

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

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William A. Mullins

Direct Dial: (202) 663-7823
E-Mail: wmullins@bakerandmiller.com

February 22, 2017

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: FD 35842, New England Central Railroad Inc. – Trackage Rights
Order -- Pan Am Southern LLC

Dear Ms. Brown:

Enclosed is Pan Am Southern LLC's ("PAS") Surrebuttal to New England Central Railroad, Inc.'s Rebuttal Evidence And Argument. This Surrebuttal contains two volumes. Volume I contains the legal argument and the verified statement of PAS witness Michael R. Baranowski, a Senior Managing Director at FTI Consulting and the head of FTI's Network Industries Strategies group within the Economic Consulting division. Volume II contains documents produced in discovery and other selected documents cited in Volume I.

PAS is filing a "Highly Confidential" and a "Public Version" of Volume I and a "Confidential" and "Public" version of Volume II (there are no "Highly Confidential" documents in Volume II). PAS is also submitting, via hand delivery, a package with a USB containing "Highly Confidential" spreadsheets produced by NECR and other FTI "Highly Confidential" workpapers, all of which were relied upon by PAS witness, Mr. Baranowski, in preparing his surrebuttal verified statement. Please note that the bolded double brackets reflect "Highly Confidential" information and the single bolded brackets reflect "Confidential" information. The "Highly Confidential" and "Confidential" information has been redacted from the "Public Version."

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Ms. Brown
February 22, 2017
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If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

cc: Parties of Record

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
– TRACKAGE RIGHTS ORDER –
PAN AM SOUTHERN LLC**

**PAN AM SOUTHERN LLC'S SURREBUTTAL TO NEW ENGLAND CENTRAL
RAILROAD, INC.'S REBUTTAL EVIDENCE AND ARGUMENT**

**Robert B. Culliford
PAN AM SOUTHERN LLC
1700 Iron Horse Park
North Billerica, MA 01862
Tel: (978) 663-1126**

**William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849**

Attorneys for Pan Am Southern LLC

Dated: February 22, 2017

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
– TRACKAGE RIGHTS ORDER –
PAN AM SOUTHERN LLC**

**PAN AM SOUTHERN LLC'S SURREBUTTAL TO NEW ENGLAND CENTRAL
RAILROAD, INC.'S REBUTTAL EVIDENCE AND ARGUMENT**

SUMMARY OF ARGUMENT

Since 1988 and through an arrangement imposed by the Interstate Commerce Commission ("ICC"), New England Central Railroad ("NECR") and Pan Am Southern LLC ("PAS")¹ have competed against each other for certain traffic that originates, terminates, and traverses the Line that is the subject of this proceeding.² In December of 2012, NECR came

¹ PAS and NECR are referred to collectively as "the parties."

² The "Line" consists of three different segments all currently owned or controlled by NECR. PAS has trackage rights over all three segments. The upper segment is a 13.4-mile line between White River Junction, Vermont and Windsor, Vermont ("Northern Segment"). It connects to the 48.8 mile line between Windsor, Vermont and Brattleboro, Vermont ("Connecticut River Line", also referred to as the "Middle Segment" or the "Former B&M Line"). The lower segment is a 10.6-mile line between Brattleboro, Vermont and East Northfield, Massachusetts ("Southern Segment") (collectively, all three segments are referred to as the "Line.").

The Former B&M Line was previously owned by PAS's predecessor company, Boston & Maine Corporation ("B&M"). The ICC approved various transactions whereby the Former B&M Line was taken from B&M against B&M's wishes and conveyed to the National Passenger Railroad Corp. ("Amtrak"), who then conveyed it to B&M's competitor, Central Vermont Railway ("CV"), the predecessor of NECR. B&M was then charged a rental fee to operate over what had previously been its own line. See National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire, 4 I.C.C. 2d 761, 1988 ICC LEXIS 233 (1988) ("Amtrak I"); The National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New

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under the control and ownership of Genesee & Wyoming Inc. (“G&W”),³ and in early 2014, NECR lost a significant propane customer to PAS.

Since those two events, and apparently under pressure from its owners to find ways to increase revenues to pay for G&W’s expensive acquisition of the NECR and other Rail America properties, NECR began to impose impediments to, and restrictions on, PAS’s ability to operate on the Line, which restrictions were held by the Board to be unreasonable.⁴ NECR also sought (and is still seeking) a 1,389% increase on the trackage rights fee that PAS currently pays to operate over the Line.⁵ NECR also seeks substantial changes to the terms and conditions of the existing trackage rights agreement (“TO”), by preventing PAS from performing haulage service and imposing onerous operating, insurance, and liability provisions.

To justify its request for an increase on PAS’s trackage rights fee, NECR claims to apply a SSW Compensation⁶ methodology. But rather than using one of the four approved methodologies, NECR uses an untested and unprecedented value-in-place methodology (“VIP”)

Hampshire, 1990 ICC LEXIS 52 (1990) (“Amtrak II”) (collectively, “Amtrak Decisions”). PAS acquired the assets of B&M in 2009.

³ See Genesee & Wyoming Inc. – Control – RailAmerica, Inc., et. al., FD 35654 (STB served Dec. 20, 2012) (“G&W/RailAmerica Transaction”).

⁴ See New Central Railroad, Inc. – Trackage Rights Terms and Conditions – Pan Am Southern LLC, FD 31250 (Sub-No. 1) (STB served Dec. 23, 2014).

⁵ NECR claims that PAS should not pay [REDACTED] per car mile, as it had done before this dispute, but rather should pay [REDACTED] per car mile.

⁶ The four methodologies for setting trackage rights compensation were set forth in St. Louis Southwestern Ry. Co. - Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis, 1 I.C.C. 2d 776, 1984 ICC LEXIS 347 (1984) (“SSW I”) and St. Louis Southwestern Ry. Co. – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis Trackage Rights Compensation, 4 I.C.C. 2d 668, 1987 ICC LEXIS 15 (1987) (“SSW II”) (collectively, “SSW” or “SSW Compensation”). The four approved methodologies are: (1) the Capitalized Earnings Approach (“CE” or “CE Approach”); (2) Replacement Cost New Less Depreciation (“RCNLD”); (3) the comparable line segments approach; and (4) the stand alone cost method. VIP is an alleged variant of RCNLD.

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to calculate PAS's new trackage rights fee. NECR used this method because it claimed that the Board's preferred Capitalized Earnings Approach ("CE" or "CE Approach") could not be used. NECR also ferociously resisted any discovery that could help PAS's experts undertake a CE Approach. As the proceeding progressed, it became clear why NECR resisted discovery and application of the CE Approach: the evidence finally produced did allow for the calculation of a CE Approach and this number was remarkably lower than the VIP approach employed by NECR.

In the NECR Rebuttal Evidence and Argument ("NECR Rebuttal"), NECR continues to insist that VIP should be the appropriate methodology. Notwithstanding this insistence and its previous claims that a CE Approach could not be calculated, NECR's experts also nonetheless calculated a CE number, which is only slightly different than the value set forth by PAS's experts, which again substantiates the accuracy and appropriateness of applying the CE Approach.

In this Surrebuttal, PAS explains why the Board should not make any changes to the existing compensation formula, but if it does, it should apply the CE Approach and reject use of the VIP methodology. PAS further explains that if the Board does apply VIP, which it should not, the VIP valuation needs to be significantly adjusted by taking out any land valuation for easement property, why it should not include infrastructure paid for by government grants and owned by the government, why certain other adjustments should be made, and why the Board cannot provide a rental component for the Middle Segment.

PAS is assisted in this Surrebuttal by Mr. Michael R. Baranowski, a Senior Managing Director at FTI Consulting and the head of FTI's Network Industries Strategies group within the Economic Consulting division. Mr. Baranowski explains why the VIP approach is not the same

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as RCNLD and should not be used in this proceeding. Mr. Baranowski also explains why the adjustments that NECR's consultants made to FTT's CE calculations in the NECR Rebuttal are inappropriate and should be rejected. Finally, Mr. Baranowski establishes why his calculations are fully consistent with prior Board precedent and should be adopted over the flawed and untested VIP approach. See Surrebuttal Verified Statement ("SRVS Baranowski") attached as Exhibit A.

This Surrebuttal also explains why NECR's policy justifications for increasing PAS's rates 1,389% should be rejected. First, the NECR Rebuttal claims that PAS is not paying its fair share to maintain the significant improvements that have been made to the Line – all of which were made to accommodate passenger operations, not freight, and were made with public grant monies. This argument is inconsistent with the Amtrak Decisions, which do not require PAS to pay for unilateral improvements made to the Line where such improvements go far beyond those contemplated in those decisions and are for the benefit of Amtrak. Likewise, if NECR now finds that its decision to unilaterally accept public money to improve the Line beyond the levels contemplated in and accounted for in the Amtrak Decisions has now put it in a position that it cannot cover its ongoing maintenance expenses, PAS and the shippers should not have their costs raised to subsidize NECR's poor business decisions.⁷

Second, NECR incorrectly claims, without evidence of any sort or any competitive analysis, that the Amtrak Decisions put NECR at a competitive disadvantage to PAS. According to NECR, this competitive disadvantage justifies raising the trackage rights fees and increasing costs and prices to shippers. In contrast, however, PAS has shown that any increase based upon

⁷ In this Surrebuttal, PAS also explains why any adopted trackage rights fee should not be made retroactive and sets forth its views regarding the TO and which provisions the parties can agree upon and which provisions will most likely require Board resolution.

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VIP would actually destroy the precise competitive parity that NECR claims it wants and that was envisioned by the Amtrak Decisions. Both PAS and the shippers would have to pay more, which simply benefits NECR, not the public interest.

In summary, in 1988 and in 1990, fully aware of the remarkable powers it was exercising in allowing Amtrak to take the Former B&M Line and sell it to a competitor,⁸ the ICC was extremely diligent in crafting an arrangement to ensure both adequate compensation to B&M and to ensure competitive parity between NECR and PAS for future service on the Line. Nothing has changed to warrant modifications to that arrangement.

If modifications are justified, which they are not, precedent is clear: any new compensation should be established through application of the SSW methodology applying the CE Approach to determine the interest rental component. Even then, the interest rental component of SSW should only apply to the Northern and Southern Segments. Any attempt to apply a VIP methodology will not only be contrary to precedent, but will place PAS at a significant competitive disadvantage, raise rates to shippers, and require PAS to subsidize bad policy and business decisions made by NECR. The simple truth is that NECR simply wants to extract more money from PAS and impose burdensome service restrictions on PAS in order to weaken PAS and bring additional revenues to NECR. This is not in the public interest.

⁸ The decisions were considered by the D.C. Circuit, Congress, and the Supreme Court. See Boston and Maine Corporation v. ICC, 911 F.2d 743 (D.C. Cir. 1990), rehearing denied, Boston & Maine Corp. v. ICC, 925 F.2d 427 (D.C. Cir. 1991); Railroad Passenger Service Act, Pub. L. 101-641, Section 9(b); National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407 (1992). Even the ICC acknowledged that its decision was “extraordinary.” See Amtrak I, 1988 ICC LEXIS 233, at *16 (“Amtrak acknowledges this is an extraordinary proceeding. We agree.”).

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ARGUMENT

I. **THE AMTRAK DECISIONS DO NOT ALLOW FOR A CHANGE IN THE TRACKAGE RIGHTS COMPENSATION FORMULA, IF THEY DO, PRECEDENT REQUIRES APPLICATION OF THE CAPITALIZED EARNINGS APPROACH**

A. NECR's Proposal To Change The Compensation Formula Is Inconsistent With The Amtrak Decisions

Amtrak I and Amtrak II were not ordinary decisions. The ICC carefully crafted its decisions. The compensation that Amtrak had to pay B&M for taking the Connecticut River Line was premised on certain fundamental assumptions regarding future capital and maintenance expenditures and the future trackage rights fees. In Amtrak II, the ICC made clear that B&M had no obligation to contribute “in any way” to the costs of planned upgrades for Amtrak service.⁹ Second, the ICC also capped the maintenance fees that B&M was required to pay, absent certain conditions,¹⁰ and specifically prohibited CV from “allocat[ing] additional costs of routine maintenance to B&M.”¹¹ Notably, the ICC only required B&M to pay for maintenance sufficient to maintain the Line at Federal Railroad Administration (“FRA”) Class II standards.¹² Furthermore, the agreed-upon trackage rights fee was deemed to be in “full satisfaction of any and all obligations of B&M to pay for the trackage rights provided herein or contribute towards the costs of dispatching, maintenance and repair of the Line.”¹³

The ICC’s going concern value (“GCV”), which was used to determine the appropriate takings compensation, was based upon these assumptions and was specifically designed to

⁹ Amtrak II, 1990 ICC LEXIS 52, at *16-17.

¹⁰ Id. at *18-22.

¹¹ Id. at *30.

¹² Id.

¹³ Id. at *52; TO, § 3.3.

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“make the B&M ‘whole’ (or no better or worse off) after the taking as opposed to before the taking.”¹⁴ The Board’s GCV calculation also assumed that B&M would be relieved of any obligation to pay an interest rental component over the Connecticut River Line, and further explained that the takings compensation B&M received from Amtrak would need to be higher if B&M were required to pay such interest rental payments to CV.¹⁵ These fundamental assumptions were extended into perpetuity.¹⁶

NECR ignores all of this specific limiting language. NECR argues that because the TO could be reopened after 20 years, the Board has the right to change all of the terms for all three segments. NECR is wrong. Allowing for reconsideration of the compensation terms alters the fundamental GCV calculations. As previously discussed by Mr. Baranowski, the assumptions underlying the ICC’s GCV calculation must be honored to ensure that B&M was properly compensated for the taking of the Connecticut River Line.¹⁷ All other things equal, if application of SSW results in a trackage rights fee higher than that calculated pursuant to the GCV assumptions, the savings the ICC calculated that B&M would achieve under the taking would be reduced. Because these calculated savings were deducted from the GCV at the time of the transaction, lower calculated savings, if known at the time, would have resulted in less of a deduction from the GCV and more compensation to B&M. Thus, if NECR’s changes result in

¹⁴ Amtrak I, 1988 ICC LEXIS 233, at *63-*64.

¹⁵ See Amtrak II, 1990 ICC LEXIS 52 at *29 (nothing that Amtrak and CV had previously agreed that B&M would never have to pay an interest rental component).

¹⁶ See Amtrak I, 1988 ICC LEXIS 233, at *68 (savings), *71 (maintenance costs), *73 (dispatcher costs), *74 (lost revenues), and *79 (land values) were all based upon calculations running in perpetuity; and Amtrak II, 1990 ICC LEXIS 52 at *28-*31 (rejecting changes to the interest rental component and the maintenance caps on the basis that the prior decision assumed certain calculations were into perpetuity so that any change would require a change in the takings compensation amount).

¹⁷ See PAS Reply, VS Baranowski at 6-10.

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PAS paying a higher trackage rights fee than what was assumed in the Amtrak Decisions, B&M (PAS) should be entitled to additional compensation for the taking.

NECR argues that none of this matters because the parties were allowed to seek changes to the TO after expiration of the 20 year period. PAS believes that changes are allowed, but those changes cannot change the fundamental premises underlying the Amtrak Decisions, especially with respect to the Middle Segment, and certainly not without reopening and reconsidering those fundamental premises. At best, if the Board rejects PAS's view, such changes to the compensation and limitations on what PAS has to pay for should only apply to the Northern and Southern Segments. This is because the TO also governed the Northern and Southern segments, which were the product of voluntary agreement. That was the purpose of the 20-year provision – to allow the parties to reconsider the terms and conditions governing the use of those segments.¹⁸ However, there is no indication that absent agreement between the parties on changes to the Middle Segment, that the Board was free to impose new terms and conditions for the Middle Segment. Certainly not without reopening and reconsidering the fundamental assumptions underlying the compensation set forth in Amtrak II.¹⁹

Confirming PAS's view that if any changes are appropriate, such changes should, at best, only apply to the Northern and Southern Segments, NECR admits that the Middle Segment should be treated differently, stating that “[a]ll of the economic terms and underlying policies that led to those decisions [i.e. the Amtrak Decisions] apply only to the Middle Segment.”

¹⁸ It is a standard provision to allow renegotiation of voluntary trackage rights agreements after a certain time period.

¹⁹ If NECR wants to reopen and reconsider the Amtrak Decisions, it must meet the standards of 49 U.S.C. 722(c), which requires NECR to meet its burden of showing material error, new evidence, or changed circumstances. NECR has not made such a showing.

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NECR Rebuttal at 2.²⁰ Even NECR's table of contents acknowledges that the Middle Segment should be treated different than the other two segments. Likewise, the discussion that follows in the NECR Rebuttal at pages 2 and 3, which focus on why the Amtrak Decisions do not cover the Northern and Southern segments, is also an explicit acknowledgment that the Middle Segment should and was treated differently. Similarly, NECR effectively acknowledges that the Board could limit its analysis to only the Northern and Southern Segments when NECR notes that if "there are reasons for the caps or capital limitations for the Middle Segment not to be changed, that determination would not be a basis for refusing to recalculate the trackage rights fee on the Northern and Southern Segments." NECR Rebuttal at 22. Clearly NECR is acknowledging that applying SSW to the Middle Segment rests on shaky legal grounds.

To apply SSW to the Middle Segment, the Board would have to ignore the specific language of Amtrak II and the GCV calculation and hold that "administrative convenience" and the 20-yr reopener clause (the justifications put forth by NECR for allowing reopening of the compensation terms for the Middle Segment) trump the fundamental assumptions underlying that carefully balanced decision. It would have to ignore the specific directives regarding what PAS is and isn't required to pay.²¹ There is no such support for such an argument. At best, NECR has established that SSW might be applicable to the Northern and Southern Segments.²²

²⁰ See also NECR Rebuttal at 7 (the "various restrictions benefiting B&M related to the taking of the Middle Segment only.").

²¹ If SSW was applied, it would be the first time that SSW has been used to cover any of the line segments. Even NECR admits that the "ICC did not use SSW to set the original trackage rights fee." NECR Rebuttal at 20.

²² If the Board does apply SSW to the Middle Segment, which it should not do, at a minimum, it is specifically clear that the Board cannot impose the interest rental component of an SSW calculation for PAS's use of that segment. See Amtrak II, 1990 ICC LEXIS 52 at *28-*31 citing Amtrak/CV's expert, Charles H. Banks, the father of NECR's current witness Charles Banks,

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B. If The Board Applies SSW, Precedent Requires Application Of The Capitalized Earnings Approach To Determine The Interest Rental Component

As discussed above, application of SSW would be contrary to the fundamental goals and assumptions of the Amtrak Decisions, especially with respect to the Middle Segment.

Nonetheless, if the Board is going to apply SSW, which, at best, it should only do with respect to the Northern and Southern segments,²³ it should utilize the CE Approach as set forth by Mr. Baranowski, and as confirmed (albeit with different adjustments) by NECR's own witnesses, Charles Banks and John Ireland of R.L. Banks & Associates, Inc. ("RLBA").

It is important to recall that NECR wrongly asserted that it was not possible to undertake a CE Approach in this proceeding. Yet, once the Board granted PAS's motion to compel discovery, it was clear that the waybill records, traffic reports, and valuation studies produced by NECR allowed Mr. Baranowski to determine earnings and allocate NECR's revenues between the respective trackage rights segments and the residual NECR. His CE analysis was consistent with Board precedent. In rebuttal, NECR continues to take issue with some aspects of FTI's calculations and with the use of the Duffs & Phelps valuation report, but fundamentally, FTI's analysis is a CE analysis, which is the preferred method for calculating the interest rental component of the SSW methodology.²⁴

explaining that "Amtrak (or its successor) will not be compensated to any extent in any year for interest rental." Id. at 29 (emphasis supplied).

²³ PAS agrees with NECR that "SSW is the *only* formula that the ICC or STB have used to set rates for trackage rights agreements that have expired." NECR Rebuttal at 20 (emphasis in original).

²⁴ It is undisputed that the Board prefers the CE Approach and has used that approach in several cases. See SSW II at *16-17 (Noting that while there are several valuation methods available, the Board prefers the CE Approach because the CE Approach best values the asset as a going-concern business with income-producing potential).

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While acknowledging that the CE Approach is the Board's preferred method, NECR nevertheless argues that the FTI analysis was not the "same" CE Approach²⁵ used in other proceedings and thus FTI's approach should be rejected in favor of the unprecedented VIP approach. NECR biggest objection is that because there was "no contemporaneous market value" for NECR, the CE analysis was not consistent with Board precedent. As such, according to NECR, it should therefore be completely rejected because not "all of the factors are easily ascertainable from the facts and circumstances of the particular proceeding." NECR Rebuttal at 43 (citations omitted).

As explained by Mr. Baranowski in his surrebuttal verified statement attached as Exhibit A, the notion that a CE could not be performed is wrong for two reasons. First, NECR's own parent company conducted a market valuation of NECR very similar to the approach used by FTI and presented in the Duff and Phelps Report.²⁶ Second, NECR's claim that CE cannot be performed without a contemporaneous market value defies logic since the entire purpose of a CE analysis is to determine the market value. SRVS Baranowski at 10-11. As articulated by the ICC, the "market value of a piece of investment property usually is based on the earnings potential of that property." SSW II, 1987 ICC LEXIS 15, at *15. That is exactly what FTI's valuation did. Indeed, if there were already a readily available market value for the subject assets, there would be no need to use the CE method.

Likewise, even if not done precisely in the same manner as some previous cases, determining the interest rental component using a CE Approach is not a static model so that it

²⁵ NECR Rebuttal at 42, n. 29. Although not the same CE Approach as previously done in other cases, there is no dispute that FTI's analysis was consistent with the previous CE methods and applied the same principles: to value the assets as a going concern business with income producing potential.

