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decision to apply its percentage reduction methodology relying upon Norfolk Southern Railway Company's ("NS") challenged rates.

The Board's ruling on the proper manner in which to index the SARR's operating expenses over the 20-year DCF period directly conflicts with prior Board precedent; is economically unsound not only when viewed solely with regard to operating expenses, but also when viewed in the context of the manner in which the Board chose to index operating revenues for the SARR; and fails to apply the agency's expertise in a manner consistent with its statutory mandates. The Board's resolution of the issues concerning the application of the percentage reduction methodology abdicates the Board's responsibility to decide disputed issues of fact; unfairly and illogically confuses the issues by seizing upon an unfounded and clearly inapplicable NS claim of the potential for shipper gaming; completely ignores extensive and critical evidence and argument advanced by CP&L; and, after acknowledging the existence of a problem, unfairly rejects well-reasoned and well-supported proposals to address the problem, again failing to confront and address the issues in a manner consistent with its statutory mandates.

As to both of these errors, the Board's failure to deal with the issues presented causes it to default to NS's evidence in a manner that is extremely prejudicial to CP&L.

## II. ARGUMENT

### A. The Board Committed Material Error in its Indexing of Operating Expenses

#### 1. Rejection of the RCAF-A Conflicts with Past Precedent

In its evidentiary filings in this case, CP&L relied upon the Board's decision in Docket No. 42051, *Wisconsin Power & Light Co. v. Union Pacific R.R.* (STB served Sept. 12, 2001) ("*Wisconsin*"), as precedent requiring that the measure used to index operating expenses should reflect the impact of productivity. *See* CP&L Op. at III-G-5 to 6; CP&L Reb. at III-G-2 to 4. The Board ruled in *Wisconsin* that: "[i]t is not unreasonable to expect that an efficient railroad built today would realize future productivity gains by utilizing new technology as it develops." *Id.* at 106. This ruling was made notwithstanding arguments by the Union Pacific that the SARR could not expect productivity gains because it was designed as a highly efficient new railroad and therefore could not expect to improve its productivity further. The Board provided a specific example of the type of productivity improvements the SARR would experience:

For example, the parties assume that the SARR would replace its information technology and communication systems every five years. The SARR could be expected to purchase equipment that would allow for productivity improvements.

*Id.*, at 106 n.197.

The evidence submitted by CP&L in this case demonstrated that the P&SH would definitely experience productivity improvements over time. For example, as CP&L pointed out at oral argument, the P&SH pays \$1.2 million each year to a contractor for support of its transportation management system. *See* November 19, 2003 Oral

Argument Transcript (“Tr.”) at 20-32; Counsel’s Exh. 3 (citing “Carolina P&L-Rebuttal Operating Budget.xls,” row 10). The contractor continuously enhances its system for developments such as on board remote computing and locomotive maintenance management. *Id.* (citing CP&L Op. Workpapers Vol. 4, p. 2214). As in *Wisconsin*, the P&SH replaces its IT hardware every five years. *Id.* (citing CP&L Reb. electronic workpaper “OPR\_EXP\_REB.123,” row 293). Technological improvements in locomotives would also be obtained through programmed replacement of leased locomotives. *Id.*; CP&L Op. Workpapers, Vol. 4, p. 2072. Moreover, the Board’s Chairman noted, at oral argument, other types of productivity improvements that would be available to the P&SH. *See* Tr. at 32 (referring to potential productivity gains from FRA approval of remote control for yard locomotives and reduction in crew sizes). In short, the Board’s decision to index operating expenses in a manner that fails to recognize productivity gains directly conflicts with *Wisconsin* and with the evidence of record.

CP&L recognizes that the Board recently rejected the use of a productivity adjustment for indexing operating expenses in Docket No. 42056, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry.* (STB served March 24, 2003) (“*TMPA*”) at 171-72, and Docket No. 42069, *Duke Energy Corp. v. Norfolk Southern Ry.* (STB served November 6, 2003) (“*Duke-NS*”) at 37. However, both of those rulings were premised on findings that the record did not contain evidence showing that the SARRs in question would realize productivity enhancements. *Id.* Clearly no such ruling would be proper based on the evidence in this case.

