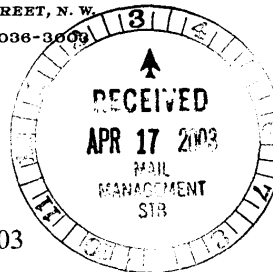


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The Honorable Vernon A. Williams
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1925 K Street, N.W.
Washington, D. C. 20423

ENTERED
Office of Proceedings

APR 17 2003

Part of
Public Record

Re: Docket No. 42070, Duke Energy Corporation
v. CSX Transportation, Inc.

Dear Secretary Williams:

On April 16, 2003, counsel for Duke Energy Corporation ("Duke") received a request from the Office of Proceedings for a public version of Duke's Post-Evidentiary Brief, noting the discussion of redacted rate case filings in the Board's decision in Ex Parte No. 638, Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under Stand-Alone Cost Methodology, Decision served April 3, 2003. An unbound original and fifteen (15) copies of that public version are enclosed for filing in this case.

Please note that this filing contains THREE COLOR PAGES which have been tabbed in accordance with the Board's governing procedures.

Thank you for your attention to this matter.

Sincerely,

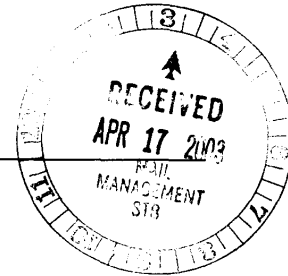
Andrew B. Kolesar III

Enclosures

cc: Counsel for Defendant

207651

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



DUKE ENERGY CORPORATION,

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. 42070

ENTERED
Office of Proceedings

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Public Record

**POST-EVIDENTIARY BRIEF OF
COMPLAINANT DUKE ENERGY CORPORATION**

PUBLIC VERSION
CONFIDENTIAL INFORMATION REDACTED

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GLOSSARY OF ABBREVIATIONS

“ACW”	Appalachia & Carolina Western Railroad
“CMP”	Constrained Market Pricing
“CSXT”	Defendant CSX Transportation, Inc.
“DCF”	Discounted Cash Flow Model
“EIA”	Energy Information Administration
“OEEAA”	STB Office of Economic, Environmental Analysis and Administration
“RCAF-A”	Rail Cost Adjustment Factor – Adjusted for Productivity
“RCAF-U”	Rail Cost Adjustment Factor – Unadjusted for Productivity
“RSAM”	Revenue Shortfall Allocation Methodology
“RTC”	Rail Traffic Controller Simulation Model
“SAC”	Stand-Alone Cost
“SARR”	Stand-Alone Railroad
“STCC”	Standard Transportation Commodity Code
“SDM”	String Diagram Model
“URCS”	Uniform Rail Costing System

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DUKE ENERGY CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42070
	)	
CSX TRANSPORTATION, INC.	)	
	)	
Defendant.	)	
	)	

**POST-EVIDENTIARY BRIEF OF
COMPLAINANT DUKE ENERGY CORPORATION**

I. BACKGROUND TO DUKE'S COMPLAINT

Duke owns three coal-burning, electric generating stations which are dependent upon CSXT's coal transportation services. These facilities consume over 3 million tons of coal annually. Between 1980 and 2002, Duke and CSXT conducted business pursuant to contract. Over this span, CSXT argues that Duke's rates declined whereas Duke contends they did not.¹ Not in dispute is the fact that following its Conrail acquisition in 1999, at the very time when the Board found that coal rates in the east were

¹ As Duke explains in its evidence, to the extent that CSXT's declining rate claims have any relevancy to the issues in this proceeding, they are derived primarily by comparing rates for different services, [REDACTED]. (Duke Reply Exh. II-B-3).

declining,² CSXT commenced what would turn out to be a program to greatly and repeatedly increase Duke's rates.

In 2000, CSXT imposed a [REDACTED] % increase in Duke's contract rates to which Duke acceded very reluctantly (Duke Op. at I-6). Thereafter, Duke evaluated CSXT's increased rates pursuant to Coal Rate Guidelines – Nationwide, 1 I.C.C.2d 520 (1985) ("Guidelines"). Duke's analysis caused it to conclude that CSXT's increased contract rates were probably too high. CSXT responded to Duke's concerns over the level of its charges by insisting upon additional rate increases. Negotiations were fruitless because Duke's positions were Guidelines-oriented whereas CSXT's were based upon its general system revenue needs and Duke's alleged ability to pay.³

When the negotiations for a new contract inevitably failed, CSXT replaced Duke's expiring contract rates with common carrier rates which raised Duke's prices by [REDACTED] percent. Visited with rate increases of over [REDACTED] percent in less than two years, Duke filed this complaint case.⁴

² See STB Office of Economics, Environmental Analysis and Administration Report at 7 (2000) ("OEEAA Report").

³ In promulgating the Guidelines, the Board anticipated that they would be used to foster negotiated pricing solutions. (Guidelines at 524). Indeed, the Board's decisions thereunder have been termed "rules of the road" providing "certainty" for commercial dealings (Docket No. 42056, Texas Mun. Power Agency v. Burlington N. and Santa Fe Ry., STB served March 24, 2003, at 37 ("TMPA")).

⁴ In its evidence, CSXT revises this rate history to its own advantage [REDACTED]

[REDACTED] (CSXT Op. at IV-A-10).

II. CSXT'S RATE JUSTIFICATIONS

There can be little question, based upon CSXT's evidence in this case, that it devised its rates pursuant to some set of undisclosed principles and thereafter tried to cobble together support for the rates under the Guidelines.⁵ Because the levels of the challenged rates are so incompatible with the maximum levels mandated by the Guidelines, CSXT has chosen to go to great lengths in its evidence to try and shore up its case through the presentation of several non-Guideline justifications for its rates. While each of CSXT's justifications is irrelevant under the Guidelines, some cursory refutation is required here, given the evidentiary prominence which CSXT has accorded to these contentions.

A. CSXT'S REVENUE NEED

The centerpiece of CSXT's case is its revenue need (CSXT Op. at I-21 to 47). Much of CSXT's voluminous evidence orbits around its mistaken belief that revenue adequacy is the "cornerstone" of rate regulation (Id. at I-25). As a matter of law, all of CSXT's revenue adequacy evidence is irrelevant to the issues in this case. The Guidelines take revenue adequacy fully into account in their articulation of a methodology for the precise determination of how much captive customers must contribute to a carrier's system revenue needs. Because the Guidelines subsume rail revenue issues, the Board's position on the probity of railroad revenue need evidence in rate cases has been made clear:

⁵ CSXT states that it established the challenged rates on the basis of its analyses of "cost" (CSXT Op. at IV-A-26) and "profitability" (id. at IV-A-13), but no details of any such analyses were ever divulged, despite Duke's requests in a June 27, 2002 Letter from Duke counsel to CSXT counsel.

Neither the Board nor the ICC has ever decided a maximum rate case based upon whether the defendant carrier or carriers was or was not revenue adequate. The fact that a carrier is revenue inadequate has never been used to deny or limit the scope of maximum rate relief.

F.D. 33388, CSX Corp., Norfolk Southern Corp. – Control & Oper. Leases/Agreements – Conrail Inc., STB Dec. No. 89, served July 23, 1998, at 66 (“Conrail”).

Despite the Board’s pronouncement that it will not be influenced by revenue need claims in rate cases, CSXT attempts throughout its evidence to influence the Board’s ultimate action in this case through its extensive discussions of its revenue needs.⁶ Indeed, CSXT’s principal position in this case holds that because of its revenue needs, the SAC standard cannot be applied by the Board in a manner that will “lead to diminished” revenues. (CSXT Op. at I-8). In other words, CSXT argues that its rates to Duke cannot be reduced because it lacks adequate revenues. CSXT’s misguided notions on a relationship between SAC levels and carrier revenue needs are at odds with the Guidelines and the precedents thereunder. The Board’s SAC methodologies cannot be manipulated on the basis of revenue need claims to produce higher stand-alone costs, as CSXT seeks.

