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March 8, 2004

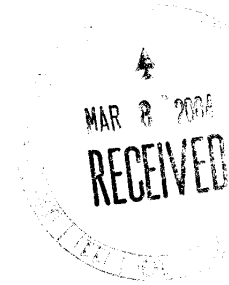
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The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St. N.W.
Washington, D.C. 20423

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 Response in Opposition to BNSF's Density Adjusted Revenue Allocation ("DARA") Procedure in the above referenced proceeding. Also enclosed is a diskette containing the electronic version of the Response in WordPerfect format.

Please note that the original and the copies contain COLOR IMAGES in Exhibit 1 and 2.

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,

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Counsel for Complainant

cc: 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

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**COMPLAINANT'S RESPONSE IN OPPOSITION TO BNSF'S
DENSITY ADJUSTED REVENUE ALLOCATION ("DARA") PROCEDURE**

The so-called "clarification" of The Burlington Northern and Santa Fe Railway Company ("BNSF") is a belated restatement of its Reply Evidence aimed at propping up the losing contention that DARA properly allocates cross-over revenues between the residual BNSF and Xcel Energy's stand-alone railroad ("SARR"), the Wyoming Colorado Coal Railroad ("WCC"). The same DARA procedures have been presented to the Board in Duke/NS, CPL/NS, and Duke/CSX.¹ In all three proceedings, the Board rejected DARA. The Board again should reject DARA in this case for the reasons presented herein and in the attached Verified Statement of Thomas D. Crowley ("Crowley V.S."). Indeed, BNSF's fourth bite at the apple clearly violates the Board's policy against re-litigating settled issues:

¹ Duke Energy Corp. v. Norfolk Southern Railway Company, STB Docket No. 42069 (served November 6, 2003); Carolina Power & Light Company v. Norfolk Southern Railway Company, STB Docket No. 42072 (served December 23, 2003); Duke Energy Corp v. CSX Transportation, Inc., STB Docket No. 42070 (served February 4, 2004).

Finally, the parties to SAC cases are cautioned not to attempt to relitigate issues that have been resolved in prior cases. Unless new evidence or different arguments are presented, we will adhere to precedent established in prior cases.

Ex Parte No. 347 (Sub-No.3) (served March 12, 2001), slip op. at 6. The DARA issue is resolved and BNSF's "clarification" should be rejected under established precedent.

I. SUMMARY OF DARA PRESENTATIONS

BNSF uses exactly the same two-step version of DARA that the Board rejected in Duke/NS, Duke/CSX and CPL/NS. See BNSF Petition at 9, 15. Step One purports to cover each party's attributable costs by paying them \$1,157.00 per million gross ton miles ("MGTM") of cross-over traffic traversing their lines. See *Crowley V.S.* at 7, 10-11, and Table No. 2. The \$1,157.00 per MGTM figure, however, covers only BNSF's (*not* the residual BNSF's) variable URCS road property costs for 2001. Id. It does not cover the WCC's attributable costs, which greatly exceed BNSF's URCS road property costs. As explained in Section II.B, *infra*, the WCC would require \$2,599.00 per MGTM to cover its actual road property investment costs. DARA Step One therefore shortchanges the WCC \$1,442.00 per MGMT of cross-over traffic. For example, based on the WCC's projected volumes of cross-over traffic for its first year of operation, DARA would fail to cover (i) over \$48 million of the WCC's attributable costs for traffic to Parish, Texas and (ii) over \$41 million of the WCC's attributable costs for traffic to Chicago, Illinois. Id. at 12, Table No. 3.

DARA Step Two allocates the cross-over revenues that exceed the attributable costs calculated in Step One. BNSF and the proponents of DARA in Duke/NS, CPL/NS and Duke/CSX refer to this band of revenue as the "total contribution" or "TC." See Duke/NS at 20-21. See also BNSF Reply Evidence at III.A 67-68. Step Two purports to allocate the TC in proportion to the parties' fixed costs per mile in their respective lines. Id. However, the

allocation formula does not account for different fixed costs per mile; it simply assumes that such costs are always identical.

The Board rejected DARA in Duke/NS, CPL/NS and Duke/CSX because the railroad defendants could not show:

1. how DARA would account for any differences in fixed costs per mile between the SARR and the residual incumbent; and
2. that fixed costs unrelated to density are identical for high and low-density lines.

Duke/NS at 22; CPL/NS at 20–21; Duke/CSX at 21.

II. BNSF’S CLARIFICATION FAILS TO REBUT THE BOARD’S CRITICISMS OF DARA.

BNSF’s “clarification” is a thinly disguised and misguided “Petition for Reconsideration” of the Duke/NS decision. BNSF freely concedes that its DARA equation is the same equation that NS used in that proceeding. BNSF Petition at 9-10, note 2. It also concedes that the “Board is correct that the formula used in the second step of DARA can be characterized by the assumption that unattributable costs, as distinct from attributable costs, are the same per route mile on the less dense as well as more dense segments of cross-over movements.” Id. at 18. Nevertheless, BNSF alleges that “The problem that the Board *perceived* with NS’s revenue allocation methodology does not in fact exist with BNSF’s DARA approach” and that DARA “does not entail the *supposed* shortcoming of the NS approach that the Board addressed in Duke/NS.” Id. at 10 [emphasis added]. In addition, BNSF charges 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 [emphasis added]. BNSF’s use of the terms “perceived,” “supposed” and “incomplete assessment” is a direct challenge to the analysis and conclusions of the Board in Duke/NS.

The point of BNSF's Clarification, that Step One of DARA captures differences in fixed costs between high and low-density lines, does not respond to the Board's criticisms of the DARA formula in Duke/NS. Because DARA Step One uses URCS variable costs, which measure BNSF's costs over a medium to long-term horizon, BNSF contends that DARA Step One captures fixed costs that vary with density, since those fixed costs become variable over the long-term. BNSF Petition at 15-16; Klick/Fisher V.S. at 26-27. According to BNSF, the remaining fixed costs, which are measured in DARA Step Two, in fact are identical for low and high-density rail lines. BNSF Petition at 18-19; Klick/Fisher V.S. at 29-30.

