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Expedited Consideration Requested

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

**REPLY TO NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO
COMPLAINANT'S SECOND MOTION TO MODIFY PROCEDURAL SCHEDULE**

E.I. du Pont de Nemours and Company ("DuPont"), hereby submits this "Reply to Norfolk Southern Railway Company's ("NS") Reply to Complainant's Second Motion To Modify Procedural Schedule" ("NS Reply") in the above-captioned proceeding. DuPont asks the Board to accept this reply to the NS Reply because the requested procedural extension is a matter of the utmost importance to DuPont, since without it, DuPont cannot present SAC evidence on January 31, 2011. Indeed, as stated in its Motion, DuPont has asked for the bare minimum amount of time that it needs to prepare SAC evidence. The NS Reply engages in gross misstatements and attempted misdirection that equity demands DuPont have the opportunity to rebut, lest the Board render a decision on the basis of these inaccuracies. Moreover, NS raises an entirely new argument that the Board must issue a final decision in this proceeding within three years, or dismiss DuPont's Complaint. Because DuPont is filing this reply only one day after the NS Reply, there is no prejudice to a timely decision by the Board.

I. NS WRONGLY CLAIMS DUPONT POSSESSED COMPLETE AND USABLE TRAFFIC DATA SINCE OCTOBER.

NS's claim that DuPont has possessed complete and usable traffic data since October 5, 2011, is patently false. NS Reply at 7-14.

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A. NS Had Not Provided Sufficient Information For DuPont to Link the Various Traffic Data Files Until November 21, 2011.

Although NS had produced waybill, car event, intermodal event, and train event data by October 5, it had not produced the critical data required to link all these data sets in a manner that would allow DuPont to conduct the analyses required to begin its traffic selection process. Cutting through all the smoke and obfuscation of the NS Reply, the critical data set that DuPont received on November 21, 2011, comprising this final piece of the traffic data puzzle, is the milepost file that NS claims “is plainly not a ‘critical data set’” because “DuPont did not even ask for it until the penultimate day of discovery.” *Id.* at 14. Both assertions are wrong and extremely insincere.

This data, which NS labeled as “SPLC_OS_MP” in its production, is required to link the car and intermodal event data (which contains SPLC and station location information) to the NS density data (which contains milepost information) in order to develop density information on a movement by movement, segment by segment basis for over 10 million movements per calendar year. The density data, in turn, is required to develop ATC revenue divisions for cross-over traffic. In fact, the requirement to develop revenue divisions using the Board’s ATC revenue division methodology is the single most critical and time consuming undertaking in the entire traffic selection process, because it requires, among other things, individually mapping every car selected for inclusion in the traffic group to density data along the entire route of movement over the incumbent railroad, developing densities for the on-SARR and off-SARR portion of every movement, and then developing contribution to fixed costs per mile for the on-SARR and off-SARR portion of every movement.

NS disingenuously claims that DuPont did not request this data until the penultimate day of discovery, in Request for Production (“RFP”) No. 171, served on September 29, 2011. NS

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Reply at 14. Although DuPont served RFP 171 on that date, it did so because NS inexplicably had not produced this mileage data in response to RFP Nos. 21 and 23, which DuPont had served on December 2, 2010. Those discovery requests read as follows:

- **REQUEST FOR PRODUCTION NO. 21** Please produce documents, in a computer readable format to the extent available, which contain complete information (including all events) tracking and describing car, locomotive and train movements for each car, locomotive, and train moving on NS lines to, from, or through the SARR States for each year or partial year 2008 to the present. **Provide location information by station, state and SPLC.** [emphasis added]
- **REQUEST FOR PRODUCTION NO. 23** Please provide **all documents**, including programs, decoders, and instructions, **necessary to utilize, evaluate and link** the data produced in response to Request for Production Nos. 20, 21, and 22. Please include with this production a description of the relationship between the databases (e.g., whether there is a 1:1 ratio between databases, or whether one can expect to link 100% of the records in one file to another file). Please also indicate which data fields are common (and may be used to link) to the provided databases. [emphasis added]