While the authorities preclude the Board from according any weight to CSXT’s numerous revenue need justifications, there is one case which makes a special exception to this rule which is applicable here. That case is Conrail. In the course of the Conrail proceedings, numerous captive rail customers apprised the Board of their fears that CSXT’s financial projections, as they were presented to and relied upon by the Board,

⁶ See, e.g., CSXT Op. at I-2 to 3, I-4, I-7 to 8, I-21 to 22, I-34 to 45, IV-A-12, IV-B-15, IV-E-1 to 2; CSXT Reply at III-I-14 to 15.

would go awry and that CSXT would then be forced to raise its rates on captive traffic in order to both make up operating shortfalls and to finance the investment (Conrail at 62). To allay these concerns, CSXT officials pledged to the Board that CSXT would meet its Conrail obligations without increasing rates (Id. at 63). In approving CSXT's application to purchase a portion of Conrail, the Board imposed the following condition:

19. Applicants must adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision.

There can be no dispute that CSXT's acquisition of Conrail has thus far been a bungle. Duke's Witness Whitehurst, who presented some of CSXT's financial projections in Conrail, demonstrated on this record that through 2001, CSXT had experienced a cumulative cash flow shortfall of \$3.2 billion as a consequence of Conrail-caused problems (Duke Reply Exh. II-B-1 at 6).⁷ The investment community is of one voice that CSXT's mishaps with Conrail have resulted in collapsed profits, sinking stock value, and massive and costly operating problems. (Duke Op. at I-17; Duke Reply Workpapers, p. 0187). It would be hard to imagine a clearer breach by CSXT of its promise to the Board in Conrail not to raise captive rates than the one recounted on the record in this proceeding. CSXT's breach of Conrail Condition No. 19 requires that the Board reject the assailed increases.⁸

⁷ Whitehurst also illustrated how CSXT was addressing its shortfall by raising rates on captive traffic (Duke Reply Exh. II-B-1 at 8).

⁸ The Board frequently recognizes merger conditions outside of the context of the merger case itself. See F.D. No. 34079, San Jacinto Rail Limited Constr. Exemption & The Burlington N. & Santa (continued...)

B. DUKE'S ABILITY TO EASILY PAY LARGE INCREASES

The second justification most frequently espoused by CSXT for the enormous increases to its already highly profitable rates is its contention that Duke "clearly has the resources to pay the increased rates."⁹ The fact that CSXT is reduced to a reliance on Duke's alleged ability to pay the large increases as a primary basis for the assailed rates demonstrates the complete lack of legitimate justification for its rates. In promulgating the Guidelines, the Board specifically endorsed the continued validity of the public interest standard in establishing reasonable rates (Guidelines at 549). No aspect of the public interest standard is clearer than the one which holds that railroad rates cannot be set in accordance with the customer's ability to pay.¹⁰ CSXT's frequent references to Duke's alleged ability to pay large increases cannot serve as a basis for the approval of rates which are otherwise unlawful.

Similarly, CSXT's collateral claim that its large increases are somehow made less unlawful by the fact that Duke passes them directly on to its customers upon whom the impact is allegedly small cannot provide the basis for Board approval of its rates (CSXT Op. at IV-A-24). These identical arguments were rejected by the agency in the

⁸(...continued)

Fe Ry. – Operation Exemption, STB served Aug. 28, 2002; cf. F.D. No. 33003, Louisiana & Delta R.R. – Lease and Operation Exemption – S. Pac. Transp. Co., STB served March 3, 1997.

⁹ CSXT Op. at I-2, I-4, I-5, I-9, I-13, I-21, I-42 to 43, IV-A-10, IV-A-15, IV-A-16, IV-A-18, IV-A-26, IV-C-1, and IV-C-21 to 22; CSXT Reply at I-60, I-66 and I-70; CSXT Reb. at I-27.

¹⁰ In re Investigation of Advances in Rates by Carriers in W. Trunk Line, Trans-Missouri & Illinois Freight Comm. Territories, 20 I.C.C. 307, 350-51 (1911); Phelps Dodge Corp. v. Director Gen., Arizona & New Mex. Ry., 57 I.C.C. 714, 718 (1920).

earliest of the modern coal rate cases as antithetical to the requirements of the public interest. San Antonio, Tx. v. Burlington N., Inc., 355 I.C.C. 405, 413, 416 (1976) ("San Antonio").

C. RATES ON COMPETITIVE TRAFFIC

In its evidence, CSXT repeatedly seeks to provide additional support for its unsound SAC computations through evidence on the levels of allegedly competitive rates;

[REDACTED]

[REDACTED]¹¹ [REDACTED]

[REDACTED]

[REDACTED] (CSXT Reply at I-49). This argument fails on both the law and the facts.

The agency was specifically petitioned (by a shipper) to make "directly observable competitive rates" a measure of SAC. The petition was denied:

. . . the use of actual or expected competitive rates resulting from actual market competition for other traffic is an inappropriate surrogate for stand-alone costs.

Ex Parte No. 347 (Sub-No. 1), Coal Rate Guidelines, Nationwide, ICC served May 31, 1990, at 1. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹¹ CSXT Op. at I-12, I-13, I-17, IV-A-7, IV-A-8, and IV-A-24; CSXT Reply at I-2, I-4, I-13, and I-49 to 51.

[REDACTED]
[REDACTED] (Id. at I-14).

D. OTHER CSXT JUSTIFICATIONS FOR THE ASSAILED RATES

1. Domino Effect

At numerous junctures, CSXT seeks to scare the Board into approving otherwise unlawfully high rates through its claims that if the Board imposes reductions in this case, droves of other customers will seek comparable rate rollbacks (CSXT Op. at I-7, I-44). A corollary to this claim is CSXT's contention that Duke's complaint itself was inspired by recent Board decisions which severely reduced carrier-established coal rates (Id. at I-5).

These arguments are absurd and are nothing more than attempts to divert attention from the real issue presented by this case; namely, whether CSXT is to be permitted to increase already profitable rates by more than [REDACTED] percent. CSXT alone is accountable for the consequences of its avaricious pricing and the Board must be wary of CSXT's efforts to place the blame for or the consequences of its pricing decisions elsewhere. If there is an increase in eastern rate cases, the cause will be CSXT's pricing, not the Board's decisions.

2. Efficiency Claims

CSXT avers that it has exhausted opportunities for increased productivity and therefore it must enhance its revenues (CSXT Op. at I-34 to 36).¹² The railroads have

¹² This claim is completely belied by the evidence on this very record which details the terribly
(continued...)

traditionally made this contention, but it has never proven true.¹³ Moreover, on this record, Duke has demonstrated that CSXT's financial welfare could be improved considerably by repricing or eliminating numerous movements from which CSXT earns revenues which are less than their variable service costs (Duke Reply Exh. II-B-2).¹⁴

3. Non-Guidelines Analyses

CSXT's evidence also includes the results of two non-SAC studies which are advanced as both the basis of the challenged rates (CSXT Op. at I-29 to 30) and as additional proof of their reasonableness (CSXT Reply at I-2). One is a so-called Ramsey Pricing analysis and another is a Revenue Shortfall Allocation Methodology ("RSAM") analysis. CSXT's first claim, as to the role of these analyses, is demonstrably bogus as the studies were begun several months after the rates were first established in late 2001. Moreover, the studies, themselves, are deficient. As explained by Duke (Reb. at III-G-22 to 25), CSXT's Ramsey Study does not employ "movement-by-movement estimates of demand elasticity" which is the sine qua non of Ramsey pricing (Guidelines at 534). CSXT's RSAM analysis is equally lacking. As Duke demonstrates when a RSAM analysis is properly performed, the result fails to provide any justification for CSXT's challenged

¹²(...continued)
inefficient coal service which Duke receives.

¹³ See, e.g., Ex Parte No. 290 (Sub-No. 5), Quarterly Rail Cost Adjustment Factor, STB served June 20, 2001, at 2, and STB served Sept. 20, 2001, at 2.

¹⁴ CSXT deprecates this analysis because Duke based it upon the Board's Costed Waybill Sample, but then turns around and uses the same sample as the basis of its claim that it will be ruined if the Board prescribes rates in this case at levels equal to 180 percent of costs (CSXT Op. at IV-E).

rates (Duke Reb. at III-G-28). In the final analysis, CSXT's evidence on these collateral studies is simply "filler" which is presented to bolster its weak SAC presentation.

