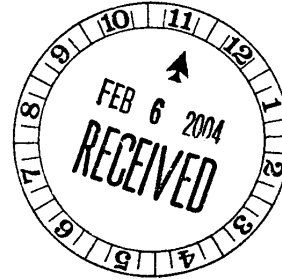


February 6, 2004

Via Hand Delivery

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



RE: STB Docket No. 42057, *Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*

Dear Secretary Williams:

Please find enclosed for filing the original and ten (10) copies of Complainant's Reply in Opposition to the Petition of the Burlington Northern and Santa Fe Railway Company for Leave to File Statement of Clarification in the above referenced proceeding. Also enclosed is a diskette containing the electronic version of the Reply in WordPerfect format.

An extra copy of this filing is enclosed for stamping and returning to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

Thomas Wilcox
Thomas W. Wilcox
Counsel for Complainant

cc: David M. Konschnik
Counsel for Defendant

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BEFORE THE
SURFACE TRANSPORTATION BOARD

PUBLIC SERVICE COMPANY OF COLORADO
D/B/A XCEL ENERGY,

Complainant,

v.

THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY,

Defendant.

Docket No. 42057

**COMPLAINANT'S REPLY IN OPPOSITION TO THE
PETITION OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY FOR LEAVE TO FILE STATEMENT OF CLARIFICATION**

For the reasons set forth in this Reply, BNSF's January 20, 2004 Petition for Leave to File Statement of Clarification ("Petition") must be denied and the so-called "Statement of Clarification" that is proffered with the Petition must, by extension, also must be rejected. Both are wholly without support in the Board's rules or precedent. Far from seeking merely to clarify the existing record in this case, BNSF's proffered "clarification" is a forty-plus-page collection of expanded arguments in response to old issues, including new arguments that are impermissible replies to Xcel's rebuttal evidence. This "clarification" dwarfs the discussion of the same issues in BNSF's reply evidence in this case.¹ BNSF has sought to introduce this material without even attempting to meet the Board's rules for submitting new evidence in a proceeding during or after the rebuttal phase of the case. Because the Petition and proffered new

¹ In total, BNSF devoted 14 pages of its Reply Evidence to explain DARA, including DARA's reliance on the URCS to calculate variable costs. See BNSF Reply Evidence at III.A-61-75.

evidence clearly violate the Board's procedural rules and are contrary to Board precedent, the Board should reject BNSF's Petition.

Xcel has not committed the significant time and resources that would be required of its counsel and experts to respond to the new material submitted by BNSF because the new evidence BNSF has proffered is unauthorized. If the Board grants BNSF's Petition, and accepts its new evidence, Xcel respectfully requests that the Board grant Xcel a period of time of no less than 20 days to file argument and evidence in response to the "Statement of Clarification" and attachments thereto.

However, that being said, even a cursory review of BNSF's proffered "clarification" reveals that it should be rejected because it does not even address the so-called "new guidance" that BNSF states the Board supplied in its recent decisions in Docket No. 42069, Duke Energy Corp. v. Norfolk Southern Railway Co., decision served November 6, 2003 ("Duke Energy"); and Docket No. 42072, Carolina Power & Light Co. v. Norfolk Southern Railway, decision served December 23, 2003 ("CPL").

A. BNSF's Filing Violates the Board's Rules on Submitting New Evidentiary Material and Board Precedent

BNSF has not even mentioned, let alone tried to meet, the Board's stringent rules for submitting new evidence in a proceeding during or after the rebuttal phase of a rate case. Those rules were recently clarified by the Board in large part to counter the delays in processing these cases caused by parties trying to introduce new evidence into the record in the latter stages of the case. Accordingly, the Board has admonished parties that there must be a "clearly defined cut-off point" after which the record of a proceeding is closed. If a party wishes to introduce evidence after this point, it must file a petition to supplement the record. The party must demonstrate that "the information sought to be introduced is central to the petitioning party's

case, could not reasonably have been introduced earlier, and would materially influence the outcome of the proceeding.” STB Docket No. 42072, Carolina Power & Light Company v. Norfolk Southern Railway Company, (served May 9, 2003) at 1-2. The evidentiary record in this case closed long ago, yet BNSF makes no attempt to meet the requirements set forth above.

