

SERVICE DATE – AUGUST 2, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42142

CONSUMERS ENERGY COMPANY

v.

CSX TRANSPORTATION, INC.

Digest:¹ On reconsideration, the Board confirms its finding that the rate challenged by the complaining shipper has been shown to be unreasonably high under the stand-alone cost constraint. The Board also confirms its finding that the complaining shipper has not shown that the defendant railroad is revenue adequate under the revenue adequacy constraint. The maximum reasonable rates prescribed in the underlying decision are modified to account for changes made to resolve petitions for technical corrections and petitions for reconsideration.

Decided: August 1, 2018

BACKGROUND

On January 13, 2015, Consumers Energy Company (Consumers) filed a complaint pursuant to 49 U.S.C. § 11701 challenging the reasonableness of the rate charged by CSX Transportation, Inc. (CSXT) to ship coal in unit train service, using Consumers-supplied rail cars, from an interchange with BNSF Railway Company (BNSF) near Chicago, Ill., to Consumers' Campbell generating station near West Olive, Mich.² Consumers asked the Surface Transportation Board (Board or STB) to prescribe reasonable rates and order reparations for past overcharges.

Consumers sought relief under both the agency's revenue adequacy constraint and the agency's stand-alone cost (SAC) test. Under the revenue adequacy constraint, the Board first determines whether the carrier has achieved long-term revenue adequacy, and if so, whether the

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² BNSF transports Consumers' coal traffic from the Powder River Basin in Wyoming and Montana, where it originates, to the interchange with CSXT. The BNSF portion of the move is subject to a contract between BNSF and Consumers, and thus not subject to challenge. 49 U.S.C. § 10709(c)(1).

complainant is unreasonably paying more than is necessary for the carrier to achieve and maintain revenue adequacy.³ Under the SAC test, the parties must hypothesize a stand-alone railroad (SARR) that could serve the traffic at issue if the rail industry were free of entry barriers. Under this test, the challenged rates cannot be higher than what the SARR would need to charge to serve the complaining shipper while fully covering its costs and earning a reasonable return on investment (ROI). This SAC analysis produces simulated competitive rates against which the challenged rates are judged.

The parties submitted evidence under both the revenue adequacy and SAC constraints. For its revenue adequacy case, Consumers submitted its evidence to support its argument that CSXT is revenue adequate, despite the Board's annual revenue adequacy determinations finding CSXT to be revenue inadequate. For its SAC case, Consumers created the hypothetical Consumers Energy Railroad (CERR), a 234.95-mile SARR. In addition to the issue traffic, CERR would carry carload traffic in unit train or trainload service, as well as intermodal container shipments in trainload service.

After the parties submitted their rate reasonableness evidence, the Board found, among other things, that Consumers' treatment of merchandise traffic in its SAC case exceeded a complainant's allowable discretion in creating its traffic group and was inconsistent with the realities of real-world railroading. Consumers Energy Co. v. CSX Transp., Inc. (December 2016 Decision), NOR 42142, slip op. at 19 (STB served Dec. 9, 2016). Accordingly, the Board directed Consumers to supplement its SAC presentation to remedy its traffic group selection. December 2016 Decision, slip op. at 20. In the same decision, the Board granted in part and denied in part CSXT's June 24, 2016 motion to strike certain portions of Consumers' rebuttal evidence. The Board also addressed Consumers' petition to supplement the record with respect to equity flotation costs, denying it on the ground sought by Consumers but directing the parties to submit supplemental evidence in the interest of fairness. Lastly, the Board established a procedural schedule under which Consumers would submit opening supplemental evidence regarding its traffic group, CSXT would submit reply supplemental evidence, and Consumers would submit rebuttal supplemental evidence. December 2016 Decision, slip op. at 24.

By decision served January 11, 2018 (January 2018 Decision), the Board found that Consumers does not have a feasible shipping alternative to CSXT for the transportation at issue

³ On March 24, 2015, CSXT filed a motion to dismiss Consumers' revenue adequacy claim, arguing that: (1) Consumers had provided no reasonable grounds to investigate the claim; (2) dismissal would simplify the dispute; and (3) the Board is considering revenue adequacy issues in Railroad Revenue Adequacy, Docket No. EP 722. The Board denied CSXT's motion in a decision served on June 11, 2015. Specifically, the Board found that: (1) Consumers had stated a claim under the revenue adequacy constraint, although the annual determinations suggest that CSXT is not revenue adequate; (2) while dismissal of this claim might simplify the dispute, that alone is not a compelling reason to preclude Consumers from advancing its claim; and (3) CSXT failed to present compelling arguments as to why the agency's exploration of revenue adequacy issues in Docket No. EP 722 should prevent Consumers from advancing a claim under the revenue adequacy constraint.

and that the challenged rate was shown to be unreasonably high under the SAC constraint. As a result, the Board prescribed maximum reasonable rates for future at-issue shipments and ordered CSXT to pay reparations for past, excessive charges. In sum, this relief totaled approximately \$50 million for Consumers (in current dollars). January 2018 Decision, slip op. at 284. The Board also found that Consumers did not show that CSXT is revenue adequate under the revenue adequacy constraint and that Consumers was not entitled to rate relief on this basis.⁴

On February 20, 2018, the Board received: (1) a joint petition for technical corrections; (2) a petition for technical corrections from Consumers; (3) a petition for reconsideration from Consumers; and (4) a petition for reconsideration from CSXT. The parties then responded to each other's petitions on March 12, 2018.

PRELIMINARY MATTERS

CSXT includes two verified statements with its petition for reconsideration, one that addresses the number of train crews required by CERR, and one that addresses bridge design. CSXT had moved to strike Consumers' rebuttal on these issues, but in the December 2016 Decision, the Board found that the rebuttal was permissible. Arguing that it did not have an opportunity to respond to the rebuttal, CSXT asserts that the verified statements should be considered "new evidence" under 49 C.F.R. § 1115.3(b). (CSXT Pet. 11, 20 n.26.) CSXT also states that it included the verified statement on bridge design not only as new evidence, but to show the Board's material error in accepting Consumers' rebuttal evidence. (Id. at 20 n.26.)

In its reply, Consumers argues that CSXT's two verified statements are not new evidence under 49 C.F.R. § 1115.3(b)(1) and therefore should be rejected. (Consumers Reply 1-3, Mar. 12, 2018.) Consumers asserts that CSXT's claim that it had no prior opportunity to respond to Consumers' rebuttal evidence contravenes the finding in the December 2016 Decision that Consumers' rebuttal on those issues was permissible. (Id. at 2-3.) Consumers also asserts that CSXT's petition for reconsideration, including the verified statements, exceeds the 20-page limit imposed by 49 C.F.R. § 1115.3(d). (Id. at 3 n.8.)⁵

The verified statements attached to CSXT's petition for reconsideration will be rejected, because they are not new evidence as contemplated by the Board's reconsideration standard. "[N]ew evidence must in fact be new; it is not new if the 'same substance' could have been brought before us previously." Tongue River R.R.—Construction & Operation—W. Alignment, FD 30186 (Sub-No. 3), slip op. at 13 (STB served June 15, 2011) (citing Friends of Sierra R.R. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989)). The information in the verified statements submitted

⁴ On March 14, 2018, the Board updated the January 2018 Decision to include a public version of the Market Dominance appendix (Appendix E).

⁵ CSXT filed a letter on March 19, 2018, asserting that the verified statements were submitted as "new evidence" under 49 C.F.R. § 1115.3(b)(1), and that the 20-page limit for petitions for reconsideration does not apply to exhibits. Consumers responded with a letter on March 20, 2018. In the interest of compiling a complete record, the Board will accept both letters.

by CSXT was “reasonably available . . . when the record was developed.” See Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 7 S.T.B. 803, 804 (2004).

To the extent that CSXT seeks to use the verified statement regarding bridge design to show material error in the January 2018 Decision, that argument also fails. The evidentiary record generally closes in SAC proceedings with rebuttal, and no right is conferred on the railroad to respond to proper rebuttal evidence. See Gen. Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, 5 S.T.B. 441, 445-46 (2001). Here, the Board ruled in its decision on CSXT’s motion to strike that Consumers’ rebuttal submissions were proper rebuttal responsive to CSXT’s criticisms on reply. December 2016 Decision, slip op at. 16-17. At that point, the record closed on that issue, barring a successful appeal of the December 2016 Decision, which CSXT did not seek. See 49 C.F.R. § 1115.3(a), (e); see also Middletown & N.J. R.R.—Lease & Operation Exemption—Norfolk S. Ry., FD 35412, slip op. at 3 (STB served May 2, 2012) (granting a motion to strike verified statements offered in reply to a petition for reconsideration because the basis for the petition was material error). Although a party might argue that it could improve the quality of the record by submitting further evidence each time its opponent submits something responsive, the evidentiary phase of each proceeding must come to an end sometime. See Bituminous Coal—Hiawatha, Utah to Moapa, Nev., NOR 37038, slip op. at 1 (ICC served Aug. 16, 1988), reconsideration denied, NOR 37038 (ICC served Dec. 7, 1988). In SAC cases, that “sometime” is upon proper rebuttal. See W. Tex. Utils. Co. v. Burlington N. R.R., NOR 41191, slip op. at 1 (ICC served Sept. 8, 1995).

For these reasons, the verified statements submitted with CSXT’s petition for reconsideration will be rejected.⁶

JOINT PETITION FOR TECHNICAL CORRECTIONS

In the joint petition for technical corrections, the parties identify four technical errors in the January 2018 Decision in the following areas: (1) vehicle expenses; (2) payroll outsourcing expenses; (3) mileage; and (4) future interest tax shield. The parties agree on the appropriate correction for each of the errors. The Board will apply each technical correction in the appropriate workpapers. In Appendix A, the Board updates all tables from the January 2018 Decision affected by the changes agreed to by the parties in the joint petition for technical corrections and all other changes adopted in this decision.

⁶ Because the Board is rejecting the verified statements on other grounds, the argument that CSXT exceeded the page limit for petitions for reconsideration is moot and will not be addressed here.

CONSUMERS' PETITION FOR TECHNICAL CORRECTIONS

As discussed below, the majority of the issues raised in Consumers' petition for technical corrections are more appropriately addressed under the standard for a petition for reconsideration, see infra at 9, and the Board will address them accordingly.⁷

Switch heaters and propane tanks. Consumers asks the Board to correct an error concerning switch heaters and propane tanks. Consumers notes that in its opening supplemental evidence, it corrected several errors where the quantities in its other track materials workpaper did not match quantities in its track materials spreadsheet. The January 2018 Decision did not reflect these corrections, and Consumers now asks the Board to make these corrections. (Consumers Pet. for Tech. Corrections 3.)

CSXT agrees that there is an error, and it states that it does not object to the Board's correcting the error if the Board also grants CSXT's request to correct an error involving crossing repaving costs. The Board routinely allows the correction of minor technical errors in SAC cases, and, here, CSXT concedes that the calculation error concerning switch heaters and propane tanks is a minor technical error. Accordingly, the Board will make the correction Consumers proposes.⁸

Cost of capital and updating indices. Consumers asks the Board to incorporate the 2016 cost of capital and railroad cost of equity into the discounted cash flow (DCF) model. (Consumers Pet. for Tech. Corrections 4.) Consumers argues that Board precedent requires the Board to use the most recently issued annual determination, which was served after the record closed but before the final decision in this case. (Id.); see also R.R. Cost of Capital—2016, EP 558 (Sub-No. 20) (STB served Aug. 7, 2017).

The Board will not incorporate the 2016 cost of capital and railroad cost of equity. The Board has previously explained that it would look for a "long-term shift" before updating a forecast that changed between the close of the record and service of the merits decision. See Sunbelt Chlor Alkali P'ship v. Norfolk S. Ry. (Sunbelt 2016), NOR 42130, slip op. at 24 (STB served June 30, 2016) (with Board Member Begeman dissenting), aff'd sub nom. Sunbelt Chlor Alkali P'ship v. STB, No. 16-15701 (11th Cir. Jan. 26, 2018). In the Sunbelt 2016 decision, referencing many of the prior decisions now cited by Consumers, the Board noted that the

⁷ Consumers raises an issue with the Board's treatment of rail transportation rates in its petition for technical corrections, and CSXT raises an issue with rail transportation rates in its petition for reconsideration. The Board addresses both issues below in the section on CSXT's petition for reconsideration.

⁸ Correcting this calculation error concerning switch heaters and propane tanks is a proper technical correction, in contrast to CSXT's request that the Board correct an error involving crossing repaving costs, which the Board is denying. For repaving costs, CSXT asks the Board to depart from agency precedent by adopting a position CSXT took in its workpapers that conflicts with the position it took in its narrative.

updating of indices and forecasts had received varying treatment in past Board decisions. Id. In reconciling the lines of precedent, the Board concluded that

[a]ttempting to use only the most recent data available, even data released after the close of the evidentiary record, can unreasonably and unnecessarily delay the issuance of a decision as the Board's staff works to integrate the new data into the SAC model. These efforts to incorporate ever more recent data must be balanced against the need for the Board to bring rate case proceedings to a conclusion.

Id. (citing BNSF Ry. v. STB, 453 F.3d 473, 482 (D.C. Cir. 2006)). The Board noted that its general practice had been to update forecasts only when more recent forecasts demonstrated “a markedly different trend than the earlier forecasts in the record.” Sunbelt 2016, NOR 42130, slip op. at 24 (citing Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113, slip op. at 22 (STB served Nov. 22, 2011), pet. for review denied sub nom. BNSF Ry. v. STB, 748 F.3d 1295 (D.C. Cir. 2014)). In Sunbelt 2016, the Board applied that approach, reversing its updates to several forecasts that were made in the merits decision. Id.

The Board believes that it is appropriate to update forecasts, including cost-of-capital forecasts, when they demonstrate a long-term shift from earlier forecasts in the record. Here, the forecasted cost-of-capital number used in the SAC test for 2016 was 10.79%, while the number subsequently calculated in Railroad Cost of Capital—2016 was 8.88%. Although there is a disparity between these numbers, no evidence has been provided to demonstrate that the disparity is not merely a “short-term, period-to-period fluctuation[] that do[es] not undermine our long-term projection[.]” See Sunbelt 2016, NOR 42130, slip op. at 25. Although the 2016 cost-of-capital figure of 8.88% is lower than the cost-of-capital figure of 9.61% adopted by the Board (and used in the SAC test) for 2015, there is no evidence in the record that this change is the result of any long-term shift or markedly different trend.⁹ Because no long-term shift of the cost of equity or cost of capital has been demonstrated, no updates will be made.¹⁰

⁹ Compare Duke Energy Corp. v. Norfolk S. Ry. Co., Docket No. NOR 42069, slip op. at 4 (STB served Oct. 20, 2004) (accepting an updated EIA forecast on reconsideration because the reasons for the discrepancies between the prior forecast and new forecast “present a new development of such significance that it cannot reasonably be disregarded”).

¹⁰ It may appear as if the Board, in Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway (Sunbelt 2014), NOR 42130 (STB served June 20, 2014), pet. for reconsideration granted in part and denied in part (STB served June 30, 2016) (with Board Member Begeman dissenting in both), aff'd sub nom. Sunbelt Chlor Alkali Partnership v. STB, No. 16-15701 (11th Cir. Jan. 26, 2018), updated the cost-of-capital figures after the close of the record. However, in that case, the Board was merely correcting evidence submitted by Sunbelt on rebuttal. On reply, the defendant railroad in that case, Norfolk Southern Railway Company (NSR), accepted Sunbelt's use of the Board-determined cost-of-capital figures for the available relevant years (2009, 2010, and 2011). NSR Reply III-G-1, Jan. 7, 2013, Sunbelt 2014, NOR 42130. Between the filing of NSR's reply and Sunbelt's rebuttal, the Association of American Railroads (AAR), as it does every year, submitted to the Board its calculations for the prior year's (2012) cost-of-capital figures. AAR Comment, Apr. 19, 2013, R.R. Cost of Capital—2012, EP 558 (Sub-No.

(continued . . .)

Consumers similarly asks the Board to update certain indices—including the rail cost adjustment factor, the rail cost recovery index, the producer price index, and the highway diesel fuel values—with values published after the close of the record. (Consumers Pet. for Tech. Corrections 6.) Consumers states that while it believes the Board should update the indices identified here, it is not seeking to update forecasts, which Consumers argues is a more complex issue. (Id. at n.6.)

While Consumers cites Sunbelt 2016, NOR 42130, slip op. at 24-25, in arguing that the indices should be updated, it again does not address the “long-term shift” standard the Board used in that decision to decide whether to update indices. In the absence of a long-term shift in the indices, the Board will not update the indices. To the extent that Consumers implies that Sunbelt 2016 does not govern the question of updating indices, the Board made no distinction between the treatment of updated indices and forecasts, noting that “indices and forecasts, by their very nature, will almost always fail to match exactly with prior estimates.” Id. at 25. As such, the indices addressed by Consumers will not be updated here.

Consumers asks that, if the Board believes Consumers’ arguments would be better addressed through the process of reconsideration (rather than as part of the technical correction review), the Board consider these arguments as part of Consumers’ petition for reconsideration. (Consumers Pet. for Tech. Corrections 7-8.) Consumers argues that the cost-of-capital figures and the indices “easily qualify as material to the outcome of the [January 2018 Decision], and the information and data in question constitute either new evidence or changed circumstances arising after the close of the evidentiary record in this case.” (Consumers Pet. for Tech. Corrections 8.) Consumers fails to explain this argument in any detail, particularly considering the objective of a demonstrated “long-term shift” for forecasts and indices described in Sunbelt 2016. As such, reconsideration on the issue of updating the cost-of-capital figures and indices will be denied.