²⁶ See Reply VS Baranowski at 26 and 31-32; see also SRVS Baranowski at 10.

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can only be done one way. In fact the Board so prefers the CE Approach over any other approach that in one case, when it was not possible because of insufficient data to make precise calculations, it nonetheless applied a modified version of the CE Approach based on whatever data was available.²⁷ The key factor is whether or not there is a means by which line specific earnings can be calculated, which, in this case, there was.

The cases cited by NECR at page 43 as allegedly supporting the notion that CE cannot be applied here actually support the notion that CE is a flexible formula for which the key point is to determine line specific earnings. See TPW, (“The CE method develops a valuation base by multiplying line-specific earnings by an earnings multiplier, n. 10.”).²⁸ ATSF at *16 specifically notes that the capitalized earnings approach “can be developed if evidence of line-specific earnings is made available.”²⁹ It could be based on SP's earnings from the line, SP's sales price when it was acquired by Rio Grande Industries, and SP's total railroad earnings.” A&M I makes it clear that SSW can and should be used even if it requires some modification.³⁰ (“We continue to believe that our SSW Compensation methodology, modified where necessary, provides the proper framework for a compensation analysis.”). Thus, the fact that there may be “no

²⁷ See St. Louis Southwestern Ry. Co. – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis, FD 30,000 (Sub-No. 16), 5 ICC 2d 525, 1989 ICC LEXIS 126, at *5, *11 (ICC served May 17, 1989) (“SSW III”).

²⁸ Toledo, Peoria, & Western Railway Corp – Trackage Rights Compensation – Peoria and Pekin Union Railway Company, FD 26476 (Sub-No. 1), 1994 ICC Lexis 175, at *10-11 (ICC served Sept. 20, 1994) (“TPW”). Note 10 states that “The earnings multiplier ordinarily is the ratio of the landlord railroad's total system market value to its total system earnings.” (emphasis supplied). The use of the phrase “ordinarily” implies that other means can be used.

²⁹ Atchison, Topeka & Santa Fe Railway Company – Operating Agreement – Southern Pacific Transportation Co., FD 22218, 8 I.C.C. 2d 297, 1992 ICC Lexis 43, at *16 (ICC served Feb. 20, 1992) (ATSF).

³⁰ Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company, FD 31281, 6 I.C.C. 2d 619; 1990 ICC Lexis 110, at *6 (ICC served March 23, 1990) (A&M I).

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contemporaneous market value” for NECR is not fatal to a CE analysis as long as line specific earnings and a corresponding earnings multiplier can be calculated using available data.

Here, unlike the A&M I case,³¹ line specific earnings were capable of development and application. Mr. Baranowski’s approach started with system-wide traffic, revenue and operating expense data for the entire NECR, which was obtained through the waybill data and the discovery ordered by the Board. He also used the Board’s Average Total Cost (“ATC”) methodology to allocate system-wide revenues to the three individual segments and developed variable costs using the Board’s Uniform Rail Cost System (“URCS”) costs for the Eastern Region.³² He then allocated operating expenses to the three segments relying on existing Board procedures and used the URCS regression formulas in a manner consistent with the approach used by the Board in Otter Tail³³ to allocate system-wide standalone operating expenses to the segment being evaluated for an internal cross subsidy. He then capitalized the difference between the allocated revenues and operating expenses by dividing by the Board’s cost of capital to determine the total GCV for each segment. That value was converted to an annual interest rental by multiplying it by the Board’s cost of capital.

Mr. Baranowski’s application of the CE Approach was fully explained in his reply verified statement and in his workpapers and the RLBA critiques of that approach are addressed in Mr. Baranowski’s surrebuttal verified statement attached hereto. His approach was consistent

³¹ See Id. at *11 emphasizing that the key part of a CE Approach is line specific earnings, which were not likely available in that proceeding. (“Here, unlike the Compensation cases, line specific earnings, a key part of our formula, were not put into the record, and it is doubtful whether they could have even been developed.”) (emphasis supplied).

³² RLBA’s critique of FTT’s ATC calculation is discussed in the SRVS Baranowski at 18.

³³ Otter Tail Power Co. v. BNSF Ry., NOR 42071, slip op. at 11-13 (STB served Jan. 27, 2006), aff’d sub nom. Otter Tail Power Co. v. STB, 484 F.3d 959 (8th Cir. 2007) (“Otter Tail”).

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with the principles underlying the CE Approach and consistent with the Board's preference to use CE even if its use requires some modification and the use of system-wide average costs where actual costs are unavailable.³⁴

As if to confirm the validity of Mr. Baranowski's approach, and despite arguing strenuously, first in resisting discovery, and then in arguing for application of VIP, that a CE analysis could not be done, NECR's witnesses performed just such an analysis in their reply statement. Although there were certain adjustments and different assumptions,³⁵ the RLBA and FTI interest rental components using a CE Approach are remarkably similar. These calculations also compare favorably to other market based valuations, such as that done by G&W and the Duffs & Phelps Report. The only outlier is RLBA's cost-based (as opposed to market based) VIP approach. See SRVS Baranowski at 4-5. Accordingly, since a CE analysis could be performed, was performed by both parties, reached similar conclusions, and was consistent with other market based valuations, the Board should, consistent with prior precedent, accept that approach in lieu of the unprecedented and inaccurate cost-based VIP approach.

II. IF VIP IS APPLIED, WHICH IT SHOULD NOT, IT SHOULD BE MODIFIED TO REFLECT STB PRECEDENT AND ACTUAL MARKET VALUES

A. As An Initial Matter, VIP Is A Cost Based Approach That Should Be Rejected In Favor Of The Market Based Capitalized Earnings Approach

As noted above, if the Board is going to apply SSW, precedent requires the Board to apply the CE methodology in determining the interest rental component. If it does so, the Board need not deal with the various adjustments and arguments regarding NECR's VIP approach.

³⁴ See GS Roofing Products Co. v. STB, 262 F.3d 767, 776-77 (8th Cir. 2001) ("GS Roofing")

³⁵ In addition to other issues, Mr. Baranowski addresses why it was improper for RLBA to include the trackage rights revenues for both Amtrak and PAS in RLBA's CE analysis. SRVS Baranowski at 18-19.

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Being a cost based approach, VIP is simply inappropriate for use in this proceeding. Unlike the CE Approach, VIP does not indicate the market value of the trackage line, but rather the cost of various inventoried railway materials purchased at their respective “prevailing market prices” with adjustments applied only for observed physical depreciation. SRVS Baranowski at 3. Such estimates of “market prices” for individual railway materials, however, say nothing about the fair value of the rail line over which PAS has trackage rights. Id.

NECR tries to defend VIP by referring to it as an “approximation” of RCNLD, and asserts that it could not perform a true estimate of RCNLD because as a Class III railroad, NECR’s accounts does not conform to the Uniform System of Accounts. NECR Rebuttal at 27. Yet, NECR’s claim is belied by its own witnesses, who grouped cost items in the VIP consistent with the road property account descriptions in the Uniform System of Accounts. As such, regardless of how NECR’s accounts are kept, a true RCNLD could have been performed by relying on the cost groups used in the VIP. SRVS Baranowski at 3. The fact that it wasn’t suggests that NECR knows the VIP results in much higher valuations than a true RCNLD valuation, which would most likely reflect similar valuations as the other market based approaches.

VIP is not RCNLD. NECR glosses over the key principles of an RCNLD valuation which differentiate it from VIP. For starters, RCNLD does not necessarily replace all assets “as they exist today in their current configuration” as NECR claims. NECR Rebuttal at 26. As noted in the 1987 report issued by the Railroad Accounting Principles Board,³⁶ RCNLD would

³⁶ RAILROAD ACCOUNTING PRINCIPLES BOARD, SP-272-134004, RAILROAD ACCOUNTING PRINCIPLES: FINAL REPORT VOLUME 1 (1987); RAILROAD ACCOUNTING PRINCIPLES BOARD, SP-273-134005, RAILROAD ACCOUNTING PRINCIPLES: FINAL REPORT VOLUME 2 (1987) (“RAPB-II”).

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consider whether these assets were “used and useful,” the “extent that the investment base includes excess or underutilized assets,” and whether there are more efficient alternative configurations. RAPB-II at 41. Also, as discussed further in Mr. Baranowski’s SRVS at 4, RCNLD would “adjust for the line segment’s current depreciation” whereas VIP as described by NECR is apparently limited to considering physical depreciation based on the condition assessment of individual railway materials. There are other significant differences between VIP and RCNLD and those differences have been discussed in the PAS Reply Statement, Verified Statement of Mr. Baranowski and the critiques are further addressed in his SRVS Baranowski.

Even if VIP was similar to RCNLD, which it is not, because the relevant data does make it possible to calculate a market valuation and interest rental component using the CE approach, precedent dictates the use of the Board’s preformed CE methodology. Nonetheless, if the Board is inclined to adopt VIP, which it should not, it should accept the modifications put forth by Mr. Baranowski in his Reply Verified Statement and his verified statement attached to this Surrebuttal. NECR attempts to show why his modifications should not be made fall short of the mark.

B. If VIP Is Used, It Would Have To Be Substantially Modified To Reflect Precedent³⁷

1. The Board Should Not Assign A Value To Property Held In Easement

The NECR Rebuttal continues to insist that the value of NECR for which it is entitled to earn an interest rental component under its VIP analysis should include valuing the real estate at

³⁷ Because the Board is required to apply the CE analysis by precedent, most of the arguments related to VIP, even if considered a substitute for RCNLD, are academic and are not relevant in a CE analysis.

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fee simple, even though it admits that it merely holds an easement.³⁸ NECR's primary arguments are (1) it can acquire CV's title to the property for a \$1 and therefore its ownership is, in effect, fee simple; and (2) because it has the attributes of full ownership, it is entitled to a return on that ownership. NECR's arguments are inconsistent with the record in this proceeding, the Amtrak Decisions, and Board precedent regarding the value to place on easement property.

First, the mere fact that NECR can acquire CV's full ownership for a \$1 proves nothing. Note that NECR's actual statement is that NECR "has the unencumbered right to operate a railroad, and effectively the full right of way to the extent of CV's title." NECR Rebuttal at 28 (emphasis supplied). Two sentences later, NECR claims that if it did not have full rights, "NECR would not be permitted to acquire fee simple for a mere \$1." *Id.* at 28-29 (emphasis supplied). These statements are fundamentally flawed because it assumes that CV itself owns the Line entirely in fee simple. For the most part, it does not.

As NECR notes, it can only acquire what CV has to give. With respect to the Middle Segment, we know from the Amtrak Decisions that most of what CV acquired from Amtrak was easement, not fee simple. This is because B&M itself held most of the Middle Segment via easement.³⁹ For the vast majority of the property, Amtrak acquired an easement who then

³⁸ NECR Opening Statement, Vol. 1, at 12 ("The appraisal recognizes that NECR owns only an easement and not fee title."); NECR Opening Statement, Vol. 2, VS RLBA at 9 ("NECR owns a permanent, unencumbered easement."). NECR Rebuttal at 28.

³⁹ The Board considered this precise issue, *i.e.* the value of B&M former right-of-way, in the Amtrak Decisions. In the context of determining how much B&M should be paid, B&M argued, as NECR does here, that its entire right-of-way should be valued as if held in fee simple. The ICC rejected B&M's valuation because the right-of-way included land subject to reversionary interests, which was given a zero value. Instead, the ICC accepted Amtrak's valuation which assigned value only to that land actually held in fee simple, which was a very small portion. See Amtrak I, 1988 ICC LEXIS 233 at *51-*63. There is no justification for including the value of easement property in a VIP valuation when the ICC has previously refused to assign any value to easement property on this very same line.

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transferred that easement to CV, who then gave an easement to NECR, and for which NECR can then buy that property – “to the extent of CV’s title” for a dollar. So NECR can buy CV’s easement (and for a small section – fee simple – which small section is unknown without going back to the Amtrak Decisions record) for a \$1. CV cannot wave a magic wand and convert easement property that it acquired from Amtrak to fee simple property.

With respect to the Northern and Southern Segments, the Board has no evidence of record – either in the Amtrak Decisions or in the record of this proceeding – to make a determination as to the quality of CV’s and NECR’s title. Mr. Anglemeyer, who provided an appraisal in NECR’s Opening Statement, specifically noted that NECR did not provide him with any title information upon which to make a reliable market valuation of the property based upon the quality of the title. NECR Opening Statement, Vol. 3, Appraisal at 2-3; and 14-15. Accordingly, Mr. Anglemeyer based his appraisal on the “extraordinary assumption” that all right-of-way was held in fee. NECR Opening Statement, Vol. 3, Appraisal at 3; 14-15; and 44. We know this “extraordinary assumption” to be wrong for the Middle Segment.

As for the Northern and Southern segments, one might assume, since the segments connect with Middle Segment and consistent of similar property and characteristics, that they too must consist mostly of easement. However, there is no evidence in the record regarding the quality of title for the Northern and Southern segments. Without any evidence of record regarding the quality of title, the Board has no basis to assume that CV owned fee simple for those segments and no basis to assign a value for those portions of the Line.⁴⁰

⁴⁰ Given that PAS raised the quality of title issue in its Reply, one would have thought that NECR would have submitted a title survey as part of its Rebuttal. It did not. As such, the only evidence of the quality of the title is set forth in the Amtrak Decisions. There is no similar evidence with respect to the Northern and Southern Segments.

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NECR's other main argument is that because its easement rights give it operating rights and because a portion of the purchase price for which NECR paid CV was allocated to the right-of-way, it should be entitled to a return on its easement rights. Of course this latter point is directly contrary to the Board's finding in McCarty Farms where the Board specifically rejected the argument that easements should have value, regardless of whether the railroad paid for the easement. See McCarty Farms, Inc., et al. vs. Burlington Northern, Inc., FD 37809, 1997 STB LEXIS 198, at *79, *85 (STB served Aug. 20, 1997) ("McCarty Farms"). NECR fails to address this case other than to speculate as to the basis for such a finding.

Perhaps realizing that it should not receive a return on property that it does not own in fee, NECR cites three rates cases that it claims support its view that it should at least be entitled to a return on the value of its easements (NECR Rebuttal at 30). NECR misinterprets the Board's treatment of easement values in those rate proceedings. In those cases, there was evidence of record establishing a separate value for the payment of the easement. The Board then indexed that original value to arrive at a current value. SRVS Baranowski at 6. This allowed the Board to include the current value of the easement in its rate reasonableness calculation.

Here, there is no evidence submitted in the record indicating any value for NECR's purchase of its easement from CV or for any property held via easement. The only evidence of value assumes that the property is fee simple, not easement. NECR does make a statement that a portion of its purchase price of the CV was allocated to the right-of-way, but what that value is and what portion was allocated was not placed into the record. As such, there is no "easement

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value” to index as was done in the rate cases⁴¹ (and this assumes that such an indexing is appropriate in the context of a SSW case – which it is not). Nor is there a value in the record for any property held via easement.

Of course the value of the right-of-way is irrelevant in the context of a CE analysis, which is the proper methodology to apply in this proceeding. But even if the Board applies VIP, which it should not do, there is no evidence of record indicating what “value” to assign NECR’s easement (or CV’s for that matter) for purposes of the VIP. As noted, Mr. Anglemeyer’s analysis assumed all right-of-way was held in fee.⁴² Given the lack of evidence for any escalated easement value and the fact that Amtrak/CV/NECR paid nothing for the easement over the Middle Segment, the value of easement property should be zero. See also SRVS Baranowski at 6. Without any evidence of easement value in the record, the Board cannot include an easement value even if it wanted to employ the VIP approach.⁴³ This is a further reason why the Board should reject use of VIP in favor of a CE Approach.

⁴¹ For the Middle Segment, we know from the Amtrak Decisions that Amtrak paid nothing for the easement and this easement was transferred to CV. Since CV paid nothing for its easement over the Middle Segment, there is likewise no pre-existing easement value that could be indexed to reflect a current easement value for the Middle Segment.

⁴² Since NECR believes easements have value, one would have assumed that in rebuttal, NECR would have presented a valuation for such easement property. At a minimum, it could have submitted the value for the CV purchase price that was allocated to the right-of-way. It did neither.

⁴³ See e.g., Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, NOR 42058, slip op. at 15 (STB served March 15, 2005), aff’d, Ariz. Elec. Power Coop., Inc. v. Surface Transp. Bd., 454 F.3d 359 (D.C. Cir. 2006) (STB dismissed a complainant’s rate case because complainant did not provide any evidence establishing the costs of constructing and maintaining the line or evidence to link the trackage rights fee to stand-alone costs. The decision noted that “AEPCO cannot look to the Board or other parties to remedy its own failure to provide any probative evidence on a basic component of the SAC test.”). Similarly, here, NECR cannot look to the Board to fill in the gap or criticize PAS for its failure to provide any evidence on the value of the easement when

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2. The Board Should Not Allow NECR To Obtain A Return On Infrastructure Funded Through Government Grants, Especially When NECR Does Not Own That Property

A large portion of NECR's VIP value reflects the value of infrastructure improvements that (1) were specifically put in place to benefit passenger operations, not freight; (2) were funded by federal and state grant money; and (3) are not even owned by NECR. In its Reply, PAS argued that based on the ICC's decision in A&M-II the Board should exclude the value of NECR improvements to the Line because the improvements were done primarily to accommodate passenger operations, not freight operations; and, NECR does not even own the infrastructure.⁴⁴ In the NECR Rebuttal, NECR claims that PAS's reading of A&M-II is too narrow and "[e]ven if the improvements were funded to improve Amtrak passenger operations, the freight operators (both NECR and PAS) have clearly also benefited from the improvements." NECR Rebuttal at 32. Thus, unlike in A&M-II, NECR argues that the improvements are "used or useful" in NECR's and PAS's freight business and should be included in the VIP valuation.⁴⁵ NECR also argues that A&M-II indicated it is particularly appropriate to include publicly-funded improvements where the railroad has the obligation to maintain the government-financed infrastructure, such as is the case here. Id.

For the reason's set forth in its Reply, PAS continues to believe that A&M-II does not stand for the proposition that NECR is entitled to a capital return on infrastructure paid for with government money, especially when that infrastructure is not even owned by NECR. The parties

NECR is the party claiming that it should be compensated for its easement value but put no evidence into the record as to what that easement value should be.

⁴⁴ Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company, 7 I.C.C. 2d 164, 1990 ICC LEXIS 374, at *17-*18 (international citation omitted) (emphasis supplied) ("A&M II"). See also PAS Reply 24-25.

⁴⁵ NECR Rebuttal at 31-34.

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clearly have a different interpretation over the language regarding “used and useful for rail purposes” and the holding of the case. However, despite all of NECR attempts to paraphrase, quote dicta, and argue that the ICC held in A&M-II that a landlord railroad is entitled to a return on infrastructure paid for by the government, the ICC held no such thing. Instead, the ICC specifically stated that “[o]ur prior finding did not assume that a railroad was never entitled to earn a reasonable return on property donated by government. We have not previously taken such a position and do not take this position here.” A&M-II, 1990 ICC LEXIS 374 at *17-18. Thus, it is true, as NECR argues, that the ICC held that there is no basis for excluding improvements just because they were publicly funded. It is just as true, however, that the ICC did not hold that publicly funded infrastructure should always be included – even if such improvements benefit rail operations. If the improvement was not used or useful to freight business, was inefficient, or was an unnecessary improvement, the Board will exclude it.⁴⁶ Here, NECR admits, and the record confirms, that the improvements made to the Line were unnecessary for freight rail purposes. The improvements were done solely for the benefit of passenger operations and were unnecessary for maintaining the Line at FRA Class II standards. As such, they should be excluded.

Regardless of which party has a better interpretation and application of A&M-II, there’s another critical problem with NECR’s argument as well. NECR completely fails to recognize that the question of whether PAS should have to contribute toward the maintenance and capital needs of passenger service has already been asked and answered. The ICC in the Amtrak Decisions was fully cognizant that the Line would be upgraded with public funds to

⁴⁶ Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company, FD 31281, 8 I.C.C. 2d 567, 1992 ICC Lexis 110, at *6 (STB served June 5, 1992) (“A&M-III”).

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accommodate passenger operations and that such upgrades would be “used and useful” to the freight railroads, but it nonetheless recognized that such improvements were going beyond those required for the continued provision of freight rail service.

With this knowledge, in Amtrak II, the ICC made clear that B&M had no obligation to contribute “in any way” to the costs of planned upgrades for Amtrak service.⁴⁷ The ICC also capped the maintenance fees that B&M was required to pay, absent certain conditions,⁴⁸ and specifically prohibited CV from “allocat[ing] additional costs of routine maintenance to B&M.”⁴⁹ The ICC only required B&M to pay for maintenance sufficient to maintain the Line at FRA Class II standards.⁵⁰

The improvements made shortly after conveyance of the line to CV and made over the past ten years by NECR were done to increase the Line to Class III or even Class IV standards. As such, regardless of whether improvements to the Line also benefitted freight, the ICC has previously said that PAS should not be required to pay a rental return on such improvements or the increased maintenance expense associated with those improvements except that necessary to maintain the Line at FRA Class II standards. There is no argument or dispute that PAS is not paying its fair share to maintain the Line at Class II standards, and NECR has not argued otherwise.

NECR wants the Board to ignore the language in the Amtrak Decisions, or alternatively, argues that such language was only meant to apply to the then planned passenger improvements. But whether limited to the then known passenger improvements or the improvements that have

⁴⁷ Amtrak II, 1990 ICC LEXIS 52, at *16-17.

⁴⁸ Id. at *18-22.

⁴⁹ Id. at *30.

⁵⁰ Id.