BNSF's effort to blur the distinction between fixed and variable costs does not cure DARA's dispositive flaws. Regardless of how BNSF purports to account for fixed costs using Step One or Step Two (or both), DARA still wrongly assumes that the WCC and the residual BNSF's cross-over segments have identical total road property investment costs per mile. This assumption lacks evidentiary support. In fact, all of the evidence on the subject confirms that the WCC's road property investment costs are greater than the residual BNSF's. *See Duke/NS* at 22. Thus, BNSF's DARA presentation contains the same fatal flaw as NS's presentation.

BNSF has "misperceived" the "supposed" shortcoming of the NS approach and performed an "incomplete assessment" of the Board's Duke/NS decision. The Board did not overlook DARA Step One in that proceeding, as BNSF contends. The Board's criticism of NS for assuming that fixed costs per mile are the same for the SARR and the residual BNSF's cross-over segments applies equally to DARA Steps One and Two. This flaw is inherent in DARA's substitution of the defendant-railroad's road property investment for both the residual incumbent and the SARR, which grossly understates the SARR's attributable costs in DARA Step One. Similarly, BNSF has not offered any evidence to prove its generalization that, because DARA

Step One accounts for differences in road property investment that are attributable to density, the remaining fixed costs per mile that are covered by DARA Step Two will be identical for both the SARR and the residual incumbent. In fact, there are many reasons why they almost certainly will not be the same.

The following sections explain in detail why the Board's critique of DARA in Duke/NS was accurate and why BNSF's "clarification" fails to address those criticisms.

A. BNSF's DARA Procedures Contain Exactly The Same Dispositive Flaws That Prompted The Board To Reject DARA In Prior Cases.

BNSF's Statement of Clarification improperly re-litigates a settled issue, using inconsistent arguments that do not cure or clarify DARA's flawed methodology for covering fixed costs. Even though BNSF and NS use exactly the same DARA equations,² BNSF insists that its "[DARA] methodology does not rest on an assumption that fixed (or below-the-wheel) costs are the same on low and high density lines." BNSF Petition at 4. BNSF is wrong. NS and BNSF's identical DARA equations necessarily contain the same assumptions about fixed costs. To wit, the equations lack ratios to account for different fixed costs, and therefore wrongly assume that high and low-density lines have identical fixed costs.

In Duke/NS, the Board properly rejected DARA because (i) it wrongly assumes "that light-density lines have the same fixed costs as heavy-density lines" and (ii) "there is no evidence that fixed costs per mile are the same for the [SARR's] segment of any move as they are for the residual [carrier's]." Duke/NS at 21, 22. In particular, the Board stressed that "NS has provided no evidence that its per-mile capital investments in the Central Appalachian region are identical to its per-mile capital investments along its lower-density delivery network. *This*

² BNSF confirms that "the revenue allocation set out in the Duke/NS decision is the same formula that BNSF used to implement DARA." Petition at 15.

deficiency strikes at the heart of NS's proposed methodology, and thus the Board will not adopt it." Id. at 22 (emphasis added).³

Duke/NS held that the dispositive shortcoming of DARA is the "implausible" assumption about identical fixed costs, coupled with NS's failure to present any evidence justifying the assumption. BNSF's evidence in this proceeding contains exactly the same implausible assumption and lacks any supporting evidence. Incredibly, however, BNSF insists that "[The DARA] procedure that BNSF employed in this proceeding does not in fact embody the shortcoming that the Board perceived in the NS approach in the prior cases." BNSF Petition at 4. BNSF's position defies logic. BNSF's flawed equation and lack of evidence embody exactly the same shortcomings that led the Board to reject DARA in Duke/NS, CPL/NS and Duke/CSX. BNSF has no legitimate basis to debate this settled issue a fourth time. For this reason alone, the Board should reject BNSF's "clarification."

B. BNSF Wrongly Assumes That the SARR and the Residual BNSF Have the Same Road Property Investment Costs Per Mile.

The first fatal flaw of DARA is its assumption that the SARR and the residual incumbent have the same road property investment costs per mile. The Board rejected DARA, in part, because "there is no evidence that fixed costs per mile are the same for the [SARR's] segment of any move as they are for the residual [carrier's]" and NS did not show "how its proposed formula would account for differences in fixed costs per mile." Duke/NS at 22. In its "clarification," BNSF misrepresents this criticism as directed solely at DARA Step Two,

³ The Board reiterated the same points in CPL/NS:

NS has not shown how its proposed formula would account for any differences in fixed costs per mile, nor shown that its per-mile capital investments in the Central Appalachian region are the same as its per-mile capital investments along its lower-density routes.

CPL/NS at 20–21.

although it applies equally to DARA Step One. More specifically, as the Board's criticism applies to this case, DARA wrongly assumes that BNSF's road property URCS variable costs may be used for both the residual BNSF and the WCC.

The record in this case confirms that the WCC and BNSF's average road property investments are not the same. BNSF's average road property investment is \$690,869 per route mile. Crowley V.S. at 7-8 and Table No.1. The WCC's investment costs are much higher, *i.e.*, \$2,345,180 per mile according to Xcel, or \$4,936,112 per mile according to BNSF. Id. Regardless of how URCS might break these costs into fixed and variable components, the WCC's costs exceed BNSF's costs by 3 to 7 times, which validates the Board's finding that that it is "implausible" to assume that high and low-density lines have identical fixed costs. *See* Crowley V.S. at 8 (referring to different levels of road property investment in this case as consistent with the Board's finding in Duke/NS that "there is no evidence that fixed costs per mile are the same for the ACC's segment of any move as they are for the residual NS's.")

DARA Step One clearly violates the principles articulated in Duke/NS for allocating cross-over revenues in proportion to costs. The Board instructs that any such allocation methodology must fairly approximate each carrier's fixed and variable costs:

There may be merit to allocating revenues based on the relative variable cost and average fixed cost to haul traffic over each line segment of the move, *if those costs can be fairly approximated.*

Duke/NS at 22 (emphasis added). In "fairly approximating" such costs, the Board stressed that "the variable cost for *each carrier's segment of the movement* would need to be calculated." Id. at 20 (emphasis added). Contrary to the Board's standard, DARA Step One does not cover attributable costs by allocating revenues in proportion to each carrier's variable costs. DARA ignores the SARR's higher attributable costs and relies *solely* on BNSF's lower URCS variable road property costs to allocate cross-over revenues. *See* Crowley V.S. at 5-6.