Tax Law. In its petition for technical corrections, Consumers asserts that the Tax Cuts and Jobs Act (the 2017 Tax Act), Pub. L. 115-97, 131 Stat. 2054 (2017), which became effective in large part on January 1, 2018, made several changes to federal tax law that directly impact the Board’s DCF model as applied in this case, including the quarterly Investment SAC calculations, the calculation of the terminal or residual value of CERR, and the calculation of CERR

(. . . continued)

16). The Board made technical corrections to AAR’s calculations when it adopted the 2012 cost-of-capital figures. Compare R.R. Cost of Capital—2012, EP 558 (Sub-No. 16), slip op. at 9, 11 (STB served Aug. 30, 2013) (cost of equity at 13.40%) with AAR Comment 6, Apr. 19, 2013, R.R. Cost of Capital—2012, EP 558 (Sub-No. 16) (cost of equity at 13.33%). Subsequently, in Sunbelt 2014, the Board used the 2012 cost-of-capital proposed by Sunbelt on rebuttal, as adopted with technical corrections in Railroad Cost of Capital—2012. Accordingly, the circumstances in Sunbelt 2014 are distinguishable from Consumers’ request here, which is to use a new annual cost-of-capital figure that was never submitted on the record in this case.

replacement assets.¹¹ (Consumers Pet. for Tech. Corrections 5.) Consumers argues that the Board's DCF model should be updated to reflect the effects of the 2017 Tax Act. Consumers asserts that the January 2018 Decision did not make a determination on this issue, despite the fact that the provisions of the 2017 Tax Act were available to the Board prior to the January 2018 Decision, and therefore Consumers is seeking correction of the January 2018 Decision to include analysis of this issue. (Consumers Pet. for Tech. Corrections 7.) In the alternative, should the Board be persuaded that this issue is better addressed through reconsideration, Consumers requests that it be deemed part of and considered under Consumers' petition for reconsideration. (Id.)

In response, CSXT does not object to the Board altering the January 2018 Decision to incorporate the effects of the 2017 Tax Act, but argues that the Board ought to do so not as a technical correction, but rather through reconsideration based on changed circumstances under 49 C.F.R. § 1115.3(b)(1). (CSXT Reply 8, Mar. 12, 2018.) CSXT asserts that a major change to federal tax law made long after the close of the record and never addressed by the parties is not the type of computational or technical error appropriately addressed in a petition for technical correction. (Id. at 7-8.) Additionally, CSXT argues that it would be arbitrary to adjust the January 2018 Decision to reflect the change in federal tax law without also correcting the assumption that CERR could benefit from thousands of annual tank cars of crude oil traffic that no longer exist. (Id. at 8.) CSXT reiterates its argument from its petition for reconsideration that the January 2018 Decision erred by ignoring what CSXT calls substantial evidence in the record of a precipitous drop in crude oil traffic. (See id.; CSXT Pet. 1-2.)

The Board will modify the January 2018 Decision to account for the effect of the 2017 Tax Act on the amount of federal taxes owed by CERR. The Board agrees with CSXT that, under the circumstances of this case, this issue is best addressed through reconsideration due to changed circumstances. Indeed, no party disputes the fact that the 2017 Tax Act constitutes changed circumstances here. Accordingly, the Board will apply the updates to the DCF model proposed by Consumers. (See Consumers Pet. for Tech. Corrections, Ex. 1, Item #4.)

The Board is not persuaded by CSXT's argument that adjusting the January 2018 Decision to reflect the change in federal tax law requires adjusting the amount of crude oil traffic forecasted to be handled by CERR. CSXT fails to sufficiently explain why these distinct issues are required to have the same outcome. As discussed in detail below, the Board rejects CSXT's claim that the Board materially erred by including crude oil volumes in the SAC analysis.

¹¹ Consumers notes three pertinent effects of the 2017 Tax Act beginning in 2018: (1) reduction of the statutory corporate tax rate from 35% to 21%; (2) limits on net operating loss (NOL) carry-forwards to 80% of taxable income; and (3) elimination of NOL carry-backs. (Consumers Pet. for Tech. Corrections 5.)

PETITIONS FOR RECONSIDERATION

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. The Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding. Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 7 S.T.B. 803, 804 (2004).

The Board will address each of the parties' petitions for reconsideration in turn.

Consumers' Petition for Reconsideration (SAC)

Loaded miles. The January 2018 Decision determined that the Uniform Railroad Costing System (URCS) Phase III loaded miles input for the issue traffic should be calculated including the six miles of CSXT track between 22nd Street and 71st Street in Chicago, even though the issue traffic is typically moved by BNSF over that segment of track. January 2018 Decision, slip op. at 280-282. In its opening evidence, Consumers argued that the loaded miles "should be based on the actual number of miles that CSXT handles Consumers' loaded coal trains from the BNSF interchange to the Campbell Station." (Consumers Opening II-4.) CSXT responded that while BNSF operates over these six miles of CSXT track to carry loaded trains, in exchange, CSXT operates over three miles of BNSF track to carry empty trains bound for Cicero Yard. (CSXT Reply II-A-2, Mar. 7, 2016). The Board found that even though CSXT and BNSF have informally agreed, when possible, to interchange loaded trains at a different point (71st Street) than the one stated in CSXT's tariff (22nd Street) for operational reasons, the issue traffic and certain non-issue traffic move over the six miles of CSXT's facilities between 22nd Street and 71st Street. Accordingly, the Board determined that including the six-mile segment in the loaded miles input, consistent with the interchange point listed in the tariff, was not a prohibited movement-specific adjustment. Moreover, the Board determined that including this segment would ensure that variable costs were calculated consistently for both purposes of rate relief under the Maximum Markup Methodology (MMM) and revenue allocation under the Average Total Cost (ATC) methodology. January 2018 Decision, slip op. at 282.

In its reconsideration petition, Consumers argues that the Board materially erred in determining CSXT's variable costs for the issue traffic by including the six miles in the loaded movement. (Consumers Pet. 1, Feb. 20, 2018.) First, citing a 1989 URCS Phase III Movement Costing Program User's Manual, Consumers asserts that URCS specifies the actual miles that the railroad handles the train as the valid "loaded miles" input; therefore, it argues, the fact that the tariff identifies 22nd Street as the interchange point is irrelevant given that the actual, real-world interchange takes place at 71st Street. (*Id.* at 1 & n.6 (citing the URCS Phase III Movement Costing Program User's Manual, Oct. 1989 at 4).) CSXT responds that the Board recognized in the January 2018 Decision that Consumers' approach would artificially bias the URCS calculations by ignoring the six miles of CSXT's lines over which loaded issue movements are transported (albeit by BNSF), in addition to the empty trains CSXT crews transport in the opposite direction. (CSXT Reply 1, Mar. 12, 2018.)

Second, Consumers argues that the supposed inconsistency between Consumers' variable cost evidence and its application of ATC to non-issue traffic in Chicago mischaracterizes the evidence.¹² (Consumers Pet. 2, Feb. 20, 2018.) Specifically, Consumers asserts that it did not allocate revenue to non-issue movements that it knew would enter CERR at 71st Street as if they had come on-SARR at 22nd Street. (*Id.*) Consumers indicates that it used a simplifying device, however, to compensate for inconsistent information and data gaps in CSXT's discovery production. Consumers alleges that CSXT did not object to Consumers' simplifying convention, which assumed the traffic entered CERR at 22nd Street, then assigned all investment costs and operating expenses consistent with that assumption to CERR, and calculated revenue divisions under ATC accordingly. (*Id.*) CSXT responds that the Board's inclusion of the 22nd Street to 71st Street portion of CSXT's network in the issue traffic distance calculations was consistent with how that segment was treated in Consumers' ATC calculations and that Consumers' petition fails to acknowledge the Board's reasoning in the January 2018 Decision. (CSXT Reply 1, Mar. 12, 2018.)

Neither argument presented by Consumers demonstrates material error. With respect to the inclusion of the six miles for purposes of URCS calculations, the URCS Phase III Movement Costing Program User's Manual that was cited by Consumers does not answer the question of what the miles should be when the tariff and the actual miles differ. The tariff between CSXT and BNSF designating 22nd Street as the interchange point reflects the legally intended, normal interchange point governing the movement of the issue traffic, even if that interchange point deviates informally based on congestion. But more importantly, Consumers does not contest the Board's finding that "the issue traffic and certain non-issue traffic move over six miles of CSXT's facilities between 22nd Street and 71st Street." January 2018 Decision, slip op. at 282. Under these circumstances, as the Board found, both the costs and the revenues for those movements should be allocated to 22nd Street in performing either the MMM or ATC calculations.

Consumers also asserts that its simplifying convention for loaded miles assumed that the traffic entered CERR at 22nd Street, then assigned all investment costs and operating expenses consistent with that assumption to CERR, and that revenue divisions under ATC were calculated accordingly. (Consumers Pet. 2, Feb. 20, 2018.) In other words, Consumers concedes that it included the six-mile segment for purposes of its ATC calculation, which demonstrates the inconsistency in Consumers' position: it would have the Board exclude the six miles at issue for purposes of URCS calculations in MMM but include them for ATC calculations. Consumers cannot have it both ways. "Whether determining variable costs for ATC purposes or for MMM, the traffic (whether issue or non-issue) should be handled consistently in the URCS Phase III program when determining costs for the movements and allocating revenues." January 2018 Decision, slip op. at 282 (noting that the Board's decision to treat the traffic consistently means

¹² As noted in the January 2018 Decision, CSXT argued that Consumers excluded these six miles in its calculations of CSXT variable costs for Consumers' shipments under MMM, but included those same miles when allocating revenues for its SARR. January 2018 Decision, slip op. at 281.

that Consumers' argument that CSXT would be overcompensated in the ATC calculation for non-issue traffic is without merit). Accordingly, the Board did not err by including in the loaded-movement miles the six miles of CSXT track between 22nd Street and 71st Street.

Exclusion of K300 Series coke trains. On reply and supplemental reply, CSXT challenged Consumers' inclusion of coke trains in the CERR traffic group selection, arguing that in the real world, these 114 base-year coke trains (K300 Series coke trains) do not move over any lines replicated by CERR. (See CSXT Reply III-A-11, Mar. 7, 2016; CSXT Reply III-A-2, Mar. 6, 2017; CSXT Reply WP "CERR Car Traffic Forecast_Supp_Reply.xlsx," Mar. 6, 2017.) According to CSXT, Consumers erroneously assumed that the K300 Series coke trains (i.e., trains K310-313 and K370-371) traversed the Barr Subdivision (which is replicated on the CERR system) when traveling to and from East Chicago, Ind., when in fact, the train sheet data produced in discovery showed that the trains did not move on the line replicated by CERR beyond the Curtis interchange tracks. (CSXT Reply III-A-11, Mar. 7, 2016.) Consumers in response argued that it had relied on defective data concerning real-world CSXT train routing that CSXT itself had provided, which produced a disconnect between the destinations and the intermediate stations in CSXT's train event data that led Consumers to equate the designations "CHICBO" or milepost "DD 2" to Barr Yard (located on the Barr Subdivision and thus on CERR). (Consumers Rebuttal III-A-19 to III-A-20, III-A-24 to III-A-25, May 20, 2016.) Consumers further argued that additional evidence demonstrated that CSXT's data was unreliable, including records of CSXT trackage rights payments to NSR, waybill data for the coke trains, and CSXT's contracts. (Id. at III-A-27 to III-A-33.)

In its January 2018 Decision, the Board found that Consumers' arguments were misplaced and that, in fact, Consumers had misinterpreted CSXT's discovery data. In particular, the Board found that neither milepost DD 2 nor designation CHICBO could be confirmed as Barr Yard from the workpapers relied upon by Consumers. January 2018 Decision, slip op. at 30. The Board found that this mistake, rather than errors in the evidence provided by CSXT on discovery, explained the discrepancy in the train event data that Consumers had presented. Id.

Consumers' incorrect assumption, the Board found, undercut the other evidence Consumers cited in support of its claim. Id. at 31. For example, the Board concluded that it would have been unlikely for traffic shown in the parties' traffic and revenue workpapers and CSXT's contract governing the K300 Series trains as originating in Bessemer, Pa., to have moved on the line replicated by CERR beyond the Curtis interchange tracks, through Barr Yard, to their destinations of Indiana Harbor, Ind., Gary, Ind., or Fairfield, Ala. Id. at 32. The Board noted that Gary is located between Bessemer and the CSXT interchange at Curtis, Ind., and to pass through Barr Yard, a train would have to travel past the destination of Gary, only to then be routed back; Fairfield is located far to the south; and Indiana Harbor is located on the CSXT Lake Subdivision that is not reasonably accessible for a movement from Bessemer. Id. Additionally, the Board noted that a diagram Consumers itself included on rebuttal, (see Consumers Rebuttal III-A-18, May 20, 2016), demonstrated that the coke traffic headed to Indiana Harbor would not travel on CERR. January 2018 Decision, slip op. at 32. Thus, the Board reasoned that CSXT's position that the trains would not travel on CERR was feasible, supported, and realistic. Id. at 33.

According to Consumers, the Board committed material error by excluding the K300 Series coke trains from the traffic group because reliable evidence in the record and data produced by CSXT confirmed that the trains moved past railroad mileposts that are located in Barr Yard near Chicago, or over NSR lines via trackage rights, both of which are on the CERR route. (Consumers Pet. ii, 3, Feb. 20, 2018.) Consumers argues that its rebuttal evidence demonstrated that: (1) the trains belonged in CERR's traffic group based on train sheet data identifying terminal points CHICBO and DD 2, which are in Barr Yard; (2) intermediate station data provided by CSXT was unreliable as it was based on train event records with no valid timestamps; and (3) records of trackage rights payments from CSXT to NSR confirmed that coke trains, which CSXT claimed moved over the Lake Subdivision, actually moved over the NSR lines that are part of CERR. (*Id.* at 3.)

Consumers asserts that the Board erroneously excluded the K300 Series coke trains after wrongly concluding that: (1) CHICBO and DD 2 were not points in Barr Yard; (2) the NSR trackage rights payment data did not refer to Barr Yard, and (3) certain contracts showed ultimate origins and destinations that were inconsistent with travel through Barr Yard. (*Id.* at 3-4.) Referring to various workpapers, Consumers maintains that record evidence confirms that both CHICBO and DD 2 are points within Barr Yard and that the Board misunderstood Consumers' argument that trackage rights payments from CSXT to NSR demonstrate that K300 Series traffic moves over the CERR portion of the Barr Subdivision. (*Id.* at 3-4, 6.) According to Consumers, its analysis showed that CSXT paid trackage rights fees to NSR for K300 Series trains to move over the NSR line "between milepost CD 501.0 and milepost CD 509-7." (*Id.* at 6-7.) Consumers also asserts that, because "CSXT paid [NSR] to move the trains over the [NSR] track (as the CERR would do), it is not 'feasible, supported and realistic' that CSXT would be transporting the same trains over the Lake Subdivision." (*Id.* at 7.) Consumers argues that the "selected grouping of contracts" referenced in the Board's decision also demonstrate that it is "probable and likely" that this traffic moved over the NSR track, as indicated by trackage rights payments and customer contracts, and thus properly would be included in the CERR traffic group. (*Id.*)

In reply, CSXT contends that the Board's determination was supported by the record evidence, including train event data documenting the intermediate points along the K300 Series trains' route of movement, waybill data identifying the actual destination as Indiana Harbor (which, CSXT asserts, is located on CSXT's Lake Subdivision, not the Barr Subdivision replicated by CERR), and CSXT contracts governing the petroleum coke traffic. (CSXT Reply 2-3, Mar. 12, 2018.)

CSXT contends that the train event data confirms the Board's conclusion that "[i]t does not seem probable or likely" that the K300 Series trains would traverse the Barr Subdivision to reach Indiana Harbor. (*Id.* at 3 (quoting January 2018 Decision, slip op. at 32.) According to CSXT, virtually all of the approximately 3,500 non-coke CERR base year westbound trains report passing at least one intermediate station west of Pine Junction on the Barr Subdivision, while not a single base year K300 Series train reports passing any intermediate station along the same route. (CSXT Reply 4, Mar. 12, 2018.) Instead, CSXT states that, upon reaching Pine Junction, every K300 Series train reports further movement via stations located along CSXT's

Lake Subdivision, which serves Indiana Harbor. (Id.) Accordingly, CSXT argues that there is no material error because this data, which can be found in Consumers’ own opening workpapers, flatly contradicts Consumers’ claim that the K300 Series trains traverse the Barr Subdivision. (Id.)

Consumers has failed to show that the Board materially erred in the January 2018 Decision by excluding the K300 Series trains from CERR’s traffic group. First, Consumers does not show that the Board erred in its determination that “neither milepost DD 2 nor designation CHICBO can be confirmed as Barr Yard from the workpapers relied upon by Consumers.” January 2018 Decision, slip op. at 30. Consumers alludes to additional evidence, which it states was derived from data provided by CSXT during discovery,¹³ to show that milepost DD 2 is located at Barr Yard. However, even assuming that it would be proper to consider this newly developed evidence at this late stage, the Board cannot verify the accuracy of Consumers’ claims because Consumers has not included such discovery documentation in its submission.