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taken place since, the principle is the same: PAS should not be required to pay costs beyond that necessary to maintain the Line at Class II standards (and even then, PAS is not required to pay any return for its use of the Middle Segment). Requiring PAS to pay beyond the standard articulated in the Amtrak Decisions requires the Board to reopen and reconsider those decisions and to provide additional compensation to PAS for the prior taking.

Perhaps, recognizing the weaknesses of its argument, NECR asks that in the event the Board accepts PAS's argument, it should only exclude publicly-funded infrastructure improvements to the Middle Segment, the segment taken from B&M. PAS disagrees. The improvements made to the other segments were likewise done to benefit passenger operations. PAS provides freight rail services. It should not have to pay a rental return on assets not necessary for freight operations.

Additionally, inclusion of such infrastructure allows NECR to recover for infrastructure it does not own. As explained in the Baranowski VS in PAS's Reply, NECR received public funding to place the passenger infrastructure improvements into service. The federal government paid for the initial passenger improvements to benefit Amtrak. By including the publicly-funded infrastructure in its VIP valuation, NECR wants PAS to pay NECR a return on value for assets paid for by the federal government and owned by the federal government.⁵¹ Should the Board allow NECR to use publicly funded infrastructure that it does not own to drive up its valuation for purposes of calculating the interest rental component of trackage rights

⁵¹ There is a distinction between paying a return on value for assets not owned by the NECR and paid for with government funds versus paying a fair share toward maintenance. All other things being equal, a tenant should pay for its fair share of the maintenance obligations. As discussed below, PAS is already meeting its maintenance obligations and should not have to pay for costs associated with maintaining infrastructure for the benefit of Amtrak and beyond the FRA Class II standard. Maintenance costs associated with Amtrak speeds above FRA Class II service should be borne by Amtrak and/or NECR as that is what NECR and Amtrak agreed to do.

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compensation, the Board would essentially be allowing NECR to receive a return for infrastructure paid for with federal and state grants, that are owned by the government entities, and that were unnecessary for the movement of freight. If anything, AM-II cannot stand for the proposition that a tenant should have to pay a return on infrastructure under those circumstances.⁵²

3. The VIP Values Should Be Adjusted To Reflect Economic Obsolescence

As previously discussed in PAS's Reply, Mr. Baranowski made an adjustment to NECR's VIP valuation by applying an economic obsolescence factor. NECR objects to application of such a factor because, in its view, "it does not reflect a reduction of the value of the assets in their current physical condition as presented in the VIP analysis." NECR Rebuttal at 37. Yet, this is precisely one of the reasons why VIP is inconsistent with the SSW approach. If NECR had actually applied RCNLD to estimate market value, it would have been required to account for all forms of depreciation, including economic depreciation (e.g., economic obsolescence). SRVS Baranowski at 9. Indeed, one of the goals of SSW is to develop a market value on which to calculate a rental return. By NECR's own admission, VIP is not a market based approach but a cost based approach.

By using an economic obsolescence factor, Mr. Baranowski was following the principles consistent with RCNLD. Indeed, even the Duff and Phelps Report ("D&P Report") that conducted an RCNLD analysis for the railroad assets acquired by Genesee and Wyoming adjusted for economic depreciation. SRVS Baranowski at 10. As explained by Mr. Baranowski

⁵² Of course if the Board applies the CE Approach and rejects the use of VIP, which precedent requires it to do, the Board does not need to decide the complicated issues associated with a VIP valuation of publicly funded infrastructure or the proper interpretation and application of A&M-II.

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in his SRVS, both RCNLD and VIP, which are cost based approaches, need to be adjusted by an economic obsolescence factor to develop a market value. SRVS Baranowski at 9-10.

Accordingly, to be consistent with RCNLD and SSW, VIP, if it is applied, should be adjusted for economic obsolescence.

4. NECR's Valuations Of Bridges, Tunnels, And Other Assets Are Arbitrary And Unsupported

As discussed in PAS's Reply, Exhibit B, Verified Statement of Michael Baranowski at 19-22, the RLBA VIP valuation lacked sufficient documentation to justify its many questionable assumptions and assigned values to assets using high-level generalities without sufficient justification. The clearest examples of these shortcomings were in the valuations of the bridges and tunnels where RLBA failed to consider the relative length of each bridge or any other relevant characteristics such as height, span spacing, or type of abutment. The estimate simplistically applied the same cost per foot to every foot of bridge within a specific category, regardless of length or steel quality, assumed the same unit cost for both the shortest and longest bridge, and all other in between, and assumed for bridges a 50 percent condition assessment without support. Similar issues existed regarding the RLBA tunnels costs. PAS Reply, VS Baranowski at 20-22.

The NECR Rebuttal did not provide any meaningful evidence in support of the vast majority of its VIP costs. NECR still did not provide any sources for its bridge and tunnel unit cost assumptions. It merely defers to the "professional judgment" of its engineering expert, Lee Meadows. But these estimates are up to six-times the levels accepted by the STB in previous cases. SRVS Baranowski at 14. Without additional documents and justification, the Board cannot rely upon the unsubstantiated VIP valuations for individual components, especially with respect to tunnels and bridges.

III. FTI WAS CORRECT TO ADJUST NECR'S MAINTENANCE COSTS TO REFLECT THE AMTRAK DECISIONS AND ACTUAL MAINTENANCE EXPENSES

- A. An Initial Matter, PAS Should Not Be Required To Contribute Toward The Increased Maintenance Costs Associated With Amtrak Speeds Above FRA Class II As Those Costs Are Contrary To The Amtrak Decisions And Should Be Covered By The PAS/Amtrak Agreements

Contrary to the allegations made by NECR in the NECR Rebuttal, the ICC's decisions in Amtrak I and Amtrak II were not intended to be solely a vehicle for compensating B&M for the condemnation of the Middle Segment. Instead, those decisions also accounted for certain assumptions regarding future capital upgrades and future maintenance levels. The ICC was truly forward-looking and considered both CV's & B&M's current and future operations in arriving at its decisions.

Yet, despite being fully aware of the economic assumptions established by the ICC in the Amtrak Decisions and the cap on PAS's obligations to pay for maintenance beyond FRA Class II standards, CV, and later, NECR, unilaterally entered into various agreements to accept public monies to add significant infrastructure to improve Amtrak's passenger operations. NECR also unilaterally decided to accept the ongoing maintenance obligations associated with those infrastructure improvements. Perhaps realizing that NECR has bitten off more than it can chew with respect to its maintenance obligations, only now does NECR ask the Board to order PAS to pay a 1,389% increase in trackage rights compensation. Doing so would either bail NECR out of its costly maintenance obligations and/or to increase NECR's profit margins.⁵³

⁵³ It should be noted that despite claiming that PAS is not paying its full share of the maintenance costs and that there is not a level playing field, NECR has presented no evidence establishing that the difference between what PAS pays and what it costs creates a financial burden for NECR. Without such evidence, it is just as plausible that NECR would use any increased

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If NECR has made a Faustian bargain, it should live with its decision for three main reasons. First, per the Amtrak Decisions the ICC only required PAS to pay for maintenance charges necessary to maintain the Line at FRA Class II standards, not Class III or IV standards for which NECR now seeks PAS to pay. Second, freight operations did not necessitate upgrading the Line to Class III. Thus, the higher costs associated with maintaining the Line at FRA Class III or IV standards should be borne by Amtrak and NECR or NECR alone. NECR made the unilateral decision to upgrade the Line's infrastructure to accommodate Amtrak's passenger operations, not PAS. Finally, NECR should be adequately compensated through its agreements with Amtrak, and if it isn't, it should seek additional funds from Amtrak or additional government subsidies, not through PAS.

1. The Amtrak Decisions Considered The Costs Associated With Upgraded Infrastructure But Nonetheless Still Limited PAS's Maintenance Obligations

When deciding to cap PAS's maintenance and capital obligations in Amtrak II, the ICC was fully aware that CV intended to make passenger improvements to benefit Amtrak service and that such passenger improvements would result in increased track speeds. Even with this knowledge, the ICC still (1) made it clear that B&M had no obligation to contribute towards planned upgrades for Amtrak service, (2) capped the maintenance fees that B&M was required to pay, and (3) ruled that B&M only had to contribute towards maintenance costs for maintaining the Line at Class II standards. The ICC intended that the established that the compensation and the trackage rights fee were to be in "full satisfaction of any and all obligations of B&M to pay for the trackage rights provided herein or contribute towards the costs of dispatching,

maintenance contributions to improve its profitability rather than pass any savings on to shippers or cover any alleged shortfall.

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maintenance and repair of the Line....”⁵⁴ Likewise, the ICC’s GCV, which was used to determine the appropriate takings compensation, was also based upon these very same assumptions and was specifically designed to “make the B&M ‘whole’ (or no better or worse off) after the taking as opposed to before the taking.”⁵⁵

NECR now seeks to fundamentally alter these decisions and the underlying assumptions of the GCV calculation in the Amtrak Decisions without an adequate adjustment to the taking compensation originally paid to B&M on the sole basis that it had a right to renegotiate the TO after 20-years. According to NECR, if the ICC intended for the cap to extend into perpetuity, it would have rendered the matter untouchable (like the arbitration clause) in the TO. As previously noted, PAS believes that at best, such an argument only applies to the Northern and Southern Segments. With respect to the Middle Segment, the Amtrak II decisions examined the very same argument, *i.e.* that B&M would benefit from the passenger improvements and thus should pay for them, but nonetheless rejected those arguments.⁵⁶ At no time did the ICC indicate that these fundamental decisions could be reconsidered and completely reversed at the end of the 20-yr reopening period.⁵⁷

The ICC in implementing the terms and conditions in Amtrak II sought to balance the needs of all parties. The ICC ensured that B&M was adequately compensated for the taking of its infrastructure, contributed towards ongoing capital upgrades and maintenance improvements related to maintaining the Line at FRA Class II status, and could never be penalized by CV

⁵⁴ Amtrak II, 1990 ICC LEXIS 52, at *at *52; TO, § 3.3.

⁵⁵ Amtrak I, 1988 ICC LEXIS 233, at *63-*64.

⁵⁶ See Amtrak II, 1990 ICC LEXIS 52, at *26-*30.

⁵⁷ Indeed, with respect to the requirement to pay an interest rental component for use of the Middle Segment, the ICC made it clear that B&M should never have to pay such a rental component.

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imposing an interest rental component. Passenger operations benefited from the investment of federal money into the Line. Shippers benefited from the preservation of competition over the Line. CV benefited because the ICC ensured that the trackage rights compensation established obligated B&M, CV, and Amtrak to share in some funding of capital upgrades and ongoing maintenance. NECR has given no valid reason for changing any of the assumptions made by the ICC with respect to the appropriate compensation that PAS should pay for use of the Line.

NECR seeks to undo these carefully crafted decisions and claims (over 17 times) that NECR does not believe that PAS pays it fair share to use the “new and improved lines.” In its view (but without any specific citation to any language in the decisions), the ICC could not have foreseen the various upgrades and changes to the Line that would occur. Therefore, the ICC’s decisions allowed all of these issues to be reconsidered and the compensation formulas changed after twenty years. NECR is wrong. The ICC was fully aware that the Line was going to be upgraded to FRA Class III condition, that there were to be additional costs of maintenance associated with these upgrade, and that PAS would benefit from increased operating speeds. Nonetheless, the ICC still capped B&M’s maintenance and capital upgrade requirements and with no language indicating that such caps would be reconsidered in 20 years.⁵⁸

⁵⁸ As with the interest rental component, at best, NECR has made a colorable argument that it could seek new compensation under the SSW methodology after the 20 year period for the maintenance component, but only for the Northern and Southern segments. Even then, as discussed by Mr. Baranowski, PAS Reply, VS Baranowski at 12-17, NECR overstates its actual maintenance expenses. The Board cannot require PAS to pay for additional maintenance over the Middle Segment without reopening and reconsidering the fundamental premises underlying the Amtrak Decisions.

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2. Any Maintenance Costs Beyond Those Required To Maintain The Line At FRA Class II Standards Should Be Borne By Amtrak and NECR

If there are maintenance obligations beyond those that PAS is required to pay for, those obligations are a result of NECR's own unilateral decisions for which PAS should not have to subsidize. For example, in 2010, NECR was awarded \$50,000,000 in federal funds⁵⁹ to accomplish additional infrastructure improvements related to passenger operations.⁶⁰ NECR unilaterally decided to accept the public funding, upgrade the infrastructure, and commit to paying for the ongoing maintenance of the publicly-owned facilities. NECR made this decision despite being fully aware that PAS was only required to pay for maintenance sufficient to maintain the Line at FRA Class II standards. (Of course NECR now seeks to make PAS pay for maintenance at FRA Class III or IV standards). Yet, given that CV/NECR made unilateral decisions to accept the passenger infrastructure investments, and to commit to maintenance of that infrastructure, despite being fully aware of the assumptions established by the ICC it should not be PAS's responsibility to compensate CV/NECR for those unilateral decisions when such

⁵⁹ See Project Benefits/Services Outcome Agreement by and among National Railroad Passenger Corporation, the State of Vermont and a State of Vermont (the "Service Outcome Agreement"), Vol. II, NECR_001181 to NECR_001194 (describing the award of grants pursuant to the American Recovery and Reinvestment Act of 2009 and the Passenger Rail Investment and Improvement Act of 2008 and describing the fact that the FRA had provided additional funding beyond that described in the original Service Outcome Agreement).

⁶⁰ Service Outcome Agreement at NECR_001181, VT Agreement at NECR_000981 ("The purpose of this Agreement is to meet the goals of State ... by providing construction assistance from the FRA and State to Railroad ... to reduce the travel time for intercity passenger service....") and NECR_000992 (committing that NECR will keep the rail line in Class III and Class IV standards for the passenger service). See also, Operating Agreement between National Railroad Passenger Corporation and New England Central Railroad, Inc. ("Amtrak/ NECR Host Agreement"), Vol. II, NECR_001274 to NECR_001326, specifically NECR_001728 [REDACTED]

[REDACTED]

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additional compensation runs contrary to the intent and fundamental assumptions underlying the Amtrak Decisions.

It appears that NECR (or perhaps more appropriately, NECR's new owners) has (have) decided that the obligations NECR accepted as a condition to its acceptance of public funding are too costly in terms of ongoing capital upgrades and maintenance. These obligations require NECR to maintain the Line at Class III, or in some cases, Class IV standards.⁶¹ NECR accepted these obligations knowing full well that PAS was only required to contribute toward maintaining the Line at Class II standards. Yet, NECR now, under the guise of leveling the playing field, seeks additional compensation from PAS so as to subsidize its unilateral decisions. However, as noted above, the ICC in Amtrak II, already determined the appropriate level of compensation that B&M should pay to maintain safe operations over the Line and that fee was intended to fully satisfy any and all obligations of PAS to pay for the trackage rights provided or contribute towards the costs of dispatching, maintenance and repair of the Line.⁶²

Any request to have PAS subsidize NECR's unilateral decisions should be rejected. It was not PAS, but NECR, who contractually obligated itself to maintain the Line at higher standards than required by the Amtrak Decisions. NECR has known that it had this obligation for over three decades. For example, in a May 10, 1988 letter to the State of Vermont, CV acknowledged that Amtrak committed \$3.1 million of funds appropriated by Congress "to the upgrade of the Line, but CV is required under its March 18 agreements with Amtrak to restore and maintain it to a level that will permit 55 mph or 59 mph passenger operations and install

⁶¹ See NECR_001096, NECR_0019196 and NECR_0019201, Vermont Agreement (NECR_000981 to NECR_001026), Amtrak/NECR Host Agreement (NECR_001274 to NECR_001326), Operating Agreement between Amtrak and NECR (NECR_001718 to NECR_001770, specifically NECR_001728.

⁶² Amtrak II at *52.

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necessary train control systems, regardless of the actual cost.”⁶³ CV moved forward with its decision to acquire the Connecticut River Line and restore the segments for Amtrak service even though it knew that the passenger rail improvements were likely to cost CV more than it had available. In this letter, CV openly acknowledged that restoring and maintaining the line for passenger operations was going to strain its resources, but went forward anyway.

Knowing that the funds would be insufficient and that B&M would not be required to cover any shortfall, CV had a solution. It entered into a Joint Venture Agreement with the State of Vermont to have Vermont fund a portion of the costs associated with acquisition of the Connecticut River Line; the agreement was intended to serve as a backstop in the event the rehabilitation costs exceeded CV’s resources.⁶⁴ To CV’s credit, it was wise to seek such a joint venture to cover any shortfall. Likewise, today, if NECR is finding that its agreements are not fully compensating it for its maintenance obligations, it should similarly seek such public funding rather than seeking to obtain such funds from PAS.

PAS does not deny that it operates on the “upgraded and well-maintained rail lines” to access and serve shippers, but PAS was given no other choice. Throughout the years, CV and NECR made unilateral decisions to accept public funds to upgrade the Line and to maintain those upgraded lines in order to accommodate passenger service. PAS had no say and no role in those decisions.⁶⁵ NECR should live or die through the deals that it made.⁶⁶

⁶³ NECR_000350-NECR_000351.

⁶⁴ NECR_000350-NECR_000351.

⁶⁵ This is unlike standard operating agreements between carriers. Such agreements normally provide that both parties must agree to any capital improvements and that both parties would share in the costs and the maintenance obligations. Here, the TO was imposed as part of a taking. PAS was given no role in the future decisions of NECR (CV) to accept or reject public funds. As such, PAS protections were “locked in” by the Amtrak Decisions. NECR seeks to undo those protections.

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In the end, despite NECR's cries for sympathy, the facts are simple: (1) B&M understood that making passenger infrastructure improvements to accommodate Amtrak was not possible given the size and profitability of its operations; (2) the ICC made it clear that B&M had no obligation to contribute towards planned upgrades for Amtrak service; (3) the ICC considered and rejected the very same arguments NECR is making in this proceeding in Amtrak II; and (4) both CV and NECR nonetheless unilaterally entered into agreements and accepted public money to upgrade and improve the Line for passenger operations beyond the FRA Class II standards. They did so in exchange for accepting sole responsibility for maintenance of the rail infrastructure assets and knowing full well that B&M and PAS would not have to contribute towards those increased contributions.⁶⁷ PAS and the shippers should not bear the expense of NECR's decisions.

3. NECR Should Be Adequately Compensated For Its Unilateral Decisions Through Its Agreements With Amtrak, Not Through PAS Subsidies

NECR is not without options. As noted, NECR can seek additional government funds to cover any potential shortfall, or, in theory, its existing agreements with Amtrak should pay for any incremental maintenance to cover maintenance costs attributable to Amtrak's use of the Line. Amtrak is supposed to reimburse NECR for [REDACTED]

⁶⁶ NECR claims that PAS wants to pay for Class II speeds but enjoy Class III service. PAS is more than willing to operate under Class II speeds if NECR operates its freight service under the same terms and conditions so as to maintain competitive parity.

⁶⁷ One wonders just what the alleged shortfall is. Given that the States of Vermont and New Hampshire and the federal government have invested heavily in the Line in recent years -- upwards of \$60 million of total federal and state public investment into the Line primarily for passenger operations -- current maintenance costs for the Line should be minimal. Nonetheless if the Board does require PAS to contribute additional maintenance obligations beyond those required for FRA Class II levels, the proper level of that calculation is addressed in the PAS Reply, VS Baranowski at 12-17; and SRVS Baranowski at 13-16 and 23.

[REDACTED]⁶⁸ This suggests that NECR is being adequately compensated by Amtrak for its unilateral decision to improve passenger rail infrastructure.

The Amtrak agreement also provides that to the extent Amtrak has required NECR to pay for improvements, [REDACTED]

[REDACTED]⁶⁹
It is unclear from NECR's testimony whether Amtrak is meeting this obligation, or, if not, whether NECR went after Amtrak for recovery of any additional eligible capital expenditures and/or increased maintenance costs that may have arisen from previously infrastructure improvements. It could be that NECR is already being compensated by Amtrak for any increased maintenance obligations and also seeks compensation from PAS, which would result in double reimbursement.

Mr. Baranowski discusses the Amtrak agreements and his belief that those agreements suggest that NECR is already being adequately compensated by Amtrak for its unilateral decision to improve passenger rail infrastructure. SRVS Baranowski at 8. But even if this is not the case, NECR has given no justification for the Board forcing PAS to subsidize NECR and Amtrak's operations, especially when the ICC in Amtrak II made it clear that CV should not look to B&M to cover additional costs associated with upgrading and maintaining the line beyond FRA Class II standards. As such, the Board should reject NECR's efforts to obtain

⁶⁸ NECR_001312.

⁶⁹ NECR_001286 and NECR_001312. Appendix IV provides NECR payment for [REDACTED]

[REDACTED] Id.

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additional compensation from PAS to cover increased costs associated to Amtrak's passenger operations.

B. The Maintenance Figures Set Forth In The NECR Rebuttal Overstate Actual Maintenance Costs

As noted above, PAS is obligated to pay its share of maintenance to the FRA Class II standard. NECR is requesting PAS to pay its share of maintenance based upon FRA Class III, and in some cases, Class IV standards. If the Board agrees with NECR that the Board has the power to apply SSW to either two or all three of the segments notwithstanding the Amtrak Decisions, the Board has an obligation to apply the right standard based upon actual data and PAS's obligation should be limited only as necessary to maintain FRA Class II standards.

