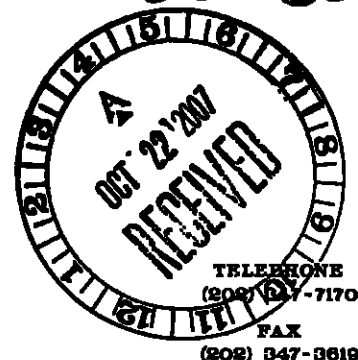


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The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
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TRANSPORTATION BOARD**

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Re Docket No 42088, *Western Fuels Association, Inc and Basin
Electric Power Cooperative, Inc v BNSF Railway Co*

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and twenty (20) copies of (i) Petition for Reconsideration and (ii) Supplemental Evidence Notice of Complainants Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc.

Also enclosed is a CD containing electronic workpaper files referenced in the Petition for Reconsideration and a copy of each of the above filings. Additionally, we have enclosed a check payable to the Surface Transportation Board for the requisite filing fee for petitions for reconsideration.

Please date stamp the extra copy of this cover letter and the enclosed filings and return them to our messenger. Thank you for your attention to this matter.

FILED

OCT 22 2007

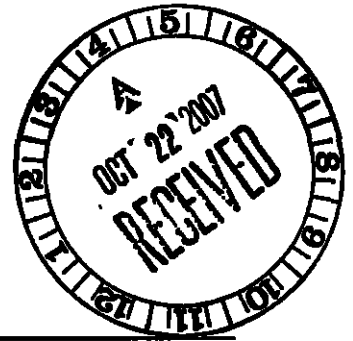
**SURFACE
TRANSPORTATION BOARD**

Respectfully submitted,

John H. LeSeur
An Attorney for Complainants

Enclosures
cc. Counsel for Defendant BNSF Railway Co.

BEFORE THE
SURFACE TRANSPORTATION BOARD



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

Complainants,

v.

BNSF RAILWAY COMPANY .

Defendant.

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SURFACE
TRANSPORTATION BOARD

Docket No. 42088

PETITION FOR RECONSIDERATION

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WESTERN FUELS ASSOCIATION, INC
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COOPERATIVE, INC

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OCT 22 2007

SURFACE
TRANSPORTATION BOARD

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

WESTERN FUELS ASSOCIATION, INC. and BASIN ELECTRIC POWER COOPERATIVE, INC.	)	
	)	
	)	
	)	
	)	
Complainants	)	
	)	
v.	)	
	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant.	)	

Docket No. 42088

PETITION FOR RECONSIDERATION

Pursuant to 49 C F R §1115.3, Complainant Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc (collectively "WFA/Basin") petition the Surface Transportation Board ("STB" or "Board") to reconsider its decision served in this proceeding ("Western Fuels") on September 10, 2007 ("Decision")

SUMMARY

WFA/Basin request that the Board reconsider its Decision because the Decision clearly and erroneously produces unfair results. In its Decision, the Board approves coal rates that exceed the defendant BNSF Railway Company's ("BNSF's") variable service costs by 500% to 700%. These rates cannot be deemed reasonable under any credible maximum rail rate standard.

The Board's Decision reaches manifestly unreasonable results principally due to the Board's unlawful decision to adopt and retroactively apply the Board's new Average Total Cost ("ATC") methodology to determine cross-over traffic divisions for WFA/Basin's stand-

alone railroad ("SARR"), the Laramie River Railroad ("LRR") To its credit, the Board admitted in its Decision that application of ATC to the LRR was not "fair[.]" Decision at 20 The Board proceeded to offer WFA/Basin the opportunity to reconfigure the LRR That is the wrong remedy. The Board should instead calculate LRR cross-over traffic divisions using the Modified Straight-Mileage Prorate ("MSP") methodology that WFA/Basin relied upon in configuring the LRR Consistent with past practice, the Board can, if it so chooses, designate such a MSP-based rate prescription an interim prescription, subject to modification or vacation by either party upon appropriate petition to the Board

The Board's Decision also contains several other errors or omissions These include the Board's failure to update the Energy Information Administration's ("EIA's") Annual Energy Outlook ("AEO") forecasts from 2006 to 2007, the failure to properly address the LRR's cost of capital, the failure to properly calculate LRR fuel costs, and the failure to properly amortize the LRR's cost of debt WFA/Basin request that the Board reconsider and correct these errors for the reasons set forth below

Finally, WFA/Basin are caught in a whipsaw between this proceeding and Major Issues¹ In its Decision, the Board applied several new Major Issues rules and findings (including the adoption and retroactive application of the ATC methodology) that WFA/Basin have challenged in pending review proceedings in the United States Court of Appeals for the District