## 2. Reliance Upon the RCAF-U is Economically Unsound

In addition to being in direct conflict with *Wisconsin*, the Board's decision not to reflect productivity improvements in indexing operating expenses is clearly wrong from an economic perspective. First, as noted in the previous section, the P&SH will definitely experience productivity improvements which the RCAF-U will not reflect and as a result operating expenses will be continuously and increasingly overstated. Secondly, the Board's logic that "... the potential impact of [productivity] improvements [for the P&SH] is far less than it would be for existing railroads, which make changes incrementally as older technology assets wear out or become obsolete" (*Decision* at 27) fails to take into account its own rulings on other issues in the case. Specifically, the Board's *Decision* adopts the NS's operating plan (*id.* at 26), and operating assumptions (*id.*). There are numerous respects in which such operations could be significantly improved. *See, e.g.*, CP&L Reb. at III-B-1 to 4, III-C-6, and III-C-29 to 56. For example, as CP&L explained at oral argument, NS's SARR gathering operation is vastly less efficient than NS's existing operations, much less anything akin to a "least cost, most-efficient" operation. Specifically, NS treats each and every less-than-trainload coal shipment as a separate train for the movement from origin mines to gathering yards. (Tr. at 23-26, Counsel's Ex. 1).<sup>1</sup> Obviously, a railroad starting off with this type of hugely inefficient operations has the opportunity for early and major productivity improvements.

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<sup>1</sup> This major deficiency in NS's operating plan is not mentioned anywhere in the *Decision* and there is no indication that it was considered by the Board in any fashion.

Another critical dimension of the Board's error in adopting the RCAF-U for indexing operating expenses, which the Board does not mention, and appears to have given no consideration to, is the pernicious effect of combining an index for *operating expenses* that excludes any consideration of productivity improvements, with an index for *operating revenues* that clearly does reflect the impact of productivity improvements on rail rates.<sup>2</sup> In combination, these approaches require the irrational assumption that although the P&SH's operating costs will not be reduced by productivity improvements, it will reduce its rates as though operating costs were reduced. Obviously, these twin assumptions condemn a SARR to continually diminishing profit margins in a manner that would not occur in the real world. *See* Tr. at 9-36.

**3. The Board's Action Conflicts with its Obligations Under the NRTP**

The National Rail Transportation Policy obligates the Board to promote: "fair and expeditious regulatory decisions," the maintenance of "reasonable rates where there is a lack of effective competition," and the use of "accurate cost information in regulatory proceedings." 49 U.S.C. § 10101(2), (6) and (13). As the Board's predecessor has noted, the Commission's role as a representative of the public interest does not permit it "to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." Finance Docket No. 32432, *New England Central R.R. – Acquisition and*

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<sup>2</sup> *See* Jim Watkins, "Forecasting Annual Energy Outlook Coal Transportation Rates," in *Issues in Midterm Analysis and Forecasting 1997* (EIA July 1997), pp. 75-82 (1997), <http://tonto.eia.doe.gov/FTPROOT/forecasting/060797.pdf>.

*Operation Exemption – Lines Between East Alburgh, VT and New London, CT* (ICC served Dec. 9, 1994), 1994 WL 698768 at \*21 and n.49; *accord* Docket No. 39639, *Vulcan Materials Co. v. Alton and Southern R.R.* (ICC Corrected Decision decided March 15, 1990) (Dolan, ALJ), 1990 WL 287547 at \*7. The Board’s affirmative regulatory duty in this regard is such that it “is not the prisoner of the parties submissions,” but rather must “weigh alternatives and make its choice according to its judgment how best to achieve and advance the goals of the National Transportation Policy.” *Baltimore & Ohio R.R. v. United States*, 386 U.S. 372, 429-30 (1967) (Brennan, J., concurring).

