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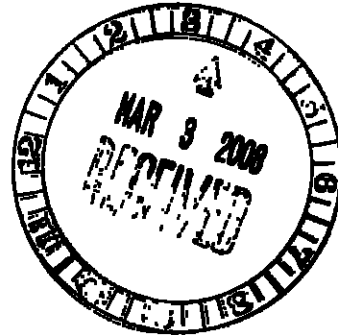
EXPEDITED CONSIDERATION REQUESTED

March 3, 2008

VIA HAND DELIVERY

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
MAR 3 - 2008
FBI of
Public Record



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

Dear Ms. Quinlan:

Enclosed please find an executed original and 20 copies of Complainants Western Fuels Association Inc. and Basin Electric Power Cooperative Inc.'s ("WFA/Basin") Petition for Clarification. The requisite filing fee is also enclosed. A copy of this Petition is being hand-served on Washington counsel for Defendant BNSF Railway Company ("BNSF").

WFA/Basin's Petition for Clarification is directed at the Board's discussion set forth in its decision served in this proceeding last Friday, February 29, 2008 concerning the procedural schedule for the submission of supplemental evidence. The matters raised in this Petition are highly time-sensitive for the reasons discussed in the Petition. Accordingly, WFA/Basin request that the Board direct BNSF to file a reply to this Petition by Friday, March 7, 2008. WFA/Basin also request that the Board convene a technical conference on an expedited basis and suggest that this conference be held on Tuesday, March 11, 2008.

Respectfully submitted,

John H. LeScur
An Attorney for Complainants

FILED

MAR 3 - 2008

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Enclosure

cc: Counsel for Defendant BNSF Railway Co.

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Public Record

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

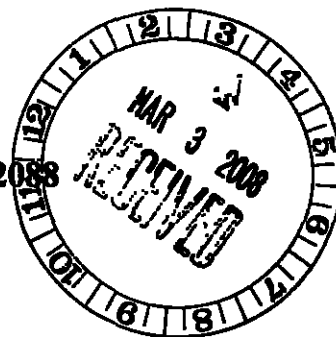
Complainants

v.

BNSF RAILWAY COMPANY

Defendant

Docket No. 42088



PETITION FOR CLARIFICATION

FEE RECEIVED
MAR 3 - 2008
SURFACE
TRANSPORTATION BOARD

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

OF COUNSEL:

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Dated: March 3, 2008

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Their Attorneys

FILED
MAR 3 - 2008
SURFACE
TRANSPORTATION BOARD

WESTERN FUELS ASSOCIATION, INC.	)	
and BASIN ELECTRIC POWER	)	
COOPERATIVE, INC.	)	
	)	
Complainants	)	
	)	Docket No. 42088
v.	)	
	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant	)	

Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc.
(“WFA/Basin”) submit this petition for clarification of the Board’s decision served in this
proceeding on February 29, 2008 (“February 2008 Decision”).

The Board's February 2008 Decision addresses supplemental evidentiary issues in a single paragraph appearing at the end of the Decision. WFA/Basin ask the Board to clarify its Decision to confirm that WFA/Basin may utilize selective publicly or commercially available data, not currently in the administrative record, in support of their reconfigured stand-alone railroad ("SARR"). This data, described in more detail below, consists of standard forms of data that parties utilize in stand-alone cost ("SAC") cases

(e.g., Interstate Commerce Commission ("ICC") Engineering Reports and land value data).

Use of this data is essential to WFA/Basin. Without it, WFA/Basin cannot properly respond to the Board's invitation, set forth in its September 10, 2007 decision ("September 2007 Decision"), affording WFA/Basin the opportunity to submit a changed SARR configuration and traffic group. Based upon their reading of the Board's September 2007 Decision, and the Board's February 2008 Decision, it appears to WFA/Basin that the Board did not intend to offer WFA/Basin the opportunity to submit new evidence and then deny them the means necessary to do so. In the highly unlikely event that this is the case, WFA/Basin alternatively request that the Board reconsider and modify this ruling.

Time is of the essence here. WFA/Basin cannot start the extensive evidentiary modeling required under the Board's supplemental evidentiary schedule until the issues raised here are resolved. WFA/Basin request that BNSF Railway Company ("BNSF") file a response to this Petition no later than Friday, March 7, 2008 and that the Board decide this Petition immediately thereafter. To facilitate this prompt action, WFA/Basin suggest that the Board hold a technical conference on Tuesday March 11, 2008.

