

**WESTERN FUELS ASSOCIATION, INC.
and BASIN ELECTRIC POWER
COOPERATIVE, INC.**

v.

Defendant.

231491
231492

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WESTERN FUELS ASSOCIATION, INC.	)	
and BASIN ELECTRIC POWER	)	
COOPERATIVE, INC.	)	
	)	
Complainants,	)	
	)	
v.	)	Docket Nos. 42088 and
	)	42088 (Sub-No. 1)
	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant.	)	
	)	

Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively “WFA”) submit this petition in response to the Surface Transportation Board’s (“STB” or “Board”) decision served on December 9, 2011 (“*Premium IP*”) in STB Finance Docket No. 35506, *Western Coal Traffic League – Petition for Declaratory Order* (“*Premium Case*”) and in support hereof state as follows:

In the *Premium Case*, the Board is conducting a declaratory order proceeding to determine whether to include the \$8.1 billion write-up in BNSF’s 2010 Uniform Railroad Costing System (“URCS”) net investment base attributable to the acquisition premium Berkshire Hathaway, Inc. (“Berkshire”) paid to acquire BNSF in 2010.¹ In *Premium II*, the Board

¹ Hereinafter, the \$8.1 billion write-up will be referred to as the “premium” or the “acquisition premium.”

announced its release of a 2010 BNSF URCS that includes the \$8.1 billion premium, subject to later revision if the Board decides to revise the 2010 BNSF URCS to remove the premium. The Board also stated that under these circumstances, “any party that believes the prescriptive effect of its 2012 rate prescription should be temporarily lifted pending the outcome of this proceeding should petition the Board to reconsider or reopen any relevant decisions.” *Premium II* at 2 (footnotes omitted).

WFA currently has a BNSF rate prescription and WFA’s prescription is impacted significantly by the premium. If allowed, inclusion of the premium is projected to increase WFA’s prescribed rate payments by over \$25 million, with WFA’s first premium-infused payments scheduled to start in mid-January of 2012. WFA interprets the Board’s *Premium II* decision as a request from the Board for petitions from shippers with rate prescriptions asking the Board to establish procedures that will permit them to recover refunds in the event that the Board does ultimately decide to revise the 2010 BNSF URCS to exclude the premium, or to issue similar forms of remedial relief.

In this Petition, WFA requests that the Board take appropriate actions to perfect WFA’s refund rights. As discussed below, WFA believes that the Board can perfect these rights in a number of different ways – the choice is up to the Board – but in all instances it is critically important to WFA that the Board take no action that will remove the current pricing caps on WFA’s rates. WFA has spent over \$8 million to obtain, and defend, its rate prescription, and WFA is opposed to any order lifting that prescription that somehow could return pricing freedom to BNSF. WFA suggests a number of different options for the Board to protect WFA’s premium refund rights, while, at the same time, protecting its current price caps. Each of these options –

including the one suggested by the Board in *Premium II* – is supported by WFA, so long as its price caps remain in place, and, after establishing an appropriate refund procedure, the Board stays any further action in this case related to the premium until the Board decides the pending *Premium Case*. WFA emphasizes that its stay request does not apply to, and has no impact on, the Board’s resolution of the pending remand issue in this case, which has been fully briefed and awaits disposition by the Board.

BACKGROUND

(1) WFA filed a complaint with the Board on October 19, 2004 alleging that BNSF Railway Company’s (“BNSF”) tariff rates for the transportation of WFA’s coal from the Wyoming Powder River Basin (“PRB”) to the Laramie River electric generating station (“LRS”) located near Moba Junction, Wyoming exceeded a reasonable maximum. This case was docketed at the STB as No. 42088 (“Base Docket”).

(2) In a decision served on February 18, 2009 (“*WFA I*”), the STB found that the assailed tariff rates in the Base Docket exceeded a reasonable maximum. The STB prescribed “the maximum lawful rate[s]” in the form of “maximum R/VC ratio[s]” applicable starting in the fourth quarter of 2004 through the third quarter of 2024. *Id.* at 31. The Board also awarded reparations equal to the unlawful payments (plus applicable interest) WFA had made under the assailed tariff rates, starting in the fourth quarter of 2004, and stated: “[i]f the parties cannot agree on the amount of reparations due, or if there is a dispute over how to calculate the variable cost of the movements at issue, WFA should bring those disputes to our attention.” *Id.*

(3) Following the issuance of *WFA I*, (i) the parties filed a joint petition to correct technical and computation errors in the *WFA I* decision; (ii) BNSF filed new tariff rates on

March 20, 2009 in purported compliance with the prescribed revenue-to-variable cost (“R/VC”) ratios; (iii) WFA began to pay BNSF’s new tariff rates; and (iv) WFA asked the Board to find that BNSF’s new tariff rates were not in compliance with the prescribed R/VC ratios because BNSF had not properly calculated its variable costs.