In its Reply, PAS noted that RLBA calculated "the estimated level [annual] amount to maintain the trackage rights line (and each of the segments) in its current FRA Class 3 condition."⁷⁰ RLBA's analysis included costs for what it calls "program maintenance" and "routine maintenance."⁷¹ RLBA also calculated maintenance at the FRA Class II standards, but even this number is highly inflated. As discussed in the PAS Reply, VS Baranowski at 12-17, these estimates are inflated because RLBA calculated and applied a *normalized* maintenance estimate even though SSW requires application of *actual* maintenance of way expenditures per track mile. Accounting for all of the deficiencies in RLBA's analysis, in his PAS Reply VS, Mr. Baranowski developed an actual maintenance expenditure (plus property taxes per car mile) of [REDACTED] per car mile.⁷² This is in stark contrast to RLBA's overinflated value of \$1.14⁷³ per car mile.

⁷⁰ NECR Opening Comments at 9; VS RLBA at 10-11.

⁷¹ Id.

⁷² PAS Reply, VS Baranowski at 17.

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In the NECR Rebuttal, NECR and RLBA notes that both parties have agreed upon the proper allocation of property taxes and that track maintenance should include both routine and capital or program maintenance. NECR Rebuttal at 39. NECR also noted that it would agree with PAS to apply actual maintenance costs as opposed to the maintenance model used in its Opening Comments. Id. However, it claims that PAS's estimate is "grossly understated" and ignored certain documents allegedly produced that show certain capitalized maintenance expenses that were not included in the PAS Reply, VS Baranowski. Id. Based upon these allegedly overlooked documents and applying a two-year average for capital maintenance, NECR claims that maintenance costs per car mile should be [REDACTED]⁷⁴ over the Southern, Middle, and Northern Segments, respectively. This compares to Baranowski's calculations of [REDACTED]⁷⁵ respectively.

There are two problems with the new NECR/RLBA analysis put forth in the NECR Rebuttal. First, the calculations were done based upon new information not previously put into the record, which should be stricken as improper rebuttal evidence. Second, it cherry-picks the time period most favorable to NECR and relies upon a two-year average for the capital maintenance component whereas the Baranowski's analysis relied upon data which contained a six-year average and therefore reflects a better estimate of actual costs.

As an initial matter, it is interesting that NECR complains that FTI's calculations were based upon "a form which was clearly not complete," NECR Rebuttal at 40, when it was NECR who provided that information and confirmed that such information was the complete

⁷³ NECR Opening Comments at 10.

⁷⁴ NECR Rebuttal at 41.

⁷⁵ PAS Reply, VS Baranowski at 17.

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information responsive to PAS's discovery request. In discovery, PAS requested NECR to "provide detailed cost for each year for capital maintenance" including "regular, periodic replacement of track and bridge components." (Document Request 20). After reviewing the materials provided, PAS counsel was asked by Mr. Baranowski to confirm with NECR that the 2008 to 2013 materials he relied upon, NECR_004541 and NECR_004586, were the "intended response to capital maintenance costs" since they were produced under Request 34 and not Request 20. NECR counsel replied confirming that the 2008 to 2013 materials Mr. Baranowski relied upon did in fact "provide the capital cost information you requested," and also referenced information on 2013, 2014, and 2015 "capital projects" produced in NECR_004594-NECR_004599. SRVS Baranowski at 15.

Now NECR claims that these very same materials were incomplete. It is unclear why NECR would have provided the materials relied upon by Mr. Baranowski if indeed they were actually incomplete. More troubling is that when specifically asked whether these materials were the "intended response to capital maintenance cost details" NECR answered affirmatively. There is nothing about the materials themselves that indicate they are incomplete. SRVS Baranowski at 15. Mr. Baranowski cannot be faulted for relying upon information that NECR said was complete.

NECR then criticizes FTI for overlooking the 2013, 2014, and 2015 "capital project" information that was produced. NECR Rebuttal at 39. In doing so, NECR produces, for the first time and in Rebuttal, "portions of summary sheets for each period applicable to NECR that were not produced with the originals." NECR Rebuttal at 39, n. 24. NECR's experts then rely upon this newly produced information, which as is explained in the SRVS Baranowski at 15-16 was the key to unlock the information that was produced in the 2013, 2014, and 2015 "capital

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project” discovery documents. As explained, with this newly produced information, Mr. Baranowski could not have conducted the analysis that NECR criticizes him for failing to conduct.

Being newly produced information submitted in rebuttal, it should be stricken from the record as improper rebuttal evidence.⁷⁶ It is fundamentally unfair to criticize FTT’s analysis when NECR’s counsel had previously confirmed that they had produced all relevant information regarding capital maintenance expenditures and then produce new information which new information is the essential ingredient to arrive as NECR’s new maintenance calculations.

Nonetheless, even given this new information, FTT’s analysis still stands. This is because the 2008 to 2013 materials relied upon by Mr. Baranowski calculate a 6-year average of capital costs across the standard capital maintenance categories of turnouts, bridges, ties, surface, signals and crossings, and specifically deduct grant funding over the period. In contrast, the 2013, 2014, and 2015 information produced by NECR, and as now unlocked with the newly produced information, does not differentiate between NECR funds and grant monies, clearly covered capital projects not related to capital maintenance, contained disparate information reporting each project separately, and did not provide any summaries indicating it was a complete set of annual information for a given year. For these reasons, using the 2008 to 2013 materials, as Mr. Baranowski did, to establish capital maintenance cost was clearly a reliable method, better than the alternatives, and fully consistent with NECR’s representations in discovery. In contrast, attempting to use the 2013 to 2015 “capital project” information would have required making subjective judgments about which capital projects involved maintenance as opposed to

⁷⁶ Consumers Energy Company v. CSX Transportation, Inc., NOR 42142, slip op. at 5-6 (STB served Dec. 9, 2016)(granting motion to strike for failure to provide reliable and relevant evidence on opening and instead, presenting it on rebuttal).

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improvements, unfounded assumptions about whether this represented all projects, and guesses about whether the reported amounts contained grant monies. SRVS Baranowski at 15-16.

If the Board determines to use NECR's new 2013 and 2014 figures, then they should, at a minimum, be combined with cost information available from 2008 to 2015 in order to provide a reliable average. Both parties agree that capital maintenance costs fluctuate significantly from year to year. Thus, given the annual spending fluctuations and the various data inconsistencies among the previously produced information and the new information, use of a period longer than the two years cherry-picked by NECR is a more reliable approach for purposes of establishing a forward-looking estimate of capital maintenance for purposes of determining SSW compensation.

IV. NECR'S PROPOSAL IS NOT IN THE PUBLIC INTEREST

A. NECR's Proposal Is Contrary To The Goal Of The Amtrak Decisions To Maintain Competitive Parity Between NECR and PAS

In its Reply, PAS took the position that the language throughout the Amtrak Decisions confirmed that it was the ICC's intent, at least in part, for CV and B&M to operate as equal competitors on the Line in a post-transaction environment which competitive parity would be eliminated if the Board were to adopt NECR's proposal. PAS Reply at 8-9. In the NECR Rebuttal, NECR argues that the primary goal of the Amtrak Decisions was not competitive parity but rather was to allow Amtrak to invoke its statutory power and force a conveyance of the Middle Segment due to B&M's long-term failure to properly maintain that line to the detriment of Amtrak's Montrealer service as well as others. NECR Rebuttal at 8. It also argues that the level of the trackage rights compensation was not of concern. Id. As such, NECR argues that contrary to PAS's assertions, the Amtrak Decisions were not focused on the need for CV and B&M to operate as equal competitors on the Line.

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PAS agrees that the “primary” goal was to ensure that Amtrak service would remain. It also agrees that the focus of Amtrak II was on the proper compensation for the taking. But in determining the proper compensation and the post-transaction structure, the ICC did not ignore competitive issues. In fact, the ICC specifically ensured that CV and B&M would have equal rights “to compete for and to interchange traffic at Bellows Falls, VT, with the GMRC [a shortline]” and to “compete for and interchange traffic at Claremont Junction with the CCR [another shortline].”⁷⁷ Competitive parity, while not the focus, was a consideration and the transaction structured to maintain that parity.

Ironically and puzzling, while advancing the argument that the trackage rights compensation and Amtrak Decisions did not intend for NECR and PAS to be on equal competitive footing, NECR turns right around and advances precisely the opposite: that the Amtrak Decisions actually did want competitive parity, but only after 20 years. Rather than being designed to ensure competitive parity from the beginning, NECR argues that the ICC actually did consider competitive issues, but its decision was structured in such a way so as to “bake in” a competitive advantage for PAS. This baked-in competitive advantage was to expire in 20 years. Thus, according to NECR, it is now time to change the rate by reopening and raising the trackage rights fee so as to finally ensure (and conveniently timed to NECR losing traffic to PAS) the precise competitive parity that NECR now says should occur and was specifically contemplated by the ICC.

NECR’s Rebuttal is replete with statements and arguments that it is at a competitive disadvantage to PAS that the Board should now remedy.

⁷⁷ Amtrak II, 1990 ICC LEXIS 52, at *13-14.

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“NECR requests that the Board . . . apply the formula in SSW Compensation to establish new rates for each of the segments in order to level the competitive playing field.” Pg. 1.

“PAS’ . . . seek[s] to protect PAS’ current unfair competitive advantage.” Pg. 2

“[S]hort shrift is given to the larger context in which this TO was first created and the competitive advantage provided to B&M (and its successor PAS) for a 20-year period of time to help compensate for the conveyance of its tracks to Amtrak.” Pg. 4.

“[T] here is no indication in any of the *Amtrak Decisions* that B&M (now PAS) should receive a competitive advantage into perpetuity, which advantage exists today since PAS does not pay its fair share to use the trackage rights lines. Certainly, there is no competitive parity in the current state of affairs given the cost advantage that PAS enjoys, which is likely why the ICC envisioned that the terms could be reopened after twenty years. In all fairness to NECR, B&M/PAS have collectively enjoyed over twenty years of competitive benefits under the existing TO.” Pg. 5.

“Contrary to PAS’ claims that NECR seeks to alter the competitive parity achieved by the Amtrak Decisions, this proceeding would actually help competitive parity. . . During those twenty years, those benefits clearly put CV (and its successor NECR) at a competitive disadvantage as B&M/PAS could charge lower rates to its shippers as it did not have to bear its fair share of the expenses attributable to the trackage rights line.” Pg. 14.

“But now, with PAS getting a subsidy through reduced costs, NECR cannot fairly compete for the business.” Pg. 18.

There are numerous other similar quotes. Apparently, NECR now believes that competition and competitive parity are relevant, and were considerations in the Amtrak Decisions, except that in the Amtrak Decisions the ICC decided to give PAS a competitive advantage.

This is a dramatic change from NECR’s previous claim that this is a simple SSW case for which competitive considerations don’t matter. If this were a run-of-the-mill SSW case, the level of the trackage rights fee would be set in accordance with the standard methodologies and without consideration of whether that level would actually provide competition or not. But this is not a standard SSW case. Both PAS and NECR apparently now agree that the Amtrak Decisions and resulting TO were in fact designed to ensure that PAS and NECR had an equal opportunity to compete on a level playing field.

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NECR cannot have it both ways, however. NECR originally said that CV voluntarily agreed to the TO and the level of the trackage rights compensation because that was a voluntary agreement outside of the Amtrak Decisions and that competitive parity and the compensation level was not of concern to the ICC. But now it says the ICC intended to bake-in a competitive advantage for PAS. Of course if that is the case, why would CV have voluntarily agreed to give B&M a 20-year competitive advantage? Clearly, they would not have done so, or if they did, and given that NECR says the TO was a voluntary agreement that it entered into for “administrative convenience,” it is not the Board’s role to bail NECR out of its own decision.

On the other hand, if the Amtrak Decisions were specifically designed to ensure that PAS had a competitive advantage that the Board now needs to remedy, a position that NECR now seems to advocate, one would have expected NECR to put some evidence into the record establishing this assertion. Where is the evidence that PAS is getting a “cost subsidy?” And that such a subsidy is allowing PAS to unfairly compete? There is no such evidence. There is no evidence of bidding between the companies showing that PAS has a competitive advantage because of the allegedly low trackage rights fee. There are no statements from any company executives, shippers, government agencies, academics, or economists explaining how and why the trackage rights fee that PAS pays provides PAS with a competitive advantage. There is no market share information showing that PAS dominates the market for those shippers that both NECR and PAS can serve because of a significant cost advantage. Indeed, one can search the entire NECR Rebuttal for any evidence that PAS has a competitive advantage, but it isn’t found.

At best, you have statements from their lawyers that PAS has a competitive advantage because it is not paying what RLBA says PAS should pay using the VIP methodology. This is circular reasoning and is certainly not evidence. In contrast, PAS has produced substantial

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evidence establishing the fact that if the Board were to raise the trackage rights fee to the level suggested by NECR, such a fee would destroy competitive parity and place PAS at a significant cost disadvantage. See PAS Reply, V.S. Bostwick at Exhibit A; the Minter Letter, and the Sheehan Letter and the comments of Washington County Railroad Company and Green Mountain Railroad Corporation in FD 35842.

The Board need look no further than the Rymes proceeding⁷⁸ to disprove the notion that PAS has had a “baked in” competitive advantage for 20 years that somehow needs to be eliminated by increasing PAS’s rates 1,389%. If PAS had such a favorable competitive advantage, one must ask how NECR was able to win the traffic away from PAS once NECR was provided with access to that shipper. If PAS was not paying its fair share and its rate was being subsidized by NECR, PAS should have been able to keep the traffic when NECR obtained access. It did not. The fact that NECR was able to take that traffic away from PAS devastates NECR’s “unfair competitive advantage” argument.⁷⁹

B. Application Of NECR’s VIP Methodology Would Limit PAS’s Ability To Compete And Would Result In Increased Prices To Shippers

As noted, PAS established in its Reply (PAS Reply at 14-17; VS Bostwick) that application of NECR’s VIP methodology would likely cause a significant transfer of traffic to trucks or a shift to NECR at higher prices. For any PAS’s allegedly captive shippers, the rates would also have to increase to cover the increased costs. Likewise, for shippers open to both NECR and PAS, PAS’s rates would likewise go up to NECR’s advantage. NECR’s reaction to

⁷⁸ Rymes Heating Oils, Inc. – Petition For Declaratory Order, FD 34098 (STB served July 19, 2002) (“Rymes”).

⁷⁹ The fact that PAS has now won that traffic back, which was apparently one of the catalysts for NECR’s actions that started this proceeding, is prime proof that the parties operate at competitive parity, which was one of the goals of the Amtrak Decisions in the first instance.

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such rate increases for shippers is the equivalent of “let them eat cake.” NECR actually says that the “fact that there would be a large increase in compensation is not a factor that the Board should consider. The only limit for the Board is to prevent unreasonable charges.” NECR Rebuttal at 17. NECR callously explains that it shouldn’t matter that PAS’s rates would have to increase because all that matters is that both NECR and PAS are “paying [their] fair share.” *Id.* at 18. It even admits that there in fact could possibly be higher rail rates if the Board imposes the requested fees, but says such higher rates must be balanced against the needs of NECR to maintain the line at FRA Class III passenger standards. *Id.* at 19. In other words, PAS and its customers should have to suffer rate costs increases in order to pay for NECR’s unilateral decision to accept government money to increase passenger speeds and the corresponding higher maintenance obligations, and if that results in higher prices to shippers – so be it. This is not in the public interest, especially when NECR has presented no evidence indicating that it is at a competitive disadvantage to PAS.

C. NECR’s Proposal Is Contrary To The Rail Transportation Policy

NECR’s proposal is not in the public interest and is not consistent with the Rail Transportation Policy (“RTP”). Nowhere does NECR demonstrate how increasing PAS’s costs with a corresponding rate increase to shippers is to the benefit of anyone but NECR. Has NECR committed to lowering rates as a result of its operating costs going down? No. Other than subsidizing NECR’s decision to accommodate Amtrak service at higher passenger speeds (which may be in the public interest but whose costs should be borne by NECR and Amtrak, not PAS), there is no benefit to PAS, the shippers, the shortlines, or to the general public, who could see shifts to trucking instead of rail.

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NECR attempts to claim that its actions are consistent with the RTP, but it cites to only one provision of the RTP – Section §10101(3) ("to promote a safe and efficient rail transportation system by allowing carriers to earn adequate revenues, as determined by the Board.").⁸⁰ Of course NECR has not proven that it is unable to earn adequate revenues nor has it argued that it cannot provide safe and efficient service under the existing compensation structure. It claims it is losing money due to its maintenance obligations, but it has not presented any such evidence. As Mr. Baranowski's CE Approach established, NECR is in fact a going concern and is profitable. FTI would not have been able to calculate a CE otherwise. Thus, any claim that NECR needs additional revenues from PAS so as to earn adequate revenues is unproven and unjustified.

In contrast, NECR admits that its proposal would raise costs to both PAS and the shippers. Obviously NECR doesn't have any concerns about PAS's ability to earn adequate revenues consistent with the RTP. PAS has also shown that application of the increased trackage rights compensation fee would hamper its competitive position and actually result in less competition, not more. In fact, it is NECR's proposal to have the government impose additional costs, limit competition, and hamper PAS's ability to compete against other modes that violate several provisions of the RTP. See §10101(1) (to allow competition to establish rates); (2) (to minimize regulatory control); (4) (to ensure effective competition among rail carriers with other modes); (5) (to ensure effective competition between rail carriers); and 12 (to prohibit discriminatory practices).

⁸⁰ But again, NECR has not established that it is earning inadequate revenues because of the Amtrak Decisions or the TO, but rather, it is clear that to the extent there is a shortfall in revenues to cover maintenance obligations (an assertion made but not proven), as explained in Section II, *infra*, that shortfall is a result of decisions made by NECR and Amtrak and/or the failure of Amtrak to pay the full costs of maintaining the infrastructure improvements.

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V. THE BOARD SHOULD REJECT NECR'S REQUEST TO GIVE ANY NEWLY ESTABLISHED TRACKAGE RIGHTS COMPENSATION RETROACTIVE EFFECT

NECR now states unequivocally that it misrepresented at the time why it entered mediation. In fact, despite the fact that it now claims that it had no hopes of reaching a mediated settlement, NECR twice petitioned the Board to extend that mediation. Letters submitted by NECR on April 16, 2015 and May 15, 2015. Even with those requested mediation extensions, the final submission of evidence and argument would have occurred in 2015. Retroactive application back to 2014 would involve a “true-up” – not just covering a few months as the parties had anticipated when mediation was *jointly* requested – but covering several years of service to customers on the line, and would serve as an unreasonable windfall to NECR.

NECR seeks to have the Board's order retroactive to cover trackage rights operations that now stretch back to June 17, 2014, referring to a letter submitted to the Board on January 30, 2015. NECR Rebuttal at 47-48. In that letter, NECR joined PAS in stating that “this proceeding is precisely the type of proceeding that could be resolved through the use of the Board's mediation procedures....” Letter submitted in FD 35842 (requesting referral to mediation). That letter explained to the Board that it was NECR's and PAS's anticipation to resolve issues in mediation, but if mediation was unsuccessful, the case would be handed to the Board for its decision no later than 90 days after the end of mediation. *Id.* It was under this specific and enunciated understanding, and their joint belief that “meaningful and substantive negotiations could resolve the underlying issues.”⁸¹

⁸¹ See PAS Letter to the Board dated January 30, 2015 (“Jan. 30th Letter”) requesting mediation and providing a suggested procedural schedule inclusive of a period for mediation.

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It is now abundantly clear that NECR never shared PAS's desire to settle the dispute quickly.⁸² NECR now claims that "NECR *only* agreed to mediation because PAS agreed to make any new compensation terms retroactive," and not to actually mediate. NECR Rebuttal at 48. In fact, "NECR did not believe that mediation would be successful" and that, as a result, mediation would merely serve to "cause a delay in the proceedings." NECR Rebuttal at id. Not only did NECR go into mediation with the expectation that it would not be successful, despite suggesting otherwise to PAS, but NECR also later dragged its feet and unnecessarily complicated and delayed discovery, which in turn caused significant delays in the procedural schedule.⁸³

NECR admits that the procedural schedule was longer than the parties' expectations, but it claims the delays that occurred in the proceeding are the fault of PAS because PAS sought what NECR unilaterally determined was unnecessary discovery. Yet, nothing could be further from the truth. It was NECR that filed the various motions that led to the extensive delay in the schedule that took nearly eleven months, two motions to compel, an additional round of evidentiary evidence, and multiple Board and administrative law judge decisions (all of which went in favor of PAS) for NECR to finally provide PAS with the information necessary for PAS to even begin to analyze the merits of the case. This certainly was not PAS's expectation when it agreed to retroactivity and the original expedited schedule.

Because PAS entered into mediation based upon the false assertions of NECR that such mediation would be meaningful and because NECR has done nothing but delay and delay the

⁸² "NECR only agreed to mediation because PAS agreed to make any new compensation terms retroactive. NECR did not believe that mediation would be successful...." See NECR Rebuttal at 48.

⁸³ For a recap of all the delays and gamesmanship engaged in by NECR in this proceeding, see Pages 53 and 54 of PAS's Reply.

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ultimate decision on the merits, the foundation of the agreement for applying any trackage rights compensation retroactively are, and have been from the start, undermined and thus the agreement is no longer applicable. To do so at this juncture would harm PAS, who had a common carrier obligation to provide shipments and did so based upon the established trackage rights compensation, but would also harm past, current, and potential shippers who could be asked to pay more due to the delays caused by NECR.

NECR claims it is not fair that PAS changed its position on retroactivity, despite all of NECR's shenanigans. But it is telling that the record shows that PAS has worked diligently to resolve the proceeding expeditiously. PAS promptly served discovery on NECR and began evaluating which methodology was most appropriate to calculate the interest rental component of trackage rights compensation. NECR, on the other hand, was content with delaying the proceeding time and again because unlike PAS,⁸⁴ it had nothing to lose and was fully content with being rewarded for its delay and obstruction.⁸⁵ The Board has previously refused to reward parties for causing unnecessary delays in trackage rights compensation cases.⁸⁶ It should not do so here.