The Board explains its decision to default to use of the RCAF-U to index operating expenses as being due to the fact that “. . . the record here does not provide an alternative approach that would better reflect the likely expected experience of the P&SH . . . .” *Decision* at 28. At the time CP&L submitted its evidentiary filings and its brief in this case, *Wisconsin* was the Board’s latest and most authoritative word on indexing operating expenses for a SAC analysis. The *TMPA* and *Duke-NS* decisions were issued after all filings were complete. *Wisconsin* said nothing about the need to develop alternative approaches that would better reflect the likely experience of SARRs with productivity improvements. The Board has, however, seen fit to admonish parties in SAC cases that they should “not attempt to relitigate issues that have been resolved in prior cases.” Ex Parte No. 347 (Sub-No. 3), *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases* (STB served March 12, 2001), at 6.

CP&L submits that it is not fair or reasonable for the Board, in these circumstances, to default to an obviously defective methodology rather than to apply its

*Wisconsin* precedent. If the Board believes some alternative (such as a mix of the RCAF-A and RCAF-U (e.g. 50/50)) is more appropriate, it should develop and apply such an alternative.

**B. The Board Erred in its Application of the Percentage Reduction Methodology**

The Board's *Decision* also errs in relying upon the inflated level of NS's challenged common carrier rates as the starting point for the percentage reduction methodology, despite an explicit finding in the *Decision* that such an approach is "subject to manipulation" and suffers from problems that are sufficiently serious to "warrant a change." *See Decision* at 32-33. CP&L submitted abundant evidence in this case demonstrating that: (1) NS had a specific intention to manipulate – and did manipulate – the Board's rate-setting practices to its advantage; and (2) without regard to NS's motivation, the essential predicate for the use of the percentage reduction methodology (*i.e.*, that the rates to be charged by the SARR properly reflect *relative* demand elasticities) was completely absent from this case.

**1. CP&L's Evidence Demonstrated a Specific NS Intention to Game the Board's Rate Review**

CP&L's evidence in this case demonstrated that NS's Senior Vice President of Coal Marketing, Mr. William Fox, specifically informed CP&L that NS intended to set the issue rates at an artificially high level for litigation purposes. *See CP&L Op.* at III-G-28 to 30. CP&L had explained to NS that since it had no alternative to NS service to Roxboro and Mayo, it would be evaluating rates proposed by NS in negotiations with reference to rate levels that might be allowed by this Board. *Id.* at III-G-28.

In the course of a telephone call to CP&L's William Knight on November 30, 2001, Mr. Fox advised Mr. Knight that if it appeared that rate litigation before the STB was likely, NS's strategy would be to set very high common carrier rates and let the STB reduce them. Mr. Knight prudently made a record of that conversation in a contemporaneous memorandum. *See Decision* at 31 (*citing* CP&L Op. Exh. III-G-2). Mr. Knight also had occasion, in the normal course, to describe his conversation with Mr. Fox to his colleagues at CP&L, Mr. Jerry Boyd and Mr. David Conley, both of whom were involved in these rail contract matters. Mr. Boyd and Mr. Conley each submitted Affidavits in this proceeding confirming Mr. Knight's account. *See* CP&L Reb. Exhibits III-G-6 and III-G-7. For his part, Mr. Fox denied making the statement.

In its *Decision*, the Board acknowledged CP&L's submission of Mr. Knight's memorandum, his accompanying Affidavit, and the Affidavits of Messrs. Boyd and Conley, as well as Mr. Fox's denials, but stated that it could not "readily assess the credibility of the two competing versions of what transpired or divine NS's motives in setting the challenged rates." *Decision* at 32.

This refusal to make a critical factual determination constitutes a material error on the Board's part. As CP&L demonstrated in its evidence (and as CP&L shows in Part II.B.2, *infra*), other abundant objective evidence supported the veracity of CP&L's witnesses and further confirmed that NS artificially inflated its rates to CP&L solely for litigation purposes. The Board should have specifically so found in its *Decision*.