Accordingly, DARA Step One allocates cross-over revenues related to road property investment to each party at the rate of \$1,157.00 per MGMT. See Crowley V.S. at 7, 10-11 and Table No. 2. At most, the \$1,157.00 figure covers BNSF's (not the *residual* BNSF's) variable URCS road property investment costs, based on BNSF's system-wide average density and net investment per route mile for 2001. See Crowley V.S. at 7-8. The figure does not cover the SARR's attributable costs because it has no relationship to the SARR's densities or net investments per route mile. *Id.* at 6-7 (noting that the URCS-based figure reflects BNSF's historical investments, and has nothing to do with the SARR's traffic group). Indeed, BNSF has no logical basis to expect that its system-wide average URCS values could produce a dollar-per-MGMT figure that accurately covers either the WCC's or the residual BNSF's attributable costs of providing service. *Id.* at 7. In sum, BNSF's \$1,157.00 per MGMT figure has no relationship whatsoever to the densities or investment costs of the WCC or residual BNSF lines handling crossover traffic in this SAC case. DARA Step One therefore does not (and cannot) accurately cover either party's attributable costs.

The only certainty that the \$1,157.00 MGMT figure brings to this case is an enormous windfall for BNSF. The windfall will occur, in part, because, as summarized above, the WCC's attributable road property costs greatly exceed BNSF's URCS road property costs. This factor alone establishes that the WCC requires a greater rate of return per MGMT to cover its actual attributable costs than the \$1,157.00 per MGMT figure derived from BNSF's system-wide URCS averages. See Crowley V.S. at 9 (confirming that BNSF's lower URCS variable costs have no relationship to the WCC's higher attributable costs).

In addition to ignoring the SARR's higher road property investment costs, DARA Step One ignores additional attributable costs that are needed to develop a cost-based rate of return

per MGTM appropriate for the SARR. In the PPL/BNSF decision,⁴ the Board found that a SARR's attributable costs include (i) its capital recovery requirements for road property assets and (ii) all other operating costs associated with handling its traffic. *See* Crowley V.S. at 9. A revenue allocation formula that covers only variable road property investments, therefore, cannot cover the SARR's attributable costs. A proper application of the PPL/BNSF decision to the WCC's actual costs and traffic densities establishes that the WCC would require compensation at a rate of at least \$2,599.00 per MGTM to cover the capital recovery portion of its attributable costs. Crowley V.S. at 10-11 and Table No.2. Thus, for every MGTM of cross-over traffic, DARA Step One shortchanges the WCC at least \$1,442.00. As stated above, in light of the WCC's cross-over traffic volumes for 2001, its first year of operations, BNSF's approach would under-compensate the WCC by \$48.7 million on traffic to Parish, Texas and by \$41.1 million on traffic to Chicago, Illinois. Crowley V.S. at 11-12 and Table No. 3.

C. BNSF Has Not Demonstrated That The Fixed Costs In DARA Step Two Are Identical For High And Low Density Lines.

The second fatal flaw of DARA is its assumption that the unattributable costs in DARA Step Two are identical for low and high-density lines. BNSF asserts that, after DARA Step One accounts for attributable costs, including all fixed costs that vary with density, the remaining unattributable costs must be identical because they do not vary with density. BNSF, however, ignores other factors besides density that can cause the fixed and unattributable costs of high and low density lines to differ.

Even if one agrees with BNSF that all rail lines begin as low-density "country roads," it still does not follow that they all have identical fixed costs per mile. The amount of such fixed

⁴ PPL Montana LLC v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42054 (served August 20, 2002).

costs depends on numerous timing and site-specific variables that have nothing to do with traffic density. In accordance with SAC methodology, the WCC incurred all of its fixed costs in 1999 and 2000 dollars, whereas BNSF incurred its fixed costs beginning more than 100 years ago. Crowley V.S. at 7. The different timing of the parties' investments leaves no doubt that the WCC's fixed costs exceed BNSF's. Id. at 7–8 and Table No. 1. The WCC's lines also are located on more difficult terrain and have more tunnels than BNSF's lines. *See* Crowley V.S. at 13–14 (documenting the different grading and tunneling factors impacting the parties' respective lines). The resulting grading and tunneling costs increase the WCC's fixed costs compared to BNSF, regardless of traffic density. Id. These independent factors all validate the Board's conclusion that the fixed costs of high and low-density lines are not the same. WCC's higher fixed costs bear out the Board's prediction that "[i]f the fixed costs per mile are not roughly the same, then [DARA] could allocate too much revenue to the light density lines." Duke/NS at 21.

Moreover, even if DARA Step Two accurately calculated the parties' average fixed *road property* costs, BNSF's arguments do not recognize the existence of different unattributable *operating costs* of providing rail service. For example, the formula does not account for the parties' fixed costs for crews, administrative expenses, and other fixed operating costs that have nothing to do with road property investment. *See* Crowley V.S. at 14-15 (noting that such unattributable costs are unique to individual carriers, and there is no basis to assume they are identical on a per mile basis). These non-road property fixed costs accounted for 49.7% of BNSF's total fixed costs in 2001. Id. The failure to account for nearly half of BNSF's fixed costs provides another compelling reason to conclude that DARA is ill-equipped to cover the parties' unattributable costs.

III. CONCLUSION

DARA accomplishes exactly the opposite of the Board's goal of "a revenue allocation procedure that 'produce[s] the fairest division between the carriers.'" *Klick/Fisher V.S.* at 21 (*quoting Duke/NS* at 22). DARA simply provides BNSF a windfall on cross-over revenues at the expense of the SARR. Under SAC principles, the SARR must incur the expense of constructing its entire rail system during a two-year period in then-current dollars. The SARR requires a sufficient return on capital investment to cover its substantial average per-mile roadbed property investments *and* its fixed operating costs. DARA Step One grossly under-compensates the SARR (i) by allocating revenues in proportion to BNSF's much lower URCS system-average per-mile road property investments and (ii) by failing to account for any of the SARR's fixed operating costs.

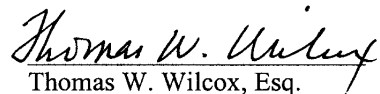
Consistent with the Board's analysis in *Duke/NS*, DARA Step Two wrongly assumes that the WCC's and residual BNSF's lines have identical average fixed costs per mile. Like the carriers in *Duke/NS*, *CPL/NS* and *Duke/CSX*, BNSF has not produced any evidence supporting this implausible assumption. Indeed, the evidence confirms that the WCC's fixed costs are higher than the residual BNSF's, bearing out the Board's prediction that "[i]f the fixed costs per mile are not roughly the same, then [DARA] could allocate too much revenue to the light density lines." *Duke/NS* at 21.

