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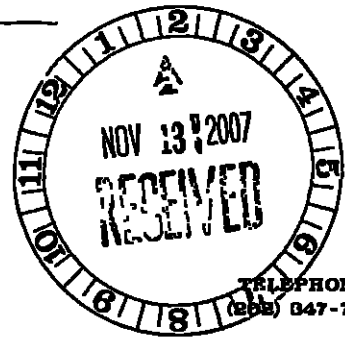
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November 13, 2007

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C 20423-0001

ENTERED
Office of Proceedings

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Public Record

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 the Complainants' Reply to BNSF Railway Company's Petition for Reconsideration.

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

Respectfully submitted,


John H LeScur
An Attorney for Complainants

Enclosures

cc Counsel for Defendant

BEFORE THE
SURFACE TRANSPORTATION BOARD



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

Complainants,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42088

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REPLY TO BNSF RAILWAY COMPANY'S
PETITION FOR RECONSIDERATION

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and BASIN ELECTRIC POWER
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Dated November 13, 2007

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**BEFORE THE
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v.

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Defendant.

Docket No. 42088

**REPLY TO BNSF RAILWAY COMPANY'S
PETITION FOR RECONSIDERATION**

Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc.

(collectively "WFA/Basin") submit this reply in opposition to the petition for reconsideration ("Petition") filed by the BNSF Railway Company ("BNSF") on October 22, 2007 ¹

PREFACE AND SUMMARY

In its Petition, BNSF argues that the Board committed two material errors in its decision ("Decision") served in this proceeding on September 10, 2007 the Board erred in not dismissing WFA/Basin's complaint and the Board erred in applying its new Average Total Cost ("ATC") methodology to a cross-over traffic movement's revenue contribution rather than to the movement's total revenue The Board should summarily reject both arguments

WFA/Basin configured their stand-alone railroad ("SARR"), the Laramie River Railroad ("LRR"), in 2004-2005 The LRR was designed to maximize revenues, and minimize

¹ WFA/Basin hereafter refer to the instant case as "Western Fuels "

costs, using the Modified Straight-Mileage Prorate (“MSP”) method to calculate cross-over traffic divisions. In its 2006 Major Issues decision,² the Board adopted a new cross-over traffic divisions methodology called Average Total Cost (“ATC”) and also ruled that it would retroactively apply ATC to set the LRR’s cross-over traffic divisions. The Board took these actions despite WFA/Basin’s demonstration that ATC was a totally arbitrary methodology designed to penalize short, high-density SARRs and that retroactive application of ATC was unlawful. WFA/Basin’s challenge to these Board actions is currently pending in the Major Issues Appeal case.³

In its Decision, the Board belatedly acknowledged that its retroactive application of the new ATC cross-over divisions methodology was not “fair[]” because “the change from MSP to ATC would affect the basic design of a SAC case.” Id. at 20. The Board stated that it had two options to address this unfairness: apply MSP or permit WFA/Basin to “supplement or revise its SAC presentation.” Id. The Board selected the second option.

BNSF argues that the Board should not have permitted WFA/Basin to submit supplemental evidence, but instead should have dismissed WFA/Basin’s complaint. According to BNSF, the Board’s supplemental evidence order is predicated upon the assertly erroneous conclusion that retroactive application of ATC was unfair to WFA/Basin. BNSF maintains that this retroactive application was fair because WFA/Basin should have anticipated that the Board would reject its MSP evidence in favor of a density-based divisions method like ATC. These

² Major Issues In Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1) (STB served Oct 30, 2006) (“Major Issues”).

