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

**Re: *New England Central Railroad, Inc.—Trackage Rights Order—Pan Am
Southern LLC (Docket No. FD 35842)***

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find the Reply of New England Central Railroad, Inc. in Opposition to the Motion to Strike filed by Pan Am Southern LLC on December 11, 2017.

Very truly yours,

/s/ Paul A. Cunningham

Counsel for New England Central Railroad, Inc.

Enclosures

cc: Parties of record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 35842

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

REPLY IN OPPOSITION TO MOTION TO STRIKE

New England Central Railroad, Inc. (“NECR”) opposes the Motion to Strike filed by Pan Am Southern LLC (“PAS”) on December 11, 2017 (“Motion” or “PAS’s Motion”). PAS moved to strike portions of NECR’s December 6, 2017, Petition for Reconsideration (“Petition” or “NECR’s Petition”) of the decision served by the Surface Transportation Board (the “STB” or “Board”)¹ in this proceeding on October 31, 2017 (“Decision”).

NECR’s Petition seeks reconsideration only on the ground of material error, including violations of the governing statutes enacted to protect the public interest. Because the Decision set a forward-looking rate and imposed new contractual provisions, it constitutes a “rule,” as defined under the Administrative Procedure Act, 5 U.S.C. § 551(4).² Rulemaking “means agency process for formulating, amending, or appealing a rule.” 5 U.S.C. § 551(5). In this rulemaking, the Board

¹ Reference to the Board, as the context warrants, may include reference to its predecessor agency, the Interstate Commerce Commission (“ICC”).

² A rule “includes the approval or prescription for the future of rates . . . prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.” *Id.*

must seek to protect and serve the public interest, even if the record of decision made by the parties primarily reflects their private concerns.

As pertinent to this reply, NECR seeks reconsideration because the Decision violates the statutory requirements for the trackage rights fee prescribed in the Decision. The prescribed fee must both afford NECR the opportunity to earn adequate revenues on NECR's railroad line over which PAS operates and maintain competitive parity between NECR and PAS. Otherwise, the trackage rights fee will undermine the public interest in an economically efficient, sustainable rail transportation system.

To substantiate the highly technical economics underlying the legal arguments in the Petition, NECR included expert economic testimony. That testimony explains how the Decision ignored and violated the basic economic principles that should have guided the Board's approach to the record and why the prescribed trackage rights fee frustrates both the revenue adequacy and competitive parity requirements. The testimony was not offered to add new evidence to the record; it simply further explained the evidence already in the record.

PAS has requested the Board to strike that testimony and all references thereto made in the Petition. Motion at 2. PAS's arguments might have been relevant had NECR sought relief on the grounds of new evidence or changed circumstances, offered evidence to supplement the record, contradicted a prior position, proposed a new methodology, or offered anything else to bolster the record. However, NECR did none of these things.

Instead, as encouraged by the Board's rules of practice and the precepts of administrative law, NECR presented an expert's view of the existing record only to elucidate the technical, economic errors made in the Decision. That professional perspective substantiates NECR's legal and logical arguments: the valuation methodology used by the Board in the Decision was economically unsound and therefore produced an unlawful result.

Consistent with Board practice, PAS's irrelevant Motion should be addressed concomitant with the Board's review of NECR's Petition. If the Board diverges from Board practice and independently rules on the Motion, the Board should, for the reasons explained below, deny the Motion.

BACKGROUND

The Decision modified a trackage rights order ("TO") governing PAS's trackage rights over three contiguous segments of NECR's railroad line (collectively, the "Line").³ The new TO, effective November 30, 2017 ("2017 TO"), supplanted a September 9, 1988 TO ("1988 TO"). One significant aspect of the 2017 TO was a new fee ("2017 TO Fee" or "Fee") to be paid by PAS to compensate NECR for PAS's operations on the Line.⁴

The Board found that the fee prescribed under the 1988 TO ("1988 TO Fee") was too low considering "the changes in costs, revenues, and other circumstances." Decision at 8. The Board expressly committed to adjust the 1988 TO Fee in a manner consistent with governing law and

³ The subject three railroad segments include a 48.8 mile middle segment, formerly owned by Boston & Maine Corporation (PAS's predecessor), a 13.4 mile northern segment, and a 10.6 mile southern segment, formerly owned by Central Vermont Railway, Inc. (NECR's predecessor).