(4) On June 5, 2009, the Board served a decision (“*WFA II*”) granting the parties’ joint petition to correct technical and computational errors in the *WFA I* decision. *Id.* at 5. Correcting these errors produced some revisions in the maximum prescribed R/VC ratios. The Board went on to hold that “[t]oday’s decision thus concludes with finality the administrative proceeding establishing the maximum lawful revenue-to-variable cost levels for the traffic at issue” and that “compliance” issues concerning variable cost calculations “will be resolved in a newly created sub-docket in this proceeding,” which the Board denominated as Docket No. 42088 (Sub-No. 1) (“Compliance Docket”). *Id.* at 4.

(5) In its decision served on July 27, 2009 in the Compliance Docket (“*WFA III*”), the Board found that BNSF had made “significant technical errors in its variable cost calculations.” *Id.* at 9. Due to these errors, WFA had been paying higher tariff rates than those permitted under the prescribed maximum R/VC ratio. The Board proceeded to calculate the maximum lawful tariff rates, reflecting the use of correctly calculated variable costs multiplied by the prescribed maximum R/VC ratio, for the first two quarters of 2009 and instructed BNSF “to reestablish, within 30 days, transportation rates that comport with this decision, and then update those rate prescriptions quarterly as new variable cost information and indices become available,

following the methodology described in *Oklahoma Gas & Elec. v. Union Pacific R.R.*, [STB Docket No. 42111 (STB served July 24, 2009) (“*OGE I*”).”² *Id.* at 10.

(6) WFA and BNSF proceeded to calculate reparations due under the Board’s orders in *WFA I, II* and *III*, including refunds for WFA shipments moving on and after March 20, 2009 where BNSF had set the maximum rates by multiplying the prescribed maximum R/VC ratio by overstated variable costs. *See* Compliance Docket, WFA’s Statement of Damages and Unopposed Petition for An Order Directing Payment at 3 (filed Sept. 23, 2009).

(7) On October 22, 2009, the Board issued an order in the Compliance Docket (“*WFA IV*”) directing BNSF to pay the reparations and interest in the amount requested by WFA. Since that time, the parties have been calculating the prescribed rates following the *OGE* procedures. These procedures contain the following basic steps:

- **Step 1:** Variable unit costs are calculated quarterly using the “most recent URCS data indexed to that quarter” by a Board prescribed indexing procedure (*OGE I* at 11);
- **Step 2:** The variable unit costs calculated in Step 1 are then multiplied by the prescribed or “stipulated maximum lawful R/VC ratio . . . to calculate the rate to be charged in that quarter” (*id.*);
- **Step 3:** The defendant railroad must publish the rates calculated using the Step 1 and 2 procedures no later than “ten days” after all data needed to calculate the current quarter index is available (*id.* at 11 n.16); and
- **Step 4:** The railroad shall “provide [the shipper] its rate calculations, including operating statistics used, upon issuance of a new rate through the prescription period and confer with [the shipper] about any discrepancies and adjust the rates retroactively in the event of an error” (*OGE II* at 4).

² The *OGE I* procedures were clarified in *Okla. Gas & Elec. Co. v. Union Pac. R.R.*, STB Docket No. 42111 (STB served Oct. 26, 2009) (“*OGE II*”).

The *OGE* procedures also provide that when there is a “release of a new year of URCS data, [the railroad] is to wait until the next scheduled [quarterly] update to incorporate those changes” in its **Step 1** variable cost computations. *OGE I* at 11 n.16.

(8) BNSF filed petitions for review of the STB’s rate prescription decisions in *WFA I, II* and *III* in the United States Court of Appeals for the District of Columbia Circuit.³ The reviewing court affirmed these decisions in all respects except one: the Court found that the Board had not expressly addressed BNSF’s objection that the Modified Average Total Cost (“ATC”) method to calculate cross-over traffic revenues contained an impermissible “double count” of variable costs. *Id.* at 612-13. The Court remanded, without vacating, the STB’s decisions and directed the Board to respond to BNSF’s objection. *Id.* at 613. The parties have filed submissions in the Base Docket setting forth their views on the remanded issue, and the issue awaits disposition by the Board.