**2. CP&L's Evidence Demonstrated a Complete Absence of the Required Predicate for Use of the Percentage Reduction Methodology**

Even without a specific finding regarding NS's motivation, however, the record in this case is replete with evidence demonstrating that the fundamental predicate for the use of the percentage reduction methodology was completely absent, thus precluding the use of the methodology as applied by the Board. In particular, the key assumption which underlies the Board's percentage reduction methodology is that the current rate structure reflects the relative demand elasticities of the different movements in the SARR traffic group, and therefore should be preserved by the percentage reduction method. *See Coal Trading Corp. v. The Baltimore and Ohio R.R.*, 6 I.C.C.2d 361, 380 (1990) (the percentage reduction methodology "preserves the rate structure for the traffic group by maintaining existing rate relationships, albeit at reduced levels, and thereby implicitly recognizes varying demand elasticities."); *Arizona Pub. Serv. Co. v. The Atchison, Topeka and Santa Fe Ry.*, 2 S.T.B. 367, 392 (1997) ("This method assumes that the comparative rate levels of the various shippers in the group reflect their relative levels of demand elasticity, so that maintaining the existing rate structure implicitly preserves the carrier's demand-based differential pricing.").

Existing rate levels do not reflect relative demand elasticities, however, if the rates for the issue traffic bear no meaningful relationship to the rates for the other similar traffic in the traffic group. Rather, the desirability of preserving the current rate structure assumes a market basis for all of the rates utilized in the percentage reduction analysis, including the rates applicable to the issue traffic.

In the instant case, there were a number of objective indicators documented in CP&L's evidence which all showed that the issue rates were not only exorbitantly high, but clearly bore no relationship to the rates or the relative demand elasticities for the rest of the SARR traffic group (*see Coal Trading and Arizona Public Service*), including:

- evidence regarding the magnitude of the increases that the challenged rates represented over both the expiring contract rates and over prior "unbundled" rates to Roxboro and Mayo;
- evidence regarding the enormous disparity between the rate increases imposed on CP&L and the rate increases that NS imposed on other captive shippers during the 2001 to 2002 time frame; and
- evidence regarding the relationship of the revenue/variable cost ratios for NS's issue service relative to the revenue/variable cost ratios for the other captive NS coal traffic that was included in the P&SH traffic base.

CP&L will summarize the evidence of record regarding each of these points, in turn.

a. **Evidence Regarding the Magnitude of the Rate Increases over Prior Contract Rates with CP&L**

As CP&L's evidence reflected, each of the rates at issue represented an increase of over { } in the previously existing rates. *See* CP&L Op. at III-G-31. Based on CP&L's aggregate tonnage to Roxboro and Mayo, these increases amounted to approximately { } million each year. Even the specific amount of the increases, *i.e.*, a uniform increase of { } per ton for all origins, reflected their artificiality and the lack of any relationship to market-based rates or demand elasticities. *Id.* at III-G-32. Significantly, the evidence of record also shows that NS was unable to provide CP&L

with any contemporaneous documents reflecting the basis for the development of NS's common carrier rates. *See* CP&L Reply at I-38 to 39 (*citing* CP&L Reply Exh. I-3).

CP&L's evidence also confirmed that the challenged rates reflected extraordinarily large increases over the "unbundled" rates that NS had charged for service during the lengthy period of time prior to the parties' single bundled contract. *See* CP&L Reb. at III-G-15 to 19. Reference to the history of the relationship of the rates for Roxboro/Mayo shows that the "bundling" in the contract that expired in early 2002 did not have a significant effect on the Roxboro/Mayo rates. Although NS claimed that CP&L "depart[ed] from the parties' historic practice" in seeking to negotiate separate contracts, one for Roxboro/Mayo and one for its other NS-served plants (NS Op. at IV-A-10), in fact, the first contract with NS that encompassed both Roxboro/Mayo and the other NS-served plants (*i.e.*, Cape Fear, Lee and Asheville) was entered in 1997. *See* CP&L Reb. at III-G-16. For at least fifteen years prior to that time, Roxboro and Mayo had been covered by contracts that applied to them alone while the other plants were handled together under separate contracts.