⁴ NECR has challenged other significant provisions of the 2017 TO, including those governing the renewal period, insurance, indemnity, and haulage, but the Fee and the contract renewal period are the only issues addressed in the testimony that PAS seeks to have stricken.

Board precedent.⁵ *Id.* at 9. Moreover, the Board recognized the parties’ agreement that *SSW Compensation* provided the governing standards for determining the appropriate trackage rights fee.⁶ *Id.* at 3.

Those governing standards require that the trackage rights fee assure the landlord railroad (NECR) the opportunity to earn adequate revenues, as directed by the Rail Transportation Policy (“RTP”)⁷ and the revenue adequacy mandate.⁸ *Id.* at 8. The governing standards also require that any prescribed trackage rights fee put the tenant railroad (PAS) in the economic shoes of the landlord railroad (NECR) to establish competitive parity. *Id.*

As the Board recognized, a trackage rights fee substantially lower than a number determined under these guiding principles “would actually stand in the way of competitive parity, because it would require one carrier to subsidize its competitor’s operations significantly.” *Id.* Moreover, maintaining the 2017 TO Fee at the depressed level prescribed under the 1988 TO

⁵ The Board recognized a line of rate cases (together referred to as “*SSW Compensation*”) as providing the methodology to determine the appropriate measure of trackage rights compensation, citing *St. Louis S.W. Ry.—Trackage Rights Over Mo. Pac. R.R.—Kansas City to St. Louis*, 1 I.C.C.2d 776 (1984), 4 I.C.C.2d 668 (1987). *See also St. Louis S.W. Ry.—Trackage Rights Over Mo. Pac. R.R.—Kansas City to St. Louis*, 5 I.C.C.2d 525 (1989), 8 I.C.C.2d 80 (1991), 8 I.C.C.2d 213 (1991).

⁶ The Board recognized NECR’s and PAS’s agreement that *SSW Compensation* would provide the framework for determining trackage rights compensation in this case, consistent with precedent, Decision at 3, but noted that PAS changed its position, and argued, for the first time, in its reply statement, that *SSW Compensation* should not apply here, *id.* at 4.

⁷ 49 U.S.C. § 10101(3) (a principal policy in regulating the railroad industry is “to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board”).

⁸ *See* 49 U.S.C. § 10704(a)(2) (Board must ensure that the “standards and procedures for establishing revenue levels for rail carriers . . . are adequate, under honest, economical, and efficient management, for the infrastructure and investment needed to meet the present and future demand for rail services and to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business”).

would contravene the RTP because it could “prevent[] NECR from earning adequate revenues [which] could impair its continued ability to maintain the track, which could in turn present safety concerns”, *id.* (quoting 49 U.S.C. § 10101(3), (8)), and could harm “the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes.” *Id.* (quoting 49 U.S.C. § 10101(4)).

Having defined the lawful course that the Board was required to follow to modify the 1988 TO, the Board then went down another path: it never returned to the governing legal touchstones, and the resulting 2017 TO Fee and related terms widely diverge from what the law allows.

There was no logical explanation for the Board’s fundamental error. Ratemaking is a legislative rather than judicial process. Accordingly, the Board here is exercising its quasi-legislative rulemaking authority delegated by Congress not only to determine the parties’ interests but to serve the public interest. Where the record is adequate to support a lawful decision, the Board is bound to exercise its independent judgment to assure compliance with the laws enacted to protect the public interest. Where the record is not adequate, the Board may not simply choose among the proposals made by the parties on the record but must seek further evidence that will allow the Board to satisfy its statutory duties.⁹

NECR could not reasonably have been expected to anticipate that the Board, which has long been committed to the “revenue adequacy” and “competitive parity” requirements under the statutes and precedents directing the Board’s actions, would not even attempt to reconcile its 2017

⁹ As the Supreme Court has underscored, the Board “is not intended to be a passive arbiter but the ‘guardian of the general public interest,’ with a duty to see that this interest is at all times effectively protected.” *Baltimore & O. R. Co. v. U.S.*, 386 U.S. 372, 429 (1967) (Brennan, J., concurring) (quoting H. R. Doc. No. 678, Practices and Procedures of Governmental Control of Transportation, 78th Cong., 2d Sess., p. 53 (1944)).

TO Fee with the law. Nor could NECR reasonably have been expected to anticipate by what means and to what extent the Board would diverge from the law. In making the highly technical record, the parties reasonably assumed compliance with the law and Board precedent, and thus focused first and foremost on presenting evidence based on that underlying assumption.