¹ Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1) (STB served Oct 30, 2006) ("Major Issues")

of Columbia Circuit² WFA/Basin's objections to the Board's actions in Major Issues apply to the Board's reliance upon, and application of, those Major Issues actions in its Decision

ARGUMENT

I. THE BOARD'S DECISION PRODUCES FUNDAMENTALLY UNFAIR RESULTS

In maximum rates cases, the Board is not "a passive arbiter but the guardian of the general public interest, with a duty to see that this interest is at all times effectively protected"³ This is particularly true when the Board applies the Guidelines,⁴ since, as the Board's predecessor readily acknowledged, the Guidelines call upon the Board to make "judgment call[s]" that result in "fair and efficient outcomes"

The real challenge for the Commission will be to translate these new guidelines into fair and efficient outcomes The guidelines do not contain a magical, mechanical formula for determining rate reasonableness No such formula exists because rate reasonableness, by its very nature, is an elusive concept that is crucially dependent upon the facts of a case Ultimately, rate reasonableness is a judgment call

² See BNSF Ry. Co. v. STB, Nos. 06-1372, et al. (D.C. Cir. filed Nov. 13, 2006) ("Major Issues Appeal")

³ Public Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. and Santa Fe Ry. Co., STB Docket No. 42057 (STB served Jan. 19, 2005) at 4 (internal quotation and citation omitted) ("Xcel II")

⁴ Coal Rate Guidelines, Nationwide, 11 C.C.2d 520 (1985) ("Guidelines").

Id. at 551 (Commissioner Strenio, concurring) The Board's Decision in this case manifestly fails to produce fair results This is material error ⁵

The Powder River Basin ("PRB") to Laramie River Station ("LRS") tariff rates that WFA/Basin are challenging currently produce average R/VC ratios under Board-mandated costing procedures of over 575%.⁶ These R/VC ratios will increase to over 711% during the 20-year discounted cash flow ("DCF") period ⁷ R/VC ratios at these draconian levels vastly exceed BNSF's system average R/VC ratios (131%) and the R/VC ratios BNSF needs to obtain to revenue adequacy (144%) ⁸ The challenged rates also possess R/VC ratios vastly in excess of the R/VC ratios for maximum rates the Board has prescribed in its most recent coal rate prescription orders. See Xcel I⁹ (as modified, prescribing maximum rates at initial R/VC ratios of 252%),¹⁰ TPMA¹¹ (prescribing maximum coal rates at initial R/VC ratios of 193%) ¹² Coal rates that

⁵ Sec. e.g., FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944) (agency ratemaking order must be set aside when "it is unjust and unreasonable in its consequences"), Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1502 (D.C. Cir. 1984) (rate regulation must prevent "consumer exploitation by the [regulated business]") (internal quotation omitted)

⁶ See STB electronic workpaper "STB LRR Traffic and Revenues.xls" with corrected revenues as referenced in the Joint Petition to Correct Technical and Computational Errors at Table 1 n.5(1) and n.6 (filed Oct. 22, 2007) These ratios would be even higher if the Board properly calculated the LRR's variable costs.

⁷ Id.

⁸ See WFA/Basin Reply Narr. at I-9 to I-10.

⁹ Pub. Serv. Co. of Col. d/b/a Xcel Energy v. Burlington N. and Santa Fe Ry. Co., STB Docket No. 42057 (STB served June 8, 2004) ("Xcel I")

¹⁰ See WFA/Basin Op. Narr. at III-H-13

¹¹ Texas Munic. Power Agency v. Burlington N. and Santa Fe Ry. Co., 6 S.1 B. 573

(continued...)

exceed variable service costs by 500% to 700% cannot be found reasonable under any fair maximum rate standard designed to protect the public interest. Nevertheless, that is the result the Board reached in this case.

The Board attempts to defend its actions by claiming that the rates WFA/Basin were paying to BNSF for LRS service under contract arrangements in effect between 1984 and 2004 were not profitable for BNSF. Decision at 1. However, the Board fails to address the undisputed record evidence that the rates WFA/Basin paid BNSF under the expired contract had R/VC ratios that averaged over 200% during the 20-year contract term.¹³ The Board also ignores the undisputed record evidence that WFA/Basin, and the rural consumers they represent here, contributed over \$311 million to BNSF's fixed costs and profits during the LRS contract term.¹⁴ The clear and undisputed record evidence shows that the expired contract was an extraordinarily profitable one for BNSF.