Furthermore, even though the parties may have previously been in agreement on retroactivity based upon premises which turned out to be false, precedent demonstrates that the

⁸⁴ During the course of this proceeding, PAS has and continues to make business decisions, move traffic, price shipments, and collect revenues based upon the existing trackage rights fee. PAS cannot go back and collect this higher fee from its shippers.

⁸⁵ PAS would have to pay the higher trackage rates fee with respect to all of the traffic it moved under its previously existing competitive rates which were in place when it benefited from competitive parity with NECR as a result of the appropriate trackage rights fee from the TO.

⁸⁶ See, e.g., NCR, 1997 STB LEXIS 123 at *15 ("We will not, however, accede to an indefinite delay of the proceeding. NS cannot reasonably be expected to provide rail service indefinitely at current freight rates while NCRR seeks a lease compensation prescription at a significantly higher level and requests that it be made retroactive to the expiration of the lease agreements.")

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Board will not apply retroactivity absent agreement of the parties.⁸⁷ Given that the underlying fundamentals of the agreement to mediate and to consent to retroactivity have proven false, PAS is within its rights to withdraw its consent. PAS made that position clear long before this surrebuttal, and the NECR Rebuttal only supports the basis for that action. As such, the Board should not apply any newly established trackage rights fee retroactively.

VI. MOST OF NECR'S PROPOSED CHANGES TO PAS'S PROPOSED TRACKAGE RIGHTS AGREEMENT SHOULD BE REJECTED BECAUSE THEY ARE INTENDED TO ADD COSTS TO PAS'S SERVICE AND ARE INCONSISTENT WITH STANDARD PROVISIONS OF MODERN DAY TRACKAGE RIGHTS AGREEMENTS

The entirety of trackage rights terms and conditions define the ability of a tenant railroad to reasonably operate and serve customers on a rail line because these terms and conditions are used to define the relationships, rights and responsibilities of both the landlord and the tenant. NECR recognizes the importance of terms and conditions to protecting the viability of competition on the line and governing the relationship between the parties. As NECR explained, the original "terms of the TO were largely agreed upon by the parties, and were based on the interim agreement that the parties agreed would apply effective with the transfer of the middle segment to B&M to Amtrak (and then to CV)." NECR Opening Statement at 15. NECR should therefore bear the burden of proof for making changes to that consensus document by demonstrating that any proposed changes either do not impose additional constraints on operations and the ability to serve customers, or are justified.

⁸⁷ "In the absence of consent by the parties, this Commission is without jurisdiction to fix compensation retroactively." National R. Pass. Corp. Application under section 402(a) of the Rail Passenger Service Act, FD 30426. 1 I.C.C. 2d 243; 1984 MCC LEXIS 210, at *13 (ICC served Oct. 25, 1984).

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In some cases, NECR has carried its burden, and/or PAS and NECR have agreed to changes to the terms. However, NECR has not carried its burden with respect to several other proposed changes. In fact, several proposed changes are not only completely unnecessary, but would set up the potential for other conflicts and arguments in the future. In other cases, the proposed changes would shift or impose additional costs or burdens on PAS that need not be shifted or imposed. PAS will limit its comments to proposed changes that as proposed would tamp down PAS's ability to compete.

Section 0.7 – Definition of “CV Lines”.

Section 0.9 – Definition of “Former B&M Line”.

Section 0.13 – Definition of the “Line”.

NECR adds language to certain definitions that simply is not necessary for a trackage rights agreement, and further such language sets up potential arguments in the future, including future reopeners. For Section 0.7 – Definition of “CV Lines,” NECR inserts the phrase “and which are currently owned by NECR”. NECR does the same for Section 0.9 – Definition of “Former B&M Line” and Section 0.13 – Definition of the “Line”. PAS objected to inclusion of the additional language in the PAS Reply, and continues to object to inclusion of the additional language. Not only have none of NECR's submissions provided any support for the proposed modifications, but rather than respond to NECR's criticisms concerning its proposed changes to the language, NECR simply ignores PAS's arguments.

NECR purports it “added the phrase ‘which are currently owned by NECR’ not to assert a title claim, but to establish it as the current party in control of the lines.” NECR Rebuttal at 49. Control of the CV Lines (Section 0.7), the definition of the Former B&M Line (Section 0.9) and the definition of the Line (Section 0.13) are not in dispute in this proceeding and are not ambiguous in the trackage rights agreement. Thus, the additional language is not warranted.

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The characterization of easement and ownership for purpose of the compensation calculation will be determined elsewhere and inclusion of such language in the TO could have an unintended effect. As stated previously “(1) the added phrase otherwise does not add anything necessary to the agreement and its meaning, (2) its addition is not supported by either the facts or NECR argument, and (3) there is a potential for mischief in adding it.” PAS Reply at 34. One can easily foresee that in the next reopener NECR would argue that inclusion of the newly suggested language in the TO being established here indicates that the STB made a determination as to nature of the NECR easement and whether that equates for all purposes as ownership. There is simply no need for the STB to wade into the issue of ownership in the TO.

Section 0.8 – Definition of “Effective Date”.

This is a new provision. NECR adds the provision to ensure that the current and all future compensation provisions be imposed retroactively. For the reasons stated in Section V above, PAS does not support imposition of retroactive compensation in this proceeding. More important, if the Board includes the suggested language in the TO, the Board would unnecessarily restrict the contractual rights of the parties to negotiate compensation in the future. By statute, the parties are charged with independently negotiating compensation, and the Board is only to get involved when the parties fail to reach an agreement.

Section 0.11 – Definition of “Hazardous Substance”.

Section 5.5 – Scheduling of Trains and Maintenance; Operating Rules (Special Rules for Transport of Hazardous Materials

Section 9.2 – Transportation of Hazardous Substances.

In the NECR Opening Statement, NECR implies that changes to the TO regarding Hazardous Substances are benign, but they are not. NECR proposes additions to two sections: a definition of “Hazardous Substance” (Section 0.11) and specific provisions related to the transport of those materials (Section 9.2). Even more egregious, NECR reserves for itself,

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without STB review or oversight, to “implement any environmental, safety or security measures, procedures or requirements that it considers necessary or desirable....” (Section 9.2(e)). To be clear, these changes are not benign, are not mere clarifications, and substantially add to (and have the potential to further add to) the burden on PAS, notwithstanding NECR claims to the contrary.

NECR’s proposes a definition for “Hazardous Substance” (Section 0.11), which is significantly broader and more ambiguous than the definition of “hazardous materials” found in current Federal or state legislation. The proposed new definition in Section 0.11 would read:

“Hazardous Substance” means any substance which is hazardous to persons or property and includes, without limiting the generality of the foregoing, (i) radioactive, explosive, poisonous, corrosive, flammable or toxic substances; (ii) substances that endanger the health and safety of persons; and (iii) substances declared to be hazardous, toxic or dangerous under any law or regulation now or hereinafter enacted by any governmental authority having jurisdiction.”

Although lengthy, the definition is quite simple once extraneous words are removed – the term “‘Hazardous Substance’ would mean any substance which is hazardous to persons or property” in any way, shape or form. Section 0.11.

In addition to the definition covering anything and everything that NECR unilaterally decides it should, NECR’s proposed new Section 5.5 would give NECR the exclusive right to make any “operating and safety rules ... governing the transportation of Hazardous Substances....”. More precisely, the suggested language would allow NECR to reserve for itself the right to define what the term means, and implement any rules it sees fit. Even if that right were eviscerated from the proposed TO, the definition would sweep into its reach any and every substance that is declared to be hazardous, toxic or dangerous by any and every governmental authority having oversight over the specific substance, as well as any substance, without regulatory limitation, that may “endanger” health and safety. The definition is too far

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overreaching and has no relationship to substances declared to be hazardous, toxic or dangerous by a governmental authority having jurisdiction over interstate freight rail transportation.⁸⁸

The sweep of the already-defined substantive provisions in the NECR, where the ambiguous definition is more specifically applied – in the new provisions of Section 9.2 – are far too extensive to reproduce here. Those provisions cover a page and a half single spaced. The provisions are limitless and include NECR dictating what must be in PAS' emergency response plan, mandating the PAS provide written follow-up reports to NECR, requiring that PAS forward any communications between government agencies and PAS, and providing remediation instructions that may or may not be consistent with governmental instructions. Section 9.2.

NECR justified its broad and significant changes with just the following two sentences:

NECR has suggested additional provisions to clarify the responsibilities of the parties with respect to hazardous materials handled by PAS over the trackage rights line. Such provisions have become customary, especially given the new regulations issued by FRA with respect to the handling of such materials.

NECR Opening Statement at 17.

In the interest of being concise, rather than restate PAS's entire argument as to why the sweeping changes are unnecessary, PAS refers the Board to its reply. See PAS Reply at 46-48. To briefly summarize PAS's position, there is already extensive Federal environmental regulation and enforcement protocols that cover the interstate freight rail transportation of hazardous materials. PAS has provided no justification for the proposed changes which include (1) broadening the definition of the covered substances, (2) expanding the federal law applicable to interstate freight rail transportation of hazardous substances; and (3) implementing a separate,

⁸⁸ In this case, NECR makes it clear that the examples of "radioactive, explosive, poisonous, corrosive, flammable or toxic" is simply an example and specifically is not to be used to limit the definition to such items as may be regulated by a governmental authority having jurisdiction over interstate freight rail transportation.

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contractual obligation that would make NECR an independent regulator of PAS's hazardous materials transport and compliance with applicable federal regulations. PAS Reply at 46-48.

Even if NECR's concerns are valid, PAS has provided the Board with a language modification that would remedy NECR's concerns without overreaching. In its Reply, PAS stated if modifications are deemed necessary, PAS proposes

the standard definition of "Hazardous Materials" contained at 49 C.F.R. §171.8. This definition is not only clear and objective, but also arises out of the regulations promulgated pursuant to the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 et seq. and related hazardous materials regulations contained in 49 CFR Parts 100-180, which regulates the movement of such materials by rail carriers.

PAS Reply at 35. NECR has given no justification for requiring PAS to do anything beyond "comply[ing] with [] applicable laws." PAS Reply at 48.

Despite PAS's suggested alternative language, NECR's position remains unchanged. In the NECR Rebuttal, in support of its initial recommendation claims that: "The proposed requirements on the handling of hazardous materials are consistent with public policy and the RTC's focus on operational and public safety. 49 U.S.C. Section 10101(8)." NECR Rebuttal at 50. NECR admits that the definition is broad, and cites as a counter-example provisions that an NECR affiliate accepted as part of the overall price to obtain trackage rights over the Dakota, Minnesota & Eastern Railroad. See NECR Rebuttal at 50. (citing *Rapid City, Pierre & Eastern Railroad, Inc. – Acquisition and Operation – Dakota, Minnesota & Eastern Railroad Corp.*, FD 35799). But NECR ignored PAS's enunciated concerns about the definition being overly broad, and declined to comment on PAS's alternative language. NECR simply has not justified that the modification to the language is reasonable and/or necessary.

Of course, sometimes the issue is in the definition, and sometimes the issue is in the substantive provisions arising out of the definition. In this case, it is both. To put this issue into

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context, NECR seeks to add several provisions regarding the transport of what is going to be defined under the contract as a “Hazardous Substance.” Section 9.2 consists of a full page and a half, single spaced, of restrictions on what PAS must do, how to do it, and who is to be the judge of whether what is done is done correctly, yet NECR claims that Section 9.2 “do[es] not add additional burdens on PAS....” NECR Rebuttal at 56. That obviously is not the case.

PAS is already subject to extensive state and Federal laws, but NECR argues that the contractual provisions it wants to impose are necessary to “ensure that [PAS] acts responsibly and lawfully” in its handling of Hazardous Substances. NECR Rebuttal at 56. Enforcement mechanisms exist in state and Federal laws to ensure compliance with those laws, yet NECR wants, as a price of the trackage rights, to be able to add obligations and or to substitute its opinion for that of the government regulator. NECR’s additional oversight is clearly unnecessary.

NECR’s new Section 9.2, would make it a contractual duty for PAS to call emergency response providers including fire stations for any derailment, even one that is minor and not involving a car containing a hazmat. (Section 9.2(d)(i)). When PAS is required by Federal or state law to notify specific agencies and/or to remediate a spill, of course PAS does so, but the provisions proposed by NECR, would substitute NECR’s judgment for that of Federal and/or state authorities. It would give NECR sole authority to decide how PAS responds to incidents, regardless of the severity of the incident and regulatory requirements and at the sole expense of PAS. (Section 9.2(d)(iii)). NECR seeks to impose obligations on PAS to report matters to the government that government itself has not asked for. (And, should the government institute a new applicable reporting requirement on the transportation of hazardous materials that is not present today, PAS would be subject to that reporting requirement, even without a specific

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reference in the trackage rights agreement.) Moreover, NECR would have sole authority to dictate the sufficiency of the reports. (Section 9(d)(iv)). As proposed, Section 9.2 far exceeds what is required under Federal and state law, and makes no allowance for existing conditions.⁸⁹

NECR also seeks authority to add additional burdens at any time that it wants, regardless whether such recommendations are truly reasonable.

NECR may at any time implement any environmental, safety or security measures, procedures or requirements that it considers necessary or desirable, in its reasonable opinion. NECR agrees to notify PAS regarding any such measures, procedures or requirements and PAS agrees to cooperate, as necessary, in implementing such measures.

Section 9.2(e).

NECR claims that the provisions of Section 9.2 “do not add additional burdens on PAS....” NECR Rebuttal at 56. That obviously is not the case.

Regulation of the rail transportation of hazardous materials is amply covered by applicable Federal law, and NECR has provided no justification for including additional regulation here, or giving NECR greater oversight and implementing authority than the federal agency charged with ensuring the safe transportation of hazardous materials by rail.

Section 1.9 – Grant of Trackage Rights Section 10.7 – General Provisions

NECR continues to seek new restrictions in Section 1.9 and Section 10.7 that would prevent PAS from performing haulage under the TO. Both of NECR’s arguments seem to

⁸⁹ NECR may point to Section 9.2(d)(vi)’s reference to restoration to “a condition existing immediately prior to the contamination,” but that is meaningless when one considers: (1) the entirety of that provision (requiring PAS to “completely clean up any such spill or condition”) and (2) putting the burden on PAS to “demonstrate to NECR’s reasonable satisfaction that any impacted lands and any impacted adjacent lands have been restored to a condition existing immediately prior to the contamination” despite the fact that PAS has no records detailing what that condition was.

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demonstrate a fundamental misunderstanding of haulage as marketing matter, and further as a matter that normally is not even adjudicated by the STB. NECR states that:

NECR believes that allowing PAS to market haulage equates to extending PAS' subsidies to others – which was clearly not intended or contemplated in the original TO. To allow haulage would pass PAS' cost advantages on to any other railroad that shows up with a train.

NECR Rebuttal at 50-51. In addition, NECR claims that:

Because haulage cars would remain in the account of [the] carrier for whom PAS was providing the haulage, there are questions about whether PAS is responsible.

NECR Rebuttal at 56.

Haulage is merely a way of marketing a rail move involving more than one railroad. Although NECR does not make this distinction clearly, when discussing haulage, the question involves the revenue waybill, not the operating waybill. Operationally a rail car that moves in haulage or in interchange follows the same path, and is covered by the same operating waybill.

There is a difference on the marketing side. If PAS offers Vermont Rail ("VTR") haulage for a car, for example, PAS would offer to move that car for a set amount that VTR would then use in its negotiations with the customer. Absent that, PAS would either on its own, or jointly with VTR, provide a rate to the customer. PAS's costs in providing the underlying transportation for the car do not change – they are precisely the same whether the marketing of that transportation is pursuant to a haulage agreement or not. Certainly, PAS does not believe that NECR is subsidizing PAS's operations over the TO lines, but even if it were, that would not be relevant to whether the foreign railcar is moved via haulage or interchange. NECR's arguments concerning Section 1.9 simply are not relevant to whether haulage is permitted under the TO or not.

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NECR's statement concerning Section 10.7, "there are questions about whether PAS is responsible," begs the question – responsible for what? If the "for what" is compensation to NECR for the movement of the haulage car, then there is no question under the TO that PAS is responsible. If the "for what" is liability as between NECR and PAS in the case of a derailment or other damages, then there is no question under the TO that PAS is responsible. The simple fact of the matter is that while the car is in PAS's possession, it would be in PAS's operating waybill account and PAS's control. The original TO's Section 9.7 (now Section 10.7) reads:

As used in this Agreement, whenever reference is made to the trains, locomotives, cars and equipment in the possession of or operated by one of the parties and includes such trains, locomotives, cars and equipment which are owned by, leased to, or *in the account of such party*. (Emphasis added.)

By failing to finish the sentence "questions about whether PAS is responsible," NECR creates ambiguity where an issue is already clear.

But NECR goes even further. NECR uses failed logic to prove a falsehood.

In discovery, PAS confirmed that neither it nor its predecessors have ever used the trackage rights to perform haulage for another carrier (except in the limited instance where PAS is hauling cars for Norfolk Southern Railway that are interchanged with NECR). *This confirms the parties' understanding of whether haulage is permitted.*

NECR Rebuttal at 57 (emphasis added).

This failed logic confuses causation with casual dependence. Just because PAS has not used the trackage rights to perform haulage for another carrier does not prove that it cannot "because the agreement prevents it" (causation), it just proves that it has not (casual dependence) without explaining why. PAS believes that haulage is permitted under the agreement, notwithstanding the fact that it has not yet reached agreements with other carriers to perform that haulage.

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Section 2.2 – Term and Termination

In the NECR Opening Statement, NECR proposed to modify Section 2.2 to reduce the time for reopening from 20 years to 10 years, without a single word of justification. NECR Opening Statement at 17. PAS, in its Reply, raise concerns:

NECR's proposal would introduce a significant amount of uncertainty into the process, to the detriment of the shipping public. When the ICC initially imposed a twenty (20) year reopening term, it did so with full knowledge of the complexities of railroad operations, projections, service, and customer service contracts. Reducing the reopening provision down by half significantly undermines the ability of PAS and its customers to plan, and would undermine the value of the competitive access provided for in this agreement.

PAS Reply at 37.⁹⁰

In the NECR Rebuttal, NECR fails to acknowledge, not yet respond to, PAS's concerns. NECR merely asserts, without explanation, that “[g]iven the rate of change in the railroad industry, the 20-year period initially imposed by the ICC is too long.” NECR Rebuttal at 51. NECR fails to explain what it means by “the rate of change in the railroad industry” and leaves the statement open for the Board to interpret it as the Board sees fit.

Rail customers make capital infrastructure, marketing, and other strategic decisions based upon several inputs – often it is the stability or volatility of the costs it will face for rail transportation that can make a difference. Permitting the reopening of the TO every 10 years introduces (rather than responds to) volatility in the market for PAS and its customers. Contrary to NECR's intentions, NECR's nebulous statement about “the rate of change in the railroad industry” justifies retention of the current 20-year reopener because it preserves PAS and its customers' ability to make decisions on ongoing needs, assets, and infrastructure.

⁹⁰ As raised in PAS's Reply, the NECR proposal and its definition of “Effective Date,” would allow this entire process to be reinitiated in only seven (7) years.

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Section 3.3 – Compensation (Minimum Track Condition)

Despite being required to provide PAS access to trackage, NECR clearly does not want to be required to keep any of the track in any minimum track condition:

There is no need to include a minimum maintenance standard. As noted in Amtrak II, 1990 ICC LEXIS 52, at *17-18, the minimum standard was only included in the TO because CV voluntarily suggested it. The ICC would not otherwise have required it.

NECR Rebuttal at 51-52.⁹¹ Unfortunately, NECR is wrong about its characterization of Amtrak

II. Specifically, the ICC stated, at *17-18:

This section also stipulates that CV shall keep the line in a state of reasonable repair corresponding to the FRA Track Standard for the applicable authorized speeds. (CV may maintain the line at a higher level than FRA Class III.) CV proposes to specify here that it shall keep the line in not less than FRA Class II condition. Since we based our calculations in Amtrak on the cost of upgrading and maintaining the line at FRA Class II standards, and since CV has proposed this standard for itself, we find it appropriate to include.

Clearly the ICC included the provision because the cost of upgrading and maintaining the line at FRA Class II standards was included in its cost calculations, and it felt no further need for justifications and rational because CV has proposed it for itself. For additional testimony on this issue and its implications in this proceeding, see Section III.A. Despite, NECR's characterizations, the ICC clearly intended on PAS's maintenance payments to cover maintaining the Line at FRA Class II condition.

But that is not all. The original TO clearly stated that the requirement to keep the Line in FRA Class II condition not only was to apply during the "term of this Agreement" but also to

⁹¹ On rebuttal, NECR submitted a draft trackage rights reflecting NECR's proposed changes. Unmarked for removal in Section 3.2 appears the following language, which has been in the original TO since the beginning: NECR "shall keep the Line, at all times throughout the term of this Agreement or any extensions thereof, in not less than FRA Class II condition."

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“any extensions thereof.” NECR provides a clear statement of why a minimum standard absolutely needs to be found in the document.

While PAS is paying for a portion of the maintenance, as discussed above, NECR does not believe that it is paying its full share to maintain the Line in its current condition. (If NECR is awarded the compensation requested herein, NECR would be willing to agree to maintain the track to FRA Class 2.)

NECR Rebuttal at 52.