In sum, DARA does not accurately allocate cross-over revenues in proportion to the attributable and unattributable costs of the WCC and the residual BNSF. Based on virtually

identical facts, the Board correctly rejected DARA in Duke/NS, CPL/NS and Duke/CSX.

Consistent with its prior holdings, the Board should reject DARA a fourth time.

Respectfully submitted,



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March 8, 2004

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

V.

Defendant

Due Date: March 8, 2004

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LIST OF EXHIBITS

<u>EXHIBIT NO.</u>	<u>TITLE</u>
1	Revised Attachment No. 3
2	Revised Attachment No. 4

I. INTRODUCTION

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314. I am the same Thomas D. Crowley that filed verified statements in the opening and rebuttal phases of this proceeding.

I have been asked by Counsel for Complainant, Public Service of Colorado D/B/A Xcel Energy ("Xcel") to respond to The Burlington Northern and Santa Fe Railway Company's ("BNSF") *Statement of Clarification Regarding Allocation of Revenues Under the Density Adjusted Revenue Allocation Method* ("Statement of Clarification") and the accompanying joint verified statement of John C. Klick and Benton V. Fisher.

BNSF submits its Statement of Clarification in an attempt to distinguish the Density Adjusted Revenue Allocation ("DARA") Method submitted in its reply evidence in this proceeding from that which was rejected by the Surface Transportation Board ("STB" or "Board") in both STB Docket No. 42069, *Duke Energy Corp. v. Norfolk Southern Railway Company*, served November 6, 2003 ("Duke/NS") and STB Docket No. 42072, *Carolina Power & Light Company v. Norfolk Southern Railway Company*, served December 23, 2003 ("CP&L").^{1/} BNSF also submits its Statement of Clarification in an attempt to recast DARA into a methodology that does not suffer from the failings described by the Board in its decisions in these three proceedings. Rather than addressing the Board's concerns directly, BNSF's Statement of Clarification obfuscates the failings of the DARA methodology as identified by the Board in Duke/NS, CP&L and Duke/CSX.

In my Reply Statement I will demonstrate that:

^{1/} Since the filing of BNSF's Statement, the STB has also rejected the DARA method in STB Docket No. 42070, *Duke Energy Corporation v. CSX Transportation, Inc.*, served February 4, 2004 ("Duke/CSX").

1. The DARA methodology advocated by BNSF in this proceeding is exactly the same methodology that was rejected by the STB in Duke/NS, CP&L and Duke/CSX;
2. BNSF's arguments that the DARA methodology accounts for the differences in the road property investment costs between the segments of the Stand Alone Railroad ("SARR") and the Residual Incumbent ("RI") when allocating revenues is incorrect for three reasons. First, the DARA method proposed by BNSF incorrectly substitutes the RI's investment in road property for the SARR's investment in road property. Second, the DARA method proposed by BNSF fails to properly account for the SARR's attributable costs. Third, contrary to BNSF's claim, differences do exist between the unattributable cost per mile for both the SARR and the RI segments. BNSF never addresses the concerns raised by the STB in Duke/NS, CP&L and Duke/CSX regarding the differences in non-road property unattributable fixed costs between the SARR segments and the RI segments; and
3. Contrary to BNSF claims, application of the DARA method as proposed by BNSF is inherently bias to the benefit of the residual dependent railroad, which on the one hand requires the SARR to incur a road property capital return requirement based on the cost of constructing a new facility and yet calculates the division of revenues on cross-over traffic based on an assumption that the SARR's attributable cost is the same as that of the RI.

Each of these findings is discussed in the balance of my reply verified statement.

II. BNSF'S DARA METHOD IS THE SAME AS THAT PREVIOUSLY REJECTED BY THE BOARD

BNSF's Statement of Clarification attempts to distance the DARA approach it presents in this proceeding from that presented by NS in the Duke/NS proceeding. BNSF does this in several instances by implying that its DARA does not have the same failings as the DARA methodology presented in other proceedings. For example, BNSF states:

"...the Board rejected NS's particular cost-based approach because "NS has not shown how its proposed formula would account for differences in fixed costs per mile.".... The Board reached the same conclusion regarding NS's revenue allocation approach in *Carolina Power & Light Company v. Norfolk Southern Railway Company*....In light of the Board's statements in those cases, it is necessary for BNSF to explain that the Density Adjusted Revenue Allocation ("DARA") procedure that BNSF employed in this proceeding does not in fact embody the shortcoming that the Board perceived in the NS approach in prior cases." See Statement of Clarification, p. 4.

Further BNSF states:

"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*." See Statement of Clarification, at page 10.

BNSF's Statement of Clarification directly contradicts the implication that the DARA method it relies on in the instant proceeding is not the same as NS's DARA. At page 9, note 2 of its Statement of Clarification, BNSF states: "it is evident from the Board's *Duke/NS* decision that the formula used by NS to allocate revenue in that case *is the same* one that BNSF uses in this case to allocate revenue on cross-over movements." [emphasis added]

The evidence and supporting workpapers submitted by the parties in the Duke/NS and CP&L proceedings is filed under seal and therefore I am not able to confirm that the procedures underlying

the DARA calculations used in these various proceedings are identical. However, comparison of the DARA formula contained in Duke/NS at page 20, note 31, with that contained in BNSF's Reply Evidence at III-A-68 and Exhibit III-A-5, demonstrates that the DARA formulas presented by the defendants in these two proceedings are the same.

Assuming that BNSF's application of the DARA procedure is in fact the same as rejected by the Board in Duke/NS, CP&L and Duke/CSX, then the arguments made in BNSF's Statement of Clarification should be rejected because they are merely an attempt to relitigate issues that have already been decided by the Board. The Board cautions parties not to relitigate previously settled issues in its decision in Ex Parte 347 (Sub-No. 3) General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, served March 12, 2001. See Ex Parte 347 (Sub-No. 3), p. 6.

