence, as it would even in the absence of *EP715*.

2. **DuPont has not manipulated “leapfrog” trains to avoid difficult or costly segments.**

Second, DuPont has not manipulated cross-over traffic, as alleged by NS, “to leap over difficult or costly segments in the interior of the SARR network.” Motion at 7. As discussed in Part IV.A., above, the objective of cross-over traffic is to “keep[] 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.*” *Xcel* at 601 [italics added]. Consistent with that precedent, DuPont has focused the DRR primarily upon those portions of the NS network that are needed to handle the issue movements. Crowley V.S. at 11. The existence of “leapfrog” segments is merely the inevitable result of a very large SARR that has been designed to handle 138 issue movements. *Id.* at 11-12. There are bound to be some gaps in the routes of cross-over traffic that require multiple interchanges between the DRR and the residual NS. The location of those gaps is happenstance, not manipulation.

In some instances, these gaps may occur over difficult terrain and in other instances they may not. NS has cherry-picked two isolated examples to support its argument while ignoring other examples that do not. DuPont Witness Crowley has identified several other “leapfrog” segments where the DRR has built the more costly segment than the residual incumbent. Crowley V.S. at 12, n. 24.

Moreover, NS has misrepresented the two “leapfrog” examples in Exhibits 1 and 2 of the Motion. In both examples, the DRR could still handle that cross-over traffic without the

“leapfrog” segments via an internal reroute¹¹ that would interchange the traffic with the residual NS just once, at Petersburg, VA. Those internal reroutes would traverse lines that the DRR replicates to handle the issue traffic and that are parallel to the actual route. Those parallel lines were just as difficult and costly, if not more so, for the DRR to build as the actual route. *Id.* at 12.

For instance, in the Exhibit 1 example, the residual NS “leapfrog” line segment from Chillicothe to Kellysville, which NS describes as having “very substantial costs of constructing and operating,” Motion at 9, runs parallel to the DRR line from Columbus to Walton, which cuts straight through the mountainous heart of West Virginia. That line too has substantial construction and operating costs. Thus, DuPont did not avoid the costs of building the SARR through difficult mountainous terrain by using “leapfrog” segments; it still incurred them, but on a parallel line.

There was no reason for the DRR to build the parallel NS line because that line is not used by the issue traffic. However, rather than reroute the cross-over traffic, to which NS undoubtedly also would have objected, DuPont retained the real-world route and interchanged the traffic with the residual NS as necessary to complete the transportation. *Crowley V.S.* at 12-13. There was nothing abusive, distorting, or manipulative about this decision.

In fact, DuPont’s decision to use “leapfrog” trains rather than reroute this cross-over traffic was a conservative decision that actually benefits NS in the SAC analysis in at least two different ways. First, if DuPont had rerouted the cross-over traffic internally over the DRR, the DRR would have received an even larger portion of the cross-over revenue with little additional expense, since DuPont had to build that line anyway for the issue traffic. By using “leapfrog” segments, however, the residual NS actually receives a greater portion of the revenue because it

¹¹ An “internal reroute” occurs entirely over the SARR, which interchanges cross-over traffic to the residual incumbent at a point along the actual real-world so as not to impose any additional costs upon the incumbent. *See Texas Municipal Power Agency v. The Burlington Northern And Santa Fe Railway Company*, 6 STB 573, 591 (2003)

handles the cross-over traffic for a greater distance. Crowley V.S. at 13. Second, because the residual NS does not incur costs to originate or terminate cross-over traffic on the “leapfrog” segments, it is in the same position as the DRR (or any SARR) when it acts as a line-haul trainload bridge carrier for cross-over movements. By NS’s logic, this makes the residual NS an over-compensated bridge carrier. Crowley V.S. at 13-14. Thus, far from being prejudiced by the “leapfrog” concept, NS has benefited from it in the SAC analysis.

Finally, “leapfrog” trains do not even constitute a very large portion of the DRR’s cross-over traffic. Less than 10% of the DRR line-haul trains carrying cross-over traffic fall within the NS definition of a “leapfrog” train. Crowley V.S. at 14. This is more consistent with the happenstance nature of “leapfrog” segments than with any form of deliberate manipulation.

D. **The DRR Does Not Implicate The Concerns With Cross-Over Traffic Expressed in EP715.**

NS inaccurately accuses DuPont 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 11. In fact, nothing could be further from the truth. Because of the extremely large size and scope of the DRR, DuPont’s SAC analysis has far less potential than most previous SAC cases to create the sort of alleged “bias” from cross-over traffic that the Board seeks to address in EP715.

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.¹² The Board noted that:

¹² EP715, slip op. at 16 and n. 10

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].¹³ 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 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 DRR 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 DRR handles very little cross-over traffic of this type that underlies the concerns expressed by the Board in *EP715*.

¹³ 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, 20. 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).

