

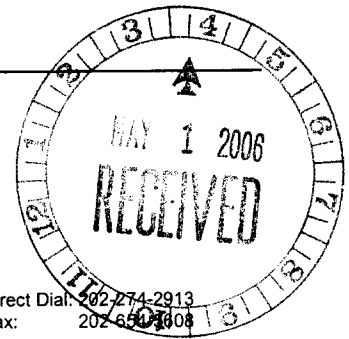
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May 1, 2006

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

ENTERED
Office of Proceedings

MAY 1 2006

Part of
Public Record

Re: STB Ex Parte No. 657 (Sub-No. 1), Major Issues In Rail Rate Cases

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and 20 copies of the Comments of Xcel Energy.

Please date stamp the enclosed extra copy, and give to the messenger for my file. If you have any questions regarding this letter or need further information, please do not hesitate to call me at (202) 274-2913.

Sincerely,

Thomas W. Wilcox
An attorney for Xcel Energy

Enclosures

cc: All Parties on Official Service List
Ray Gardner, Esq.

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 657 (Sub-No. 1)

ENTERED
Office of Public Records

MAJOR ISSUES IN RAIL RATE CASES

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Public Record

COMMENTS OF XCEL ENERGY



I. INTRODUCTION

On February 27, 2006, the Board proposed new rules regarding application of the stand-alone cost ("SAC") rate reasonableness methodology. These rules are comprised of six discrete proposals, but Xcel Energy is only commenting on the proposal regarding new standards for reopening and vacating a prior Board decision based on a SAC analysis.

A. Identification and Interest of Xcel Energy

Xcel Energy, through its operating subsidiaries (Northern States Power-Minnesota, Northern States Power – Wisconsin, Public Service Company of Colorado, and Southwestern Public Service Company), provides a wide range of energy-related services to 3.3 million electricity customers in ten states in the Midwest and West, from the upper peninsula of Michigan to the Rocky Mountains in Colorado and New Mexico. These subsidiaries operate fifteen coal-fired electric generating stations with a combined output of up to 8,092 MW. These generating stations are major consumers of Powder River Basin ("PRB") coal, which is delivered almost exclusively via the BNSF Railway Company and the Union Pacific Railroad Company. Costs for rail transportation are a major component of Xcel Energy's operating expenses.

Through its operating subsidiary Public Service Company of Colorado, Xcel Energy was a complainant in Docket No. 42057, *Public Service Company of Colorado d/b/a Xcel Energy v. Burlington Northern and Santa Fe Railway Company*, a relatively recent stand-alone cost ("SAC") rate reasonableness case. The challenged rates covered the transportation of coal by BNSF from mines in the PRB to the Pawnee Electric Generating Station in Brush, Colorado. The final Board decision in this case was served June 8, 2004, and modified in subsequent decisions on December 14, 2004, January 19, 2005, and May 3, 2005. The cumulative result of these decisions was a reduction in the challenged rate ranging from 14% to 23% over the 20-year life of the discounted cash flow ("DCF") model used by the Board. The Board's determination of the maximum reasonable rates that could be charged by BNSF for the Pawnee transportation service required several years of proceedings. Barring future developments, this rate prescription will stay in effect until 2020.¹ Given the long time frame involved, it is not inconceivable that the Board's rules for reopening prior decisions might come into play at some point over this time period.

B. Overview of the Proposed Rules

In the Notice, the Board made three basic proposals regarding its reopening rules. First, in part informed by the D.C. Circuit decision in *Burlington Northern and Santa Fe Railway Company v. Surface Transportation Board*, 403 F.3d 771 (D.C. Cir. 2005), the Board proposed to apply the same rules to both railroads and complainants for determining whether the standards for reopening a case under 49 U.S.C. § 722(c) have been met. Notice at 35 and 37. Second, if the standards are met and reopening occurs,

¹ The Board's decisions were appealed by BNSF at the U.S. Court of Appeals for the D.C. Circuit in Docket No. 05-1030. All briefs have been filed and oral argument was held on December 8, 2005. A decision from the court is expected in the near future.

the Board has proposed that the preexisting rate decision be vacated (thus, requiring the parties to start over) only if extensive changes to the traffic group or the configuration of the stand-alone railroad are necessary; otherwise, the reopening process would work within the structure of the prior SAC analysis. Notice at 36. Third, if reopening occurs, the Board proposes to codify the rule it applied in *Arizona Public Service Company v. Atchison, Topeka & Santa Fe Railway Company*, Docket No. 41185 at 8 (served May 12, 2003). In that case, the Board lifted the prescriptive effect of the prescribed rate upon reopening, but required the defendant railroad to maintain the *status quo* by continuing to charge the prescribed rate until the reopening proceeding is completed. Under this approach, once the new rate level is determined, one party would be required to make the other whole, with the calculation beginning on the reopening date. Notice at 37.