III. VARIABLE COSTS

Throughout its evidence, CSXT emphasizes its claimed right to impose very high rates on Duke's traffic - rates which are "multiples" of variable costs (CSXT Op. at I-29). Indeed, CSXT's SAC position in this case would permit revenue/cost ratios exceeding 600 percent. However, when CSXT turns in its evidence to the actual computation of its variable costs on Duke's services, CSXT reverses field and goes to extreme lengths to overstate the levels of its variable costs so as to make their revenue/cost ratios appear smaller. Thus, while asserting that it has a right to charge rates "well above" 259 percent of costs if it chooses (CSXT Op. at I-30), CSXT's variable cost evidence would have the Board conclude that it exercised great restraint in establishing Duke's rates by limiting their average revenue/cost ratios to only 277 percent (CSXT Reb. at II-A-85). CSXT is able to portray its assailed rates as evincing less extreme ratios of revenues to costs both because it withheld crucial data which would have greatly lowered its variable costs and also because it committed numerous cost-finding errors which inflated its costs.

A. MISSING CSXT DATA

The Guidelines place market dominant railroads on notice of the fact that they may be called upon to justify their rates with data which they alone possess. (Guidelines at 548). In its administration of the Guidelines, the Board has repeatedly

underscored the importance of movement specific data in rate cases.¹⁵ For example, in TMPA, the Board endorsed the computation of return and depreciation on road property expense by using investment data for the specific segments of the railroad traversed by the issue traffic instead of average data for the system (Id. at 56). In this proceeding, with the exception of some deficient and self-serving fuel data, CSXT produced virtually none of the movement specific data which Duke sought. Generally speaking, CSXT took the position that it does not have to maintain records to comport with the requirements of rate cases (CSXT Reply at Appendix A).

Through its failure to produce data from its files, CSXT enables a high variable cost scenario. Nowhere is this better illustrated than with roadway investment. Under CSXT's accounting, it buries the carrying costs of its huge Conrail investment in such a way so that they are shared by Duke's traffic in URCS system average computations even though Duke's traffic does not use the former Conrail properties. CSXT's refusal to produce specific roadway investment data, precluded Duke from purging the Conrail roadway and depreciation expenses from the costs for its services (Duke Reb. at I-4 to 5). Had Duke been able to present roadway investment and depreciation on a line-specific basis, its variable CSXT costs would have been appreciably lower.

¹⁵ In its Decision served February 9, 2001 in the TMPA proceeding, the Board found the reliance on system average data to be a "shortcoming in variable cost analyses" (Id. at 8).

Where common carriers exercise market power, they must be held to a duty to produce basic cost data.¹⁶ Where, as in this case, the carrier does not produce basic, specific cost data, there must be a presumption against the railroad's cost analyses and in favor of the shipper's.

B. BASIC ERRORS IN CSXT'S VARIABLE COST COMPUTATIONS

1. Cycle Times

The largest single contributor to the difference between the parties' computation of variable costs is cycle time because cycle time dictates the bulk of CSXT's locomotive and car costs, which costs cause a major share (approximately 30%) of the difference in the parties' variable costs.

CSXT's cycle times are vastly inflated due to CSXT's unprecedented inclusion of excess railcars in its cycle time database which database is then used by CSXT to determine cycle times for both freight cars and locomotives. For this reason, CSXT's cycle time evidence reflects not only the time spent by railcars in an actual "cycle" between two consecutive loadings, but it also reflects the time spent by surplus railcars waiting to be assigned to Duke service (i.e., costs for which CSXT already is compensated through URCS by a spare margin addition).¹⁷

¹⁶ The Board has heretofore noted that railroads possess cost data which they do not make available. See Docket No. 42051, Wisconsin Power and Light Co. v. Union Pac. R.R., STB served Sept. 13, 2001, at 52 ("Wisconsin").

¹⁷ On rebuttal, CSXT partially corrected for these double counts (CSXT Reb. at II-A-20), but its evidence continued to overstate cycle times.

2. Helper Service

The lynchpin of CSXT's argument regarding its inflated helper service costs for locomotive helper service is its position that its own records (produced to Duke during discovery) do not mean what they say. See CSXT Reb. at II-A-76 ("Duke purported to calculate the distance the helper units must run in assisting a train based on a document provided in discovery."). Specifically, CSXT argues that its records display "the minimum distance over which helper service is required, based on the physical constraints of the route (such as ruling grade and curvature)," but that those records "did not purport to represent the actual operation of CSXT helper units" Id. at II-A-76 to 77 (emphasis in original).¹⁸

In support of its "actual" mileages (which greatly exceed those shown in its records), CSXT offers the "estimates" of Witness Fliess, which supposedly consider the true cut-off points for CSXT's helpers. Id. at II-A-76 ("CSXT based its distances on information provided by Mr. Fliess."). The estimates prepared for this litigation by CSXT's witness, however, cannot provide a legitimate basis to deviate from actual CSXT records. Duke's computation of helper service costs, based upon CSXT's records, is the best evidence on these costs.

3. Locomotive Fuel

In its evidence in this case, Duke used CSXT's system average fuel expense because CSXT stated, in discovery, that it had no records for Duke's trains (Duke Op. II-A-

¹⁸ [REDACTED]

[REDACTED]. See Duke Op. Workpapers Vol. 2, pp. 1111-1114.

33). CSXT, despite its claimed lack of records, used results from a special study to increase fuel costs to a level [REDACTED] percent higher than system average. CSXT's study merits no weight, however, because inter alia, it relies upon a considerable amount of data that is glaringly erroneous.

For example, CSXT's study records 24 instances of locomotives traversing the Riverbend to Erwin route segment, but CSXT's study inconsistently calculates the total miles traveled between those two points from as few as 45.6 miles to as many as 178.3 miles (Duke Reb. at II-A-34). Similarly, CSXT's study contains entries for fuel consumed by locomotives traveling as much as 50.7 miles during loading or over 100 miles during unloading, and by locomotives showing a full throttle position for a duration of 25-40 minutes while in a single yard or at a single plant (Id. at II-A-36 to 38). For these and the many other reasons presented in its evidence (Duke Reply at II-A-28 to 37; Duke Reb. at II-A-25 to 39), the Board must ignore CSXT's adjustments to the URCS system fuel expense.

4. Conclusion

As shown in Duke's evidence, the challenged rates evince an average revenue/cost ratio of approximately 380% (Duke Reb. at II-A-57). Because of the numerous irregularities in CSXT's variable cost computation, which are highlighted above and which are detailed at length in Duke's evidence (Duke Reply Part II-A), Duke's evidence provides the most accurate information on CSXT's costs and should be accepted by the Board. CSXT's failure to produce movement specific data should serve as a strong presumption that Duke's cost figures are overstated.

C. CSXT'S SATELLITE ISSUES

CSXT has injected a number of miscellaneous issues into this proceeding, some of which require comment.

1. Rate Origins and Destinations

One element of CSXT's litigation strategy is to attempt to employ CMP principles to disrupt eastern coal commerce. CSXT seeks through this strategy to deter others from challenging its rates. It is an established commercial fact in the east that large coal consumers, such as Duke, satisfy their coal purchase requirements from numerous coal mines. Traditionally, the eastern railroads have grouped mines together into districts for ratemaking purposes. Coal commerce in the east is dependent upon the origin district form of ratemaking.¹⁹ While Duke would have preferred that the traditional eastern coal rate structure be maintained, it reluctantly confined its challenge to 46 separate origin/destination pairs to avoid delaying disputes (Duke Op. I-14 to 16).