The mileage data requested by RFP 171 was responsive to both of these earlier discovery requests. Although NS had provided car event data (and months later intermodal event data) that included location information by station, state, and SPLC in response to RFPs 21 and 23, NS provided train event data that contained **only milepost information**. The common fields that NS provided to link the two data sets were insufficient to link the files with adequate specificity. For example, if a train was travelling between Chicago and Buffalo, and a car moved on that train between Toledo and Cleveland, there was insufficient data to link the switching events for that car (into and out of the Chicago to Buffalo train) at Cleveland and Chicago without the SPLC_OS_MP database. Without this critical link that was not produced until November 21, 2011, DuPont was unable to develop, much less evaluate, operating scenarios for its SARR.

Once it became clear, at the close of discovery, that NS was not going to produce any additional traffic data, DuPont served RFP 171 so that there could be absolutely no doubt what was missing from the NS production. Why NS failed to produce the SPLC_OS_MP database in

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response to RFP Nos. 21 and 23 is a mystery, because NS knew full well the important role of this data to linking the other traffic data that it had produced. For NS to assert that DuPont was not diligent in requesting that data is patently false. Moreover, why it took NS nearly two months, from September 29 until November 21, to produce the SPLC_OS_MP database in response to RFP 171, which was DuPont's second attempt to obtain this information, also is a mystery, since NS has not made any claim that this required a special study.

B. DuPont's Selection of Contracts Does Not Indicate That NS Had Provided Complete Traffic Data by October 5th.

NS's contention that DuPont had complete and usable traffic data by October 2011 also relies heavily upon its claim that DuPont was in fact using the traffic data in October to select contracts for production by NS. NS Reply at 14-16. DuPont's Motion does not claim that the NS traffic data was utterly useless for any and all purposes. DuPont pointed out that selection of the traffic group is the very first step in developing SAC evidence, upon which all subsequent steps are dependent, and that DuPont could not complete that first step without complete and usable traffic data. Motion at 5-6. The ability to identify contracts from the traffic data is a far cry from having sufficient data to select the SARR traffic group.

In selecting contracts for production, DuPont was identifying potential traffic that it might wish to include in its SARR, which is but the first step in ultimately identifying the optimal traffic group. The selection of the SARR traffic group, which is but the very first phase of developing SAC evidence, entails the following steps:

1. Determine the route of movement for issue traffic over the incumbent system,
2. Develop a preliminary SARR system based on the issue traffic route of movement,
3. Identify traffic that moves over the preliminary SARR system,
4. Determine the route of movement for all traffic that moves over the preliminary SARR system,
5. Determine the trains used to move the traffic over the preliminary SARR system,

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6. Determine the locations where SARR traffic is handled (enters the system, exits the system, and is switched into and out of trains along the preliminary SARR system),
7. Develop variable costs for the OnSARR and OffSARR portions of the movements in the potential SARR traffic group,
8. Develop densities for the OnSARR and OffSARR portions of the movements in the potential SARR traffic group,
9. Develop fixed costs for the OnSARR and OffSARR portions of the movements in the potential SARR traffic group,
10. Develop SARR revenue divisions for cross-over traffic in the potential SARR traffic group,
11. Evaluate SARR revenues relative to construction and operating costs,
12. Determine which traffic to include in the SARR traffic group,
13. Determine the optimal operating plan and equipment requirements for the tentative traffic group,
14. Determine what physical plant adjustments are required for the preliminary SARR system to efficiently handle the tentative traffic group,
15. Repeat steps 4 through 14 until the optimal traffic group and SARR configuration is established.

DuPont could not undertake 9 of these 15 steps (Steps 6 and 8-15) without the SPLC_OS_MP database that NS did not produce until November 21.

DuPont's selection of contracts also shows that, contrary to NS's suggestion, DuPont was not "sitting on its hands" waiting for NS's traffic data. NS Reply at 12. DuPont was in fact doing what it could do with the information produced by NS.