**III. THE DARA METHODOLOGY DOES NOT DISTINGUISH
BETWEEN THE ROAD PROPERTY COSTS OF THE SARR AND THE RI**

The Board rejected the DARA approach in Duke/NS primarily because:

“...there is no evidence that fixed costs per mile are the same for the ACC’s segment of any move as they are for the residual NS’s. By definition, fixed cost are those costs that do not vary with output and would include investments in land, tunnels, track and bridges. But this does not mean that the fixed investment costs are the same for light- and heavy-density lines.....

There may be merit to allocating revenues based on the relative variable cost and average fixed cost to haul traffic over each line segment of the move, if these costs can be fairly approximated. But NS has not shown how its proposed formula would account for differences in fixed costs per mile....NS has provided no evidence that its per-mile capital investments in the Central Appalachian region are identical to its per-mile capital investments along its lower density network. This deficiency strikes at the heart of NS’s proposed methodology, and thus the Board will not adopt it.” Duke/NS at 22.

Central to BNSF’s Statement of Clarification is its argument that the DARA procedure *does* account for differences in the fixed cost per mile through the use of the Board’s Uniform Rail Costing System (“URCS”) formula to allocate revenues based on the SARR’s and RI’s attributable costs. BNSF argues that URCS is a long-run variable cost formula that, for individual coal movements, is comprised of approximately 20 to 25 percent of return on and depreciation of road property investment.^{2/} BNSF also argues that the line segments with the greatest density will enjoy proportionally greater revenues because Step 1 of DARA allocates revenue to each cross-over move based on its attributable cost using the URCS formula, and then accumulates the allocated revenue for each cross-over move. BNSF concludes that, because 20 to 25 percent of these allocated revenues are associated with investment in road property, the segments with greater density will have

^{2/} See Klick/Fisher supporting verified statement, p. 26.

accumulated greater revenues attributable to that investment.

BNSF then argues that, because Step 1 of DARA has accounted for all density related differences in investment cost per mile, the contribution from cross-over movements distributed in Step 2 of DARA can be allocated assuming that fixed costs per mile are the same for both the SARR and RI segments.

BNSF's arguments regarding DARA are flawed for at least three reasons. First, DARA, as proposed by BNSF (and NS), incorrectly substitutes the RI's investment in road property for the SARR's investment in road property. Second, the DARA method proposed by BNSF fails to properly account for the SARR's attributable costs. Third, contrary to BNSF's claim, differences do exist between the unattributable cost per mile for the SARR and RI segments. BNSF never addresses the concerns raised by the STB in Duke/NS, CP&L and Duke/CSX regarding the differences in non-road property unattributable fixed costs between the SARR segments and the RI segments. Each of these issues is addressed below.

A. DARA Improperly Substitutes the RI's Road Property Investment for the SARR's Road Property Investment

The DARA method relies on BNSF's own URCS variable cost to represent both the WCC's road property investment cost and the RI's residual road property investment cost for each cross-over movement. Use of URCS costs to represent the SARR's road property investment cost is incorrect for two reasons. First, URCS return on and return of investment in road property represents consumption of BNSF's assets that are currently in place, having nothing to do with the requirements of the SARR traffic group. Only the assets that must be in place to efficiently handle the SARR's traffic should be considered in the SARR's attributable cost.

For example, BNSF calculates its road property investment to equal \$1,157 per million gross ton-miles. This amount, calculated from BNSF's URCS, is based on BNSF's system-wide average density per route mile which has no relationship to the density of the SARR in this proceeding, the Wyoming Colorado Coal Railroad ("WCC"). Further, it is doubtful that this system average density has any relationship to the individual BNSF segments that comprise the BNSF lines required to move the WCC originated traffic to destination.^{3/}

Second, as demonstrated by Xcel in Rebuttal, BNSF's average net investment in road property equals \$690,869 per route mile.^{4/} By contrast, the WCC's investment equals \$2.3 million per route mile. The reason for this vast difference is that BNSF's road property investment is based on investment beginning many years ago and continuing through the present day. By contrast, the WCC, based on stand-alone cost theory, is constructed at current dollars. Therefore, using BNSF's historic investment as a substitute for the WCC's investment vastly understates the required return on road property for the WCC.

Table No. 1 below compares BNSF's historic net investment in road property and return on net investment per route mile with that of the WCC as calculated in BNSF's Reply and Xcel's Rebuttal evidence.

^{3/} BNSF's average density per route mile equals 29.7 MGTMs per mile. By contrast, according to BNSF's Attachment 3 to its Statement of Clarification, the average density per route mile on the WCC is 33.8 MGTMs per mile and BNSF's average density on the Pawnee Junction to Parish, TX segment equals 34.0 MGTMs per mile.

^{4/} See Xcel Rebuttal electronic workpaper "road property per mile comparison.xls".

Table No. 1
**Comparison of BNSF Historical
Investment to WCC Investment per Route Mile**

<u>Carrier</u> (1)	<u>Road Property Net Investment (millions)</u> (2)	<u>Route Miles</u> (3)	<u>Road Property Investment/mile</u> (4)	<u>ROI per mile</u> (5)
1. BNSF – Historical	\$22,935	33,198	\$690,869	\$97,412
2. WCC – Xcel	\$875	373	\$2,345,180	\$330,670
3. WCC – BNSF	\$1,847	374	\$4,936,112	\$695,995

Source: Xcel Reply to Statement of Clarification electronic workpaper “Investment per GTM.xls”

As shown previously, the Board in Duke/NS rejected the DARA method precisely because “...there is no evidence that fixed costs per mile are the same for the ACC’s segment of any move as they are for the residual NS’s.” Table No. 1 above, confirms the fallacy of BNSF’s basic assumption underlying its DARA method, i.e., that the investment per route mile for the WCC and the RI are the same.

B. BNSF’s DARA Fails to Account for the SARR’s Attributable Cost

BNSF claims: “DARA distinguishes between the coverage of attributable cost for both carriers and the sharing of whatever contribution exists *above* the combined attributable cost of the two carriers.”^{5/} This statement is misleading. As stated previously, BNSF’s DARA procedures rely on its URCS cost to represent attributable cost for both the SARR and the RI and BNSF has made no demonstration that its URCS costs accurately represent the WCC’s attributable costs.

To the contrary, as shown in the previous section, the net investment in road property for BNSF

^{5/} See Statement of Clarification, p. 11.

is far less than that required for the WCC as posited in either Xcel's Rebuttal or BNSF's Reply evidence. For this reason alone, it is not possible that BNSF's attributable costs, as represented by BNSF's URCS variable cost, have any relationship to the WCC's attributable costs.