CSXT, unsatisfied with Duke's concessions on the scope of the required rate prescription, advances additional restrictive and repressive rate contentions, which have no legal support, and which, if accepted by the Board, would strangle eastern coal commerce. Specifically, CSXT seeks to further narrow the already narrowed scope of the Board's prescriptive powers to an ever-shrinking universe of origin-destination pairs through its position that rates may not be prescribed for routes which have not moved coal (CSXT Reb. at I-4). CSXT's position finds no support in the law. In the first place, a carrier's statutory

¹⁹ See Investigation of Railroad Freight Rate Structure Coal, 345 I.C.C. 71, 118 (1974).

duty to maintain "reasonable rates" is not restricted to those rates which actually move traffic (49 U.S.C. § 10701(d)(1)). The agency has consistently permitted the challenge of rates even though the shipper has yet to use them.²⁰ The Board must reject CSXT's efforts to curb its prescriptive authority. To the contrary, the public interest requires the Board to order CSXT to restore and maintain its origin district rate structure.

2. CSXT's Common Carrier Schedules

CSXT's several schedules and its CORE 120 publication in particular,²¹ which hold out the terms of the coal transportation services which it offers, transgress the Board's requirements concerning the form and content of common carrier schedules. They are complex, confusing, and unfathomable. They are essentially a form of unilateral contract and are filled with strange provisions such as those dealing with volume incentives, loading incentives, alternate route rates (i.e., items 8, 9, and 14 of CORE 120). They defy the Board's primary directive for common carrier schedules; namely, that they be "readily usable." See Ex Parte No. 528, Disclosure, Publication, and Notice of Change of Rates and Other Service Terms for Rail Common Carriage, STB served May 3, 1996, at 12. In its order in this proceeding, CSXT must be directed to establish rates in comprehensible schedules which meet the Board's "usability" mandate.

²⁰ See, e.g., San Antonio at 418; Lum v. Great Northern Ry., 21 I.C.C. 558 (1911).

²¹ See Supplement-Amendment to the Verified Complaint of Duke Energy Corporation, April 5, 2002 ("Supplement-Amendment"), at Exh. G.

3. Synfuels

Duke is unwilling to permit CSXT's machinations on synfuels to pass unmentioned (Duke Op. I-8 n.5). Synfuels, a form of processed coal, have customarily been treated by the eastern railroads as coal and have moved as coal.²² As part of its Duke reprisal, CSXT, for the first time, in the Duke schedules excluded synfuels from its coal schedules; thereafter secured a separate STCC number for the product (29 911 91); and established separate and higher rates on synfuels (CORE 128).²³ Once again to avoid delay, Duke chose not to initiate another separate rate case directed at CSXT's new synfuels rates, as CSXT insisted.²⁴ Duke asks that the Board take notice of CSXT's efforts to complicate and obstruct these proceedings by needlessly insisting upon separate litigations for a product that moves interchangeably with coal.

4. Evidentiary Issues

At CSXT's request, the Board struck from Duke's rebuttal evidence certain minor modifications to Duke's SARR involving a tunnel and a relocated yard.²⁵ The Board invited Duke to file a petition supplementing its evidence if the tunnel and yard information were central to its case and its outcome. Duke declined this invitation for two reasons.

²² CSXT's claim that Duke "improperly" billed synfuels as coal is nonsense.

²³ See Supplement-Amendment at Exh. H.

²⁴ See CSXT's April 17, 2002 "Motion to Sever Duke's Synfuel Rate Claim in a Separate Docket or, in the Alternative, to Reopen Discovery."

²⁵ See Docket No. 42070, Duke Energy Corp. v. CSX Transp., Inc., STB served March 25, 2003, at 4.

One is the fact that according to Duke's calculations, these changes have only a \$0.17 impact on SAC. The other is that past precedent confirms that petitions and motions cause extensive delays in rate cases.²⁶ In its evidence in this case, Duke explained that the enormous rail rates which it began paying on January 1, 2002 were so burdensome that in order to secure a timely determination of its complaint it would have to accept CSXT's discovery violations in order to avoid extended exposure to CSXT's abusive rates (Duke Op. at I-8 to 11). While "fairness" should certainly preclude the use of new material on rebuttal, fairness should also require that defendant railroads meet their discovery obligations. As the record in this case demonstrates, CSXT did not produce usable traffic data, which is critical to the configuration of the SARR, until well after the close of discovery and shortly before the due date for opening evidence (Id. at I-11).

IV. STAND-ALONE COSTS

A. INTRODUCTION

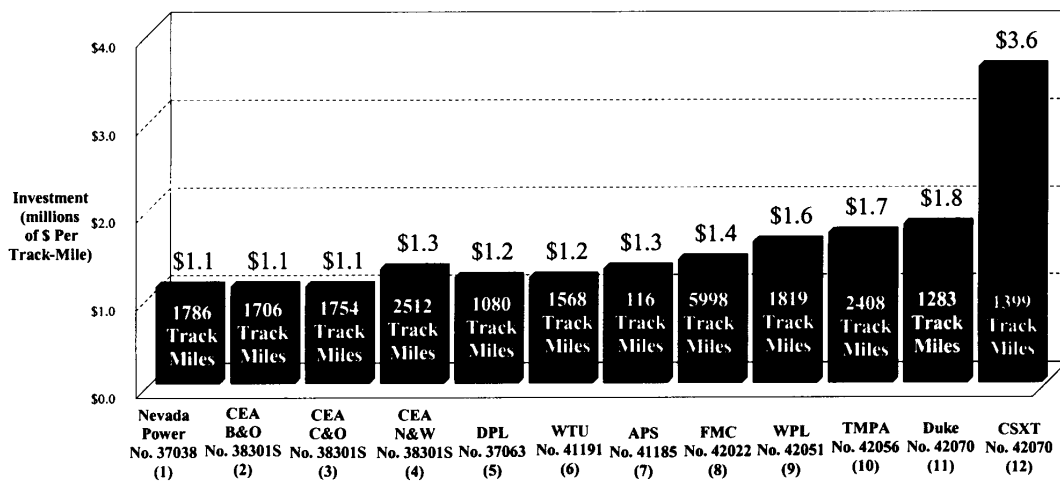
Because CSXT concedes that the revenue/cost ratios of its rates greatly exceed the jurisdictional threshold, the survival of CSXT's rates depends upon SAC levels. The parties have compiled a detailed record on SAC.²⁷ Duke's evidence

²⁶ To its credit, but too late to help Duke, the Board has recognized and enacted new rules to address this problem. See Ex Parte No. 638, Procedures to Expedite Resolution of Rail Rate Challenges to be Considered under the Stand-Alone Cost Methodology, STB served April 3, 2003.

²⁷ It is ironic that CSXT keeps requesting the Board to dismiss Duke's case for failure to make a prima facie case (CSXT Reply at I-10, Reb. at I-31) when Duke's SAC evidence is amongst the most comprehensive presentations ever to come before the Board which has never dismissed a Guidelines case because the complainant's evidence was deficient.

supports investment and operating expense levels for the Appalachia & Carolina Western Railroad (“ACW”), the SARR in this proceeding, which are harmonious with those of all other SARRs reviewed and endorsed by the Board under the Guidelines and for which it has made data available publicly. While Duke’s calculations of the important SAC components in this case lie squarely within the mainstream of SARR economics as articulated by the Board, CSXT’s calculations of these same expenses are so high that they simply have no counterparts in the Board’s SAC universe. If the Board’s prior cases mark the stand-alone road with certainty, as Commissioner Morgan believed they did, there can be no doubt that CSXT is off the road in this case as the following charts show:

Chart I
Comparison of The Costs Per Track Mile To Construct SARRs



As Chart I illustrates, CSXT's roadway investment expense for the ACW of \$3.6 million per track mile (column 12) is nearly three times as high as the average expense for previous SARRs (\$1.3 million). CSXT's enormous roadway investment expense for the ACW cannot be ascribed to any material difference in the ACW's location or facilities because other hypothetical carriers in the Board's SARR family were built in the same region which the ACW serves (i.e., SARRs in columns 2, 3, 4, and 5 of Chart I) or in regions with more formidable terrain (i.e., column 1).