NECR's Petition is based on the existing record and raises a claim of material error. NECR's Petition asks the Board to reconsider several aspects of the Decision, including the 2017 TO Fee.¹⁰ As pertinent here, NECR seeks reconsideration of the Interest Rental Component ("IRC") of the Fee on the ground, among others, that the resulting return of and on capital is too low to satisfy either the revenue adequacy or competitive parity standards. The Petition, therefore, seeks to bring the proceeding back to the simple fundamental principles that the Board itself recognized must govern here.

To substantiate the logical and legal arguments advanced in the Petition, NECR provided two verified statements ("Verified Statements"). Julie M. Carey validates the economic reasoning underpinning NECR's claims of material error. Edward Foley addresses aspects of rail competition

¹⁰ NECR's Petition also identified as material error the following aspects of the Decision not directly addressed in PAS's Motion. All involved denying NECR the benefit of standard contractual provisions and protections in the 2017 TO and all exacerbate the Board's violation of the revenue adequacy and competitive parity mandates governing this proceeding. 1) The Board's failure, especially in light of the Board's determination that the old rate denied NECR adequate revenues, to apply retroactively the prescribed rate as initially agreed to by the parties. 2) The Board's failure to recognize and account for the economic impact of including off-market indemnification and insurance provisions in the TO. 3) The Board's decision to allow PAS to extend its preferential rates to any connecting carrier through the provision of haulage. 4) The Board's imposition of an unreasonably long 20-year term for the TO without opportunity for reopening to adjust for substantial change in circumstance, which will frustrate NECR's opportunity to adjust to the market conditions faced by NECR in competition with PAS and other carriers. 5) The Board's decision to adjust the Fee by an escalator that is not economically sound, is unduly complex and ambiguous, and will be difficult to implement.

not accounted for in the Decision to provide information for Ms. Carey’s economic review of the Decision.¹¹ Together, they demonstrate, **based on the existing record**, the Board’s deviations from the economic logic mandated by the governing statute. They show that the method chosen by the Board to determine the return to and on NECR’s capital under the 2017 Fee was economically indefensible and produced a fee that denies NECR both adequate revenues and competitive parity with PAS. They also show that the Board, by following the economic logic required by the statute, which has guided the Board’s economic regulation for decades, could have, **based on the existing record** or such additions as the Board might have required, determined an IRC that satisfies the adequate revenue and competitive parity requirements.

PAS has moved to strike the Verified Statements in their entirety and all references to the Verified Statements made in NECR’s Petition. The gist of PAS’s argument is that NECR’s Petition, and the supporting Verified Statements, present “new argument, analysis and evidence” that NECR could and should have raised previously. Motion at 1-2.

ARGUMENT

PAS’s Motion advances the same fundamental objection to “newness” in various forms.¹² PAS errs both in assuming that any of these forms have any relevance to NECR’s Petition and in

¹¹ Without that expert testimony, NECR would have had little incentive to pursue reconsideration. It could have made its legal arguments to the Court of Appeals on the record of decision without expert elaboration. The existing record fully reveals that the valuation applied by the Board was economically circular, and, being based on a revenue stream deemed inadequate by the Board in the Decision, could only have produced an IRC that precluded adequate returns to NECR. The Verified Statements provide the Board with more than this *prima facie* conclusion to assist the Board in reviewing the record from a more developed economic perspective.

¹² PAS has moved to strike the Verified Statements of Mr. Foley and Ms. Carey, and the portions of NECR’s legal argument they substantiate as improper “new analysis and evidence.” Motion at 2-3, 6-7, 11. PAS also seeks to strike NECR’s argument about “revenue inadequa[cy]”

citing multiple cases as purported support that are entirely off point.¹³ None of the cases cited by PAS applies to NECR's Petition because those cases involve petitions premised upon the introduction of "new evidence" to the record and NECR is not seeking relief based on additions of "new evidence" to the record.¹⁴

as improper "new argument." *Id.* at 12-13. PAS argues that the Board should not consider the "newly raised evidence" and "new argument" raised by NECR in its Petition because that same evidence and argument could and should have been offered during the rebuttal phase. *Id.* at 4, 8, 13.