Moreover, in STB Docket No. 42054, PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Company, served August 20, 2002 ("*PPL*"), the Board held that the attributable cost for traffic moving on a SARR is equal to the stand-alone cost associated with that traffic.^{6/} Applying that measure of attributable cost, the Board determined that an identifiable subset of traffic moving on the SARR did not cover the collective *attributable cost* associated with that traffic. See *PPL* at p. 12. To reflect the SARR's attributable cost for the identified subset of traffic in that proceeding, the STB included the SARR's capital recovery requirement for all road property assets required to move the subset of traffic and *all* operating costs associated with the subset of traffic. In this instance, all cross-over traffic moving on the WCC is at issue and therefore, based on *PPL*, the attributable cost associated with this traffic is equal to the WCC's stand-alone cost related to the cross-over traffic, not BNSF's URCS cost.

To address the Board's criticism of NS for not demonstrating that DARA accounts for differences in road property investment per mile, BNSF determines the portion of attributable cost that represents return on and depreciation of road property investment for both the SARR and the RI segments based upon BNSF's URCS road property costs. BNSF calculates this amount to equal

^{6/} By its decision served March 29, 2003, the Board reopened the *PPL* proceeding to allow the parties to comment on limited issues related to the calculation of the alleged cross-subsidy by a subset of the SARR's traffic in that proceeding. In my May 23, 2003 verified statement on Reopening in *PPL*, I expressed the opinion that the existence of a cross-subsidy created by a subset of traffic on a SARR should not be based on the STB's interpretation of the SARR's attributable cost, but instead should be based on the real world considerations made by a carrier when it makes a determination to move incremental traffic. As explained in my May 23, 2003 verified statement, this decision is not based on total cost, but instead on the variable, incremental, marginal or attributable cost of handling the additional traffic.

\$1,157 per million gross ton-miles. Using this amount for both the SARR and the RI, BNSF then creates examples showing how the revenues allocated to the WCC are higher than for the RI. However, BNSF substantially understates the amount that should be allocated to the WCC.

Applying the Board's definition of a SARR's attributable cost as equal to its stand-alone cost, the return on investment portion of the WCC's attributable cost is equal to the capital recovery requirement yielded by the DCF model in a stand-alone proceeding. Therefore, WCC's attributable road property cost equals \$2,599 per million gross ton-miles,^{2/} or nearly 125 percent more than the \$1,157 per million gross ton-miles used by BNSF in its allocation of revenues to the WCC using the DARA method.

Using the Board's *PPL* definition of attributable cost for a SARR, BNSF's assumption that the attributable cost per mile for the WCC and the RI are identical is factually incorrect. As a result, BNSF application of DARA vastly understates the proper allocation of revenues to the WCC on cross-over movements.

Table No. 2 below summarizes the road property cost per gross ton-mile used by BNSF in its DARA method and the WCC's road property cost per gross ton-mile based on the capital recovery requirement presented in Xcel's Rebuttal and BNSF's Reply evidence.

^{2/} See Xcel Reply to Statement of Clarification electronic worksheet , "Investment per GTM.xls".

Table No. 2 <u>Comparison of BNSF and WCC Road Property Costs</u> (Per Million GTMs)			
<u>Carrier</u> (1)	<u>Capital Requirement</u> (2)	<u>Million Gross Ton-miles</u> (3)	<u>Road Property Per GTM</u> (4)
1. BNSF	--	--	\$1,157
2. WCC – Xcel	\$97,250,058	37,420	\$2,599
3. WCC – BNSF	\$191,790,599	37,420	\$5,125
Sources: Line 1, BNSF Statement of Clarification, Attachment 2. Line 2 and 3, Electronic workpaper “Investment per GTM.xls”			

Because BNSF’s DARA fails to account for WCC’s attributable cost, it understates the amount of revenue that should be allocated to the WCC to account for its return on and return of road property investment, and thereby creates a significant shortfall in WCC’s revenues. To illustrate this shortfall, I have restated Attachment No. 3 and Attachment No. 4 to BNSF’s Statement of Clarification. Table No. 3 below shows that the WCC shortfall for the Eagle Butte to Parish route and for the Eagle Butte to Chicago Route equals \$48.7 and \$41.1 million, respectively.

Table No. 3
WCC Revenue Shortfall Resulting
from Using URCS Return on Road Property

<u>Item</u> (1)	<u>Eagle Butte</u> <u>to Parish, TX</u> (2)	<u>Eagle Butte</u> <u>Chicago, IL</u> (3)
1. Million Gross ton-miles	33,798	28,539
2. BNSF URCS road property cost/MGTM	\$1,157	\$1,157
3. WCC actual road property cost/MGTM	\$2,599	\$2,599
4. Road property cost/MGTM shortfall (Line 3 - Line 2)	\$1,442	\$1,442
5. Revenue Allocation shortfall (millions) (Line 1 x Line 4)	\$48.7	\$41.1
6. Route Miles	390	217
7. Revenue shortfall per mile (Line 5 / Line 6)	\$124,953	\$151,841

Sources: Col. 2, Revised Attachment No. 3.
Col. 3, Revised Attachment No. 4.

C. Step 2 of DARA Incorrectly Assumes that
Unattributable Costs are the Same Per Mile of Railroad

Step 2 of BNSF's DARA method allocates contribution above attributable cost to the SARR and RI segments in inverse proportion of mileage to density. BNSF asserts that, because Step 1 of the DARA method accounts for differences in road property investment that are attributable to density, the remaining fixed costs of serving the traffic are the same per mile of road for both the SARR and RI. To illustrate this point, BNSF uses the Board's highway construction cost analogy from Duke/NS and claims that the cost of building a super highway and a country road are the same once the traffic volume factor has been removed.

BNSF's generalization is incorrect and has no bearing on the allocation of contribution from cross-over traffic for two reasons. First, as discussed in Section A, above, BNSF's assumption fails

to account for differences in timing of the investment or occurrence of the fixed costs. As stated previously, BNSF's road property fixed costs were incurred over a lengthy historic time period compared with the contemporary construction of the WCC.