The fact of the matter is that there was only so much that DuPont could do, because determination of the traffic group and final SARR configuration/operating plan is both a linear (steps must be followed sequentially) and an iterative (final results dictate a return to an earlier step) process that can only begin when all the critical data sets can be linked in a manner that allows full utilization of the data to conduct the analyses required to develop a SARR. Because railroads do not develop their databases and supporting codes for the purpose of generating SAC analyses, making determinations such as on- and off-SARR locations and determining SARR miles and on- and off-SARR densities and fixed costs cannot be done using simple queries of the

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data as it is kept in the normal course of business by NS or any other railroad. Essentially, DuPont must generate entirely new data tables for these purposes. This table development is completely reliant on DuPont's ability to establish critical links between data sets, which was not possible until November 21 at the earliest.

Finally, NS raises a red-herring when it points to the part of DuPont's Motion that predicts the size of its SARR and number of peak period trains as evidence that DuPont has been able to use the NS traffic data. NS Reply at 19, n. 21. The SARR distance, however, is determined mostly by the origins and destinations of the issue movements, not by the traffic data. DuPont's Motion predicted route miles, not track miles, which does depend upon traffic data. The peak week train estimate provided a very broad range based upon what DuPont has been able to do with the traffic data since November 21, and nothing more. DuPont provided this information to illustrate the complex and time-consuming process of developing SAC evidence.

II. NS RAISES NUMEROUS RED-HERRINGS AND ENGAGES IN SUBSTANTIAL MIS-DIRECTION.

Throughout its Reply, NS raises numerous red-herrings and engages in mis-direction to distract the Board from the key issues and relevant facts.

NS's claim that the Board's previous extension of the procedural schedule by 90 days was "generous" because there was only a 34-day delay in production of traffic data due to SSI issues is absurdly disingenuous. NS Reply at 5-7, 17. To reach that conclusion, NS must contend that, absent the SSI delay, it would have produced traffic data on the very last day of discovery. If that had occurred, DuPont undoubtedly would have had to request additional time even absent the SSI issue. The 90-day extension due to the SSI delay merely maintained the status quo of the original procedural schedule had that delay not occurred, because it took 90 days to resolve the SSI issue from the date NS first asserted SSI objections to DuPont's traffic

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data discovery requests. Indeed, that was the predicate for DuPont's Motion to Modify Procedural Schedule, filed on August 9, 2011. There was never any extra time built into that schedule, contrary to NS's *post hac* assertion.

NS's additional assertion that DuPont received a windfall from the SSI-induced delay because NS continued to produce some non-SSI traffic data and responded to DuPont's other (*i.e.* non-traffic data) discovery requests during that time ignores the undisputable fact that traffic data is the *sine qua non* without which most other discovery is of limited value. NS Reply at 6-7, 10. For example, NS points to density data that it produced in February 2011. *Id.* at 10. That density data, however, could not be linked to the car event data until NS produced the SPLC_OS_MP database on November 21, because that database is the key to linking the car event and density data to one another. The ability to link those two data sets is essential to develop SARR revenue divisions under the ATC methodology.

NS engages in further misdirection when it argues that the original procedural schedule already accounted for the complexities of this proceeding. NS Reply at 5-6, 17-18. That is beside the point. Regardless whether the original procedural schedule had given DuPont one year or ten years to submit Opening Evidence, the prejudice to DuPont of receiving complete and usable traffic data just two and a half months before the due date would be precisely the same because DuPont would not have been able to use that additional time for the intended purpose.

Furthermore, NS's comparison of the original DuPont procedural schedule to those for Total Petrochemicals and M&G Polymers in Docket Nos. 42121 and 42123, respectively, is a red-herring. NS Reply at 18. Although both cases were filed several months before DuPont's Complaint, neither of those cases has yet presented SAC evidence or even has a procedural schedule for doing so. By the time SAC evidence is filed in those cases, both Complainants will

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have had far more time to prepare SAC evidence than DuPont, despite having smaller SARRs than DuPont and not having incurred SSI-related delays.

