

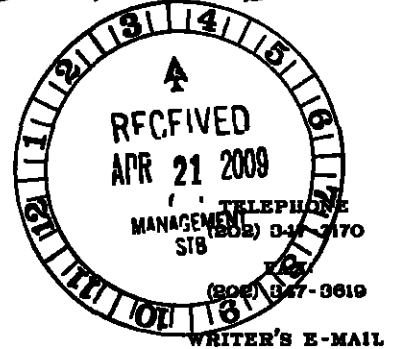
22 4926

SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N.W.

WASHINGTON D.C. 20036-3003



WILLIAM L. SLOVER
C. MICHAEL LOFTUS
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PUGOLIZZI
ANDREW B. KOLESAN III
PETER A. PFOHL
DANIEL M. JAFFE
STEPHANIE P. LYONS
JOSHUA M. HOFFMAN

April 21, 2009

OF COUNSEL
DONALD G. AVERY

VIA HAND DELIVERY

ENTERED
Office of Proceedings

APR 21 2009

Part of
Public Record

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

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

Dear Secretary Quinlan:

Enclosed for filing in the above-referenced proceeding please find an original and 20 copies of WFA/Basin's Motion to Strike BNSF's April 15, 2009 Filing, Or, In the Alternative, Motion For Leave To File A Surreply

Also enclosed for filing are three (3) copies of a compact disc containing the filing and accompanying workpapers. The narrative written portion of the filing is public. The accompanying workpapers contained on the disc are HIGHLY CONFIDENTIAL and are being FILED UNDER SEAL. Expedited handling of this matter is requested for the reasons set forth in the WFA/Basin's April 2, 2009 Reply filing in this docket

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. LeSeur
An Attorney for Complainants

Enclosures
cc. Counsel for Defendant

RECEIVED
APR 21 2009
MANAGEMENT
STB

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

Docket No. 42088

V.

Defendant

ENTERED
Office of Proceedings

APR 21 2009

**Part of
Public Record**

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

OF COUNSEL:

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

**By: John H. LeSeur
Christopher A. Mills
Peter A. Pfohl
Daniel M. Jaffe
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170**

Dated: April 21, 2009

Attorneys for Complainants

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**WFA/BASIN'S MOTION TO STRIKE BNSF'S APRIL 15, 2009 FILING, OR, IN
THE ALTERNATIVE, MOTION FOR LEAVE TO FILE A SURREPLY TO
BNSF'S FILING**

On April 15, 2009, BNSF Railway Company ("BNSF") filed a pleading with the Board entitled "BNSF's Opposition to WFA/Basin's Request for Additional Rate Relief" ("Filing"). For the reasons set forth in Part I below, Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. ("WFA/Basin") request that the Board strike this Filing from the record on grounds that it constitutes an impermissible reply to a reply. Alternatively, if the Board considers BNSF's Filing, WFA/Basin ask that the Board also accept and consider WFA/Basin's surreply set forth in Part II below. This surreply responds to contentions raised for the first time in BNSF's Filing and further demonstrates that WFA/Basin's calculation of the stand-alone cost

(“SAC”) rates called for under the Board’s decision served in this proceeding on February 18, 2009 (“Decision”) are correct.

**I.
THE BOARD MUST STIKE BNSF’S FILING BECAUSE IT IS AN
IMPERMISSIBLE REPLY TO A REPLY**

On March 20, 2009, BNSF filed a Notice¹ setting forth rates, effective on that date, it claimed “complied” with the Board’s Decision. Id., Verified Statement of Jill K. Mulligan at 1. WFA/Basin filed a Reply² to BNSF’s Notice on April 2, 2009. In their Reply, WFA/Basin responded to BNSF’s claim that its rate calculations complied with the Board’s Decision, demonstrated that BNSF’s claims were clearly wrong, and submitted correctly calculated maximum rates.

On April 3, 2009, BNSF submitted a letter replying to WFA/Basin’s Reply. WFA/Basin submitted a letter to the Board on April 6, 2009 asking the Board to reject BNSF’s letter as an impermissible reply to a reply. On April 15, 2009, BNSF filed a second reply to WFA/Basin’s Reply. BNSF’s April 15 Filing is a lengthy pleading in which BNSF presents numerous arguments responding to WFA/Basin’s Reply.

