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March 25, 2004



**By Hand Delivery**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

**FILED**

MAR 25 2004

Re: **STB Docket No. 42070, Duke Energy Corporation v. CSX SURFACE  
Transportation, Inc. TRANSPORTATION BOARD**

Dear Secretary Williams:

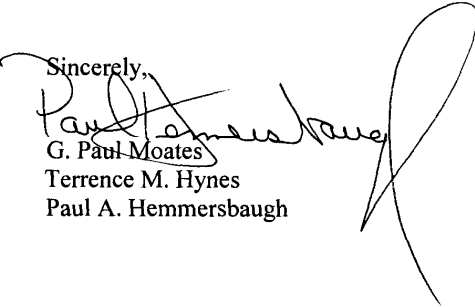
Enclosed for filing on behalf of CSX Transportation, Inc. in the above-referenced proceeding are a signed original and ten (10) copies of Defendant CSX Transportation, Inc.'s Petition for Reconsideration ("Petition"). Also included are ten (10) CD ROMs containing WordPerfect versions of the Petition, exhibits in PDF format, and electronic workpapers. Finally, in accordance with Board regulations, we have enclosed a check for \$150.00 to pay the filing fee associated with this Petition.

Please acknowledge receipt of this submission for filing by date-stamping the enclosed duplicate paper copy and returning it to our messenger.

If you have any questions concerning this filing, please contact the undersigned.  
Thank you for your attention to this matter.

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Sincerely,

  
G. Paul Moates  
Terrence M. Hynes  
Paul A. Hemmersbaugh

Enclosures

cc: Counsel for Complainant (w/encls.)

BEFORE THE  
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION,

*Complainant,*

v.

CSX TRANSPORTATION, INC.,

*Defendant.*

STB Docket No. 42070



DEFENDANT CSX TRANSPORTATION, INC.'S  
PETITION FOR RECONSIDERATION

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SURFACE  
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**DATED: March 25, 2004**

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DUKE ENERGY CORPORATION,  
  
*Complainant,*  
v.  
  
CSX TRANSPORTATION, INC.,  
  
*Defendant.*

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STB Docket No. 42070

Pursuant to 49 C.F.R. § 1115.3, CSX Transportation, Inc. (“CSXT”) petitions the Board for reconsideration of certain limited aspects of the decision served in the above-captioned proceeding on February 4, 2004 (the “*Decision*”). The *Decision* found that the cumulative net present value of SARR costs exceeded SARR revenues by a significant margin, and accordingly the challenged rates were found to be well below a maximum reasonable level. It is thus unlikely that any purported errors identified in the parties’ Reconsideration Petitions could change the conclusion that the challenged rates are not unreasonable. *See Decision* at 7-8, 31-32. Nonetheless, CSXT believes that, for the good of the regulatory process and to provide clear, sound guidance for parties to future proceedings, some aspects of the *Decision* should be reconsidered and revised.

As discussed below, certain rulings and findings embodied in the *Decision* would set precedents that CSXT believes are unsound and contrary to basic SAC and administrative law principles. In particular, while the *Decision* reached outside the record to apply a government coal production forecast, it declined to apply the most current up-to-date version of that forecast at the time of the *Decision*. Moreover, the *Decision* significantly dilutes the Board's salutary rules prohibiting new evidence on rebuttal by accepting new evidence submitted for the first time on rebuttal without requiring the complainant to satisfy the strict conditions and limitations upon such evidence. Time after time in this proceeding, Duke has attempted to introduce material new

evidence after the deadline for such evidence has passed. Repeated, untimely submissions of new evidence are not only fundamentally unfair to the opposing party, they also undermine the Board's orderly consideration and timely determination of these cases.

Finally, while CSXT disagrees with the Board's *sua sponte* decision to offer Duke a post-*Decision* opportunity to request phasing, it appreciates the Board's desire to afford parties every reasonable opportunity to present evidence concerning future changes to the challenged rates. CSXT further understands that the Board wishes that issue to be addressed separately, in the event that Duke elects to seek phasing. *See Decision*, STB Docket No. 42070 (served Feb. 20, 2004). Accordingly, CSXT will reserve its arguments regarding phasing, as well as the substantial additional discovery that would be necessary in a phasing proceeding concerning all aspects of Duke's fuel costs, its accounting for and reporting of those costs and associated revenues, its passing through of those costs to its customers, and other relevant matters, until the appropriate time following the Board's determination of issues presented on reconsideration.

#### **I. TRAFFIC AND REVENUE**

During the course of the proceedings both parties relied, at least in part, upon forecast data for Central Appalachia from EIA Annual Energy Outlook ("AEO") 2002 in order to project traffic volumes for 2005-2021. EIA's AEO 2002 projected a cumulative change in CAPP coal production for that period of -14.4%. In its *Decision*, in order to forecast traffic volumes for 2005-2021, the Board reached outside of the record and relied upon EIA AEO 2003. For the period 2005-2021, AEO 2003 forecast a cumulative change in CAPP coal production of +4.3%. However, the EIA AEO 2004 was released in January 2004 (three weeks before the *Decision*), reflecting a cumulative change in CAPP coal production for 2005-2021 of -7.0%. (*see* <http://www.eia.doe.gov/oiaf/aeo/supplement/index.html>). AEO 2004 – the EIA's latest and presumably best current projection of CAPP coal production for 2005-2021 – demonstrates (1) that the 2003 EIA projections relied upon by the Board are substantially overstated; and (2) that the AEO 2002 projections contained in the record are substantially closer to current EIA projections than are the AEO 2003 forecast data used by the Board. Notwithstanding these facts,

the *Decision* used the overstated 2003 projections on the ground that AEO 2004 “was released too late to be relied upon in this decision.” *Id.* at 47.