The Board also claims that BNSF's current tariff rates for the 175-mile haul from the PRB to LRS are "low" on a dollars-per-ton basis because they are less than rates BNSF charges to other shippers that receive coal transported 1500+ miles from the PRB. Decision at 1. Such rate comparisons are absurd because they fail to include basic economic factors such as

¹¹(...continued)
(2003) ("TMPA") (as modified)

¹² See WFA/Basin Op. Narr. at III-H-13.

¹³ See WFA/Basin Reply Narr. at IV-6-7.

¹⁴ See WFA/Basin Op. Narr. at IV-A-4.

distance and cost¹⁵ – factors deeply embedded in agency precedent for over 100 years¹⁶ The Board's arbitrary comparisons cannot disguise the fact that the Board is approving coal rates that exceed service costs by 500% to 700%

WFA/Basin are not-for-profit organizations. They appear here on behalf of the ultimate payors of BNSF's monopoly freight rates – the small rural and municipal electricity consumers served by the LRS plant WFA/Basin repeatedly emphasized in their filings before this agency that these consumers were looking to the STB as their last line of defense against BNSF's monopoly pricing abuses The consumers themselves, along with their elected representatives, joined WFA/Basin in asking the Board to take "balanced and fair" actions¹⁷ to protect the interests of LRS customers, many of whom are living below the poverty line and all of whom are "hard hit" by BNSF's monopoly prices¹⁸

Unfortunately, the Board's complex stand-alone cost ("SAC") gyrations in this case have produced results that are so unfair to LRS customers that they shock the conscience The undisputed evidence in this case shows that over the 20-year DCF period, these rural

¹⁵ See generally D Phillip Locklin, Economics of Transportation (7th ed. 1972) at 454 ("[o]bviously, one of the most important considerations affecting cost of service is the length of the haul For this reason, rates for longer hauls should ordinarily exceed the rates for shorter ones ")

¹⁶ See, e.g., Salt Cases of 1923, 92 I C C 388, 410 (1924) (comparable rate analysis must factor in "distances" and "costs").

¹⁷ See WFA/Basin Op Exhibit IV-B-1 (Joint Letter to the STB from 20 United States Senators and Representatives)

¹⁸ See WFA/Basin Op. Exhibit IV-B-8 at 2 (Joint Letter from over 200 cooperatives, municipal power systems and public power systems the LRS owners' serve)

customers are being asked to bear rate increases that exceed \$1 billion¹⁹ These unfair results require the Board to reconsider its Decision and decide this case in a manner that does produce fair results

II. THE BOARD'S DECISION IS PREDICATED UPON FUNDAMENTALLY UNFAIR PROCEDURES

The LRR was configured in late 2004 and early 2005 In configuring the LRR, WFA/Basin relied upon the Board's MSP methodology to set the LRR's cross-over traffic divisions This reliance was eminently reasonable since the STB had used MSP, or a similar mileage-based divisions methodology, in its last nine rate case decisions involving cross-over traffic²⁰ As succinctly summarized by Board counsel in the Summer of 2005, MSP was a "settled rule"²¹

Had the Board decided this case using MSP, WFA/Basin would have been entitled to substantial rate relief since the LRR's MSP-based revenues exceeded the LRR's costs by approximately \$2.4 billion over the 20-year DCF period However, long after WFA/Basin designed the LRR, the Board decided in its 2006 Major Issues decision to retroactively apply its new ATC cross-over divisions methodology in Western Fuels Major Issues at 75-76 The Board's retroactive substitution of ATC for MSP divisions reduced the LRR's revenues by over

¹⁹ See WFA/Basin Op. Narr. at IV-A-7.

²⁰ See WFA/Basin Op. Narr. at III-A-17 to III-A-18.

²¹ See Joint Brief of Respondents STB and United States of America at 52, BNSF Ry. Co. v. STB, 453 F.3d 473 (D.C. Cir. 2006) ("Xcel Appeal") (No. 05-1030) (filed July 21, 2005).

\$2.9 billion. This single change wiped out all of WFA/Basin's MSP-based rate relief since, using ATC, the LRR's revenues did not exceed its costs.