BNSF’s April 15 Filing should be rejected for the same reason its April 3, 2009 letter should be rejected – it is an impermissible reply to a reply. The Board’s Rules

¹ See Notice of Filing of Verified Notice of Compliance (“Notice”).

² See WFA/Basin’s Reply to BNSF’s Notice of Filing of Verified Notice of Compliance (“Reply”).

of Practice clearly state that “[a] reply to a reply is not permitted.” 49 C.F.R. § 1104.13(c); accord Dairyland Power Cooperative v. Union Pacific Railroad Co., STB Docket No. 42105 (STB served July 29, 2008) at 4 n.9 (replies to replies “will not be accepted or considered” by the Board).

It is particularly important that the Board enforce its rules here due to BNSF’s conduct. BNSF has sandbagged WFA/Basin twice in these post-Decision proceedings. First, BNSF refused to meet and confer with WFA/Basin prior to making the rate calculations set forth in its Notice. See Reply at 7. This refusal was directly contrary to the Board’s instructions. See Decision at 31. Second, its Notice is a truncated document that simply describes in two short sentences how BNSF calculated its asserted “compliance” rates. Only after WFA/Basin filed its Reply has BNSF come out of its bunker and presented to the Board and WFA/Basin a multitude of contentions purporting to explain and justify its rate calculations. BNSF could have, and should have, presented these explanations in a meet and confer session or in its Notice. Waiting until after WFA/Basin filed its Reply is not permissible.

Also, the Board should not be misled by BNSF’s actions to end run the Board’s Rules of Practice. WFA/Basin’s Reply responded to, and corrected, BNSF’s rate calculations. This is clearly a permissible reply despite BNSF’s lame attempts to distract the Board’s attention by renaming WFA/Basin’s Reply a “Request for Additional Rate Relief.” Under BNSF’s approach, any time a party presented reply calculations that

differed from those presented by a moving party, the moving party could claim, as BNSF has here, that the replying party is seeking different relief and file a reply to a reply. Such an approach would result in replies to replies in virtually all cases where numerical calculations are presented by the moving party. That is not permitted under the Board's rules

Finally, BNSF cites two cases in support of its request to file a reply to a reply.³ Each case involved abandonment proceedings where the carrier seeking the abandonment filed opening and closing submissions. In each case, the carrier included in its closing submission new material that opposing parties claimed should have been included in the carrier's opening submission. The Board granted the opposing parties requests to file a reply to a reply to address the "new allegations"⁴ and "new information"⁵ contained in the carrier's closing submissions. These case holdings are clearly inapposite here and, if anything, support the principle that the Board will enforce its Rules of Practice in a manner designed to discourage carrier sandbagging tactics

³ See Tulare Valley Railroad Co. – Abandonment and Discontinuance Exemption – in Tulare and Kern Counties, CA, STB Docket No. AB-397 (Sub-No. 5X) (STB served Feb. 21, 1997) ("Tulare") and Wyoming and Colorado Railroad Co., Inc. – Abandonment Exemption – in Carbon County, WY, STB Docket No. AB-307 (Sub-No. 5X) (STB served Nov. 10, 2004) ("Wyoming").

⁴ Wyoming at 1.

⁵ Tulare at 1.

II.

WFA/BASIN CORRECTLY CALCULATED THE ISSUE TRAFFIC SAC RATES

If the Board does decide to accept and consider BNSF's Filing, WFA/Basin request that the Board also accept and consider the additional surreply material set forth below. This surreply addresses contentions BNSF makes for the first time in support of its Notice rate calculations⁶ WFA/Basin's surreply further demonstrates that the BNSF's Notice rate calculations are wrong and that the rate calculations set forth in WFA/Basin's Reply are correct.

