

***Expedited Consideration Requested***  
**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**



**AEP TEXAS NORTH COMPANY,**

**Complainant,**

**v.**

**BNSF RAILWAY COMPANY,**

**Defendant.**

**Docket No. 41791 (Sub-No. 1)**

**ENTERED**  
**Office of Proceedings**  
**JUN 4 - 2008**  
**Part of**  
**Public Record**

**UNOPPOSED MOTION FOR EXTENSION OF TIME**

Respondent BNSF Railway Company ("BNSF") hereby moves the Board for an extension of the deadlines for the parties to file supplemental opening and reply evidence in this proceeding. The Board's May 29, 2008 decision ordered the parties to file opening evidence on June 30, 2008 and reply evidence on July 14, 2008. As discussed further below, this proposed schedule would create a severe hardship for BNSF, its counsel and consultants, and it could interfere with the creation of a full evidentiary record in this case, since it would require BNSF to prepare opening and reply evidence in this docket at the same time that BNSF is responding to supplemental evidence filed in *Western Fuels Association v BNSF Railway Company*, STB Docket No. 42088. To ensure that the parties have an adequate opportunity to address the issues raised in the Board's May 29, 2008 decision, BNSF requests that the Board modify the schedule and order the parties to submit opening evidence on August 8, 2008 and reply evidence on September 5, 2008.

Counsel for BNSF has conferred with counsel for AEP Texas regarding the proposed extension and is authorized to state that AEP Texas agrees with the alternative schedule proposed by BNSF.

BNSF further requests that the Board give expedited consideration to this request for an extension of time since the date set in the May 29, 2008 decision for filing opening supplemental evidence is already less than one month away. Expedited treatment of this request will allow BNSF to focus its efforts appropriately in the preparation of evidence in the two pending cases.

### **BACKGROUND**

BNSF is a defendant in two pending rate reasonableness cases – this case brought by AEP Texas and a case brought by Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc. (collectively, “WFA/Basin”), in Docket No. 42088. The Board held both cases in abeyance while it considered its proposed new rules for SAC cases in *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1). Following the Board’s adoption of new rules, the Board issued decisions in both cases on September 10, 2007.

The Board found that neither AEP Texas nor WFA/Basin had demonstrated that BNSF’s rates for transportation of coal to the petitioners’ respective electric generating facilities – Oklahoma in the case of AEP Texas and Laramie River in the case of WFA/Basin – were unreasonable. The Board determined, however, that “fairness” dictated that AEP Texas and WFA/Basin should each be given the opportunity to submit modified evidence to respond to the Board’s application of its newly adopted Average Total Cost (“ATC”) methodology for allocating revenues between the stand-alone railroad and the incumbent on cross-over movements. The Board instructed AEP Texas and WFA/Basin to advise the Board whether they sought to reopen the record and submit new SAC evidence. On October 22, 2007, AEP Texas

declined the Board's invitation to submit supplemental evidence. WFA/Basin, on the other hand, accepted the Board's invitation. As a result, WFA/Basin filed opening supplemental evidence on May 13, 2008. BNSF's reply to that opening supplemental evidence is due on July 14, 2008, the same day that the Board has called for reply evidence in the *AEP Texas* case. WFA/Basin's rebuttal evidence is due on August 11, 2008.

Although AEP Texas decided not to seek a reopening, on October 22, 2007 it sought reconsideration of several issues addressed in the Board's September 10 decision. BNSF also sought reconsideration of certain aspects of the September 10 decision. Among other things, AEP Texas argued that it was erroneous for the Board to use the 2005 railroad industry cost of capital in the SAC calculations, since that cost of capital determination used a DCF model that is no longer used by the Board to determine the railroad industry cost of capital. On May 29, 2008, the Board denied both BNSF's and AEP Texas' petitions, with the exception that on the cost of capital issue, the Board "reserve[d] judgment on whether to restate the rail industry's cost-of-capital figures using CAPM in the SAC analysis." May 29 Decision at 7. The Board further directed AEP Texas and BNSF to file additional evidence and argument on the following issues:

- "[E]ach party should submit separate SAC calculations, one showing their cost-of-capital figures developed under the single-stage DCF approach through 2005, changing to a CAPM cost of capital in 2006, and a second showing their cost-of-capital calculations under CAPM for all years."
- "[S]hould any of the revised SAC analyses show an over-recovery of revenue for the [SARR], the parties should apply the 'Maximum Markup Methodology' (MMM) ... to determine the extent of any rate relief to which AEP Texas would be entitled."
- "We also direct the parties to address whether: if the pre-2006 cost-of-capital findings are not restated, we should forecast the cost of capital in succeeding years by taking an average of the 1998 through 2006 cost-of-capital figures (as has been our practice in prior SAC cases), or instead use only the 2006 cost-of-equity figure, which is based on the more current CAPM."

The Board directed that opening evidence and argument should be filed by both parties on June 30, 2008, two weeks prior to the filing deadline for BNSF's reply evidence in the *WFA/Basin* case, and that reply submissions should be filed on July 14, 2008, the day on which BNSF's reply evidence in *WFA/Basin* is due.

### **ARGUMENT**

The schedule established by the Board's May 29, 2008 decision for filing supplemental evidence would impose a severe burden on BNSF and could interfere with the creation of a full evidentiary record in this case. The current schedule would require BNSF to divide its attention between two significant cases under compressed and overlapping schedules for both cases. An extension in the schedule for filing supplemental evidence in the *AEP Texas* case will give both parties adequate time to prepare supplemental evidence.