Second, Consumers cites to evidence already in the record that it claims confirms that both CHICBO and DD 2 are points within Barr Yard. However, Consumers fails to demonstrate that this information does indeed confirm the location of CHICBO and milepost DD 2. For example, Consumers cites to two workpapers that associate conflicting Freight Station Accounting Codes (FSACs)¹⁴ with CHICBO and milepost DD 2.¹⁵ Consumers also associates one of those conflicting FSACs (FSAC 712040600) with Standard Point Location Code (SPLC)¹⁶ 380000, a generic SPLC used by all railroads for the Chicago area. (See Consumers Opening WP “CERR Route Miles Opening.xlsx,” tab “CERR Miles,” cells M78 & P78.) However, Consumers’ evidence also shows that Barr Yard’s FSAC is 91073, and its geographically specific SPLC is 380681. (See Consumers Opening WP “CERR Route Miles Opening.xlsx,” tab “CERR Miles,” cells M82 & P82.) It is unclear why, if CHICBO and milepost DD 2 are in Barr Yard, they are not associated with the FSAC and SPLC associated with Barr Yard in Consumers’ own evidence. With such conflicting evidence in the record, the location of CHICBO and milepost DD 2 is still unclear. As such, Consumers’ assertion that CHICBO and DD 2 are associated with the Barr Subdivision is not supported.

¹³ According to Consumers, the source of this additional evidence is “data.gdb” produced on May 1, 2015.

¹⁴ A FSAC is a unique railroad industry location code.

¹⁵ Compare Consumers Opening WP “CERR Route Miles Opening.xlsx,” tab “CERR Miles,” cell M78 (associating CHICBO and milepost DD 2 with FSAC 712040600) with Consumers Opening WP “Train_Profiles.acc database,” Table FE6DAP (associating CHICBO and milepost DD 2 with FSAC 064000005).

¹⁶ The SPLC, assigned by the National Motor Freight Traffic Association, is designed to provide each point originating freight and each point receiving freight in North America with a unique code number to identify the point with its geographic location, using two digits to identify State, County, and City, and additional digits to identify Sub-Code.

Further, the Board disagrees with Consumers' assertion that the Board misunderstood Consumers' argument that CSXT trackage rights payments to NSR demonstrate that the K300 Series traffic moves over the CERR portion of the Barr Subdivision. As discussed in the January 2018 Decision, slip op. at 31, the 114 coke trains dropped from CSXT's traffic group selection were identified from CSXT's supplemental reply workpapers. (See also CSXT Reply WPs "CERR Car Traffic Forecast_Supp_Reply_Alt1.xlsx" & "CERR Car Traffic Forecast_Supp_Reply_Alt2.xlsx," Mar. 6, 2017.) The parties' traffic and revenue workpapers and CSXT's contract governing this traffic demonstrate that the K300 Series traffic originates in Bessemer and terminates in one of three destinations: Indiana Harbor, Ind., Gary, Ind., or Fairfield, Ala. As the Board previously found, the K300 Series trains do not in fact move over CERR west of Pine Junction, and it would be economically and operationally impractical for them to do so.¹⁷

Consumers also argues that its analysis shows that CSXT paid trackage rights fees to NSR for movement of the K300 Series trains between milepost CD 501.0 and milepost CD 509.7, an 8.7-mile segment of NSR's line that runs parallel to the Lake Subdivision. (See Consumers Rebuttal III-A-28 to III-A-29, May 20, 2016.) Consumers, however, fails to acknowledge that, in order for CERR to step into CSXT's shoes to serve the Indiana Harbor plant by utilizing CSXT's trackage rights (which are overhead trackage rights),¹⁸ CERR would need to either construct the Lake Subdivision, bridge to another segment constructed by CERR, or arrange transportation of the cars from Barr Yard to Indiana Harbor. None of these arrangements are reflected in Consumers' evidence. Moreover, Consumers' workpapers, for both revenue and operating cost calculations, do not route the K300 Series trains over the NSR trackage segment. Consumers' operating expenses and revenue divisions only reflect the K300 Series trains moving to Barr Yard and do not account for the K300 Series trains moving over mileposts CD 501.0 and CD 509.7. (See Consumers Rebuttal WPs "Base Unit Merch Trains v6_Statistics_Rebuttal.xlsx," tabs "2014 Full Base Year Unit Merch" and "Pivot-Cars by OnSarr OffSARR" & "Rebuttal_ConsumersJointFacCharges 2014.xlsx," Mar. 6, 2017; see also Consumers Supplemental WP "CERR Divisions - Supplemental.xlsx.") Thus, it would be inappropriate to include the K300 Series trains in Consumers' traffic group selection as the K300 Series coke trains were never included in Consumers' calculation for trackage rights payments.

Intermodal lift costs. Consumers argues that the Board materially erred in its calculation of lift fees for the 59th Street Intermodal Terminal,¹⁹ alleging that the workpaper calculations

¹⁷ Consumers' passing reference to the "selected grouping of contracts," Consumers Pet. 7, Feb. 20, 2018, fails to address the Board's findings with respect to these contracts. As the Board concluded regarding these contracts, "[b]ased on these origin-destination pairs, it is unlikely that trains would travel through Barr Yard." January 2018 Decision, slip op. at 32.

¹⁸ Based upon the agreement between CSXT and NSR, CSXT's trackage rights are limited to bridge traffic only. (See Consumers Opening WP "Contract NS552," Section 2, file "JFA Part 3 of 4 (CSX-CNSMR-HC29057 to 30332).pdf.")

¹⁹ The 59th Street Intermodal Terminal is an intermodal terminal owned by CSX Intermodal Terminals Inc. (CSXIT).

conflict with the Board's decision. Specifically, Consumers argues that the Board in its decision stated that it would include clerical support and utilities, consistent with its prior ruling in Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc. (Total Petrochemicals 2016), NOR 42121, slip op. at 128-129 (STB served Sept. 14, 2016) (with Board Member Begeman dissenting in part), but that the Board's workpapers included all terminal costs proposed by CSXT. According to Consumers, this resulted in the acceptance of 100% of the costs proposed by CSXT despite the Board's statement that it was accepting Consumers' lift fees with adjustments. (Consumers Pet. 7-8, Feb. 20, 2018.) Consumers also cites to CSXIT's published lift charge as support for its claim that the lift cost used by the Board is too high. (Id. at 8).

Consumers' argument is without merit. In the January 2018 Decision, the Board, citing Total Petrochemicals 2016, found that Consumers' calculation of lift costs "exclude[d] several operating expenses, including clerical support and utilities, that the Board has recognized as properly included to support intermodal operations." January 2018 Decision, slip op. at 71. Contrary to Consumers' interpretation, however, the Board's finding does not mean that intermodal operating expenses must be *limited* to those in Total Petrochemicals 2016. Indeed, the Board specifically indicated that it was modifying Consumers' lift fees to include the additional operating expenses excluded by Consumers in its calculation of costs associated with its use of the 59th Street Intermodal Terminal, as identified in CSXT's reply at Table III-A-3 (see CSXT Reply III-A-45, Mar. 7, 2016).²⁰ In addition, Consumers' reference to CSXIT's published lift charges is untimely, as it does not represent new evidence within the meaning of 49 C.F.R. § 1115.3(b)(1). See Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 7 S.T.B. 803, 804 (2004). Finally, Consumers did not provide any substantive arguments as to why the Board's inclusion of all of the various terminal costs proposed by CSXT was erroneous. The Board therefore finds no material error.

Bridges. Consumers also challenges the Board's findings in the January 2018 Decision concerning the bridges needed for the CERR system and Belt Railway Company (BRC) track. (Consumers Pet. 8, Feb. 20, 2018.) As discussed below, in its 2016 reply, CSXT challenged Consumers' bridge designs for several reasons. Based on CSXT's claims, the Board in its decision rejected 13 bridges where Consumers would have required the placement of additional piers in the roadway beyond those used for existing bridges. January 2018 Decision, slip op. at 225. Ten bridges were rejected where Consumers' proposed design was based on insufficient length over a roadway.²¹ Additionally, the Board in its decision rejected one of Consumers'

²⁰ On reply, CSXT had proposed to eliminate all costs and revenues associated with terminating and originating intermodal traffic at the 59th Street Intermodal Terminal, based on its claim that Consumers' lift cost was flawed. The Board found this approach to be unsupported. See January 2018 Decision, slip op. at 71.

²¹ See January 2018 Decision, slip op at 227, Table C-7, Columns 3 & 4; STB WP "Bridge Costs_Supp_Reply_Alt1_Alt2_STB.xlsx," Tab "Route Bridges," Columns L, M, N, AI & AJ and Tab "Criteria Summary & Count." Consumers states in its petition that the Board's workpaper shows that it rejected 24 of Consumers' bridge designs for reasons involving "Slopes & piers reduce horizontal clearance," not the 13 stated in the narrative of the decision. The

(continued . . .)

bridge designs due to the placement of an additional pier in the water. January 2018 Decision, slip op. at 224.

On reconsideration, Consumers argues that the Board did not consider the evidence it provided on rebuttal. Consumers notes that it (1) introduced a Chicago bridge survey showing that having piers in traffic medians and/or sidewalks would not be atypical, (2) submitted a document titled “Typical Chicago Street.pdf” illustrating how the CERR bridge piers could be placed within roadways safely and without obstructing traffic, and (3) provided aerial maps of key, sample bridges. Based on this evidence, Consumers claims its bridge designs are appropriate. To illustrate the validity of its designs, Consumers specifically points to two bridges, DC 24.97 and DC 27.45, that were rejected by the Board, but that Consumers claims were supported by evidence in the record. Consumers also argues that “CSXT’s Reply did not include any evidence specific to the placement of piers” for these bridges. (Consumers Pet. 8-9, Feb. 20, 2018.)

Consumers has not shown that the Board committed material error. As noted by CSXT, Consumers had the responsibility on rebuttal to show that its designs for the challenged bridges would not place the new piers in a way that would obstruct vehicular or pedestrian traffic over roadways and sidewalks. Consumers did not meet this burden. Rather than make a showing regarding these specific locations, Consumers only demonstrated that, as a general matter, piers can sometimes be placed in roadways—an issue not in dispute. But Consumers did not provide any evidence demonstrating that the placement beyond what currently exists would not hinder pedestrians or vehicles for these specific bridges.

As for the two examples in which Consumers claims that the Board erred in rejecting its designs, Consumers’ arguments are not persuasive. Consumers argues that CSXT provided no “specific evidence as to the placement of piers” for these two bridges. (Consumers Pet. 9, Feb. 20, 2018.) However, CSXT clearly argued in its reply²² that Consumers’ design for certain bridges could require additional spans, which CSXT argued would require the placement of additional piers. Based on this narrative, CSXT’s workpaper,²³ and the Google Earth file

(. . . continued)

24 designs rejected for reasons involving “Slopes & piers reduce horizontal clearance” was the total of the 14 designs rejected for issues involving the additional piers (including the bridge at milepost DC 13.23 (Ashland Avenue) that CSXT broke into two separate designs), plus the 10 rejected for insufficient span lengths. (STB WP “Bridge_Costs_Supp_Reply_Alt1_Alt2_STB.xlsx,” Tab “Route Bridges,” Columns L, M, N, AI & AJ and Tab “Criteria Summary & Count.”) To clarify, the Board is providing a new table listing the instances where the agency rejected Consumers’ bridge designs. See Appendix B. As noted below, the Board did not reject any of Consumers’ bridge designs for issues involving slopes. The Board further notes that the 24 bridge designs does not include the bridge at Clark Road and that bridge should not be listed in Table C-7.

²² CSXT Reply III-F-95 to III-F-98, Mar. 7, 2016.

submitted by Consumers, there was a sufficient basis for the Board to reject Consumers' design for those bridges.

With respect to the first example, DC 24.97, Consumers argues that it provided an aerial map that has an overlay of the proposed bridge and asserted that there is a grassy median that could easily accommodate the additional piers. (Consumers Pet. 9, Feb. 20, 2018.) However, Consumers' assertion does not address the Board's rationale for rejecting Consumers' proposed bridge design at this location, namely, that the Type 3 spans used in Consumers' proposed bridge were "not shown to be able to span [the] roadway." (See STB WP "Bridge Costs_Supp_Reply_Alt1_Alt2_STB.xlsx," Tab "Route Bridges," Cell N55, & Tab "Criteria Summary & Count".) In particular, the bridge at DC 24.97 appears to cross a four-lane roadway. Consumers states that Type 3 bridges, which can span up to 50 feet, can span "upwards of four lanes of traffic." (Consumers Pet. 9-10, Feb. 20, 2018) (citing workpaper indicating that two lanes of traffic require a clearance of 24 feet). However, the bridge at DC 24.97 is not perpendicular to the roadway but rather crosses at an angle. (See Consumers Rebuttal WP "Layout DC24.97.pdf," May 20, 2016.) Consumers did not show that a 50-foot Type 3 span could accommodate a four-lane roadway at that angle. The fact that Consumers shows that there is space for an additional pier does not allay this concern.

With respect to DC 27.45, Consumers claims that the Board incorrectly measured the bridge length and that additional piers could exist with the roadway given that the real bridge has piers in the roadway between the lanes. (Consumers Pet. 9, Feb. 20, 2018.) Consumers' argument is not persuasive. Consumers proposed seven piers for a section of that bridge in which there are currently only five. Consumers attempted to demonstrate that this would be feasible by pointing to an aerial view of the bridge with markings indicating its proposed pier placement. (See Consumers Rebuttal WP "Layout DC27.45.pdf," May 20, 2016). But it is not clear from the aerial view that more piers could be placed without interfering with vehicle lanes or the sidewalk. In its petition for reconsideration, Consumers also includes a photograph that it claims demonstrates that the piers coexist with the roadways. (Consumers Pet. 10, Feb. 20, 2018.) Even if the Board were to consider the untimely photograph of the bridge, that photo would not be any more persuasive. Based on views of the same bridge from different angles in Consumers' Google Earth file (see Consumers Opening WP "Barr Blue Island and Kenton Subs Photo Locations.kml."), it appears that the additional piers proposed by Consumers would indeed obstruct traffic. As discussed above, the mere fact that piers can sometimes be placed within roadways and sidewalks without obstructing traffic does not establish that Consumers' proposed placement of two additional piers in the roadway under this bridge would not obstruct traffic. Given its failure to make such a showing based on record evidence, Consumers has failed to demonstrate that the Board erred.

Equity flotation costs. Consumers challenges two of the Board's findings that relate to equity flotation costs. First, Consumers argues that the Board committed material error by

(... continued)

²³ CSXT Reply WP "Bridge Costs_Reply.xlsx," Tab "Route Bridges," Column P, Cells P53 and P57, Mar. 7, 2016.

rejecting Consumers’ proposal to use a private placement to derive its proposed equity flotation fee. (Consumers Pet. 11, Feb. 20, 2018.) Consumers asserts that it supported its flotation fee with witness testimony and, because CSXT did not challenge the feasibility or direct cost of a private placement, the Board erred in finding this testimony to be unsupported. (*Id.*) CSXT argues that the Board properly rejected Consumers’ evidence and that Consumers has failed to address the Board’s reasons for doing so. (CSXT Reply 7-8, Mar. 12, 2018.)

Contrary to Consumers’ claim, CSXT did object to Consumers’ private placement-based equity flotation fee on the ground that it “significantly understates the CERR’s total cost to raise the needed capital.” (CSXT Reply III-G-6 to III-G-7, Mar. 6, 2017).²⁴ More importantly, Consumers’ petition for reconsideration ignores the fact that the Board did consider Consumers’ private placement evidence and found that it did not support Consumers’ position. As the Board explained in the January 2018 Decision, slip op. at 268, although Consumers attempted to support its proffered 0.95% fee by comparison to the Lehman Formula, it did not establish that the Lehman Formula is currently in use and in fact the textbook cited by Consumers’ witness states that it is now largely ignored by the investment community. The Board also found Consumers’ fee unsupported because it offered no transaction costs for real-world private placement or mergers and acquisitions (M&A) to support its 0.95% figure. *Id.* Given that its petition for reconsideration fails to address either point, Consumers has not demonstrated material error.

Second, Consumers challenges the Board’s adoption of a 5% flotation cost derived from CSXT’s initial public offering (IPO) evidence, arguing that it was material error and that new evidence supports Consumers’ cost estimate. Consumers argues that the use of only IPOs of comparable size to CERR in adopting a 5% flotation cost constituted material error because it amounted to an impermissible barrier to entry. (Consumers Pet. 12, Feb. 20, 2018.) Consumers asserts that if an IPO-based fee is required, the Board must use the 2.1% flotation cost accepted in Sunbelt 2016, NOR 42130, slip op. at 31-32.