¹³ See PAS's Motion at 2-3 (citing *Sunbelt Chlor Alkali P'ship v. Norfolk S. Ry. Co.*, Docket No. NOR 42130, slip op. at 19 (STB served June 30, 2016) (granting in part and denying in part Sunbelt's petition for reconsideration, and noting that "Sunbelt cannot introduce a new argument on reconsideration and claim the Board erred by not considering that argument in an earlier decision"); *B. Willis C.P.A. Inc. – Petition for Declaratory Order*, Docket No. FD 34013, slip op. at 3-4 (STB served July 26, 2002) (denying petition to reopen based on new evidence where the new evidence was not previously unavailable and petitioner did not satisfactorily explain why it did not submit the evidence until after service of the Board's decision); *S.R. Investors, Ltd. d/b/a Sierra R.R. Co. – Abandonment – in Tuolumne Cnty, CA*, AB-239X, 1988 ICC LEXIS 17, at *6-7 (ICC served Jan. 20, 1988) (granting motion to strike evidence appended to a motion to reopen where the new evidence was not previously unavailable and petitioner failed to explain why it did not earlier submit the evidence)).

¹⁴ Regarding a petition for reconsideration based on additions to the record of decision, the term "new evidence" means "evidence that was not reasonably available to the party when the record was developed, and not simply newly raised." *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, ("TMPA/BNSF"), Docket No. 42056, 2004 STB LEXIS 597, at *5 (STB served Sept. 27, 2004) (citations omitted). See also *Canadian Nat'l Ry. Co., Grand Trunk Corp., & Grand Trunk W. R.R. – Control – Ill. Cent. Corp., Ill. Cent. R.R. Co., Chicago, Cent. & Pac. R.R. Co., & Cedar River R.R. Co.*, FD 33556, 2002 STB LEXIS 500, at *14 (STB served Aug. 27, 2002) ("'new evidence' is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding") (citations omitted). As NECR makes clear in its Petition, NECR did not offer the Verified Statements as "new evidence" to supplement the record. Petition at 7 fn.7.

NECR is not seeking to amend the record in any way. No new evidence is required to show the Board's error. NECR is seeking only to explain how the material errors made by the Board arise from its failure to apply the governing law to the evidence in the existing record.¹⁵

One particular illustration of PAS's confused and misleading approach to "newness" is its objection to Ms. Carey's discussion of the replacement cost new less depreciation ("RCNLD") valuation method. Motion at 7-8. Ms. Carey explains why, from the perspective of economic logic, RCNLD was indisputably appropriate for the Board's valuation requirements and the only objective measure of value proposed on the record. Verified Statement of Julie M. Carey 3, 5, 14-16 ("Carey VS").

PAS argues that the Board cannot consider her explanation because it improperly presents a "new methodology" that NECR is suggesting for the first time in its Petition. Motion at 7-11. PAS conveniently neglects to note, however, that the RCNLD concept is not new to this proceeding. And PAS ignores that the point of Ms. Carey's testimony was not what the Board should have done with that methodology but that RCNLD was the only economically sound valuation method on the record. *See Carey VS* at 3, 14. In other words, **Ms. Carey is not seeking to amend the record, but to explain it.**

PAS's Motion went to great lengths to obscure this simple distinction. For example, PAS makes much of a statement in NECR's Rebuttal in which NECR argued for application of the

¹⁵ The one element of chronologically new evidence in the Verified Statements is contained in the traffic data presented by Mr. Foley for the period after the closing of the record. It is not offered as an independent basis for reconsideration but informs Ms. Carey's assessment of the record.

value-in-place (“VIP”) method, and not RCNLD. Motion at 1 fn.3, 8 & fn.18 (citing NECR Rebuttal at 27-28). PAS neglects, however, also to note that NECR’s Rebuttal clarified on those same pages, as Ms. Cary further elucidates, that VIP is a variation of RCNLD.

Again, NECR’s Petition and the Verified Statements were not intended to add something “new” to the record. NECR sought to explain why, when exercising its duty to protect the public interest, the Board should not have ignored the only valid line valuation methodology on the record. In exercising its duty to protect the public interest, the Board could not pick another, legally and economically invalid capitalized earnings (“CE”) method for any reason. Certainly, it could not do so merely because NECR used the VIP nomenclature to distinguish its RCNLD variation from others, or because the Board did not want to pursue further evidence to calculate RCNLD if it did not find the evidence of record sufficient.