(9) On or around March 31, 2011, BNSF submitted to the Board its Class I Railroad Annual Report for the Year Ending December 31, 2010 (“2010 R-1”). The Western Coal Traffic League (“WCTL”) reviewed BNSF’s 2010 R-1, and found that BNSF had written-up its property accounts, and adjusted its depreciation accounts, to account for the substantial acquisition premium Berkshire paid to acquire BNSF.

(10) On May 2, 2011, WCTL filed a petition (“Petition”) for a declaratory order in the *Premium Case*. Using BNSF’s 2010 R-1 data, WCTL estimated that BNSF’s 2010 URCS net investment base would increase by approximately \$7.625 billion as a result of the Berkshire acquisition premium payment and that BNSF’s 2010 URCS annual depreciation charges would

³ *BNSF Ry. v. STB*, 604 F.3d 602 (D.C. Cir. 2010).

also be impacted. Petition at 2-3. WCTL later revised its net investment impact calculation upward to approximately \$8.1 billion based on additional information provided by BNSF. See *Premium Case*, WCTL et al. Joint Opening Evidence and Argument (filed Oct. 28, 2011) at 2 n.1.

(11) In its Petition, WCTL requested that the Board institute a declaratory order proceeding open to public participation; that the Board adopt a procedural schedule “tailored to permit the Board to make a final decision prior to [the Board’s] anticipated issuance of BNSF’s 2010 URCS in the fourth quarter of this year;”⁴ and that at the conclusion of the proceeding the Board adjust BNSF’s URCS, starting in 2010, by removing the \$8.1 billion acquisition premium in BNSF’s URCS net investment base, and by making corresponding changes in BNSF’s annual URCS depreciation calculations. *Id.* at 1.

(12) Several shipper groups supported WCTL’s Petition and BNSF opposed it. In its decision served on September 28, 2011 (“*Premium I*”), the Board granted WCTL’s request to institute a declaratory order proceeding to “address the effect of the subject net investment base write-up on the annual URCS and revenue adequacy determinations for BNSF beginning in year 2010.” *Id.* at 2-3. The Board also held that it would not issue a decision in the *Premium Case* before it issued the 2010 BNSF URCS, but said it would make any necessary revisions to BNSF’s 2010 URCS at the conclusion of the case if it found that the premium write-up was “inappropriate.”

Because this proceeding will occur during the time of year when the Board typically processes the previous year’s URCS data and revenue adequacy calculations, we intend to continue to process them using the 2010 R-1 data filed with the Board earlier this year. If the Board later determines that the write-up is inappropriate, we will consider any necessary recalculation or revisions at that time.

⁴ Petition at 8 (footnote omitted).

Id. at 3.

(13) Pursuant to the procedural schedule the Board adopted in the *Premium Case*, WFA became a party of record, and has actively participated in the *Premium Case*, filing opening evidence and argument on October 28, 2011 and reply evidence and argument on November 28, 2011. In these submissions, WFA is requesting that the \$8.1 billion premium write-up be excluded from BNSF's 2010 URCS net investment base. WFA will not repeat here its arguments and evidence in support of this request, but incorporates by reference its opening and reply submissions in the *Premium Case*. In its opening and reply filings in the *Premium Case*, BNSF continues to oppose the removal of the acquisition premium from its 2010 URCS net investment base.

(14) On December 9, 2011, the Board served *Premium II*. In *Premium II*, the Board announced that it was "issuing BNSF's URCS data for 2010, which reflect the increase in BNSF's net investment following its acquisition by Berkshire." *Id.* at 2. The Board noted that "[t]his increase will have an effect on at least two existing rate prescriptions beginning in January 2012" and "[a]s such, any party that believes the prescriptive effect of its 2012 rate prescription should be temporarily lifted pending the outcome of this proceeding should petition the Board to reconsider or reopen any relevant decisions." *Id.* at 2 (footnotes omitted) (citing *Major Issues in Rail Rate Cases*, STB Ex Parte 657 (Sub-No. 1), (STB served Oct. 30, 2006) at 70, 73-75 ("*Major Issues*"); *E.I. DuPont de Nemours & Co. v. CSX Transp. Inc.*, STB Docket No. 42099 (STB served Nov. 21, 2008) at 3 ("*DuPont*"); and 49 C.F.R. §§ 1115.3 and 1115.4.