³ BNSF Ry. v. STB, Nos. 06-1372, et al. (D.C. Cir. filed Nov. 13, 2006) (“Major Issues Appeal”).

contentions find no support in the record or the law WFA/Basin reasonably relied on MSP in developing the LRR and, as the Board acknowledged in its Decision, retroactive application of ATC to the LRR is fundamentally unfair Accordingly, the Board must summarily reject BNSF's request that this case be dismissed. Moreover, as WFA/Basin demonstrated in their prior submissions in this case and in Major Issues, the law clearly requires that the Board decide this case using MSP divisions.⁴

BNSF also argues that the Board impermissibly deviated from Major Issues by applying ATC to LRR cross-over traffic movements' revenue contribution (i.e., movement revenue in excess of ATC variable costs) According to BNSF, Major Issues requires the Board to apply ATC to cross-over traffic movements' total revenue The Board has already considered, and rejected, BNSF's argument In its Decision, the Board concluded that application of ATC to cross-over traffic movements' revenue contribution was "consistent with our objectives in Major Issues " Decision at 14

I.

THE BOARD MUST DENY BNSF'S REQUEST TO DISMISS WFA/BASIN'S COMPLAINT

BNSF first argues that the Board committed material error by inviting WFA/Basin to submit supplemental evidence BNSF asks the Board to rescind this invitation and dismiss WFA/Basin's complaint. See Petition at 1-2, 4-8. According to BNSF, the Board's supplemental evidence order is predicated upon the mistaken finding that retroactive application of ATC in this case is unfair to WFA/Basin. BNSF maintains that this retroactive application

⁴ See, e.g., WFA/Basin's Petition for Reconsideration at 8 (filed Oct 22, 2007).

was fair because (i) WFA/Basin did not have “a valid reason to believe” the STB would accept its use of MSP (id. at 4); (ii) MSP was not a “settled rule” (id. at 1), (iii) WFA/Basin should have anticipated, based on prior Board decisions, that the Board would apply a density-based cross-over traffic divisions methodology (id. at 6); and (iv) the Board departed from established precedent in directing the submission of supplemental evidence (id. at 4). BNSF’s predicate assertions ignore the law and the record. Accordingly, BNSF’s request that the Board dismiss WFA/Basin’s complaint must be summarily rejected.

**A. WFA/Basin Had “A Valid Reason to Believe”
The Board Would Accept Its MSP Evidence**

WFA/Basin configured the LRR in late 2004 and early 2005. Prior to that time, the Board had consistently utilized MSP, or similar mileage-based divisions methodologies, in its last nine case decisions involving cross-over traffic.⁵ This precedent alone provided WFA/Basin with a substantial “reason to believe” that the Board would apply MSP in deciding the Western Fuels case. Subsequent developments and decisions confirmed that WFA/Basin’s reliance was justified.

In July of 2005, the Board briefed the United States Court of Appeals for the District of Columbia Circuit in the Xcel Appeal case.⁶ In Xcel,⁷ the Board had approved Xcel’s use of MSP to set cross-over traffic divisions. Board counsel referred to MSP as a “settled rule”

⁵ See WFA/Basin Op. Narr. at III-A-17-18.

⁶ BNSF Ry. v. STB, 453 F.3d 473 (D.C. Cir. 2006) (“Xcel Appeal”).

⁷ Public Service Co. of Colo. d/b/a Xcel Energy v. Burlington N. and Santa Fe Ry., STB Docket No. 42057 (STB served June 8, 2004) (“Xcel”).

that Xcel reasonably relied upon and the Board reasonably accepted⁸ The D C Circuit subsequently agreed and affirmed the Board's acceptance of MSP in Xcel Appeal. See id., 453 F 3d at 484 (referring to MSP as a "settled rule")

In January of 2006, the Board issued its Otter Tail decision⁹ This decision was issued approximately two months after the record initially closed in Western Fuels In Otter Tail, the Board again used MSP to set cross-over traffic divisions. This marked the tenth straight decision in which the Board had used a mileage-based methodology to set cross-over traffic divisions In Otter Tail, the Board cited MSP as a "settled rule" (id. at 13) and found that application of MSP was consistent with "precedent" Id. at 17

B. MSP Was A "Settled Rule"

Next, BNSF contends that WFA/Basin had no reasonable basis to rely on MSP because, BNSF asserts, MSP was not a "settled rule" Petition at 1 This assertion, of course, is directly contradicted by the precedent just cited the Board relied on MSP in its last ten rate case decisions prior to its 2006 decision in Major Issues; Board counsel asserted, and the reviewing court agreed, that MSP was a settled rule in Xcel Appeal; and the Board held MSP a settled rule in Otter Tail

BNSF does not cite or address these authorities Instead, BNSF cites two decisions where the Board applied MSP but stated in dicta that the Board had "not adopted a single preferred procedure for developing revenue divisions on cross-over traffic" See Petition

⁸ See Joint Brief of Respondents STB and United States of America, Xcel Appeal, at 52 (filed July 21, 2005) ("Xcel Appeal Brief").