PAS also carefully avoids bringing to the Board’s attention several points that completely undermine its “new methodology” claim. Ms. Carey observed that the record contains a fully developed, wholly independent, and objective RCNLD valuation, prepared by Duff and Phelps, which the Board might have adopted. Carey VS at 3-4, 15. That valuation was introduced not by NECR but by PAS, which relied on the Duff and Phelps report as a source of data, Verified Statement of Michael R. Baranowski, Exhibit A to PAS’s Surrebuttal to NECR’s Rebuttal Evidence and Argument at 9 (filed Feb. 22, 2017); Verified Statement of Michael R. Baranowski, Exhibit B to PAS’s Reply to NECR’s Opening Statement and Evidence at 27-28, 31-32 (filed July 19, 2016), later also referred to by the Board in calculating the 2017 TO Fee, Decision at 12-14. PAS also neglects to mention the Board’s discussion of RCNLD as a proper valuation methodology. Decision at 12, 13 fn.18.

In this proceeding, the Verified Statements and the Petition present no new methodology. Instead, they illuminate why the Board erred when it failed to pursue its statutory duty and to

develop and implement, based entirely on the existing record, a proper economic approach to valuing the Line and prescribing the 2017 TO Fee. The foregoing “new methodology” example illustrates the more general principle that PAS should have brought to the Board’s attention: the law governing petitions for reconsideration and administrative appeals generally distinguishes between what petitioners offer as additions to the record and what they offer to explain the errors made by the agency. NECR offered only the latter. There is therefore no merit to any of PAS’s objections, all of which assume NECR offered the former.

Petitions for reconsideration that seek to add new evidence to a closed record are properly regarded by the Board as potential efforts to re-litigate what could and should have been litigated before the record closed.¹⁶ Reconsideration based on new evidence is not warranted if the newly presented, relevant evidence was available to the petitioning party before the Board decided but simply was not timely raised. As both NECR and PAS agree, the Board is under no charge to “behave like Penelope, unraveling each day’s work to start the web again the next day.” *See W. Coal Traffic League v. ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984).¹⁷

By contrast, the Board encourages parties to file for reconsideration where they believe that the Board has erred, “as it is a more expeditious and efficient means of achieving corrections or adjustments than resort to the federal courts in the first instance.” *TMPA/BNSF*, 2004 STB

¹⁶ *See Simplified Standards for Rail Rate Cases*, Docket No. EP 646 (Sub-No. 1), slip op. at 12-13 (STB served Mar. 19, 2008) (stating that “new arguments that could have been presented earlier cannot be raised for the first time on reconsideration”).

¹⁷ *See also Conn. Trust for Historic Pres. v. ICC*, 841 F.2d 479, 484 (2d Cir. 1988) (noting that a party’s change of position from one earlier taken – which change the party admitted was due to an internal change in administration – need not be considered by the ICC as it is under no mandate to “rethink its decisions whenever an affected party changes its mind at a late stage in the process”).

LEXIS 597, at *4. Petitions for reconsideration based on the existing record and substantiated by evidence that helps to clarify the record and the errors alleged are favored because such petitions advance the purposes underlying petitions for reconsideration. Hence, the rules of practice expressly allow a petitioner to submit additional evidence to support a petition for reconsideration based upon material error.

Expert testimony may support a petition for reconsideration based on material error without supplementing the record because that substantiation can enhance the goals of administrative and judicial economy that underlie the provisions for administrative appeals. Substantiating testimony is especially warranted where the underlying issues are highly technical, and the agency's perspective may be enhanced by analyses provided by an independent expert in the technical field.¹⁸ Nowhere, therefore, does Board precedent state, nor does common sense dictate, that a petitioner is precluded from presenting elucidatory evidence to substantiate a claim of material error. Such blanket preclusion could perversely prevent a petitioner from satisfying its burden of showing material error that would warrant reconsideration by the Board.

Under 49 C.F.R. § 1115.3(b)(1) and (2), the Board may reconsider actions only upon a showing by the petitioner of new evidence, changed circumstances, or material error. And a petition for reconsideration must meet the requirements of 49 C.F.R. § 1115.3(c). Namely, it “must

¹⁸ The Petition, drafted by and directed to individuals who are not experts in economics, is intended to be sufficiently detailed to apprise the reader of the material errors committed by the Board. Pursuant to that purpose, NECR retained an industry expert (specifically an economist) to offer clearer explanation, in technical terms, of the economic consequences of the Board's missteps. Offering well-reasoned expert testimony to assist the Board in understanding the highly technical facts at issue is the precise purpose for which expert testimony is permitted. *See e.g., Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993) (in assessing whether expert testimony is relevant, the question is whether the expert testimony “will assist the trier of fact to understand or determine a fact in issue”).

