

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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RATE REGULATION REFORMS

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Docket No. EP 715

**REPLY SUBMISSION OF WESTERN COAL TRAFFIC LEAGUE,
CONCERNED CAPTIVE COAL SHIPPERS, AMERICAN PUBLIC POWER
ASSOCIATION, EDISON ELECTRIC INSTITUTE, NATIONAL RURAL
ELECTRIC COOPERATIVE ASSOCIATION, WESTERN FUELS
ASSOCIATION, INC., AND BASIN ELECTRIC POWER COOPERATIVE, INC.**

C. Michael Loftus
Andrew B. Kolesar III
Stephanie M. Archuleta
Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

*Counsel for Concerned Captive
Coal Shippers*

William L. Slover
John H. LeSeur
Robert D. Rosenberg
Peter A. Pfohl
Daniel M. Jaffe
Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

*Counsel for Western Coal Traffic League,
American Public Power Association,
Edison Electric Institute, National Rural
Electric Cooperative Association,
Western Fuels Association, Inc., and
Basin Electric Power Cooperative, Inc.*

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GLOSSARY

AAR	Association of American Railroads
<i>AEP Texas</i>	<i>AEP Tex. N. Co. v. BNSF Ry.</i> , NOR 41191 (Sub-No. 1) (STB served Sept. 10, 2007)
<i>AEPCO</i>	<i>Ariz. Elec. Power Coop., Inc. v. BNSF Ry. & Union Pac. R.R.</i> , NOR 42113 (STB served Nov. 22, 2011)
<i>APS I</i>	<i>Ariz. Pub. Serv. Co. v. Atchison, Topeka & Santa Fe Ry.</i> , 2 S.T.B. 367 (1997)
<i>APS II</i>	<i>Ariz. Pub. Serv. Co. v. Atchison, Topeka & Santa Fe Ry.</i> , 7 S.T.B. 1021 (2004)
<i>APS</i>	<i>APS I</i> and <i>APS II</i>
ARC	Alliance for Rail Competition, <i>et al.</i>
AECC	Arkansas Electric Cooperative Corporation
<i>Arkansas Power</i>	<i>Ark. Power & Light Co. v. Burlington N. R.R.</i> , 3 I.C.C.2d 757 (1987)
ATC	Average Total Cost
BNSF	BNSF Railway Company
Chemical Shippers	American Chemistry Council, <i>et al.</i>
Chlorine Shippers	Chlorine Institute
<i>Coal Rate Guidelines</i>	<i>Coal Rate Guidelines – Nationwide</i> , 1 I.C.C.2d 520 (1985), <i>aff'd sub nom. Consolidated Rail Corp. v. United States</i> , 812 F.2d 1444 (3d Cir. 1987).
<i>Coal Shippers</i>	Western Coal Traffic League, Concerned Captive Coal Shippers, American Public Power Association, Edison Electric Institute, National Rural Electric Cooperative Association, Western Fuels Association, Inc., and Basin Electric Power Cooperative, Inc.
CSX	CSX Transportation, Inc.
CURE	Consumers United for Rail Equity

<i>DuPont</i>	<i>E.I. DuPont de Nemours & Co. v. Norfolk S. Ry.</i> , NOR 42125 (STB served Nov. 29, 2012)
ECP	Efficient Component Pricing
FERC	Federal Energy Regulatory Commission
Grain Shippers	National Grain and Feed Association
ICC	Interstate Commerce Commission
<i>IPA</i>	<i>Intermountain Power Agency v. Union Pac. R.R.</i> , NOR 42136
<i>July 2012 Decision</i>	<i>Rate Regulation Reforms</i> , EP 715 (STB served July 25, 2012)
KCS	Kansas City Southern Railway Company
MMM	Maximum Markup Methodology
NS	Norfolk Southern Railway Company
<i>OPPD I</i>	<i>Omaha Pub. Power Dist. v. Burlington N. R.R.</i> , 3 I.C.C.2d 123 (1986)
<i>OPPD II</i>	<i>Omaha Pub. Power Dist. v. Burlington N. R.R.</i> , 3 I.C.C.2d 853 (1987)
<i>OPPD</i>	<i>OPPD I and OPPD II</i>
OxyChem	Occidental Chemical Corporation
PPG	PPG Industries, Inc.
PRB	Powder River Basin
RPI	Road Property Investment
SAC	Stand-Alone Cost
SARR	Stand-Alone Railroad
Shortlines	American Short Line and Regional Railroad Association
<i>Simplified Standards</i>	<i>Simplified Standards for Rail Rate Cases</i> , EP 646 (Sub-No. 1) (STB served Sept. 5, 2007)
STB/Board	Surface Transportation Board

