

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

Complainants)

v.)

BNSF RAILWAY COMPANY)

Respondent)

STB Docket No. 42088

**BNSF RAILWAY COMPANY'S
REPLY TO COMPLAINANTS' PETITION FOR CLARIFICATION**

BNSF Railway Company ("BNSF") hereby replies to the March 3, 2008 Petition for Clarification ("Petition") of the Board's February 29, 2008 Decision in the above-captioned matter ("Decision"), filed by complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively referred to as "WFA/Basin"). In that Petition, WFA/Basin request the Board to "clarify" the Decision by authorizing WFA/Basin to use certain publicly or commercially available engineering and construction data in the supplemental evidentiary filings contemplated by the Board's September 10, 2007 decision in this case. Should the Board decline to authorize the use of publicly or commercially available data, WFA/Basin request in the alternative that the Board open up the case to a new round of discovery to be followed by new evidentiary filings.

Despite its title, WFA/Basin's Petition seeks to revise the Decision, not to "clarify" it. The Decision as written unambiguously prohibits the use of publicly or commercially available engineering or construction data that is not in the record. The purpose of limiting supplemental

evidence to material already in the record is to avoid relitigating a host of SAC issues that have already been resolved by the Board. BNSF explained in its petition for reconsideration that there is in fact no need for any supplemental evidence in this case. But if supplemental evidence is to be submitted, it should be limited in scope.

WFA/Basin apparently contemplate using the supplemental evidence that the Board has authorized to expand the footprint of its SARR beyond the geographic scope of the SARR they previously posited. BNSF seriously questions the appropriateness of such a reconfiguration. However, this is an issue that is better resolved with reference to the particulars of a proposed reconfiguration than in the abstract. Therefore, BNSF will not oppose WFA/Basin's request for permission to use certain publicly or commercially available engineering and construction data in presenting supplemental evidence, so long as the data are limited to those types of data set out in footnote 2 of the Board's March 5, 2008 decision, namely: "land value data; ICC Engineering Report data; geodetic map data; mileage data; R.S. Means Manual data; and new field observation evidence not currently in the record." *March 2008 Decision* at 1, n.2. WFA/Basin assert that these data may be necessary if WFA/Basin posit a reconfiguration of the SARR.¹

If the Board grants WFA/Basin's request, it should make it clear that the permission to go outside the record extends only to the data specified in footnote 2 of the Board's March 5, 2008 decision. The only rationale offered by WFA/Basin for using data outside the existing record is to support a possible reconfiguration of the SARR, but WFA/Basin's proposed modification to the Decision is more open ended and vague. WFA/Basin specifically request the Board to modify the Decision to allow the parties to submit supplemental evidence on reopening based on

¹ BNSF is concerned that WFA/Basin's reference to "field observations" is vague and open ended and BNSF reserves the right to challenge the reliability and reasonableness of any "field observations" used in WFA/Basin's supplemental evidence.

“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.*” Petition at 9 (emphasis added). WFA/Basin present no rationale for using data other than the publicly or commercially available engineering and construction data identified in footnote 2 of the Board’s March 5, 2008 decision, and the Board should therefore limit the use of non-record data to the data identified in footnote 2.

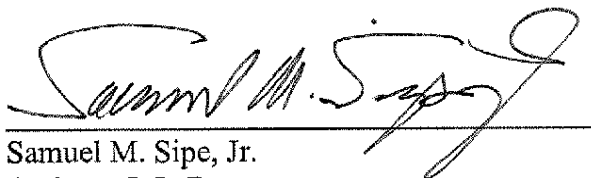
While not opposing the use of the limited data identified in footnote 2 of the Board’s March 5, 2008 decision in WFA/Basin’s supplemental evidence, BNSF does not concede that any reconfiguration of the SARR would be appropriate, and in particular, does not concede that it would be appropriate for WFA/Basin to posit a reconfigured SARR with a geographic footprint extending beyond the lines and yards of the previously posited LRR. However, BNSF and the Board have no way of knowing at this juncture what, if any, reconfiguration of the SARR WFA/Basin might propose. Therefore, rather than addressing the reconfiguration issue in the abstract, BNSF reserves the right to challenge WFA/Basin’s rationale and assumptions regarding any reconfiguration of the SARR in BNSF’s reply to WFA/Basin’s supplemental evidence. BNSF also reserves the right to challenge the reliability or reasonableness of any engineering or construction data that WFA/Basin may use in their supplemental evidence.

In light of BNSF’s position on WFA/Basin’s request to “clarify” the Decision, WFA/Basin’s alternative request for discovery followed by sequential evidentiary filings is moot. WFA/Basin asked the Board to consider its alternative request in the event that the Board declined to permit use of certain publicly or commercially available data. If the Board allows WFA/Basin to use publicly and commercially available engineering and construction data as

discussed above, there is no need to consider WFA/Basin's alternative proposal that a new round of discovery be pursued in this case.

Finally, the Board should cancel the technical conference in this matter that is scheduled for March 14.² If the Board allows WFA/Basin to use publicly and commercially available engineering and construction data of the type identified in footnote 2 of the Board's March 5, 2008 decision, there is no need to waste the Board's and parties' time discussing the detail of that data at a technical conference. If WFA/Basin intend to discuss use of any data other than that identified in footnote 2 of the Board's March 5, 2008 decision, such a discussion would be inappropriate because BNSF would not be in a position to comment meaningfully on such data at the technical conference. BNSF cannot be expected to take a position on the acceptability of any particular data without advance knowledge of the data that WFA/Basin intend to use and how they intend to use it. Accordingly, there is no valid reason to hold a technical conference at this time.

Respectfully submitted,



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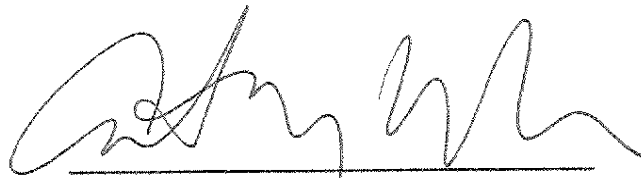
March 7, 2008

² WFA/Basin also request that the filing deadlines in the procedural schedule be extended by the time it takes the Board to decide their Petition. BNSF does not object to this request.

CERTIFICATE OF SERVICE

I hereby certify that this 7th day of March, 2008, I served a copy of BNSF Railway
Company's Reply to Complainants' Petition For Clarification on the following by hand delivery:

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