A. **BNSF Agrees With WFA/Basin On How and Why the Board Developed the Maximum MMM R/VC Ratios**

In its Decision, the Board determined that the forecasted BNSF revenues for WFA/Basin's stand-alone railroad ("SARR") exceeded the SARR's SAC in all involved time periods. The Board proceeded to utilize its new Maximum Markup Methodology ("MMM") to distribute the rate reductions to qualifying members of the WFA/Basin SARR traffic group so that in each time period SARR revenues equaled SARR costs.

⁶ Consideration of this surreply is necessary to avoid the clear prejudice to WFA/Basin that would otherwise arise if WFA/Basin were not permitted to address BNSF's new contentions and conforms to Board precedent in cases where the Board does permit an opposing party to file a reply to a reply. See, e.g., Arizona Electric Power Cooperative, Inc. v. Burlington Northern and Santa Fe Ry. Co. and Union Pacific R.R. Co., STB Docket No. 42058 (STB served Dec. 31, 2001) at 4 n.8 ("Complainant objected to defendants' filing of a reply to a reply, but addressed the issues raised therein. In the interest of a complete record, we will accept all the tendered pleadings.")

Under the Board's MMM procedures, the Board calculates a rate-to-variable cost ("R/VC") ratio for each on-SARR movement for each involved time period. "MMM then utilizes an iterative process that first determines the average R/VC ratio for the SARR traffic group movements and adjusts the average upward (if necessary) to the benchmark R/VC ratio at which, if all traffic with R/VC ratios above the average are reduced to the benchmark [maximum] R/VC level, and all other rates are left unchanged, the SARR would cover its SAC costs." Decision at 7. Once the benchmark maximum MMM R/VC ratio is determined, SARR traffic group movements with R/VC ratios above the maximum MMM R/VC ratio are reduced to rates with R/VC ratios equal to the benchmark maximum MMM R/VC ratio.

As discussed in detail in WFA/Basin's Reply, the Board calculated the initial R/VC ratios for each involved SARR movement for each involved time period using forecasted BNSF revenues and forecasted BNSF variable costs, with the latter based on 4Q04 URCS costs indexed forward using the RCAF-A. See Reply at 4, 14-15. The Board calculated the resulting maximum MMM R/VC ratios in the workpapers accompanying the Board's Decision and included a table in its Decision showing the resulting maximum MMM R/VC ratios for each involved time period. See id. at 4. For example, the maximum MMM R/VC ratio for 2009 is 240%. Decision at 31

In its April 15 Filing, BNSF does not dispute that the Board developed its MMM procedures to allocate SAC relief. Nor does BNSF dispute that the Board

developed the maximum MMM R/VC ratios in this case using 4Q04 URCS costs indexed by the RCAF-A. However, BNSF claims in its Filing, as it did in its Notice, that the maximum MMM R/VC ratios, which are calculated using indexed 4Q04 costs, should be applied to a different set of costs to determine maximum MMM rates – a procedure that is clearly wrong.

B. BNSF's Assorted Arguments That It Used the Correct Costing Procedures To Develop 1Q09 Maximum MMM Rates Are Wrong

In its Notice, BNSF applied the 2009 maximum MMM R/VC ratio (240%) to issue traffic variable costs calculated using BNSF's 2007 Phase III URCS costs, as developed by BNSF, indexed to 4Q08 levels using a market basket of price indices. In its Reply, WFA/Basin demonstrated that BNSF used the wrong variable cost procedures and corrected BNSF's maximum rate calculations by applying the 240% maximum MMM R/VC ratio to the correctly calculated variable costs – the Board's 2004 URCS costs indexed to 2009 levels using the RCAF-A. These are the same costs the Board used to develop the maximum MMM R/VC ratios.

BNSF argues in its April 15 Filing that its approach to calculating variable costs for MMM purposes is correct, and WFA/Basin's approach is wrong, because its approach, purportedly (1) complies with the Board's instructions in the Decision; (2) follows governing Board precedent; (3) properly applies SAC theory; (4) produces more accurate results; (5) produces reparations in line with the Board's forecasts; and (6) is

otherwise consistent with Board standards and objectives in maximum rate cases. Each of these assertions is wrong.