Second, BNSF fails to recognize the potential differences in the construction of the actual WCC segments and the residual BNSF segments, thus ignoring the Board's stated concern in Duke/NS. As noted previously, the STB stated that "NS has not shown how its proposed formula would account for difference in fixed costs per mile. NS has provided no evidence that its per-mile capital investments in the Central Appalachian region are identical to its per-mile capital investments along its lower density network. This deficiency strikes at the heart of NS's proposed methodology, and thus the Board will not adopt it".^{8/}

In a similar manner, BNSF's generalization that fixed costs per mile are the same for both the SARR and the RI fails to account for differences in investment specific to the SARR and RI segments that result from differences in the geographic terrain where the segments are located. For example, having no relationship to density, the grading on the WCC is far more severe than on the RI segments. The grading quantities per mile for the WCC from Eagle Butte to Pawnee Junction equal 89,296 cubic yards per mile.^{9/} By contrast, the grading quantities per mile from Pawnee Junction to Parish, Texas are only 26,678 cubic yards per mile.^{10/}

Another example of the difference in investment cost between the WCC and the RI that is not

^{8/} See Duke/NS at p. 22.

^{9/} See Reply to Statement of Clarification electronic workpaper "Engineering Report Quantities per mile.xls".

^{10/} Reliant Energy's Parrish Plant located near Houston, Texas is the southern most destination on the BNSF system for traffic originating on the WCC. The cubic yards of grading for the RI segment between Pawnee Junction and Parrish are based on the publically available Interstate Commerce Commission's Engineering Reports and are summarized in the accompanying electronic workpaper titled "Engineering Report Quantities per mile.xls"

density related has to do with tunnels. Between Bridger Junction and Guernsey on the WCC there are 4,776 feet of tunnels. By contrast, according to publically available track charts of BNSF's system there are no tunnels on the BNSF between Pawnee Junction and Parish, Texas.

Clearly, significant differences do exist in the investment cost per track mile, that are not related to density. BNSF has made *no* attempt to address these differences in its Statement of Clarification and therefore, BNSF's evidence suffers from the same deficiency as the Board found in NS's evidence in the Duke/NS proceeding.

In addition to the above, BNSF's Statement of Clarification ignores the fact that unattributable costs include more than return on road property. Unattributable costs also include operating costs that are unique to an individual carrier which have no relationship to the miles of railroad. These include, for example, the fixed portion of crew costs and general and administrative expenses. The operating portion of fixed costs on BNSF in 2001 equal 49.7 percent of total fixed costs.^{11/}

BNSF's Statement of Clarification assumes that the SARR and RI's fixed costs other than those related to road property are the same on a per-mile basis. Stated differently, BNSF has made no attempt to demonstrate that the fixed or unattributable operating costs of the WCC and the RI are the same on a per mile basis. The STB rejected NS's use of DARA in Duke/NS precisely because NS failed to demonstrate the differences in the fixed cost per mile between the SARR and the RI and it should make the same determination in this proceeding.

^{11/} See Reply to Statement of Clarification electronic workpaper "Fixed Operating Expense.xls".

IV. FAIRNESS ISSUE

BNSF cites Ex Parte No. 347 (Sub-No.1) as allowing the complainant to select a subset of defendant's traffic in order to realize the benefits of economies of density, scope and scale. Based on this, BNSF concludes that the relative densities cannot be "fairly ignored" when allocating revenues on cross-over traffic. BNSF then concludes by indicating that the SARR should not be able to recoup a larger share of unattributable cost than the RI. BNSF states "the fairest divisions between the carriers" is to give them both the same opportunity to cover their attributable cost.

BNSF's sense of "fairness" is extremely biased. As pointed out previously, contrary to BNSF claims, application of the DARA method as "clarified" by BNSF results in an inherently unfair Stand-Alone Cost model, which on the one hand requires the SARR to incur a road property capital return requirement based on the cost of construction of a new facility, but on the other calculates the division of revenues on cross-over traffic based on an assumption that the SARR's attributable costs are equal to BNSF's historic investment.

V. CONCLUSIONS

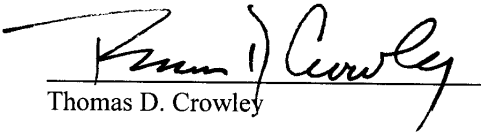
The DARA method advocated by BNSF in this proceeding has previously been rejected by the Board in Duke/NS, CP&L and Duke/CSX. The Board rejected DARA in these proceedings because the carriers failed to demonstrate how DARA would account for differences in fixed cost per mile, and they did not demonstrate that the capital investments in the SARR are identical to those of the RI.

In its Statement of Clarification, BNSF discusses the role of URCS variable cost and the allocation of revenues from cross-over traffic based on URCS variable cost. From this discussion, BNSF concludes that by using URCS, DARA allocates sufficient revenues to the SARR to cover its capital investment. BNSF, however, incorrectly equates its own historical road property investment used in URCS, with that of the current investment in road property made by the WCC. The Board in PPL identified attributable cost for a SARR as equal to its stand alone cost (including road property investment at current levels) not the defendant's URCS cost as relied on in DARA.

Moreover, BNSF, like the defendants in the prior cases, assumes that fixed costs per mile for the SARR and the RI are identical. But also like those other defendants, BNSF has made no attempt to demonstrate that its assumption is correct with regard to either fixed road property or fixed operating costs. As a result, BNSF's evidence suffers from the same deficiency as the Board found in Duke/NS and CP&L and therefore DARA should also be rejected in this proceeding.

VERIFICATION

I, Thomas D. Crowley, verify under penalty of perjury that I have read the verified statement in Reply to BNSF's Statement of Clarification that I have sponsored, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.


Thomas D. Crowley

Sworn to and subscribed before me
this 8th day of March, 2004.

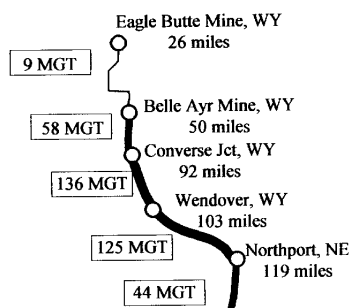

Anthony V. Evanshaw III
NOTARY public for the State of Virginia

My Commission expires September 30, 2007.