UP	Union Pacific Railroad Company
URCS	Uniform Railroad Costing System
USDA	United States Department of Agriculture
USM	US Magnesium, L.L.C.
WFA	<i>W. Fuels Ass'n, Inc. v. BNSF Ry.</i> , NOR 42088 (STB served Feb. 18, 2009, June 5, 2009, and June 15, 2012)
WFA 2007	<i>W. Fuels Ass'n, Inc. v. BNSF Ry.</i> , NOR 42088 (STB served Sept. 10, 2007)
WTU	<i>W. Tex. Utils. Co. v. Burlington N. R.R.</i> , 1 S.T.B. 638 (1996)

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ASSOCIATION, INC., AND BASIN ELECTRIC POWER COOPERATIVE, INC.**

In response to the Surface Transportation Board’s (“STB” or “Board”) decision served in this proceeding on July 25, 2012 (“*July 2012 Decision*”), the Western Coal Traffic League, Concerned Captive Coal Shippers, American Public Power Association, Edison Electric Institute, National Rural Electric Cooperative Association, Western Fuels Association, Inc., and Basin Electric Power Cooperative, Inc. (collectively “Coal Shippers”) present the following reply submission.

PREFACE AND SUMMARY

The Board instituted this proceeding to obtain public comment on the following Board proposals:

Full-SAC Cases: The Board proposed two “technical” changes to the calculation of stand-alone costs (“SAC”): (i) stand-alone railroads (“SARR”) would have to originate or terminate overhead cross-over traffic and/or transport only trainload traffic, and (ii) the Board would replace the Modified Average Total Cost (“Modified ATC”) method to

allocate cross-over traffic revenues with a new Alternative Average Total Cost (“Alternative ATC”) method.

Simplified-SAC Cases: The Board proposed to remove the current adjusted \$5 million relief cap, but, in return, complainant shippers would be required to submit detailed road property investment (“RPI”) calculations.¹

Three-Benchmark Cases: The Board proposed to increase the current adjusted \$1 million relief cap to \$2 million.

According to the Board, its proposals were intended “to improve ways to protect captive rail shippers from unreasonable rates.”²

A broad spectrum of shippers,³ including Coal Shippers, tendered opening submissions in this proceeding. The United States Department of Agriculture (“USDA”) also filed an opening submission on behalf of agricultural shippers. Shippers, and USDA, agree that the Board’s proposals do not “improve ways to protect captive shippers from unreasonable rates”:

Full-SAC Cases: Shippers uniformly oppose the Board’s proposals to limit cross-over traffic, and to replace Modified ATC with Alternative ATC because, if adopted, the proposals will preclude captive shippers from obtaining Full-SAC relief in most cases.

¹ The Board also proposed to apply Alternative ATC in Simplified-SAC cases.

² STB News Release No 12-13 at 1 (July 25, 2012) (initial caps and bolding omitted).

³ See Opening submissions (“Op.”) filed by American Chemistry Council, *et. al* (“Chemical Shippers”); Chlorine Institute (“Chlorine Shippers”); National Grain and Feed Association (“Grain Shippers”); Alliance for Rail Competition *et al.* (“ARC”); Consumers United For Rail Equity (“CURE”); US Magnesium, L.L.C. (“USM”); PPG Industries, Inc. (“PPG”); Arkansas Electric Cooperative Corporation (“AECC”); and Occidental Chemical Corporation (“OxyChem”).