ARGUMENT

WFA requests that the Board take whatever action it concludes is necessary to protect WFA's refund rights in the event the Board decides to remove the \$8.1 billion premium from BNSF's 2010 URCS net investment base. WFA believes that the Board has three options here: (1) open up a new sub-docket in this case; (2) reopen the Compliance Docket; or (3) reopen the Base Docket. WFA believes that the correct legal option is the first one. However, regardless of which option is selected, the Board should enter a carefully crafted order securing WFA's refund rights, and after entering that order, stay further action in this case on the premium issue pending the Board's resolution of the *Premium Case*.

WFA does not believe it is necessary to temporarily lift the rate prescription in this case in order to perfect WFA's refund rights because the premium issue does not impact the prescribed maximum R/VC ratio in 2012 (248%). However, this issue is not of major practical significance so long as the Board (i) caps BNSF's pricing during the pendency of the *Premium Case* at the 248% R/VC level (calculated using the initial BNSF 2010 URCS); (ii) directs that WFA will be made whole for overpayments it made if the Board revises the 2010 BNSF URCS to remove the premium; and (iii) reinstitutes the current prescription once the premium issue is resolved.

I.

WFA's REFUND RIGHTS MUST BE PROTECTED

The Board instituted the *Premium Case* to determine whether to remove the \$8.1 billion premium from BNSF's 2010 URCS net investment base. The Board decided in *Premium I*, and reaffirmed in *Premium II*, that it would issue BNSF's 2010 URCS with the premium

write-up, subject to “any necessary recalculation or revisions” when it decides the *Premium Case*. *Premium II* at 1. If the Board decides that the premium should not be included in the BNSF 2010 URCS, shippers that paid rate prescriptions based on the erroneous URCS should be made whole for their overpayments.

Indeed, the issue here appears to be exclusively timing-related. WCTL reviewed BNSF’s 2010 R-1 data promptly after that data was filed with the STB, and based upon that review – which showed for the first time the potential impact of the premium on BNSF’s 2010 URCS net investment base – filed a timely petition for a declaratory order asking the Board to resolve the premium issue before the BNSF 2010 URCS was released. Had the Board done so, and ruled in favor of WCTL, WFA would have begun paying rates in 2012 calculated using variable costs that did not include the premium.

WFA recognizes that the Board has an active docket, and that the Board did not take-up WCTL’s proposal to decide the 2010 URCS issues before the 2010 URCS was issued. However, WFA should not be penalized for case processing time periods that are beyond its control, particularly in light of the impact of the premium on the LRS rates. The record developed to date in the *Premium Case* shows that “payments under WFA/Basin Electric’s rate prescription will increase by approximately \$1.9 million annually, and by approximately \$25.2 million over the remaining life of the rate prescription, due to the inclusion of the acquisition premium in BNSF’s URCS.” *See Premium Case, WCTL, et al. Joint Opening Evidence and Argument* (filed Oct. 28, 2011) at 16 (footnote omitted). Conversely, if the Board decides to exclude the premium from BNSF’s URCS, these same rate increases should all be mooted.

The logical – and reasonable – approach for the Board to take under these circumstances is to take appropriate actions to ensure that WFA can be made whole if the Board does decide to remove the premium from BNSF’s 2010 URCS. *Cf. Cost Ratio For Recyclables – 1983 Determination*, 3 I.C.C. 2d 407, 420-21 (1985) (“it would be unfair to the parties to be subject to an inappropriate rate cap simply because of the length of time it took us to conclude this proceeding [revising the rate caps]”).

II.

THE APPROPRIATE DOCKET TO PERFECT WFA’S REFUND RIGHTS IS A NEW SUB-DOCKET IN THIS CASE

The Board suggested in *Premium II* that WFA ask the Board to file a petition seeking to “reconsider or reopen any relevant decisions.” *Id.* at 2. However, none of the prior decisions in *WFA* address the Berkshire acquisition premium issue. Of course, the Board is considering this issue in the *Premium Case*, but that case has not been decided.’ Under these circumstances, WFA suggests that the best approach is for the Board to institute a new sub-docket – No. 42088 (Sub-No. 2) – to address the impact of the premium on the WFA rate prescription. This would technically not be a reopening, but the institution of a new sub-docket to address a new issue that arose in the context of an ongoing twenty-year rate prescription where rates are calculated every quarter.