I. BACKGROUND

WFA/Basin designed their SARR, the Laramie River Railroad ("LRR"), in the Winter of 2005. The LRR was designed to maximize revenues and minimize costs using the Board's Modified Straight Mileage Prorate Method ("MSP") to set cross-over traffic divisions. WFA/Basin proceeded to defend the LRR in their opening, reply, and rebuttal filings in this case and in their final brief. The last of these filings, the final brief, was submitted on December 6, 2005.

After the record initially closed in this case, the Board issued a Notice of Proposed Rulemaking in Major Issues.¹ In Major Issues, the Board proposed to replace the MSP method to set cross-over traffic divisions with a new Average Total Cost ("ATC") method. The Board further proposed to apply ATC in the pending rate cases. In Major Issues, WFA/Basin repeatedly objected to the Board's application of ATC in their pending rate case on grounds that in order to maximize revenues and minimize costs using ATC, WFA/Basin would have developed a differently configured railroad, with a

¹ Major Issues In Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1)(STB served Oct. 30, 2006), pet. for review docketed, No. 06-1374, et al. (D.C. Cir. Nov. 13, 2006)("Major Issues").

different traffic group.² WFA/Basin made the same arguments in this proceeding.³

In its September 2007 Decision, the Board found that the LRR's revenues did not exceed the LRR's costs. However, the Board acknowledged that the change from MSP to ATC "could have prejudiced" WFA/Basin and concluded that "fairness dictates that WFA have an opportunity to modify its SAC presentation in light of the new revenue allocation methodology." Id. at 3, 20. The Board proceeded to hold that if WFA/Basin elected to submit supplemental evidence, "WFA may increase or decrease the traffic group, change the configuration of the LRR, and submit evidence on all related issues (such as revenue from new traffic or construction costs avoided or added due to a new configuration)." Id. at 20. The Board asked WFA/Basin to inform the Board by a specified date (later set as of October 22, 2007) whether they would submit supplemental evidence. The Board also asked WFA/Basin to "suggest an appropriate procedural schedule." Id.

On October 22, 2007, WFA/Basin informed the Board that they would file supplemental evidence.⁴ WFA/Basin proposed two alternative procedural schedules for

² See WFA/Basin Additional Opening Comments at 25-28 (May 1, 2006); WFA/Basin Additional Reply Comments at 6 (May 31, 2006); and WFA/Basin Additional Rebuttal Comments at 13-17 (June 30, 2006).

³ See, e.g., WFA/Basin Opening Second Supplemental Evidence at 2-4 (Feb. 22, 2007); WFA/Basin Rebuttal Second Supplemental Rebuttal Evidence at 2-3 (Apr. 9, 2007).

⁴ See WFA/Basin's Supplemental Evidence Notice (Oct. 22, 2007).

the Board's consideration. One schedule established a discovery period followed by sequential evidentiary filings. The other schedule called for the filing of supplemental evidence with no discovery. WFA/Basin informed the Board that they were amenable to a no-new-discovery schedule only if "the Board directs that the parties' supplemental evidence be limited to the use of material already in the administrative record (including the discovery record) as well as any other public or commercial material that is equally available to each side without discovery." Id. at 1-2 .

WFA/Basin's no-discovery schedule was intended to reduce case costs for both sides by eliminating new discovery; to give WFA/Basin the evidentiary flexibility they needed to present their supplemental evidence using existing record evidence and publicly/commercially available evidence not in the record; to create a level evidentiary playing field between BNSF and WFA/Basin by limiting the submission of new evidence to evidence that was equally obtainable by each party; and to prevent WFA/Basin from being blind-sided by new internal BNSF data. Id. at 2.

BNSF responded to WFA/Basin's scheduling proposals on November 13, 2007.⁵ BNSF objected to both of WFA/Basin's proposals. According to BNSF, the proposal calling for discovery was not permissible because "supplemental discovery should not be permitted." Id. at 1. BNSF also refused to agree with the conditions that WFA/Basin had proposed for the use of a no-discovery schedule. BNSF maintained that

⁵ BNSF's Reply To Supplemental Evidence Notice (Nov. 13, 2007).

it could not agree “in the abstract” with the parties’ submission of new public/commercial evidence on grounds that “it is not clear what types of information would be covered or the uses to which such information would be put in the SAC evidence.” Id. at 2.

Last Friday, the Board served its February 2008 Decision. The February 2008 Decision is directed principally at deciding issues raised in the parties’ petitions for reconsideration and correction of the Board’s September 2007 Decision. The Board’s February 2008 Decision also contains a single paragraph (at page 8) discussing WFA/Basin’s proposed procedural schedules. The Board made the following rulings in its February 2008 Decision that are pertinent for purposes of this Petition:

- The Board reaffirmed its prior holding that it would permit WFA/Basin the opportunity to present supplemental evidence to reconfigure its SARR and its traffic group to maximize revenues and minimize costs using the Board’s new ATC method. Id. at 2-4.