To the extent the Board decides to take “official notice” of government data published after the close of the record, it should rely upon the most up-to-date government forecast available prior to the issuance of a final decision. Duke has now filed an (unauthorized) “Technical Error” Petition, the premise of which is that the Board’s final decision ought to reflect the SARR’s revenues and costs as accurately as possible. *See* “Duke Energy Corporation’s Petition to Correct Technical and Computational Errors,” STB Doc. No. 42070 (March 16, 2004). Indeed, Duke proposes that costs now be adjusted based upon several post-close-of-record data and circumstances, including Duke’s extremely belated disclosure of mistakes in its own workpapers (which were filed in 2002). *Id.* at 13-14. If the Board is going to make these sorts of corrections on the ground that it wants to estimate revenues and costs as accurately as possible, that principle should apply with equal force to the Board’s projection of traffic for 2005-2021. When the Board runs a new 20-year Discounted Cash Flow (“DCF”) to incorporate any adjustments necessitated by its resolution of the pending post-*Decision* motions, there is simply no rational basis for failing to use the most up-to-date government projections available in that final DCF run.

## **II. ROAD PROPERTY INVESTMENT**

The Board should reconsider its acceptance of the excavating equipment Duke introduced for the first time on Rebuttal, and instead adopt the excavator unit costs for common earthwork, loose rock, and solid rock proffered in CSXT’s Reply. The Board properly rejected some of the new earthmoving equipment Duke introduced on Rebuttal (and adopted CSXT’s dump truck hauler and bulldozer) because Duke had not shown that CSXT’s Reply equipment was infeasible or unrealistic. *Decision* at 79. The Board should apply the same rule to reject the excavator Duke substituted on Rebuttal (and adopt CSXT’s excavator unit costs) for the very same reason: Duke’s opening equipment was unrealistic and infeasible, and Duke has not shown that the equipment CSXT proffered on Reply is infeasible or unrealistic.

**A. Duke Failed To Meet The Standard for Consideration of New Rebuttal Evidence.**

CSXT's Reply demonstrated – and the *Decision* concluded – that the equipment Duke proposed in its case-in-chief was unrealistic and infeasible for the required excavation. *Decision* at 79 (“Having failed in its opening evidence to account for the difficulty of grading areas of solid and loose rock in mountainous terrain, Duke is limited in what it may present on rebuttal on this issue.”). As a result of CSXT's showing, Duke's Rebuttal abandoned its opening equipment, and proposed entirely new excavation equipment and methods. *Id.* (“Duke now concedes that its original proposal for earthmoving equipment was flawed.”). Because Duke's opening excavator was infeasible, the Board's rules limiting new rebuttal evidence make clear that it must adopt the excavators CSXT specified in its Reply Evidence, *unless* Duke's rebuttal demonstrated that CSXT's excavators are infeasible or unrealistic:

[W]here on reply the railroad . . . offers feasible, realistic alternative evidence that avoids the infirmities in the shipper's [infeasible] evidence and that is itself supported, the Board will use the [railroad's] reply evidence for its SAC analysis. . . . [W]here the shipper shows that the railroad's reply evidence is itself unsupported, infeasible, or unrealistic, the shipper may supply corrective evidence.

*NS/Duke* at 14-15 (emphasis added); *see Decision* at 14 (reiterating this standard); *id.* at 79.

CSXT met this standard in its Reply evidence, demonstrating that the excavation equipment it selected was feasible and realistic (*see, e.g., CSXT Reply III-F-22 to 29*). Indeed, Duke expressly conceded that CSXT's Reply equipment was feasible, stating:

Duke's experts have reviewed CSXT's evidence and concur that equipment other than that used by Duke could be used to accomplish to earthwork requirements for the ACW north of Bostic. However . . . Duke's experts conclude that the more appropriate equipment to use for this operation is not the high-cost equipment selected by CSXT but rather [the equipment Duke substituted on rebuttal]. This equipment is equivalent to the equipment selected by CSXT. . . .

Duke Reb. III-F-46 (underline emphasis added, italics emphasis in original). Because Duke conceded the feasibility of CSXT's excavators, the Board's evidentiary rules require adoption of

CSXT's excavating equipment unless Duke demonstrated that such equipment was "unrealistic." *See, e.g., NS/Duke* at 14-15.

Duke's claim that the equipment CSXT selected is designed for digging sewer trenches – the sole basis for the Board's finding that CSXT's excavating equipment was not realistic – is simply false. Duke's Rebuttal made a fleeting, unsupported, and unexplained assertion that the general type of equipment associated with one of the excavator unit costs CSXT selected on Reply was "more useful in digging a trench for a sewer or water line." *See* Duke Reb. III-F-46 (citing no support for that assertion). Apparently extrapolating from Duke's erroneous general assertion, the *Decision* incorrectly surmised that the specific equipment CSXT selected was "backhoe-type equipment" that is "designed primarily for trenching," and further speculated that such equipment would be "relatively inefficient for performing other types of excavation; thus it would likely not be used for grading of a railroad ROW." *Decision* at 79; *compare* Duke Reb. III-F-46.

Contrary to Duke's unsupported assertion and the Board's erroneous expansion of that assertion, the evidence shows that the heavy construction equipment that CSXT selected as its excavators is the type of equipment that would be used to construct a modern railroad right-of-way – it is emphatically *not* "designed primarily for trenching." Duke's evidence did not even *claim*, let alone prove, that the excavator CSXT selected was a "backhoe." *See* Duke Reb. III-F-46. Nor did Duke claim that CSXT's excavator would not be used for excavating a railroad right-of-way. *Id.* Quite the opposite: Duke expressly conceded that such equipment could be used to excavate the ACW right-of-way, and was "equivalent to the equipment" Duke substituted on Rebuttal. *Id.*

Duke's response to NS' Reconsideration Petition regarding the very same issue incorrectly asserted that Duke's evidence had "stated" that "the primary use for a backhoe excavator is digging below grade." That claim misrepresented the record in *Duke/NS*, and if Duke repeats that claim here, it would misrepresent the record in this case. In both cases, Duke's Rebuttal Evidence did not claim that the carrier's excavator was a "backhoe." *See, e.g., Duke*

Reb. III-F-46 (describing CSXT's Reply excavator as a "3 CY hydraulic excavator.")). Also, Duke's evidence did not even claim – much less prove – that the "primary use" of the equipment selected by the defendant was "digging below grade." *See id.* In both cases, Duke's evidence said nothing at all about the suitability of any of the defendant's equipment, or Duke's rebuttal equipment, for digging above or below grade. *See id.* Duke's Reconsideration Reply in *NS/Duke* also introduced new evidence to attempt to support Duke's post-evidentiary claim that a "backhoe" is used to dig trenches (*see* Duke Reconsideration Reply at 15, STB Doc. No 42069 (March 15, 2004); *see also infra*, n.1), but that untimely new claim was irrelevant because Duke had never asserted in its evidentiary submissions that the defendant's excavator was a "backhoe."