DuPont Witness Crowley has reviewed the cross-over traffic in DuPont's Opening Evidence to determine how much is the "hook-an-haul overhead trainload service" that concerned the Board in *EP715*. He found that *less than 10%* of the DRR's cross-over traffic constitutes this type of traffic. Crowley V.S. at 10. In fact, the residual NS frequently is the bridge carrier with the DRR providing the more costly terminal services. *Id.* Furthermore, in many instances where the DRR acts as a bridge carrier, NS also is a bridge carrier, but over a larger geographic footprint, which means that neither the DRR nor the residual NS provides more costly terminal services. *Id.* at 10-11.

Assuming, *arguendo*, that the Board has identified a genuine bias, only a small portion of the DRR's cross-over traffic is the type that creates this alleged bias.¹⁴ Moreover, the DRR also handles cross-over traffic where the alleged bias favors the residual NS. Therefore, NS's contention that the DRR is the "poster child for cross-over traffic abuse" that the Board seeks to address in *EP715*, Motion at 11, 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.

V. **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*,¹⁵ or the "Alternate-ATC" proposed in *EP715*. First, NS attempts to

¹⁴ 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. 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.

¹⁵ The NS Motion, at 13, refers to this as the "Amended-ATC Methodology." However, because the Board's decisions refer to this as "Modified ATC," DuPont adheres to the Board's chosen nomenclature.

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 DuPont 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 conclusion of *EP715* so that the Board can apply Alternate-ATC or whatever other revenue allocation methodology may be promulgated through *EP715*.¹⁶

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 DuPont’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 13-16. 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

¹⁶ NS also claims that DuPont erroneously used Modified-ATC in its Opening Evidence because the Board had not yet reconfirmed Modified-ATC in *Western Fuels IV* when DuPont submitted its Opening Evidence. Motion at 17-19. This argument is another “red-herring” in the NS Motion. Regardless whether the Board had reconfirmed Modified-ATC when DuPont submitted Opening Evidence, the Board subsequently has done so. Thus, this entire NS argument is predicated upon “what might have been,” not “what is.”

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 14, 15.

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 15. 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 22-27. 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 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 24-26. However, the Motion is far off base. The courts have repeatedly found the distinction between legislative rules and interpretive rules to be “notoriously hazy”¹⁷ and “enshrouded in considerable smog.”¹⁸ 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 and *Guidelines*; 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). 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 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.

NS conclusively asserts that Modified-ATC is a legislative rule because it has the “force and effect of law.” Motion at 25. NS appears to have mistakenly interpreted the fact that

¹⁷ *Orengo Caraballo v. Reich*, 11 F.3d 186, 194-195 (D.C. Cir. 1993) (“*Orengo*”).

¹⁸ *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1108 (D.C. Cir. 1993) (citations omitted).

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 clarification regarding the exact 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. See Parts V.B.2 and V.B.3, *infra*. 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).

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 of Original-ATC, as stated by the Board, was to “ensure that a truncated SAC analysis using cross-over traffic will approximate the outcome of a full SAC analysis.” *Major Issues* at 24. See also *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 17 (served Feb. 27, 2006). 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. *Major Issues* at 25. The adoption of Original-ATC was upheld as reasonable. *BNSF Railway Company v. Surface Transportation Board*, 526 F.3d 770, 783-784 (D.C. Cir. 2008).

In the first application of Original-ATC in a specific case, several questions arose as to the exact manner in which it should be applied. *Western Fuels II*, slip op. at 11-14. The Board resolved three disputed issues between BNSF and WFA regarding the proper application of Original-ATC and, additionally, the Board raised a fourth issue on its own. The Board recognized that both WFA and BNSF had used ATC to allocate *total revenue*, a procedure that would create an “illogical and unintended result” for SARR traffic group members with total revenue either below or barely above the variable cost. *Id.*, slip op. at 14. Specifically, using ATC to allocate “total revenue” could cause the on-SARR revenue allocation to be less than variable cost for the highest-density portion of the movements. *Id.* In order to avoid this result, the Board clarified that ATC should be used to allocate total revenue contribution rather than total revenue. *Id.*

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). 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). *See also, American Mining Congress*, 995 F.2d at 1112 (“A rule does not...become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted.”).

Although BNSF petitioned the Board to reconsider its refinement of ATC, it did not assert that the refinement should have been subject to APA notice and comment rulemaking

procedures. *See* BNSF Petition for Reconsideration, *WFA v. BNSF*, STB Docket No. 42088 (filed Oct. 22, 2007). Only NS, belatedly, has devised this new argument.

2. **The refinement of ATC was necessitated by the purposes of both ATC and the Guidelines.**

The refinement of ATC in *Western Fuels II* was consistent with the Board's stated objectives in *Major Issues*, which were to (1) take account of "economies of scale, scope and density" (p. 25); (2) "make the analysis more manageable without introducing bias" (p. 32); and (3) "ensure that the result more closely aligns with what a larger, more cumbersome SAC analysis would show" (p. 36). The refinement was designed to avoid cross-subsidization, a key tenet of *Guidelines* and the SAC test. *Guidelines*, 1 I.C.C.2d at 523-524. *See also PPL Montana*, 437 F.3d at 1245-1246. "The SAC test is designed to measure the costs of serving traffic in the absence of inefficiencies or cross-subsidies." *Duke Energy Corporation v. Norfolk Southern Railway Company*, 7 STB 89, 112 (2003).