As an initial matter, Consumers’ argument that the Board must adopt the 2.1% flotation cost from Sunbelt 2016 is raised for the first time in its petition for reconsideration and is therefore untimely. Moreover, Consumers is incorrect that the SAC principle against impermissible barriers to entry allows it to use the equity flotation cost from Sunbelt 2016 as the “lowest feasible cost.” As the Board indicated in the January 2018 Decision, slip op. 269 n.205, Sunbelt 2016 did not establish a ceiling (or a floor) for equity flotation fees. Consumers is not entitled to have the 2.1% fee applied in this case simply because it was adopted by the Board in another case based on a different record, particularly when the SARR in that case is not of comparable size to CERR and the Board specifically limited its findings in Sunbelt 2016 to the record built in that case. In determining what is the “lowest feasible cost” that the SARR would incur, the Board must look at the evidence for that particular case. Here, for instance,

²⁴ Even if CSXT had not objected, it would have still have been permissible for the Board to reject Consumers’ private placement evidence on its own accord. See Pub. Serv. Co. of Colo. v. Burlington N. & Santa Fe Ry., NOR 42057, slip op. at 4 (STB served Jan. 19, 2005) (holding that the agency is not a prisoner to the parties’ submissions).

Consumers does not address the record evidence showing that, in general, the equity flotation fee percentage decreases as the size of the issuance increases. (See CSXT Reply III-G-4, Table III-G-2, Mar. 7, 2016.)

In support of its 0.95% figure, Consumers offers as new evidence a 2014 New York Times article, an M&A amendment to an SEC Form S-4 filed in 2016, and a Wall Street Journal article from January 15, 2018. (Consumers Pet. 11-13, Feb. 20, 2018.) Neither the New York Times article nor the M&A amendment are new evidence under the Board's reconsideration standard, as they were "reasonably available . . . when the record was developed." See Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 7 S.T.B. 803, 804 (2004). Accordingly, they will not be considered.

Consumers cites the Wall Street Journal article for the proposition that the 2.1% flotation cost adopted by the Board in Sunbelt 2016 overstates the lowest feasible IPO cost available for CERR. (Consumers' Pet. 12-13, Feb. 20, 2018.) The article reports that Spotify was planning for a direct listing IPO instead of using conventional underwriting.²⁵ Consumers asserts that a direct listing is similar to a private placement, as the buyers and sellers are brought together via investment bankers, avoiding other costs associated with conventional underwriting. (Consumers Pet. 13, Feb. 20, 2018.) Consumers calculates that the flotation fee for Spotify using a direct listing would be 0.9%. (Id.)

But, Spotify is not an appropriate proxy for CERR because Spotify was seeking a market for its existing investors through a direct listing on the NYSE, instead of seeking to raise capital, as CERR must do. (See id.; CSXT Reply 8, Mar. 12, 2018; January 2018 Decision, slip op. at 270 n.206.) Indeed, the articles cited by Consumers note that Spotify "doesn't need public money"²⁶ and that other companies may not follow Spotify's approach because "[n]ot every company can do without the cash"²⁷ Here, where CERR's goal is to raise funds, Consumers has not shown that the Spotify evidence establishes that Consumers' proffered equity flotation cost, using private placement, is a feasible and supported way to meet the needs of CERR.

For the above reasons, the Board will deny Consumers' petition for reconsideration as it relates to the SAC findings in the January 2018 Decision.

²⁵ Maureen Farrell, Spotify Disrupted the Music World, Now It's Doing the Same to Wall Street, Wall St. J. (Jan. 15, 2018), <https://www.wsj.com/articles/spotify-disrupted-the-music-world-now-its-doing-the-same-to-wall-street-1516024778>. On April 3, 2018, Spotify completed a direct listing of its ordinary shares on the New York Stock Exchange (NYSE). Spotify Tech. S.A., Prospectus Supp. No. 1 (Form 424B3) (May 3, 2018).

²⁶ Stephen Wilmot, Spotify, Like Google, Wants to Reinvent the Tech IPO, Wall St. J. (Dec. 5, 2017), <https://www.wsj.com/articles/spotify-like-google-wants-to-reinvent-the-tech-ipo1512476451>, cited at Consumers Pet. 13, Feb. 20, 2016.

²⁷ See Farrell, n.25.

Consumers' Petition for Reconsideration (Revenue Adequacy)

In the January 2018 Decision, the Board concluded that the evidence presented by Consumers had not shown CSXT to be revenue adequate under 49 U.S.C. § 10704. January 2018 Decision, slip op. at 4. After discussing the limitations of Consumers' evidence, the January 2018 Decision found that Consumers had not satisfactorily rebutted the railroad's prima facie case of revenue inadequacy, which was based on the Board's annual determinations for the past 29 years that CSXT's ROI has been consistently below the industry's cost of capital (COC). Id. at 21.

In its petition for reconsideration, Consumers asserts that the Board materially erred in rejecting its revenue adequacy claim. (Consumers Pet. 13-17, Feb. 20, 2018.) Consumers maintains that the Board incorrectly relied "solely" on the annual determinations in finding that CSXT was not revenue adequate and gave no "meaningful consideration" to Consumers' evidence. (Id. at 13-14.) Consumers also argues that the January 2018 Decision should have addressed the particular revenue adequacy criteria specified in § 10704(a)(2). (Id. at 15.) Consumers next asserts that the Board should not have relied solely on an industry-wide COC and should have considered instead the use of "CSXT's own COC figures." (Id. at 15-16.) Consumers further criticizes the January 2018 Decision for failing to accord at least some significance to the fact that CSXT's revenues have "for years" been sufficient to pay shareholder dividends and engage in stock buybacks while also funding capital expenditures. (Id. at 16-17.) Furthermore, Consumers faults the Board for not "describ[ing] any apparent deficiencies in Consumers' planned approach" when the Board denied CSXT's 2015 motion to dismiss the revenue adequacy claim. (Id. at 14-15 (citing generally Consumers Energy Co. v. CSX Transp., Inc. (June 2015 Decision), NOR 42142 (STB served June 15, 2015).) Finally, Consumers argues that the notion that CSXT lacks adequate revenues to support capital planning is inconsistent with its recent announcement that it will repurchase over \$5 billion worth of shares and increase its dividend over the coming years. (Id. at 17.)

CSXT responds that the Board acted properly in rejecting Consumers' revenue adequacy claim. (CSXT Reply 9-14, Mar. 12, 2018.) CSXT asserts that the Board did, in fact, give meaningful consideration to Consumers' evidence (notwithstanding Consumers' dissatisfaction with the outcome). (Id. at 10.) CSXT further argues that it was reasonable for the Board to rely on the annual revenue adequacy determinations given that the test constitutes a consistently followed legislative rule that was specifically "designed to address the § 10704 factors." (Id. at 10-11.) CSXT likewise states that the Board's decision to reject the alternative cost-of-equity figures was compelled by basic principles of administrative law. (Id. at 11.) CSXT also asserts that the Board properly rejected Consumers' argument regarding dividend payments and stock buybacks. (Id. at 11-13.) Finally, CSXT disputes the notion that the Board was obliged to provide Consumers an evidentiary roadmap when denying CSXT's motion to dismiss. (Id. at 13 ("Consumers cannot now blame the Board for not addressing the deficiencies of its foreshadowed case after having insisted [in its reply to the motion to dismiss that] it would be inappropriate to do so."))

The Board concludes that Consumers fails to identify any material error in the denial of Consumers' revenue adequacy claim. While the Board's annual revenue adequacy findings

played an important role in resolution of the issue, the Board did not merely look to those findings in considering Consumers' revenue adequacy claim. Rather, the January 2018 Decision gave significant consideration to Consumers' various challenges to the reliability of the annual determinations and Consumers' other probative evidence. January 2018 Decision, slip op. at 16-21.

The January 2018 Decision clearly considered Consumers' arguments that the Board's annual revenue adequacy determinations should not be considered due to alleged flaws in the COC methodology. Id. at 16-18. The January 2018 Decision also included responses to Consumers' arguments regarding CSXT's use of stock buybacks and various other issues. Id. at 18-19. The Board next considered Consumers' financial ratio evidence, concluding that some of the specific ratios proffered by Consumers were irrelevant to long-term railroad revenue adequacy while others were theoretically relevant but deficient as presented by Consumers in this case. Id. at 19-20. While Consumers may disagree with the Board's conclusion that Consumers' evidence did not satisfactorily rebut the railroad's prima facie showing of revenue inadequacy (based on the Board's consistent annual determinations), the Board considered and appropriately addressed Consumers' revenue adequacy evidence.

The January 2018 Decision also clearly addressed the revenue adequacy criteria specified in § 10704(a)(2), explaining that the agency's annual test incorporates the § 10704 statutory criteria and that CSXT was therefore permitted to rely on these annual determinations given that the agency's test was specifically designed to operationalize the statutory revenue adequacy factors. Id. at 21 nn.25 & 26. Consumers' claim that the Board did not adequately address the § 10704 factors is incorrect.

Furthermore, the January 2018 Decision did not err in rejecting Consumers' proposal to effectively disregard the Board-calculated industry-wide COC. As the January 2018 Decision explained, "use of an industry-wide COC for the annual revenue [adequacy] determinations has been the agency's consistent practice," due in part to the industry-wide figure's greater reliability. Id. at 18 (citing Methodology to be Employed in Determining the R.R. Indus.'s Cost of Capital, EP 664, slip op. at 17-18 (STB served Jan. 17, 2008)). And while the January 2018 Decision acknowledged that a rigorously developed internal COC might be considered probative of revenue adequacy under certain circumstances, the "internal" COC figures that Consumers submitted in this case were not so persuasive as to cause the Board to find CSXT revenue adequate, particularly in light of its prior annual determinations and its other findings in that decision. Id. (explaining that Consumers simply pointed to slides showing COC figures for CSXT and other Class I carriers from Wall Street analysts that had been included in presentations to CSXT's Board of Directors in four non-consecutive years). The Board's conclusion that such figures were not persuasive, especially in light of the other evidence in the case, was reasonable. Id.²⁸

²⁸ In its petition for reconsideration, Consumers asserts a new argument concerning the reliability of the "internal" COC values, suggesting for the first time that CSXT used these values to make certain management decisions. (Consumers Pet. 16, Feb. 20, 2018.) In addition to this argument being untimely, Consumers fails to support it with any record evidence.

The January 2018 Decision also correctly concluded that CSXT's use of earnings to pay dividends or repurchase stock is not necessarily indicative of revenue adequacy. January 2018 Decision, slip op. at 18. The Board explained that, as a general matter, even companies that are revenue inadequate or financially distressed will in the long run return money to their shareholders to minimize principal-agent problems and to attract capital. Id. at 18-19. Consumers challenges the Board's general premise that firms choose to return money to shareholders to remain competitive in the capital markets and maintain investor confidence, id. at 19, by pointing to a single firm (Berkshire Hathaway) that purportedly "has not paid a dividend in some 50 years and has engaged only sporadically in stock buybacks." (Consumers Pet. 17, Feb. 20, 2018.) But this single supposed counter-example does nothing to undermine the main point that even a revenue inadequate railroad may engage in stock buybacks, dividend payments, or other similar activities designed to boost investor confidence. January 2018 Decision, slip op. at 19. The fact that select firms may be able to maintain such investor confidence through other means (e.g., outperforming the market or intense growth) does not mean that a carrier is revenue adequate just because it decides to use the more traditional tools of stock buybacks and dividend payments.

Additionally, the Board was not obligated to identify "apparent deficiencies in Consumers' planned approach" when it denied CSXT's 2015 motion to dismiss the revenue adequacy claim. (Consumers Pet. 14-15, Feb. 20, 2018.) In keeping with the Board's motion to dismiss standard, the Board's decision denying CSXT's motion was based on whether the allegations in Consumers' complaint were legally sufficient to provide reasonable grounds to investigate, and it reiterated the agency's long-standing position that parties in rate cases may introduce evidence of revenue adequacy other than the agency's annual determinations. June 2015 Decision, slip op. at 2. The Board's decision also was consistent with Consumers' own arguments at the time: that Consumers had no obligation "to provide a preview of its evidence before discovery is concluded and its opening evidence is due," that it was not conceding that it would be appropriate "to argue or consider the weight of the evidence" at the motion to dismiss stage, and that it "reserve[d] the right to submit other information regarding CSXT's revenue adequacy in its actual evidentiary presentation." (Consumers Reply 2, 7 n.5, Apr. 13, 2015.) Even if Consumers pointed to certain pieces of information to support its overarching contention that CSXT is revenue adequate (id. at 2-3, 7-12), the Board was not required to substantively address the sufficiency of this information or begin weighing it prior to evidentiary submissions by both parties.

Finally, the Board's ruling on the revenue adequacy claim is not undercut by CSXT's "recent announcement that it will repurchase over \$5 billion worth of shares over the coming years, and increase its dividend on the same timeline." (Consumers Pet. 17, Feb. 20, 2018 (emphasis in original).) Even assuming arguendo that CSXT's February 2018 public announcement about possible future stock repurchases and dividends are relevant to revenue adequacy, statements made after the Board's decision are not relevant to the question of whether the Board materially erred based on the record before it. And, as noted in the January 2018 Decision, (1) any carrier's revenue adequacy status can change based on a variety of factors, (2) CSXT appears close to achieving revenue adequacy on an annual basis, and (3) CSXT recently made profound alterations to its operations and presumably its cost structure over the past year (a

period not covered by Consumers’ evidence) in an attempt to increase profitability. January 2018 Decision, slip op. at 21. Whether CSXT’s operational changes will move it more quickly to revenue adequacy in the future has no bearing on the correctness of the Board’s finding that CSXT was not revenue adequate based on the record at the time of the underlying decision. See id. at 21.

For the above reasons, the Board will deny Consumers’ petition for reconsideration as it relates to the revenue adequacy findings in the January 2018 Decision.

CSXT’s Petition for Reconsideration

Crude oil train forecasts. In its reply, CSXT replaced Consumers’ forecast for crude oil shipments with updated internal forecasts that, according to CSXT, “better reflect[ed] the new state of the world.” (CSXT Reply III-A-26, Mar. 7, 2016.) Specifically, CSXT asserted that the internal forecast provided to Consumers in discovery was prepared in early 2015 and was downloaded from CSXT’s system for production in April of 2015; at that time, the price for West Texas Intermediate crude—the bellwether of crude oil prices—was \$56.25 and on the rise. (Id. at III-A-25.) But, at the time of its March 2016 reply, CSXT pointed out that the price for oil had declined to \$32.74, which caused crude-by-rail shipments to plummet, with no forecast of a rebound in the foreseeable future. (Id.) Because of this “transformational change” in the marketplace, CSXT stated that it replaced the dated crude oil volume forecasts used by Consumers with updated internal forecasts. (CSXT Reply III-A-26, Mar. 7, 2016.) On rebuttal, Consumers continued to rely upon CSXT’s internal traffic forecast provided in discovery to project future CERR crude oil volumes, noting that the Board had historically rejected non-public forecasts introduced by railroads in their reply presentations. (Consumers Rebuttal III-A-72, III-A-74, May 20, 2016.)

In the Board’s January 2018 Decision, slip op. at 83, the Board noted its general practice of not updating forecasts after the close of the record unless more recent forecasts demonstrated a “markedly” different trend than the earlier forecasts in the record. The Board reasoned that, while the change in crude oil prices from \$56 a barrel to less than \$33 a barrel between opening and reply could potentially have supported an argument of a “markedly” different trend in crude oil prices if the change persisted, the record indicated, and CSXT acknowledged in its final brief, that crude oil had rebounded to \$50 a barrel, only slightly lower than that which was submitted in Consumers’ opening evidence. Thus, the Board found that Consumers’ reliance on CSXT’s own internal forecasts was a realistic approach and accepted Consumers’ evidence regarding crude oil volumes. Id.

