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July 19, 2004

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

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Re: Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company, Reply to Petition for Reconsideration, S.T.B Docket No. 42057

Dear Secretary Williams:

Please accept for filing on behalf of complainant Public Service Company of Colorado d/b/a Xcel Energy this Reply to BNSF's Petition for Reconsideration. The original and 10 copies are included. A copy of this filing is on the accompanying three CDs.

An extra copy of this filing is included for stamping and return to this office. If there are any questions concerning this matter, please contact the undersigned at 202-274-2913.

Sincerely,

Thomas W. Wilcox

Thomas W. Wilcox
Counsel for Complainant

Cc: Bruce A. Colt, Esq.
Gerald D. Zimmerman

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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REPLY TO PETITION FOR RECONSIDERATION

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July 19, 2004

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Defendant.

Docket No. 42057

REPLY TO PETITION FOR RECONSIDERATION

Complainant Public Service Company of Colorado d/b/a Xcel Energy ("Xcel Energy"), pursuant to 49 C.F.R. § 1115.3, hereby submits this Reply to BNSF's Petition for Reconsideration ("Petition"), filed in this proceeding on June 28, 2004.

I. Preface and Summary of Argument

BNSF's Petition for Reconsideration of the Board's June 8, 2004 decision ("Decision") in this proceeding is largely a rehashing of fundamentally flawed arguments raised by BNSF in this case and a re-arguing of already settled stand-alone cost principles. However, BNSF has also impermissibly included brand new evidence and argument/testimony into its Petition in violation of the Board's procedural rules. BNSF also appears to have relied in part upon evidentiary materials submitted under seal in another proceeding to which only BNSF counsel and outside consultants have access to under the applicable protective order, and which order also prohibits the use of such material in this proceeding.

BNSF's objections to the Board's Decision do not even come close to meeting the material error standard enunciated in the Board's rules. BNSF's Petition begins by rehashing the arguments in support of BNSF's attempt to fundamentally rewrite the Coal Rate Guidelines¹ to: (1) require the Board to essentially ignore SAC principles and rules if a railroad defendant is revenue inadequate as determined by 49 U.S.C. §10704(a)(2); (2) eliminate the use cross-over traffic in a complainant's stand-alone cost analysis; and (3) require that a complainant's entire case be summarily dismissed if, at the end of the proceeding, the Board determines that the operating plan proposed by the complainant is not feasible. To accept these extreme arguments would reverse decades of precedent applying the finely-crafted balance in the Guidelines and effectively end the protections that captive shippers have under the Board's rate reasonableness standard.

BNSF claims that the Board did not sufficiently take BNSF's technical revenue adequacy into account in the Decision. Of course, the Guidelines were specifically developed to provide adequate revenues for defendant carriers while also protecting captive shippers from monopoly pricing. Hence, application of the Guidelines includes full consideration of the defendant's revenue needs, as the Board and ICC have stated many times. BNSF's Petition also evinces an attempt to drastically alter the complainant's burden of proof in SAC cases. In particular, BNSF seeks to have rate reasonableness complaints dismissed for the sole reason that the complainant's SARR operating plan is found insufficient. Not only is such a standard found nowhere in the Guidelines or Board/ICC precedent, but, if applied, such a standard would mean the complete abdication of the Board's statutory duty to determine rate reasonableness for

¹ Xcel Energy continues to use in this Reply the abbreviations for case names and other abbreviations that the Parties and the Board have used throughout this proceeding.

captive shippers. BNSF argument that 49 U.S.C. §11701(c) requires dismissal of Xcel Energy's complaint because this proceeding was not completed in three years is specious. The ICC made it plain over 20 years ago that this statute does not apply to complaint proceedings, and it never has been. BNSF's suggested use of the statute would only encourage defendants to prolong and delay Board proceedings, a potential outcome the ICC recognized long ago.

BNSF's attempt to upset the Guidelines' balance continues with an attack on the use of cross-over traffic, in this case and generally, despite the fact that the use of cross-over traffic in SARR presentations is a "well established practice." BNSF's position on this point is contrary to a decade of SAC precedent and also to the design flexibility complainants are given under the Guidelines. Moreover, the use of cross-over traffic keeps SAC presentations to a manageable size and simply reflects the interlining capabilities that all railroads have.

BNSF's attack on cross-over traffic is accompanied by an alternative argument – that if the Board accepts cross-over traffic, it should allocate revenues using the DARA method. This discredited method has now been rejected by the Board in four cases. DARA's flaws have already been exposed by the Board: it is based on the erroneous assumption that fixed costs are the same for both low density and high density lines and it makes improper use of URCS.

BNSF next claims the Board should not have included the Jeffrey Energy Center traffic in the Xcel Energy's SARR traffic group. This argument is easily disposed of, as the record clearly demonstrates that routing this traffic over the lines of the SARR easily meets the Board's TMPA rerouting test: there are no off-SARR impacts and the WCC

service is better than that provided actually provided by BNSF. BNSF's alternative "shared facilities" argument finds no support in the Guidelines and is based on a misstatement of decisions issued prior to the issuance of TMPA.