In refining application of the ATC method to fulfill the previously-stated intent and objectives, the Board's decision in *Western Fuels II* is on solid ground. "[A]gencies are entitled to great deference in the interpretation of their own rules." *Marseilles Land and Water Company v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003). In one case, the Department of Veterans Affairs revised a regulation (which was published in the Code of Federal Regulations) without using notice and comment procedures required under the APA. *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365 (Fed. Cir. 2001). The court found the revision was an interpretive rule, and therefore exempt from APA requirements, because the revision was prompted by court decisions that had deviated from the Veterans Department's intent in originally issuing the regulation. *Id.* at 1375-1377.

Other precedent supports the Board's decision in *Western Fuels II*. 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 interpretation). With its clarification of ATC, the Board did not intend to create new duties; it simply intended to ensure that ATC met the goals originally established for it. 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*, as well as the overall purposes and goals of the *Guidelines*. The only difference between Original-ATC and Modified-ATC was the Board's clarification that the ATC methodology, which the Board did not change, should be applied to the allocation of total revenue contribution rather than total revenue. In all substantive respects, the ATC methodology itself remained unchanged. Under established precedent, this refinement was, at most, an interpretive rule exempt from APA procedures, not to mention an entirely permissible use of the Board's adjudicatory authority.

3. **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. 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.

When dealing with a SARR the size of the DRR, there inevitably are many high density and low density segments. As a result, where one revenue allocation methodology favors certain SARR movements, 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, DuPont has applied all three ATC variants to its Opening Evidence, filed on April 30, 2012. First, DuPont determined the impact upon the DRR’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 17-18 of the *Crowley V.S.* *See also, Id.*, Ex. 2.

Original ATC, compared against Modified-ATC, reduces the DRR revenues between 5.1 and 5.3 percent annually. Alternate-ATC, from *EP715*, would reduce DRR revenues between 5.5 and 6.1 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 range from 2.4 to 10.3 percentage points higher in any single year. Using Alternate-ATC would increase the R/VC ratios by just 1.5 to 7.3 percentage points. In all cases, the highest R/VC ratios of 128.1% and 125.1% for Original-ATC and Alternate-ATC, respectively, are well below the jurisdictional floor of 180%.

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 DuPont has demonstrated in this Reply, it is not too difficult or time-consuming to adjust the Modified-ATC results to reflect either the Original or Alternate-ATC.

VI. **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 12, 21-22. 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 12 [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, not to mention that the law would strongly disfavor retroactive application of any cross-over traffic limits adopted in *EP715* (See Part III, above). Moreover, as discussed in Part IV.D, above, this case does not substantially implicate the cross-over traffic issues raised in *EP715*. In addition, as discussed in Part IV.C., above, the “leapfrog” trains that NS has made the focal point of its cross-over traffic abuse allegations against DuPont, are not the subject of *EP715*, and in any event should be resolved in the context in which they arise as opposed to a general rulemaking proceeding.

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.

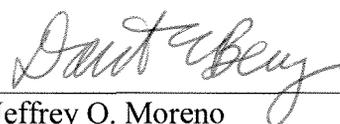
VII. **CONCLUSION.**

Although NS describes its Motion as “fairly modest,” it is anything but modest. Motion at 27. It has substantial prejudicial ramifications for DuPont and it asks the Board to violate a fundamental principal of administrative law against retroactive rulemaking. Moreover, NS attempts to mischaracterize DuPont’s Opening Evidence as one of the most, if not the most, egregious abuse of cross-over traffic ever, when in fact many prior complainants have used far more cross-over traffic, both in the quantity of cross-over traffic and in the nature of the cross-over traffic that the Board proposes to circumscribe in *EP715*. Thus, contrary to NS’s contention

that the proposed rules in *EP715* are designed to curtail the very type of abuse and manipulation found in DuPont's Opening Evidence, that Evidence presents even fewer such concerns than most prior SAC cases. 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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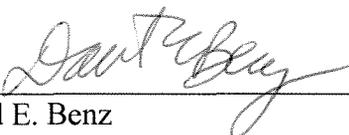
August 27, 2012

CERTIFICATE OF SERVICE

I hereby certify that this 27th day of August 2012, I served a copy of the foregoing via e-mail and hand delivery upon:

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David E. Benz

BEFORE
THE
SURFACE TRANSPORTATION BOARD

)	
)	
E.I. DuPont De Nemours & Company)	
)	
Complainant,)	
)	
v.)	
)	STB Docket No. 42125
)	
Norfolk Southern Railway Company)	
)	
Defendant.)	
)	
)	

Verified Statement
Of

Thomas D. Crowley
President
L.E. Peabody & Associates, Inc.