- The Board denied WFA/Basin’s request that the Board utilize the Energy Information Administration’s (“EIA”) 2007 Annual Energy Outlook traffic and revenue forecasts. The Board did so on grounds that the 2007 forecasts were not “markedly different” than the 2006 forecasts already in the record. Id. at 7. The Board also ruled that the parties should utilize a 2006 Global Insight operating index forecast in presenting their next rounds of supplemental evidence. Id. at 10.

- The Board ruled that the parties should address in their next rounds of supplemental SAC evidence the use of the Board's recently adopted Capital Asset Pricing Model ("CAPM") to make SARR cost-of-capital computations. Id. at 6.

- Finally, and most consequentially for instant purposes, the Board ruled that "supplemental evidence should be limited to what is already in the administrative record, including the discovery record, except information the parties need to develop cost-of-capital calculations under CAPM." Id. at 8.

II. CLARIFICATION REQUEST

WFA/Basin request that the Board clarify its February 2008 Decision to avoid what appears to WFA/Basin to be an unintended result. Specifically, WFA Basin ask the Board to clarify that it did not intend to limit WFA/Basin's ability to submit in its supplemental evidence filings limited amounts of standard SAC data not currently in the administrative record (including the discovery record). This unintended result appears to have come about due to the language WFA/Basin used in their Supplemental Evidence Notice.

Specifically, in their Supplemental Evidence Notice, WFA/Basin stated that they would be amenable to proceeding without discovery if the Board permitted the parties to submit supplemental evidence based on the existing record, along with other publicly or commercially available data not in the record. WFA/Basin's reference to the

use of publicly or commercially available data not in the record was intended to encompass two general categories of evidence.

First, WFA/Basin wanted the opportunity to update traffic and revenue forecasts with publicly available traffic data and forecasts (e.g., the most recently available EIA forecasts, the most recently available Global Insight forecasts, etc.). WFA/Basin read the Board's February 2008 Decision as holding that the parties are required to use the forecasts set forth in the current record, as corrected by the Board's Decision, in their supplemental filings.

Second, and far more consequentially, WFA/Basin wanted to utilize publicly or commercially available data, not currently in the record, to reconfigure the LRR to maximize revenues and minimize costs under ATC. While most of the data needed to make this reconfiguration is in the record (including the discovery record), some consequential publicly/ commercially available data is not. For example, to reconfigure the LRR, WFA/Basin will most likely need to introduce some new information not currently in the record including: land value data; ICC Engineering Report data; geodetic map data; mileage data; and R.S. Means Manual data. This type of data is routinely utilized by complainant shippers in configuring SARRs, by railroad defendants in critiquing SARR configurations, and by the Board in making decisions in SAC cases. As a second example, if WFA/Basin move LRR facilities (e.g., yards) or interchange points with the residual BNSF, WFA/Basin will likely need to support these

changes with new field observation evidence not currently in the record.

While WFA/Basin understand that the Board does not want the parties to utilize the new evidence to update forecasts in their supplemental evidentiary filings, WFA/Basin do not believe that the Board intended to limit WFA/Basin's ability to submit new SARR configuration evidence. This concern can be simply remedied by changing the text at page 8 of the February 2008 Decision to read, starting from the fourth line from the bottom of the page, "what is already in the administrative record, except publicly or commercially available information the parties need to develop cost-of-capital calculations under CAPM and to develop modified SAC presentations to address the new revenue methodology."

Granting this clarification request is critical to WFA/Basin. The Board emphasizes throughout its February 2008 Decision that the purpose of the supplemental evidentiary procedures is to accord WFA/Basin the opportunity to reconfigure the LRR and the LRR's traffic group to address the Board's new ATC methodology. WFA/Basin simply cannot do so without submitting some evidence that is not in the record, a record that to date has been limited to discovery and the submission of evidence related to WFA/Basin's initial configuration of the LRR.

Granting this clarification request is also consistent with the Board's ruling on CAPM in the February 2008 Decision. The Board recognized that in order for the parties to file supplemental evidence on CAPM, the parties would need to utilize publicly

or commercially available data that is not in the record. Accordingly, the Board expressly permitted the parties to use this data. The Board has also permitted WFA/Basin the opportunity to submit supplemental SAC evidence to address the impact of ATC. Just as with the case with CAPM, WFA/Basin need to submit some new evidence using data not currently in the record to reconfigure the LRR to maximize revenues and minimize expenses under ATC.