The Means cost manual<sup>1</sup> conclusively demonstrates that Duke's unsupported characterization of CSXT's heavy duty excavators as "trenching tools" is simply wrong. While there are two Means categories for trenching equipment (which include equipment for digging a "sewer trench"), the equipment CSXT selected is *not* listed in the trenching equipment categories. *See Means* Categories "Excavating, Trench or Continuous Footing." and "Excavating, Utility Trench." (copies attached as Exhibit A.) Rather, CSXT selected its excavators from two entirely separate and distinct Means categories, the "Excavating, Bulk Bank Measure, Common Earth Piled" section, and the "Drilling and Blasting Only, Rock, Open Face"

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<sup>1</sup> Throughout this proceeding, both parties used the "R.S. Means Heavy Construction Cost Data" manual to develop construction unit costs. Both parties have referred to this authority as "Means" or the "Means Handbook." *See, e.g.,* Duke Rebuttal III-F-214, n.6. After oral argument, Duke attempted to introduce a different authority (R.C. Ringwald's "Means Heavy Construction Handbook"), which appears to simply set forth generalized, summary descriptions of the functions of broad categories of equipment, without any indication of specific requirements, parameters, costs, or production rates of any specific piece of equipment. *See* CSXT Letter to Secretary Williams at 3-4 (Oct. 3, 2003) (copy attached as Exhibit B hereto) (objecting to Duke's post-argument attempt to introduce this new source a year after the close of the evidentiary record, noting that Duke conceded the newly submitted material was "not in evidence"). This new and different publication contained no cross-reference to the specific Means unit cost and productivity data – nor any indication whatsoever of how, or even if, the general descriptions in those exhibits might correspond to any specific piece of equipment – set forth in the Means cost data that Duke relied upon in its evidence. *See id.* It would be even less appropriate for Duke to attempt to rely upon such new evidence in a Reconsideration Petition or Reply. *But see* Duke Reply to NS' Reconsideration Petition, STB Doc. No. 42069 (March 15, 2004) Exhibits 1-2 (attaching and relying upon excerpts from the same new source on this very issue, without even acknowledging they were not in the record).

section. *Compare* Duke Reb. III-F-46 with CSXT Reply WP III-F-0112. Indeed, Duke selected its Rebuttal excavating equipment from the very same Means section that CSXT used for its common earth excavator. *See* Duke Reb. III-F-43 (stating that the equipment Duke selected – from Means “Excavating Bulk Bank . . .” category – “is the type of equipment used for the economical movement of excavated material from the embankment to the haulers”).

The sole basis for the *Decision*’s acceptance of Duke’s rebuttal equipment was the erroneous finding that CSXT’s excavators were more suitable for trenching. *Decision* at 79. Because the *Decision*’s rejection of the excavating equipment package CSXT proffered on Reply was erroneous, unsupported, and contrary to clear record evidence, the Board should correct its finding on this important point. Once the erroneous rejection of CSXT’s excavating equipment is corrected, application of the Board’s rules to the facts of this case compels adoption of CSXT’s excavator unit costs for purposes of the final *Decision*. Because Duke’s opening equipment was infeasible and CSXT’s Reply equipment is feasible and realistic, the Board should not have even *considered* the excavator Duke proposed for the first time on Rebuttal, because that evidence is precluded as a matter of law. *See, e.g., NS/Duke* at 14-15.

Because Duke proffered this new equipment for the first time on Rebuttal, CSXT was denied the opportunity to submit evidence demonstrating that the equipment associated with the Means unit cost that Duke selected would be infeasible for the work of excavating the narrow mountain corridors and steep, rugged terrain that characterize the ACW roadway. Recognizing the fundamental disadvantage such a tactic imposes on an opposing party, the Board’s standard for allowing new evidence on rebuttal is appropriately strict and difficult to meet. *See, e.g., Decision* at 14-15. As the Board stated in rejecting Duke’s other rebuttal equipment, regardless of whether Duke’s rebuttal excavator might “have been appropriate to propose on opening, it is not appropriate rebuttal in light of CSXT’s realistic alternative.” *Decision* at 79.

**B. Duke Did Not Show That Its Rebuttal Excavator Is Feasible or Realistic.**

Even if the Board were to consider the new excavator Duke substituted on Rebuttal – which it should not – Duke did not meet its burden of showing that its new excavator would be

feasible or realistic for the excavation tasks for which Duke designated it. The record evidence does not support a finding that, in the locations and conditions at issue in this case, Duke's new excavator could achieve the production rates (and corresponding unit costs) Duke claims.

Duke did not submit any documentary evidence to show that the new equipment it selected on rebuttal would be feasible or realistic for excavating the ACW roadbed. Indeed, the available evidence suggests Duke's new rebuttal equipment would be neither. Unlike CSXT's Reply evidence, Duke's Rebuttal selected only one excavator to handle two distinct tasks – excavating and loading loose and common earth into dump trucks; and scooping up and loading rocks, boulders, and other materials generated from blasting of solid rock. As the Board implicitly recognized in adopting CSXT's dump truck "hauler," acceptance of Duke's blasting costs should have no effect on the determination of the appropriate excavating equipment. The costs and methods of blasting solid rock into material ranging from small particles to large rocks and boulders are entirely separate from the question of what equipment should be used to scoop up and load the resulting rocks and boulders into dump trucks. Moreover, blasting has nothing at all to do with common and loose earth excavation.

Duke made no attempt to explain how it could use the same equipment – generating almost the same unit costs – for excavating common and loose earth (which is essentially granular material) from an embankment, *and* for moving large rocks and boulders. CSXT selected two different excavators, because its experts determined the same piece of equipment would not be realistic for these two very different tasks. Duke's use of the same equipment (and only marginally different unit costs) for both tasks assumes that equipment could achieve nearly the same production rate regardless of whether it was digging soft dirt from a hillside or scooping up, hauling and loading into trucks blasted rock rubble, including hard rocks and boulders that have been blasted from solid rock. Although this assumption is contrary to common sense, Duke offered no evidence to carry its burden of proving its Rebuttal excavator could realistically perform either – let alone both – of these disparate tasks.