BNSF is in the process of preparing complex reply evidence in the pending *WFA/Basin* case. The same counsel and consultants represent BNSF in both cases and are involved in the preparation of evidence and argument in both cases. Under the Board's schedule, BNSF's counsel and consultants would be required to prepare potentially complex opening and reply evidence in the *AEP Texas* case at the same time that they are preparing even more complex and detailed reply evidence in the *WFA/Basin* case. As noted, BNSF would be required under the May 29, 2008 schedule to file its opening evidence in the *AEP Texas* case just two weeks before its reply filing is due in *WFA/Basin*, and it would be required to both analyze and respond to *AEP Texas*' opening filing during the two week period that will involve the most intensive

activities in preparing the *WFA/Basin* reply evidence. The Board has regularly granted requests for extension of time under similar circumstances.<sup>1</sup>

The broad scope of WFA/Basin's supplemental opening evidence has already required extensive efforts by BNSF to prepare full and complete evidence in the *WFA/Basin* case within the relatively short period allowed. Although the Board sought to limit the scope of supplemental evidence in the *WFA/Basin* case, WFA/Basin presented an entirely new SARR, posited the construction of new SARR lines, and substantially modified the SARR traffic group. Moreover, while WFA/Basin's original SAC presentation assumed no rerouting of SARR traffic, WFA/Basin's supplemental opening evidence presents a SARR that depends heavily on rerouted traffic. WFA/Basin's supplemental opening evidence thus involves a completely new operating plan for the SARR, new SARR yards, new crew arrangements, new hypothetical interchange arrangements on cross-over traffic, a new interchange partner, and a multitude of other new SAC assumptions that BNSF must address on reply.

It would be particularly burdensome for BNSF to analyze and respond to AEP Texas' opening submission concerning cost of capital and MMM issues during the two-week period between June 30, 2008 and July 14, 2008, when BNSF will be in the process of finalizing, compiling, and double-checking its reply evidence in *WFA/Basin*. A two-week period to analyze and respond to evidence on complex economic issues would be difficult even if there were no other SAC evidentiary filings to make during that time period. The burdens would be

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<sup>1</sup> See, e.g., *Arizona Elec Power Coop, Inc v Burlington Northern and Santa Fe Railway Co*, STB Docket No. 42058 (Served Feb. 11, 2004); *PPL Montana, LLC v Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42054 (Served Aug. 29, 2002); *Texas Municipal Power Agency v Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42056 (Served Jan. 22, 2001)

exacerbated by the need to prepare and file reply evidence in another SAC case during the same two-week period.

Even if BNSF did not have competing demands from the overlapping schedules, the Board's May 29, 2008 schedule would still be compressed given the substantial effort that will be required to prepare the opening and reply evidence called for by the Board in the *AEP Texas* case. The Board has ordered the parties to submit argument and evidence on whether to restate the railroad industry's cost of capital for historical years and how to forecast the cost of capital for future years. The Board has also ordered the parties to restate SAC results under different cost of capital assumptions. This restatement of SAC results will require numerous calculations and modifications to the complex SAC spreadsheets and careful attention to detail.

In addition, if any of the alternative results shows an over-recovery by the SARR, the parties are instructed to apply the Maximum Markup Methodology ("MMM") to determine whether AEP Texas is entitled to any relief. The MMM methodology has never been applied by the Board in a SAC case. Thus, the mechanics for implementing MMM are still in the process of being developed. Moreover, the development of an appropriate MMM model would be complicated in this case by the need to conform that model to different cost of capital assumptions. In the *WFA/Basin* case, the complainants presented three separate models for the application of MMM. It will take time to prepare an appropriate MMM model and apply it to the SAC evidence in this case.

In light of the complexity of the effort needed to prepare supplemental evidence and the overlap in the procedural schedule with in the *WFA/Basin* case, BNSF requests that the Board modify the schedule set out in the May 29, 2008 decision so that the date for filing opening supplemental evidence is August 8, 2008 and the date for reply evidence in September 5, 2008

An extension of the date for filing opening evidence until August 8, 2008 would give BNSF approximately three weeks to prepare evidence after filing reply evidence in the WFA case on July 14, 2008. The Board's May 29, 2008 decision contemplated a one-month period for preparing opening evidence. BNSF proposes that reply evidence be submitted on September 5, 2008 to allow the parties sufficient time to review the opening evidence of the other party and to prepare a response to that evidence. As explained above, the two-week reply period originally contemplated by the Board provides too little time to explore the details of the other party's filings and to prepare responsive evidence. As noted previously, counsel for AEP Texas has authorized BNSF to state that AEP Texas agrees with the alternative schedule proposed by BNSF.

### **CONCLUSION**

For the reasons stated above, the Board should modify the procedural schedule for filing supplemental evidence in this case and instruct the parties to file opening evidence on August 8, 2008 and reply evidence on September 5, 2008. In addition, BNSF requests that the Board give expedited consideration to this request for an extension.

Respectfully submitted,

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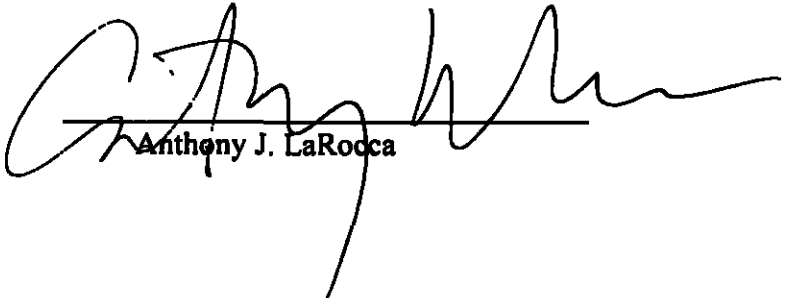
Attorneys for BNSF Railway Company

June 4, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that this 4th day of June, 2008, I served a copy of BNSF's Unopposed Motion For Extension Of Time on the following by hand delivery:

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