On Behalf
Of

E.I. DuPont De Nemours & Company

Filed: August 27, 2012

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LIST OF EXHIBITS

<u>EXHIBIT NO.</u>	<u>EXHIBIT DESCRIPTION</u>
(1)	(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	Comparison of DuPont's MMM Revenue to Variable Cost Ratios Based on Cross-Over Traffic Revenue Calculated Using Alternate Average Total Cost Division Methodologies

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 E.I. DuPont De Nemours & Company's ("DuPont") Opening Evidence in this proceeding. A copy of my credentials is included in Part IV of DuPont's Opening Evidence.

I have been requested by Counsel for DuPont to address certain portions of Norfolk Southern Railway Company's ("NS") motion to hold this case in abeyance, which was filed on August 6, 2012 ("Motion").^{1/} 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."^{2/}

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. DuPont has expended significant time and money developing its

^{1/} NS Filed an errata to its Motion on August 10, 2012.

^{2/} See, *EP 715*, p17, footnote 11.

Opening Evidence, which complies with the precedent that has been set through Board action over the last several decades. Holding this case in abeyance and potentially requiring DuPont 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 DuPont 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 DuPont’s reliance on cross-over traffic, as prior complainants have for years, is somehow distorting and impermissible; and (2) that DuPont cannot employ the only revenue division methodology that has been employed in other rate cases decided by the Board since *Major Issues*.^{3/} Both of NS’s arguments are fatally flawed and are discussed below under the following topical headings:

II. DuPont’s Reliance on Cross-Over Traffic Is Neither “Distorting” Nor “Impermissible”

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

^{3/} See, STB Ex Parte No. 657 (Sub No. 1), *Major Issues in Rail Rate Cases*, decided October 30, 2006 (“*Major Issues*”).

II. DUPONT'S RELIANCE ON CROSS-OVER TRAFFIC IS NEITHER "DISTORTING NOR "IMPERMISSIBLE"

Throughout its Motion, NS mischaracterizes DuPont's use of cross-over traffic in its stand-alone railroad ("SARR") traffic group as "misuse" or "abuse."⁴ NS further states that inclusion of cross-over traffic "distorts"⁵ SAC analyses. These descriptions are inaccurate and misleading.

NS presents the following three general complaints about DuPont's use of cross-over traffic: (1) that DuPont included too much cross-over traffic in its traffic group; (2) that some of the traffic in DuPont's traffic group moves on and off the SARR several times; and (3) that *EP 715* will prohibit most of DuPont's traffic selection and operations methods. None of these complaints have any merit as discussed below.

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

DuPont relies on the inclusion of cross-over traffic for precisely the reasons first considered by the ICC^{6/} 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."^{7/}

The ICC fostered the concept of cross-over traffic by its decisions in *Nevada Power*.^{8/} 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

^{4/} See, e.g., Motion pp. 1 and 3.

^{5/} See, e.g., Motion p. 3.

^{6/} Interstate Commerce Commission ("ICC") is the predecessor to the STB.

^{7/} See, *EP 715*, p. 16.

^{8/} Docket No. 37038, *Bituminous Coal – Hiawatha, Utah to Moapa, Nevada*, ("Nevada Power").

Moapa, NV, as well as to carry coal and non-coal traffic moving over line-segments in California, Colorado, Nevada and Utah.^{9/} The ICC found, however, that the defendant railroads 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.^{10/} 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."^{11/}

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.^{12/} 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.^{13/} The Union Pacific Railroad Company ("UP"), the remaining defendant in the case,^{14/} 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.^{15/} UP also objected to the inclusion of additional traffic indicating that this action exceeded the scope of the reopening.

^{9/} See, 6 ICC 2d 1, 46 (1989) ("1989 Nevada Power Decision").

^{10/} See, 1989 Nevada Power Decision, p. 17.

^{11/} Id.

^{12/} See, 10 ICC 2d 259, 263 (1994) ("1994 Nevada Power Decision").

^{13/} See, 1994 Nevada Power Decision, p. 262.

^{14/} 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.

^{15/} See, 1994 Nevada Power Decision, p. 265, note 12.

The ICC partially agreed with the UP and restricted the footprint of the updated SARR to that of 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.^{16/}

Based on the ICC's rulings in limiting the scope of NPC's SARR,^{17/} but including the universe of all shippers utilizing the line segments that are common both to the SARR and the incumbent railroad,^{18/} 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 SARR would receive from/or tender to railroads other than the incumbent at an existing interchange point; and (3) cross-over traffic,^{19/} defined as traffic the SARR would interchange with the incumbent railroad at a hypothetical interchange point on the incumbent railroad's system.^{20/} 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.^{21/}

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

^{16/} 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*”).

^{17/} See, *1991 Nevada Power Decision*, p. 3.

^{18/} See, *1989 Nevada Power Decision*, p. 44.

^{19/} The term “cross-over traffic” was coined by the UP in the *Nevada Power* proceeding and adopted by the ICC.