In its petition for reconsideration, CSXT argues that the Board’s SAC analysis erroneously relies, in part, on assumed contributions from crude oil trains that “do not exist.” (CSXT Pet. 1.) According to CSXT, the Board erred in reasoning that there was no “markedly” different trend in crude oil *prices*, and thus that continued use of the outdated 2015 forecasts for crude oil *trains* was “realistic.” (Id. (emphasis in original) (citing January 2018 Decision, slip op. at 83.)) CSXT further argues that the assumption that crude oil prices directly drive crude oil volumes is contradicted by public studies of the relationship between pricing and volumes. (Id.) CSXT asserts that crude oil volumes have dropped since the first two quarters of 2015, when

CSXT was moving over 30,000 carloads of crude oil per quarter. (*Id.* at 2.) According to CSXT, in the third quarter of 2017, it moved a mere 206 carloads: over a 99% drop from early 2015. (*Id.*) In contrast, CSXT argues that the SAC analysis assumes 10% volume growth between 2015 and 2017. (*Id.*) CSXT argues that the precipitous drop in crude oil traffic is shown not just by “the mountain of news reports,” the revised CSXT business forecasts, and U.S. Energy Information Administration (EIA) public reports, but by the Annual and Quarterly Freight Commodity Statistics (QCS) reports submitted to the Board by CSXT. (*Id.* at 1-2.) Thus, CSXT argues that the Board had clear evidence that Consumers’ crude oil assumptions were unrealistic. (*Id.* at 2.) CSXT, therefore, argues that its updated forecasts were the best evidence of record and should have been used by the Board. (*Id.*)

In its reply, Consumers asserts that, in fact, it was CSXT that wanted the Board to correlate pricing with expected traffic trends when it pointed in its reply evidence to lower prices “with no forecast of a rebound” as a reason to lower the volume projections. (Consumers Reply 3-4, Mar. 12, 2018.) Consumers further argues that, after advocating that the Board adopt price trends as an indicator of future traffic volumes, CSXT cannot now claim that it was “material error” for the Board to agree with such an approach. (*Id.* at 4.) According to Consumers, recent and publicly available information vindicates the Board’s conclusion that higher domestic oil prices support CSXT’s own internal crude by-rail volume projections. (*Id.*) Consumers points out that data published by EIA and public reporting show that domestic crude oil production is rising to record levels, and that forecasted crude oil shipments by rail are trending higher in 2018, as compared to the previous year. (*Id.*) Accordingly, Consumers argues that the Board was right to reject CSXT’s argument that its own forecast should be abandoned because of a temporary shift in oil prices and near-term volumes, especially since CSXT proposes to adjust only one of the many traffic forecasts relied on in the January 2018 Decision. (*Id.*)

The Board did not materially err in its decision to use CSXT’s 2015 crude oil volume forecast in its SAC analysis. As discussed in the January 2018 Decision, slip op. at 83, in general, the Board updates forecasts only in situations where more recent forecasts demonstrate a “markedly” different trend than the earlier forecasts in the record. See Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113, slip op. at 22 (STB served Nov. 22, 2011), pet. denied sub nom. Ariz. Elec. Power Coop. v. STB, 748 F.3d 1295 (D.C. Cir. 2014). In this instance, the Board correctly declined to update the forecast for crude oil shipments given that there had been no demonstrated long-term shift in crude oil volumes to justify updating the forecast. Despite CSXT’s argument that the Board erred in assuming that “crude oil prices directly drove crude oil volumes,” CSXT’s own reply evidence was based on the correlation of pricing with expected volumes.²⁹ (See CSXT Reply III-A-25, Mar. 7, 2016.) Thus, the Board did not err in finding Consumers’

²⁹ CSXT has waived any new argument that other factors besides price have influenced crude oil volumes, (CSXT Pet. 1 n.3 (e.g., “pipelines have come online”)). Under 49 C.F.R. § 1115.3(b), a petition for reconsideration may only be brought on the grounds of new evidence, changed circumstances or material error, not new argument that could have and should have been presented in the earlier stages of the proceeding. Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 7 S.T.B. 803, 804 (2004).

crude oil estimates were feasible and supported, especially given CSXT's concession, in its final brief, that the price of crude oil had almost rebounded to earlier levels.³⁰

Nor has CSXT demonstrated that its own internal forecasts, the EIA public reports, or its QCS reports submitted to the Board for 2016 and 2017 confirm that changes in crude oil volumes met the forecast standard articulated above. Rather, the types of significant changes that may warrant updating involve important long-term shifts in indices and forecasts, not short-term fluctuations that may not be sustained and do not undermine the Board's long-term projections. See Sunbelt 2016, NOR 42130, slip op. at 25. The Board, therefore, rejects CSXT's argument that the Board materially erred by including crude oil volumes in the SAC analysis.³¹

ATC density. In its petition for reconsideration, CSXT argues that it was material error for the Board to accept a "plain and undisputed density error" in Consumers' ATC calculations for a 0.35-mile segment of rail within Chicago, and that the error resulted in a disproportionate amount of revenue allocated to CERR. (CSXT Pet. 2-3.) On opening, Consumers had relied on a special density study CSXT provided to Consumers in discovery. On reply, CSXT noted an error caused by "a simplification in the routing algorithm used by CSXT" in the special study relied on by Consumers and chose to correct the density error by using actual train movements over the segment rather than adjusting the routing algorithm. (CSXT Reply III-A-51 to III-A-52, Mar. 7, 2016.) In the January 2018 Decision, slip op. at 89, the Board adopted Consumers' density figures.

CSXT states that there is no way to reconcile the Board's commitment to correcting technical errors with the failure to use the correct density figure in this instance. (CSXT Pet. 3.) CSXT also argues that the Board's decision was a departure from agency precedent, which, according to CSXT, permits the correction of information provided in discovery if those corrections are based on publicly available information or other evidence presented on the record. (*Id.* at 4.) CSXT states that neither Consumers nor the Board's decision contested that the density in the special study contains an error. (*Id.* at 2, 3.) CSXT further argues that the Board mischaracterized the representations CSXT made to Consumers in discovery and that it never claimed that the special study was the "best information available," and that its corrective evidence (using actual train movement data) was "far more reliable." (*Id.* at 4-5.) Therefore, CSXT argues that the Board should not have accepted Consumers' evidence based on the special study, and that it is fundamentally unfair and arbitrary to use information that is incorrect. (*Id.* at 3-5.)

³⁰ The Board notes that the price of crude oil has risen above \$65 per barrel since the time of CSXT's reply evidence. U.S. Energy Information Administration, Cushing, OK WTI Spot Price FOB, Daily, <https://www.eia.gov/opendata/qb.php?sdid=PET.RWTC.D> (last visited Aug. 2, 2018).

³¹ While the Board finds that it did not err in its inclusion of crude oil volumes in the SAC analysis, CSXT has the option of filing a petition to reopen alleging changed circumstances and/or new evidence should it wish to argue, in the future, that there has been a demonstrable significant, long-term shift in crude oil volumes.

Consumers replies that the Board reasonably relied on the special study in issuing the underlying decision. (Consumers Reply 4, Mar. 12, 2018.) Consumers argues that, despite CSXT’s attempt to argue otherwise on reconsideration, CSXT represented to Consumers in discovery that train movement data can overstate the actual total tonnage due to incorrect assumptions and “that the special study was prepared in order to address ‘the limitations of the gross tonnage data.’” (*Id.* at 5 (citing CSXT Pet., Ex. 3).) Consumers further argues that unlike Public Service Co. of Colorado v. Burlington Northern & Santa Fe Railway, NOR 42057 (STB served Dec. 14, 2004), on which CSXT relies, there is no computational error at issue, only an attempt by CSXT to avoid using its own unfavorable study. (*Id.* at 5.)

The Board finds no material error. CSXT points to Public Service Co. of Colorado, NOR 42057, for the proposition that the Board is “committed to promptly correcting [] technical errors,” and to the Board’s January 2018 Decision for the proposition that the Board has itself corrected several errors in the parties’ evidence in this case. (CSXT Pet. 3 & n.6.) But in each of the situations cited, the technical corrections allowed by the Board were just that—simply fixing transposed numbers or correcting mathematical calculations. Even if CSXT is correct that this error is akin to a technical error, the appropriate solution would have been to correct the algorithm that caused the error in the special study. Rather, as the Board noted in the January 2018 Decision, slip op. at 90, CSXT did not attempt to fix the underlying algorithm but instead proposed to substitute different evidence altogether.

CSXT argues that it should be allowed to impeach the evidence it provided in discovery, citing Board precedent³² to argue that the Board may look at other information produced in discovery or publicly available information. (CSXT Pet. 4.) But even under the reading of Board precedent proposed by CSXT, the Board’s underlying holding is correct. Although CSXT takes issue with the Board’s description of CSXT’s representations of the two sets of data provided in discovery, (CSXT Pet. 4), CSXT attested that it produced the special study to correct for the “limitations” and “overstate[ment]s” of the actual train movement data that it sought to use.³³ It was not error for the Board to prohibit CSXT from impeaching its evidence in a manner that was inconsistent with its prior representation. CSXT argues that allowing for the correction is a matter of fairness but does not address the consequences of the Board accepting evidence that CSXT has itself stated is less accurate. Such a holding would be unfair to Consumers, which developed its case in chief on the evidence to which CSXT had attested.³⁴

³² Pub. Serv. Co. of Colo. v. Burlington N. & Santa Fe Ry., 7 S.T.B. 589, 673 (2004) and Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113, slip op. at 103 (STB served Nov. 22, 2011), pet. for review denied sub nom. BNSF Ry. v. STB, 748 F.3d 1295 (D.C. Cir. 2014).

³³ Specifically, CSXT, in a letter to Consumers regarding discovery matters, stated that the actual train movements “can produce a figure that overstates the actual total ton-miles,” and that “[r]ecognizing the limitations of the gross tonnage data, CSXT performed a special study of system-wide car event data to calculate total ton-miles by individual segment” (CSXT Pet., Ex. 3 at 1-2.)

³⁴ CSXT cites several examples where corrections were allowed by courts to studies and models as support for its argument that the Board’s decision to accept the special study findings on density is arbitrary and “fundamentally unfair.” (CSXT Pet. 5, nn.9-10.) However, none of
(continued . . .)

Revenue allocation for merchandise cross-over traffic. In the January 2018 Decision, slip op. at 37-39, the Board rejected CSXT’s request for an adjustment to the revenue for merchandise cross-over traffic allotted to CERR. CSXT argues that the Board erred in not allowing an adjustment, pointing to Board statements in Rate Regulation Reforms, Docket No. EP 715, as support for such an adjustment. (CSXT Pet. 6-8.) Consumers responds that CSXT’s proposed adjustment would result in the residual carrier receiving compensation for services that it did not perform. (Consumers Reply 6-7, Mar. 12, 2018.)

The Board declined to adopt the revenue distribution adjustment due to CSXT’s failure to support the appropriateness of an adjustment on the specific traffic at issue. As the Board explained, any such adjustment must “reflect the differences between how the incumbent and SARR handle the traffic.” January 2018 Decision, slip op. at 38; see also Rate Regulation Reforms, EP 715, slip op. at 7, 25-28 (STB served July 18, 2013). CSXT’s reply evidence did not refute Consumers’ valid argument that CSXT handles much of the issue traffic in the same or similar manner as CERR. January 2018 Decision, slip op. at 38-39. As the Board noted, “CSXT has not shown that CERR’s handling of the traffic is any different” than the incumbent. Id. at 39.³⁵

On reconsideration, CSXT argues that it “maintains a massive gathering network” to handle merchandise traffic outside of the portion of its network replicated by CERR in the SAC analysis and, therefore, that it is unfair for CERR to retain all of the revenues from the merchandise traffic in the traffic group. (CSXT Pet. 6-7.) While CSXT concedes that CERR handles merchandise traffic in the traffic group in the same manner as CSXT, CSXT argues that the Board’s decision not to permit CSXT’s ATC adjustment is an abandonment of the statements in Rate Regulation Reforms. (Id. at 6-8.) Contrary to CSXT’s arguments, nothing in the January 2018 Decision suggests that the Board, consistent with the concerns expressed in Rate Regulation Reforms, would not consider a properly calibrated adjustment supported by evidence demonstrating the differences between the incumbent and SARR’s handling of traffic. A requirement that a defendant carrier base its proposed ATC adjustment on such differences is firmly grounded in Rate Regulation Reforms, where the Board expressed revenue allocation concerns about traffic moving in new SARR-devised “hook-and-haul” service that differed from the incumbent carrier. Rate Regulation Reforms, EP 715, slip op. at 25-26 (describing situations where the SARR received traffic after it had been combined into a single train and then delivered the train back to the incumbent carrier for further handling); see also Sunbelt 2014, NOR 42130, slip op. at 200 (rejecting an ATC adjustment and noting that the defendant railroad had not demonstrated that hook-and-haul traffic had been widely used by the SARR). If the incumbent

(. . . continued)

the cited cases rely on data provided specifically by one party to an adversarial party, attested to as a special study to address deficiencies in underlying data, and relied upon by the adversarial party to build its case.

³⁵ In some instances, CERR interchanges with CSXT interchange partners and not the residual CSXT—meaning that those originating, terminating, and blocking costs are not being incurred by the residual CSXT either.

carrier itself handles the traffic in a similar “hook-and-haul” manner as a SARR, there would not have been the same basis for the concern.³⁶ Here CSXT’s approach is simply to apply its adjustment to all the merchandise traffic moved by CERR, not just to any new hook-and-haul service that was the basis of the Board’s concern in Rate Regulation Reforms. But CSXT failed to identify the subset of traffic that itself moves in hook-and-haul service, where CSXT in effect is providing the same service as CERR. As a result, CSXT’s proposed adjustment is necessarily overbroad and CSXT has not provided information that would allow the Board to determine the breadth of that overreach.

Revenue allocation for intermodal shipments to the 59th Street Intermodal Terminal. CSXT asserts that the Board committed material error in its allocation of revenues for shipments to the 59th Street Intermodal Terminal.³⁷ (CSXT Pet. 8-11.) CSXT claims that the Board failed to include all the costs CSXT incurs at the 59th Street Intermodal Terminal, yet simultaneously included those costs in the revenue allocation, thus distorting the SAC analysis. CSXT asks the Board to reconsider its determination and choose from a range of options that include: (1) adding what CSXT alleges is “the full complement of costs” incurred by it in originating or terminating traffic at this facility, (2) including only the costs for the interchange service CSXT alleges are “actually provided by CERR,” or (3) crafting an entirely new and unspecified approach. Below, the Board addresses each of the specific cost issues raised by CSXT.

Inspectors. CSXT argues that the Board should have accounted for nine additional inspectors needed at the terminal facility when it granted Consumers the full origination and termination credit for ATC revenue allocation. (*Id.* at 9.) CSXT had argued in its reply evidence, as part of its identification of additional costs to originate and terminate intermodal shipments, that additional inspectors were needed. (CSXT Reply III-A-45, Mar. 7, 2016.) CSXT’s reply evidence also noted that “CSXT (not CSXIT) inspected more than 1,600 intermodal trains at 59th Street, which Consumers selected as CERR traffic. Staffing a 2-person inspection crew 24/7 would require 9 people.” (CSXT Pet. 9 (quoting CSXT Reply III-C-65, Mar. 7, 2016).) In its reply to CSXT’s reconsideration petition, Consumers generally discusses revenue allocation issues regarding the 59th Street Terminal, but it does not address CSXT’s argument that the cost for additional inspectors should have been included in the costs

³⁶ In the AEPCO case, which CSXT cites, the Board was concerned with traffic that both originated and terminated on the incumbent railroad. Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113, slip op. at 2 (STB served June 27, 2011) (“Here, most of AEPCO’s traffic group moves in trainload service, but most of the variable costs calculated for that group are costed assuming it is moved in carload and multi-car service.”) Here, CSXT concedes that it hands off and accepts fully formed trains from the western carriers in the Chicago area. As such, just as with the SARR in this case, it is not providing either originating or terminating services for much of the traffic.

³⁷ CSXT owns the land underlying the terminal. Pursuant to an agreement between CSXT and CSXIT, CSXT pays CSXIT “lift fees” equal to 110% of all CSXIT’s operating costs, less any revenues from third parties, for providing intermodal terminal services. (Consumers Rebuttal III-D-162, May 20, 2016; CSXT Final Br. 16.)

for originating and terminating intermodal shipments. (See Consumers Reply 7-11, Mar. 12, 2018.)

The Board concludes that CSXT has demonstrated that terminal inspection employees are one of the additional operating expenses that should have been included in the calculation of costs for originating and terminating intermodal shipments at the terminal. Because the Board erred in not accounting for the costs of nine additional inspectors, the Board will now include those costs.

Usage Adjustment. CSXT also argues that the Board materially erred in accepting Consumers’ allocation of 54% of total lift costs for CERR—which CSXT claims was unexplained—when CERR would handle 67% of containers at the terminal. (CSXT Pet. 9.) On opening, Consumers based its total proposed lift costs on the overall number of “lifts” CERR would handle at the terminal. Consumers then applied a “usage adjustment” of 54% to the total lift costs to account for the fact that only 54% of the traffic that goes through the 59th Street Terminal would be CERR traffic. (See Consumers Opening III-D-142 to III-D-143; Consumers Opening WPs “CERR CSXIT Lift Charge_Open.xlsx” & “CSXIT Costs and Volume.xlsx.”) On reply, while CSXT questioned the 54% pro-rata share of lift costs that Consumers attributed to the selected intermodal traffic (CSXT Reply III-A-44, Mar. 7, 2016), CSXT’s reply evidence did not suggest an alternative metric or percentage.³⁸ On reconsideration, CSXT now argues for the first time that the lift cost allocation should be 67%, which it calculates based on the number of “containers” or “loads” (as opposed to “lifts”). (CSXT Pet. 9; see Consumers Opening WP “CSXIT Costs and Volume.xlsx,” Tab “Volumes.”) But by failing to raise this argument on reply, CSXT has waived it and cannot now claim material error. Furthermore, CSXT provides no explanation for its position that a “container” or a “load” metric should be used instead of a “lift” metric in determining cost allocation. Given that the Board is seeking to estimate the expense associated with the number of “lifts” at the facility, the Board finds no basis on this record for allocating the costs on something other than a “lift” metric basis. The Board finds no material error.

Return on Land Costs. CSXT further argues that the Board erred because it allocated revenue based on variable costs that included a return on land costs that the Board ultimately determined CERR would not incur. (CSXT Pet. 9-10.) CSXT argues that, for CERR to receive the full revenue for originating and terminating traffic at the terminal facility, the Board should add the full complement of costs incurred by CERR in originating and terminating traffic, including the cost of land ownership.

The Board finds no material error in its treatment of land costs and the resulting calculation of terminal costs or in its allocation of revenue to CERR. In its January 2018

³⁸ While CSXT argued on reply that Consumers had “offered no justification or explanation” for its 54% calculation (CSXT Reply III-A-44 n.65, Mar. 7, 2016), the January 2018 Decision concluded otherwise and found Consumers’ “general approach to calculating the lift fees for the 59th Street Intermodal Facility . . . to be feasible.” January 2018 Decision, slip op. at 71.