Granting this clarification request also will not create new evidentiary burdens. As the Board knows, reconfiguration of the LRR and its traffic group has significant evidentiary consequences. WFA/Basin will need to develop a new engineering plan; develop a new operating plan; re-run the Rail Traffic Controller Model; re-run the Discounted Cash Flow Model; and present supporting expert testimony on all of these issues. These steps need to be undertaken for any new LRR configuration. The use of a limited amount of non-record data simply accords WFA/Basin the opportunity to present this revised SARR configuration in the proper manner.

Additionally, BNSF is not harmed in any way by the granting of this clarification request. BNSF has the opportunity to respond to WFA/Basin's opening supplemental evidence in its reply supplemental evidence and can address all reconfiguration issues in that evidence. This Petition also addresses BNSF's concerns, as stated in BNSF's Reply to WFA Basin's Supplemental Evidence Notice, concerning the identity of the public and commercial information, not already in the record, that

WFA/Basin plans to utilize in its supplemental evidence. As discussed above, WFA/Basin intend to supplement the current administrative record utilizing only publicly or commercially available information of the type routinely introduced in SAC cases to support the configuration of a SARR and the composition of the SARR's traffic group.

III. ALTERNATIVE RECONSIDERATION REQUEST

In the unlikely event that the Board did intend to preclude WFA/Basin from utilizing publicly or commercially available data not already in the record to support its reconfigured SARR, WFA/Basin ask that the Board reconsider and modify its February 2008 Decision. The Board's September 2007 Decision authorizes WFA/Basin to reconfigure their SARR. The Board also recognized in its September 2007 Decision that WFA/Basin were in the best position to know how a procedural schedule should be crafted to permit WFA/Basin to present this new evidence. Both of WFA/Basin's proposed procedural schedules permitted WFA/Basin to supplement their prior evidentiary filings with new public/commercial data concerning the reconfigured SARR and, as discussed above, use of such evidence is essential for WFA/Basin to properly develop and submit a revised SAC analysis that addresses the impact of ATC. It would be material error for the Board to provide WFA/Basin the opportunity to reconfigure their SARR and then deny WFA/Basin the ability to do. See 49 U.S.C. §722(c) (Board can correct material errors in its decisions).

In addition, if the Board did intend to preclude WFA/Basin from using publicly or commercially available data not already in the record to support their reconfigured SARR, the Board also materially erred by not adopting WFA/Basin's alternative schedule. As discussed above, WFA/Basin proposed two procedural schedules – one calling for discovery and a second that did not. WFA/Basin stated they were amenable to the Board's promulgation of the no-discovery schedule only if that schedule was accompanied by a Board order that permitted the parties to submit evidence using existing record data and new, non-record data that either side could access from public or commercial sources. If the Board was not amenable to such an approach, WFA/Basin asked the Board to adopt their alternative schedule calling for discovery followed by sequential evidentiary filings. This second approach, like the first, would permit the parties to submit new publicly and commercially available information, plus new internal BNSF information.

In its February 2008 Decision, the Board does not address WFA/Basin's proposed alternative schedule. If the Board is not willing to permit WFA/Basin to utilize limited new publicly/commercially available information under the no-discovery approach, WFA/Basin ask the Board, on reconsideration, to modify the current proposed schedule to adopt their alternative schedule that includes a discovery period before evidence is filed.

**IV
TIME IS OF THE ESSENCE**

WFA/Basin are directed to file opening supplemental evidence in less than two months, on April 29, 2008. WFA/Basin cannot advance the preparation of their case, which as the Board knows involves considerable computer modeling, until the Board addresses this petition for clarification. WFA/Basin have filed and hand-served this Petition on the first business day after the Board issued the February 2008 Decision. WFA/Basin request that the Board direct BNSF to file a response to this Petition by Friday, March 7, 2008 and that the Board decide the Petition promptly thereafter. A technical conference should facilitate the Board's prompt review and WFA/Basin suggest that such a conference be held on Tuesday, March 11, 2008.⁶

Respectfully submitted,

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

By: John H. LeSeur 

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Dated: March 3, 2008

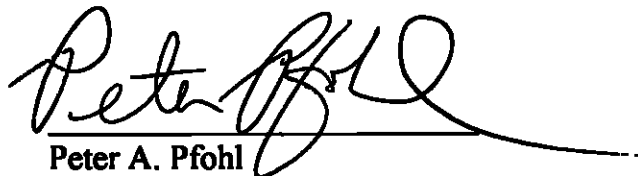
Their Attorneys

⁶ WFA/Basin also ask that the filing deadlines in the Board's procedural schedule be extended by the time it takes the Board to decide this Petition.

CERTIFICATE OF SERVICE

I hereby certify that this 3rd day of March, 2008, I served a copy of the foregoing Petition for Clarification by hand delivery on designated outside counsel for BNSF, as follows:

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