Finally, BNSF objects to various forecasting and road property decisions made by the Board after consideration of all the evidence of record. As explained in the body of this Reply to Petition for Reconsideration, all of BNSF's objections to these determinations are without merit, and BNSF's attempt to introduce new evidence and argument in its Petition to rehabilitate or supplement its evidence in response to the Decision must be rejected.

II. Argument

A. BNSF's Technical Revenue Inadequacy was Addressed by the Decision

BNSF's Petition begins with a continuation of a theme sounded by BNSF throughout this proceeding: that application of the stand-alone cost test under the Coal Rate Guidelines, despite explicitly being crafted for the purpose of fulfilling the Board's statutory requirement to consider a railroad's technical revenue inadequacy under 49 U.S.C. § 10701(d)(2), should have been disregarded in this case. Xcel Energy has set forth in great detail in its filings throughout this proceeding the policies and rules that demonstrate BNSF's argument is meritless.² These policies and rules are very briefly summarized again below.

The Guidelines were developed with extensive railroad input over many years in order to meet the twin statutory goals of protecting captive shippers from monopoly pricing and ensuring that railroads have the opportunity to earn adequate revenues. The stand-alone cost method of determining maximum reasonable rates was specifically developed for the purpose of "providing necessary protection for captive shippers, while providing the railroads the opportunity to earn adequate revenues" pursuant to 49 U.S.C. §10704(a)(2). Guidelines at 521 (citations omitted). Accordingly, as the ICC and Board have repeatedly stated, this balancing of statutory objectives means that a rate may be found unreasonable even if the defendant railroad is revenue inadequate.³ As the Board has further explained, "the revenue adequacy goals of the statute are reflected in, and

² See Xcel Energy's Reply at I-6 to 22 and II-A-122 to 133; Xcel Rebuttal at I-4 to 5; and Xcel Energy Final Brief at 4 to 5.

³ Review of Rail Access and Competition Issues, Ex Parte 575, 3 STB 92, 96 (n.6) (1998); Bituminous Coal – Hiawatha, Utah to Moapa, Nevada ("Nevada Power"), Docket No. 37038, 6 ICC2d 1, 9 (1989); McCarty Farms v. Burlington Northern Inc., Docket No. 37809, 4 ICC2d 262, 280 (1988); Coal Rate Guidelines, Nationwide, Ex Parte 347 (Sub-No. 1), 1 ICC2d 520, 536-537 (1985); Allied Chemical Corp. v. Ann Arbor Railroad System, Docket No. 38412S, 1 ICC2d 492, 507-508 (1985).

satisfied by, CMP and the SAC test.”⁴ Moreover, “[b]ecause the SAC test provides for earnings sufficient to cover all of the capital and operating costs needed to provide economical and efficient service to the [issue] traffic in the [SARR], by definition it enables [the defendant railroad] to earn ‘adequate’ revenues.”⁵

Thus, BNSF’s complaint that the Board erred because the Decision did not discuss how the Board addressed BNSF’s revenue needs is puzzling, since as BNSF well knows, the entire process of applying the stand-alone cost principles in the proceeding was for the purpose of achieving a result that explicitly addressed BNSF’s need to earn adequate revenues. BNSF’s claim that the Board did not give “due consideration” to BNSF’s revenue inadequacy is nothing more than (1) a claim that the Board should have gone outside the stand-alone cost test and the Guidelines generally to find a reason to give BNSF still more revenues from the Pawnee movement; and (2) a complaint that the Board did not resolve all disputed evidentiary issues in BNSF’s favor in order to reach a result that maximized the rates established for this movement.⁶ Both of these arguments are utterly without merit.

B. Xcel Energy Presented a Prima Facie Case and Met Its Overall Burden of Establishing that BNSF’s Rates are Unreasonable

BNSF’s Petition also sets forth another attempt by BNSF in this proceeding to alter the means by which the reasonableness of rail transportation rates is determined under the Guidelines. Specifically, BNSF has sought to alter the complainant’s ultimate burden in these cases from demonstrating that the rates it has challenged are

⁴ Union Pacific Railroad Co. v. Surface Transportation Board and United States of America, Docket No. 02-1198 and Consolidated Case No. 02-1225, Joint Brief of Respondents Surface Transportation Board and United States of America, filed December 26, 2002 at 38 (n. 49) (emphasis added).

⁵ Id. at 37 (citation omitted).

⁶ See Petition at 1-2 and oral argument transcript at 61. *Note:* some versions of the oral argument transcript erroneously list Chairman Nober as the speaker on page 61 even though it is clearly BNSF counsel.

unreasonable, to presenting to the Board a flawless operating plan for complainant's stand-alone railroad. Under BNSF's proposed standard, a finding by the Board that a complainant's operating plan is infeasible would necessarily result in dismissal of the entire case. It is apparently of no concern to BNSF that, had this proposal been applied in prior stand-alone cost cases it would have resulted in the dismissal of nearly all, if not all, of the cases brought under the stand-alone cost test of the Guidelines. In fact, neither the Board nor the ICC have ever dismissed a case based on the failure of the complainant to present a feasible SARR plan. See discussion in Xcel Energy Reply to Motion for Summary Disposition and for Stay, filed February 26, 2003 at 15-17.