CSXT's ACW operating costs are equally out-of-step with those of prior SARRs as shown in Chart II:

Chart II
Comparison of The Ton-Mile Operating Costs of SARRs

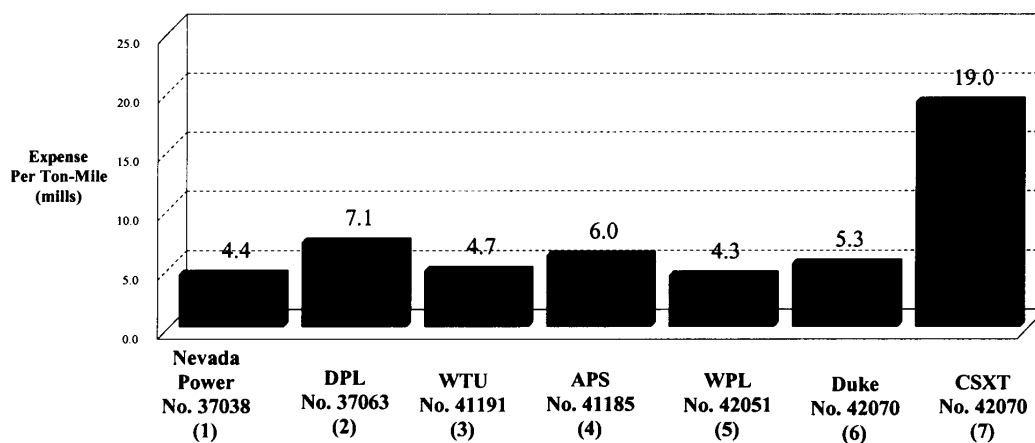
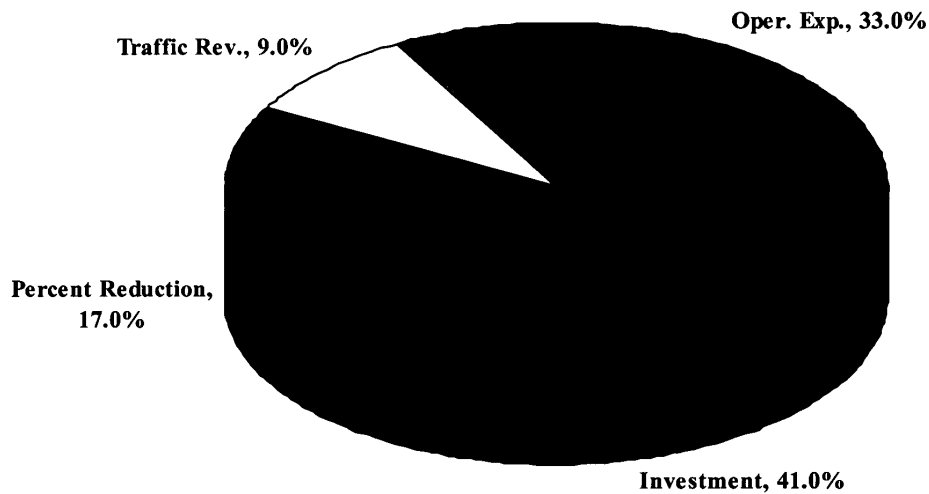


Chart II shows that the costs to operate the ACW, according to CSXT's evidence in this case, of 19 mills per ton-mile, is over 350% greater than the average operating costs (5.3 mills per ton-mile) of other SARRs for which the Board has computed operating costs. Here, as with roadway investment expense, there is no special feature of the ACW's operations which would justify the high costs which CSXT propounds. The ACW's high-volume, point-to-point, unit and trainload coal services are very similar to the services performed by the other SARRs in Chart II.

Because the ACW is not dissimilar from prior SARRs, CSXT's unprecedentedly high expenses for the ACW and its SAC of approximately \$30.00 per ton cannot be ascribed to any unique attributes of the ACW. Instead, CSXT's high SAC is a direct product of CSXT's unsound SAC cost-finding methodologies which are unprecedented and which studiously flout the primary tenet of the Guidelines that SAC must represent the "least cost most efficient" replacement of CSXT's coal transportation services. Chart III depicts the principal expense items which make up SAC together with the contribution made by each item to the large difference in the SAC positions of Duke and CSXT:

Chart III
Causes of the Differences Between the Parties SAC's



Based on SAC for the movement from Sarah to Cliffside where Duke's SAC is \$4.97 and CSXT is \$34.27.

B. ROADWAY INVESTMENT

Roadway investment differences account for nearly one-half of the total difference between the respective SAC claims in the evidence (Chart III). In its evidence, CSXT claims that it costs \$3.6 million a mile (\$5 billion for the entire road) to construct 1,399 ACW track miles whereas the Board has found that other SARR roads could be built for a fraction of this cost (Chart I). The sole explanation for the huge difference in roadway investment costs between other SARRs in CSXT service territory as well as other

SARRs generally, and CSXT's ACW costs in this case lies in CSXT's use of unsound stand-alone cost finding methodologies.

1. Earthwork

The largest component of the ACW's roadway investment expense is the cost of its earthwork. Duke performs the ACW's earthwork for \$521 million, whereas CSXT contends that the same earthwork costs \$1.52 billion. Earthwork costs are a function of the amount of earth moved and the costs to move it. Because of prior agency precedent on the determination of quantity, the parties' estimates of the amounts of earth to be moved are relatively close (Duke Reb. at III-F-41). Their costs for its movement are not. Duke's earthwork plan was devised and designed by well-qualified, rail construction specialists who included Witness Sullivan, who served for many years as Conrail's Chief of Engineering. Duke employed recognized construction industry cost data (from the Means Handbook of construction costs ("Means")) in a fashion heretofore approved by the Board.²⁸ Duke's ACW grading plan was fully detailed and supported in a comprehensive electronic workpaper (III-f_Grading ACW Rebuttal.xls).

In its reply, CSXT complained that Duke's earthwork plan was deficient because it employed the "lowest cost equipment" (CSXT Reply at III-F-22), seemingly unaware that Duke's economical choice of earth moving equipment comported fully with stand-alone theory (Docket No. 42022, FMC Wyoming Corp. v. Union Pac. R.R., STB served May 12, 2000, at 117 ("FMC")). More importantly, CSXT failed to demonstrate

²⁸ See Wisconsin at 82.

that Duke's plan and equipment were not feasible. Other than denigrating Duke's choice of certain types of earthmoving equipment, there is nothing CSXT's voluminous evidence which demonstrates that Duke's basic earthwork plan is not feasible (TMPA at 119). Instead of showing how Duke's approach might be unworkable, CSXT devotes most of its evidence on earthwork to the presentation of a different and much more costly approach to moving earth. Significantly missing from CSXT's earthwork presentation is any proof that CSXT, itself, incurs costs in its real world construction activities which corroborate those it wishes to attribute to the ACW (Duke Reb. at III-F-23). If CSXT actually engaged in such costly methods of earthmoving, it would have been simple and dispositive to include actual cost evidence from these experiences in its evidence. It did not.²⁹

On rebuttal, while standing by the feasibility of its basic grading plan (III-F-46), Duke presented alternative evidence demonstrating that if, for some reason, heavier or more sophisticated equipment were required for the ACW's earthwork, suitable equipment for the ACW project was available at costs well below those posited by CSXT (Duke Reb. at III-F-46).³⁰ Illustrative of CSXT's overreaching in its computation of ACW's earthwork costs is its use of a 100% additive to costs for hauling earth. A cost additive for "rough terrain or steep grades" is mentioned in Means. Instead of establishing how the ACW

²⁹ It bears note that CSXT's rail construction experts, Ralph Whitehead Inc. have no experience constructing facilities for CSXT. (CSXT Reply at IV-44 to 47, 131 to 134).

³⁰ The authorities clearly provide for the introduction of new evidence on rebuttal when it is "responsive to the reply." Docket No. 37038, Bituminous Coal – Hiawatha, Utah to Moapa, Nevada, ICC served Dec. 7, 1988, at 4. In Docket No. 41989, Potomac Electric Power Co. v. CSX Transp., Inc., STB served Nov. 24, 1997, at 3, the Board stated that its rebuttal rules are to be interpreted "broadly" in SAC cases.

construction qualifies for the application of the rough terrain additive, CSXT fabricates the application in its evidence by quoting from Means that the 100% cost additive applies in: "SW Virginia and WV." (CSXT Reply at III-F-24). CSXT's quotation does not appear in Means and was made up by CSXT for the purposes of this case. As Duke demonstrates on rebuttal, doubling the cost of hauling earth is inappropriate in constructing the ACW since the hauls are short and site accessibility is excellent (Duke Reb. at III-F-47). Doubling of substantial costs is but one of the many unsound techniques which CSXT has used to overstate its earthwork expenses. CSXT's flawed approach to earthwork is a major source of its erroneous SAC computations.