state in detail the nature of and reasons for the relief requested.” *Id.* In establishing material error, the petitioner may introduce evidence; but “the evidence must be stated briefly and must not appear to be cumulative, and an explanation must be given why it was not previously adduced.” *Id.*

The grounds for reconsideration alleged in the petition must demonstrate to the Board that its prior decision requires material alteration. Otherwise, the Board will not reconsider its decision. *Canadian Nat’l Ry. Co. & Grand Trunk Corp. – Control – EJ&E W. Co.*, Docket No. FD 35087 (Sub-No. 8), 2017 STB LEXIS 183, at *10-11, 20-21 (STB served Oct. 30, 2017) (denying reconsideration where petitioner repeated arguments earlier made and failed to present sufficient evidence to undermine the Board’s applied methodology or earlier determinations).

Under long-standing Board precedent, an aggrieved party has both “a right to allege material error” and to provide substantiating evidence. *See Keokuk Junction Ry. Co. – Feeder Line Acquisition – Line of Toledo, Peoria and W. Ry. Corp. Between La Harpe & Hollis, IL (“KJRY/TP&W”)*, Docket No. FD 34335, 2005 STB LEXIS 89, at *16 (STB served Feb. 7, 2005), *aff’d sub nom. TP&W v. Surface Transp. Bd.*, 462 F.3d 734 (7th Cir. 2006), *cert. denied*, 549 U.S. 1278 (2007).

Given the petitioner’s burden of demonstrating a need for reconsideration, substantiating expert testimony especially makes sense in informal proceedings to set rates, such as this one. In deciding whether to grant reconsideration, the Board must review a voluminous and complex record replete with esoteric jargon, often presented to advance the interests of the parties over those of the Board. In this context, the Board understandably could lose sight of first principles and make a material error as it focuses on trying to make sense of the technical minutiae of the record.

When that occurs, an aggrieved party may seek reconsideration by the Board expecting that, if the record were elucidated, the Board may reconsider, and if need be, reopen, the record to make a legally defensible decision consistent with the governing statutes and the public interest.

NECR took this course when it filed the Petition.¹⁹ Rather than assert merely the legal and logical arguments developed by counsel, NECR engaged an independent expert to aid the Board in understanding the evidence in the record. That expert's role was not to suggest additions to the existing record but to bring greater clarity to the record of decision and the nature of the material economic errors.

The Verified Statements comply with both 49 C.F.R. § 1115.3(c) and Board precedent. They support NECR's claim of material error through expert examination of the narrowly focused economic assessment of the Decision. As PAS admits, the supporting evidence is not cumulative. PAS's Motion at 4, 8 (noting that NECR did not previously submit evidence on competition before the Verified Statement of Edward Foley and describing the Carey VS as presenting new analysis and argument). It is briefly stated, using tens of pages to address a record and Decision of many hundreds of pages. NECR also explained that it could not previously have adduced this evidence as it relates to the material errors of the Decision.

PAS does not dispute that in prescribing a trackage rights fee, the Board must ensure that the landlord railroad (NECR) can earn adequate revenues on the Line from the tenant railroad (PAS). PAS instead asserts that NECR may not explain why the Decision did not meet this duty because the explanation is "new." And it does so even though it does not explain how NECR could have known that the Board would use the wholly unsuitable CE method in reaching its Decision,

¹⁹ Pursuant to the Hobbs Act, 28 U.S.C. §§ 2341 et seq., NECR has also filed a Notice of Appeal in the U.S. Court of Appeals for the D.C. Circuit to preserve its opportunity to pursue judicial review.

how it would be applied, or what result it would produce. NECR could not possibly have presented its argument and its experts' substantiating evidence earlier in the proceeding.

As the Board well knows, however, revenue adequacy and competitive parity are not new issues; they are the paramount legal and economic issues in this proceeding – established by Congress, recognized by the Board in the Decision, and addressed by NECR in its earliest pleadings.²⁰ Via its Petition, NECR has merely sought to illuminate how the Board, on the record of decision, committed material error by ignoring and therefore not legally resolving these fundamental issues.