The reason such a standard does not exist, of course, is that a complainant's ultimate burden is to demonstrate the rates it has challenged are unreasonable, and the Board's responsibility is to "determine whether the carrier has abused its market power by charging an unreasonable rate to a shipper who has no effective transportation alternative for that traffic." Decision at 22. As the Board further explained in the Decision:

The Board is not simply an adjudicator, rather, it is charged with carrying out the rail transportation policy set forth in 49 U.S.C. 10101, and more specifically, with investigating the reasonableness of a challenged rate, making findings as to its reasonableness, and then taking appropriate action to compel compliance with the statute. 49 U.S.C. 11701(a). The Board strives to achieve an appropriate balance so that the adversarial process works in a manner that provides an adequate record upon which the Board may make a fair and informed assessment of the reasonableness of a challenged rate.

Id. at 23. Accordingly, although the ICC and the Board have declined to use the complainant's operating plan in nearly every stand-alone cost case, the agencies have gone on to fulfill their responsibility of determining the reasonableness of a challenged

rate. BNSF's claim that it is "impossible" to assess rate reasonableness without complainant's operating plan is therefore obviously wrong and belied by years of agency precedent – the Board can and does assess rate reasonableness despite rejecting complainants' operating plans.

BNSF's Petition also misstates both the ICC's February 13, 1995 decision in McCarty Farms and the Board's April 4, 2003 decision in this case. As to McCarty Farms, BNSF fails to point out that even though the operating plan challenged by the unsuccessful motion to dismiss in that case was eventually determined to be infeasible after all the evidence was submitted, the Board did not dismiss the complaint. Additionally, it certainly was not the "plain import" of the April 4, 2003 decision in this proceeding denying BNSF's motion to dismiss "that the complaint would be dismissed if and when the Board concluded that Xcel Energy had not met its burden of formulating a feasible operating plan." Petition at 4. The April 4, 2003 decision followed the rule of McCarty Farms that requires a defendant to meet the very high burden of demonstrating that the operating plan presented by the complainant in its opening evidence is "patently incapable of meeting the shipper's needs" before a complaint can be dismissed at that stage of the proceeding. See April 4, 2003 decision at 2, note 2. BNSF did not make this showing. There is absolutely no "import" (and BNSF admits that there is no explicit statement to this effect) that the Board intended its April 4, 2003 decision to mean that dismissal "would" occur at the end of the proceeding if the Board ultimately found Xcel Energy's operating plan to be infeasible. As stated above, there is no precedent supporting such an interpretation of the April 4, 2003 decision.

C. 49 U.S.C. § 11701(c) Has No Application to Complaint Proceedings

BNSF's specious argument – raised for the first time in this proceeding in BNSF's Petition – that this case should have been dismissed by the Board under 49 U.S.C. § 11701(c), should be rejected out of hand. The level of credence this argument should be given should be measured by the fact that it appears in a footnote in BNSF's Petition with no supporting authority. It was made plain over 20 years ago by the ICC that "ordinary complaint proceedings are not included in the class of proceedings designated as 'formal investigative proceedings begun by the Commission' subject to the 3-year period of limitations in section 11701(c)." Ex Parte No. 421, Complaints Filed Pursuant to the Savings Provisions of the Staggers Rail Act of 1980 (Section 229, Public Law 94-448), 367 I.C.C. 406, 410 (1983) ("Ex Parte No. 421")⁷ The ICC noted that this distinction between private party complaints and Commission (now Board) investigation proceedings has long been found throughout the federal transportation statutory scheme. Id. at 410. Rail carrier defendants in the past have recognized that this three-year limit does not apply to private complaints. See Docket No. 37063 and No. 38025S, Increased Rates on Coal, L&N RR, October 31, 1978, (ICC served December 5, 1988). Indeed the statute has never been applied in a stand-alone cost complaint case, some of which have taken over ten years to complete.

The reason the three-year limit of §11701(c) does not apply to rate complaint cases is obvious: to apply the statute to a private party complaint would be disastrous for the Board's administration of justice. It would "discourage settlements and encourage defendants to engage in dilatory tactics by rewarding them if they are successful in

⁷ The ICC's decision in Ex Parte No. 421 was prompted by a dispute over Section 229 complaints (rate complaints filed within 180 days of the passage of the Staggers Act), but the Commission noted that § 11701(c) does not apply to any complaints initiated by private parties. Ex Parte No. 421 at 411.

drawing out the proceeding beyond 3 years.” Ex Parte No. 421 at 411.⁸ As the ICC stated, this would “violate basic notions of due process.” Id. Thus, the statute puts a limit on Board-instituted actions, but not on complaints brought by private parties such as Xcel Energy.