CP&L's analysis of these prior "bundled" and "unbundled" contracts demonstrated that the relationship that existed under the exorbitant { } increases imposed in April, 2002 was totally inconsistent with the historic *unbundled* relationship. In fact, as counsel for CP&L recounted at the oral argument in this proceeding (*see* Tr. at 11-13 and 103-105), if the new 2002 rates to Roxboro/Mayo were established at the historic *unbundled* relationship relative to the new Cape Fear and Lee Rates, the rates

would range between {            } per ton and {            } per ton – or approximately \$5.00 a ton lower. *See* CP&L Reb. at III-G-17 to 18.

**b. Evidence Regarding Rate Increases to Other Shippers**

CP&L's evidence in this proceeding also demonstrated a huge disparity between the rate increases imposed by NS on CP&L and those NS implemented in other contract expiration situations during the same general time frame as the expiration of the CP&L contract. *See* CP&L Op. at III-G-39 to 40. Contracts produced by NS in this proceeding showed that replacement contracts for coal contracts expiring in 2001 and 2002 entailed average rate increases of {            } in railroad supplied cars. *Id.*<sup>3</sup>

**c. Evidence Regarding Revenue/Variable Cost Ratios**

Most significantly, CP&L's evidence also demonstrated the wide disparity between NS's issue rates versus its other coal rates by presenting a comparison of revenue/variable cost ratios for the other captive coal shippers included within the traffic group for CP&L's SARR model. *See* CP&L Reb. at III-G-28 to 32. Working from the URCS Phase III costing model submitted by NS in its Reply Evidence (for purposes of showing relative revenue/variable cost ratios only), CP&L applied the NS costing program to all captive coal traffic handled by the P&SH. The results of this analysis confirmed that CP&L's Roxboro and Mayo rates do not inhabit the same rate universe as the remainder of the stand alone traffic group's captive coal traffic.

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<sup>3</sup> A securities analyst's report issued in December, 2001, indicates that NS was looking to raise utility coal rates in the "high single-digit range." *Id.* at III-G-40.



increased over the expired contract rate;<sup>4</sup> and that (iii) CP&L's proposals would not "address the concern that the approach is subject to manipulation by a shipper." *Id.* at 32-33.<sup>5</sup> The Board's rejection of all of the CP&L proposals was improper.

**a. The Evidence of Record Demonstrates the Fallacy of the Board's "Bundling" Concern**

As CP&L demonstrated *supra*, the evidence of record in this case confirmed that the "bundling" or "unbundling" of rates to CP&L's various coal-fired plants had little or no impact on NS's rate levels. Consequently, it was improper for the Board to rely upon bundling concerns as a basis for rejecting CP&L's proposed alternatives. *See* Tr. at 104

**b. The Board Erred by Rejecting CP&L's Rate Surrogate Alternative**

The Board rejected CP&L's proposal to use a rate surrogate (up to ten percent higher than the expired contract rates) as a starting point for the percentage reduction methodology, finding that there is "no sound basis for selecting that particular level." *See Decision* at 32. Contrary to the Board's suggestion, and as CP&L stated *supra*, CP&L submitted evidence in this case demonstrating {

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<sup>4</sup> At oral argument, CP&L indicated that its preferred solution to the gaming problem would be to use the expired contract rates plus a factor of ten percent as a starting point for the percentage reduction method. *See* Tr. at 103 ("The one that makes the most sense is to take the expiring contract rates, to mark them up by ten percent . . .").

<sup>5</sup> The Board's recitation of CP&L's "four" proposed alternatives (*see Decision* at 32) misstates CP&L's evidence by referring to a proposal to use the defendant's last good-faith offer. In the negotiations with CP&L, "NS never made an actual contract proposal, despite repeated requests from CP&L that it do so." *See* CP&L Op. at III-G-39.