Based on her review of the record, Ms. Carey elaborates why, from an economist's perspective, the CE method used by the Board to value the Line is economically circular and therefore inherently inadequate to identify an IRC high enough to give NECR an opportunity to earn adequate revenues on the Line. Carey VS at 6-7. Ms. Carey explains that the value determined by the CE method is based not on cost but existing prices for NECR's services, and that those prices are constrained by the 1988 TO Fee that the Decision found was too low to provide a sufficient return. *Id.* at 8-9. Therefore, as Ms. Carey explains, the value of the Line derived from those existing, artificially constrained prices is too low. *Id.*

Ms. Carey further explains why RCNLD is the only economically objective valuation method proposed on the record that could have offered NECR the opportunity to earn adequate revenues on the Line. *Id.* at 14-15. Again, she does not offer RCNLD as a new methodology.

²⁰ See e.g., Verified Statement of Dave Ebbrecht, Volume 2 of NECR's Opening Statement and Evidence at 3-4.

Instead, she points out 1) that an objective valuation method, almost universally agreed to be legally and economically valid, was available, and 2) extensive relevant evidence of RCNLD elements from two sources was on the record, and 3) the CE method was obviously economically untenable. On that basis, she concludes the Board could only have met the statutory standard by applying RCNLD to the existing record evidence or requesting such additional evidence as it may have required. Carey VS at 3, 6-7, 14-16.

Ms. Carey also notes that unless PAS paid a fee that assured NECR the opportunity for adequate revenues, there could be no competitive parity between PAS and NECR. *Id.* at 9, 11. Finally, based on Mr. Foley's estimate of the NECR traffic on and off the Line subject to competition from PAS, she illustrates how the absence of competitive parity on the Line appears to deny NECR the opportunity to earn adequate revenues not only on the Line but on the balance of its rail system. *Id.* at 8-9.

Ms. Carey does all of this not to suggest that the Board supplement the record and rely on her testimony as the record of decision, but to assist the Board to better understand how the record supports NECR's Petition and its claims of material error.

PAS is obviously concerned that the Board not have access to the perspective on the record offered in the Verified Statements. But these are substantive concerns about the ideas presented, not valid concerns about "new evidence." They fail as the basis for its Motion because explaining the nature of errors allegedly made in the Decision on the basis of the existing record is what administrative appeals are all about. What would be the point of seeking reconsideration without adding a new perspective on the Board's Decision?

Explanations are part of the record of Decision, and for that reason, whether the explanatory testimony supporting NECR's Petition is new or old is not pertinent. The pertinent question is whether NECR is asking the Board to decide this case on the testimony supporting the Petition

or to recognize that it made the wrong decision based on the record as it stood on October 30, 2017, and to reconsider that Decision. NECR is seeking only the latter, which is its right. Besides the rules of practice, the logic of administrative law, and common sense, the cases cited by PAS to support its Motion support NECR's right to adduce substantiating evidence.

The Board recognized that right in *KJRY/TP&W*, which, as cited by PAS, is otherwise irrelevant. There, TP&W filed a petition for reconsideration, arguing that the Board committed material error. As part of TP&W's Petition for Reconsideration, it proffered evidence to "demonstrate to the Board that it had erred in its evaluation of the evidence in setting the net liquidation value of a line ..." and ignored its precedent in determining the value. *See* TP&W Opposition to Motion to Strike at 7-8, *KJRY/TP&W* (filed Dec. 23, 2004). Unlike the Verified Statements, TP&W's evidence was not substantiating evidence but evidence that TP&W sought to have added to the record of decision. KJRY moved to strike TP&W's petition and the evidence TP&W submitted in support thereof. The Board's somewhat confusing discussion of when evidence can be added to the record of decision, explaining that the additional evidence can only be evidence that "was not available earlier" (*KJRY/TP&W*, 2005 STB LEXIS 89, at *10), is just not pertinent here, where the issue is not additional evidence of record but substantiation of the views of counsel **about** the Decision made on that record.

It is a worth noting, however, that even in that case the Board underscored that the rules of practice allow a petitioner to introduce evidence on appeal if the petitioner explains "why [the evidence] was not previously adduced." *Id.* at *12 (citing 49 C.F.R. § 1115.3(c)).