Finally, NS suggests that DuPont's failure to respond to NS's October 21, 2011 letter asserting that the NS traffic data was in fact complete and that DuPont had exaggerated the scope of purported data deficiencies in an October 13, 2011 letter somehow signifies DuPont's acquiescence to the NS letter. NS Reply at 13. DuPont did not respond because a response was not necessary. Despite NS's hyperbole and gross misrepresentations in its October 21 letter, NS stated that it did not possess the requested data, and provided DuPont with a partial solution for obtaining the requested information. As DuPont noted in its Motion, at 4, that solution itself required another month of work by DuPont. Therefore, DuPont considered it a waste of resources and petty squabbling to engage in an extended argument with NS over a question that was rendered moot by NS's response.¹

III. NS HAS NOT PRESENTED ANY BASIS FOR THE BOARD TO EXTEND ITS TIME TO REPLY TO DUPONT'S OPENING EVIDENCE AT THIS TIME.

DuPont takes no position on NS's suggestion that it should be granted an equivalent amount of additional time that may be granted to DuPont, except to state that it is premature to grant NS any additional time at this juncture. NS Reply at 4, 23. After DuPont submits its Opening Evidence, NS is free to request additional time based upon specific facts that might justify such an extension. But, the mere fact that the Board extends the time for DuPont to submit Opening Evidence by itself does not constitute adequate justification.

¹ To the extent that any response to the NS letter is even necessary, knowing the mileage associated with all movements is critical for several reasons. Every movement in the SARR traffic group must be costed using URCS Phase III costing as part of the ATC revenue division process, and URCS Phase III requires mileage as an input. Although DuPont was able to develop miles for most of the intermodal units using the methodology suggested by NS (linking the units to railcars on which they travelled), there are still cases where intermodal units move on more than one railcar between origin and destination, and where units moved for less than the entire car cycle (e.g., was removed from the car at mid-cycle). However, NS has provided mileage data only for complete car cycles. If an intermodal unit moved on more than one railcar, or moved for less than the entire car cycle, DuPont still does not have the mileage associated with the intermodal unit movement in the data provided by NS.

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NS's suggestion that extra time for DuPont, and not NS, is prejudicial to NS is a red-herring. A major reason for DuPont requesting additional time is that it has not in fact had access to complete and usable NS traffic data for much of the time contemplated by the first two procedural schedules. Moreover, this delay is attributable to the fact that DuPont could not fully understand and use the NS traffic data. In contrast, because this is NS data, NS has no such issues with having complete data or understanding that data. Furthermore, DuPont is the party responsible for developing the SARR and presenting SAC evidence based upon that SARR. The NS objective on reply is to critique DuPont's SARR. Common sense dictates that it is much more difficult and time-consuming for DuPont to create a SARR out of data provided by NS than it is for NS to critique that SARR using its own data.

IV. NS INCORRECTLY ASSERTS THAT THIS PROCEEDING MUST BE DISMISSED IF NOT COMPLETED WITHIN THREE YEARS.

NS's assertion that the Board must resolve rate reasonableness cases within three years is contrary to long-standing Board precedent, suffers from a strained interpretation of 49 U.S.C. § 11701, and is inconsistent with legislative history.

Under section 11701(c), "[a] formal investigative proceeding begun by the Board under subsection (a) of this section is dismissed automatically unless it is concluded by the Board . . . by the end of the third year after the date on which it was begun." Thus, for DuPont's complaint to be automatically dismissed under this provision, it must be a "formal investigative proceeding begun by the Board under [49 U.S.C. § 11701(a)]."² Section 11701(a), however, does not define "formal investigative proceeding." Instead, it states that:

Except as otherwise provided in this part, the Board may begin an investigation under this part only on complaint.³

² *Id.*

³ 49 U.S.C. § 11701(a).