⁹ Otter Tail Power Co v BNSF Ry., STB Docket No 42071 (STB served Jan 27, 2006) ("Otter Tail")

at 5 (quoting cases) While the Board may not have formally “adopted” MSP in a rulemaking proceeding, the Board’s clear and consistent case practice since 1994 was to use mileage-based methodologies to set SARR cross-over traffic divisions. See Xcel Appeal Brief at 52

Moreover, even if MSP was not a settled rule – which it clearly was – there is no dispute that the Board adopted ATC after WFA/Basin configured the LRR and that ATC employs a substantially different methodology to set cross-over traffic divisions than MSP In its prior decisions, the Board has routinely permitted parties to file supplemental evidence to address new precedent See, e.g., Otter Tail Power Co v BNSF Ry., STB Docket No 42071 (STB served Nov 21, 2003) at 1 (permitting Otter Tail to modify its case-in-chief “to address new issues raised by recent decisions”), Otter Tail Power Co v. BNSF Ry., STB Docket No 42071 (STB served April 14, 2004) at 2 (permitting BNSF “to file new evidence based on new precedent”), Public Service Co of Colo d/b/a Xcel Energy v Burlington N and Santa Fe Ry., STB Docket No. 42057 (STB served Feb 17, 2004), at 1 (permitting BNSF to file supplemental evidence “to address Board statements made in recent decisions in other rail rate reasonableness proceedings”).

**C. BNSF Failed To Present
A Superior Alternative To MSP**

In its Xcel Appeal Brief, and in Otter Tail, the Board stated it would depart from the MSP “settled rule” only if a party to a case presented a demonstrably “superior” alternative to MSP See Xcel Appeal Brief at 52. accord Otter Tail at 13 (“any party seeking a departure from precedent bears the burden of a persuasive showing that its alternative is superior”)

In Western Fuels, BNSF clearly failed to submit a superior alternative to MSP.

BNSF's preferred divisions approach was its so-called "contestable market" methodology. This methodology set the LRR's cross-over traffic divisions at BNSF's Uniform Rail Costing System Phase III costs for replicating the LRR service.¹⁰ BNSF's contestable market approach was one that the ICC/Board had consistently rejected in prior cases as an impermissible method to set cross-over traffic divisions.¹¹ The Board reaffirmed these rulings in Major Issues, Id. at 36. BNSF's rejected contestable market divisions methodology clearly was not superior to MSP.

BNSF's alternative divisions methodology was a "modified" MSP that, for unit coal train traffic, reduced the 100-mile MSP origin/destination mileage blocks.¹² The Board rejected BNSF's proposed modified MSP approach, in favor of MSP, in Otter Tail, See id. at 15-17. Thus, BNSF's proposed modified MSP, like its proposed contestable market divisions methodology, clearly was not superior to MSP.

WFA/Basin's reliance on the settled MSP rule was further justified by BNSF's clear failure to present a superior alternative to MSP.

**D. WFA/Basin Could Not Have Foreseen
The Board's Adoption Of ATC**

BNSF argues that WFA/Basin should have known when they designed the LRR that the Board was planning to replace MSP with a new so-called "density"-based divisions

¹⁰ See BNSF Reply Narr. at III.A -35-45

¹¹ See WFA/Basin Reb Narr at III-A-32-33.

¹² See BNSF Reply Narr at III A -50-57

methodology BNSF cites the Board's decisions in Duke/NS,¹³ Duke/CSXT¹⁴ and Xcel in support of this contention Duke/NS was decided in November of 2003. Duke/CSXT was decided in February of 2004; and Xcel was decided in June of 2004.