Decision, the Board found reasonable Consumers’ assertion that lease payments from CSXIT would cover whatever costs CERR would incur for purchasing the terminal property. The Board noted that CSXT had failed to address Consumers’ assertion on opening that the lease payments were sufficient to cover the land investment and had failed to provide any evidence of the lease payments CSXT actually received from CSXIT or evidence that such lease payments do not fully cover CSXT’s land costs. January 2018 Decision, slip op. at 71. The January 2018 Decision assumed that CSXT incurs land ownership costs but ultimately concluded that such costs are fully balanced by CSXIT lease payments. Thus, CSXT’s assertion that the Board determined CERR would incur no land costs is incorrect.³⁹ Likewise, there is no basis for CSXT’s argument that the Board erred because it allocated revenue based on variable costs that included a return on land costs that the Board ultimately determined CERR would not incur.

CSXT asserts that, should the Board decline to add the costs it claims CERR will incur, the Board should instead use the actual variable costs incurred by CSXT at the terminal facility in lieu of the system-wide average costs. CSXT claims that such an adjustment is needed to maintain the proper relationship between revenues allocated to the terminal facility (which according to CSXT includes a return on land investment) and the costs the Board assumes CERR would incur at this terminal (which according to CSXT does not include the land costs for the terminal). However, in determining revenue allocation, the Board allocates revenues for cross-over traffic on a system-wide average of total costs by using the URCS variable and fixed costs for the carrier, and therefore does not factor in costs incurred at any specific facility. To do otherwise, as CSXT proposes, would constitute a movement-specific adjustment to URCS, which the Board prohibits in such circumstances out of concerns related to cost and complexity. See Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 50-52 (STB served Oct. 30, 2006), aff’d sub nom. BNSF Ry. v. STB, 526 F.3d 770 (D.C. Cir. 2008); see also Sunbelt 2014, NOR 42130, slip op. at 197; Kan. City Power & Light Co. v. Union Pac. R.R., NOR 42095, slip op. at 6-8 (STB served May 19, 2008). Therefore, the Board finds no material error in its revenue allocation or its accounting for land costs.

Train assignments/road crews. CSXT asserts that the Board erred in accepting Consumers’ evidence that every train crew operating in Chicago could complete two train assignments within 12 hours. CSXT argues that the Board’s analysis of the evidence was flawed because it: (1) used the wrong traffic group; (2) combined trains from different days to calculate the daily average transit time; (3) mistakenly applied train transit times from Consumers’ opening RTC model, rather than CSXT’s supplemental “Alternative 1” RTC model; (4) ignored the directional imbalance in train movements; and (5) failed to account for the time of day the trains arrive on CERR. (CSXT Pet. 11.)⁴⁰ Consumers does not respond to these specific arguments.

³⁹ Although CSXT argues on reconsideration that the costs of land ownership should be included, it points to no evidence in the record of what those land costs would be.

⁴⁰ As discussed above, the verified statement CSXT cites in support of its arguments has been stricken from the record.

The Board agrees that its analysis erroneously included merchandise and coke trains that were not part of CERR's final traffic group, as well as trains moving to Consumers' West Olive facility, and also erroneously omitted certain CERR trains that operated during the analysis period. Additionally, the Board recognizes that its analysis incorrectly based daily average transit times on groups of trains that operated on different days. The Board's analysis erroneously applied transit times from Consumers' Opening RTC model, rather than CSXT's Supplemental "Alternative 1" RTC model. The Board corrects its analysis accordingly. (See STB WP "CERR Base Year Trains_Supp_Reply_Alt1 with Table III-D-2-STB.recon.")

The Board finds no material error, however, with respect to CSXT's remaining two assertions. First, in regard to factoring in the directional imbalance in train movements, the Board's analysis placed no restriction on the second train that a crew would take in regard to direction or departure from a specific location. Rather, the analysis factored in three one-hour taxi rides that would shuttle crews between stations during a shift. See January 2018 Decision, slip op. at 101. This was a reasonable assumption given the relatively small footprint of CERR in the Chicago area. Thus, the Board's analysis did not ignore the directional imbalance in train movements, as CSXT suggests, but determined that crew rebalance was not necessary, notwithstanding the imbalance of westbound and eastbound trains.

Second, the Board finds no support for CSXT's argument that the Board's analysis is flawed because it failed to account for the time of day trains arrive on the CERR system. In its reply, CSXT argued that the assumptions underlying Consumers' analysis were flawed because they did not factor in the arrival and departure times of trains. (CSXT Reply III-D-36, Mar. 7, 2016.) CSXT's own corrective evidence, however, did not account for the train arrival and departure times. (*Id.* at III-D-39.)⁴¹ On reconsideration, CSXT again argues that the Board must account for train arrival and departure times yet cites to no record evidence to support the inclusion of this data. As the Board has noted, it will not address the merits of an incomplete proposal that lacks supporting evidence. See Total Petrochems. 2016, NOR 42121, slip op. at 43-44 (rejecting an argument that lacked supporting workpapers). Therefore, the Board finds that it did not materially err in not including train departure and arrival times in its analysis of road crews, as CSXT failed to provide the necessary evidence to support its argument at the appropriate time.

After correcting its analysis to include the appropriate traffic group and transit times, the Board finds no evidence that would alter its original conclusions regarding turnaround service provided by Chicago road crews. The Board's corrected analysis shows that train crews could handle two trains within a 12-hour shift and that no recrews would be necessary.

Police staffing. CSXT argues that the Board committed material error in accepting Consumers' proposal "to have only one Security Agent assigned to Chicago." (CSXT Pet. 12.) CSXT asserts that the Board failed to explain its departure from recent precedent that recognized

⁴¹ The Board's January 2018 Decision found Consumers' evidence concerning road crew needs to be feasible and supported and did not address CSXT's failure to perform the necessary analysis to support its argument regarding train arrival and departure times.

the distinct security needs of urban areas. (*Id.* (citing Total Petrochems. 2016, NOR 42121, slip op. at 90-91; E.I. DuPont de Nemours & Co. v. Norfolk S. Ry. (DuPont), NOR 42125, slip op. at 92-93 (STB served Mar. 24, 2014), corrected & updated, NOR 42125 (STB served Oct. 3, 2014), reconsideration denied, NOR 42125 (STB served Dec. 23, 2015)).) CSXT further argues that the Board’s decision “was based on the factually incorrect conclusion[]” that CSXT had not provided evidence as to the specific security needs of Barr Yard. (*Id.*)

The Board finds no basis for reconsideration regarding the security staffing it adopted for CERR. Contrary to CSXT’s claim, Consumers’ proposed security staffing is consistent with recent precedent on a route-mile and revenue basis. See January 2018 Decision, slip op. at 120. As Consumers notes, the police staffing that the Board adopted in the January 2018 Decision averages one Security Agent per 58.8 miles, nearly the same staffing level on a route-mile basis as DuPont and far greater than the staffing level adopted in Total Petrochemicals 2016, which involved a SARR that ran through multiple urban areas. (See Consumers Reply 10, Mar. 12, 2018.)

The Board determined that, while CSXT had provided general statistics concerning crime and police staffing figures for railroads in the Chicago area, it had provided no evidence to support the need for eight additional Security Agents for CERR’s Chicago operations, which, according to CSXT, primarily consists of “one large facility in Chicago at Barr Yard and . . . several major interchange tracks” located in the yard. (See CSXT Reply III-D-90, Mar. 7, 2016). In its petition, CSXT argues that it did provide evidence, referring to: (1) its selected police data for the Chicago area, and (2) its evidence regarding 24/7 police presences at the major yards of “every real-world railroad in Chicago” and the number of railroad police in Chicago for each railroad. (CSXT Pet. 12 (citing CSXT Reply III-D-91, Mar. 7, 2016).) As the Board explained in its decision, however, CSXT’s evidence is general in nature and provides no specific support for the specific security needs of CERR, in and around Barr Yard. The Board finds no material error.

Track crews. In its petition for reconsideration, CSXT argues that it was material error for the Board to accept Consumers’ proposed three track crews, instead of CSXT’s proposed four track crews, because such an approach would require a single track crew to maintain the “rural segment” of CERR, which it describes as a 122-route-mile, 130-track-mile district, from Porter, Ind. to West Olive.⁴² (CSXT Pet. 13.) CSXT asserts that, rather than addressing its arguments regarding the infeasibility of such a large track crew district, the Board improperly focused on the average track crew district size of 70 track miles. (*Id.*)

In its reply, Consumers argues that the Board did specifically acknowledge CSXT’s objection to Consumers’ proposed track crew staffing, but “simply rejected it as unpersuasive.” (Consumers Reply 11, Mar. 12, 2018.) Consumers also argues that the track crew maintenance

⁴² The parties in their pleadings, and the Board in the January 2018 Decision, discuss two distinct segments of CERR: a rural segment, from Porter to West Olive, of lighter density, and an urban segment, between 22nd Street in downtown Chicago and Curtis, Ind., of heavier density.

force approved by the Board in this case had a coverage ratio of 70 track miles per crew, which is as robust as the 72:1 mileage-to-crew ratio for main line track approved in Total Petrochemicals 2016. (*Id.*)

The Board will deny CSXT’s request to reconsider the Board’s acceptance of Consumers’ proposed three track crews, as the Board did not commit material error. As an initial matter, the Board did in fact consider and address CSXT’s arguments regarding the feasibility of having three track crews, one of which would be tasked with the majority of the rural segment. But it rejected those arguments due to the anticipated lower workload resulting from the “light density, and thus less intensive maintenance needs, of the rural segment of CERR.” January 2018 Decision, slip op. at 138.

Substantively, it was not material error for the Board to accept a track crew district of the size and density proposed by Consumers. First, CSXT incorrectly states that Consumers would have one track crew maintain a district comprised of 122 route miles and 130 track miles. Consumers’ proposal was to have one track crew be responsible for maintenance of the line from West Olive to the Michigan/Indiana state line, not to Porter, as CSXT states. Consumers proposed that the 18.64-route mile segment from the Michigan/Indiana state line to Porter would instead be part of the district covered by the other two track crews located at Barr Yard. See id. at 136. The track crew responsible for the segment of the line between West Olive and the Michigan/Indiana state line would therefore be responsible for approximately 104 route miles and 112 main line track miles (see the table below), not the entire rural segment comprised of 122 route miles and 130 track miles as claimed by CSXT.

Second, a track crew district of this size and density is reasonable and consistent with Board precedent. As the Board noted in its decision, see id. at 138 n.95, in Total Petrochemicals 2016, slip op. at 107-08, the Board accepted track crew districts for branch lines—which are similar in density to CERR’s rural segment⁴³—of 100 track miles per crew. See also W. Fuels Ass’n, Inc. v BNSF Ry., NOR 42088, slip op. at 58, 26 (STB served Sept. 10, 2007) (accepting an average of approximately 89 track miles per track crew). In light of this precedent, CSXT has not shown that one track crew district covering 104 route miles and 112 main line track miles of light density traffic is infeasible. Accordingly, the Board did not commit material error in accepting three total track crews on CERR, including Consumers’ proposal for one track crew to maintain the district from West Olive to the Michigan/Indiana state line.

⁴³ See Consumers Rebuttal III-D-130, May 20, 2016, noting that CERR’s rural segment handling only 8 million gross tons annually is low-density.

CERR Track Miles from West Olive to Michigan/Indiana State Line	
Route miles Porter to West Olive ⁴⁴	122.20
Route miles Porter to Michigan/Indiana State Line ⁴⁵	- 18.64
<i>Route miles Michigan/Indiana State Line to West Olive</i>	<i>103.56</i>
Sidings in this district (including Wells Siding) ⁴⁶	5.95
Campbell Plant lead track ⁴⁷	2.38
<i>Main line track miles Michigan/Indiana state line to West Olive</i> ⁴⁸	<i>111.89</i>

Crossing repaving costs. In its petition for reconsideration, CSXT also argues that the Board committed material error by accepting Consumers’ opening cost calculation for crossing repaving of \$299,936. As explained in the January 2018 Decision, CSXT stated in the portion of its reply narrative under the heading “Crossing Repaving” that it agreed with the \$299,936 cost for “track geometry testing,” but the Board took this to be a scrivener’s error and determined that CSXT instead meant that it accepted the \$299,936 cost for crossing repaving. January 2018 Decision at 149 n.110. Additionally, there was a mismatch between CSXT’s narrative, in which it stated that it agreed with Consumers’ proposed \$299,936 figure, and its workpapers, which showed a different crossing repaving cost. The different cost in CSXT’s workpapers was due to CSXT’s applying Consumers’ crossing repaving methodology (i.e., calculating 10% of total grade crossing construction costs) to CSXT’s own total grade crossing construction costs. The Board stated that when there is a conflict between the narrative and the workpapers, the narrative generally controls, and thus accepted the \$299,936 figure CSXT had stated it agreed with in its reply narrative. Id. at 148-149.

On reconsideration, CSXT contends that the Board should have taken the methodology that Consumers used, which CSXT adopted in its workpapers, and applied that methodology to the Board’s final accepted grade crossing construction costs. (CSXT Pet. 13-14.) CSXT argues that, as a result of this error, the Board’s accepted crossing repaving cost has “no connection to the construction costs from which it is supposed to be derived.” (Id. at 14.) According to CSXT,

⁴⁴ January 2018 Decision, slip op. at 65.

⁴⁵ STB WP “CERR Route Miles_Supp_Reply_STB.xlsx,” Tab “CERR Miles,” Cell AH339.

⁴⁶ STB WP “CERR Route Miles_Supp_Reply_STB.xlsx,” Tab “Sticks,” Cells Q34, Q37, and U50. (See also CSXT Reply WP “CERR STICK DIAGRAMS_Supp_Reply.pdf” at 5, Mar. 6, 2017.)

⁴⁷ January 2018 Decision, slip op. at 65.

⁴⁸ There are also 1.36 track miles of setout tracks in this district, including the Helper Train Pocket at Saugatuck Hill. STB WP “CERR Route Miles_Supp_Reply_STB.xlsx,” Tab “Sticks,” Cells U30:U40. (See also CSXT Reply WP “CERR STICK DIAGRAMS_Supp_Reply.pdf” at 5, Mar. 6, 2017.)

the Board's supposed error was that it "ignored" CSXT's workpapers because its reply narrative was "unclear" due to a scrivener's error. CSXT maintains that its scrivener's error is the sort of minor technical error that the Board routinely allows parties to correct in SAC cases. (*Id.*)

In its reply to CSXT's petition, Consumers argues that the Board did not commit material error in accepting Consumers' crossing repaving costs based on CSXT's statement in its narrative, even though its workpapers reflected a different cost, because the Board "followed the established rule that a party's narrative controls over its workpapers." (Consumers Reply 11-12, Mar. 12, 2018.) Consumers also states that the "scrivener's error" referred to by the Board was CSXT's use in its reply narrative of the term "track geometry testing" when it apparently meant "crossing repaving," and the Board accepted CSXT's intended meaning, which was to agree with Consumers' repaving cost figure. (*Id.* at 12.)

The Board will deny CSXT's request to recalculate repaving costs using the methodology employed in the parties' workpapers rather than use the specific crossing repaving cost figure to which the parties agreed in the narratives. Despite what its workpapers showed, CSXT's narrative clearly stated that it was accepting Consumers' specific crossing repaving cost figure (\$299,936). As the Board stated in its decision, "where there is a conflict between a party's narrative and its workpapers, the Board will generally treat the party's narrative as reflecting the party's position." *January 2018 Decision*, slip op. at 153. *See also id.* at 148-149. The Board's application of this rule for crossing repaving was not material error. And it was not material error to adopt a crossing repaving cost that was not tied to grade crossing construction costs—such a connection was employed in the parties' workpapers, but the two costs are not required to be connected. Because both parties agreed to a specific crossing repaving cost,⁴⁹ the Board rejects CSXT's request that the Board recalculate those costs based on the methodology used in the parties' workpapers.

It is true that the Board often allows the correction of minor technical errors in SAC cases. But as Consumers states, and contrary to CSXT's argument in its petition, the "scrivener's error" to which the Board's decision referred was CSXT's narrative reference to "track geometry testing" in the paragraph discussing "crossing repaving"; it was not CSXT's acceptance of Consumers' specific cost instead of its methodology. *See id.* at 149 n.110.

Real estate transaction costs. As discussed in the *January 2018 Decision*, the parties disagreed as to the transaction costs for acquiring the land required for the CERR system. Consumers did not include any real estate transaction costs on opening. On reply, CSXT argued that CERR would need to incur \$20.8 million associated with land acquisition activities, such as title work, surveys, appraisals, negotiations, and closing. *January 2018 Decision*, slip op. at 173.

⁴⁹ The Board notes that, although CSXT's reply narrative accepted the specific crossing repaving cost proposed in Consumers' opening narrative, Consumers had by then submitted an errata sheet to its opening that changed its original opening crossing repaving cost. (Consumers Errata 3, Dec. 4, 2015.) Nevertheless, the parties reached agreement when, on rebuttal, Consumers accepted the crossing repaving cost that was accepted in CSXT's reply narrative. (Consumers Rebuttal III-D-138, May 20, 2016.)

On rebuttal, Consumers argued, among other things, that CSXT failed to cite evidence proving CSXT itself incurred these costs on a per parcel basis and that CSXT's estimates were neither realistic nor in the range of transaction costs accepted in prior cases.