WFA/Basin presented detailed evidence and argument in this case and in Major Issues demonstrating it was unlawful and impermissibly retroactive to apply ATC in Western Fuels. The Board did not meaningfully address WFA/Basin's demonstration in Major Issues, but in its Decision it belatedly acknowledges that the application of ATC in Western Fuels was not "fair[]" because "the change from MSP to ATC would affect the basic design of a SAC case." Decision at 20

Having concluded that application of ATC was unfair, the Board stated in its Decision that it had two options: it could decide the case using MSP or it could permit WFA/Basin to redesign their SARR. WFA/Basin submit that the law in this instance accords the Board only one option (apply MSP),²² but in any event, the Board did not address a permissible third option. That option is to set an interim prescription based upon MSP, while permitting either party to request the Board to modify or vacate the prescription based on changed circumstances (e.g., the new ATC procedures).

This third option is supported by agency precedent – the landmark San Antonio case. In San Antonio,²³ the ICC prescribed maximum coal rates under ratemaking standards in effect in 1976. However, the ICC prescription was an interim one because, inter alia, the agency was considering the adoption of new maximum rate standards to replace the then-current

²² See Joint Brief for Shipper Petitioners at 37-42, Major Issues Appeal (filed Sept. 24, 2007).

²³ San Antonio, Tex. v. Burlington N. Inc. (ICC Docket No. 36180).

standards²⁴ Under the interim prescription, the prescription could be (and later was) prospectively modified based upon the application of new maximum rate standards.²⁵

The third option also comports with Congressional directives that coal rate cases be decided expeditiously See 49 U.S.C. §10704(c)(1) WFA/Basin instituted this case in October of 2004. The record closed on December 6, 2005. To ensure expeditious decisions in coal rate cases, Congress has directed that these cases be decided within 9 months of the close of the record (id.) – here September 6, 2006. It is now October of 2007. Application of the third option will provide WFA/Basin with some belated rate relief in a far more timely manner than the supplemental evidence procedure the Board has proposed.

The Board can and should reconsider its supplemental evidence order based upon the facts of this case and, at a minimum, enter an interim rate prescription that is subject to prospective, not retrospective, modification or vacation upon an appropriate petition from WFA/Basin or BNSF. In its Decision, the Board states “[p]resumably, WFA would have us apply all the old procedures – even those which favor the carrier such as percent reduction or forecasting operating expenses without any adjustment for productivity – and not just those that favor WFA.” Decision at 20. As the Board knows, that relief was not the relief advocated by WFA/Basin in this case before the record initially closed in December of 2005, nor the relief

²⁴ See San Antonio, 355 I.C.C. 405, 417-18 (1976), Burlington N. Inc. v. United States, 555 F.2d 637, 647-48 (8th Cir. 1977)

²⁵ See San Antonio, 359 I.C.C. 1 (1978) and 361 I.C.C. 482 (1979), vacated on other grounds sub nom. San Antonio Tex. v. United States, 631 F.2d 831 (D.C. Cir. 1980)

WFA/Basin advocated in Major Issues ²⁶ But if that is the relief the Board finds appropriate, WFA/Basin do not object to the Board's application of an interim prescription under a proper application of the referenced standards

The Board also expressed concern in its Decision that any continued use of MSP would run afoul of the court's decision in Xcel Appeal Decision at 20 However, any such concerns are misplaced. In Xcel Appeal, the reviewing court affirmed the Board's use of MSP to set cross-over traffic divisions but stated in dicta that the Board's reliance on MSP might be on "shaky ground" if a party in a future case presented the Board with a superior "density"-based alternative to MSP Id., 453 F 3d at 489 Significantly, the court did not direct the STB to develop, and retroactively apply, a new density-based divisions method to set cross-over traffic divisions in the Xcel case

The court's decision in Xcel Appeal was issued several months after the record initially closed in Western Fuels Consistent with the Board's actions in Xcel (and the nine rate case decisions prior to Xcel), WFA/Basin used MSP to set cross-over traffic divisions And, just as was the case in Xcel, BNSF did not present any superior density-based cross-over traffic divisions methodologies Indeed, BNSF presented no density-based divisions methodologies at

²⁶ In their opening and rebuttal evidentiary filings in Western Fuels, WFA/Basin asked the Board to adopt a new hybrid index to adjust the LRR's operating expenses and asked the Board to adopt a new method, called RAM, to allocate SAC costs amongst the LRR traffic group In Major Issues, WFA/Basin first asked the Board to adopt and apply WFA/Basin's hybrid index and RAM in deciding Western Fuels If the Board denied this request (which it did), WFA/Basin alternatively asked the Board to apply the Board's proposed hybrid index, and one of the Board's proposed alternatives to percent reduction in deciding Western Fuels, because neither action would unfairly require WFA/Basin to reconfigure the LRR

all in Western Fuels²⁷ and the two alternatives to MSP that BNSF did present were methods the Board had rejected in decisions issued both before and after the record closed in Western Fuels²⁸ Application of the Xcel Appeal holding calls for the Board to apply MSP to decide Western Fuels, not to retroactively apply a new divisions methodology