Exhibit 1

Allocation of Revenues for Recovery of Road Property Costs in Step #1 of DARA Eagle Butte - Parish Route

SARR Segments

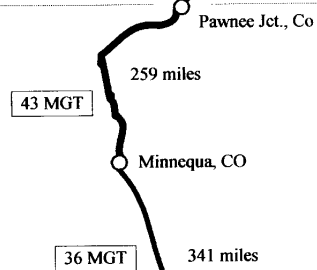


BNSF

33,798 MGTM*
x \$1,157 per MGTM**
= \$39.10 Million
÷ 390 Route Miles
= **\$100,266 per Route Mile**

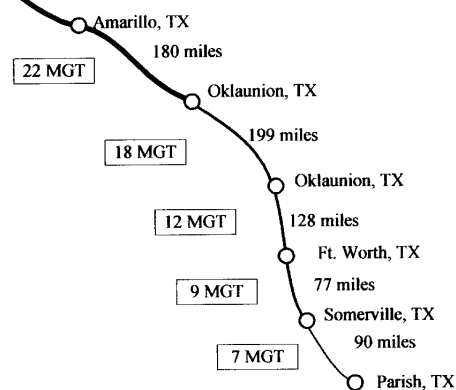
WCC

33,798 MGTM*
x \$2,599 per MGTM
= \$87.84 Million
÷ 390 Route Miles
= **\$225,233 per Route Mile**
\$124,967 Shortfall per
Route Mile



33,969 MGTM*
x \$1,157 per MGTM**
= \$39.30 Million
÷ 1,274 Route Miles
= **\$30,856 per Route Mile**

Residual RR Segments Traversed by Cross-Over Traffic

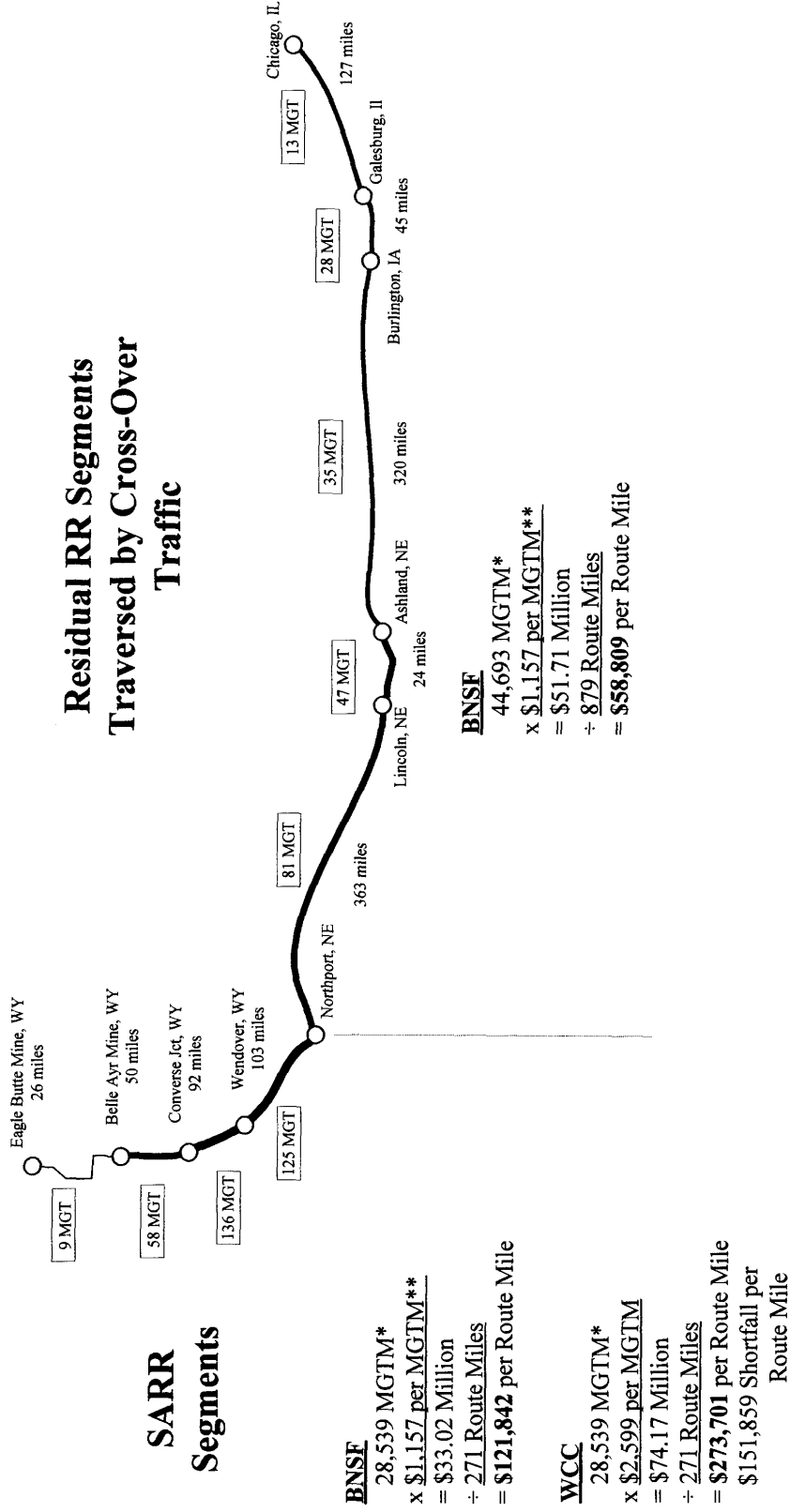


* Does not include Xcel issue Traffic
** See Attachment 2

Use of BNSF URCS road property investment per million GTMs results in a WCC Revenue shortfall of \$124,967 per route mile

Exhibit 2

Allocation of Revenues for Recovery of Road Property Costs in Step #1 of DARA Eagle Butte - Chicago



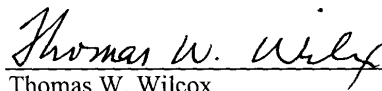
* Does not include Xcel issue Traffic
** See Attachment 2

Use of BNSF URCS road property investment per million GTMs results in a WCC Revenue shortfall of \$151,859 per route mile

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2004, I served a copy of Complainant's Response in Opposition to BNSF's Density Adjusted Revenue Allocation ("DARA") Procedure by hand delivery to counsel for Defendant at the following address:

Samuel M. Sipe, Jr., Esq.
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Thomas W. Wilcox