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In addition to having authority to bring an investigation upon complaint, the Board has limited authority under the part to initiate an investigation on its own accord.

Despite this ambiguity, the Board and its predecessor have reasonably interpreted section 11701(c) to apply only to Board-initiated proceedings. The Supreme Court has held that deference should be given to an agency's reasonable interpretation of its statute where the statute is ambiguous regarding a specific issue.⁴ Nearly 30 years ago, the Interstate Commerce Commission ("ICC" or "Commission") held that the phrase "formal investigative proceeding" referred only to an investigation begun on the Commission's own initiative.⁵ More recently, in 2009, the Board held that section 11701(c) "does not apply to rate cases begun on complaint"⁶ and supported this holding before the D.C. Circuit Court of Appeals.⁷ The Board's position rests on three main premises: (1) Congress prescribed automatic dismissal to protect carriers from drawn-out ICC-initiated investigations; (2) Congress ratified the interpretation by not clarifying the meaning of formal investigative proceedings when it enacted the Interstate Commerce Commission Termination Act ("ICCTA"); and (3) due process requires affording a complainant a full hearing.

Congress intended automatic dismissal to only act as a constraint upon the Board.⁸ The ICC arrived at this conclusion based on the legislative history of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), which is the genesis of the automatic dismissal

⁴ Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

⁵ Complaints Filed Pursuant to the Savings Provisions of the Staggers Rail Act of 1980 (Section 229, Pub. Law 94-448), 367 I.C.C. 406, 411 (1983) (holding that complaint proceedings are not "formal investigative proceedings").

⁶ W. Fuels Ass'n v. BNSF Ry., STB Docket No. 42088, slip op. at 9 (served Feb. 18, 2009)

⁷ BNSF Ry. v. STB, 604 F.3d 602, 608 (2010). The court refused to resolve the issue because it was improperly raised by BNSF.

⁸ See Staggers Complaints, 637 I.C.C. at 409. At the time Congress adopted the automatic-dismissal provision, the ICC regularly initiated proceedings that went on for many years. For example, the ICC initiated Ex. Parte 270, an investigation of freight rate structure, on December 11, 1970, and it branched off into multiple sub-investigations that were still in existence in 1976. See Investigation of R.R. Freight Rate Structure, 340 I.C.C. 868 (1971); Investigation of R.R. Freight Rate Structure, 345 I.C.C. 2042 (1976).

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provision; Congress's intent not to enact substantive change when recodifying the provision in section 11701 and adding the reference to section 11701(a); the failure to refer specifically in the provision to complaint actions brought by private parties; and the distinction between complaint and investigative proceedings.⁹ Further, the Commission reasoned that applying the provision to complaint-initiated investigations would lead to absurd or irrational results by discouraging settlements and encouraging defendants to engage in dilatory tactics.¹⁰ In addition, the Commission noted that applying the provision to complainants would "violate basic notions of due process and fairness," which Congress could not have intended.¹¹

By not defining the meaning of "formal investigative proceeding" when enacting the ICCTA, Congress adopted the Commission's view that section 11701(c) does not apply to complaint-initiated investigations. The Supreme Court has stated that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."¹² Here, Congress made no changes to the phrase "formal investigative proceeding" and did not preclude the Board from beginning investigations on its own initiative.¹³

Interpreting the automatic-dismissal provision to apply to complaint-initiated investigations would deprive complainants of their Constitutionally-protected right to due process by requiring dismissal where a complainant is not at fault for delays to its case. The Supreme Court has indicated that statutes should not be construed to conflict with the Constitution.¹⁴ The Supreme Court has also held that "a cause of action is a species of property

⁹ Id. at 409-10.

¹⁰ Id. at 410.

¹¹ Id. at 411.

¹² Lindahl v. Office of Pers. Mgmt., 470 U.S. 768, 783 n.15 (1985)

¹³ Compare 49 U.S.C. § 11704 (1994) with ICC Termination Act of 1995, Pub. L. No. 104-88, § 102(a), 109 Stat. 803, 845 (1995).