III. THE BOARD SHOULD CORRECT SPECIFIC ERRORS IN ITS SAC CALCULATIONS

A. Failure to Update EIA Forecasts

In SAC cases, the parties and the Board use indices to forecast revenues and costs over the 20-year DCF period. In prior SAC cases, the STB has consistently updated EIA AEO forecasts to include the most recent such forecasts available prior to the issuance of the final decision. See Xcel I at 53, Otter Tail²⁹ at 17, B-1, B-4 to B-5. In its Decision, the Board departs from this long-established practice by holding that it will not apply EIA's most recent AEO forecasts (made in 2007) because, the Board opines, these forecasts did not "significant[ly] change" (id. at 28) the AEO forecasts (made in 2006) that the Board had previously ordered the parties to utilize in this case. See Western Fuels at 2 (STB served Mar. 17, 2006).

The STB does not quantify the impact of its failure to substitute the EIA AEO 2007 forecasts. WFA/Basin have made this quantification. Substituting the EIA AEO 2007

²⁷ See BNSF Reply Narr. at I-10

²⁸ See WFA/Basin Additional Reply Comments at 5-6, WFA/Basin Additional Rebuttal Comments at 16-18

²⁹ Otter Tail Power Co. v. BNSF Ry. Co., STB Docket No. 42071 (STB served Jan. 27, 2006)

forecasts will increase the LRR's revenues by \$242 million over the 20-year DCF period³⁰ This is clearly a very significant increase. Use of the AEO 2007 forecast is also dictated by principles of fundamental fairness. In its 2006 supplemental evidence order, the Board directed the parties to substitute the EIA AEO 2006 forecasts for the EIA AEO 2005 forecasts the parties had submitted in their filings before the record closed in December of 2005. Substitution of the 2006 EIA AEO forecasts for the 2005 AEO forecasts decreased the LRR's revenue by \$212 million³¹ Applying the 2007 AEO forecast will make-up the LRR revenue loss attributable to the Board's prior order

B. Failure to Properly Address the 2005 Cost of Capital Calculation

In their supplemental filings, WFA/Basin objected to the Board's calculation of the 2005 cost of capital³² WFA/Basin did so for the extensive reasons set forth in the comments of the Western Coal Traffic League ("WCTL") in Railroad Cost of Capital – 2005, Ex Parte No 558 (Sub-No 9), the Board has rejected WCTL's challenges to its 2005 cost of capital computations³³ and WCTL has filed a petition seeking judicial review of the Board's decision.³⁴ WFA/Basin request that if the Board is ordered by the court or otherwise decides to correct its

³⁰ See WFA/Basin Reconsideration electronic workpaper "Impact of 2007 EIA Forecasts.xls"

³¹ See WFA/Basin Reconsideration electronic workpaper "Comparison of 2005 and 2006 EIA Forecasts.xls"

³² See WFA/Basin Supp. Rebuttal at 13-14

³³ See Railroad Cost of Capital – 2005, STB Ex Parte No 558 (Sub-No 9), (STB served Sept. 20, 2006) at 6-8, on reconsideration (STB served Feb. 12, 2007)

³⁴ See Petition For Review, Western Coal Traffic League v. STB, No. 07-1064 (D.C. Cir. filed Mar. 13, 2007)

current 2005 cost of capital calculation, that properly corrected 2005 capital costs be applied to calculate variable and stand-alone costs in Western Fuels. WFA/Basin also request that the Board expressly so hold this in its reconsideration decision

C. Failure to Address Proposed Cost of Capital Calculations

After all evidentiary filings were made in this case, the Board issued its notice of proposed rulemaking in Methodology to Be Employed in Determining the Railroad Industry's Cost of Capital, Ex Parte No 664 (STB served Aug 14, 2007) The notice is a new, substantially changed circumstance Therein, the Board concluded that its current DCF approach used to determine the cost of rail equity was outdated and should be replaced by a "superior financial model," the Capital Asset Pricing Model ("CAPM") Id at 6 Table 2 of the Board's notice, as corrected, recalculates the rail industry's cost of capital under CAPM

**Table 2
Cost-of-Capital Comparison**

Year	Current DCF	2-Stage DCF	CAPM
1997	9.7	7.4	10.5
1998	11.6	6.8	8.8
1999	10.7	7.0	9.3
2000	10.8	8.1	9.2
2001	10.1	6.8	8.1
2002	9.6	6.2	7.2
2003	9.4	6.0	6.7
2004	10.1	6.2	7.1
2005	12.2	6.7	7.5