2. Other Elements of Roadway Investment Expense

Throughout its treatment of ACW roadway investment expense, CSXT exaggerates each discrete cost component of roadway investment. On tunnel costs, for example (\$338 vs. \$482 million), CSXT inflates the ACW costs primarily by both erroneously indexing previously Board-sanctioned tunnel cost levels from an incorrect year (CSXT uses 1978 instead of 1980, the proper year) and by using an adjustment index for rail industry costs instead of one for the construction industry (CSXT Reply at III-F-74). The differences between the parties on tunnel costs would doubtless have been much greater were it not for the Board's decision in Coal Trading³¹ where it established the basic tunnel cost parameters which constrained CSXT. Regrettably, the Board has not established similar rules on bridge costs and CSXT took extensive liberties in running up

³¹ Coal Trading Corp. v. Baltimore & O.R.R., 6 I.C.C.2d 361 (1990).

the costs of the ACW's bridges. Duke's rebuttal evidence contains a detailed refutation of the extensive criticisms of its bridge costs presented by CSXT (Duke Reb. at III-F-103 to 113).

Other revealing examples of the extremes to which CSXT goes to overstate ACW investment costs are presented in its treatment of mobilization and land costs. Despite the fact that Duke's contractors included the cost of moving equipment and supplies to the jobsite (mobilization) in their overall cost proposals upon which Duke relied, CSXT adds large additional costs for mobilization. CSXT's mobilization costs are both excessive and redundant (Id. at III-F-127 to 131). Land and land clearing costs also illustrate CSXT's cost inflation tactics. CSXT takes Duke's land acquisition cost – based primarily on detailed and qualified appraisals covering nearly the entire ACW route – and arbitrarily trebles it for the 1,140 ACW route miles which CSXT's land value witness failed to examine. CSXT's development of land costs is both arbitrary and inconsistent with SAC theory. It is the antithesis of the “detailed procedure” upon which the Board insisted in TMPA (at 114). On land clearing costs, CSXT derives very high costs by claiming, without any support, that trees in Appalachia “typically exceed 36 inches” in diameter. As Duke demonstrates on rebuttal, actual tree measurements along ACW's route confirmed that 70 percent of the trees requiring removal were less than 12 inches in diameter. (Duke Reb. at III-F-26).

Through a systematic repetition of unsound cost inflating tactics, CSXT produces a roadway investment expense of \$3.6 million per track mile as compared with Duke's \$1.8 million. Duke's roadway investment costs are the highest of any SARR in

history whereas CSXT's are so high that they have no counterparts in either the real or the stand-alone world. They exist solely for the purpose of this litigation and the Board should reject them and accept Duke's reasonable portrayal of ACW roadway investment expense.

C. OPERATING COSTS

Differences in the operating costs of the ACW (5 vs. 19 mills per ton mile) account for 33 percent of the SAC difference. Here, as with roadway investment costs, Duke's cost computations for the ACW are consistent with the operating costs of other members of the Board's SARR family whereas CSXT's are wildly out of line with the costs of other SARRs (see Chart II).³²

To develop its ACW operating cost evidence, Duke relied upon the collective expertise of several specialists who were highly qualified in the field of rail operations. For example, Duke's Witness Yocum has 30 years of operating experience including stints as CEO of regional railroads similar in size to ACW and as Vice President Transportation of CSXT itself. Using CSXT's traffic data, Duke's witnesses first identified ACW's customers and the transportation services which they required. They then configured the ACW's facilities (tracks, passing tracks, yards, etc.) which would be needed to provide the train services required by ACW's customer base. Thereafter, they carefully designed an operating plan to accommodate the ACW's peak service requirements (Duke Op. at III-C) and they computed, in copious detail, the annual expenses required to implement their

³² CSXT's argument that coal movements in the east require the costly and complicated handling of empty cars in yards to assemble trains of various car-types and train sizes (CSXT Op. at I-6), does not apply to the ACW's very efficient point-to-point operations and therefore cannot be a valid justification for CSXT's high ACW operating costs.

operating plan (Id. at III-D). Duke's direct operating evidence is thorough, cohesive, and reasonable. Because the ACW's peak operational year is 2004, it unquestionably has a significant over-capacity for most of its 20-year life.

After Duke's witnesses configured the ACW and developed its operating plan, pertinent data therefrom was run through a computer model (SDM model) "to test the adequacy of the ACW" as designed by Duke's experts (Id. at III-C-16). In its reply, CSXT completely distorts and misrepresents the development of Duke's ACW operating evidence with its repeated contention that Duke "based its opening evidence on a fundamentally flawed and unreliable" computer model.³³ CSXT's misleading and erroneous description of Duke's opening evidence serves as the springboard for CSXT's use of an assertedly superior computer model (RTC model) as the cornerstone for its entire operating cost presentation. Using data from the RTC model, CSXT first points to numerous alleged shortcomings in Duke's operating plan (CSXT Reply at III-C-9, III-C-11). Again, based upon outputs from its own RTC model, CSXT then presents a different version of the ACW operating costs which are appreciably higher than Duke's (Id. at III-D-69).

Putting to one side, for the moment, CSXT's mistaken argument that Duke's operating evidence must fall because it is based upon a defective computer model, CSXT's model-based positions on ACW operating expenses raise the issue as to whether the Board can accord any weight, whatsoever, to CSXT's operating cost evidence. As just noted, all of CSXT's operating cost positions flow from outputs of its RTC model. CSXT's RTC model

³³ CSXT Reply at I-37; see also id. at I-38 to 41, III-B-2 to 4, and III-B-18 to 36.

has not been presented in its evidence. As such, there is no way for the Board to understand the RTC model's assumptions and methodologies. The authorities make clear that in administrative proceedings, if evidence based upon computer models is to be probative, the proponent of such evidence must introduce the model itself.³⁴ Before an agency can rely on computer model evidence, it must have an opportunity to understand the model's assumptions and methodologies, etc.³⁵ Accordingly, CSXT's long litany of evidentiary deficiencies in Duke's ACW operational plan (CSXT Reply at III-B-2 to 3) and its own highly expensive ACW counter-operating plan (based upon what CSXT describes as the "well-established RTC Model" (Id. at III-C-4)) must be rejected on account of the failure of CSXT to satisfy the basic evidentiary requirements applicable to the use of computer models.

Conversely, Duke has fully met these requirements in its use of the SDM Model in its presentation of certain aspects of ACW's operating cost evidence. The authorities mandate that the agency have access to: "the underlying data used in the analyses, programs and programming method and all relevant computer inputs and outputs."

³⁴ Novartis Corp. v. Ben Venue Laboratories, 271 F.3d 1043, 1051 (Fed. Cir. 2001).

³⁵ U.S. Air Tour Assoc. v. Fed. Aviation Admin., 298 F.3d 997, 1008 (D.C. Cir. 2002); see also United States v. Russo, 480 F.2d 1228, 1241 (6th Cir. 1973) ("Russo") (quoting the Manual for Complex and Multidistrict Litigation: "It is essential that the underlying data used in the analyses, programs and programming method and all relevant computer inputs and outputs be made available to the opposing party far in advance of trial. This procedure is required in the interest of fairness and should facilitate the introduction of admissible computer evidence. Such procedure provides the adverse party and the court with an opportunity to test and examine the inputs, the program and all outputs prior to trial.").