Simplified-SAC Cases: Shippers/USDA uniformly oppose the Board’s proposals because requiring shippers to make detailed RPI calculations offsets any benefits associated with eliminating the rate caps. Shippers are doubtful that any shipper will pursue a Simplified-SAC case, but, to incent a shipper to seek relief under this standard, Shippers/USDA request that the Board abolish rate relief caps, allow 10-year rate prescriptions, and retain the current RPI calculation procedures.

Three-Benchmark Cases: Shippers/USDA have grave concerns that the Three-Benchmark approach will not provide any meaningful rate relief to captive shippers, but to incent a shipper to seek relief under this standard, Shippers/USDA request that the Board abolish rate relief caps and allow 10-year rate prescriptions.

The major railroads, and railroad trade associations, also presented opening submissions.⁴ The railroads’ submissions demonstrate that they have no interest in “improv[ing] ways to protect captive shippers from unreasonable rates.”⁵ For the most part, the railroads devote their submissions to the promotion of new approaches that, if adopted, would make things worse, not better, for captive shippers.

Nevertheless, even the railroads appear to recognize that some of the Board’s Full-SAC proposals go too far. BNSF, CSXT and NS note that the cross-over traffic “disconnect” issues that appear to be troubling the Board could be solved by

⁴ The railroads filing individually were BNSF Railway Company (“BNSF”), Union Pacific Railroad Company (“UP”) and Kansas City Southern Railway Company (“KCS”). Norfolk Southern Railway Company (“NS”) and CSX Transportation, Inc. (“CSXT”) filed jointly. The Association of American Railroads (“AAR”) and the American Short Line and Regional Railroad Association (“Shortlines”) also filed opening submissions. The Shortlines adopted the AAR’s comments.

⁵ STB News Release No 12-13 at 1 (July 25, 2012) (initial caps and bolding omitted).

permitting the parties to make adjustments to system-average Uniform Railroad Costing System (“URCS”) costs used in the revenue allocation process, rather than by banning certain forms of cross-over traffic. While Coal Shippers do not believe that there is a “disconnect” problem with cross-over traffic revenue allocations, they do agree that any perceived “disconnect” should be addressed by adjusting URCS, not by banning certain forms of cross-over traffic.

ARGUMENT

I.

THE BOARD SHOULD NOT ADOPT ITS PROPOSALS RESTRICTING THE USE OF CROSS-OVER TRAFFIC

The Board’s Full-SAC cross-over traffic restriction proposals are predicated on an asserted “disconnect” between the revenues allocated under the Board’s Modified ATC procedure on “hook-and-haul” traffic as compared to the costs incurred by the SARR and the residual incumbent in transporting this traffic.⁶

The Board appears to believe that the “disconnect” allocates too much revenue to the SARR and too little revenue to the residual incumbent. The Board also appears to believe that the appropriate way to resolve the “disconnect” is to limit SARRs to the transportation of trainload traffic and/or to require SARRs to originate or terminate all cross-over traffic.

Coal Shippers demonstrated in their opening submission that if the Board adopts its proposed cross-over traffic limitations, SAC will simply stop being a viable

⁶ *July 2012 Decision*, slip op. at 16.

remedy for most coal shippers. Coal Shippers also demonstrated that the Board’s “disconnect” premise was wrong, and, even if it was correct, the way to address it would be through modifications to the calculation of URCS variable costs used in ATC. All other shippers addressing the Board’s Full-SAC proposals agree with Coal Shippers.

Several railroads concede that any “disconnects” can be remedied through variable cost modifications. Others devote most of their opening submissions to their side-bar requests that the Board expand this proceeding to ban the use of all forms of cross-over traffic in Full-SAC cases.

A. Adoption of the Board’s Cross-Over Traffic Limitations Would Preclude Most Shippers from Obtaining Any Full-SAC Relief

Coal Shippers demonstrated in their opening submission that the Board’s Full-SAC proposals would effectively end maximum rate regulation for most captive coal shippers.⁷ Thus, Full-SAC would join the regulatory graveyard where the other three asserted large case constraints on rail pricing – revenue adequacy, management efficiency and phase-in – are now buried.⁸

All shippers addressing the Board’s Full-SAC proposals agree with Coal Shippers that the Board’s proposed cross-over traffic limitations would mean the end of Full-SAC as a viable regulatory remedy. *See, e.g.*, CURE Op. at 4 (“the net effect of [the Board’s Full-SAC proposals] would be that most captive shippers would be unable to obtain relief in Full-SAC proceedings”); ARC Op. at 6 (“the proposed changes make Full

⁷ Coal Shippers Op. at 26.