II. COMMENTS

Xcel Energy generally supports the Board's proposal, but offers several comments on the specific elements. These comments reinforce for the Board the importance of recognizing the significant differences between complainants and defendants in coal rate reasonableness cases.

A. The Board Should Clarify the Application of Final New Reopening and Vacatur Rules.

Where a rate prescription exists, a petition to reopen a SAC case can be filed at any time during the 20-year prescription period. Hence, the new Board rules regarding reopening and *vacatur* could apply to preexisting Board rate reasonableness decisions such as the *Xcel Energy* decision. Yet, at the same time, the Board stated in its Notice that the "changes we adopt here will be applied in future SAC rate cases." Notice at 2 (emphasis added). It seems unlikely that the Board intends to retain both the existing and

the new reopening standards for the next 15-20 years, until the date by which all rate prescriptions preceding the issuance of the new rules end. Hence, Xcel Energy requests that the Board clarify whether reopening and *vacatur* standards adopted in this rulemaking would apply to preexisting rate prescriptions such as the one in Docket No. 42057.

B. The Board Should Only Reopen Rate Cases in Very Limited Circumstances.

The Board appears to have proposed to apply the same reopening standards under 49 USC § 722(c) and 49 CFR § 1115.4 to both complainants and defendants. *See* Notice at 35 and 37. This proposal appears to be in direct response of the court's decision in *Burlington Northern and Santa Fe Railway Company v. STB*, 403 F.3d 771, 777 (D.C. Cir. 2005). Notice at 35. In that case, the Court rejected the Board's attempt in that proceeding to apply different standards to the complainant and the defendant. However, to the extent the Board's proposal intends to require both parties to meet an identical set of standards, the court in that case did not mandate such identical treatment. Rather, the court merely said that the Board had not provided a "reasoned basis" in that particular proceeding for dissimilar treatment. *Id.* at 778. Xcel Energy submits that there is a reasoned basis for adopting rules that apply a stricter reopening standard under §722(c) to defendant railroads than complainants. Specifically, due to the interplay between the statutory reasonableness standards and the rate-setting freedom of railroads, the complainant generally bears the greater risk when reopening occurs. In other words, reopening cannot harm a railroad because the worst that can happen is establishment of a new reasonable rate, whereas reopening could harm the complainant because it is the first

step toward vacating the rate prescription, returning rate setting freedom to the railroad, and repeating the burdensome ordeal of another SAC case.

The Board should also be cautious when determining whether a request by a railroad to reopen a rate prescription is warranted because the *Coal Rate Guidelines* were meant to provide the basis for negotiated contract solutions. 1 ICC 2d 520, 524 (1985) (“a benefit of these guidelines is to enable both the shipper and the railroad to estimate the maximum rate we would prescribe if the matter were brought to us for adjudication. We believe that this will encourage contract solutions...”). If the Board does not hold railroads to strict standards for reopening, then a railroad that loses a rate complaint will be less likely to view Board’s rate determination as an outer rate limit for contract negotiations. Greater uncertainty would surround possible litigated outcomes, thereby eventually discouraging, rather than encouraging settlements and contract transportation.

Finally, the new rules should confirm that short-term changes in a railroad’s cost and revenue structure are not grounds for reopening a SAC case. In developing cost, traffic, and revenue data that will apply for a 20-year period, there will necessarily be some imprecision in the forecasts and specific figures used. This is to be expected and does not warrant reopening. *Arizona Public Service Company and PacifiCorp v. The Atchison, Topeka and Santa Fe Railway Company*, Docket No. 41185, 3 STB 70, 74 (1998) (in rejecting a request to reopen a rate case due to coal traffic being less than expected for three years, the Board stated that “actual traffic figures will almost always invariably fail to match exactly with yearly (or multi-year) traffic projections”). The Board should only reopen cases due to permanent fundamental shifts in evidentiary

assumptions. *Id.* at 75 (Board suggests that only “continuing, long-term shifts” in figures used for a SAC analysis are sufficient to warrant reopening).