Instead, BNSF seeks to bypass these clear directives by disingenuously styling its new evidence as a “clarification,” and by basing its Petition on an extremely liberal interpretation of the decision issued by the Board on November 21, 2003 in Docket No. 42071, Otter Tail Power Company v. The Burlington Northern Santa Fe Railroad Company (“Otter Tail Power”). This decision has no application to these circumstances. In that case, the complainant was permitted to file supplemental evidence on cross-over revenues as a result of the Board stating in a footnote in Duke Energy that the Board no longer considered actual divisions of revenues to be “particularly instructive.” Duke Energy at 20, note 29. This statement by the Board reversed 10 years of prior precedent which had held that the best evidence for estimating cross-over revenues was actual market-based revenue divisions.²

The complainant in Otter Tail Power had relied on that prior precedent and sought and obtained actual revenue divisions from BNSF in discovery, which it had then used to calculate cross-over revenues for the SARR in that proceeding. See STB Docket No. 42072, Otter Tail Power Company’s Motion to Modify Procedural Schedule and Petition to Supplement the Evidentiary Record, filed November 10, 2003, at 4. Under those unique circumstances, the Board, among other things, granted the complainant’s request to recalculate its SARR’s cross-over revenues using the newly announced MSP methodology the Board adopted in Duke Energy in order to avoid prejudice to the complainant. In Otter Tail Power, therefore, the “new issues

² Bituminous Coal – Hiawatha, Utah to Moab, Nevada, 10 I.C.C. 2d 259, at 280 (1994); accord; STB Docket No. 42022, FMC Wyoming Corp. v. Union Pacific R.R. Co. (served May 12, 2000).

raised by recent decisions” that warranted the submittal of new evidence consisted of a significant change in prior SAC policy and methodology. It is also significant to note that the order in Otter Tail Power was issued during the evidentiary phase of the case, and that BNSF was given an opportunity to reply to the supplemental evidence.

In stark contrast to the above facts and circumstances, BNSF’s Petition seeks to submit new evidence and argument on a methodology for calculating cross-over revenues that the Board has never accepted, and indeed has now thrice affirmatively rejected. There has thus been no change in prior SAC methodology that would warrant BNSF’s filing. At a minimum, this new material violates the established rule against re-litigating settled issues. Ex Parte 347 (Sub. No 3) General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, served March 9, 2001. BNSF raises no “new issues raised by recent decisions” that are contrary to prior Board precedent, because no such precedent exists. Rather, BNSF seeks merely to repackage and supplement the evidence its experts sponsored in this proceeding in an attempt to avoid the fate that befell the same theories sponsored by these experts in CPL, Duke Energy,³ and, on February 4, 2004, in Docket No. 42070, Duke Energy Corp. v. CSX Transportation Inc., served February 4, 2004, at 20–22 (“Duke Energy/CSX”). Moreover, unlike the circumstances in Otter Tail Power, BNSF’s filing comes over eight months after rebuttal evidence was filed in this case, and five months after final briefs were filed. BNSF’s statement that its filing “would not disrupt this proceeding” is therefore false. Petition at 5.

B. BNSF’s “Clarification” Does Not Address the Board’s Rationale for Rejecting DARA in Duke Energy and CPL

The Petition and proffered evidence are an obvious attempt by BNSF to salvage the Density Adjusted Revenue Allocation (“DARA”) formula that BNSF, through its experts Klick

³ CPL at 20–21; Duke Energy at 22.

and Fisher, has proposed to allocate SARR cross-over revenues in this proceeding. The same experts proposed the identical formula in Duke Energy, CPL, and Duke Energy/CSX,⁴ and the Board rejected the formula in all three cases because it does not properly allocate cross-over revenues between a SARR and the residual railroad. BNSF attempts to salvage DARA even though it admits, as it must, that “the formula used by NS to allocate revenue in [Docket No. 42069] is the same one that BNSF uses in this case to allocate revenue on cross-over traffic movements.” Petition at 9–10, note 2.

BNSF’s self-styled “clarification” really is a petition for reconsideration of the Duke Energy and CPL decisions. This is evident from the text of the proffered “clarification” itself:

The problem that the Board perceived with NS’s revenue allocation methodology does not in fact exist with BNSF’s DARA approach.

* * *

DARA gives effect to economies of density, but does not entail the supposed shortcoming of the NS approach that the Board addressed in *Duke/NS*.

Proffered Statement at 10 [emphasis added]. In a more direct assault on the Board’s decisions, BNSF asserts that “the criticisms the Board made of NS’s revenue allocation methodology were based on an incomplete assessment of the allocation formula and do not apply to DARA.” Id. at 15. But, since the NS formula and BNSF’s DARA formula are identical, DARA must suffer from the same shortcoming as the NS formula. BNSF’s use of the terms “perceived” and “supposed” removes any doubt that this “clarification” does not attempt to clarify DARA or to

⁴ Compare Verified Statement of Klick and Fisher attached to proffered Statement and CPL, Supplemental Evidence of Defendant Norfolk Southern Railway Company (filed November 24, 2003) (sponsored in part by Benton Fisher). All of the filings in Duke Energy/CSX were made under seal, but the Board is certainly able to confirm that the same experts have advanced the same formula in all four cases (including this case). Finally, Messrs. Klick and Fisher have advanced this same formula in Otter Tail Power. See Otter Tail Power, Reply Evidence of BNSF, filed October 8, 2003 (public version), at III.A-82 to III.A-100.

distinguish DARA from the NS formula, but rather, it is an attack on the Board's critique of the NS formula.