Similarly, the significant difference between the parties' unit costs for rock excavation and loading is largely attributable to Duke's tacit assumption that the product of blasted solid rock would consist entirely of small particles and dirt, rather than ranging from small particles to large rocks and boulders. This unrealistic assumption allowed Duke to posit that its excavator would achieve nearly the same productive volume (and hence roughly the same unit costs) for blasted rocks and boulders as it would for loose and common earth. *Compare* Duke Reb. III-F-46 *with id.*, III-F-53 (using same piece of equipment and unit costs that differ by only 33 cents per cubic yard). This assumption is contrary to common sense and experience – as anyone who has passed through a highway rock-cut construction project knows, the product of blasting is a mixture of large rocks, boulders, and smaller rocks and particles, not exclusively dirt and pebbles.<sup>2</sup> The Means blasting unit costs Duke relied upon provide no indication that the low-cost blasting Duke selected would generate the extraordinary result of uniformly small particles. And Duke offered no other evidence to suggest that its blasting methods (which the *Decision* adopted) would produce the uniformly small rocks and particles necessary to achieve the extremely low rock excavation and loading unit costs Duke proffered on Rebuttal. Thus, Duke has failed to meet its burden of proof that the unit costs (and associated equipment) it selected on Rebuttal are feasible and realistic. *See* Decision at 14; *Duke/NS* at 14-15.

Logic, consistency, and the Board's clear standard for considering new evidence offered on rebuttal all compel the conclusion that the Board should revise the *Decision* to reject Duke's excavator and adopt the excavating equipment (and associated unit costs) proffered by CSXT. *Decision* at 79. Particularly given the *Decision*'s treatment of other grading equipment (*see id.*), any other conclusion regarding excavating equipment would be arbitrary and capricious.

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<sup>2</sup> Duke previously claimed that unit costs for excavating "boulders," apply only to the excavation of non-blasted boulders. *See* Duke Reb. III-F-52 to 53. This is incorrect. The term "boulders" refers to the size and diameter of the rock, not to whether it was the product of blasting or existed naturally.

### III. OPERATING PLAN AND COSTS

#### A. ACW Operating Expenses (\$3.2 Million Annual Cost Understatement)

The Board adopted CSXT's methodology for calculating ACW operating expenses.

*Decision* at 51. CSXT first calculated operating statistics for the ACW's peak-year traffic (which, based upon CSXT's Supplemental Evidence, would be 2004). *See* CSXT Supp. WP "LUMs and Carmiles (CSX) v4 (Modified Off Jct) v3.xls." CSXT then developed base-year operating statistics by applying to the peak-year operating statistics the ratio of base-year tons to peak-year tons. *See* CSXT Supp. WP "Equipment Counts (Modified Off Jct) v3.xls."

The Board made two errors in applying this methodology to its revised ACW tonnage.

First, the Board developed peak-year operating statistics based on the wrong "peak" year.

Consistent with the traffic projections adopted by the *Decision*, the ACW's "peak" year should be 2008 (not 2004). *See* STB WP "STB csxRevprojbasedontariffs-reroutes-MSP.xls."

However, the Board used 2004 volumes to develop ACW peak-year operating statistics. *See* STB WP "STB-LUMs and Carmiles (CSX) v4 (Modified Off Jct) v3.xls." Second, the Board applied the wrong ratio to its (incorrect) peak-year operating statistics in calculating the ACW's base-year operating statistics. Instead of developing a ratio reflecting the base-year (2002) and peak-year (2008) tons adopted in the *Decision*, the Board applied a ratio based upon the Board's estimate of 2002 tons and CSXT's estimate of 2004 tons. *See* STB WP "STB-Equipment Counts (Modified Off Jct) v3.xls," tab "Operating Expense Inputs." The cumulative impact of these errors was to understate ACW operating costs by approximately \$3.2 million in the base year (this calculation assumes the Board adopts the higher fuel costs advocated in CSXT's evidence. *See infra* III.B).

CSXT has recalculated the ACW's peak-year and base-year operating expenses based upon the traffic projections adopted in the *Decision* and the same methodology used by CSXT in preparing its evidence. Specifically, CSXT calculated peak-year operating statistics based upon the ACW's 2008 tons (as determined by the Board). CSXT then developed the ACW's base-year operating expenses by applying to those peak-year operating statistics a tonnage ratio reflecting the relationship between the ACW's 2002 and 2008 tons. *See* CSXT Recon. WP

“CSX-STB-Equipment Counts (Modified Off Jct) v3.xls.” Correcting the Board’s errors in applying the operating expense methodology would increase the ACW’s annual operating expenses by \$3.2 million. *See also*, III.B, *infra*. (describing the fuel cost adjustment included in the operating expenses to which the ratio is applied).

**B. ACW Fuel Costs (\$16.8 Million Base Year Cost Understatement)**

The *Decision* (at 55) adopted Duke’s, rather than CSXT’s, estimate of the ACW’s cost for locomotive fuel. The Board’s ruling on this issue was based on findings that (i) the per-gallon fuel cost reported in CSXT’s R-1 Annual Report (upon which Duke relied) provided the most reasonable estimate of the per-gallon cost of fuel; and (ii) that the fuel consumption rate developed by CSXT in a special study “was based on fuel consumption for a type of locomotive that the ACW would not use.” *Decision* at 55. The latter finding conflicts with the undisputed record evidence, and therefore constitutes material error.

It is undisputed that the ACW road locomotive fleet would consist of General Electric AC4400CW locomotive units. *See, e.g., Decision* at 53; Duke Op. III-C-7; CSXT Reply III-C-8. As CSXT’s Reply Evidence showed, all of the locomotives from which data was collected for CSXT’s special study of fuel consumption rates were, in fact, GE AC4400CW units. CSXT Reply II-A-35, n.25; *see also* CSXT Reply WP “Duke – loco – fuel - adj.123” sheet “GE Fuel Consumption.” Thus, the Board’s finding that CSXT’s special study was based upon a type of locomotive different from that which the ACW would use is clearly erroneous.