Alternatively, if the Board believes the proper procedural avenue is to reopen the *WFA* case, WFA petitions the Board to do so. 49 C.F.R. § 1115.4 provides that the Board, upon petition, may at any time “reopen an administratively final action of the Board” when the Board finds the proceeding involves “material error, new evidence, or substantially changed

circumstances.” *Id. Accord* 49 U.S.C. § 722(c)(1). Also, “[t]he alleged grounds [to reopen] must be sufficient to convince [the Board] that, if taken as facially true and correct, they might lead us to materially alter our decision in [the involved] case.”⁵ These criteria are easily satisfied in this case.

The Board’s decisions in *WFA I, II, III* and *IV* became administratively final in 2009. Since that time, Berkshire acquired BNSF (February 2010); BNSF filed its 2010 R-1 with the Board (March 2011); the Board instituted the *Premium Case* (September 2011); and the Board issued BNSF’s initial 2010 URCS, subject to later revision (December 2011). All of these actions constitute both “new evidence” and “substantially changed circumstances.” Moreover, the Board will clearly have committed a “material error” by releasing the 2010 BNSF URCS (with the premium) for use in implementing the WFA rate prescription if it later determines the premium should have been excluded from BNSF’s 2010 URCS.

WFA submits that if the *WFA* case is to be reopened, the proper docket for the reopening is the Compliance Docket – No. 42088 (Sub-No. 1) – not the Base Docket – No. 42088. The Board prescribed the maximum R/VC ratios in the Base Docket, and left disputed issues concerning the calculation of the variable costs used in the R/VC ratio calculations for resolution in the Compliance Docket. As shown in the *Premium Case*, WFA and BNSF dispute whether the premium should be excluded from BNSF’s 2010 URCS. This is a variable cost calculation dispute which, if it is to be considered in a reopened *WFA* docket, should be considered in the Compliance Docket.

⁵ *Ark. Elec. Coop. Corp. – Petition for Declaratory Order*, STB Finance Docket. No. 35305 (STB served Nov. 22, 2011) at 3.

III.

A CAREFULLY CRAFTED RELIEF ORDER IS REQUIRED

Regardless of which docket the Board selects, the Board should enter an order that (1) initiates or reopens the docket; (2) directs BNSF to invoice WFA at the prescribed R/VC ratio of 248% calculated using the initial BNSF 2010 URCS, starting with BNSF's first quarterly adjustment of the LRS rates in 2012; (3) orders the parties to keep account of the monies paid; (4) directs BNSF to make WFA whole within thirty days for any overpayments it made (plus interest) if the Board finds in the *Premium Case* that the premium should be excluded from BNSF's URCS or if the Board orders other remedial relief; (5) stays further action in the docket pending a final decision in the *Premium Case*; and (6) reinstates the current prescription once the premium issue is resolved.

The relief requested in parts (2) to (4) is designed to continue to cap BNSF's rates during the pendency of the *Premium Case* at current maximum prescribed rate levels (calculated using BNSF's initial URCS), while preserving WFA's right to obtain prompt repayment of overcharges it incurred if the Board decides to exclude the premium from BNSF's URCS or takes other remedial action.⁶ This relief is modeled after the relief the Board orders when it decides to remove the prescriptive effect of a rate prescription pending further proceedings before the Board. This form of relief order can be utilized in this case regardless of whether the Board concludes it needs to temporarily lift the WFA rate prescription.

The stay requested in part (5) is also appropriate here as it will conserve the parties' and the Board's resources. WFA and BNSF have both made extensive filings on the premium

⁶ See *Major Issues* at 70; *Arizona Pub. Serv. Co. v. Atchison, Topeka & Santa Fe Ry.*, 6 S.T.B. 851, 858-60 (2003); *DuPont* at 2.

issue in the *Premium Case*. There is no need for the parties to replicate that evidence in this case, and the Board's decision in the *Premium Case* is likely to be dispositive in this case.

Granting a stay is also consistent with the approach used by the Board in *Major Issues*. In that case, the Board held portions of rate cases in abeyance pending resolution of issues of "industry-wide significance" being considered in *Major Issues*. *Id.* (STB served Feb. 27, 2006) at 2. The *Premium Case* also involves issues of industry-wide significance, and all major shipper associations are participating in that case.