1. BNSF Did Not Comply With the Board's Instructions

In its Decision, the Board directed the parties to apply the “Maximum MMM R/VC” ratios to variable costs developed “using unadjusted URCS, with indexing as appropriate.” *Id.* at 31. BNSF claims that these “express terms” instruct BNSF to utilize the Board’s 2007 URCS, indexed using BNSF’s market basket price index to 4Q08 levels. Filing at 2, 5. BNSF’s construction of the Board’s “express terms” is obviously incorrect.

Both WFA/Basin and BNSF developed variable costs for purposes of calculating the maximum MMM SAC rates using “unadjusted URCS, with indexing.” Decision at 31. The question here is which unadjusted base-year costs to use, and how to index those base-year costs. The Board answered the question of “which costs” to use in Major Issues.⁷ There the Board held that “[t]o calculate [MMM] rate prescriptions, the parties should project the initial (base-year) URCS variable costs forward.”⁸ The base-year costs in this case, as BNSF acknowledges, are 4Q04 URCS costs Notice at 6. The

⁷ Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1) (STB served Oct. 30, 2006), aff’d sub nom. BNSF Ry. Co. v. STB, 526 F.3d 770 (D.C. Cir. 2008) (“Major Issues”).

⁸ *Id.* at 14 n.19. BNSF argues that the Board’s statement refers only to the calculation of the maximum MMM R/VC ratios (Filing at 11-12) but the Board’s statement clearly and specifically states “rate prescriptions” (emphasis added) must be calculated using the “initial (base-year)” costs, indexed forward.

Board answered the question of which indexing procedures should apply by holding in its Decision that the 4Q04 URCS base-year MMM variable costs should be indexed using the RCAF-A. Decision at 30.

The Board itself followed these clear directions when it developed maximum MMM rates for the forecast issue traffic movements. As shown in the Board's Decision workpapers, the Board developed maximum MMM rates for the forecast traffic moves using 4Q04 base-year URCS costs, indexed going forward using the RCAF-A forecast in the record. See Reply at 4-6. WFA/Basin's calculations of variable costs, and maximum MMM rates, for all issue traffic origins, follow the MMM rate prescription calculation instructions set forth in Major Issues, as applied by the Board in its Decision workpapers. BNSF's procedures do not See id at 11-19.

2. BNSF's MMM Costing Procedures Do Not Comply With Governing Board Precedent

BNSF claims that its MMM variable costing procedures comply with "30 years" of governing Board and Interstate Commerce Commission ("ICC") precedent concerning the calculation of variable costs in maximum rate cases. See Filing at 11. This argument misstates and misapplies governing Board/ICC precedent.

MMM is a new method to calculate maximum SAC rates. The Board developed MMM in its 2006 Major Issues proceeding and applied "MMM for the first time" in its Decision. Decision at 30. There obviously is not "30 years" of precedent on how to calculate MMM variable costs. The governing precedents here are the Board's

Major Issues standards and the Board's application of those standards in the Decision workpapers. As demonstrated above, and in WFA/Basin's Reply, WFA/Basin's MMM cost calculations conform to these governing precedents whereas BNSF's cost calculations clearly do not.

BNSF also misstates the holdings in the Board cases and proceedings that it cites as supporting its "precedent" arguments. In SAC cases, the Board sets maximum rates at the greater of the 180% R/VC jurisdictional threshold ("JT") or the applicable SAC rate.⁹ BNSF claims the governing precedent here is the Board's procedures for updating base-year JT calculations. This precedent is inapposite because MMM is not a JT calculation, it is a SAC calculation, and the Board's use of indexed base-year costs in making SAC calculations is fully consistent with governing SAC precedent.

In making JT calculations, the Board has directed parties to periodically update base-year URCS JT calculations using the most recently available data when the calculation needs to be made.¹⁰ However, the Board has not applied similar procedures in making SAC calculations. Instead, the Board has directed that SAC calculations be based on the Board's base-year SAC calculations, and the forecasts of those computations contained in the Board's SAC model, unless a party demonstrates that

⁹ See, e.g., West Texas Utilities Co. v. Burlington Northern and Santa Fe Ry. Co., STB Docket No. 41191 (STB served June 27, 2003) at 2 ("a railroad has the right to charge the higher of the SAC rate or the jurisdictional threshold"), Wisconsin Power and Light Co. v. Union Pacific R.R. Co., 5 S.T.B. 955, 966, 985 (2001) ("WPL") (same); Major Issues at 6 (same).