D. The Board Properly Rejected BNSF’s Attempt to Eviscerate the Guidelines by Eliminating Cross-Over Traffic

In yet another attempt to fundamentally change the Guidelines by reversing many years of established precedent, BNSF argues that the Board erred by not excluding all cross-over traffic from Xcel Energy’s SARR traffic group. Petition at 4-7. Xcel Energy’s use of cross-over traffic was fully supported by precedent spanning the past decade. Decision at 13. The Board’s discussion of this issue in the Decision highlights that BNSF’s economic theory and policy arguments are a thin veneer covering the real objective of this argument: that if Xcel Energy or any other complainant was deprived of the ability to use cross-over traffic to attempt to prove the unreasonableness of rail transportation rates, then these cases would not be brought in the first place due to their overwhelming cost and complexity. Decision at 16. The Board’s lengthy discussion of this issue in the Decision, in particular the observation that precluding the use of cross-over traffic in this case would have required Xcel Energy to have posited a SARR ten times larger than that which was presented, is completely ignored in BNSF’s Petition.

⁸ Indeed, BNSF did all it could to drag out the discovery phase of the case, thereby causing that phase of the case alone to take over two years to complete. The most egregious example of such tactics is summarized in Xcel Energy’s March 15, 2002 Third Motion to Compel and for Sanctions, which explains in detail how BNSF led Xcel Energy on for over a year by agreeing to produce certain road property data, then abruptly reneged on the agreement, forcing Xcel Energy to file the motion and delaying discovery of this data until after September 25, 2002, when the Board ordered its production. Other examples include BNSF exerting its influence over one of its suppliers and refusing to accede to the supplier voluntarily providing Xcel Energy with information about the fuel gauges it sells to BNSF. This forced Xcel Energy to file a petition for issuance of a formal subpoena *duces tecum* to obtain such information, which further delayed the case.

But BNSF well knows that if the Board was to attempt to reach the level of precision that BNSF erroneously claims is required under the Guidelines, that the sheer size of the undertaking would essentially foreclose this avenue of relief from abuses of monopoly power.

In any event, as Xcel Energy demonstrated in this proceeding, the use of cross-over traffic in a SAC model is completely consistent with the Guidelines, which do not require a complainant or the Board to determine the “full cost” of serving a selected traffic group. Moreover, elimination of cross-over traffic would eviscerate the Guidelines and force the SARR to be exactly like the defendant, thereby depriving a complainant of its right to eliminate inefficiencies by developing a railroad different from the defendant. See Guidelines at 542. Finally, cross-over traffic enables the SARR to have access to all the productive techniques and modes of competitive behavior used by the incumbent. See, e.g., Nevada Power, 6 I.C.C. 2d 1, 45 and 54. BNSF can and does interline great quantities of traffic every day, and it is free to develop new interline relationships wherever it pleases. To limit the SARR’s ability to pursue a broad range of interline relationships would be a clear entry barrier in violation of the Guidelines.

BNSF’s claim that the inclusion of any cross-over traffic in a SAC analysis leads to rate setting based on “arbitrary allocations” is obviously wrong. As the Board correctly noted in the Decision, the use of cross-over traffic necessarily requires a careful analysis of the allocation of revenues between the SARR and the residual defendant in order to accurately estimate what portion of the cross-over revenues should be attributed to the SARR network and what portion to the residual BNSF network. Decision at 16. The Board has concluded that the Modified Straight Mileage Prorate method presently

provides the best estimate of how cross-over revenues should be allocated. Any claim by BNSF that the allocation produced by the application of this method is arbitrary is merely a complaint that BNSF disagrees with the Board's evidentiary conclusions. Finally, BNSF's "cream-skimming" argument (i.e., that Xcel Energy gained an advantage by replicating the dense portions of the BNSF close to the PRB, but not the less-dense feeder lines) fails because it is based in large part on the faulty assumption that fixed costs are the same for both heavily-used and lightly-used rail lines. Decision at 18. Moreover, what BNSF calls "cream skimming" is nothing more than the grouping of traffic encouraged by the Guidelines, subject to the requirement that taking advantage of traffic densities must be adequately supported and justified. Decision at 22.

E. BNSF's Cross-Over Traffic Revenue Allocation Formula was Not Probative Evidence in this Proceeding

In its Petition BNSF continues its attempt to reverse the rejection of the Density Adjusted Revenue Allocation ("DARA") formula first asserted in Duke-NS and utilized by BNSF in this proceeding. BNSF's efforts in this regard began with the filing of BNSF's Statement of Clarification in this case on January 20, 2004. See, generally, Xcel Energy Response in Opposition to BNSF's [DARA] Procedure filed March 8, 2004. Xcel Energy's Response to the Statement completely rebutted all of BNSF's claims. Contrary to BNSF's claim that the Board didn't mention BNSF's Statement in the Decision, Petition at 8, the Board obviously considered and rejected in BNSF's Statement in deciding to reject DARA in this proceeding for what is now the fourth time in as many SAC cases in which it has been presented. See Decision at 18. Clearly, the Board has considered and rightfully rejected BNSF's claims in its Statement that the Board does not

understand DARA, and the Board should reject BNSF's latest attempt to overcome the fatal flaws of its proposed method.