It is well-established that “[m]ore specific evidence is generally preferred over more general evidence.” *See, e.g., Decision* at 13-14; Docket No. 42072, *Carolina Power & Light Company v. Norfolk Southern Ry. Co.* (Decision served December 23, 2003) at 14; *West Texas Utilities Co. v. Burlington Northern R.R.*, 1 S.T.B. 638, 713 (1996). The special study conducted by CSXT developed the fuel consumption rate for AC4400CW locomotives operating in coal service over the lines replicated by the ACW. The results of that study are far more specific – and relevant – evidence of the likely experience of the ACW’s locomotive fleet than the average rate of fuel consumption of CSXT’s system-wide fleet (which includes other types of

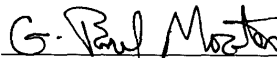
locomotives, as well as operating conditions far different than those that the ACW would experience). Accordingly, the Board should reconsider its adoption of CSXT's system-wide fuel consumption rate, and instead apply its preference for specific evidence to adopt the more specific rate of consumption developed in CSXT's special study.

CSXT has recalculated the ACW's annual fuel expense based upon (i) the per-gallon fuel cost reported in CSXT's R-1 Annual Report (as adopted in the *Decision*) and (ii) the fuel consumption rate for AC4400CW locomotives developed in CSXT's special study. Correcting the *Decision* to calculate the ACW's fuel expense in this manner results in an annual increase of approximately \$16.8 million in the ACW's base-year operating costs, without the peak-to-base year adjustment. (When this understatement is adjusted to correct the peak-to-base year ratio error, *supra* III.A, the net understatement is \$18.4 million, and a corresponding increase in each of the other nineteen years of the DCF period).

#### **CONCLUSION**

The Board should grant CSXT's reconsideration petition, and make the corresponding adjustments and corrections to its *Decision*.

Respectfully submitted,



**R. Eden Martin**

**G. Paul Moates**

**Terence M. Hynes**

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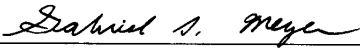
*Counsel for Defendant CSX Transportation, Inc.*

**DATED: March 25, 2004**

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 25th day of March, 2004, I served the foregoing  
“Defendant CSX Transportation Inc.’s Petition for Reconsideration” by causing five (5) copies  
thereof to be delivered, via hand delivery, to:

William L. Slover  
Robert D. Rosenberg  
Christopher A. Mills  
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\_\_\_\_\_  
Gabriel S. Meyer

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# *Heavy Construction Cost Data*

