

BEFORE
THE
SURFACE TRANSPORTATION BOARD

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)	
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> (1)	<u>EXHIBIT DESCRIPTION</u> (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.

<u>Year</u> (1)	<u>STB Modified ATC</u> (2)	<u>STB Original ATC</u> (3)	<u>EP 715 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."