Finally, WFA emphasizes that its requested stay is limited to the Board's resolution of the premium dispute. The requested stay does not apply to the pending remanded ATC issue. Briefing on that issue was completed earlier this year, and is ripe for decision by the Board.⁷

IV.

THE BOARD DOES NOT NEED TO TEMPORARILY LIFT THE WFA RATE PRESCRIPTION TO PERFECT WFA'S REFUND RIGHTS

The Board suggested in its *Premium II* decision that a shipper could request that "the prescriptive effect of its 2012 rate prescription should be temporarily lifted pending the outcome of this proceeding." *Id.* at 2 (footnotes omitted). WFA does not believe that the Board has to "temporarily lift[]" the WFA rate prescription to perfect WFA's refund rights, but if the Board disagrees, WFA has demonstrated its right to have its prescription temporarily lifted. WFA has no objection to the Board taking this action so long as it is accompanied by an order in the form requested in Part III above.

⁷ The part (6) relief is also critical as it restores the rate prescription.

A. There Is No Need to Lift the WFA Rate Prescription

The Board does not need to temporarily lift the WFA rate prescription to perfect WFA's refund relief because the WFA rate prescription in 2012 is set at a maximum R/VC ratio of 248%. *WFA II* at 4. This ratio will remain the same regardless of how the Board resolves the premium issue, so there is no need to temporarily lift the 248% maximum R/VC ratio. Whether to include or exclude the premium from BNSF's URCS raises a compliance issue – *i.e.*, how to calculate the variable costs used in applying the prescribed maximum R/VC ratio – not a prescription modification issue.

Under the governing Board compliance procedures, the carrier calculates the maximum rates quarterly, subject to review and approval by the shipper. *OGE I* at 11.⁸ If the shipper disputes the calculations and the carrier agrees, the carrier “adjust[s] the rates retroactively.” *OGE II* at 4. If the parties cannot agree, the Board resolves the dispute, and orders make-whole payments. *WFA III* at 10-11. As summarized by Board counsel:

The Board has . . . frequently ordered railroads to establish rates per ton that do not exceed a prescribed revenue-to-variable cost ratio without establishing a specific rate per ton to be charged. In those cases, the Board generally has left it to the parties to make the necessary calculations and stated that, if a dispute arises, the Board will separately address that dispute.

Joint Reply of BNSF and STB to Opposition to Motion to Govern Future Proceedings at 8-9, *BNSF Ry. v. STB*, No. 09-1092 (D.C. Cir. filed July 17, 2009) (footnotes omitted). The Board's compliance procedures do not envision, or require, that prescriptions be lifted, because the

⁸ *Accord WFA I* at 31-32; *Kansas City Power & Light Co. v. Union Pac. R.R.*, STB Docket No. 42095 (STB served May 19, 2008) at 8-10; *Wisconsin Power & Light Co. v. Union Pac. R.R.*, 5 S.T.B. 955, 985 (2001); *West Tex. Utils. v. Burlington N. R.R.*, 1 S.T.B. 638, 677-79 (1996).

prescriptions remain unchanged, nor is there any question that the Board can make a shipper whole if it finds that a shipper has overpaid under the defendant carrier's variable cost computations.

The Board's compliance procedures are fully consistent with the Board's rulings in *Major Issues* concerning the standards that apply when a stand-alone cost ("SAC") case is reopened. *See id.* at 67-75. The Board's extensive discussion of the standards that apply when a SAC case is reopened is premised on the assumption that either the shipper, or the carrier, is "call[ing] into question the SAC analysis upon which the prescription [is] based" and is seeking to revise or vacate the prescribed maximum SAC R/VC ratios. *Id.* at 73. In that event, the Board ruled that if the standards governing reopening are met, the Board would reopen and "lift the prescriptive effect" of its prior rate prescription orders pending further review of the matter. *Id.* In contrast, issues raised in compliance proceedings assume the maximum SAC R/VC ratios are correct.