The Board found that neither party's evidence was feasible, supported, and realistic. Id. at 175. With respect to Consumers, the Board found that its choice to omit real estate transaction costs was inconsistent with Board precedent holding that such costs are inherent in real estate transactions and would be incurred by a new rail entrant. The Board also found, however, that CSXT's real estate transaction costs, although supported with some evidence, were wholly unrealistic. The Board noted that in past SAC cases it has accepted real estate transaction costs that were no more than 3.7% of the total land valuation. In contrast, CSXT's proposed real estate transaction costs would constitute 17.3% of Consumers' total land value for CERR—almost five times greater than the highest figure that the Board had ever accepted in a prior case. The Board noted that CSXT had failed to explain why a real estate transaction cost percentage so much higher than the Board has accepted in past cases is warranted. Id. The Board concluded that, even though it disagreed with Consumers' rationale for omitting transaction costs, its proposed 0% figure was far closer than CSXT's 17.3% figure to the range of transaction costs accepted in prior cases. Id. at 176.

On reconsideration, CSXT argues that the Board erred in rejecting CSXT's proposed transaction costs. (CSXT Pet. 14-15.) CSXT argues that, according to past precedent and the January 2018 Decision itself, when only one party presents evidence on a cost, that evidence is necessarily the best of evidence of record. (Id. (citing, among others, Western Fuels Ass'n v. BNSF Ry., NOR 42088, slip op. at 69 (STB served Sept. 10, 2007), remanded on other grounds sub nom. BNSF Ry. v. STB, 604 F.3d 602 (D.C. Cir. 2010); Total Petrochems. 2016, NOR 42121, slip op. at 124; and January 2018 Decision, slip op. at 95).) CSXT adds that this is the case even when the proposed cost is flawed. (CSXT Pet. 14 n.17.) In the alternative, CSXT suggests that, if the Board does not accept its 17.3% figure as the best evidence of record, it should accept some percentage for these costs, such as the 4.1% percentage arising from Sunbelt 2014, NOR 42130.⁵⁰ CSXT notes that the Board has adopted percentages not suggested by parties for the engineering additive and mobilization cost factor, and that in the January 2018 Decision the agency adopted its own calculation for equity flotation costs. (CSXT Pet. 15 n.18 (citing January 2018 Decision, slip op. at 270).)

The Board finds that it did not err in rejecting CSXT's proposed real estate transaction costs. Where neither party has presented feasible and supported evidence on an issue, the Board generally accepts the best evidence of record. See, e.g., January 2018 Decision, slip op. at 172 ("Neither party has submitted entirely feasible and supported evidence of land valuation in Cook County, Ill. . . . The Board must therefore decide which party has presented the best evidence of record.") Here, the Board found CSXT's evidence to be wholly unrealistic, meaning that it did not satisfy the requirement that corrective evidence must be realistic. See Duke Energy Corp. v.

⁵⁰ CSXT claims that the percentage stemming from Sunbelt 2014 is 4.1%, but the percentage is actually 3.7% (the acquisition cost of \$8,233,100, Sunbelt 2014, NOR 42130, slip op. at 103-104, divided by the land value of \$220,362,502, id. at 97).

Norfolk S. Ry., 7 S.T.B. 89, 101 (2003). In contrast, in the cases CSXT cites, the Board did not find the accepted evidence to be unrealistic, making those cases inapposite. Accordingly, it was not material error for the Board to reject CSXT's figure here.

CSXT argues in the alternative that, even if the Board reasonably declined to adopt CSXT's 17.3% figure as the best evidence of record, the Board should have adopted some lower percentage rather than assign zero costs to this expense. (CSXT Pet. 15.) CSXT, however, did not present this alternative argument before the Board issued the January 2018 Decision, so the argument is waived. See New England Cent. R.R.—Trackage Rights Order—Pan Am S., LLC, FD 35842, slip op. at 4-5 (STB served April 26, 2018). The argument also lacks merit. Although it is true, as CSXT notes, that the Board has at times adopted a cost not presented by either side (such as the Board did for equity flotation costs),⁵¹ in those instances, the Board generally develops costs by continuing to rely on the evidence in the record before it. See January 2018 Decision, slip op. at 270. CSXT does not suggest the Board could have followed a similar approach for real estate transaction costs. On the contrary, CSXT suggests that the Board should apply the percentage used in Sunbelt 2014. CSXT fails to explain why that particular case, as opposed to another SAC case, should have been the Board's guide on this issue. Nor does CSXT otherwise attempt to show that the specific percentage in Sunbelt 2014—which involved a larger SARR assembled through larger parcel acquisitions in a more rural part of the country—would be appropriate here. See January 2018 Decision, slip op. at 176 (distinguishing the real estate transaction cost evidence accepted in other cases). The Board will not alter its finding that Consumers' position is closer to the transaction costs CERR would incur acquiring land for its system.

Land inflation index. In the January 2018 Decision, slip op. at 270, the Board adopted the index approach proposed by Consumers to measure land value inflation over the 10 years covered by the DCF. The Board used Consumers' proposed index to determine inflated land values from 2015 onward and deflated land value from 2015 back to 2012. Although CSXT had agreed to the use of the index starting in 1Q 2015 to the end of the 10-year period, it objected to its use before the beginning of 2015.

In its petition for reconsideration, CSXT argues that the Board erred by valuing land appreciation between 2013 and 2015 using Consumers' land index. Specifically, CSXT argues that the Board erred by finding that CSXT did not sufficiently explain its position, claiming that it explained that its objection to Consumers' approach was based on the fact that it resulted in land price increases of 27% between 2013 and 2015, a result inconsistent with actual sales over that time period. (CSXT Pet. 15.) CSXT further claims that the Board erred in finding that CSXT's proposed methodology using comparable sales data was unsupported. CSXT asserts that its analysis was not based on the ultimate land valuation rejected by the Board, but rather, was a "straightforward analysis of the changes in raw sales comparison data along the CERR." (Id. at 16.) It notes that the choice of index need not be governed by land valuation, citing DuPont, NOR 42125, slip op. at 145-46.

⁵¹ See supra at n.24 (citing Pub. Serv. Co. of Colo. v. Burlington N. & Santa Fe Ry., NOR 42057, slip op. at 4 (STB served Jan. 19, 2005)).

In the January 2018 Decision, slip op. at 271, the Board found that CSXT had not sufficiently explained why it objected to the use of the index; accordingly, the Board did not adopt CSXT's alternative methodology. CSXT argued that because Consumers' index resulted in an "astronomical" 27% increase in land values for the pre-2015 period, it was necessary to develop its alternative proposed percentage for that same time period. To do so, CSXT started with raw sales data, but it then adjusted those values based on its expert's land valuation, which the Board ultimately rejected. (CSXT Reply Ex. III-F-1 at 154, Mar. 7, 2016 ("The change in value of the real estate along the CERR corridors between January 1, 2013 and January 1, 2015 is calculated by valuing the corridor as of January 1, 2013 and comparing that estimate to the value presented in this report.")) While CSXT argues on reconsideration that its proposed percentage for the 2013-2015 land value increase was not predicated on that rejected valuation, CSXT conceded in its March 7, 2016 reply narrative that its proposal for the earlier years was in fact based on that valuation analysis. (CSXT Reply III-G-12, Mar. 7, 2016 ("CSXT has used Mr. Rex's January 1, 2013 appraisal value for the CERR real estate of \$124.2 million as the amount to be recovered in the DCF."))

Finally, CSXT argues that the January 2018 Decision materially erred by "assuming that the appropriate index for historical real estate inflation was controlled by the wholly separate issue of which party's valuation should control." (CSXT Pet. 16.) However, CSXT is mistaken. The Board did not suggest there is a link between the land valuation and the index. Instead, the Board found CSXT's particular land inflation methodology for the 2013-2015 period, which was not an index, to be unsupported because it was "based on the land valuation report rejected by the Board in the RPI appendix." January 2018 Decision, slip op. at 271; (CSXT Reply Ex. III-F-1 at 154, Mar. 7, 2016). Having rejected CSXT's valuation report, the Board reasonably rejected CSXT's alternative land inflation methodology, which relied on that report. Accordingly, CSXT has not shown that the Board committed material error in using the index for the 2013-2015 period.

Michigan Department of Transportation data.

Embankment. In the January 2018 Decision, the Board accepted Consumers' use of Michigan Department of Transportation (MDOT) data to compute CERR's cost for common earthwork excavation. January 2018 Decision, slip op. at 185. The Board agreed with CSXT, however, that Consumers' proposed MDOT-based unit cost for common excavation on opening did not reflect the cost for building embankment. Id. at 185.

To account for this embankment cost, CSXT in its reply evidence proposed using MDOT data to develop (1) an average common excavation unit cost,⁵² and (2) an average embankment

⁵² To address geographic differences in common excavation unit costs, CSXT developed two such unit costs: (1) an average "urban" common excavation unit cost (using MDOT data from projects in Wayne County, Mich., which encompasses Detroit), which it applied to the 44% of CERR's track miles in the more urban Illinois and Indiana segment; and (2) an average "rural" common excavation cost (using MDOT data from projects within 100 miles of the CERR right-

(continued . . .)

unit cost, which CSXT multiplied by 70% to reflect the typical assumption in SAC cases that 70% of excavated quantities are used as embankment. CSXT then added these unit costs and applied the sum to the total quantities of excavation and embankment required to build CERR. (CSXT Reply III-F-48, Mar. 7, 2016; CSXT Reply WP “MDOT Excavation Unit Costs_Reply Analysis.xlsx,” Tab “Reply Analysis,” Columns V:Z, Mar. 7, 2016.)

The Board rejected CSXT’s approach, finding the alternative approach Consumers proposed on rebuttal to correct flaws in CSXT’s approach to be feasible and supported. Using MDOT data, Consumers developed average unit costs for common excavation and embankment, added those unit costs, and divided by the total quantities of common excavation and embankment in the MDOT projects. (Consumers Rebuttal WP “MDOT Excavation Unit Costs_Reply Analysis_Consumers.xlsx,” Tab “Tier Calculations-Exc-Emb,” Row 17, May 20, 2016.) The Board used that combined “weighted average” unit cost to determine the total cost for common excavation and embankment. January 2018 Decision, slip op. at 185; (STB WP “CERR Grading_Supp_Reply_Alt1_Alt2_STB.xlsm,” Tab “Total Cost Summary,” Row 8).

In its petition for reconsideration, CSXT claims that the Board erred in accepting Consumers’ methodology to account for embankment costs. (CSXT Pet. 16-17.) In particular, CSXT argues that the weighted average fails to account for the fact that embankment volumes, as defined by the Interstate Commerce Commission (ICC) Engineering Reports, are a subset of total excavation volumes. Therefore, according to CSXT, by adding the total costs of excavation to the costs of embankment in the MDOT data and then dividing that sum by the sum of excavation volumes and embankment volumes in the MDOT data, the method overstates the total quantity of earthwork and understates the combined unit cost. (CSXT Pet. 17.) Consumers argues that the Board did not err in accepting Consumers’ methodology. (Consumers Reply 14, Mar. 12, 2018.)

CSXT’s claim that the Board materially erred lacks merit. Although it is true, as CSXT notes, that the Board typically assumes in SAC cases that 70% of excavated materials listed in the ICC Engineering Reports would be used for embankment, this does not mean that embankment volumes are a subset of excavation volumes in the MDOT data. On the contrary, Consumers’ opening workpapers show that MDOT listed excavation and embankment as separate bid items. (See, e.g., Consumers Opening WP “MDOT Excavation Unit Costs.xlsx,” Tab 11, Cells I31 & I32.) CSXT points to nothing on reconsideration that establishes that the MDOT data accepted by the Board treated the embankment quantities as a subset of the excavation quantities. Accordingly, the Board properly declined to treat one as a subset of the other in calculating a combined unit cost for excavation and embankment based on the MDOT data.

(. . . continued)

of-way), which it applied to the 56% of the CERR track miles in the more rural western Michigan segment. (CSXT Reply III-F-48, Mar. 7, 2016.) The Board, however, addressed the geographic difference in common excavation unit costs by applying the location factors from the R.S. Means Handbook (Means), a decision CSXT does not challenge on reconsideration. See January 2018 Decision, slip op. at 185-86.

Borrow. In its petition for reconsideration, CSXT claims the Board committed material error by accepting Consumers' MDOT costs for borrow. CSXT argues that the Board erred in justifying its use of MDOT borrow costs on the ground that those costs were “‘derived from multiple real-world construction projects in the same geographic region with the same topographic diversity of that of the CERR’” even though “the MDOT borrow data that the Board accepted . . . derived from just four small projects in Michigan accounting for 6,370 total cubic yards of borrow.” (CSXT Pet. 17 (quoting January 2018 Decision, slip op. at 179).) CSXT argues that the MDOT borrow costs do not represent the cost CERR would incur because: (1) the sample size—four projects involving 6,730 cubic yards of borrow—is too small to derive an accurate borrow unit cost for the 1 million cubic yards of borrow required to construct CERR; and (2) MDOT costs are not geographically representative of the borrow costs CERR would incur in Indiana and Illinois, particularly because haul distances are greater in Chicago than in rural Michigan. (*Id.* at 17-18.) Because of these concerns, CSXT argues that the Board should base CERR's borrow costs on nationwide averages drawn from Means. Consumers argues that the Board should deny reconsideration because CSXT's arguments are identical to those the Board addressed in the January 2018 Decision. (Consumers Reply 15, Mar. 12, 2018.)

CSXT's arguments are not persuasive. First, in critiquing the Board's acceptance of the sample size on which the MDOT-derived borrow costs were based, CSXT fails to address the specific reason the Board gave for rejecting CSXT's “sample size” argument pertaining to the MDOT borrow data. In the January 2018 Decision, the Board stated that “[a]lthough CSXT argues that these four projects involved only 6,370 cubic yards of borrow, whereas CERR would require over a million cubic yards of borrow, CSXT does not provide a rationale or evidence showing that the unit price of borrow would depend on the amount of borrow purchased.” January 2018 Decision, slip op. at 190. CSXT never addresses that the Board found CSXT failed to demonstrate that borrow costs are tied to volume. Nor does CSXT provide any rationale for why four projects is an insufficient sample size. CSXT has therefore not shown that the Board erred.

Second, the Board explained that the use of Means location factors sufficiently adjusts the MDOT-derived labor rates and materials prices for borrow to account for cost differences CERR would encounter in Illinois and Indiana. January 2018 Decision, slip op. at 190; (STB WP “Grading_Supp_Reply_Alt1_Alt2_STB.xlsm” Tab “Location Factor,” Columns E, F, J & K (calculating weighted average location factors for “materials” and “installation”).) It was not erroneous to account for geographical differences in those costs in this manner. Although CSXT notes that a location factor does not account for cost differences due to longer lengths of haul, CSXT cites to nothing in the record supporting its assumption that there would be longer lengths of haul in constructing CERR than there were in the four MDOT projects. The MDOT data that the Board accepted is based on a series of Michigan projects in the general vicinity of the CERR route that incurred real costs for borrow. The figures were then adjusted to account for localized materials and installation costs. Although the length of haul is not explicitly addressed in Consumers' approach, the Board concludes that, overall, Consumers' approach is still superior to CSXT's evidence. For these reasons, the Board will not reconsider its acceptance of the borrow costs based on MDOT projects.

Offline transportation #115 rail. In the January 2018 Decision, the Board noted that the parties agreed that rail used in the construction of CERR would be sourced in Steelton, Pa., shipped to Russell, Ky., for welding, and then shipped to CERR railheads. January 2018 Decision, slip op. at 210. The Board accepted CSXT's proposal to use a transportation rate for the Steelton to Russell leg based on the unmasked 2013 Waybill Sample, and a rate for the Russell to CERR railheads leg based on a quote from a rail manufacturer selected by Consumers, which included three free days for unloading a rail train. Id. at 210-11, 211 n.157. Claiming that it would take a total of 17 days to unload a rail train, CSXT also proposed to add a cost for renting each rail train for an additional 14 days. The Board rejected this addition, concluding that each rail train could be unloaded in three days. Id. at 211-212. Both CSXT and Consumers ask the Board to correct two errors in how the Board implemented its decision.

First, the parties agree that the Board's workpapers did not apply the unmasked 2013 Waybill Sample rate for one of the two types of rail being transported, 115-pound rail. (Consumers Pet. for Tech. Corrections 3; CSXT Pet. 18-19.) The Board agrees that this was an error and will make this correction.

Second, although the parties agree that the Board's workpapers did not apply the manufacturer quote to the Russell to CERR railheads leg of the trip, they disagree on how to implement the change. In its petition for technical corrections, Consumers acknowledges the need to apply the rate in the quote, but, as CSXT notes, Consumers' proposed correction is flawed because it does not actually apply that rate. (Consumers Pet. for Tech. Corrections 3; CSXT Reply to Pet. for Tech. Corrections 3-4.) In its petition for reconsideration, CSXT applies the manufacturer's quoted rate in its proposed correction, but Consumers claims that CSXT's approach would include rail train rental costs that the Board held CERR would not incur. (See Consumers Reply 16, Mar. 12, 2018); see also January 2018 Decision, slip op. at 211-212.