¹⁰ See, e.g., WPL, 5 S.T.B. at 985 n.84.

continued reliance on the forecasts constitutes material error.¹¹ The Board has also emphasized that normal “short-term, year-to-year fluctuations” in SAC model forecasts do not constitute material error.¹²

The Board’s application of its MMM procedures is part of the Board’s calculation of SAC rates, not part of its calculation of the JT.¹³ The Board’s decision in Major Issues to utilize forecasted base-year costs to calculate maximum MMM SAC rates, and the Board’s application of those standards in its Decision workpapers, is clearly consistent with the Board’s use of forecasted data to calculate SAC rates in all of its prior SAC decisions.

The Board treats updating the JT and SAC differently for obvious reasons. See Reply at 16-17. The JT is a calculation independent of SAC that can be updated easily. That is not true of SAC calculations. SAC involves many different moving parts including complex forecasts of traffic group revenues; SAC calculations; and with MMM, MMM variable costs. Updating SAC calculations (e.g., changing the base-year traffic or revenue projections) is a massive undertaking because, as a practical matter, the whole SARR may need to be revamped, and a new operating plan prepared, based on

¹¹ See Major Issues at 72; Arizona Public Service Co. and PacifiCorp v. The Atchison, Topeka and Santa Fe Ry. Co., 2 S.T.B. 367, 384-85, 395 (1998) (“APS”)

¹² Major Issues at 72; accord APS, 2 S.T.B. at 384-85, 395.

¹³ See, e.g., Major Issues at 9 (purpose of MMM is to “allocate the total SAC costs among all of the movements in the traffic group”); Decision at 29 (“MMM seeks to determine how much differential pricing the carrier must be permitted in order to recover the total SAC costs”).

changing traffic patterns and modeling of the SARR's operations using the Rail Traffic Controller modeling required in a SAC case. Also, the SAC forecasts are all intended to work in harmony, using common base periods and compatible forecasting procedures, so selective updating of some model inputs but not others produces skewed, nonsensical results because the SAC model is not being run with a complete, compatible data set.

**3. BNSF's Procedures Violate Basic SAC Principles
Applied By the Board In Major Issues**

According to BNSF, the Board ruled in Major Issues that the calculation of maximum MMM R/VC ratios is an exercise in the "SAC world," whereas application of the ratios is a "real world" exercise that requires application of the maximum MMM R/VC ratios to the most current variable cost data available for the issue traffic. Filing at 4-5, 18-19.

BNSF's musings concerning "real world" and "SAC world" concepts find no support whatsoever in Major Issues or any of the Board's other decisions involving SAC calculations. The SAC test, by definition, sets the rate a hypothetical, highly efficient SARR could charge to provide service to the complainant shipper. The defendant carrier's "real world" rates are then compared to the hypothetical SARR's rates and if the "real world" rates the defendant carrier is collecting from the complainant shipper exceed the rates the hypothetical SARR would collect for this service, the shipper is entitled to rate relief. See Major Issues at 7 ("Under the SAC constraint, the rate at issue cannot be higher than what the SARR would need to charge to serve the

complaining shipper while fully covering all of its costs, including a reasonable return on investment. This analysis produces a simulated competitive rate against which we judge the challenged rate.”)