*16th Annual Edition*

**2002**



## 02300 | Earthwork

| 02315   Excavation and Fill |      | CREW                                                       | DAILY OUTPUT | LABOR HOURS | UNIT | 2002 BARE COSTS |       |        |       | TOTAL INCL O&P |
|-----------------------------|------|------------------------------------------------------------|--------------|-------------|------|-----------------|-------|--------|-------|----------------|
|                             |      |                                                            |              |             |      | MAT.            | LABOR | EQUIP. | TOTAL |                |
| 800                         | 3200 | 300 HP, 100' haul                                          | B-10M        | 1,150       | .010 |                 | .30   | .90    | 1.20  | 1.44           |
|                             | 3250 | 300' haul                                                  | "            | 400         | .030 |                 | .86   | 2.59   | 3.45  | 4.15           |
|                             | 3400 | 460 HP, 100' haul                                          | B-10X        | 1,680       | .007 |                 | .20   | .82    | 1.02  | 1.21           |
|                             | 3450 | 200' haul                                                  | "            | 600         | .020 |                 | .57   | 2.29   | 2.86  | 3.39           |
| 900                         | 0010 | EXCAVATING, TRENCH or continuous footing, common earth     |              |             |      |                 |       |        |       |                |
|                             | 0020 | No sheeting or dewatering included                         |              |             |      |                 |       |        |       |                |
|                             | 0050 | 1' to 4' deep, 3/8 C.Y. tractor loader/backhoe             | B-11M        | 200         | .075 |                 | 2.92  | 1.19   | 4.11  | 5.75           |
|                             | 0060 | 1/2 C.Y. tractor loader/backhoe                            | B-11M        | 200         | .080 |                 | 2.19  | 1.08   | 3.27  | 4.54           |
|                             | 0062 | 3/4 C.Y. hydraulic backhoe                                 | B-12F        | 270         | .069 |                 | 1.75  | 1.69   | 3.44  | 4.50           |
|                             | 0090 | 4' to 6' deep, 1/2 C.Y. tractor loader/backhoe             | B-11M        | 200         | .080 |                 | 2.19  | 1.08   | 3.27  | 4.54           |
|                             | 0100 | 5/8 C.Y. hydraulic backhoe                                 | B-120        | 250         | .064 |                 | 1.89  | 1.57   | 3.46  | 4.58           |
|                             | 0110 | 3/4 C.Y. hydraulic backhoe                                 | B-12F        | 300         | .053 |                 | 1.57  | 1.52   | 3.09  | 4.06           |
|                             | 0120 | 1 C.Y. hydraulic backhoe                                   | B-12A        | 400         | .040 |                 | 1.18  | 1.41   | 2.59  | 3.33           |
|                             | 0130 | 1-1/2 C.Y. hydraulic backhoe                               | B-12B        | 540         | .030 |                 | .87   | 1.31   | 2.18  | 2.76           |
|                             | 0300 | 1/2 C.Y. hydraulic excavator, truck mounted                | B-12J        | 200         | .080 |                 | 2.36  | 3.68   | 6.04  | 7.60           |
|                             | 0500 | 6' to 10' deep, 3/4 C.Y. hydraulic backhoe, 6' to 10' deep | B-12F        | 225         | .071 |                 | 2.10  | 2.03   | 4.13  | 5.40           |
|                             | 0510 | 1 C.Y. hydraulic backhoe                                   | B-12A        | 400         | .040 |                 | 1.18  | 1.41   | 2.59  | 3.33           |
|                             | 0600 | 1 C.Y. hydraulic excavator, truck mounted                  | B-12K        | 400         | .040 |                 | 1.18  | 2.17   | 3.35  | 4.17           |
|                             | 0610 | 1-1/2 C.Y. hydraulic backhoe                               | B-12B        | 600         | .027 |                 | .79   | 1.18   | 1.97  | 2.48           |
|                             | 0620 | 2-1/2 C.Y. hydraulic backhoe                               | B-12S        | 1,000       | .016 |                 | .47   | 1.70   | 2.17  | 2.58           |
|                             | 0900 | 10' to 14' deep, 3/4 C.Y. hydraulic backhoe                | B-12F        | 200         | .080 |                 | 2.36  | 2.28   | 4.64  | 6.10           |
|                             | 0910 | 1 C.Y. hydraulic backhoe                                   | B-12A        | 360         | .044 |                 | 1.31  | 1.56   | 2.87  | 3.70           |
|                             | 1000 | 1-1/2 C.Y. hydraulic backhoe                               | B-12B        | 540         | .030 |                 | .87   | 1.31   | 2.18  | 2.76           |
|                             | 1020 | 2-1/2 C.Y. hydraulic backhoe                               | B-12S        | 1,000       | .016 |                 | .47   | 1.70   | 2.17  | 2.58           |
|                             | 1030 | 3 C.Y. hydraulic backhoe                                   | B-12D        | 1,400       | .011 |                 | .34   | 1.50   | 1.84  | 2.16           |
|                             | 1300 | 14' to 20' deep, 1 C.Y. hydraulic backhoe                  | B-12A        | 320         | .050 |                 | 1.48  | 1.76   | 3.24  | 4.17           |
|                             | 1310 | 1-1/2 C.Y. hydraulic backhoe                               | B-12B        | 480         | .033 |                 | .98   | 1.47   | 2.45  | 3.11           |
|                             | 1320 | 2-1/2 C.Y. hydraulic backhoe                               | B-12S        | 850         | .019 |                 | .56   | 2      | 2.56  | 3.04           |
|                             | 1330 | 3 C.Y. hydraulic backhoe                                   | B-12D        | 1,000       | .016 |                 | .47   | 2.09   | 2.56  | 3.01           |
|                             | 1400 | By hand with pick and shovel 2' to 6' deep, light soil     | 1 Clab       | 8           | 1    |                 | 23.50 |        | 23.50 | 36.50          |
|                             | 1500 | Heavy soil                                                 | "            | 4           | 2    |                 | 47    |        | 47    | 73             |
|                             | 1700 | For tamping backfilled trenches, air tamp, add             | A-1          | 100         | .080 |                 | 1.88  | .61    | 2.49  | 3.59           |
|                             | 1900 | Vibrating plate, add                                       | B-18         | 230         | .104 |                 | 2.52  | .24    | 2.76  | 4.19           |
|                             | 2100 | Trim sides and bottom for concrete pours, common earth     |              | 1,500       | .016 | S.F.            | .39   | .04    | .43   | .64            |
|                             | 2300 | Hardpan                                                    |              | 600         | .040 |                 | .96   | .09    | 1.05  | 1.60           |
|                             | 2400 | Pier and spread footing excavation, add to above           |              |             |      |                 |       |        | 30%   | 30%            |
|                             | 3000 | Backfill trench, F.E. loader, wheel mat., 1 C.Y. bucket    |              |             |      |                 |       |        |       |                |
|                             | 3020 | 100' haul                                                  | B-10R        | 400         | .020 |                 | .86   | .54    | 1.40  | 1.90           |
|                             | 3040 | 200' haul                                                  | "            | 200         | .060 |                 | 1.72  | 1.07   | 2.79  | 3.80           |
|                             | 3060 | 300' haul                                                  | "            | 100         | .120 |                 | 3.43  | 2.14   | 5.57  | 7.60           |
|                             | 3080 | 2-1/4 C.Y. bucket, minimum haul                            | B-10T        | 600         | .020 |                 | .57   | .62    | 1.19  | 1.55           |
|                             | 3090 | 100' haul                                                  | "            | 300         | .040 |                 | 1.14  | 1.23   | 2.37  | 3.10           |
|                             | 3100 | 200' haul                                                  | "            | 150         | .080 |                 | 2.29  | 2.47   | 4.76  | 6.20           |
|                             | 4000 | For backfill with dozer, see div. 02315-120                |              |             |      |                 |       |        |       |                |
|                             | 4010 | For compaction of backfill, see div. 02315-300             |              |             |      |                 |       |        |       |                |
| 940                         | 0010 | EXCAVATING, UTILITY TRENCH Common earth                    |              |             |      |                 |       |        |       |                |
|                             | 0050 | Trenching with chain trencher, 12 H.P., operator walking   |              |             |      |                 |       |        |       |                |
|                             | 0100 | 4" wide trench, 12" deep                                   | B-53         | 800         | .010 | L.F.            | .30   | .11    | .41   | .57            |
|                             | 0150 | 18" deep                                                   |              | 750         | .011 |                 | .32   | .11    | .43   | .61            |
|                             | 0200 | 24" deep                                                   |              | 700         | .011 |                 | .34   | .12    | .46   | .65            |
|                             | 0300 | 6" wide trench, 12" deep                                   |              | 650         | .012 |                 | .37   | .13    | .50   | .70            |
|                             | 0350 | 18" deep                                                   |              | 600         | .013 |                 | .40   | .14    | .54   | .76            |
|                             | 0400 | 24" deep                                                   |              | 550         | .015 |                 | .43   | .16    | .59   | .83            |
|                             | 0450 | 36" deep                                                   |              | 450         | .018 |                 | .53   | .19    | .72   | 1.01           |
|                             | 0600 | 8" wide trench, 12" deep                                   |              | 475         | .017 |                 | .50   | .18    | .68   | .96            |

## SITE CONSTRUCTION

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CSXT Reconsideration  
Exhibit B

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October 3, 2003

BY HAND

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

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



Dear Secretary Williams:

We write in response to Duke counsel's letter objecting to CSXT's use at oral argument of certain counsel's exhibits as an aid to the Board's understanding of the evidence previously submitted by the parties in the above-captioned proceeding. *See Letter from William L. Slover to Secretary Williams (Oct. 1, 2003) (the "October 1 Letter").* Contrary to Duke's assertions, CSXT's demonstrative exhibits were entirely accurate, appropriate, and based upon evidence already in the record in this case (or, in a few instances, in the public record). *See, e.g., Transcript of Oral Argument at 81 (Sept. 10, 2003) (CSXT counsel advised that the slides were "counsel's exhibits," intended to summarize and illustrate evidence and arguments already in the record).* CSXT used demonstrative exhibits (based on record evidence) primarily to address erroneous claims that Duke improperly raised for the first time on Rebuttal or on brief.