Implied but not stated is that if NECR is not awarded the compensation it has demanded, NECR would not feel bound to maintain the track to FRA Class II. And that provides a very powerful tool for NECR to beat down competition and to punish customers who attempt to have PAS service.⁹² Moreover, the compensation NECR seeks includes costs attributable to maintaining the Line at Class III or IV, but NECR at best may be willing to maintain the Line at Class II if and only if it is awarded the compensation it seeks.

Section 3.3 – Compensation (Gives NECR Unilateral Right to Increase)

NECR downplays the importance of the changes it proposes to Section 3.3, but there is nothing insignificant about them. To be clear, NECR wants the STB to grant NECR the unilateral right to modify the compensation that the STB establishes in this proceeding.

Specifically, NECR asks the Board to include the following provision in the TO:

Additionally, if NECR identifies additional variable costs attributable to PAS’ use of the Line, the per car mile fee shall be adjusted by the annual amount of such variable costs divided by PAS’ car miles during the previous 12 months.

See NECR Rebuttal (Page 4 of the Proposed Trackage Rights Terms and Conditions).

⁹² NECR repeatedly suggests the Board should separate out the CV Lines from the Former B&M Lines, and apply different terms and conditions to each. If NECR was able to downgrade trackage at will along the lines, it could affect PAS’s ability to provide service over other points along the line. There is no need to treat the segments differently as to minimum track standards.

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NECR characterizes this as merely an extension the current proceeding,⁹³ but no matter how benignly NECR characterizes it,⁹⁴ the provision, if imposed, would allow NECR the unilateral and unchecked right to add costs to PAS on top of what NECR has proposed, and on top of what the STB grants in this proceeding.

Section 3.7 – Compensation (Acceleration and Increase in Payments for Capital Projects)

NECR's proposed modifications to Section 3.7, among other things, places unreasonable payment timing obligations on PAS. Specifically, NECR proposes to modify Section 3.7 as follows (new language to be added appears underlined and that to be deleted appears as ~~struck~~):

In the event that NECR is required to undertake any major capital projects (not generally included in routine or program maintenance) which may become necessary due to changes in applicable local, state or federal statutes, ordinances or regulations, or by catastrophic occurrences on the Line, including but not limited to, floods, washouts, or destructions of bridges, or implementation of Positive Train Control, PAS or its assignee shall pay its proportionate share of the expenditures actually made by NECR for such capital projects based upon the percentage of total car miles on the Line attributable to PAS's (or its assignee's) average traffic volume during the ~~five (5) year period preceding the capital project~~ two (2) year period preceding the capital project. NECR shall issue its bill to PAS for the payments specified by this Section 3.7 as soon as practicable following the acceptance of a bid or commencement of the capital project. Payments not received by PAS by such last day of the month in which the bill is issued will accrue interest at the rate of one and one-half (1.5%) percent per month for each month or portion of a month by which the payment is late.

See NECR Rebuttal (Page 4 of the Proposed Trackage Rights Terms and Conditions).

In its rebuttal, NECR claims without these new provisions NECR would have "no contractual way to collect" amounts owed to it for capital projects. NECR Rebuttal at 53. This is not correct.

⁹³ "NECR's proposed language merely reflected the addition of the SSW Compensation factors." NECR Rebuttal at 51.

⁹⁴ "NECR has proposed only having the opportunity to have PAS pay for additional variable costs that arise, without waiting for the reopener...." *Id.* at 52.

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The specific provisions of the TO are very specific. For example, the impact of late payments (see, e.g. Section 8.2 states that “If PAS becomes delinquent in payment of any amount by more than fourteen (14) days under the terms of Section 3, NECR shall be entitled to receive advance payment from PAS for each PAS train seeking access to the Line until PAS satisfies the delinquency in full”). See NECR Rebuttal (Page 7 of the Proposed Trackage Rights Terms and Conditions). Moreover, the provisions NECR proposes to add are not reasonable and could be used to provide NECR an unjustified windfall. For example, if there is a proposal to construct a specific capital project, NECR would have the right to bill PAS immediately upon the acceptance of a bid for that project, without regard to: (1) when the project would be initiated; (2) how long it will take to complete; or (3) how much the project would cost. See NECR Rebuttal (Page 4 of the Proposed Trackage Rights Terms and Conditions).

The language proposed by NECR could result in PAS being required to pay millions of dollars with little or no lead time for a project that may not be even designed, let alone constructed, for months. These charges are not triggered by costs being imposed on NECR, but the mere anticipation that such costs will be imposed in the future.

Further, the penalty rate is triggered by the issuance of a bill. If a substantial bill is issued to NECR on the 27th of a month, then “Payments not received by PAS by such last day of the month in which the bill is issued [that is, within a few days] will accrue interest” at the penalty rate.⁹⁵ This penalty rate is an onerous rate of one and one-half percent (1.5%) per month until paid. Id.

⁹⁵ See NECR Rebuttal (Page 4 of the Proposed Trackage Rights Terms and Conditions).

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These provisions open the door to abuse, are not needed, and would provide NECR with an unjustified windfall. The changes requested should not be allowed, especially when there are other contractual provisions that already protect NECR.

Section 3.9 – Compensation (NECR Access and Auditing of PAS Records and Activities)

NECR's new Section 3.9 "reserves [NECR] the right to audit the records and activities of PAS for the sole purpose of verifying PAS's compliance with the billing and payment provisions of this Agreement." NECR offers no justification for Section 3.9, and this lack of justification is more disconcerting when the proposed addition seeks not only production of data concerning "volume of cars" but also, explicitly, the production of "confidential shipper information."

NECR certainly has remedies if it believes that PAS is misreporting the number of cars moved, but NECR does not even focus in on this as justification for the entirely new and intrusive document production regime. Instead, NECR attempts to justify Section 3.9, on the basis that the auditing provisions are necessary to ensure that PAS is "complying with all FRA and other safety requirements," NECR Rebuttal at 53. FRA and other safety requirements do not deal with billing and payment provisions. To the extent that the Board mandates data reporting, "confidential shipper information" should not be required to be produced.

Section 5.1 – Scheduling of Trains and Maintenance; Operating Rights

NECR requests changes in Section 5.1 that would downgrade NECR's current obligations for the scheduling of its maintenance. There is no need to make that change.

First, NECR implies that it is PAS that seeks a change ("The term 'best efforts' requested by PAS could imply that NECR must take measures, regardless of additional cost, to accommodate PAS' operations"), but that simply is not the case. In fact, the current TO states that "CV shall coordinate with B&M and use its best efforts in scheduling the work required for

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the upgrading of the Former B&M Line and any future maintenance or repair of the Line to minimize any interference with or disruption of B&M's operations over the Line." So NECR mischaracterizes the fact that it is NECR – and not PAS – that is seeking a change to this provision and would have to bear the burden of persuasion for the change.

NECR claims it needs to downgrade the obligation from "best efforts" to "reasonable efforts" as a matter of cost, and to "allow NECR to balance the burdens in a more fair and evenhanded way." NECR Rebuttal at 54. To be clear, in the past the host railroad has considered the operations of all its tenants when scheduling maintenance and repair so as to not impact service to customers on the line, and there is no reason now to alter that. NECR has not shown a burden that it has experienced, and maintenance expenses are compensated through the trackage rights formula. The downgrading of NECR's obligations under this provision is not justified.

Section 7.3 – Release and Indemnification (Major Changes to Liability Provisions)

In the NECR Opening Statement, NECR proposed major changes to the accident liability and indemnification provisions found in Section 7.3, but NECR made no mention of those proposed changes in the text of its submission. Now NECR (incorrectly) claims that "NECR's changes do not change the overall effect of the [accident liability and indemnification] provision, and to the extent it does make changes it does so evenly with respect to each party." NECR Rebuttal at 55. The changes proposed by NECR are material, uneven, and unfair.

The changes proposed by NECR are subtle and appear to be minimalistic. Specifically, NECR would add just a few words (appearing as underlined) to the provision:

7.3 Without in any way restricting the terms of this Section 7, in the case of a collision or accident between the train of either party to this Agreement and the property of a third person or entity, including Amtrak, including any action done in the process of trying to avoid an accident or a collision, such party shall save

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harmless and indemnify and defend the other party forthwith for all damages suffered by (or claimed against) the other party including damages to equipment and structures and third party injuries (including death) or injuries (including death) to the employees or agents of the other party (including also the results of those actions done in the process of avoiding a collision or accident), and irrespective of the ordinary negligence or fault of either party or such third person or other entity, and with a right of subrogation in favor of such party against any such third person or other entity.

Those few words do change the overall effect of the provision, and in each case shift risk, liability and expense to PAS.

As an initial matter, the current liability provisions can be reduced to the following:

(1) In the case of an accident between the train of PAS and the property of a third person, PAS shall save harmless⁹⁶ and indemnify NECR for all damages suffered by NECR including damages to NECR equipment, structures or employees, notwithstanding the negligence of either PAR or NECR or such third person, and with a right of subrogation in favor of PAS against any such third person.

(2) In the case of an accident between the train of NECR and the property of a third person, NECR shall save harmless and indemnify PAS for all damages suffered by PAS including damages to PAS equipment, structures or employees, notwithstanding the negligence of either PAR or NECR or such third person, and with a right of subrogation in favor of NECR against any such third person.

The following two scenarios demonstrate the how significantly a handful of words can impact PAS. If PAS and Amtrak were to have a collision due to NECR's negligent dispatching, under the current TO PAS would have to indemnify NECR for all damages suffered by NECR, notwithstanding NECR's negligence. But if Amtrak had separately indemnified NECR for injury or death to its passengers, then there would be nothing along those lines for PAS to indemnify NECR for, and no payment for that liability would be made. That would not be the case under the provision as NECR now proposes. Instead, if PAS and Amtrak were to have a collision due to NECR's negligent dispatching, PAS would have to indemnify NECR for all

⁹⁶ The term "save harmless" in essence means that one party – in this case PAS – will make no claims against the other party – in this case NECR – for the liabilities.

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damages even if they were merely “claimed against” NECR, notwithstanding any separate Amtrak indemnification. Because this indemnification would be based on unadjudicated claims and not awarded damages, any Amtrak indemnification would not come into play because NECR would not have suffered any damages. PAS could be left holding the bag for awarded damages to Amtrak passengers in a manner that it would not be if the provisions were not changed. The same cannot be said regarding a collision between NECR and Amtrak where an Amtrak passenger claim is almost certainly not to be claimed against PAS, a party not involved in the incident and which does not control, maintain or dispatch the line.

NECR’s arguments are simply incorrect. NECR argues that: “Initially it should be noted that PAS presents its objections to the proposed changes in this section as if they are being imposed solely on PAS. That is not the case.” NECR Rebuttal at 54 (emphasis added). On the surface, the changes appear as if there is no unbalanced effect, but clearly the effect of those changes are significantly unbalanced. Further, NECR’s assertion that “[a]dding third party injuries makes sure that all possible damages are covered” not only expands the damages that would otherwise have to be covered by PAS, it does so in an unfair and unreasonable manner, particularly given the current Amtrak/NECR operating agreement. NECR Rebuttal at 54.

Finally, NECR claims that “[t]he additional reference to Amtrak is [merely] for clarity.” NECR Rebuttal at 54. However, NECR’s true intentions is clear in its rebuttal. NECR wants to have PAS cover the Amtrak liabilities that are currently covered by Amtrak:

Although the current Amtrak agreement provides for indemnification, that will expire in 2020 (long before this one reopens), and there is no guarantee that the current indemnification provisions will be continued or continue in the same form.

NECR Rebuttal at 54.

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It is NECR that has the agreement with Amtrak, and it is NECR that can proceed under that agreement against Amtrak for indemnification for claims or awards for injuries or deaths to Amtrak passengers. If Amtrak refuses to renew its indemnification upon renewal of the Amtrak/NECR host Agreement, NECR has, at that time, a remedy at 49 U.S.C. Section 14308.⁹⁷

Finally, NECR seeks to make a subtle – but potentially far reaching – change involving the negligence of either party. Currently, the liability provisions apply “irrespective of the negligence of either party or such third party.” NECR proposed changing this language to “irrespective of the ordinary negligence or fault of either party or such third party.” NECR provides no justification for the change.

If anything, the discussion above should demonstrate that changes in liability provisions should be made carefully, and only after a great deal of discussion and justification because a couple words can and does make a significant difference. District of Columbia law governs interpretation of the TO. Section 10.9. Under District of Columbia law, indemnification for one’s own ordinary negligence is permitted, but indemnification for one’s own gross negligence while permitted is strongly disfavored and in fact has been rejected for railroads.⁹⁸ NECR’s

⁹⁷ Piling on top of this the obligation to defend the other party is even worse. As stated above, it is highly unlikely that PAS would have any claims against it in a case involving a collision between NECR and PAS, so in that way, the adding of the obligation to defend is not evenhanded as claimed by NECR. More importantly, the obligation NECR seeks to add is for “claims made” – not adjudicated damages. So, the obligation to defend helps nothing but adds costs.

⁹⁸ In National Railroad Passenger, Judge Oliver Gasch held that an indemnification provision that would have indemnified a railroad company was not enforceable “in cases of gross negligence, reckless, wanton or willful misconduct, or conduct for which punitive damages may be sought.” Judge Oliver found that a very strong public policy reason exists for not allowing railroads to claim indemnification from gross negligence. To allow railroads to be indemnified for gross negligence, “would deprive the traveling public of its reasonable expectation that indemnitee . . . would conform its conduct to the [applicable] safety requirements.” National Railroad Passenger v. Consolidated Rail, 698 F. Supp. 951, 972 (D.D.C. 1988), vacated on other

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proposed change from requiring indemnification notwithstanding the “negligence” of a party to “the ordinary negligence or fault” sets up an argument to expand indemnification to cover situations where NECR acts in a grossly negligent or intentional manner. PAS has no intention of assuming blanket responsibility for NECR’s negligence and is concerned that modification of the TRO language as suggested by NECR would reduce NECR’s safety focus and subject PAS to liability for NECR’s actions, regardless if such actions were grossly negligent.

The claim by NECR that “NECR’s changes [to the liability and indemnification section of the TO] do not change the overall effect of the provision, and to the extent it does make changes it does so evenly with respect to each party” is belied by practical application of the changes. NECR has not adequately justified any changes to Section 7.

Section 9 – Insurance.

NECR would add two pages, single-spaced, provisions dealing with insurance. As justification, NECR claims that insurance provisions are common today, and besides, it is good practice for rail carriers to carry insurance to avoid being uninsured (references Lac Megantic incident). NECR Rebuttal at 55. NECR acknowledges that “there were no specific insurance requirements to back up the liability and indemnification provisions in the original TO,” and claims that simply requiring insurance “should not be any additional burden on PAS.” NECR Rebuttal at 55-56. When one digs into the details, however, the claim simply does not stand up.

The new insurance provisions are onerous and unnecessary. To throw out just one example, the new insurance provisions would require something not at all normal in the rail

grounds, 282 U.S. App. D.C. 132, 892 F.2d 1066 (D.C. Cir. 1990) (“National Railroad Passenger”). See also Southern R. Co. v. National R. Passenger Corp., 1989 U.S. Dist. LEXIS 8857 (D.D.C. July 28, 1989). For a non-railroad case rejecting indemnification for gross negligence. See Harris v. Howard Univ., Inc., 28 F. Supp. 2d 1, 9, 1998 U.S. Dist. LEXIS 18521, at *13-14 (D.D.C. 1998) (“Harris”).

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transportation industry, requiring “products and completed operations” coverage⁹⁹ at a \$200,000,000 level with no more than a \$1,000,000 self-retention. Schedule A Section 1.1(a)(v). No, the new insurance provisions are not typical. The new provisions would require PAS to “provide NECR with written notice and all reasonable particulars and documents related to any damages, losses, incidents, claims and potential claims concerning” the TO Agreement. Schedule A Section 1.1. The new insurance provisions are intrusive into the PAS/customer relationship in ways that are simply not justifiable. The provisions would require PAS to “promptly give notice to NECR’s Risk Manager of any claim or notice of incident, or notice of potential claim related to this Agreement that is required to be reported to PAS’s liability insurance company,” even if the matter was a simple cargo claim. Schedule A Section 1.2.

Additionally, NECR would reserve for itself the unilateral ability to impose further, more onerous and more expensive requirements at its discretion. “Not more frequently than once every three years, NECR may request reasonable changes to the required insurance coverage to reflect then –current risk management practices in the railroad and underwriting practices in the insurance industry.” Schedule A, Section 1.1.¹⁰⁰

Although generally advocated as “common” requirements that are both consistent with public interest and ones that “should not be any additional burden on PAS,” NECR Rebuttal at 55-56, such claims are simply not true. Most important, NECR has not shown that this is a

⁹⁹ Products and completed operations insurance is a subset of general liability coverage that is often purchased by manufactures of products and construction and installation contractors that protects against claims arising from products that have been sold or distributed and operations that contractors have completed.

¹⁰⁰ Although the provision seems to be in terms of a “request”, the introductory paragraph of this section makes it clear that “PAS, at its sole cost and expense, shall take out and keep in full force and effect, and pay all premiums for, throughout the term and during such other time as this Agreement remains in force, the following insurances.”

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requirement that is independently needed, because “[a]s a practical matter, documents produced by PAS in discovery clearly demonstrate that PAS already carries a substantial amount of insurance.” NECR Rebuttal at 56. Any review of the details of the proposed provisions demonstrates that these provisions are not necessary, not justified, and should not be imposed.

Section 10.8 – Assignment

Lastly, NECR wants to make changes to the Section 10.8 assignment provisions of the original TO. Specifically, NECR wants to mandate that PAS’s assignment to any affiliate of any or all of PAS’s rights and obligations under the original TO is subject to NECR’s consultation. Specifically, NECR wants to make assignment subject to the receipt of NECR’s written consent. NECR claims that “there is no substantial impact that would result from the change from ‘after consultation’ to ‘following written consent that will not be unreasonably withheld,’” NECR Rebuttal at 58, but that is simply not true. The term “after consultation” implies a full briefing but no right to object. The term “following written consent that will not be unreasonably withheld,” not only implies the right to object, but a potential disagreement about that objection and whether the objection is, or is not, reasonable, and the potential adjudication of that dispute.

CONCLUSION

PAS continues to believe that the compensation and maintenance provisions of the existing TO cannot be changed, although other provisions unrelated to the takings calculations and compensation contributions in the Amtrak Decisions can be changed and were in fact the reason for the 20-yr old reopener clause. Changing the TO compensation terms requires the Board to reopen the Amtrak Decisions and make adjustments to the takings compensation calculations, which were based upon perpetual assumptions. Furthermore, increasing the compensation that PAS pays will result in increased prices to shippers, disrupt the competitive

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parity that exists between PAS and NECR, and provide NECR with a double windfall, as it will collect maintenance contributions from both Amtrak and PAS even though the Amtrak agreements are intended to cover the increased costs associated with Amtrak's service.

If the Board disagrees, both NECR and PAS agree that the proper methodology for determining the new compensation was set forth in SSW. SSW should be applied to all three segments. In applying SSW to the Middle Segment, however, the Amtrak Decisions made it clear that PAS should never have to pay an interest rental component nor should it have to pay for any maintenance obligations beyond that required to maintain the Middle Segment at FRA Class II standards. In applying SSW with respect to the Northern and Southern Segments, the parties agree on variable costs, agree that actual maintenance costs should be used, although differ on the amounts, but with respect to how to calculate the interest rental component, the parties significantly disagree.

With respect to maintenance costs, PAS should not have to pay for maintenance costs that are the responsibility of Amtrak and are covered by the various Amtrak agreements. Those costs are a direct result of agreements between NECR and Amtrak and are directly attributable to increased Amtrak speeds beyond the FRA Class II level. If NECR is not recovering enough to cover its maintenance commitments in those agreements, PAS should not have to subsidize NECR's bad business decisions. In calculating the amount PAS owes to maintain those segments as FRA Class II standards, PAS's experts have used a 6-year average of capital costs across the standard capital maintenance categories of turnouts, bridges, ties, surface, signals and crossings, and specifically deduct grant funding over the period. NECR's experts cherry pick the most favorable years and propose use of a two year average, which should be rejected.

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With respect to the interest rental component (which should not apply to the Middle Segment), NECR proposes use of VIP, a never before used methodology and which is not equivalent to RCNLD. In contrast, PAS's experts, applying the Board's preference for use of a capitalized earnings approach, have calculated an interest rental component consistent with long standing Board precedent using earnings data produced by NECR and the Board's costing data. Interestingly, after insisting that a CE Approach could not be used, NECR's experts were able to use the same data to calculate their own CE figures, which are remarkably similar to FTI's calculations. As such, the Board should apply a CE Approach.

If the Board does use the CE Approach consistent with precedent, the Board need not resolve the parties significant disputes and disagreements over VIP. If the Board does apply VIP, which it should not, the VIP valuation needs to be significantly adjusted by taking out any land valuation for easement property. It should not include infrastructure paid for by government grants and owned by the government and certain other adjustments should be made. In fact, when these adjustments are made, the VIP approach actually yields a lower value than the CE Approach. Application of VIP is also not in the public interest. Application of VIP will place PAS at a significant competitive disadvantage, raise rates to shippers, and require PAS to subsidize bad policy and business decisions made by NECR.

In the end, the Board should reject NECR's efforts to significantly change the terms and conditions of the Amtrak Decisions. If it does, it should apply SSW in the manner advocated by PAS and its experts and such changes should not be retroactive. Finally, it should carefully consider the various other changes to the TO advocated by both NECR and PAS, and in doing so, it should not adopt changes that would limit PAS's ability to compete on equal footing with NECR (by prohibiting PAS from providing haulage service, for example) or by imposing other

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burdensome restrictions on PAS in order to weaken PAS's ability to compete. NECR's proposals are, boiled down to their essence, designed to benefit NECR and only NECR. This is not in the public interest.