PAS's reliance on *Middletown & N.J. R.R. – Lease and Operation Exemption – Norfolk S. Ry. Co.* ("*M&NJRR*"), Docket No. FD 35412, 2012 STB LEXIS 156 (STB served May 2, 2012), as support for its Motion is similarly misplaced. For the purposes cited by PAS, it is irrelevant. It does, however, support NECR's right to submit substantiating evidence. Like *KJRY/TP&W*,

M&NJRR addressed a context different from NECR's Petition. In *M&NJRR*, the Board granted UTU-NY's motion to strike additional evidence, comprising a verified statement and accompanying exhibits, submitted by M&NJ in its reply to UTU-NY's motion for reconsideration, because "M&NJ's reply contained additional evidence, **which is not permitted in response to a petition for reconsideration.**" *M&NJRR*, 2012 STB LEXIS 156, at *5 (emphasis added). The Board explained that "[b]ecause the petition for reconsideration was based solely on alleged material error in evaluating the evidence that was before the Board when it issued the September 2011 decision, we will reach our decision based upon the evidence submitted prior to the September 2011 decision." *Id.* at *6. Like the petitioner in *M&NJRR*, all NECR seeks here is a lawful decision based on the existing record, or a record supplemented later to meet the Board's requirements. The testimony that PAS seeks to strike was properly submitted by NECR to explain why the law requires reconsideration of the Decision and how the record of decision offers a path to a lawful result.

Also irrelevant to NECR's Petition is PAS's reliance on *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions ("BNSF Tariff")*, Docket No. FD 35557, slip op. (STB served May 15, 2015), as support for its claim that NECR has used the Petition to reargue and correct positions and evidence addressed and rejected by the Board during the rebuttal proceedings. As detailed above, that is not NECR's purpose, nor what NECR has done. *BNSF Tariff* can be readily distinguished.

In *BNSF Tariff*, Arkansas Electric Cooperative Corp. ("AECC") requested that the Board reconsider a key finding because "the Board did not sufficiently address arguments regarding [a host of particulars]." *Id.* at 4. In denying AECC's petition for reconsideration, the Board underscored that it addressed most of AECC's arguments and rejected them in the earlier proceedings. *Id.* at 4-5. Here, even PAS admits that NECR's evidence is not cumulative, and there is no dispute that the Board failed to tie the Decision to the governing statutory mandate it otherwise recognized.

Also, the Board rejected the petition for reconsideration in *BNSF Tariff* for attempting to “correct the deficiencies in its reply evidence and argument;” and the Board emphasized that even if the petition had been correctly presented, AECC’s arguments and evidence demonstrated no basis for reconsideration. *Id.* at 6. Here, however, NECR’s Petition shows that ***a proper decision could have been made on the record***, with or without additional evidence, as the Board determines.

CONCLUSION

For all these reasons, PAS’s Motion entirely misses the mark.

The Board and the parties recognized the statutory goals to be attained by the 2017 TO Fee, but the Board did not pursue them. NECR had no way of predicting – much less any reasonable basis for arguing and presenting supporting evidence – that the Board would expressly recognize the statutory mandates, regulations, and precedent governing its actions and then elect not to observe them. And the substantive issues raised by NECR’s Petition relate solely to the material errors that the Board made when it diverged from the course correctly enunciated in the Decision.

NECR’s Petition does not raise new argument, theory, or evidence on reconsideration that it reasonably could have been expected to present earlier. Nor is it taking a position that contradicts its prior evidence or presenting a new line valuation methodology. The Verified Statements and the portions of the Petition referring thereto were submitted properly to elucidate the record and substantiate the arguments of counsel and should be considered, not stricken, by the Board.

The Board should not separately entertain PAS's Motion to Strike. Instead, it should consider and rule upon PAS's Motion to Strike and NECR's Petition in a single, integrated decision, as it has in prior cases.²¹ If the Board elects to depart from precedent and consider PAS's Motion independently from NECR's Petition, the Board should deny PAS's Motion to Strike.

Respectfully submitted,

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²¹ NECR is unaware of any Board precedent, and PAS cites none, wherein the Board has stricken alleged "new evidence" on a motion to strike independent of deciding the merits of a pending petition for reconsideration. By contrast, in *KJRY/TP&W*, 2005 STB LEXIS 89, at *8-16 and *M&NJRR*, 2012 STB LEXIS 156, at *6, two cases cited as support by PAS, the Board declined to separately entertain a motion to strike evidence and argument from a pending petition for reconsideration, but instead ruled on both the motion to strike and motion for reconsideration in a single, integrated decision. The Board should do the same here.

CERTIFICATE OF SERVICE

I certify that I have this 29th day of December, 2017, caused true copies of the foregoing

Reply in Opposition to Motion to Strike to be served upon the parties listed below by email.

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