^{20/} See, *1994 Nevada Power Decision*, p. 265.

^{21/} 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.

same economies of scale, scope and density that the incumbents enjoy over the identical route of movement.”^{22/}

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.^{23/} 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.”^{24/}

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

^{22/} See, *1994 Nevada Power Decision*, p. 265, footnote 12.

^{23/} See, *1994 Nevada Power Decision*, p. 266.

^{24/} See, *1994 Nevada Power Decision*, p. 267.

on which the traffic moves. This allows shippers to effectively hypothesize smaller SARR networks, and unnecessarily prolong proceedings by forcing all parties, including 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.^{25/} 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.

To serve the issue traffic, DuPont must construct and operate a SARR of unprecedented size. When selecting SARR traffic, DuPont 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, DuPont would be forced to construct almost the entire NS network. DuPont strictly adhered to the Board's rules and prior precedent regarding

^{25/} See, *1994 Nevada Power Decision*, at page 265.

the selection of traffic for the SARR traffic group. NS may not like DuPont's inclusion of cross-over traffic but NS cannot demonstrate that DuPont violated any rules when it defined its traffic group.

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

NS states that DuPont's opening presentation "exemplifies the Board's concerns about expanded use of cross-over traffic in a manner that distorts the SAC analysis."^{26/} Contrary to NS's statement, the amount of cross-over traffic included in DuPont'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. In fact, DuPont relies on relatively less cross-over traffic than did prior complainants in recently decided rate cases.

DuPont's Opening work papers show that approximately 82 percent of the traffic transported on the DRR moves in cross-over service, and accounts for approximately 79 percent of the SARR's revenue.^{27/} Compared to the amount of cross-over traffic reviewed and accepted by the STB in prior SAC presentations, DuPont relied on *less* cross-over traffic than most other complainants. Exhibit No. 1 to this verified statement shows the amount of cross-over traffic by percentage from prior SAC presentations to the cross-over traffic included in DuPont's Opening evidence.^{28/}

As Exhibit No. 1 shows, cross-over traffic has accounted for well over 90 percent of the SARR's traffic in several recent cases, including the most recent case decided by the STB, i.e.,

^{26/} See, Motion, p. 4.

^{27/} See DuPont opening e-workpapers "2009.xlsx," "2010 AG 10.xlsx," "2010 Gen Merch 20_25_30.xlsx," "2010 Coal 80-Chem 40-Auto 60.xlsx," and "2010 IM.xlsx."

^{28/} 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 "Exhibit No. 1.xlsx."

AEPCO.^{29/} Cross-over movements accounted for 82 percent of DuPont's total traffic by volume.

There is simply no truth to NS's position that DuPont has "abused" cross-over traffic in developing its SAC evidence. The facts show that DuPont relied less on cross-over traffic than complainants in many prior SAC cases.

**C. THE DUPONT STAND-ALONE RAILROAD
("DRR") 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."^{30/}

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, leaving the residual incumbent to perform more costly terminal activities.

^{29/} 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*").

^{30/} See, *EP 715*, p. 16.

This is simply not the case in DuPont. I have evaluated the DRR traffic group and determined that less than 10 percent of the DRR cross-over traffic makes up the type of moves that the Board is concerned about.

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. DuPont's issue traffic moves in carload service over many NS lines in the real-world. For all of the DuPont issue movements, the DRR constructed the branch lines required to serve the traffic, selected other traffic that originated and terminated on those lines, and performed all of the origin and termination switching for that traffic.

The DRR originates and/or terminates a large portion of its cross-over traffic, thus providing those terminal services itself. As noted in NS's Motion, approximately 80 percent of the DRR traffic is cross-over traffic and about half of that traffic is handled in overhead service on the DRR. That means that the other half of the DRR cross-over traffic (and the roughly 20 percent of the traffic that is local to the DRR) is originated and/or terminated by the DRR. In fact, for many cross-over movements, the DRR performs the costly terminal operations and the residual NS serves as the bridge carrier. For example, the DRR originates or receives in interchange from western carriers a significant volume of intermodal traffic at Chicago that moves over the DRR to Fort Wayne, IN, where the traffic is handed to the residual NS in intact trains. The residual NS then moves the intact trains to Cincinnati, OH where they are returned to the DRR. The DRR then terminates the traffic to Georgetown, KY and East Point (Atlanta), GA.

Furthermore, in many instances where DRR acts as a bridge carrier, NS also acts as a bridge carrier, but over a larger geographic footprint. Specifically, NS receives traffic at interchanges with western railroads and delivers the trains to interchanges with Class II and

Class III railroads. For example, NS receives intact automotive trains from CIND^{31/} at Cincinnati that it delivers intact to FEC^{32/} at Jacksonville, FL. The DRR receives the same intact automotive trains from CIND at Cincinnati and then it delivers them intact to the residual NS at CGA Jct. (Macon), GA. The residual NS then delivers the intact trains to FEC at Jacksonville, FL. The DRR 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 DRR are not intended to cover any terminal operations and reflect only interchange^{33/} and line-haul costs.