See Russo at 1241. Duke has provided the model itself,³⁶ and detailed instructions for its use.³⁷ Neither CSXT nor the Board can fault Duke's operating cost evidence on the grounds that its computer model-related elements are unfathomable because those aspects of Duke's evidence which are model-based meet or exceed the well-established requirements for the presentation of evidence derived from computer models.³⁸

Finally, as noted earlier, Duke's operating evidence is not based entirely upon a computer model as CSXT's erroneously asserts. Instead, Duke's experts independently devised the ACW's "configuration, yard location and sizes, and operating plan" (Duke Reb. at III-C-3) using CSXT's traffic data, ACW customer requirements, and their expertise. The ACW's detailed configuration, the most critical element in the determination of operating costs, was carefully designed by Duke's experts to accommodate the ACW's peak business and is set forth in evidence in the ACW track diagrams which are presented in detail in Duke's evidence for the Board's inspection (Id. at III-B-8 to 18 and Exh. III-B-3). Similarly, Duke's staffing of the ACW is based upon the actual experience of Duke's experts with regional and other railroads. For example, Duke's Witnesses Yocum, Kruzich, and Weishaar have extensive experience in managing railroads at the executive level,

³⁶ See Duke Reb. electronic workpaper "stringacw_reb.zip."

³⁷ See Duke Reb. electronic workpaper "readme_csx_reb.zip."

³⁸ Duke's SDM-related evidence meets and exceeds the standards prescribed by the Board for the use of such programs in TMPA, STB served May 28, 2002, at 2. The documentation problems with respect to an earlier version of the SDM described in TMPA (at 68, 74) do not exist with respect to the SDM used in this proceeding as demonstrated in Duke's electronic workpapers.

designing and implementing railroad information technology systems, and marketing railroad coal transportation services.

The soundness of Duke's ACW operating cost evidence is attested to by the fact that the cost it develops for the ACW – 5.3 mills per ton-mile – compares most favorably with the average operating costs of other SARRs (4.9 mills, Chart II) for whom the Board has approved data. Conversely, CSXT's extraordinary ACW operating cost of 19 mills per ton-mile has no prior SARR precedent. Further proof of the unreliability of CSXT's operating cost evidence is the fact that it would require the Board to find that it costs considerably more to operate the optimally efficient ACW than it costs to operate CSXT itself.³⁹ Clearly, such illogical evidence cannot be probative of reasonable ACW costs and the Board must find Duke's evidence to be the best evidence of record.⁴⁰

D. ACW TRAFFIC AND REVENUE

While the evidence before the Board on the ACW's future traffic and revenues is voluminous, the difference between the parties' revenue projections has a relatively small impact on base-year SAC in comparison to the impacts of the investment and operating cost differences.⁴¹ CSXT's projection of ACW revenues is approximately 20

³⁹ CSXT's own operating costs are [REDACTED] mills per ton-mile – i.e., average CSXT variable costs of [REDACTED] mills taken to full cost level ([REDACTED]%; system ratio of variable to full costs).

⁴⁰ CSXT has sent up a fusillade of alleged defects in Duke's ACW operating plan but consistently fails to demonstrate that any alleged defect which it identifies has a significant impact on actual operations or their costs. See Docket No. 42057, Public Service of Colo. d/b/a Xcel Energy v. The Burlington N. and Santa Fe Ry., STB served April 4, 2003, at 2.

⁴¹ As discussed infra, CSXT's purposeful mismatch between productivity-based SARR rate (continued...)

percent less than Duke's (Duke Reb. at III-A-76). This difference is in turn caused by the fact that there are differences between the parties in the ACW's future tonnage and in the revenues from those tons.

The primary cause for the different tonnages lies in the methodologies used by the parties to forecast ACW traffic in the early years of its operations (2002-2005). In its opening evidence, Duke took actual CSXT tonnage for ACW's origins for 2001 (the last full year of actual data) and applied projected annual changes obtained from CSXT in discovery, for the years 2002-2004. For 2005 and beyond, Duke initially used a flat projection and thereafter primarily used the changes projected by the Energy Information Administration ("EIA"). CSXT also uses its own change forecasts except it selects 2002 as the base year for their application. CSXT focuses on 2002 (a partial year) because most coal traffic was off in 2002. It then locks in its reduced projection of 2002 traffic levels for 2003 and beyond by applying its forecasted annual changes for those years to its constructed and lowered volume for 2002. As the foregoing makes clear, the basic difference in the total ACW tonnage calculation is driven by the parties' differing positions on the appropriate base year with Duke initially using 2001 actual traffic from ACW's service origins and CSXT a combination of actual and estimated 2002 data which resulted in a significant reduction between 2001 and 2002 (i.e., [REDACTED]).⁴²

⁴¹(...continued)

escalation and non-productivity-based SARR cost escalation has a major impact on SAC for future years in the 20-year DCF model.

⁴² See CSXT Reply electronic workbook "CSXrevprojbasedontariff_revised.xls."

On rebuttal, Duke explained that even though 2002 was an atypical year for coal traffic on account of warm weather, etc., that tonnage from ACW's service origins (as contrasted with the CSXT system as a whole) had nonetheless increased slightly. On rebuttal, Duke, following CSXT's basic approach, switched its base year for projecting ACW tonnages from actual 2001 traffic to actual 2002 traffic (8 mos.) and actual 2001 (4 mos.) as a surrogate for 4Q02. Duke's 2002 ACW tonnage was ■■■ million whereas CSXT's was ■■■ million. CSXT's effort to construct a very reduced ACW volume for 2002 is merely a ploy to embed CSXT system-wide declines in 2002 into all of the future ACW traffic statistics. CSXT's own documents disclosed that 2002 was an atypically down year for coal and lend further support to Duke's conservative estimates of the ACW's coal traffic in 2002.⁴³

A more material impact on SAC is caused by the parties' different calculations of ACW revenues whose difference is only partially a product of the difference in ACW tonnages. The primary cause of the difference in the revenue calculations for the ACW is the use of the different methodologies by the parties to compute ACW revenues for those movements which also move in part on CSXT's lines (crossover traffic). The preferable method for the allocation of cross-over revenues would be the use of CSXT data on CSXT's actual divisions on joint movements of coal. CSXT refused to produce this information (Duke Reb. at III-A-40). Under such circumstances, the Board has endorsed the use of a modified mileage prorate methodology to allocate

⁴³ See CSXT Reb. at III-A-7 to 8; CSXT Workpapers WP-III-A-5157 to 5158.

crossover revenue (FMC at 27-29 & n.62). Duke employed this approach. Despite the Board's admonitions about relitigating decided matters, CSXT advances an entirely different methodology for allocating revenues from crossover traffic which method, not unexpectedly, diminishes ACW's share of crossover revenues so as to increase Duke's SAC. Not only has CSXT's basic approach been proscribed by the Board, it is unsound as well as Duke shows in its evidence (Duke Reb. at III-A-44 to 45).

With respect to future years, while Duke reluctantly adopted the modest EIA forecast for the basic post-2005 tonnages, the use of EIA's productivity-adjusted rate forecast to adjust future ACW rate levels as proposed by CSXT is improper. EIA projects future rail rates levels on a national, not regional, basis, and assumes continued productivity improvements.⁴⁴ The EIA rate projections are thus a poor surrogate for the ACW's specific eastern traffic base where the carriers are committed to major rate increases (Duke Reply Exh. II-B-1 at 6 to 7).

CSXT's use of the EIA rate forecast is especially inconsistent with its use of the RCAF-U to adjust future ACW operating expenses, as there is no basis to conclude that future rates will be driven by productivity, but that costs will not. CSXT's attempt to adjust ACW's revenues for productivity through use of EIA but not its costs through use of the RCAF-U results in an improper mismatch and further flaws CSXT's revenue projections.

⁴⁴ See Watkins, "Forecasting Annual Energy Outlook Coal Transportation Rates," Issues in Midterm Analysis and Forecasting (EIA 1997), <http://tonto.eia.doe.gov/FTP/ROOT/forecasting/060797.pdf>, at 75.

E. DETERMINATION OF DUKE'S SAC

The stand-alone cost-finding process generates a 20-year stream of revenue and cost data for the SARR. To constrain the coal rates of a complaining shipper, the SARR system data which is produced by the Board's discounted cash flow procedures must be translated into a specific SAC for the complaining shipper against which the challenged rates may be measured in instances where, as here, total SARR revenues exceed costs.