Despite the fact that DARA had been rejected three times prior to the Decision, and was again rejected in this proceeding, BNSF claims that DARA is somehow the "best evidence of record" on cross-over revenues in this case. This assertion is astounding, given that DARA has never been found to be probative evidence or a useable methodology in any previous SAC case. See Ex Parte 347 (Sub-No. 3), General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, slip op. at 6 (STB served March 12, 2001) (cautioning parties in SAC cases "not to attempt to relitigate issues that have been resolved in prior cases"). In sharp contrast, Xcel Energy calculated cross-over revenues in this case using the modified mileage block prorate ("MMP") methodology that had previously been accepted by the Board in no fewer than five SAC cases.⁹ The revenue allocation evidence submitted by Xcel based on the MMP methodology was unrebutted by BNSF. In the intervening eastern coal rate cases, beginning with Duke-NS, the Board determined that it was "appropriate to modify" this already accepted methodology to make it more precise. Duke-NS at 22-25. Unlike DARA, therefore, MSP is not a completely new method, but merely a modification of a method that the Board has previously determined reasonably allocates cross-over revenues. BNSF's assertion that the Board looked "outside the record" for its revenue allocation procedure is incorrect. Finally on this point, BNSF tries in its Petition to introduce a new evidentiary argument for the first time in this proceeding – it claims that the MSP attribution of 100 miles credit for originating and terminating traffic is too high.

⁹ See Xcel Energy's Final Brief at 17.

Petition at 7 (n. 7). This brand new evidentiary argument is offered in blatant violation of the Board's procedural rules and must be disregarded.

As stated above, BNSF rehashes the arguments in support of DARA that the Board has now rejected in four cases. However, like the railroad defendants before it, BNSF cannot overcome the fact that DARA improperly assumes that fixed costs are the same for low density and high density lines and that DARA makes inappropriate use of URCS system average costs. Decision at 17-18. Moreover, the evidence in this case convincingly shows that DARA produces a result that is not surprisingly heavily biased toward the defendant railroad by allocating more revenues to the defendant's residual system that are necessary to cover its costs of providing service over the segments in question.

F. Inclusion of the Jeffrey Energy Center Traffic in the WCC Shipper Group is Appropriate Because the Reroute Meets the Board's TMPA Standard and the WCC Meets the Needs of this Shipper

The Board determined in the Decision that Western Resources' Inc.'s Jeffrey Energy Center's coal traffic was properly included in Xcel Energy's shipper group. In doing so, the Board noted that this precise rerouting had been accepted in TMPA without complaint by BNSF, Decision at 23, and that in any event this reroute was a "local reroute" for which all costs associated with providing service over the different route were reflected in the SAC analysis. Id. The Board also correctly determined that the reroute would serve the needs of Western Resources, thereby meeting the principles set out in TMPA. Decision at 21. BNSF's arguments that the Board materially erred in making this determination are all easily disposed of. In the first place, the Board's use of BNSF's operating plan in lieu of Xcel Energy's does not warrant exclusion of the Jeffrey

Energy Center traffic, since the record contains ample other evidence supporting the Board's finding. This evidence included, but was not limited to, (1) the fact that the two routes are virtually the same length (the SARR route was 7.1 miles, or 1% longer); (2) the reroute avoided a costly locomotive helper service (Xcel Energy Rebuttal Narrative at III-A-17); and (3) the contract for this movement expressly permitted this alternative routing. But, as the Board noted, use of BNSF's operating plan also supports inclusion of the Jeffrey traffic. BNSF's Petition simply ignores the critical fact that "the cycle time from Eagle Butte to Northport under BNSF's own operating plan for the WCC is shorter than BNSF's actual average cycle time for the movement." Decision at 21. Instead, BNSF weakly argues the Board's statement that "adding the JEC traffic [to BNSF's operating plan] could add congestion to those lines," (Petition at 10, quoting Decision at 29 (emphasis added)), means that the SARR could not meet the needs of Western Resources. Whether any congestion would occur is problematic given that, unlike BNSF in actually providing service to Western Resources, the WCC does not share any track with UP. But in any event, the concept of potential congestion is irrelevant as long as the cycle times are acceptable, which the Board found them to be in this case.