**D. LEAPFROG CROSS-OVER
SEGMENTS ARE NEITHER
ABUSIVE NOR MANIPULATIVE**

NS identifies so-called "leapfrog" trains as a "new and unprecedented manipulation of cross-over and overhead traffic." Motion at 7. The traffic DuPont included on the DRR that NS calls "leapfrog" traffic is simply NS traffic that actually moves in part over NS lines constructed by the SARR, and in part over other NS lines that are parallel to or duplicate the rail lines constructed by the SARR. NS wrongly characterizes DuPont's omission of "leapfrog" segments from the DRR as manipulation of cross-over traffic to avoid building costly line segments. DuPont has built segments needed to serve the issue movements. The whole point of cross-over traffic is to avoid the need to perform a full SAC analysis of the entire NS network, but instead to focus on the facilities required by the issue traffic. The simple fact is that the line segments in question are not required to serve the issue traffic and it is DuPont's choice as to whether or not the segment should be built. "Leapfrog" segments are the inevitable result of the large SARRs

^{31/} CIND is the Central Railroad Company of Indiana.

^{32/} FEC is the Florida East Coast Railway, LLC.

^{33/} 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).

that are needed to handle many different carload movements without building the entire defendant railroad.

NS has cherry-picked select cross-over routes where the “leap-frog” segments *may* be more costly in order to support its assertion that DuPont deliberately created “leapfrog” trains to avoid constructing more costly segments. But, there also are examples where the DRR is the more costly segment and the “leapfrog” segment is less expensive to build.^{34/}

In addition, DuPont has not avoided building costly segments in the NS examples; but rather, it has avoided building them twice. For example, in Exhibit 1 to the NS Motion, NS claims that DuPont sought “to avoid the very substantial cost of constructing and operating” the line from Chillicothe, OH to PD Junction, WV. While DuPont did not build that particular NS line because that line is not used by the issue traffic, it did build a similarly costly parallel line from Columbus, OH to Walton, VA through the mountains of West Virginia.

Although DuPont could have rerouted the cross-over traffic from the Chillicothe-PD Junction line to the Columbus-Walton line in order to receive an even greater share of the cross-over revenue for the DRR, the “leapfrog” operations preserve the actual routing of the shipments in question, and attribute revenues to the carrier over which the traffic moves. If DuPont rerouted the traffic to parallel routes over the DRR, NS would complain that it was deprived of

^{34/} For example:

- DRR built the line segment from Roanoke, VA through Altavista, VA to Abilene Cross, VA (approximately 120 miles) and did not build the shorter parallel northern line from Roanoke through Lynchburg, VA to Abilene Cross, VA which is approximately 100 miles long or 20 miles shorter.
- DRR built the line segment from Moberly, MO to Decatur, IL (approximately 210 miles) and did not build the shorter parallel southern line from Moberly, MO to E. St. Louis, IL which is approximately 150 miles long or 60 miles shorter.
- DRR built the line segment from Spartanburg, SC to Columbia, SC (approximately 100 miles) and did not build the shorter parallel eastern line from Ft. Mill, SC to Columbia, SC which is approximately 150 miles long or 10 miles shorter.

its fair share of cross-over revenue. Rather than rerouting this traffic over the lines included in the SARR, DuPont chose to hand the traffic back to NS in a highly efficient “hook and haul” through service to retain NS’s actual routing for this traffic and essentially penalizing the SARR with a smaller share of the movement revenues based on the Modified ATC methodology.

Furthermore, NS’s example of DRR not having built the “costly” segment between Chillicothe, OH and PD Junction, WV ignores the significant fact that this segment is also one of NS’s busiest lines, and therefore would have resulted in a significant increase in SARR revenues if it had been included in the SARR network. Under existing rules and precedent, the complainant has every right to make the build/no-build determination for segments that are not required to serve the issue traffic.

NS opposition to “leapfrog” traffic also contradicts its other arguments for restricting all types of cross-over traffic. On the one hand, NS points to the Board’s concern that line-haul trainload bridge carriers are somehow over-allocated revenues when cross-over traffic is included in the SARR traffic group as a reason for excluding cross-over traffic from the DRR traffic group. On the other hand, NS expends a great deal of effort complaining that the DRR configuration and operations “force” NS into acting in the role of line-haul trainload bridge carrier (i.e., “leapfrog” service). Amazingly, NS claims that when NS serves as the overhead trainload bridge carrier in this instance, NS is under-allocated revenues. Yet, the same ATC revenue division methodology is employed in both cases. It simply cannot simultaneously be beneficial and detrimental to serve in the role of line-haul trainload bridge carrier. The “leapfrog” service that NS complains about in this instance is in fact the polar opposite of the circumstance that the Board seeks to address in *EP 715*.