The Board's compliance procedures are also fully consistent with the prohibitions against retroactive ratemaking set forth in *Arizona Grocery v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932) ("*Arizona Grocery*"). As the Board has explained, in *Arizona Grocery*, "the Supreme Court held that the ICC could not award reparations to a complaining shipper with respect to past shipments that had moved under *previously approved and prescribed rates*." *Major Issues* at 73 (emphasis added). When the Board prescribes a maximum R/VC ratio it is not "approv[ing] and prescribe[ing] rates" (*id.*), but instead is prescribing a maximum R/VC ratio. The parties then make quarterly calculations to translate the R/VC ratio into rates per ton and if a dispute arises concerning these calculations, the Board resolves it. Simply stated, *Arizona*

Grocery precludes the STB from retroactively changing prescribed maximum R/VC ratios; it does not preclude Board review and retroactive modification of the parties' quarterly cost calculations.⁹

B. If the Board Concludes that WFA's Refund Rights Can Be Protected Only If the LRS Prescription Is Temporarily Lifted, the *Major Issues* Requirements for Granting This Relief Are Satisfied

In *Major Issues*, the Board decided to address petitions to revise or vacate SAC rate prescriptions using five sequenced steps: (i) determine whether the standards for case reopening are met and, if so, (ii) reopen and lift the prescriptive effect of the prescription to determine if (iii) the prescription should be permanently vacated. If the prescription is not vacated, the Board then determines (iv) whether it can conduct a proper investigation without extensive changes to the stand-alone railroad traffic group or configuration. In cases where no extensive changes are necessary, the Board will (v) "[i]nvestigate the reasonableness of the challenged rate in the reopened proceeding." *Id.* at 69.

If the Board decides the only way it can protect WFA's refund rights is to apply the *Major Issues* standards governing the temporary lifting of rate prescriptions, those standards are satisfied here: WFA has shown its entitlement to reopening under governing Board standards (*see* Argument II above). This showing is sufficient to permit the Board to temporarily lift the prescriptive effect of the WFA rate prescription and the Board can address the premium issues presented on reopening in the manner requested by WFA, because there is no basis to vacate the

⁹ *See BP West Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1304 (D.C. Cir. 2004) ("*Arizona Grocery* bars reparations that retroactively change a final Commission-approved rate"). The courts have also held that *Arizona Grocery* "does not apply in situations where there is 'adequate notice that resolution of some specific issue may cause a later adjustment to the rate being calculated at the time of service.'" *Quest Corp. v. Koppendrayer*, 436 F.3d 859, 864 (8th Cir. 2006) (citations omitted). The Board's entry of the order requested by WFA will further inform BNSF that the Board's resolution of the Premium Case "may cause a later adjustment to the [LRS] rate[s] being collected at the time of service." *Id.*

prescription; resolution of WFA's request does involve any changes to WFA's SARR; and the relief requested can be granted in the reopened proceeding.

C. If the Board Concludes that WFA's Refund Rights Can Be Protected Only If the WFA Prescription Is Temporarily Lifted, WFA Seeks Such Relief Only If Accompanied By the Requested Order Capping BNSF's Prices

While the *Major Issues* requirements are met, WFA seeks a temporary removal of its rate prescription only if the Board enters the accompanying refund order requested in Part III above. WFA has spent well over \$8 million to obtain and defend its rate prescription, and WFA has no interest in seeing that prescription vanish – even temporarily – unless, as requested in Part III above, the Board expressly caps BNSF's rates at the current prescribed maximum R/VC ratio levels, calculated on an interim basis using the initial 2010 BNSF URCS, and orders a limited reopening related solely to the premium issue.

This relief request is consistent with the Board's rulings in *Major Issues*. See *Major Issues* at 70 (if a temporary lifting of a rate prescription is ordered, the railroad will "be instructed to maintain the status quo, the parties [will be] directed to keep account of the amounts paid during the pendency of the rate investigation, and, upon completion of the investigation, one party [will be] then required to make the other party whole").

CONCLUSION

WFA respectfully requests that the Board grant the relief it requests in the manner set forth above.

Respectfully submitted,

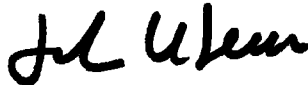
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Dated: December 14, 2011

By: John H. LeSeur
Christopher A. Mills
Peter A. Pfohl
Daniel M. Jaffe

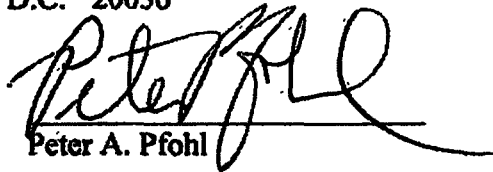

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Attorneys for Complainants

CERTIFICATE OF SERVICE

I hereby certify that this 14th day of December, 2011, I served copies of the foregoing Petition by hand delivery on designated outside counsel for BNSF, as follows:

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