BNSF is really trying to re-write the Board’s decision in Major Issues, and all of the Board’s prior decisions adopting and applying the SAC test, to change the SAC test. The SAC test compares “real world” rates to hypothetical SAC rates and then lowers the real world rates if the hypothetical SAC rates are lower. The hypothetical SAC rates are the product of the Board’s SAC model, which, as applied here, develops MMM variable costs using 4Q04 base-year URCS costs, indexed by the RCAF-A. The SAC rates in this case are produced using this SAC model, not the arbitrary approach BNSF cooked up that mixes some SAC model inputs (the maximum R/VC ratios) with non-model inputs (different variable costs and different indexing procedures) to produce a result that is not a SAC rate but some artificial agglomeration of inputs that achieves BNSF’s real objective – higher maximum rates than those called for under the Board’s SAC constraint.¹⁴

¹⁴ BNSF also repeatedly argues that the Board’s MMM procedures produce maximum R/VC ratios, not maximum rates, and as a consequence the Board intended in Major Issues that the R/VC ratios be applied to the most currently available variable cost data in order to reduce reliance on SAC forecasts. See, e.g., Filing at 17-18. That of course is not what the Board said or did in Major Issues. The Board addressed concerns about the reliance on forecasts in the SAC modeling process by reducing the SAC discounted cash flow analysis period in future cases (but not in the instant case) from 20 years to 10 years. See Major Issues at 64-66, 75. The Board separately addressed the issue of how to calculate variable costs for MMM rate prescription purposes and, as

In its Decision, the Board rejected several BNSF proposals that collaterally attacked the MMM procedures adopted by the Board in Major Issues. See Decision at 6-8. BNSF's maximum rate calculations constitute BNSF's most recent collateral attack on the Major Issues MMM procedures. The Board should reject this attack, just as it has rejected BNSF's prior collateral attacks.

4. BNSF's "Accuracy" Claims Are Wrong

BNSF repeatedly argues that use of indexed 2007 URCS costs produces more "accurate" variable cost computations than the use of indexed 4Q2004 URCS costs. Notice at 4, 5, 12-15, 17, 19-21. BNSF's contentions are wrong because they fail to recognize the purpose and use of the MMM procedures in developing maximum SAC rates.

The Board's calculation of traffic group members' revenues and SAC costs is predicated upon the use of forecasted base-year costs. If the revenues exceed the SAC costs in the analysis period, the Board uses MMM to allocate the revenue reductions. MMM uses forecasted base-year variable cost computations to make these reduction distributions. BNSF's claims that updating the base-year 2004 MMM variable costs to 2007 levels for the issue traffic will produce more "accurate" results is not correct because, as discussed above, selective updating of some components in the SAC analysis,

discussed above, held that these costs should be calculated using indexed base-year costs. See id. at 14 n.19.

but not all components, does not produce more “accurate” results. Indeed, it produces skewed, inaccurate results.

WFA/Basin provided one example of this skewing in its Reply. The most basic principle of the Board’s SAC test is that a complainant shipper will not pay more than the SAC rate for its service.¹⁵ If SAC rates are calculated using WFA/Basin’s variable costing approach, SAC rates on their traffic will be reduced to equal the SAC model rates in 2009 (and in all other time periods). However, if SAC rates are calculated using BNSF’s “updated” approach, SAC rates on the WFA/Basin traffic will not be reduced to equal the SAC model rates in 2009 (and in all other time periods). WFA/Basin’s rate calculation results are obviously correct and BNSF’s calculations are obviously wrong.

A second example further illustrates the obvious infirmities in BNSF’s “accuracy” claims. BNSF’s procedures call for “updating” the variable cost computations for only the issue traffic. However, if, as BNSF postulates, variable costs should be updated, variable costs should be updated not just for the issue traffic, but all other members of the SARR traffic group. This procedure would restate all traffic group members’ costs to the same “updated” basis and result in traffic group revenues being reduced to equal SAC costs.

¹⁵ See Major Issues at 7. The only exception to this rule is if the SAC rate is less than the JT, the Board will set the maximum rate at the JT level.