} . See CP&L Op. at III-G-37 to 40. Each of those measures suggested that a rate increase not motivated by gaming would have been within the range proposed by CP&L. As such, the Board erred in finding that there was no sound basis for selecting a ten percent increase for purposes of developing a surrogate rate increase.

To the extent that the Board is concerned about unfairness to NS from using rate levels derived from (*e.g.*, at 110% of) the “bundled” expiring contract rates, it could rely on the rates effective April, 2002 that would result from the new rates to Cape Fear and Lee and the historic “unbundled” relationship of such rates to the rates to Roxboro and Mayo (*i.e.*, in the range of {            } to {            } per ton).

c. **The Utter Irrelevance of Potential Shipper “Gaming”**

The Board’s *Decision* is wholly off-base to the extent that it relies upon the concern of potential “gaming” of the regulatory process by a shipper as a basis for rejecting the various alternatives proposed by CPL. According to the Board, this type of gaming can occur in the grouping of highly rated traffic by a shipper:

Given a traffic group with sufficiently highly rated non-issue traffic, the percent reduction approach could brand any rate level established by a defendant railroad as unreasonable (assuming that the R/VC percentage exceeds the jurisdictional threshold). This potential could encourage a shipper to challenge an otherwise reasonable rate, or enable a shipper to obtain an inordinate rate reduction, simply by selecting a traffic group with much higher-rated traffic.

*See Decision* at 31; *id.* at 32 (“Nor would any of [CP&L’s proposed alternatives] address the concern that the approach is subject to manipulation by a shipper.”).

The Board’s discussion of this form of gaming is both irrelevant and logically misdirected. As an initial matter, CP&L notes the overwhelming contrast in the

evidentiary record between: (i) CP&L's significant and objective evidence that NS had intentionally gamed the percentage reduction method in this case; and (ii) NS's off-hand and unsupported musings in a single paragraph of its Reply Summary and Argument (*id.* at I-52-53) regarding the possibilities of shipper gaming which, notably, lack any reference to traffic grouping. The Board's treatment of these vastly disparate presentations as somehow equivalent and deserving of balanced handling suggests a complete disregard of the evidence of record.

Moreover, there is no correlation between the "cause" of supposed shipper gaming (*i.e.*, traffic group selection) and the cause of railroad gaming (*i.e.*, complete railroad discretion in setting the starting point for the percentage reduction method). Absent some causal relationship between these two concerns, there was no reason for the Board to refuse to accept a solution to railroad gaming simply because the proposed solution did not also solve the illusory "problem" of shipper gaming.

Finally, ignoring the obvious conflict with the *Coal Rate Guidelines* requirement that a complaining shipper be free to develop an optimal traffic group,<sup>6</sup> even if one were to accept that shipper gaming could be a real problem, the Board completely ignored the fact that, by its own findings, no such gaming occurred in this case. The Board accepted CP&L's traffic group in this case with the minor exception of certain rerouted traffic, which the Board excluded.<sup>7</sup> Consequently, there was no logical reason

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<sup>6</sup> See *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 542-44 (1985).

<sup>7</sup> NS's charges of the potential for shipper gaming highlight a fundamental and critical distinction between any such activity by a complaining shipper and NS's position (as accepted by the Board) with regard to its challenged rates. The railroad in a SAC

whatsoever for the Board to express concerns regarding the impact of CP&L's proposed solutions to the railroad gaming problem on the shipper gaming "problem."

For the foregoing reasons, it was material error for the Board to rely upon concerns regarding supposed shipper gaming with regard to the grouping of traffic as a basis for rejecting CP&L's alternative proposals regarding the correction of the Board's percentage reduction methodology.

**4. The Board Erred in Declining to Implement its Own Solution to the NS Gaming Problem**

Having rejected CP&L's proposed alternatives, the Board could have developed its own solution to neutralize the possibility of railroad gaming. Instead, the Board simply defaulted to its admittedly deficient approach:

. . . [T]he Board is receptive to another approach for determining the appropriate extent of rate relief in SAC cases. Unfortunately, the Board has not been presented here with an alternative to the percent reduction approach that would remove the flaws while still conforming with the statute and Guidelines.