C. **The Board Should Endeavor to Work Within the Framework of the Existing SAC Analysis.**

The Board has proposed that, when reopening occurs, the preexisting rate prescription will remain in effect unless the Board concludes after its investigation that “attempting to interweave the old and new SAC presentations would be so complicated and convoluted that it would be preferable to vacate the old decision and design a new SARR in a new proceeding.” Notice at 36. As noted in section D below, Xcel Energy strongly supports the Board’s proposal to maintain the *status quo* during its investigation. The Board adds that the two changes severe enough to warrant vacating the prescription would “in nearly all instances” consist of extensive changes to the SARR traffic group or the configuration of the SARR. *Id.*

Xcel Energy cautions the Board that once the threshold standards of 49 USC § 722(c) are met and a case is reopened, the determination of whether to vacate the prescription or work within the existing SAC framework should also take into account the relative risks and burdens on the complainant and the railroad. Requests by defendant railroads to vacate a rate prescription should be subject to very narrow and strict standards, since *vacatur* of a rate prescription enables the railroad to regain complete rate-setting autonomy to charge any rate during the pendency of the new case, and imposes on the complainant the high burden of preparing and submitting a new SAC analysis. On the other hand, the need for strict standards is less for *vacatur* requests by complainants, since by making the request the complainant is demonstrating its willingness to assume the risks and costs of returning rate-setting authority to the railroad.

In any event, the Board's rules should favor working within the existing SAC model unless the complainant seeks to vacate the prescription. When working within the existing SAC model on reopening, the Board should also strive to achieve a balanced approach in determining what changes can be made within an existing SAC model so that these changes do not tend to only result in increases of prescribed rates. For example, the Board should recognize that changes in a SARR traffic group could include not only the elimination of non-issue traffic from the SARR but also the addition of new non-issue traffic.

D. It is Appropriate to Maintain the *Status Quo* Rate During Reopening.

Xcel Energy supports the Board's proposal to maintain the rate *status quo* in the event a rate reasonableness case is reopened. Notice at 37. This standard would adopt the rules applied in *Arizona Public Service Co. & PacifiCorp v. BNSF*, Docket No. 41185 at 8 (served May 12, 2003). Under this proposed rule, if the Board determines that the standards of § 722(c) have been met and reopens a proceeding, the total rate paid by the complainant (rate plus valid surcharges and other charges) during the reopening proceeding cannot exceed the level of the prescribed rate in effect when the prescriptive effect is lifted. The rate can change only when the Board determines what the new reasonable rate should be, or decides the prescription should be vacated. When the new SAC analysis is complete, the parties would be required to make all necessary payments to each other in order to make the other whole, starting from the date of the Board's vacating decision. Hence, once these payments are made, it would be as if the newly determined reasonable rate had applied from the date of reopening.

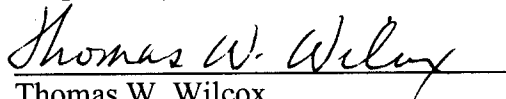
Maintaining the preexisting rate is necessary to avoid the economic dislocation that could occur if a transportation rate suddenly increased dramatically. If the railroad were permitted to set any rate it wanted pending the outcome of a new SAC analysis, it would inflict undue hardship on the complainant. Moreover, when it appears a new SAC analysis would be more favorable for the complainant, maintaining the prior rate would eliminate any temptation the defendant railroad might have to use the threat of a drastically higher tariff rate to prevent the complainant from seeking *vacatur*.

The Board can order the defendant railroad to maintain the preexisting rate during the new SAC analysis under its authority to prevent irreparable harm. 49 U.S.C. § 721(b)(4). Xcel Energy believes that the Board's proposal on this subject does not violate the rule of *Arizona Grocery Company v. The Atchison, Topeka and Santa Fe Railway Company*, 284 U.S. 370 (1932), for the same reasons mentioned by the Board in the Notice at page 38.

III. CONCLUSION

Xcel Energy respectfully requests that the Board take these comments into consideration in this rulemaking.

Respectfully submitted,



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May 1, 2006