WFA/Basin include in their surreply workpapers the MMM calculations and results for 2009 if variable costs for all traffic group members are updated, following the same procedures BNSF selectively applied only to the issue traffic – i.e. 2007 URCS costs are indexed to 4Q08 levels using BNSF’s price index procedures – and the MMM model is re-run with the new updated cost inputs. The results are shown in Table 1, which also includes the 2009 MMM rate calculations set forth in WFA/Basin’s Reply and the 2009 MMM rate calculations set forth in BNSF’s Notice:

Table 1 Comparative 2009 MMM Calculations			
Mine Origin	All Traffic Group Update (\$/Ton) ¹⁶	WFA/Basin MMM (\$/Ton) ¹⁷	BNSF Notice (\$/Ton) ¹⁸
Antelope	\$2 78	\$2 74	\$3 89
Belle Ayr	\$3 62	\$3 62	\$5 10
Black Thunder	\$3 21	\$3 19	\$4 52
Buckskin	\$4 19	\$4 06	\$5 90
Caballo	\$3 67	\$3 65	\$5 17
Caballo Rojo	\$3 63	\$3 59	\$5 10
Cordero	\$3 52	\$3 49	\$4 95
Dry Fork	\$4 08	\$4 06	\$5 73
Eagle Butte	\$4 14	\$4 09	\$5 83
Jacobs Ranch	\$3 32	\$3 24	\$4 67
North Antelope	\$2 89	\$2 83	\$4 07
Rawhide	\$4 11	\$4 11	\$5 78

¹⁶ See WFA/Basin Apr. 2, 2009 Reply electronic workpaper “WFA 2009 MMM Rates With Updated Variable Cost.xls.”

¹⁷ See WFA/Basin Apr. 2, 2009 Reply electronic workpapers “2004 URCS phase III inputs and outputs_2009 correction.xls,” and “MMM Model Linked to III-H-3 Reb (STB final corrected revenues) xls ”

¹⁸ See BNSF electronic workpaper “WFA 2009 Rates.xls.”

As shown in Table 1, updating all of the MMM variable cost inputs using BNSF's updating procedures, re-running the MMM model, and applying the resulting maximum MMM R/VC ratios to the issue traffic movements' updated variable costs produces issue traffic SAC rates very similar to those calculated using the WFA/Basin's Reply procedures. The principal reason for this result is that when all traffic group members' variable costs are updated using BNSF's procedures, the maximum MMM R/VC ratio drops from 240% to 171%. Thus, the increase in the variable costs is offset by the decrease in the maximum MMM R/VC ratio.

WFA/Basin are not advocating here that the Board update the MMM R/VC ratios. The results summarized in Table 1 simply demonstrate that BNSF's selective updating of only the issue traffic variable costs produces a skewed answer because BNSF's procedure fails to recognize that the MMM model inputs are all interrelated. If, however, the Board does decide that the parties should use updated variable costs to make MMM calculations, all traffic group members' variable costs will need to be recalculated and the MMM model run with the new R/VC ratio inputs. Any other approach will result in clearly erroneous results since the variable costs for the traffic group members will not be calculated using the same procedures and, as a result, qualifying traffic group members' rates will not be reduced to appropriate SAC levels.

**5. BNSF's Rate Calculations Do Not
Conform To Board Forecasts**

The Board estimated that its Decision would reduce WFA/Basin's forecasted tariff rates by 60%. Id. at 2. As shown in WFA/Basin's Reply, BNSF's calculations fall far short of the predicted 60% reduction and cut the forecasted relief by 33%. Id. BNSF begrudgingly acknowledges that its calculations produce reductions far below those estimated by the Board but claims that its rate calculations are supported by the Board's reparations forecasts. See Filing at 21, 15-16.

Specifically, BNSF estimates that use of its rate setting procedures will produce reparations of approximately \$114 million, an amount that it claims is in line with the Board's \$100 million reparations estimate. Id. at 15-16. In reviewing BNSF's contentions here, WFA/Basin discovered that the Board made an error in the reparations calculations set forth in its workpapers and summarized in its News Release. That error involved the use of understated forecast issue traffic tonnages due to the Board's importing tonnages from the wrong spreadsheet cells.¹⁹ Use of the correct forecast tonnages increases the projected reparations to approximately \$143 million (on a nominal basis)²⁰ Of course, WFA/Basin paid BNSF sums substantially in excess of the

¹⁹ See STB electronic workpaper "MMM Model Linked to III-H-3 Reb.xls," cells G5 to G8 in each worksheet. This error does not impact the Board's MMM calculations since the Board used the correct issue traffic forecast tonnages in making these calculations. If, as appears likely, BNSF was studying the Board's reparations calculations, it too would have noticed this error, but BNSF does not mention it in its Filing.

forecasted \$143 million, and they will seek only to obtain reparations due them for unlawful payments, plus applicable interest.