In the case of the DRR, the moves NS dubs as “leapfrog” traffic actually place NS -- not DRR -- in the role of “over compensated” bridge carrier about which the Board expressed concern in *AEPCO* and *EP 715*.^{35/} The Board is not contemplating restricting “leapfrog” moves from SAC analyses. In fact, the Board’s first proposed restriction would specifically allow “leapfrog” moves.

In the final analysis, the “leapfrog” traffic that NS finds so objectionable does not even constitute a significant portion of the DRR’s cross-over traffic. I have evaluated the DRR Opening Evidence traffic group and determined that less than 10% of the DRR line-haul trains carrying cross-over traffic would fall into NS’s “leapfrog” category.^{36/}

^{35/} Recall the example above where the DRR originates intermodal traffic at Chicago and moves it over the DRR to Fort Wayne, IN, interchanges the traffic to the residual NS in intact trains, the residual NS moves the intact trains to Cincinnati, OH and returns them intact to the DRR for final delivery to Georgetown, KY and East Point (Atlanta), GA.

^{36/} This value was determined based on an evaluation of the trains included in the the DRR’s base year operating statistics calculations presented as part of DuPont’s Opening Statement. See e-workpaper “Base Year Train List_Statistics_Open_Errata_split train 1D.xlsx.”

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

NS asserts that Modified ATC,³⁷ 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 DuPont in its Opening Evidence. However, NS’s claims are contradicted by its acknowledgement at footnote 11 that the Board and the parties used Modified ATC in *AEPCO*,^{38/} which was the last case ruled upon by the Board prior to DuPont’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 DuPont 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*.^{39/} 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.^{40/} NS is wrong.

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

^{38/} 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.

^{39/} 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*”)

^{40/} See, Motion, p. 15.

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].^{41/} 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]^{42/}

Regardless which ATC methodology is applied to the DRR 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,^{43/} 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. As evidenced by NS’s own descriptions of the types of traffic included in the SARR traffic group, 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.

^{41/} See, *EP 715*, p. 18.

^{42/} Id.

^{43/} Sec, 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 exclusively on DuPont’s use of Modified ATC in calculating its revenue divisions on cross-over traffic. NS does not mention the impact of DuPont’s use of Modified ATC on the calculation of the maximum reasonable rate under SAC, the only purpose of developing revenue divisions.

I tested the impact of applying the three forms of the ATC formula to the cross-over traffic in the DuPont case. Table 1 below compares the DRR revenues used in DuPont’s Opening Evidence based on the STB’s preferred Modified ATC methodology to the DRR 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
DRR Revenues Calculated Using Alternative Average Total Cost Revenue Division Methodologies

<u>Time Period</u>	<u>DRR 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. June-Dec '09	\$3,349,996,131	\$3,178,986,187	\$3,166,533,610	-5.1%	-5.5%
2. 2010	6,642,807,927	6,302,360,037	6,243,572,304	-5.1%	-6.0%
3. 2011	7,250,894,061	6,865,810,122	6,805,913,509	-5.3%	-6.1%
4. 2012	8,092,558,612	7,665,950,382	7,597,951,918	-5.3%	-6.1%
5. 2013	8,683,051,185	8,228,286,613	8,154,929,653	-5.2%	-6.1%
6. 2014	9,511,505,582	9,013,872,912	8,933,728,163	-5.2%	-6.1%
7. 2015	10,287,456,885	9,752,257,148	9,664,743,603	-5.2%	-6.1%
8. 2016	11,264,722,566	10,679,217,191	10,583,075,261	-5.2%	-6.1%
9. 2017	12,407,612,570	11,761,626,288	11,656,091,026	-5.2%	-6.1%
10. 2018	13,496,875,907	12,795,955,967	12,680,577,377	-5.2%	-6.0%
11. Jan-May '19	6,116,978,938	5,799,985,378	5,747,428,922	-5.2%	-6.0%

1/ [Column (3) ÷ Column (2)] -1x100.
2/ [Column (4) ÷ Column (2)] -1x100.
Sources: e-workpapers “DRR MMM Input.xlsx,” “DRR MMM Input (Original ATC).xlsx,” and “DRR MMM Input (EP 715 ATC).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 DRR revenues between 5.1 and 5.3

percent per year. Similarly, using the STB’s proposed *EP 715* ATC methodology reduces DRR revenues between 5.5 and 6.1 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 DuPont'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><i>EP 715</i> ATC</u> (4)
1. 2009	117.8%	128.1%	125.1%
2. 2010	118.1%	127.6%	124.9%
3. 2011	117.6%	127.0%	124.2%
4. 2012	114.3%	121.6%	118.7%
5. 2013	113.3%	120.2%	117.3%
6. 2014	109.8%	115.4%	112.8%
7. 2015	107.8%	112.5%	110.4%
8. 2016	104.4%	108.3%	106.6%
9. 2017	101.2%	104.5%	103.1%
10. 2018	98.4%	101.2%	100.1%
11. 2019	95.7%	98.1%	97.2%

Source: Exhibit No. 2

As shown in Table 2 above, using DRR 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 2.4 and 10.3 percentage points, while using the STB’s proposed *EP 715* ATC formula increases the R/VC ratios between 1.5 and 7.3 percentage points over using Modified ATC revenues.