Lastly, BNSF raises a flawed argument that the Jeffrey Energy Center traffic should be excluded because the revenues from this traffic purportedly do not contribute to the costs of providing this transportation. Petition at 10-11. The short answer to this assertion is that Xcel Energy properly accounted for all of the costs associated with moving the Jeffrey tons over the SARR's facilities in Xcel Energy's SAC analysis. Thus, BNSF's statement that the Jeffrey traffic is paying for facilities it does not use and is providing a huge subsidy to the SARR is not true. Moreover, the "several recent cases"

in support of this theory that BNSF cryptically refers to in its Petition with only a citation to BNSF's Final Brief are the Board's August 19, 2002 decision in AEPCO and the Board's March 21, 2003 decision on reconsideration in PPL. Neither of these even address rerouting. Rather, they address the application of the PPL "cross-subsidy" test, i.e., whether the revenues from a subset of the SARR traffic group are being used to pay the costs of tracks and facilities in another part of the proposed SARR. See AEPCO at 3; PPL at 7. BNSF's attempt to glean from these two decisions a rule that a SARR designer cannot route any shipper's traffic on the SARR such that it does not "share facilities" (i.e., use the same track) as that shipper's traffic on the incumbent is untenable. BNSF Final Brief at 13-14. This flawed interpretation would impermissibly prohibit all complete reroutes, let alone the Jeffrey reroute, which is only a partial reroute because the Jeffrey traffic follows the same initial stretch of BNSF track. Decision at 22.

In conclusion, the Jeffrey movement was properly included in the WCC traffic group because Xcel Energy has accounted for all the costs and ramifications of rerouting the Jeffrey traffic and the WCC meets the needs of Western Resources, Inc. for this service. Decision at 19-23.

G. The Board Properly Rejected BNSF's Faulty Tonnage and Revenue Forecasts

BNSF also states the Board committed material error by rejecting various BSNF revenue and tonnage forecasts. Petition at 11-12. The Board correctly excluded these forecasts, Decision at 53-55, as they were based on faulty special studies and made-for-litigation forecasts. First, BNSF objects to the Board's rejection of its methods for determining new WCC transportation rates for the SARR once current contracts expire. For competitively served plants, BNSF improperly based its methodology on contracts

that were signed before WCC operations began. These historic contracts do not reflect the market conditions that existed during WCC operations and therefore cannot be used to determine its transportation rates. Xcel Energy's Rebuttal Narrative at III-A-84 to 87. BNSF also criticizes the Board for not explaining why it used the EIA forecast to project new competitive rates, but this criticism ignores the Board's explanations of its preference for EIA forecasts: (1) the EIA is an impartial entity and is therefore more reliable; (2) its figures are true forecasts – they are not simply projections based on past trends; and (3) it is preferable to use EIA revenue forecasts since they correspond to the EIA tonnage forecasts also used by the Board. TPMA at 27-29; Duke-NS at 64-65; Duke-CSX at 48; CP&L at 51. See Decision at 55.

The Board also correctly rejected BNSF claims that rates for captive customers tend to decline after contracts expire. This assertion is based on new contracts whose terms were significantly different than the terms of the old contracts. Thus, a comparison of rates is of no value for these customers. See Xcel Energy's Rebuttal Narrative at III-A-75 to 83. The Board correctly rejected both BNSF's faulty special study of captive contracts and its rate determination method based on the unreliable, made-for-litigation "Macro Coal Forecast." Finally, BNSF claims the Board should have used the Macro Coal Forecast to project WCC tonnages between 2005 and 2007. As explained by Xcel Energy in its Rebuttal, the Macro Coal Forecast has no probative value. Xcel Energy's Rebuttal at III-A-41 to 45. In addition, this forecast is for the entire BNSF system, in contrast to the PRB-specific EIA forecast proffered by Xcel Energy and properly used by the Board.

H. The Board Did Not Commit Material Error on Any of the Construction Issues Raised by BNSF in its Petition

1. Xcel Energy's Evidence on Yard Grading at the Guernsey and Wendover Yards is the Best Evidence of Record

In its Petition BNSF argues that the Board materially erred in relying on the ICC Engineering Report for determining the amount of fill required at the Guernsey and Wendover yards. Petition at 12-15. However, in support of this argument BNSF again improperly seeks to introduce new evidence and argument into this proceeding in violation of the Board's rules. Petition at 13-14 and Attachment 1. Specifically, the Board, after reviewing all the evidence on this issue, concluded that "Xcel Energy's assumption of 1 foot of fill is used for all yards other than the Bill Yard." Decision at 95. In making this determination, the Board concluded BNSF did not demonstrate that enough of a distinction between the SARR's yard locations and the BNSF's original yard locations was present to warrant departing from the 1-foot fill assumption. Id. In its Petition, BNSF has brazenly sought to introduce additional and new evidence and argument/testimony into the record of this case to try to demonstrate that such a distinction exists for the Guernsey yard.¹⁰ This new evidence and argument must be ignored.

But in any event, BNSF cannot demonstrate that the Board committed material error on this point. BNSF's claims regarding the amount of grading needed at the Guernsey yard are unfounded and lacking in evidentiary support. In the first place, BNSF agreed to allocate the great majority of the earthwork quantities in the ICC Engineering Report to the mainline. BNSF Reply Narrative at III.F-42 to 49. Xcel

¹⁰ BNSF has attached a topographical map in its Petition that differs from maps included in BNSF's evidence. See BNSF.RP.WP.III-F-00256. This map, and the accompanying explanation/testimony in the Petition are impermissible new evidence.