Respectfully submitted,

Robert B. Culliford
PAN AM SOUTHERN LLC
1700 Iron Horse Park
North Billerica, MA 01862
Tel: (978) 663-1126



William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849

February 22, 2017

Attorneys for Pan Am Southern LLC

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of Pan Am Southern LLC's Surrebuttal to New England Central Railroad, Inc.'s Rebuttal Evidence And Argument by mailing copies of the Reply via prepaid first class mail to all parties of record in this proceeding or by more expeditious means of delivery.

Dated at Washington, D.C. this 22nd day of February, 2017.



William A. Mullins
Attorney for Pan Am Southern LLC

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
– TRACKAGE RIGHTS ORDER –
PAN AM SOUTHERN LLC**

**PAN AM SOUTHERN LLC'S SURREBUTTAL TO NEW ENGLAND CENTRAL
RAILROAD, INC.'S REBUTTAL EVIDENCE AND ARGUMENT**

EXHIBIT A

VERIFIED STATEMENT OF MICHAEL R. BARANOWSKI

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I. INTRODUCTION

I am Michael R. Baranowski of FTI Consulting. On July 19, 2016, I submitted a verified statement accompanying the Reply Statement and Evidence of Pan Am Southern (“PAS”) regarding the proper means of determining trackage rights compensation for 73-miles of New England Central Railroad (“NECR”) mainline track between East Northfield, MA and White River Junction, VT (the “Line” or “trackage right segments”). In that statement I evaluated the formulation of trackage rights compensation developed by New England Central Railroad (“NECR”) witnesses Charles Banks and John Ireland of R.L Banks and Associates (“RLBA”) in their Opening Statement and Evidence. First, I reviewed the SSW Compensation Methodology (“SSW”) used by the ICC/STB to establish trackage compensation and explained how the terms of the “takings compensation” that was awarded to PAS in the Amtrak Decisions required excluding the interest rental component of SSW from the middle segment of the PAS trackage rights. Second, I developed maintenance of way costs based on NECR’s actual spending instead of RLBA’s hypothetical costs for normalized maintenance. Third, I critiqued a valuation of the Line developed by NECR which used an unconventional and unsubstantiated Value in Place (“VIP”) methodology. Fourth, I developed a valuation of the Line using a Capitalized Earnings (“CE”) approach.

In its Rebuttal, NECR defends its novel VIP valuation approach and rejects the necessary adjustments to its methodology that I made in my reply verified statement that account properly for the substantial amounts of grant monies received by NECR to improve the characteristics of the trackage rights segments to better accommodate Amtrak service, NECR’s lack of an ownership stake in any of the right of way used by the trackage rights segments, and the economic obsolescence driven by the failure of the NECR trackage rights segments to meet their

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earnings potential. Separately, NECR inappropriately changes its methodology for estimating PAS's share of the capitalized maintenance component of the Board's SSW trackage rights compensation formula. Finally, NECR makes a number of unnecessary and unwarranted adjustments to my CE based valuation for trackage rights segment. I have been asked by counsel for PAS to respond to items raised by NECR in the NECR Rebuttal Evidence and Argument ("NECR Rebuttal") and to demonstrate that NECR's VIP based valuation overstates the fair value of the trackage rights segments and is inconsistent with the SSW principles.

II. NECR'S VIP APPROACH PRODUCES A VALUATION THAT IS FAR OUT OF LINE WITH ANY RELEVANT MEASURE OF VALUE FOR THE TRACKAGE RIGHTS SEGMENTS.

When developing the interest rental component under SSW compensation, the goal is to establish a realistic current market valuation for the trackage line. This view is consistent with the principles of trackage compensation articulated by the Railroad Accounting Principles Board ("RAPB"). "The RAPB believes that, where capital costs are relevant, current market values should be used for competitive access costs."¹ See RAPB II 75. The NECR Opening recognizes the goal of this proceeding is to provide a "reliable market valuation." NECR Opening at 12. However, as demonstrated below, NECR's VIP approach results are out of line with all practical measures of fair market valuation for the trackage lines.

There are multiple valuation techniques that may be used to develop current market value, which is most easily understood in this context as what a rail line segment is expected to command in an arm's length transaction between a willing buyer and seller. In my reply verified statement, I explained that the VIP approach favored by NECR did not conform to valuation

¹ RAILROAD ACCOUNTING PRINCIPLES BOARD, SP-272-134004, RAILROAD ACCOUNTING PRINCIPLES: FINAL REPORT VOLUME 1 (1987); RAILROAD ACCOUNTING PRINCIPLES BOARD, SP-273-134005, RAILROAD ACCOUNTING PRINCIPLES: FINAL REPORT VOLUME 2 (1987) ("RAPB-II").

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methods previously accepted by the Board or to those used in general practice, and identified certain elements that aligned with either net liquidation value or Replacement Cost New Less Depreciation (“RCNLD”). In rebuttal NECR elaborates on the VIP method and backpedals on its opening assertion that VIP represents a “reliable market valuation.”² NECR admits now that VIP is strictly a cost-based appraisal of the individual components of the rail line assets, not a valuation of the lines themselves.

The VIP methodology, similar to RCNLD, provides the current value of the trackage line segments in their current configuration, by looking at the current values of the materials currently comprising the rail line, depreciated as appropriate to reflect wear and tear on the assets over their useful lives in the field. NECR Rebuttal at 27.

The key point is that VIP does not indicate the market value of the trackage line, but rather the cost of various inventoried railway materials purchased at their respective “prevailing market prices” with adjustments applied only for observed physical depreciation. NECR Rebuttal, RLBA Rebuttal at 3. However, NECR’s estimate of “market prices” for individual railway materials says nothing about the fair value of the rail line over which PAS has trackage rights.

NECR tries to defend VIP by referring to it as an “approximation” of RCNLD, and asserts that it could not perform a true estimate of RCNLD because as a Class III railroad, NECR’s accounts did not conform to the Uniform System of Accounts. NECR Rebuttal at 27. NECR’s claim is belied by its own witnesses, who group cost items in the VIP consistent with road property account descriptions in the Uniform System of Accounts.

Further, NECR glosses over several key principles of an RCNLD valuation that differentiate it from VIP. For starters, RCNLD does not necessarily replace all assets “as they

² NECR Opening at 12.

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exist today in their current configuration” as NECR claims. NECR Rebuttal at 26. As noted in the RAPB, RCNLD would consider whether these assets were “used and useful,” the “extent that the investment base includes excess or underutilized assets,” and whether there are more efficient alternative configurations providing the “existing service potential.” See RAPB II at 40-41. This is a particularly relevant standard for the trackage rights segments which, as explained further below, have been reconstructed to a higher standard than required by PAS with non-NECR funds to accommodate Amtrak service requirements. Also, as discussed below, RCNLD would “adjust for the line segment’s current depreciation” as NECR recognizes³ including where appropriate economic depreciation that adjusts the value of assets in place consistent with their economic earning power. VIP on the other hand, as acknowledged by NECR, considers only physical depreciation based on the observed physical condition of individual railway component materials.

³ NECR Rebuttal at 26.

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As the below chart demonstrates, NECR'S VIP valuation is a significant outlier compared with other available measures of value for the trackage rights segments, which, not surprisingly, cluster around the same general level. [[

]]

See Baranowski Sur. WP "NECR Trackage Line Valuation Comparison.xlsx."

III. NECR'S ARGUMENTS AGAINST MY CORRECTIONS TO ITS VIP VALUATION ARE WITHOUT MERIT.

A. NECR's Inclusion Of Land That It Does Not Own In Its VIP Is Wrong.

NECR argues in its rebuttal that its VIP should include a value for land along the trackage rights segment right of way that NECR accesses under an operating easement. NECR concedes "[i]t is true that NECR has only an operating easement from the CV to use the property."⁴ NECR then summarizes what it believes to be supportive Board precedent noting that "[w]here value has been paid for easement property, the Board is clear that the current value of

⁴ NECR Rebuttal at 28.

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the easement property [] should be used to value the property.” NECR Rebuttal at 30. NECR asserts that this precedent supports its position that the right of way for the trackage rights segments should be valued at its current value (including a right of way assemblage factor) as if it were owned in fee simple by NECR. In fact, the precedent cited by NECR and the corresponding figures it cites focus on the value of the consideration actually paid by railroads for easements. For example, if a railroad acquired an easement in 1890 at a cost of \$10.00, Board precedent would index that \$10.00 easement payment to current levels. There is no assumed conversion of fee simple ownership; access to the right of way is still via easement. In NECR’s specific case, the consideration it has paid for the easement is zero. Therefore, under the cited Board precedent, indexing zero to its current value is still zero.

NECR also opines that its predecessor CV “presumably had to pay” when it acquired some portions of the operating easement in 1930. *Id.* at 29. In its Rebuttal, NECR produces a document entitled “CV Lease and Sale Agreement,” showing that some amount of the purchase price NECR paid CV in 1994 was allocated to land – presumably land that was actually owned by CV – somewhere along the 331-mile route.⁵ NECR has not however attributed any of that amount to the easement for the trackage right segments that are the focus of its valuation. Since NECR has not demonstrated that any consideration was paid for its easement, the STB SAC precedent it cites would attribute zero value to its easement. This is consistent with the approach I had taken in my corrections to certain of NECR’s VIP calculations.

⁵ NECR Rebuttal, Volume IV.

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B. NECR Is Wrong That It Is Entitled To Interest Rental Under VIP For Assets Put in Place Using Grant Monies.

NECR's arguments for why it is entitled to interest rental under VIP for assets put in place using grant monies misconstrue the funding agreement NECR unilaterally made with Amtrak. As explained in the PAS Reply, nearly all of the public funding identified for assets on the trackage segments was intended to improve the track infrastructure to operate a more efficient Amtrak passenger rail service. PAS Reply at 24-26 and PAS Reply, VS Baranowski at 24-25. This agreement was made unilaterally between NECR and Amtrak without PAS's involvement. While PAS cannot practically avoid any incidental benefits to the track infrastructure as a result of the agreement, this does not mean as NECR blindly asserts that "PAS has reaped all of the same benefits of the improvements as Amtrak has,"⁶ nor does it justify PAS being penalized by means of a higher trackage payment for an agreement it is not party to.

NECR, makes three erroneous claims that, when corrected, remove any possible grounds for requiring PAS to pay interest rental on assets acquired with grant monies. First, NECR is wrong that it is entitled to "earn a sufficient return to be able to later replace the asset." *Id.* at 33. The fact is that the grant monies were used primarily to upgrade the trackage rights segments to accommodate higher Amtrak required operating speeds. To my knowledge there has not been any economic evaluation to demonstrate that the non-PAS related earnings on the trackage rights segments are sufficient to provide for replacement of the non-PAS related assets as they wear out. As such, it would be unfair to hold PAS to a financial standard that other users of the line cannot meet.

As the RAPB explains when discussing capital requirements based on current asset valuation, "if investors can reasonably expect to earn a competitive return...funds can be

⁶ NECR Rebuttal at 32.

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obtained from the capital markets” rather than “generated internally” and it is not always that case “that essentially all assets will be replaced with funds provided from operations in advance of replacement.” See RAPB II at 42.

Second, NECR is wrong that it “has the clear obligation to pay for all maintenance” for the publicly funded assets⁷. To the contrary, NECR’s operating agreement with Amtrak requires NECR to pay for all maintenance costs to ensure [REDACTED]

_____, and requires Amtrak to pay [_____] _____.

_____.⁸ Thus, maintenance for the publicly funded upgrades that _____

[REDACTED],¹⁰ and as such will be fully covered by Amtrak's incremental maintenance payments to NECR. In fact, the agreement between NECR and Amtrak governing the Vermonter rehabilitation project explicitly recognizes that [REDACTED]

See NECR 001106. Consistent with this view, NECR's re-stated

⁷ NECR Rebuttal at 33.

8 [REDACTED]

[REDACTED] NECR 001286 and NECR 001312.

⁹ NECR 001096.

¹⁰NECR_001285, NECR_001286, NECR_001305, NECR_001312.

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capitalized maintenance figures, which I discuss below, deduct from NECR's maintenance liabilities expenditures funded by grants. NECR Rebuttal at 39.

Third, NECR's claim that "PAS [] also received the benefit of NECR's matching funds"¹¹ is misleading since my adjustments to VIP did not consider NECR's contribution –

[[REDACTED]]
[REDACTED]] – as a grant. PAS Reply, VS Baranowski at 30 and NECR_001118.

C. Under Properly Constructed RCNLD, The D Component Includes Economic Depreciation That Recognizes That The Rail Lines Are Not Achieving Their Earning Potential.

Had NECR applied the RCNLD method to estimate market value, instead of its flawed and incomplete VIP method, it would have been required to account for all forms of depreciation, including economic depreciation (e.g., economic obsolescence). In its rebuttal NECR recognizes properly that economic depreciation adjusts for market conditions unrelated to the physical condition of the assets and reflects the plain fact that the assets are not achieving their earning potential. However, NECR's rebuttal assertions that I "cherry-picked" the economic obsolescence adjustment and that this adjustment is applied after and not as part of the initial RCNLD figure misses the point.¹² As the Report explains, [[REDACTED]]
[REDACTED]] See NECR_0027845. The RCNLD figure before the economic obsolescence adjustment is not a market value but a cost-based figure, and only after applying the economic obsolescence adjustment, which reflects that the assets are not achieving their full economic value, does the RCNLD figure represent a fair market value. Likewise, the VIP figure, which is also a cost-based

¹¹ NECR Rebuttal at 34.

¹² NECR Rebuttal at 35-37.

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evaluation of the individual component assets, does not represent market value unless a comparable adjustment for economic obsolescence is applied.

IV. NECR'S REJECTION OF BOTH AN ECONOMIC DEPRECIATION ADJUSTMENT AND A CE VALUATION IS BASED ON THE FALSE NOTION THAT MARKET VALUE IS UNAVAILABLE.

Despite rejecting my proposed economic obsolescence adjustment to VIP, as discussed above, NECR concedes this adjustment is necessary to reflect market value. NECR's position can effectively be summed up as acknowledging a market value is preferable but insisting none is available in order to justify using VIP:

Economic obsolescence does not reflect a change in the physical condition of an asset...*It is more reflective of a market value.* However, as discussed hereafter in connection with the discussion of the CE method, there is no readily available market-value, and accordingly NECR believes that the interest rental component should be based on the value of the assets [under VIP]. NECR Rebuttal at 36-37. (emphasis added).

NECR's claim that there is no available market value is wrong for two reasons.

First, the Duff and Phelps Report plainly does provide a purchase price and corresponding fair market valuation specifically for the NECR.¹³ In response to NECR's claim that the Report is not a valuation and attempt to discredit its conclusions because it involved a transaction of multiple railroads,¹⁴ the Report speaks for itself: "[[REDACTED]

[REDACTED]
[REDACTED]]¹⁵ As explained in my reply verified statement, the Report explicitly showed [[REDACTED]

¹³ See PAS Reply, VS Baranowski at 26 and 31-32.

¹⁴ NECR Rebuttal at 36.

¹⁵ NECR_0027896.

■■■■■. PAS Reply, VS Baranowski
at 26.

Second, NECR is wrong in its claim that a CE valuation cannot be performed without a market value because the point of a CE valuation is to determine market value. The ICC recognizes that the “purchase price or market value of a piece of investment property usually is based on the earnings potential of that property...”¹⁶ As I demonstrate in my reply verified statement, the CE method is an accurate means of establishing the current market value required by SSW based on the segment-specific earnings of the trackage line. PAS Reply, VS Baranowski at 33-40.

NECR’s real objection is focused on my application of the STB’s pre-tax industry cost of capital to capitalize my calculated annual earnings instead of a market based multiplier. NECR Rebuttal at 42 and RLBA Rebuttal at 9. It is true that in some trackage compensation cases earnings multipliers have been derived for a specific railroad and then applied to a line segment on that railroad. However, the industry cost of capital has been used for similar purposes in ICC/STB precedent, including to discount future earnings in the Amtrak decision determining the “takings compensation” to be paid to PAS’s predecessor.¹⁷ Use of the industry cost of capital is aligned generally with the ICC’s acceptance that using an earnings multiplier for an entire railroad is a reasonable representation of the earnings multiplier for a specific line. SSW I, 1984 ICC LEXIS 347 at *26-*36.

¹⁶ St. Louis Southwestern Ry. Co. – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis Trackage Rights Compensation, 4 I.C.C. 2d 668, 1987 ICC LEXIS 15, at *15 (1987) (“SSW II”).

¹⁷ National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire, 4 I.C.C. 2d 761, 1988 ICC LEXIS 233, at *68 (1988) (“Amtrak I”).

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In effect, NECR is simply trying to hide behind the fact that no specific earnings multiplier exists for the trackage rights segments and assert that a CE valuation is thus impractical. As I discussed earlier, the market value of NECR is available from the G&W acquisition of RailAmerica. This may be used to develop a market based earnings multiplier. While my application of the Board's concurrent railroad industry cost of capital to my calculation of annual earnings for the trackage rights segments is the most accurate and internally consistent approach, application of the earnings multiplier for NECR derived from the RailAmerica acquisition would yield [[REDACTED]] results.

In its rebuttal NECR describes how "[a]s traditionally applied by the ICC and the Board...[t]he earnings multiplier is determined by dividing the market value of the owning railroad's total railroad property by the owning railroad's total railroad earnings." NECR Rebuttal at 42. This calculation can be performed using the information from the 2012 transaction.

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As the below table shows, NECR's 2012 fair market value for road property divided by its 2012 operating income yields a factor of [[REDACTED]], which is [[REDACTED]] to the factor of 6.77 developed in my reply using the STB's 2014 pre-tax industry cost of capital¹⁸.

NECR 2012 Road Property Fair Market Value Based on G&W Acquisition	[[REDACTED]]
NECR 2012 Operating Income	[[REDACTED]]
Earnings Multiplier Developed for NECR Based On 2012 Transaction	[[REDACTED]]
Earnings Multiplier Based on STB's 2014 Pre-Tax Industry Cost of Capital (PAS Reply)	6.77

Source: Baranowski Sur. WP "NECR Earnings Multiplier.xlsx."

V. OTHER FLAWS WITH THE VIP VALUATION

While VIP should be rejected on its face for not measuring market value of the Line, other critical flaws with the VIP method also bar its use in determining value for the purposes of developing an interest rental component under SSW.

A. NECR's Valuation Of Bridges, Tunnels And Other Assets Under Its VIP Continues To Be Arbitrary And Unsupported.

NECR still has not provided any meaningful evidence in support of the vast majority of its VIP costs. For example, in my reply verified statement, I pointed out that 61% of costs in the VIP were based on four entirely unsourced unit cost assumptions for one tunnel and three bridge types. PAS Reply, VS Baranowski at 21. NECR does not provide any sources for these unit

¹⁸ Although NECR suggests that the 2012 G&W acquisition is outdated, it provides no reason why an earnings multiplier derived from 2012 financial information would diverge materially from a comparable evaluation two years later in 2014. See NECR Rebuttal at 43. The ICC recognized that the earnings multiple is a "single abstract number...which relates earnings to value". See SSW I, 1984 ICC Lexis 347 at *30. Consistent with the recognition that such a relationship is generally steady over time, the ICC derived an earnings multiplier for the MP line using a 1982 market value divided by MP's overall 1979 earnings re-stated in 1982 dollars, which it applied to line-specific earnings from 1979 and was used to calculate an interest rental component for forward-looking trackage compensation commencing in 1983. See SSW II, 1987 ICC Lexis 15 at *21-*25.

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cost assumptions, and merely defers to the “professional judgment” of its engineering expert, Lee Meadows. NECR Rebuttal, RLBA Rebuttal at 4. Sufficient justification is required, especially when, as is the case here, the unit costs he used are up to six-times the levels accepted by the STB.¹⁹ It is not clear why NECR asserts his “railroad experience” or “recent construction experience” or “actual inspection of the NECR” makes him qualified to set tunnel and bridge unit costs without any evidence. NECR Rebuttal, RLBA Rebuttal at 4. For the complete lack of evidence and documentation, and NECR’s refusal to address any of the valid concerns with its assumptions I raised, the VIP must be summarily rejected.

VI. NECR PROPOSED CAPITALIZED MAINTENANCE ADJUSTMENTS SHOULD BE REJECTED.

Instead of using estimated “normalized” program maintenance developed in its opening, RLBA now accepts use of a capitalized maintenance estimate based on actual NECR historical expenditures, but calculates these figures from only 2013 and 2014 capital spending data. More problematic is that RLBA’s new estimate is derived in part from new materials not produced in discovery. Without explanation, RLBA dismisses the figures I developed relying on actual expenditures reported for a longer period of time from 2008-2013 from materials NECR provided in discovery. NECR’s new production of additional capital expenditure details is self-serving and its proposed new use of a two-year average is untenable. In contrast, the figures I developed are based on reliable data NECR specifically approved and appropriately cover a larger time period to control for fluctuating year to year capital maintenance spending patterns.

¹⁹ See PAS Reply, VS Baranowski at 21. \$38,000 per foot for steel plate girder used by Meadows after adjustment for 50% depreciation / \$6,494 average cost per foot for steel plate girder in SSAC at 2014 price levels.