Id, at 2 (STB served Aug 20, 2007)

The Board applied ATC in the Western Fuels case because the Board deemed ATC superior to MSP Major Issues at 31 Fairness dictates that if the Board adopts CAPM, the Board should similarly apply properly calculated CAPM-based cost of capital computations to all periods covered by the DCF model in Western Fuels. Any other result will inform the shipping public that the Board is quite willing to apply new rules that hurt shippers in SAC cases but will not apply new rules that help them WFA/Basin request that the Board state in its reconsideration decision that it will apply the new STB revised cost of capital procedures, if adopted, to determine the LRR's capital costs

D. Failure to Utilize Hedged Fuel Prices

WFA/Basin developed the price that the LRR would pay for fuel in the base period (4Q04) as equaling BNSF's system-average price per gallon of diesel fuel (including handling, taxes and hedge effect) that BNSF paid for fuel in the base period BNSF developed the LRR's base period locomotive fuel prices using a special study that purported to develop location-specific fuel prices BNSF paid in the base period at fueling locations replicated by the LRR. BNSF's location-specific prices were "substantially higher than its system-average fuel price[s]." Decision at 37 The Board deemed BNSF's fuel price evidence "more accurat[c]" and accepted it Id at 38

The Board's conclusions concerning the accuracy of BNSF's location-specific fuel price calculations are wrong The record in this case clearly establishes that the reason why BNSF's location-specific fuel prices were "substantially higher" in the base period than its system-average fuel prices is due to the fact that BNSF's location-specific fuel prices exclude

fuel hedging whereas BNSF's system-average prices include fuel hedging³⁵ Excluding fuel hedging results in inaccurate fuel price computations. This result is also clear from the record In its reports to its shareholders, BNSF calculates fuel prices that include hedging effects³⁶ Similarly, the BNSF reports fuel prices in its R-1 annual reports to the Board that include hedging effects³⁷ BNSF does so because the law requires BNSF to provide accurate fuel price data to its shareholders, and to the Board in its R-1 reports, and hedged prices, not unhedged prices, accurately measure the price BNSF pays for fuel

The Board cryptically acknowledges the problems inherent in its acceptance of BNSF's unhedged fuel price calculations by arguing that "use [of] a single year's hedging results for long-term forecasting of fuel costs is unrealistic " Decision at 38 This argument is incorrect Parties in SAC cases must develop accurate base period fuel prices This requires use of hedged fuel prices, if the prices are hedged Otherwise, the base period fuel prices will not be accurate The used of hedged fuel prices is clearly "realistic" since it accurately captures the price the carrier actually pays for fuel Conversely, using unhedged prices is "unrealistic" because it ignores the actual fuel prices paid by the carrier in the base period Once an accurate base period fuel price is obtained, the accuracy of forecasted prices for subsequent time periods turns on the accuracy of the forecast methodology

WFA/Basin request that the Board reconsider and accept its hedged base period fuel prices since these prices, not BNSF's unhedged prices, accurately reflect the actual fuel

³⁵ See WFA/Basin Rebuttal at III-D-16 to III-D-18

³⁶ Id. at III-D-17 to III-D-18

³⁷ Id. at III-D-17.

prices the LRR would pay in the base period. Accepting WFA/Basin's hedged fuel price evidence also complies with the Board's consistent use of hedged fuel prices in SAC cases³⁸

E. Failure to Address WFA/Basin's DCF Debt Amortization Evidence

WFA/Basin amortized the LRR's debt over the estimated lives of the assets acquired with this debt. The Board refused to consider WFA/Basin's debt amortization evidence on grounds that WFA/Basin failed to present the evidence in a manner that complied with the STB's rules of evidence. Decision at 135-36. As a result, the Board accepted BNSF's approach where the LRR's debt was amortized over a 20-year period. The Board erred in not addressing the merits of WFA/Basin's debt amortization evidence.

BNSF was clearly put on notice in WFA/Basin's opening evidence how WFA/Basin was amortizing the LRR's debt. This also was not a new issue as it was one BNSF was contemporaneously addressing in the AEP Texas case³⁹. In its reply evidence, BNSF clearly understood WFA/Basin's methodology and criticized it on grounds that "WFA/Basin have not demonstrated that financing could be obtained for the 50-year term it assumes." BNSF Reply Narr. at III G-20. WFA/Basin provided that demonstration on rebuttal. See WFA/Basin Rebuttal III-G-39 ("[o]ver the last ten years, the U.S.-based Class I railroads have obtained over \$5.6 billion in debt-financing with maturities ranging from 30 to 100 years").