The Board agrees that it was an error to not apply the manufacturer quote for transportation from Russell to the CERR railheads. However, as CSXT stated, Consumers' proposed correction is flawed because it does not actually fix the error at issue. Further, Consumers is incorrect when it claims that CSXT's approach improperly includes a rental cost. It is true that when CSXT put forward its rate in the original case it included the rail train rental costs to which Consumers objects here. (See CSXT Reply WP "Rail Worksheet-2015_Reply.xls," Cells L32-L34, Mar. 7, 2016 (showing amounts for the total rental days, rental cost, and rental cost per track-foot).) However, when CSXT added the transportation rate for the Russell to CERR railheads leg on reconsideration, it started with the Board's workpaper, which did not include the rail train rental costs. (See STB WP "Rail Worksheet-2015.Supp_Reply_Alt1_Alt2_STB.xls," Cells L32-L34 (showing the total rental days, rental cost, and rental cost per track-foot as zero).) CSXT's proposed correction did not change these cells. (See CSXT Pet. 19, n.22.) As such, CSXT has appropriately applied the manufacturer's quoted rate to the second leg of the rail's trip to the CERR system. The Board will therefore make the adjustment as proposed by CSXT.

Offline ballast transportation costs. In the January 2018 Decision, the Board accepted CSXT's general approach of basing the off-line transportation cost for ballast on the 2013 Public Use Waybill Sample, but it modified CSXT's proposed cost calculation. CSXT had calculated

off-line ballast transportation costs using movements in only railroad-owned cars and gave no justification why it limited its calculation in this manner. The Board included in its calculation both railroad-owned and privately-owned cars, reasoning that over 50% of the movements in the Waybill Sample move in privately-owned cars. January 2018 Decision, slip op. at 207. In its petition for reconsideration, CSXT objects to the Board's inclusion of movements in privately-owned rail cars because Consumers did not propose CERR would own any rail cars. (CSXT Pet. 18.) CSXT claims that allowing CERR to transport ballast at private car rates without incurring the costs of private car ownership understates the cost of ballast transportation. Consumers argues that CSXT's objections are without merit. (Consumers Reply 15-16, Mar. 12, 2018.)

The Board finds no error in its offline ballast costs determination. CSXT's argument assumes that, to benefit from a private-car rate, CERR must own the cars. But the Board did not suggest or assume that CERR, as the receiver, would be the source of any private cars transporting ballast. As noted by Consumers, private car shipments could also be made in railcars provided by the product supplier or another non-railroad party. (Id. at.15.) CSXT has not shown that Consumers' proposed ballast suppliers could not provide their own cars, nor has CSXT identified a separate fee those suppliers would charge for the use of those cars.⁵³ Therefore, CSXT has not shown that the Board erred by including privately owned cars along with railroad-owned cars in the offline ballast costs the agency accepted in the January 2018 Decision.

Consumers' rebuttal bridge designs. CSXT raises two related arguments on reconsideration concerning the bridges the Board accepted for CERR in the January 2018 Decision. First, CSXT argues that the Board erred in concluding that Consumers did not propose using spill slopes when it designed CERR's bridges. See January 2018 Decision, slip op. at 224-25. CSXT initially raised a concern about spill slopes in its March 7, 2016 reply where it claimed that Consumers' designs would impede activity under numerous bridges, in some instances because the designs employ spill slopes. On reconsideration, CSXT argues that the amount of rip rap Consumers uses in its designs belies the Board's conclusion that spill slopes are not present.⁵⁴ (CSXT Pet. 19.) CSXT argues that on rebuttal Consumers itself did not dispute that its standard bridge design assumed rip rap quantities for spill slopes and that instead Consumers' argument was that, for certain bridges, those rip rap costs could be foregone to

⁵³ CSXT's own evidence demonstrates that suppliers can provide their own cars. Indeed, CSXT's track engineering experts obtained a rate for transporting ballast materials from an aggregate supplier and specifically requested a private car rail rate. (See CSXT Reply III-F-71 to III-F-72, Mar. 7, 2016; CSXT WP "Vulcan Ballast Transportation Quote.pdf," Mar. 7, 2016 ("ballast would be moved in 100 ton hopper cars supplied by the supplier of the ballast").)

⁵⁴ In support of this argument, CSXT also refers to a verified statement included with its petition for reconsideration. (CSXT Pet. 19 (citing V.S. Magistro 2-3).) However, as explained earlier in this decision, the Board is rejecting the verified statement because it is improper evidence at this stage in the proceeding. Even if the Board were to consider the verified statement, it would not demonstrate that the Board materially erred because, as discussed below, the presence of rip rap does not necessarily indicate spill slopes.

offset higher wing wall costs. (*Id.* at 19-20.) Second, CSXT contends on reconsideration that the Board ignored CSXT’s argument, contained in its final brief, that Consumers’ purported redesign of its bridges on rebuttal deprived CSXT of the ability to challenge Consumers’ design.⁵⁵ Specifically, CSXT asserts that Consumers redesigned its bridges to avoid using spill slopes on rebuttal, noting that Consumers stated that it provided “average costs” on opening and that the complainant could repurpose the “wing walls” in its bridge costs to serve as wall abutments.

CSXT’s position that Consumers redesigned its bridges on rebuttal to use wing walls as wall abutments to avoid using spill slopes is incorrect. On opening, Consumers’ workpapers proposed bridge designs with abutments consisting of driven steel H-piles with pre-cast pile caps. (Consumers Opening WP “Bridge Costs.xlsx,” Tab “Bridge Type 1,” Rows 13 & 23, Tab “Bridge Type 2,” Rows 14-15 & 20, and Tab “Bridge Type 3,” Rows 14-15 & 20.) In its narrative, Consumers said that “CERR will use precast pile caps and wing walls” (Consumers Opening III-F-67), but said nothing about spill slopes. On rebuttal, in response to CSXT’s claim that Consumers’ design included spill slopes, Consumers clarified that “[t]he railroad bridges over the streets of Chicago will not have a spill slope, but instead require vertical face wing walls.”⁵⁶ (Consumers Rebuttal III-F-102, May 20, 2016.) Consumers said nothing about using wing walls as wall abutments, as CSXT claims. On the contrary, Consumers said that “[t]he abutments can still be driven piles with pre-cast pile caps and the wing walls can still be pre-cast construction, exactly like the proposed CERR prototypes.” (*Id.*) Significantly, Consumers made no material changes to its workpapers concerning Type I, II, or III bridges between opening and rebuttal. Consumers did not change costs or volumes for existing components nor did it add or delete components. In short, on rebuttal, Consumers clarified its opening position, but did not change it, and that position involved neither the use of spill slopes nor the use of wing walls as wall abutments.

As for CSXT’s argument that the sheer volume of rip rap in Consumers’ workpapers shows that Consumers’ design included spill slopes, the volume of rip rap is not determinative,

⁵⁵ CSXT also points to a verified statement containing Google Earth images of the bridges and explaining the structural flaws with Consumers’ purported redesign. (CSXT Pet. 20 (citing V.S. Magistro).) Again, the Board is rejecting the verified statement. Even if the Board were to consider this evidence in support of CSXT’s position, the Board would conclude that CSXT has failed to demonstrate material error given that, as discussed below, Consumers did not redesign its bridges on rebuttal. Furthermore, verified statement’s explanation of the flaws in Consumers’ design does not actually describe the designs Consumers put forward.

⁵⁶ While a “wing wall” generally refers to a retaining wall along the side of the approach to a bridge, it is clear from the context that Consumers used the term on rebuttal to mean a retaining wall underneath the bridge that would be attached to the driven steel H-piles that serve as abutments. (Consumers Rebuttal III-F-101, May 20, 2016 (“The size and design of the wing wall will vary depending on the conditions under the bridge.”); Consumers Rebuttal WP “Contech Precast Wing Walls.pdf,” at 2, May 20, 2016 (showing picture of vertical “pre-cast back wall and wing wall” with notation stating that “CERR will use pre[-]cast components attached to driven steel H-piles”).)

as rip rap is not only used in spill slopes, as noted by the Board in the January 2018 Decision, slip op. at 224. Also, to the extent that Consumers included costs for more rip rap than required by its bridge design, that is no reason to conclude that CERR would have to redesign its bridges, as CSXT did, by doubling or tripling their lengths. It may simply mean that Consumers included more rip rap costs for its bridge designs than is necessary.

Finally, CSXT was not deprived of the opportunity to challenge Consumers' bridge design. As explained above, Consumers did not change its position on rebuttal; rather, Consumers' argument on rebuttal that spill slopes would not be necessary was consistent with its opening design that included caps on driven steel piles with wing walls. As discussed in the December 2016 Decision ruling on CSXT's motion to strike various pieces of rebuttal evidence, Consumers properly provided argument to defend its opening position.

For the above reasons, the Board will grant in part and deny in part CSXT's petition for reconsideration.

SUMMARY AND RESULTS

Taking into account the combined effect of the technical corrections and the issues on which the Board has granted reconsideration, the Board continues to find that the rate challenged by Consumers has been demonstrated to be unreasonably high under the SAC constraint. This analysis shows that Consumers is entitled to approximately \$94.9 million in rate relief over the SAC analysis period (in current dollars). The maximum reasonable revenue-to-variable cost ratios prescribed in the underlying decision are modified accordingly, as shown in Table 4 in Appendix A to this decision. In Appendix A, the Board updates all tables from the January 2018 Decision affected by the changes adopted herein.

It is ordered:

1. The joint technical corrections are adopted.
2. Consumers' petition for technical corrections is granted in part and denied in part, as described above.
3. Consumers' petition for reconsideration is denied, as described above.
4. CSXT's petition for reconsideration is granted in part and denied in part, as described above.
5. This decision is effective on the date of service.

By the Board, Board Members Begeman and Miller.

APPENDIX A: Combined results of technical corrections and reconsideration

TABLE 4

CERR MMM RESULTS	
Year	MMM Revenue to Variable Cost Ratios
2015	465.9%
2016	571.7
2017	409.0
2018	435.6
2019	430.9
2020	403.4
2021	403.0
2022	379.6
2023	390.0
2024	348.4

TABLE B-1

CERR Operating Costs			
Item	Consumers Supplemental Rebuttal	CSXT Alternative 1	STB
Train & Engine Personnel	\$6,418,548	\$8,990,415	\$6,093,708
Locomotive Lease Expense	1,440,235	1,717,312	1,681,464
Locomotive Maintenance Expense	1,933,500	2,394,639	2,213,750
Locomotive Operating Expense	4,195,042	4,134,521	3,955,732
Railcar Lease Expense	4,953,013	4,664,069	4,929,444
Material & Supply Operating	620,778	642,550	457,028
Ad Valorem Tax	1,961,180	1,179,468	2,947,632
Operating Managers	5,067,703	6,332,757	5,959,413
General & Administration	7,016,537	10,552,184	7,192,747
Loss and Damage	108,623	108,603	108,592
Trackage Rights	1,731,726	4,466,331	1,973,957
Intermodal Lift and Ramp Cost	5,933,928	0	10,810,371
Insurance	1,976,211	2,326,285	2,292,118
Maintenance of Way	8,803,297	13,532,731	10,213,592
Startup and Training	2,520,533	3,325,367	2,592,320
Total Annual Costs	54,680,853	64,367,232	63,421,868

TABLE B-3

Non-Train Operating Personnel Expenses			
Department	Consumers Supplemental Rebuttal	CSXT Alternative 1	STB
<u>Operations</u>			
VP Operations	1	1	1
Director of Operations Control	1	1	1
Manager of Operating Rules, Safety and Training	1	1	1
Customer Service Managers	2	2	2
Subtotal Operations	5	5	5
<u>Transportation</u>			
Manager - Train Operations	3	4	3
Assistant Manager - Train Operations	3	4	3
Manager - Locomotive Operations	1	1	1
Manager Crew and dispatch	0	5	0
Crew Callers	5	5	5
Dispatchers	9	9	9
Assistant Manager - Locomotive Operations	0	1	0
Subtotal Transportation	21	29	21
<u>Mechanical</u>			
Chief Engineer	1	1	1
Manager of Mechanical Operation	1	1	1
Inspectors	10	10	19
Subtotal Mechanical	12	12	21
Total	38	46	47

TABLE C-1

Construction Costs			
Construction Item Categories	Consumers Supplemental Rebuttal	CSXT Alternative 1	STB
Land	\$120,633,781	\$132,592,291	\$120,752,482
Roadbed Preparation	35,549,371	78,561,183	36,353,146
Culverts	1,178,674	2,724,802	3,092,965
Track	208,270,502	257,791,644	228,626,654
Tunnels	-	-	-
Bridges	72,475,470	165,431,925	108,147,811
Signals & Communications	41,974,905	46,924,007	45,841,079
Building & Facilities	11,743,447	25,869,533	12,797,557
Public Improvements	3,384,306	11,062,417	11,062,417
Mobilization	10,113,570	36,704,053	12,039,884
Engineering	37,457,667	58,836,551	44,592,163
Contingencies	42,214,791	68,390,611	50,255,368
TOTAL	584,996,484	884,889,018	673,561,527

TABLE C-4

Roadbed Preparation Costs			
Roadbed Item Categories	Consumers Supplemental Rebuttal	CSXT Alternative 1	STB
Clearing & Grubbing	\$2,358,310	\$2,148,645	\$2,148,645
Earthwork	24,344,590	55,149,282	25,389,712
Finish Grading	1,419,074	1,476,237	1,428,104
Land for waste quantities	0	7,733,273	0
Lateral Drainage	202,834	207,965	201,671
Yard Drainage	0	0	0
Retaining Walls	6,627,236	11,247,160	6,619,351
Rip Rap	282,510	283,803	250,846
Relocation of Utilities	39,987	39,987	39,987
Topsoil Placement / Seeding	27,230	27,230	27,230
Subgrade Preparation	0	0	0
Road Surfacing	199,401	199,401	199,401
Environmental Compliance	48,200	48,200	48,200
Culvert Cost	1,178,674	2,724,802	3,092,965
Total Roadbed Preparation Investment	36,728,045	81,285,985	39,446,112

TABLE C-5

Track Construction Expenses			
	Consumers Supplemental Rebuttal	CSXT Alternative 1	STB
Rail	\$43,452,083	\$50,794,848	\$47,922,831
Ties	50,247,638	53,068,838	52,339,660
OTM ¹	12,630,848	12,957,088	12,731,659
Ballast & Subballast	43,484,880	68,106,902	53,544,412
Track Labor ²	40,635,054	44,455,249	41,047,678
Field & Compromise Welds	522,488	3,549,492	552,801
Geotextile	1,696,275	1,767,350	1,700,928
Turnouts ³	12,777,938	16,853,290	14,343,433
Diamonds	684,616	2,778,335	2,177,614
Lubricators ⁴	865,312	947,994	865,312
Switch Heater ⁵	1,177,597	1,982,178	1,304,555
Derails	93,265	527,571	93,265
Wheel Stops	2,507	2,507	2,507
TOTAL	208,270,502	257,791,644	228,626,654

¹ Includes spikes, pandrols, clips, screws, rail anchors, propane tank, and additional crossover costs

² Includes tie, ballast, and subballast labor costs

³ Includes turnout, installation and switch stand cost

⁴ Includes lubricator and installation cost

⁵ Includes switch heater and installation cost

TABLE D-1
(\$ Millions)

Year	SARR Capital Requirement	SARR Operating Costs	SARR Revenue Requirements
2015	\$65.1	\$59.0	\$124.1
2016	65.3	52.5	117.8
2017	67.5	59.9	127.4
2018	70.2	61.6	131.8
2019	72.9	65.0	137.8
2020	75.5	69.6	145.1
2021	78.3	72.8	151.2
2022	81.2	76.9	158.1
2023	84.1	78.5	162.6
2024	87.0	83.7	170.7

TABLE D-2
(\$ Millions)

Year	SARR Revenue Requirement	SARR Revenues	Overpayments (Shortfalls)	Present Value
1Q2015 - 4Q2015	\$124.1	\$131.6	\$7.4	\$7.1
2016	117.8	118.0	0.2	0.2
2017	127.4	145.5	18.1	14.0
2018	131.8	145.2	13.4	9.3
2019	137.8	152.5	14.7	9.2
2020	145.1	166.0	20.9	11.9
2021	151.2	172.4	21.2	10.9
2022	158.1	185.7	27.6	12.8
2023	162.6	187.1	24.5	10.2
2024	170.7	206.7	36.0	13.6
Cumulative Net Present Value				\$99.3

APPENDIX B: Reasons for rejections of Consumers' bridges

Milepost		Reason
CG	113.2	Insufficient length over other railroad.
CG	113.5	Column within roadway.
DC	6.7	Pier in water.
DC	13.23	Column within roadway.
DC	13.23	Column within roadway.
DC	15.46	Column within roadway.
DC	21.36	Insufficient length over roadway.
DC	21.65	Column within roadway.
DC	23.5	Column within roadway.
DC	24.97	Insufficient length over roadway.
DC	27.45	Column within roadway.
DC	S. Archer Ave	Column within roadway.
DC	27.55	Column within roadway.
DC	27.75	Column within roadway.
DC	28.2	Column within roadway.
DC	28.64	Column within roadway.
DC	29.96	Insufficient length over roadway.
DC	30.19	Insufficient length over roadway.
BRC	13.61	Column within roadway.
BRC	16.36	Insufficient length over roadway.
BRC	16.9	Insufficient length over roadway.
BRC	16.93	Insufficient length over roadway.
BRC	14.48	Insufficient length over roadway.
BRC	17.72	Insufficient length over roadway.
BRC	18.03	Insufficient length over roadway.
BRC	18.57	Column within roadway.