Energy and BNSF both agreed to rely on the ICC Engineering Report for grading amounts and to allocate all of the ICC Engineering Report figures to the mainline except for one-foot of fill for the yards. Xcel Energy Rebuttal Narrative at III-F-33 to 38. After attributing the great majority of the earthwork to the mainline, it is improper for BNSF to try to calculate actual earthwork quantities for the yards. See WPL at 81.

Second, BNSF argues that the Guernsey Yard is in “a completely new location” from that in the ICC Engineering Reports, thereby warranting departure from the 1-foot fill assumption. Petition at 13. This is a departure from the position in BNSF’s reply evidence. See BNSF Reply Narrative at III.F.47-48. It is also not true. Xcel’s WCC Guernsey Yard was constructed in same location as BNSF’s current Guernsey Yard, which is adjacent to the original location of the yard in 1915. BNSF expanded its original Guernsey Yard to the east in the 1970’s, and Xcel Energy’s WCC Guernsey Yard also includes this expansion area.¹¹ Notably, BNSF did not provide to Xcel Energy in discovery or include in its evidence any documentation related to the costs of expanding the Guernsey yard in the 1970s. In any event, both the WCC Guernsey Yard and the actual Guernsey Yard encompass portions of the yard location included in the ICC Engineering Report. BNSF’s citation to Duke-CSX as support for its position is of no help, since: (1) in that case the yard was proposed in an entirely new location; (2) the Board’s decision in that case was based on the evidence of record in that case; and (3) the grading quantities for the relevant yard were undisputed. Duke-CSX at 77. Regardless of the yard location, BNSF’s agreement to use the one-foot fill assumption in the

¹¹ Compare BNSF Reply Exhibit III.F-4 (pages 13 and 13A), and Xcel Energy Opening Exhibit III-B-1 (page 10).

calculation of main line quantities meant that it had to rely on one-foot of fill in the yards.

Duke-NS at 91; Duke-CSX at 77; CP&L at 91.

Finally, BNSF's yard grading evidence for the Guernsey and Wendover yards was based on BNSF's use of computer programs and software that BNSF refused to produce to Xcel so its experts could test BNSF's conclusions. BNSF Reply Narrative at III.F-48; Xcel Energy Rebuttal Narrative at III-F-30 and 37. Without access to these programs, neither Xcel Energy nor the Board can determine how the programs worked and test how BNSF developed its earthwork quantities. Consequently, BNSF's evidence on this issue is untested by the adversarial process and cannot be used.

2. BNSF's Earthworks Unit Costs

BNSF also argues that the Board committed material error in accepting the use of the 11 CY elevating scraper as appropriate for common excavation along the WCC. Petition at 15-16. Contrary to BNSF's assertion, the elevating scraper designated by Xcel Energy is capable of engaging in common excavation in construction of the WCC. TMPA at 119. Furthermore, BNSF's Petition erroneously assumes that the Board agreed with BNSF that much of the soil on the route would be "cohesive and semi-cohesive, i.e., clay and silt." Petition at 15. However, BNSF's soil composition evidence was internally inconsistent, Xcel Energy Rebuttal Narrative at III-F-39 to 40, and the Board specifically rejected this assertion in any event. Decision at 96.

BNSF also asks the Board to reconsider its rejection of the secondary blasting of boulders included by BNSF in the solid rock excavation. Petition at 16. BNSF's basis for the inclusion of secondary blasting is limited to two extremely weak pieces of evidence. First, BNSF asserts that the cost should be included in WCC construction

simply because secondary blasting is an available cost listed in RS Means Cost Data. Petition at 16, note 20. Simply because the cost for an activity is included in Means does not mean any particular project requires that activity. Second, BNSF relies on photos submitted with its reply evidence of what appears to be a road widening project in Black Hawk, Colorado. Black Hawk is approximately 30 miles west of Denver in the Rocky Mountains, a terrain far more severe than anything along the WCC route. Even so, the photos show little more than some dirt and boulders of indeterminate size being loaded onto dump trucks. It is impossible to know if blasting has occurred, and, if so, whether the blasting was comparable to blasting that would occur along the WCC. The Board correctly determined that this evidence did not demonstrate that secondary blasting was required for the SARR in this case.

3. Materials Transportation

BNSF raises an issue with regard to the STB's understanding of how materials are transported. Petition at 17. Xcel Energy agrees that the Board appeared to reverse the parties' positions in the text of the Decision. However, this minor error is irrelevant, since there is nothing inappropriate in the WCC transporting certain materials over the residual BNSF (welded rail between Northport and Pawnee Junction and ties between Denver and Donkey Creek¹²) and Xcel "provided an acceptable method for calculating transportation costs." Decision at 107.