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.”^{44/}

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. DuPont’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 DuPont’s reliance on cross-over traffic, as prior complainants have for years, is somehow distorting and impermissible. 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.”^{45/} 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-over traffic would be “distorting” to the SAC analysis because it would result

^{44/} See, *EP 715*, p. 17, footnote 11.

^{45/} See, *1994 Nevada Power Decision*, p. 265, footnote 12.

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 DuPont'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, DuPont's traffic group contains significantly less cross-over traffic than those of complainants in most recent cases.

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 10 percent of the DRR traffic falls into this category, the Board's concern is basically irrelevant to this case. In fact, NS's complaints about DuPont's use of so-called "leapfrog" traffic place the residual NS, not the SARR, into the role of "over compensated" hook-and-haul overhead trainload carrier. The leapfrog issue is a *non sequitur*.

NS also argues that DuPont 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.^{46/}

NS claims there is no precedent for DuPont's use of Modified ATC. This assertion is clearly inaccurate. Both the Board and the parties used Modified ATC in *AEPCO*, which was

^{46/} See, Exhibit No. 2.

the last case decided by the Board prior to DuPont's filing of its Opening Evidence.

Furthermore, although the most recent *Western Fuels* decision that employed Modified ATC (on remand) was not published prior to DuPont filing its Opening Evidence, that decision simply 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."^{47/}

NS raises doubt over whether the Board's directive that rules promulgated as a result of *EP 715* applied only to the use of cross-over traffic or to revenue division methodology as well. However, in *EP 715* 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].^{48/}

^{47/} See, *EP 715*, p. 18.

^{48/} *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. Docket No. 42113, <i>Arizona Electric Power Cooperative v. BNSF Railway Company and Union Pacific Railroad Company</i> , November 22, 2011	91%
3. 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%
4. STB Docket No. 42070 <i>Duke Energy Corporation v. CSX Transportation, Inc.</i> , February 4, 2004	90%
5. STB Docket No. 42072, <i>Carolina Power & Light Company v. Norfolk Southern Railway Company</i> , December 22, 2003	85%
6. <u>Docket No. 42125, E. J. du Pont de Nemours & Co. v. Norfolk Southern Railway Company</u>	82%
7. STB Docket No. 42069, <i>Duke Energy Corporation v. Norfolk Southern Railway Company</i> , November 5, 2003	79%
8. STB Docket No. 42056, <i>Texas Municipal Power Agency v. The Burlington Northern And Santa Fe Railway Company</i> , March 21, 2003	75%
9. STB Docket No. 42088, <i>Western Fuels, Inc., and Basin Electric Power Cooperative v. BNSF Railway Company</i> , February 17, 2009	74%
10. No. 30738, <i>Bituminous Coal - Hiawatha, Utah to Mopa, Nevada</i> , October 12, 1994	60%
11. No. 41191, <i>West Texas Utilities Company v. Burlington Northern Railroad Company</i> , April 26, 1996	33%
12. No. 41185, <i>Arizona Public Service Company and Pacificorp v. The Atchison, Topeka and Santa Fe Railway Company</i> , July 21, 1997	0%

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.

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

<u>Year</u>	<u>Modified ATC Methodology 1/</u>	<u>Original ATC Methodology 2/</u>	<u>Ex Parte 715 Methodology 3/</u>
(1)	(2)	(3)	(4)
1. 2009	117.8%	128.1%	125.1%
2. 2010	118.1%	127.6%	124.9%
3. 2011	117.6%	127.0%	124.2%
4. 2012	114.3%	121.6%	118.7%
5. 2013	113.3%	120.2%	117.3%
6. 2014	109.8%	115.4%	112.8%
7. 2015	107.8%	112.5%	110.4%
8. 2016	104.4%	108.3%	106.6%
9. 2017	101.2%	104.5%	103.1%
10. 2018	98.4%	101.2%	100.1%
11. 2019	95.7%	98.1%	97.2%

1/ Revenues based on the STB's Modified Average Total Cost division methodology as used in Docket No. 42088, *Western Fuels Association, Inc., and Basin Electric Power Cooperative v. BNSF Railway Company*, served February 18, 2009, and presented in DuPont's Opening Evidence. See DuPont Opening e-workpaper "Maximum Markup Errata.accdb."

2/ Revenues based on the STB's Original Average Total Cost division methodology as proposed in STB Ex Parte No. 657 (Sub-No. 1), *Major Issues in Rail Rate Cases*, Served October 30, 2006. See e-workpaper "MMM Original ATC.accdb."

3/ Revenues based on the STB's proposed Average Total Cost division methodology as described in STB Ex Parte No. 715 *Rate Regulation Reforms*, Served July 25, 2012. See e-workpaper "MMM EP 715 ATC.accdb."