¹⁴ Clark v. Martinez, 543 U.S. 371, 379-80 (2005).

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protected by the Fourteenth Amendment's Due Process Clause."¹⁵ Accordingly, a complainant must be given a "meaningful opportunity to be heard"¹⁶ and cannot be deprived of such opportunity through no fault of its own. Placing a defined time limit on all complaint-initiated investigations would be inconsistent with this notion of due process.

In this proceeding, the first 90 day extension was caused not by any act of DuPont, but by the need to resolve a novel issue raised by NS as to whether its traffic data was SSI, and the time required by an entirely different agency, the FRA, to resolve that issue. DuPont's current request for a further extension is due to the fact that the defendant, NS, did not produce complete and usable traffic data to DuPont in a timely manner that would enable DuPont to present its evidence in accordance with the current procedural schedule. Due process would not be served by dismissing DuPont's Complaint because these two issues that are completely beyond DuPont's control prevented the Board from issuing a final decision within three years.

That no appellate level court has interpreted the automatic-dismissal provision is of little moment. As mentioned above, a reviewing court will uphold the Board's interpretation of its statute if it is reasonable. NS has failed to show that the Board's firmly established interpretation of section 11701 is unreasonable. Moreover, NS's assertions regarding the automatic-dismissal provision run contrary to established principles of statutory interpretation. Accordingly, the Board's precedent regarding automatic dismissal should apply here.

V. CONCLUSION.

In its Motion, DuPont took great pains not to cast blame or suggest that NS was deliberately engaged in dilatory tactics, because such accusations can rarely be proven with absolute certainty, and doing so is not constructive. NS, however, has exploited DuPont's

¹⁵ Logan v. Zimmerman Brush Co., 455 U.S. 428 (1982) (finding that a cause of action could not be extinguished because a state agency failed to act on a charge of unlawful conduct within a certain period).

¹⁶ Boddie v. Connecticut, 401 U.S. 371, 377 (1971)

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attempt to take the high road by painting a halo around its own head and accusing DuPont of engaging in exaggerations and hyperbole.

The fact of the matter is that NS can easily create the appearance of substantial cooperation by producing large volumes of traffic data early in the process, but then withholding a few key pieces that DuPont needs in order to use any of that data. Without those key pieces, DuPont would have to make numerous assumptions that then would be vulnerable to attack by NS in its reply evidence.

Indeed, the NS Reply appears to be setting DuPont up for just such an attack:

Finally, if the Board does grant DuPont a 30-day extension of time to file opening evidence, it should make clear that the Board will not tolerate unsupported assumptions and “shortcuts” in DuPont’s SAC presentation. Even without an extension, DuPont will have an extraordinary amount of time to prepare its opening evidence, and it has no excuse to submit anything less than a full and completely documented presentation in its opening evidence.

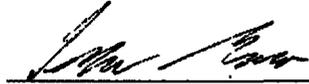
NS Reply at 23. By withholding critical data until very late in the procedural schedule, NS ensures that DuPont will be forced to make numerous assumptions and take “shortcuts.” Then, in opposition to DuPont’s Motion, NS disingenuously downplays and misrepresents the significance of that data.

NS’s opposition to DuPont’s Motion has all the appearance of a tactical ploy to prevent DuPont from having adequate time to develop credible evidence. DuPont has made clear in its Motion that any extension short of 90 days will be inadequate. Therefore, if the Board grants NS’s suggested 30 day extension or “splits the baby” at 60 days, DuPont will still have to engage in various assumptions and “shortcuts” that NS asks the Board to proscribe. The Board should not allow such manipulations and instead focus upon ensuring that the parties are permitted adequate time to develop reliable and credible evidence.

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WHEREFORE, for the foregoing reasons, DuPont respectfully requests that the Board grant DuPont's Motion to Modify Procedural Schedule.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that this 21st day of December 2011, I served a copy of the foregoing via e-mail and first class mail upon:

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