6. BNSF's Other Erroneous Contentions

BNSF makes a series of other erroneous contentions, including the following.

- BNSF claims that the maximum MMM SAC rates calculated by WFA/Basin fall below the JT in the first quarter of 2009. See Filing at 19-20. That is not correct. See WFA/Basin Reply at 20 n.17. Moreover, if the maximum MMM SAC rates fall below the JT in other time periods, the maximum rates for those periods will simply be set at the JT levels.

- BNSF claims that WFA/Basin's calculation of the maximum MMM SAC rates is inconsistent with the statutory directive calling for the Board to consider BNSF's revenue needs when setting maximum rates. See Filing at 15. The Board's SAC test fully accounts for BNSF's revenue needs and the results of that test comply with the Board's statutory directive to consider a carrier's revenue needs in setting maximum reasonable rates. See BNSF Ry. v. STB, 453 F.3d 473, 480 (D.C. Cir. 2006) (SAC test implements statutory revenue adequacy directives).

- BNSF claims that WFA/Basin used the wrong mileages to calculate Phase III URCS costs on the issue traffic moves. See Filing at 23. The mileages used by

²⁰ See WFA/Basin Apr. 2, 2009 Reply electronic workpaper "MMM Model Linked to III-H-3 Reb (STB Corrected).xls."

WFA/Basin are the same mileages used and accepted by the Board in its development of URCS Phase III costs in this case. Moreover, these mileages were originally calculated by the BNSF in its July 14, 2005 filing in this case, and were subsequently accepted by both parties.²¹ WFA/Basin correctly relied upon the mileages agreed to by the parties in this case.

- BNSF claims that WFA/Basin misapplied the corrections set forth in the parties Technical Corrections Petition.²² See Filing at 23-24. BNSF is again incorrect. WFA/Basin correctly applied the technical corrections to produce the corrected figures included in WFA/Basin's Reply. BNSF claims that WFA/Basin's application of the technical corrections "make no sense," (Filing at 24, n.7) but BNSF presents no supporting workpapers or corrected revenue calculations. BNSF's unsupported challenge is incorrect and should be rejected by the Board.

CONCLUSION

WFA/Basin request that the Board grant the relief they request in the

²¹ See BNSF July 14, 2005 Reply electronic workpaper "BNSF Moba Reply PRB.123," worksheet "OPR_STATS."

²² See Joint Petition To Correct Technical and Computational Errors, filed Mar. 10, 2009 ("Technical Corrections Petition").

manner set forth above.

Respectfully submitted,

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

OF COUNSEL:

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

Dated: April 21, 2009

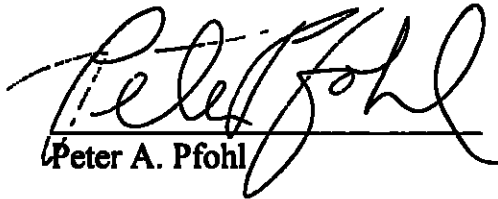
By. John H. LeSeur 
Christopher A. Mills
Peter A. Pfohl
Daniel M. Jaffe
1224 Seventeenth Street, N.W.
Washington, D C 20036
(202) 347-7170

Attorneys for Complainants

CERTIFICATE OF SERVICE

I hereby certify that this 21st day of April, 2009, I served copies of
WFA/Basin's Motion To Strike BNSF's April 15, 2009 Filing, Or, In the Alternative,
Motion For Leave To File A Surreply To BNSF's Filing by hand delivery on designated
outside counsel for BNSF, as follows:

Samuel M. Sipe, Jr., Esq.
Anthony J. LaRocca, Esq.
Frederick J. Horne, Esq.
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795



Peter A. Pfohl