4. Roadbed Width and Side Slope

BNSF also argues that the Board should reconsider its acceptance of Xcel Energy's evidence on roadbed width and side slopes for the SARR. The Board's conclusion that BNSF's evidence was insufficient to require a different result was fully

¹² Xcel Energy Rebuttal Narrative at III-F-78 to 79.

supported by the record. As for roadbed width, BNSF objections to the use of a 24-foot roadbed width for single track between Eagle Butte to Reno Junction are belied by the fact that BNSF accepted the 24-foot width for a segment with higher density (Northport to Pawnee Junction). Xcel Energy Rebuttal at III-F-16 to 17. This, coupled with the WCC's lower tonnages than BNSF's actual operations, makes use of the 24-foot widths reasonable and appropriate in this case.

Similarly, the 1.5:1 side slope accepted by the Board in this proceeding follows what the parties agreed to use in recent cases. Duke-NS at 90; Duke-CSX at 76; CP&L at 78; TMPA at 116 (n. 183). In a case where there was a dispute, the Board still chose 1.5:1, finding it supported by AREMA. WPL at 80-81. Again, blind reliance upon the characteristics of BNSF's actual operations would be inappropriate in light of this consistent SAC history and the fact that the WCC carries significantly fewer tons than the existing BNSF. Moreover, Xcel Energy has previously explained that BNSF's use of 1.5:1 for the output side of the earthwork calculation, but something greater than 1.5:1 for the input side of the calculation, inevitably overstates earthwork quantities. Xcel Energy Rebuttal Narrative at III-F-18 to 19.

5. Guernsey Tunnel #2 Daylighting Costs

The Board did not err in excluding costs for side slope protection and raising the track grade in connection with the WCC's excavation of the area where BNSF's daylighted Guernsey Tunnel #2 is currently located. Petition at 18-19. BNSF did not inform Xcel of these costs during discovery, so Xcel Energy did not have an opportunity to "propose suitable alternatives." Decision at 93. In its Petition, BNSF asserts that Xcel Energy did not ask for this information. This assertion is flatly wrong. Xcel Energy

asked for grading construction information in its request for production No. 80.¹³ Furthermore, in its request for production No. 85 Xcel Energy sought discovery of the complete AFE for all construction projects exceeding \$1 million since 1995. Xcel Energy Request for Production Documents No. 85.¹⁴ Both Xcel Energy and BNSF found that the daylighting of Guernsey Tunnel #2 exceeded \$1 million in cost and, as BNSF noted, the daylighting took place in 1997-1998. BNSF Reply Narrative at III.F-39.

BNSF also relies on a comparison between Xcel Energy's workpapers and certain evidence and confidential workpapers BNSF states were filed by the complainant in the TPMA case to argue that Xcel Energy knew side slope protection was needed. Petition at 18-19. Xcel Energy does not have access to the filings referenced by BNSF since such materials were filed under seal, and it is Xcel Energy's understanding that the protective order in the TPMA proceeding precludes the use of information filed under seal in that case from being used in any other proceeding. BNSF's actions are therefore highly improper and appear to violate a protective order in another proceeding.

With regard to raising the track 6-8 feet, Xcel Energy mentioned that fact in its evidence only in the context of calculating excavation quantities. Xcel Energy Rebuttal Narrative at III-F-29. Xcel Energy noted that its excavation quantity estimate (of 50% of the total quantities) was conservative compared to BNSF's daylighting quantity since BNSF raised the track bed after daylighting; that is, there would be no need for Xcel Energy to excavate as far down simply to raise the track bed afterward.

¹³ Request for Production of documents No. 80 reads, in pertinent part: "Provide the following information with respect to grading construction activities undertaken at any time on any BNSF line segment located in ... Wyoming ... (a) Number of cubic yards of excavation ... (c) Grading construction data ... (i) Construction method."

¹⁴ Request for Production of documents No. 85 reads, in pertinent part: "Provide the following for each construction and rehabilitation project which exceeded \$1,000,000 in cost and was completed by BNSF, as an outside contractor acting on its behalf, since 1995: ... (c) A complete copy of the Authorization for Expenditure ("AFE") and description of all columns and data contained with the AFEs."

6. Highway Overpass Bridge Costs

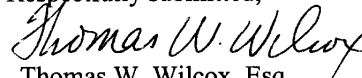
Lastly, BNSF claims the Board used the wrong highway overpass (grade separation) costs. Petition at 19. BNSF has failed to understand the Board's Decision. The Board noted first the Xcel included three grade-separation costs for the WCC north of Bridge Junction. Decision at 115. This implies that the Board accepted Xcel's costs for the highway overpass north of Bridger Junction, which is confirmed by the Board's workpapers. The Board then discussed the difference of opinion between Xcel and BNSF for the grade separation costs over the remainder of the WCC. Id. The Board followed BNSF on these costs over the remainder of the WCC. There is no error on this point.

III. Conclusion

For all the reasons set forth hereinabove, the Board should deny the Petition for Reconsideration of defendant BNSF.

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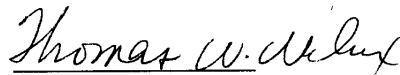
Attorneys for Complainant

July 19, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July 2004, I served a copy of the
Complainant's Reply to Petition for Reconsideration by hand upon the counsel for the
defendant at the following address:

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