WFA/Basin's rebuttal filing did not violate the Board's evidentiary rules. These rules limit "[r]ebuttal statements" to issues raised in the reply statements to which they are

³⁸ See, e.g., Xcel I at 61, TMPA, 6 S.T.B. at 635-36, 663.

³⁹ See AEP Tex. N. Co. v. BNSF Ry. Co., STB Docket No. 41191 (Sub-No. 1) (STB served Sept. 10, 2007) ("AEP Texas") at 106-07.

directed ” 49 C F R §1112.6 WFA/Basin’s rebuttal evidence responded to issues raised by BNSF in its reply evidence. Nor did WFA/Basin change in any way their opening DCF amortization procedures on rebuttal. WFA/Basin simply responded to criticisms of that approach raised by BNSF.

Also, the Board’s decision not to address the debt amortization issue is completely inconsistent with its treatment of the same issue in AEP Texas. In AEP Texas, the Board did address the merits of AEP Texas’ proposal to amortize SARR debt over the life of the SARR assets (id. at 107) even though the evidentiary sequence in AEP Texas was identical to that in Western Fuels. In AEP Texas, the Board rejected AEP Texas’ use of a life-of-asset amortization period because the Board found that AEP Texas’ rebuttal evidence showed that “although some [railroad] debt may be issued for longer than 20 years, most debt is amortized over considerably less than 20 years.” Id. That response misses the point. The issue here is not one of determining the average amortization period of a Class I carrier’s debt, but whether it was feasible for the LRR to obtain long-term debt financing in the marketplace. The LRR’s debt principal approximates \$382.7 million and the evidence WFA/Basin submitted clearly shows Class I railroads routinely obtain debt financing for such amounts for time periods of up to 100 years.⁴⁰ With today’s flat, and in some cases inverted, yield curves, it makes sense for a highly efficient SARR to prevail itself of the advantages of long-term, low-cost financing.

WFA/Basin request that the Board reconsider its decision not to address the merits of WFA/Basin’s debt amortization evidence, and upon reconsideration, accept this evidence.

⁴⁰ See WFA/Basin Rebuttal electronic workpaper “RRDebtIssues_update.xls ”

IV.
WFA/BASIN'S CONTINUING OBJECTIONS
TO THE BOARD'S MAJOR ISSUES DECISION

WFA/Basin are being whipsawed between this proceeding and Major Issues. In Major Issues, the Board adopted, over WFA/Basin's objections, several new rules, including a new rule to set divisions on cross-over traffic ("ATC Rule"), a new rule to calculate variable costs for jurisdictional threshold purposes ("Unadjusted Cost Rule"), and a new rule to calculate SARR productivity adjusted operating expense forecasts ("Productivity Rule"). The Board proceeds to mechanically apply these new rules in its Decision, citing, without further discussion, Major Issues as authority for its actions. See Decision at 6, 12, 19.

WFA/Basin, along with all other participating coal shippers, presented substantial evidence and argument in Major Issues demonstrating that the Board should not adopt the ATC Rule, the Unadjusted Cost Rule and the Productivity Rule. This evidence demonstrated, *inter alia*, that the ATC Rule violated Guidelines, the Unadjusted Cost Rule produced arbitrary and inaccurate costs, particularly when applied to efficient unit coal train service; and that the Productivity Rule mistakenly understated SARR productivity gains. As discussed above, WFA/Basin also objected to the Board's decision in Major Issues to retroactively apply ATC in Western Fuels.

WFA/Basin and other coal shippers have filed petitions seeking judicial review of Major Issues in the United States Court of Appeals for the District of Columbia Circuit. These petitions ask the Board to vacate the ATC Rule, the Unadjusted Cost Rule and the Productivity Rule, as well as the Board's decision to retroactively apply ATC in Western Fuels. Should the Court grant any of the relief requested by petitioning shippers, and Board, on remand, take

remedial actions that modify or vacate the involved Rules and findings, the Board will need to take appropriate corrective measures in this proceeding WFA/Basin request that the Board specifically confirm in its reconsideration decision that the Board will take such remedial measures in this proceeding

Respectfully submitted,

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

OF COUNSEL

Slover & Loftus
1224 Seventeenth Street, N W
Washington, D C 20036

Dated: October 22, 2007

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Christopher A Mills
Peter A. Pfohl
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(202) 347-7170

Their Attorneys

CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of October, 2007, I served a copy of the foregoing Petition for Reconsideration by hand delivery on designated outside counsel for BNSF, as follows.