For example, Duke claimed for the first time in its Brief (without citation to the record or other evidentiary support) that the operating costs per ton-mile calculated by CSXT for the "optimally efficient" ACW exceeded CSXT's actual system average costs per ton-mile. *See Duke Brief at 31, n.39 (claiming CSXT's actual costs were 13 mills per ton-mile).*<sup>1</sup> As Chairman Nober's questions at argument indicated, were this claim true, it would be troubling. Duke's claim, however, is patently untrue, and is readily refuted by information in the Board's own public records. Because Duke first asserted this unsupported claim in its brief, CSXT was obliged to correct it at oral argument, in order to ensure the Board was not misled on this important point. *See Oral Arg. Tr. at 72-74 (CSXT counsel responding to question regarding Duke's claim) (copy attached as Exhibit A hereto).* CSXT calculated its actual system average

<sup>1</sup> CSXT Slide 21 incorrectly identified the source of Duke's claim (as "Duke Rebuttal at 31"). Duke asserted this claim in its brief, and the correct source is Duke Brief at 31, and n.39.

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operating costs per ton-mile, based entirely on publicly available data contained in CSXT's Forms R1 (data that was not generated for purposes of this case), and illustrated that straightforward calculation in a demonstrative slide. *See* CSXT Oral Arg. Slide 21 (showing that CSXT's actual system average costs were about 27 mills per ton-mile, substantially higher than the costs CSXT calculated for the hypothetical optimally efficient ACW).<sup>2</sup>

Despite its rhetoric, Duke's letter offers only one substantive objection to CSXT's oral argument exhibits. As explained below, that objection cannot withstand scrutiny. Duke's real complaint is that CSXT's demonstrative exhibits effectively illustrated what CSXT had already demonstrated in its evidentiary submissions and brief – that, even if accepted, the new evidence Duke improperly submitted on Rebuttal would not satisfy Duke's burden of proof or resurrect its fundamentally flawed SAC presentation. Below, CSXT sets the record straight with respect to the specific claims in Duke's letter.

First, Duke claims CSXT's use of demonstrative slides was somehow inappropriate, because "Duke had no opportunity to respond to those slides, especially considering the constraints Duke faced for its oral rebuttal." October 1 Letter at 1. This assertion is wholly without merit. The majority of the slides CSXT used at oral argument were used to respond to new evidence and claims that Duke improperly raised for the first time in its Rebuttal presentation (e.g. Duke's substitution of a new earthmoving equipment package in its Rebuttal submission and its incorrect and misleading claim that its Rebuttal evidence corrected the errors in its string diagram model and resulting SARR configuration and operating plan) or on brief (e.g., Duke's submission of inaccurate and irrelevant "ton-mile operating costs" from prior SAC cases). *See generally*, CSXT Brief at 3-22, 35-39 (describing several of the numerous instances in which Duke introduced new evidence for the first time on rebuttal).<sup>3</sup>

Duke's suggestion that it somehow did not have a fair and adequate opportunity to address the points set forth in CSXT's counsel's exhibits is hard to fathom. Each side had the same amount of time in which to present its case to the Board, and Duke counsel had the procedural advantage of opening and closing the argument. Duke counsel took full advantage of that opportunity, by taking the unusual step of reserving nearly half of his allotted time for rebuttal argument. *See* Oral Argument Tr. 10 (reserving 20 of 45 minutes for rebuttal); *see also id* at 94-95 (Chairman Nober authorized counsel for Duke to "take the time you need to finish up your presentation."). Duke faced no unfair "constraints" on its rebuttal argument.

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<sup>2</sup>CSXT's use of this information was entirely appropriate, because it is well-established that the Board may take official notice of matters in its own records. *See, e.g.*, 49 C.F.R. §§ 1114.1 – 1114.6.

<sup>3</sup> The remainder of the slides, to which Duke asserts no specific objection, were simply excerpted from the evidence submitted by the parties during the course of this proceeding.

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Second, Duke's sole substantive objection – that CSXT's slides did not accurately depict one of the new pieces of earthmoving equipment that Duke introduced for the first time on rebuttal – is erroneous, and cannot be reconciled with Duke's own evidence. Remarkably, the basis for Duke's unfounded claim that CSXT's slide inappropriately introduced new evidence at oral argument is a new source that Duke did not cite, submit, or mention in its evidentiary submissions or even in its brief, but instead raised for the first time in its post-argument October 1 Letter. Duke's entire attack on CSXT's demonstrative exhibit is thus based on citations to a new source that Duke expressly admits is "not in evidence." October 1 Letter at 2. Moreover, as explained below, the shovel portrayed by CSXT is the type of equipment on which Duke based its Rebuttal earthmoving costs.

On Rebuttal, Duke changed its earthmoving unit costs and methods (substituting a shovel for the scraper it had specified in its case-in-chief), thereby denying CSXT the opportunity to submit an evidentiary response. *See* Duke Rebuttal at III-F-46. The new unit cost proffered in Duke's Rebuttal is listed in Means under "shovels." *See* Duke Rebuttal WP Vol. 1, p. 0153 (Means Heavy Construction Cost Data (2002) Item No. 022315 400 3900). According to Means, that cost is based on a B-12T crew configuration. *See id.* The corresponding tables in the same Means publication indicate that the piece of equipment associated with the Means unit cost Duke selected (using a B-12T crew) is a "75-ton crawler crane" with a "lattice boom," using a 3 cubic yard bucket attachment. *See* RS Means Heavy Construction Cost Data at 399, 26 (Cost Data Item 01590 600 1100) (copies attached as Exhibit B).<sup>4</sup> The demonstrative slides CSXT used to depict Duke's crawler crane shovel were computer-generated images of that 75-ton piece of equipment, taken from specification sheets provided by the equipment manufacturer. *See* CSXT Slides 12-14; Oral Arg. Tr. at 81-82.