In Duke/NS, Duke/CSXT and Xcel, the Board rejected carrier-sponsored "density"-based divisions methodologies in favor of MSP¹⁵ These case decisions illustrate that in all cases decided by the Board prior to Major Issues, the Board, when given the choice between MSP and so-called density-based cross-over traffic divisions methodologies, chose MSP Indeed, that is exactly how BNSF read these decisions in the Summer of 2005

WFA/Basin submitted their opening evidence in April of 2005 The opening evidence calculated LRR cross-over traffic divisions using MSP. BNSF filed its reply evidence in July of 2005 BNSF objected to MSP but did not submit any alternative density-based cross-over traffic divisions methodology. BNSF stated that it was not doing so because the Board had rejected density-based divisions methodologies in prior rulings. See BNSF Reply Narr at I-10 ("The Board has previously rejected BNSF's attempts to estimate the costs of each section of a through movement based in part on the relative densities of each line segment ")

BNSF's own actions in this case demonstrate the fallacy of its current contentions If, as BNSF now contends, it was clear that the Board would reject MSP for a density-based divisions methodology, why did BNSF not present such a methodology for the Board's

¹³ Duke Energy Corp v Norfolk Southern Ry., STB Docket No. 42069 (STB served Nov. 6, 2003) ("Duke/NS")

¹⁴ Duke Energy Corp. v. CSX Transp. Inc., STB Docket No. 42070 (STB served Feb. 4, 2004) ("Duke/CSXT")

¹⁵ The Board did so again in its January 2006 decision in Otter Tail See id. at 15-17

consideration in this case? The answer is obvious – no one could foresee the Board’s subsequent decision to abandon MSP in favor of an assertedly density-based revenue allocation

methodology

E. The Cases BNSF Cites Do Not Support Its Supplemental Evidence Arguments

BNSF cites several recent Board SAC decisions in support of its dismissal contentions. BNSF fails to point out, however, that in all of the cases cited, the Board did direct, or accept, supplemental evidentiary filings during the course of the litigation.¹⁶ In one of the cases BNSF cites (PPL I¹⁷), the Board did decide not to accept some supplemental evidence, but that decision is clearly distinguishable

In PPL I, the Board dismissed PPL’s maximum coal rate complaint on grounds that its SARR contained an impermissible internal cross-subsidy.¹⁸ PPL filed a reconsideration request where it asked the Board to permit it to “alter portions of its case-in-chief in light of [the Board’s] cross-subsidy analysis.” PPL II, 6 S T B at 762 The Board denied PPL’s request in part, on grounds that “PPL is hardly in a position to claim surprise here, as its own witness suggested the cross-subsidy analysis that we used” (PPL II at 758) and that the Board’s cross-subsidy analysis “merely applied well established principles to the particular facts and issues presented to us in this case ” Id. at 762

¹⁶ See, e.g., Duke Energy Corp v Norfolk Southern Ry., STB Docket No. 42069 (STB served Oct 20, 2004) at 25, Xcel at 37, PPL Montana, LLC v The Burlington N and Santa Fe Ry., STB Docket No. 42054 (STB served Aug 31, 2004) (“PPL III”) at 1.

¹⁷ PPL Montana, LLC v. The Burlington N and Santa Fe Ry., 6 S T B 286 (2002) (“PPL I”), on reconsideration , 6 S.T.B. 752 (2003) (“PPL II”), and PPL III (STB served Aug 31, 2004).

¹⁸ Id., 6 S T.B at 299

In Western Fuels, neither WFA/Basin's witnesses, nor BNSF's witnesses "suggest[ed]" that the Board set cross-over traffic divisions using any procedure remotely similar to ATC. WFA/Basin's witnesses asked the Board to apply MSP and BNSF's witnesses proposed no density-based alternatives to MSP. Similarly, PPL I dealt with an issue of first impression in a SAC case – internal cross subsidies. See PPL II at 757 ("[t]his is the first case in which a railroad has claimed that the shipper's SAC evidence relied on a cross-subsidy") The Board stated that it resolved this new issue using "well established principles " Id. at 762 The issue of how to calculate SARR cross-over traffic divisions of course was not one of first impression in Western Fuels How to calculate cross-over traffic divisions was an issue that the Board had considered and resolved in numerous prior case decisions preceding Western Fuels. And, in all of these cases, the Board determined that "well established principles" sanctioned the use of MSP or other mileage-based divisions methodologies