Samuel M Sipe, Jr, Esq
Anthony J LaRocca, Esq.
Linda S Stein, Esq
Steptoe & Johnson, L L P
1330 Connecticut Avenue, N W
Washington, D C 20036-1795


Peter A Pfohl



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

Complainants,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42088

**ENTERED
Office of Proceedings**

OCT 22 2007

**Part of
Public Record**

SUPPLEMENTAL EVIDENCE NOTICE

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

OF COUNSEL

**Slover & Loftus
1224 Seventeenth Street, N W
Washington, D C 20036**

Dated October 22, 2007

**By John H LeScur
Christopher A Mills
Peter A Pfohl
Daniel M Jaffe
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1224 Seventeenth Street, N W
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Their Attorneys

BEFORE THE
SURFACE TRANSPORTATION BOARD



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

Complainants

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42088

SUPPLEMENTAL EVIDENCE NOTICE

Pursuant to the Board's decisions served in this proceeding on September 10, 2007 and September 26, 2007. Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc (collectively "WFA/Basin") hereby notify the Board that they wish to submit supplemental stand-alone cost ("SAC") evidence ¹ WFA/Basin request that the Board adopt the proposed procedural schedule set forth in Attachment 1 to govern the submission of supplemental SAC evidence

WFA/Basin's proposed procedural schedule does not permit any supplemental discovery WFA/Basin are amenable to this approach provided that the Board directs that the parties' supplemental evidence be limited to the use of material already in the administrative

¹ Nothing in this Notice should be construed as a waiver of WFA/Basin's objections to the Board's actions in this case. These objections remain ongoing.

record (including the discovery record) as well as any other public or commercial material that is equally available to each side without discovery against the other.

As the Board knows, SAC changes of the type permitted under the Board's September 10, 2007 decision will be complex, time-consuming and very expensive for WFA/Basin. Additional discovery will greatly add to this complexity, delay and expense. However, as the Board also knows, most data needed to present a SAC case is confidential or highly confidential data possessed by the defendant carrier, here BNSF Railway Company ("BNSF"). WFA/Basin must not be prejudiced by BNSF's selective presentation in BNSF's supplemental evidentiary filings of new confidential or highly confidential internal BNSF data. WFA/Basin address this concern by their proposed evidentiary limitation. If the Board does not grant WFA/Basin's requested limitation, WFA/Basin request that the Board adopt the procedural schedule set forth in Attachment 2.

Respectfully submitted,

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

By

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Dated: October 22, 2007

Their Attorneys

PROPOSED PROCEDURAL SCHEDULE

<u>Date</u>	<u>Event</u>
Day 0	Date of service of STB decision adopting procedural schedule
Day 60 ¹	WFA/Basin's opening third supplemental SAC evidence due
Day 105	BNSF's reply third supplemental SAC evidence due
Day 135	WFA/Basin's rebuttal third supplemental SAC evidence due
Day 210	STB final decision due

¹ If Day 60 falls between December 24, 2007 and January 1, 2008, this due date shall be extended to January 7, 2008, with all subsequent dates adjusted accordingly

PROPOSED PROCEDURAL SCHEDULE

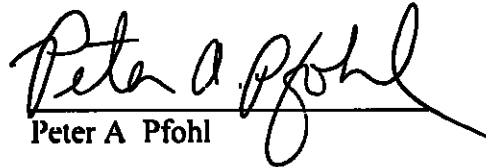
<u>Date</u>	<u>Event</u>
Day 0	Date of service of STB decision adopting procedural schedule; Discovery period begins ¹
Day 45	Discovery period ends
Day 105	WFA/Basin's opening third supplemental SAC evidence due
Day 150	BNSF's reply third supplemental SAC evidence due
Day 180	WFA/Basin's rebuttal third supplemental SAC evidence due
Day 255	STB final decision due

¹ Initial discovery responses and objections will be due 5 business days after service of the requests. Any motions to compel will be due 5 business days thereafter. These motions will be handled under the Board's discovery procedures set forth at 49 C.F.R. 1114.31(a), except that a reply to a motion to compel will be due 5 business days after receipt of the motion.

CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of October, 2007, I served a copy of the foregoing Supplemental Evidence Notice by hand delivery on designated outside counsel for BNSF, as follows.

Samuel M Sipe, Jr , Esq
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