In promulgating the Guidelines, the Board stated that the precise method to be used for determining a complaining shipper's SAC "is an issue best left for a case-by-case resolution." (Guidelines at 546). Consistent with this approach, the Board has thus far in its administration of the Guidelines employed two distinct methodologies for the establishment of the complaining shipper's SAC – the pro rata/ton mile approach⁴⁵ and the percentage reduction approach.⁴⁶ As Duke's evidence discloses, the method which the Board selects to determine Duke's SAC will greatly influence the levels of the maximum rates established in this proceeding (Duke Reb. at III-H-7).

While recent cases under the Board's case-by-case approach favored the use of the percentage reduction method, use of this method without modification is inappropriate given the facts of this case. In cases where it used the percent reduction method, the Board did so on the basis of its assumption that the rates challenged in those

⁴⁵ See, e.g., Omaha Public Power Dist. v. Burlington N. R.R., 3 I.C.C.2d 853, 856-58 (1987); Arkansas Power & Light Co. v. Burlington N. R.R., 3 I.C.C.2d 757, 773-74 (1987).

⁴⁶ Coal Trading at 380, 436, 450; Arizona Pub. Serv. Co. v. The Atchison Topeka & Santa Fe Ry., 2 S.T.B. 367, 392-93 (1997) ("Arizona").

cases were components of an existing rate structure which reflected relative levels of “demand elasticity,” “so that maintaining the existing rate structure [by percentage reduction] preserves the carrier’s demand-based differential pricing.” See Arizona at 392.

In TMPA (at 14), the Board stated that “absent better evidence” it uses the percentage reduction method. Here the evidentiary record is replete with compelling evidence that the challenged rates do not form a part of any existing rate structure and do not reflect true elasticities of demand. As the Board’s own analysis discloses, the average price in the east to move a ton of coal 360 miles in all forms of service (i.e., unit train, multiple car, etc.) is \$9.25 whereas CSXT’s challenged rate is \$16.45.⁴⁷ A rate for unit train service that is nearly twice as high as the going rate for general coal services in the region is demonstrably not consistent with the existing coal rate structure. As the evidence also shows, prior to the spate of post-Conrail increases, Duke’s rates averaged around \$[REDACTED] per ton (CSXT Op. at IV-A-6). The record is replete with evidence establishing the metes and bounds of the existing rate structure which evidence shows that other captive ACW customers pay around [REDACTED] mills per ton-mile⁴⁸ whereas CSXT seeks to charge Duke circa [REDACTED] mills. In summary, the Board would err if it assumed here that the challenged rates reflect relative demand elasticity or that they are components of an existing rate structure.

⁴⁷ See OEEAA Report at 13, 17.

⁴⁸ Based on: (i) a [REDACTED] million sum of revenues from Duke Reb. electronic workpaper “CSX RevProjbasedontariffsrebuttal.xls” for destinations in Duke Reb. electronic workpaper “ACW-CSX Captive Shippers.xls;” and (ii) a [REDACTED] ton-mile sum of SAC miles x SAC tons from Duke Reb. electronic workpaper “CSX RevProjbasedontariffsrebuttal.xls” for destinations in Duke Reb. electronic workpaper “ACW-CSX Captive Shippers.xls.”

As Duke has demonstrated, CSXT's assailed rates are aberrations which are not components of the existing rate structure. Rather they are rates which CSXT established either to punish Duke for its resistance to CSXT's repeated attempts to increase its rates and/or to game the Board's percent reduction methodology. Any doubt on the accuracy of this allegation is dispelled by the transparency of CSXT's attempts to show the Board that there were bona fide considerations which it used to establish Duke's rates. CSXT's statements that its rates reflect its consideration of CMP principles are truly remarkable when its own evidence makes clear that CSXT did not begin any CMP analysis until well after the filing of Duke's complaint.⁴⁹ The same is true for CSXT's so-called Ramsey and RSAM analyses as well as its rates to Duke's Marshall Station. None of these claimed rate benchmarks existed at the time the assailed rates were established in late 2001. While CSXT makes seemingly endless references to such other rate justifications as "differential pricing," "revenue need," etc., its evidence is devoid of any demonstration as to how these general economic concepts were applied to create the rates which CSXT established. Furthermore, the Board is on record that rail revenue needs are unrelated to the determination of maximum rate levels (Conrail at 66). CSXT has failed to provide either a legitimate basis for the rates it established for Duke or any viable evidence that they are components of a rate structure or that they reflect the relative demand elasticities of Duke's traffic.

⁴⁹ At the time it established its rates, CSXT had no traffic or cost data suitable for use under the Guidelines (see CSXT Op. at Appendix A). While CSXT testified that it had used some other cost and profitability data to establish Duke's rates, it produced none of this data in discovery (see n.5, supra).

Because the statute gives CSXT complete freedom to establish initial rates to its customers, the Board cannot permit such rates to then form the cornerstone of a maximum reasonable rate structure, where as here, there is evidence that the rates were arbitrarily set. To conclude that the assailed rates are worthy candidates for the application of percentage reduction would effectively transfer control of rail rate making authority away from the Board to CSXT. As simple logic discloses, CSXT can predetermine eventual SAC levels at the outset by manipulating the level of those rates as to which it anticipates shipper challenges under the Guidelines. Under the Board's case-by-case approach to the establishment of the SAC for the complaining shipper, it must conclude, on the basis of the best evidence in this record that the application of percentage reduction methodology without modification would undermine CMP and the law's requirement that rates be reasonable. Duke has offered several alternative methods for the calculation of its SAC and commends them to the Board's favorable consideration. (Duke Op. at III-G-26 to 35).

V. CONCLUSION

CSXT's evidence in this case represents a failed attempt to make the shoe fit. Because it arbitrarily established rates with the highest revenue/cost ratios ever to come before the Board, CSXT has been hard-pressed to conform the challenged rates with the rate ceilings mandated by the Guidelines and the Board's rulings thereunder.

At the core of CSXT's extensive defense lie two flawed themes. One holds that Duke's SAC evidence is riddled with error. CSXT avoids the quantification of the alleged errors because the truth of the matter is that to the limited extent that they have merit, their collective impact on SAC is very slight. The other theme is CSXT's

presentation of its own version of SAC which, if given credence, would be the equivalent of de facto deregulation as CSXT's SAC would permit coal revenues five times higher than the highest rates ever prescribed by the Board.

Because of its bizarre results, CSXT's SAC evidence provides no guidance to the Board in its resolution of this case. Conversely, Duke's evidence and its SAC computations conform with the Guidelines and support SAC expenses and rates which are consistent with prior SAC precedent, while at the same time they permit CSXT to charge the most profitable coal rates ever sanctioned by the Board.

VI. AFTERWORD

Not content with coal revenues of 50+ mills per ton-mile (the Board prescribed 13 in TMPA), CSXT notified Duke on April 11, 2003 (one business day before the due date of this brief) that on April 1, 2003 it had again raised Duke's rates. CSXT's rates are now 6.5% higher than those challenged in Duke's complaint. The cost and revenue computations in the brief do not reflect the actual rates, as re-increased.

VII. PRAYER FOR RELIEF

Because Duke has demonstrated that the assailed rates are unlawful, it prays for the following relief pursuant to 49 U.S.C. § 10704(a):

- a finding by the Board pursuant to 49 U.S.C. §10707 that CSXT possesses market dominance over Duke's traffic;
- a finding by the Board that the rates established by CSXT, and which took effect on January 1, 2002, on Duke's traffic, and subsequently increased, are unlawful under 49 U.S.C. §10701(d)(1);
- the prescription of the maximum reasonable rates identified in Table III-H-5 (Exp. Contract) of Duke's Rebuttal Narrative; and

- the award of reparations for all charges collected by CSXT in excess of the prescribed rates; interest thereon at a reasonable rate (Duke Reb. at III-H-15 to 21); and reimbursement of the \$57,500 which Duke paid to file its case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2003, I caused five copies of the foregoing Post-Evidentiary Brief of Complainant Duke Energy Corporation to be served by hand upon the following counsel for Defendant CSX Transportation, Inc.:

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