F. Case Dismissal Is Clearly Impermissible

In its Decision, the Board stated that it had two options to address the unfairness of retroactively applying ATC to the LRR apply MSP or permit WFA/Basin the opportunity to reconfigure the LRR to maximize revenues, and minimize costs, using ATC The Board selected the second option

BNSF asks the Board to select a different option (complaint dismissal) on grounds that the Board's retroactive application of ATC was fair. BNSF's arguments in support of this contention are baseless for the reasons discussed above, so the Board clearly cannot opt for BNSF's proposed dismissal option. Moreover, as WFA/Basin have previously demonstrated in Major Issues and in this case, the Board is legally required to decide this case using MSP

II.

THE BOARD'S APPLICATION OF ATC TO MOVEMENT CONTRIBUTION DID NOT VIOLATE MAJOR ISSUES

BNSF also argues that the Board's application of ATC in Western Fuels violated the cross-over traffic principles the Board articulated in Major Issues. Specifically, BNSF argues that Major Issues requires the Board to apply ATC to a cross-over traffic movement's total revenue, not to the movement's revenue contribution.

The Board explained in its Decision that it applied ATC to a cross-over traffic movement's revenue contribution, rather than to the movement's total movement revenue, to avoid "illogical and unintended result[s]".

Because the traffic group includes considerable traffic with total revenue either below or barely above variable cost, and because the off-SARR segments of the movements have lower densities, the practical effect of [applying ATC to total movement revenue] would be to drive the R/VC percentages of the movements below 100% (or if the total revenue is already less than variable costs, the effect is to drive the percentage even lower). This means the on-SARR revenue allocation for those movements would be insufficient to cover the variable cost (as calculated using URCS) of handling traffic for the highest-density portion of a movement.

To avoid such an illogical and unintended result, we make a necessary refinement to the ATC approach here. Instead of applying ATC allocation procedure to total revenue, we will apply the same allocation procedure to total revenue *contribution* (i.e., revenue in excess of variable cost as calculated by URCS).

The Board also explained in its Decision that applying ATC to a cross-over traffic movement's revenue contribution was fully "consistent with our objective in Major Issues"

[Application of ATC to revenue contribution] is reasonable and consistent with our objective in Major Issues. Traffic must cover its variable costs before it can be expected to make any contribution to joint and common costs. Therefore, the objective is how to allocate the revenue *contribution* (if any is available) between the facilities replicated by the SARR and those of the residual incumbent. While the language used in Major Issues to explain the basic ATC approach led the parties to allocate total revenue rather than total revenue contribution, we did not contemplate this situation, where such a procedure would result in other traffic on the SARR cross-subsidizing those cross-over movements with on-SARR revenue allocations below variable costs. Such a result would plainly conflict with our express purpose to find a non-biased, cost-based method. See Major Issues at 32.

Decision at 14

BNSF's petition devotes substantial verbiage to the ATC issue. Petition at 2-3, 9-19. However, in the end, BNSF's verbiage collapses into a single point – BNSF disagrees with the Board's view on what ATC is intended to accomplish. That disagreement does not rise to the level of material error under the governing legal standards. See St. Louis Southwestern Ry. – Abandonment – In Smith and Cherokee Counties, TX, 9 I.C.C.2d 429, 431 (1992) ("[w]hile petitioners may disagree with our interpretation, they have not demonstrated material error")

CONCLUSION

The Board should deny BNSF's Petition for the reasons set forth above

Respectfully submitted,

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

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Dated November 13, 2007

Their Attorneys

CERTIFICATE OF SERVICE

I hereby certify that this 13th day of November, 2007, I served a copy of the foregoing Reply to BNSF Railway Company's Petition for Reconsideration by hand delivery on designated outside counsel for BNSF, as follows:

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