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In discovery PAS asked NECR to “provide detailed cost for each year for capital maintenance” including “regular, periodic replacement of track and bridge components.”²⁰ After reviewing the materials produced, I asked PAS counsel to confirm with NECR that the 2008 to 2013 materials I relied upon, NECR_004541 and NECR_004586, were the “intended response to capital maintenance costs” since they were produced under Request 34. As a result, PAS counsel asked NECR counsel the following:

NECR did not produce any materials directly responsive to [Request 20]... Separately, NECR produced materials in response to Document Request No. 34 – which requested total NECR costs for rail, turnouts, and OTM from 2008 to present—that show “Net NECR Capital” and “Grant Funding” amounts by year between 2008 to 2013 for categories such as turnouts, bridges, and ties. This appears to be your intended response to capital maintenance cost details requested in Document Request No. 20. See NECR_004541 and NECR_004586. (Mullins email to NECR’s Counsel Eric Hocky 4/1/2016)

NECR counsel replied confirming that the 2008 to 2013 materials I relied upon do “provide the capital cost information you requested,” and also referenced information on 2013, 2014, and 2015 “capital projects” which it now belatedly supplements in rebuttal:

We believe that information provided in Request 34 (including in particular the cross reference to the information in response to Request 31) does provide the capital cost information you requested, to the extent it is available ... The response to Request 31 also includes responsive information including the spreadsheets related to 2013, 2014, 2015 capital projects produced at NECR_04594-NECR_004599. (Eric Hocky email to Mullins 4/14/2016).

Despite the above representation, NECR now characterizes the 2008 to 2013 materials I provided as coming “from a form which was clearly not complete.” NECR Rebuttal at 40. It is unclear why NECR would have provided these materials in discovery if indeed they were actually incomplete. More troubling is that when specifically asked whether these materials were the “intended response to capital maintenance cost details” NECR answered affirmatively. There is

²⁰ PAS’s First Set of Discovery Requests to New England Central Railroad, Served June 11, 2015 (Document Request 20).

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nothing about the materials themselves that indicate they are incomplete. While it is true there is no capital maintenance spending in some years, this is consistent with NECR's observation that these activities "vary year by year." NECR Rebuttal at 40. Importantly, the 2008 to 2013 materials explicitly calculate a 6-year average of capital costs across the standard capital maintenance categories of turnouts, bridges, ties, surface, signals and crossings, and specifically deduct grant funding over the period.²¹ In contrast, the 2013, 2014, and 2015 information on "capital projects" initially produced by NECR did not differentiate between NECR funds and grant monies, clearly covered capital projects not related to capital maintenance, contained disparate information reporting each project separately, and did not provide any summaries indicating it was a complete set of annual information for a given year. For these reasons, using the 2008 to 2013 materials to establish capital maintenance costs is clearly the most reliable approach, better than the alternatives, and fully consistent with NECR's representations in discovery. In contrast, relying on the 2013 to 2015 "capital project" information as NECR proposes would have required making subjective judgments about which capital projects involved maintenance as opposed to improvements, unfounded assumptions about whether this represented all projects, and guesses about whether the reported amounts contained grant monies.

Seemingly oblivious to the deficiencies of what it produced, NECR alleges that I "overlooked" the 2013, 2014, and 2015 "capital project" information NECR Rebuttal at 39. Then, shifting gears, NECR proceeds to explain that "[f]or ease of review, NECR is now producing the portions of the summary sheets for each period applicable to NECR that were not produced with the originals." NECR Rebuttal at 39. This is troubling several reasons. First, to be clear, NECR did not produce these summaries in discovery even after the follow up email

²¹ NECR_004586.

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regarding capital maintenance materials. Second, without these summaries there is no way to know whether grant funding is included in the figures originally reported for the individual projects. Third, without these summaries there is no way to know whether the individual projects together represent NECR's annual capital spending. Fourth, even with these summaries the materials still require subjective judgment to differentiate between capital improvement and maintenance projects. Fifth, even if I had the necessary contextual information to understand the figures, there is no way I could have calculated NECR's rebuttal figures from materials provided in discovery because the newly produced summaries contain additional projects and report different figures for some previously produced projects. These problems make it clear that NECR has changed its story on capital maintenance costs in a way that contradicts its previous statements, violates the discovery process, and should be summarily rejected.²²

VII. NECR'S ADJUSTMENTS TO THE CE METHOD ARE MERITLESS.

NECR purports to identify and correct a few errors and omissions in my CE calculations. As discussed below, each is meritless and after addressing these allegations RLBA's restatement of the CE method without any other objections only serves to reinforce the accuracy of this approach and my calculations processing NECR's waybill data and implementing the ATC-allocation method to determine segment-specific earnings.

²² Nonetheless, if NECR's new 2013 and 2014 figures are accepted, then they should be combined with cost information available from 2008 to 2015 in order to provide a reliable average. The annual spending fluctuations, data inconsistencies, and improper supplementing of discovery make use of a period longer than the two years cherry-picked by NECR a more reliable approach that is more consistent with the Board's preference for more years of data for purposes of establishing a forward-looking estimate of capital maintenance for purposes of determining SSW compensation.

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A. NECR's Adjustments To ATC Revenue Allocation Are Unnecessary And Make No Difference If Properly Implemented.

RLBA alleges that the ATC calculation under my CE method incorrectly treated [REDACTED] of costs as variable and purports to correct this to [REDACTED] variable costs. NECR Rebuttal, RLBA Rebuttal at 10-11. Both parties use the [REDACTED] variable cost ratio derived from 2014 URCS for the Eastern Region, which is the appropriate version of URCS consistent with Board precedent for short line costs. There is no URCS version for NECR, because as NECR touts, it does not submit financial information consistent with the Uniform System of Accounts. As the below chart shows, RLBA adjusts the cost levels down to total NECR's annual operating expense but this has no difference on the relative costs used by the ATC formula. [REDACTED]

Source Baranowski Sur. WP “ATC Illustration.xlsx.”

The only reason RLBA's results differ is because RLBA introduces a distortion by inexplicably, and likely mistakenly, [REDACTED] [REDACTED] when attempting to implement, in an unnecessarily complicated way, its meaningless adjustment to overall cost levels used in the ATC formula. See RLBA Rebuttal WP "HC Fixed Variable calculations Tables 19 and 21.xlsx," tab "Allocation," columns DV to DW and Baranowski Sur. WP "ATC Illustration.xlsx."

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B. NECR's Addition Of Amtrak Trackage Payments To The CE Valuation Is Contradictory To Its Agreement With Amtrak Which Represents [REDACTED]

NECR contends that [[REDACTED]] in Amtrak trackage payments, which it mistakenly characterizes as "trackage rights income," should be included in the CE valuation. NECR Rebuttal, RLBA Rebuttal at 13. NECR calculates this amount by multiplying Amtrak's annual car-miles on NECR by the per car mile fee Amtrak pays NECR²³ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. NECR_001314. All of these items are Amtrak costs reimbursed to NECR, as opposed to income paid to NECR, which represents revenues over costs. [REDACTED]
[REDACTED]. Consistent with this, my CE valuation appropriately excludes trackage rights revenue and trackage rights operating expenses, and it would be improper to add in Amtrak trackage payments [REDACTED].

²³ See RLBA Rebuttal WP "HC Trackage rights income.xlsx," tab "Trackage rights adjustment", cell E25 and Baranowski Surrebuttal WP HC "2014 Amtrak trackage rights support.pdf"

PUBLIC VERSION

C. NECR's Addition of PAS Trackage Payments To The CE Valuation Is Circular In Nature And The Board Has Rejected Such Attempts in Similar SSW Cases.

NECR similarly contends that [REDACTED] in PAS trackage payments should be included in the CE valuation, which it develops by multiplying PAS's car-miles by the 2014 existing per car mile rate.²⁴ [REDACTED], NECR inexplicably assumes this rate represents pure income. This claim is particularly ironic to make in the current proceeding where NECR claims the rates PAS pays are so low it is effectively being subsidized. Moreover, adding PAS revenues under existing rates to a valuation determining PAS's rates going forward is circular in nature, and the Board has rejected such attempts in similar trackage compensation cases.²⁵ Finally, PAS earnings generated on the trackage segments are included in the CE and separately adding trackage payments, which are already implicit in the PAS earnings determination, would introduce a double-count.

D. Baranowski's Use Of NECR Earnings Per Carload Over The Lines Adequately Reflects PAS Earnings On The Line.

RLBA questions using NECR earnings as a proxy for PAS earnings under the Baranowski CE valuation, and asserts this method has not "specifically accounted for the approximately [REDACTED] of PAS revenue for services to customers located on the middle segment." NECR Rebuttal, RLBA Rebuttal at 12. However, RLBA does not make any adjustments to this method in its re-stated CE valuation. As the below table shows, my method if anything overstates PAS earnings by extrapolating PAS revenues assigned to the middle segment that are [REDACTED] of total revenues PAS receives from its customers on the middle segment, leaving only [REDACTED] of revenues to cover the remaining portion of the move.

²⁴ See RLBA Rebuttal WP "HC Trackage rights income.xlsx," tab "Trackage rights adjustment," cell F25.

²⁵ See Ark. & Mo. R.R. v. Mo. Pac. R.R., 6 I.C.C.2d 625, 1990 ICC Lexis 110 (ICC served March 23, 1990).

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Total PAS Revenue From Customers on Middle Segment	[[REDACTED]]
Extrapolated PAS Revenue Assigned to Middle Segment	[[REDACTED]]
Percent	[[REDACTED]]

NECR Rebuttal, RLBA Rebuttal at 12 and Baranowski Sur. WP “PAS Revenue Extrapolation.xlsx.”

VIII. THE AMTRAK DECISIONS CATEGORICALLY PROHIBIT INTEREST RENTAL FROM EVER BEING INCLUDED IN RATE FOR MIDDLE SEGMENT.

NECR makes several unconvincing arguments trying to rationalize why the takings compensation amount could be based on a calculation that excludes interest rental into perpetuity while the corresponding trackage order could have interest rental added in after 20 years. The general arguments NECR makes are that 1) PAS and its predecessors have already benefited enough from the interest rental exclusion; 2) some other assumptions in the compensation calculation may have worked out in PAS’ favor; 3) the takings compensation was only an estimate with no guarantee of being realized; and 4) NECR requires an interest component to replenish capital in the long run. These arguments simply re-hash arguments for including interest rental that the ICC has already considered and rejected. The key point is that the Amtrak Decisions determined takings compensation and approved the trackage order based on categorically excluding interest rental into perpetuity.

A review of the relevant decision language plainly shows that PAS’s view that interest rental is permanently and categorically excluded from trackage compensation for the middle segment is correct. The Amtrak II Decision summarizes CV’s argument attempting to add an interest rental fee because, just as NECR argues here, it viewed the takings compensation as higher than expected, asserted the interest rental exclusion was non-permanent, and argued it required an interest rental component to raise capital:

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[CV] argues that because the Commission ultimately set just compensation far in excess of Amtrak's calculations, CV is not now bound by the restrictive trackage rights terms Amtrak originally proposed. Submitting that Amtrak never sought permanently to preclude an interest rental charge and the Commission has included an interest-rental charge in other imposed trackage rights agreements, CV argues that such a charge should be included here. CV concludes that CV must be able to earn a long-term return on its capital investment, and an interest-rental component on capital is the most reasonable solution." (Emphasis added)²⁶

The ICC rejected this argument, including CV's assertion that interest rental was not permanently excluded:

"...the GCV [takings compensation] that we developed precluded any additional interest-rental payment. Our determination that the line was worth more than Amtrak's original estimate is no rationale for imposing CV's proposed interest-rental charges" (Emphasis added) *Id.* at 30.

Had the ICC intended to allow interest rental after 20 years, then it would not have extended the interest rental exclusion beyond 20 years in its calculation, nor rejected specific assertions that the interest rental exclusion was not permanent.

IX. CONCLUSION

If the Board chooses to adopt SSW compensation, then it should reject NECR's unconventional and unsubstantiated VIP valuation which does not represent market value as required by SSW and adopt my CE valuation, without the flawed and unnecessary adjustments proposed by NECR in rebuttal. My CE valuation best conforms with the Board's preferred method for developing an interest rental component under SSW. If the Board is instead inclined to adopt the cost-based VIP approach, then it must make the adjustments I have identified, including the adjustment for economic depreciation, in order to provide a meaningful market value as required by both SSW and economic common sense. Regardless of which valuation is

²⁶ The National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire, 1990 ICC LEXIS 52 (1990), at *27-*31 ("Amtrak II").

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used, the terms of the Trackage Order and corresponding “takings compensation” approved in the Amtrak Decisions by design expressly prohibit into perpetuity any interest rental component ever being included in the trackage rate for the Middle Segment. While the parties generally agree on the remaining components of SSW compensation, NECR’s belated attempt to cherry-pick new capitalized maintenance figures that it withheld in discovery should be rejected, and the long-term average I develop which properly controls for year to year fluctuations in capital maintenance spending should be used.

The below tables summarize the components of the SSW trackage compensation per car mile – under both a Restated Banks VIP Approach and a CE approach to the interest rental component – which I developed in my reply statement and reaffirm here.

Proposed Rate Under Restated Banks VIP Approach (2014)			
	Southern Segment	Middle Segment	Northern Segment
Variable Dispatching	\$0.02	\$0.02	\$0.02
Maintenance/Operating	\$0.42	\$0.36	\$0.36
Interest Rental	\$0.07	\$0.00	\$0.12
Total per Car Mile	\$0.51	\$0.38	\$0.50

Proposed Rate Under CE Approach (2014)			
	Southern Segment	Middle Segment	Northern Segment
Variable Dispatching	\$0.02	\$0.02	\$0.02
Maintenance/Operating	\$0.42	\$0.36	\$0.36
Interest Rental	\$0.82	\$0.00	\$0.71
Total per Car Mile	\$1.26	\$0.38	\$1.09

See Baranowski Reply WP “Trackage Rate Calculation.xlsx”, tab “Trackage Rates.”

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VERIFICATION

I, Michael R. Baranowski, a Senior Managing Director at FTI Consulting and the head of FTI's Network Industries Strategies group within the Economic Consulting division, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Surrebuttal Verified Statement.

Executed this 22 day of February, 2017.


Michael R. Baranowski

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
– TRACKAGE RIGHTS ORDER –
PAN AM SOUTHERN LLC**

**PAN AM SOUTHERN LLC'S SURREBUTTAL TO NEW ENGLAND CENTRAL
RAILROAD, INC.'S REBUTTAL EVIDENCE AND ARGUMENT**

VOLUME II

**PUBLIC DOCUMENTS PRODUCED IN DISCOVERY
AND OTHER RELEVANT DOCUMENTS**

**Robert B. Culliford
PAN AM SOUTHERN LLC
1700 Iron Horse Park
North Billerica, MA 01862
Tel: (978) 663-1126**

**William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849**

Attorneys for Pan Am Southern LLC

Dated: February 22, 2017



Central Vermont Railway, Inc.

2 FEDERAL STREET
ST. ALBANS, VERMONT 05478
802-527-7518

May 10, 1988

The Honorable Susan C. Crampton,
Secretary
State of Vermont
Agency of Transportation
133 State Street
Montpelier, Vermont 05602

Dear Secretary Crampton:

Now that legislation clarifying Vermont's capabilities to assist in the rehabilitation of the Connecticut River Line has cleared the legislature, I enclose duplicate original copies of the Memorandum of Understanding which you sent to me for signature several weeks ago. CV is very appreciative of the support by the State for the Amtrak application and for the program which will result in the upgrading of the Brattleboro-Windsor segment of the Connecticut River Line and the restoration of Montrealer service through Vermont. As the eventual owner of the Line pursuant to arrangements with Amtrak, CV is pleased to make additional commitments to the State concerning maintenance and operations on the Line for the benefit of Vermont shippers and freight railroads.

The major threat to success of this project is delay. Although we are encouraged by the recent rulings by the Interstate Commerce Commission establishing an expedited procedural schedule for the case, Guilford has vowed to wage a legal battle to delay implementation of the transactions. If they succeed, the rehabilitation work cannot be completed during 1988, in which case conditions on the Line may deteriorate to a point beyond our ability to remedy.

As you know, resources available for this project are limited. Amtrak has committed \$3.1 million of the funds appropriated by Congress to the upgrade of the Line, but CV is required under its March 18 agreements with Amtrak to

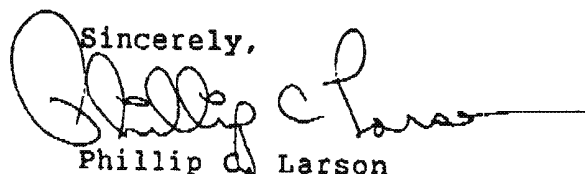
Hon. Susan C. Crampton
May 10, 1988
Page 2

restore and maintain it to a level that will permit 55 mph or 59 mph passenger train operations and install necessary train control systems, regardless of the actual cost.

On April 1, Guilford submitted evidence in the arbitration proceeding with Amtrak before the National Arbitration Panel claiming that the cost of upgrading the Line between Springfield and White River Junction (roughly twice the mileage of the segment we will acquire) would be \$9 million. And just as Amtrak filed its application at the Commission, we learned that an additional three miles of 10 mph slow orders were added, bringing the total to 32 miles of the 49 mile segment restricted to that speed. This new information strongly suggests that additional resources will be needed, even if we can get started on the proposed timetable. The amounts available to Amtrak and CV will be strained even further if conditions on the Line continue to worsen, or if we are delayed in gaining access to the Line.

Therefore, we are pleased to learn that the Vermont legislature has enacted legislation which will permit the state to devote certain of its limited funds to serve as a backstop in the event rehabilitation costs exceed our present resources, or the compensation required for acquisition exceed Amtrak's estimates of what is fair and just under the circumstances. We look forward to working with the state on this joint venture to rehabilitate the Connecticut River Line.

Sincerely,



Phillip C. Larson

PCL/dww

enclosures

1178G

Post-It® Fax Note	7871	Date	7/2/01	# of pages	1
To	Mike Olmstead	From			
Co./Dept.		Co.			
Phone #	527-3482	Phone #			
Fax #		Fax #			

NOW THEREFORE, in consideration of the premises and mutual covenants contained in this Agreement, the Parties agree as follows:

Operation of the Service shall be governed by the above-mentioned Agreements except as specifically provided below:

1. Project Defined. This Project is to be completed as detailed in the Standard Rail Agreement dated August 26, 2010 as may be amended and as listed in the following Exhibit 1.
2. Service Outcomes Resulting from the Project. The Service Outcomes to be realized upon completion of the Project are described in Exhibit 2.
3. Compliance with ARRA Requirements. Each of the Parties shall comply with grant requirements applicable to the Project which are mandated by ARRA, including the requirement that authorized representatives of the FRA, U.S. Department of Transportation and the Comptroller General shall, until three years after completion of the Project, have access to and the right to examine, audit and copy any Project information controlled by the State, Amtrak, the Host, and their respective contractors.
4. Modification of Amtrak-Host Agreement. Upon completion of the Project or portions of the Project ("Phases"), as listed in Exhibit 2, Amtrak and the Host shall amend the Amtrak-Host Agreement (or subsequent Amtrak-Host Agreement, should the April 2, 1995 agreement be renegotiated) as follows:
 - a) Modification of Appendix I of the Amtrak-Host Agreement to reflect the new Maximum Passenger Train Speeds permitted by the Project described in Exhibit 2, Table 2A of this Agreement.
 - b) Appendix V, Table 1 shall be modified such that the Scheduled Time from Origin equals the Phase 2 Scheduled Amtrak Train Trip Time.
 - c) Modification of Appendix IV, Section III, Item 1 of the Amtrak-Host Agreement to reflect incremental track maintenance payments as listed therein and adjusted according to that agreement.
5. (Reserved)
6. Discontinuance or Reduction of Service, Resumption of Service. If the Service is discontinued or reduced, the following shall apply:
 - a) Any Federal penalties or return of funds to the Federal Government shall be paid according to the Standard Rail Agreement dated August ~~XX~~26, 2010, and
 - b) Host shall, for no less than one year following such discontinuance or reduction of Service, maintain the Project in an operable condition that will allow resumption of service at the same level of utility as when the Service was discontinued.
7. (Reserved)
8. (Reserved)

4. Attachment B – Payment Provisions, Description
 Replace NECR HSR Grant Scope with the following:

Vermont Rehabilitation Project Budget			
Project	Quantities	Units	Actual
Work Element 1: Rail	1,513,670	LIN FEET	\$43,798,829
Work Element 2: TIES (disposal cost included)	140,000	EA	\$9,553,731
Work Element 3: SURFACING	222	MILES	\$2,785,751
Work Element 4: BALLAST (shoulder cleaning)	39	MILES	\$1,428,529
Work Element 5: TURNOUTS AND DIAMONDS	50	EA	\$2,787,811
Work Element 6: GRADE CROSSING WARNING DEVICES			\$3,525,206
Work Element 7: REBUILD AT-GRADE CROSSINGS	72		\$2,156,509
Work Element 8: BRIDGES – MAINTENANCE	36	EA	\$2,005,616
Work Element 9: CTC EXTENSION & UPGRADE			\$1,743,000
Work Element 10: COMMUNICATION SYSTEM UPGRADE			\$291,087.50
Work Element 11: CULVERT IMPROVEMENTS/DITCHING			\$222,170.50
Work Element 12: VERMONT PASSENGER BUSSING			\$391,000
CONTINGENCY			\$75,000
BRIDGES – STRENGTHENING	8	EA	\$1,507,973
VERMONT ADMINISTRATION FEE			\$250,000
ANNUAL AUDIT			\$100,000
ROADWAY WORKER INSURANCE PROVIDED BY RR	1	EA	\$62,500
TOTAL PROJECT COST			\$72,684,713
PROJECT FUNDING SOURCES			
CREDIT FOR SALVAGE VALUE OF RELEASED RAIL & OTM	32,670	NET TONS	(\$14,962,455)
NECR CONTRIBUTION			(\$5,000,000)
FRA HSIPR GRANT			(\$52,722,258)
TOTAL FUNDING SOURCES			(\$72,684,713)