. . . The Board welcomes proposals for appropriate alternatives to the percent reduction approach in future cases. But in the absence of a feasible alternative that satisfactorily addresses the concerns articulated here and conforms with the statute, the Board will not depart from its precedent.

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proceeding has the opportunity to review, contest, and present alternative evidence on any element of a shipper's SAC analysis that it believes constitutes "gaming." The Board can review and analyze each side's position and determine what it believes is the appropriate resolution of the issue, whether it be the position of the shipper, the railroad, or otherwise. According to the *Decision*, however, a railroad may set its common carrier rates at any level it chooses and the Board's only choice is to take those rates as a given for purposes of allocating SARR revenue reduction under the percentage reduction methodology.

*Decision* at 32-33. This result is fundamentally inconsistent with the Board's duty to refrain from merely "calling balls and strikes" and deprives CP&L and the balance of the shipping public of the benefit of meaningful regulatory oversight. *See, e.g., Aberdeen and Rockfish R.R. v. United States*, 270 F. Supp. 695, 711 (E.D. La. 1967) ("In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."); *accord Vulcan, supra*, 1990 WL 287547 at \*7; *New England Central, supra*, 1994 WL 698768, at \*21 and n.49.<sup>8</sup>

The question of railroad gaming of the Board's percentage reduction methodology was an issue of first impression in this case with tremendous consequences for the protection of the shipping public from unreasonable freight rates. CP&L made what it considers to have been an effective effort to develop alternative solutions to this admitted defect in the Board's SAC methodology. As is set forth *supra*, CP&L respectfully submits that the Board erred in declining to accept one of CP&L's proposals.

The Board compounded its error, however, by declining to impose any solution whatsoever to the problem. The Board has properly gone beyond the parties' evidence on other issues, including certain instances in this case (*e.g.*, the proper revenue

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<sup>8</sup> *See also B&O, supra*, 386 U.S. at 389-90. In *B&O*, the Supreme Court determined that the ICC failed to fulfill its duties to remedy harms that it itself had identified relating to the Penn-Central merger. *Id.* at 389 ("In its effort to expedite the merger the Commission failed to provide the very protection that it at the same time declared indispensable to the three roads. This leaves the ultimate conclusion – that prompt consummation of the Penn-Central merger clearly would be in the public interest – without support and it falls under the Commission's own findings.").

allocation on crossover traffic and the proper treatment of rerouted traffic). Upon deciding to reject each of CP&L's reasonable efforts to resolve the acknowledged defect in the percentage reduction methodology, the Board likewise was obligated to develop its own solution rather than to continue to rely upon an admittedly flawed approach.<sup>9</sup>

Given the extreme significance of the gaming issue to the preservation of meaningful STB rate oversight, CP&L respectfully submits that the Board should have been at least as vigilant in addressing this issue as it was with respect to the comparably trivial issue of reroutes and the issue of revenue allocation on crossover traffic. The failure to afford such attention to the issue – which strikes at the very heart of the Board's maximum reasonable rate regulation methodology – constitutes material error.

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<sup>9</sup> The Board's active steps in developing solutions to both the crossover division and rerouted traffic matters have worked to the benefit of defendant railroads. Affirmative steps to resolve the gaming problem in this case, which were not taken, would benefit the shipping public.

**CONCLUSION**

For the foregoing reasons, CP&L respectfully requests that the Board reconsider its December 23, 2003 *Decision* in this proceeding, and, upon reconsideration, serve a new decision and rate prescription consistent with the showings made herein.

Respectfully submitted,

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DATED: January 20, 2004

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**CERTIFICATE OF SERVICE**

I hereby certify that this 20th day of January, 2004, I have caused copies of the foregoing Petition for Reconsideration to be served by hand on counsel for defendant Norfolk Southern Railway Company as follows:

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