In support of Duke's newly minted claim that it intended a different shovel than that specified in its own workpapers, Duke offers a separate and different Means publication, which neither Duke nor CSXT cited or purported to rely upon in the evidence submitted in this proceeding, the "Means Heavy Construction Handbook."<sup>5</sup> *See* October 1 Letter. Duke's new

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<sup>4</sup> Contrary to Duke's suggestion, CSXT did not at any time refer to the equipment Duke substituted on rebuttal as a "dragline." Compare October 1 Letter at 2 with CSXT Brief at 11, n.21 The "dragline" characterization is Duke's label for the equipment depicted in CSXT's slide.

<sup>5</sup> Duke expressly defined the term "2002 Means Handbook" as referring collectively to "the 2002 RS Means Heavy Construction Cost[] [Data] and the 2002 RS Means Building Construction Costs." Duke Rebuttal III-F-214, n.6. Until October 2003 (nearly eleven months after the parties submitted their final round of evidence), Duke did not claim that it was relying on the separate publication, "Means Heavy Construction Handbook," which appears to be a primer that describes, in general, non-specific terms, the functions and uses of various categories of construction equipment. *See* October 1 Letter (conceding that the Means Heavy Construction Handbook is "not in evidence.")

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source appears to set forth general, summary descriptions of broad categories of equipment, without any indication of specific requirements, parameters, costs, or production rates of any specific piece of equipment. *See* October 1 Letter, Exhibits II, IV. Those exhibits contain no cross-reference to the specific Means cost and productivity data – nor any indication whatsoever of how, or even if, the general descriptions in those exhibits might correspond to specific equipment – set forth in the Means cost data that Duke relied upon in its evidence. Thus, even if the Board were to accept Duke's unsupported and untimely claim that it meant to select some other piece of equipment than that specified in its Rebuttal workpapers, the earthwork costs it used in its SAC presentation would be incorrect because they were based on the unit costs for the equipment specified in Duke's workpapers.

Third, Duke claims that it was improper for CSXT (using publicly available turning distance data published by the equipment manufacturer) to use a demonstrative exhibit that illustrated the infeasibility of the hauler Duke also introduced for the first time in its Rebuttal. Here again, Duke asks the Board both to ignore its procedural rules and to insulate Duke from the consequences of its own actions and tactical decisions. Duke introduced radically new and different earthwork equipment for the first time on Rebuttal, when CSXT had no opportunity to submit an evidentiary response. *See* CSXT Brief at 11. In addition to demonstrating that the Board should disregard Duke's attempt to significantly revise its case-in-chief on rebuttal, CSXT also described several reasons that the oversized and ill-suited equipment Duke substituted on rebuttal was physically infeasible and could not work. *See id.*<sup>6</sup> The two slides to which Duke now objects simply illustrate (using the equipment manufacturer's publicly available data and specifications) what CSXT's brief discussed – the oversized quarrying and mining hauler Duke proposed on Rebuttal would be infeasible for constructing a SARR in the mountains of Central Appalachia. *Compare id.* at n.21 (Duke's rebuttal hauler's turning distance is 3-times greater than the width of the ACW roadbed) *with* CSXT Oral Argument Slide 17 (illustrating the infeasibility of such a turning distance).

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<sup>6</sup> Thus, Duke asks the Board to accept new evidence it introduced on rebuttal, while at the same time precluding CSXT from even attempting to respond to that untimely new evidence. Duke's letter even objects to the limited responses to Duke's improper rebuttal contained in CSXT's brief. Duke did not raise this objection in a timely manner (i.e. within 10 days of the April 14, 2003 filing of the final brief in this matter), but instead waited nearly six months to assert this belated objection. It would be difficult to imagine a more clear-cut, stark illustration of the unfairness of allowing a party to revise its case-in-chief by submitting material new evidence on rebuttal. *See* Decision, *Duke Energy Corp. v. CSXT*, STB Doc. No. 42070 (March 25, 2003) (striking as improper new evidence Duke submitted on rebuttal in this case). If the Board agrees with CSXT that Duke improperly substituted new equipment on rebuttal, there would be no need to reach the question of whether CSXT's demonstrative slides accurately depict the physical infeasibility of that equipment.

The Honorable Vernon Williams, Secretary

October 3, 2003

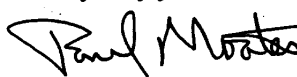
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Fourth, Duke's vague allegation that CSXT's calculations of SAC operating costs "rest on confidential data" is unsupported, and ignores the fact that it was Duke that proffered the irrelevant operating cost comparisons from prior cases in the first instance. CSXT believes that such comparisons are not relevant considerations in a SAC analysis, and the Board's maximum rate reasonableness determination in this case should be based solely on the SAC evidence developed and submitted in this record. But in insisting that the Board consider such comparisons, Duke must accept that any such comparisons must be made on an apples-to-apples basis by considering SARRs that traversed terrain similar to that at issue in this case.

In its brief, Duke offered a chart that purported to compare the operating costs per ton-mile of the hypothetical stand-alone railroads in prior SAC cases. *See* Duke Brief at 20, Chart II. Duke provided no specific citation to the record in those cases, nor any other explanation of how it calculated those costs, so CSXT could not determine the source or accuracy of those calculations. With one exception, however, all of the operating costs Duke calculated referred to SARRs that traversed the relatively accommodating terrain of the plains and prairies of the West.<sup>7</sup> In response to the skewed SARR cost comparison chart Duke offered on brief, CSXT calculated the operating costs per ton mile adopted by the Board in Eastern cases involving SARRs that traversed terrain similar to that involved in the instant case. *See* CSXT Slide 23. Then, to facilitate a better "apples-to-apples" comparison, CSXT indexed the costs in all of those cases to constant 2002 dollars, using the Board's RCAF. *See* CSXT Slide 24.

If the Board has any questions about the matters discussed in this letter, we would be pleased to address them.

Very truly yours,



G. Paul Moates  
Paul A. Hemmersbaugh

Attachments

cc: William L. Slover, Esq.

<sup>7</sup> The single exception was DPL (STB Doc. No. 37063), which settled before the Board issued a decision. Thus, by definition, whatever data Duke used to calculate its ton-mile operating costs for the SARR in DPL was "data not included in [a] reported agency decision[]." *See* October 1 Letter at 2.