BNSF's "clarification" adds nothing that BNSF has not already had ample opportunity to present in the record of this proceeding. The crux of BNSF's "clarification" already is in the record at page III.A-67 of BNSF's Reply Narrative, which BNSF quotes on page 19 of the "clarification." BNSF simply has taken that text and blown it up into two dozen pages of additional argument. BNSF should not be permitted to expand its arguments now, after the record has closed, just because it believes it did an inadequate job in its Reply Evidence.

That BNSF's "Statement of Clarification" clearly goes far beyond simply clarifying the evidence that is already in the record is also plain from the fact that BNSF devotes five pages of the proffered statement to argue why its DARA methodology is preferable to the Modified Straight-Mileage Prorate ("MSP") method the Board first adopted in Duke Energy and later applied in CPL and Duke Energy/CSX. Proffered Statement at 20–24. Since the adoption of MSP post-dates the close of the record in this case, BNSF's evidence and argument on this point cannot possibly be a "clarification" of the existing record. There are many other similarly blatant examples in the proffered statement, including, but by no means limited to: (1) 17 pages of a restatement and re-argument of the DARA methodology, including new arguments in opposition to Xcel's rebuttal evidence that violate the Board's rules on "replies to replies" (see proffered Statement at 17–18); (2) new expert testimony and evidence regarding the Board's URCS methodology (proffered Verified Statement at 26–27); and (3) expert testimony and at least eight new computer files restating, revising and/or recalculating cross-over costs and revenues for the SARR in this case (see, e.g., Id. at 28; and, as example, computer file "Restated WCC Traffic Revised.xls").

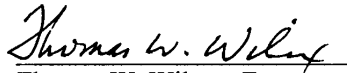
Xcel reiterates that it has deferred committing the significant time and resources that will be required to respond to the argument, expert testimony, and additional evidence contained in BNSF's proffered filing until the Board decides on whether to admit it. However, an in-depth review of the filing is not required to conclude that it should be rejected because it does not seek "clarification" of any "new issues raised by recent decisions." Petition at 5. In particular, the new evidence BNSF seeks to admit does not even address, much less clarify, anything about the Board's rationale for rejecting DARA in Duke Energy, CPL, and now Duke Energy/CSX. In those cases, the Board properly rejected DARA because the allocation formula wrongly assumes that high- and low-density lines have the same fixed costs per mile. Duke Energy at 22; CPL at 20–21; Duke Energy/CSX at 21. Because BNSF has admittedly relied on the exact same formula in this case, BNSF's already-filed evidence in this proceeding suffers from the exact same infirmities as its brethren: It does not contain any support for the assertion that BNSF's per-mile capital investments are the same over all line segments of different densities included in its network (even assuming that this is a proper approach for calculating revenue divisions, which it is not).

BNSF weakly represents that "[t]he DARA procedure implemented by BNSF **does not** assume that the fixed costs . . . are the same per mile for light density lines as for heavy density lines," proffered Statement at 15 (emphasis in original), but BNSF's only support for this representation is a lengthy tome on the variable cost component of DARA. Such material does not respond to the rationale that compelled the Board to reject DARA in Duke Energy, CPL, and Duke Energy/CSX, and which compel the same result in this case. Moreover, it bears repeating that in rejecting DARA in the three prior cases, the Board did not alter any established SAC methodology.

C. Conclusion

For all the reasons set forth in this Reply, the Board must deny BNSF's Petition and refuse to accept BNSF's proffered "Statement of Clarification" and attachments thereto. Should the Board decide to grant BNSF's Petition, Xcel requests that the Board establish a date, not less than 20 days after the service date of such decision, for Xcel to file a substantive response to the Statement of Clarification, Verified Statement, and other evidence proffered by BNSF.

Respectfully submitted,



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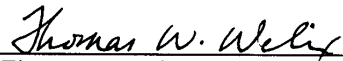
Attorneys for Complainant

February 6, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2004, I served a copy of the Complainant's Reply in Opposition to the Petition of the Burlington Northern and Santa Fe Railway Company for Leave to File Statement of Clarification by hand delivery to counsel for Defendant at the following address:

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