⁸ *Id.* at 11.

SAC cases more expensive and less likely to produce significant relief”); Chemical Shippers Op. at 9 (“the Board’s proposed limits upon cross-over traffic will . . . deny captive shippers meaningful access to the regulatory process”).

All shippers addressing the Board’s Full-SAC proposals also agree with Coal Shippers as to the reasons why the Board’s limitations on cross-over traffic doom the Full-SAC test: SARRs will become unmanageably large, complex and expensive to model (if they must be extended to reach all traffic group origins or destinations) or SARRs will become too small to replicate scale economies enjoyed by the defendant (if they are limited to transportation of trainload traffic). *See, e.g.*, Coal Shippers Op. at 26-33; Chemical Shippers Op. at 6; CURE Op. at 4; AECC Op. at 6.

Finally, all shippers addressing the Board’s Full-SAC proposals agree with Coal Shippers that the Board’s proposals to limit the use of cross-over traffic fly in the face of over 25 years of Board precedent holding that shippers have broad rights to choose their traffic group, and configure their SARRs, in order to maximize SARR revenues while minimizing SARR costs. *See, e.g.*, Coal Shippers Op. at 26-27; Chemical Shippers Op. at 4-5.

For their part, the railroads, with the exception of KCS, offer tepid support for the Board’s proposals to limit the use of cross-over traffic.⁹ As discussed below, two

⁹ *See* CSXT/NS Op. at 18 (“If . . . the Board is unwilling or unable to perform the needed adjustments to URCS to address cross-over traffic revenue allocation distortions, it would be justified in adopting one or both of the limits on cross-over traffic that it has proposed.”); BNSF Op. at 10 (“If the Board does not eliminate cross-over traffic altogether from Full SAC analyses, the Board should limit its use to traffic that is handled by the incumbent in trainload service.”); UP Op. at 6-7 (“if the Board goes no further in

railroads (BNSF and UP) want the Board to expand this proceeding to include banning all forms of cross-over traffic. As also discussed below, BNSF, CSXT and NS recognize the Board's concerns about revenue allocation on hook-and-haul cross-over traffic do not require the adoption of the Board's proposals banning most forms of cross-over traffic.

B. The Board's Proposed Restrictions on Cross-Over Traffic are Predicated on Two Faulty Premises

Coal Shippers demonstrated in their opening submission that the Board's proposals to limit the use of cross-over traffic in Full-SAC cases were based on two faulty premises: (1) that the operations of the SARR are relevant for purposes of the ATC revenue allocation process; and (2) even assuming the SARR's operations were relevant and there was a "disconnect" between the revenues allocated to the SARR and the costs incurred by the SARR, the "disconnect" could be remedied only by banning certain forms of cross-over traffic.¹⁰

Shippers addressing the Board's Full-SAC proposals agree with Coal Shippers that both of the Board's premises are incorrect.¹¹ BNSF, UP, CSXT/NS and AAR agree with the Board that the operations of a SARR are relevant to the revenue allocation process,¹² but none of them addresses the long line of contrary STB

reexamining the use of cross-over traffic in Full SAC cases, UP suggests a complainant should be allowed to choose which of the two limits would apply in its case, but that one or the other should apply"); KCS Op. at 11 ("KCS has no specific comment on the Board's proposal to curtail the use of cross-over traffic in Full-SAC cases"); AAR Comments at 18.

¹⁰ Coal Shippers Op. at 12-13.

¹¹ See, e.g., Chemical Shippers Op. at 10-16.

¹² See BNSF Op. at 11; UP Op. at 6-7; CSXT/NS Op. at 17; AAR Op. at 17-18.

precedents,¹³ nor do they address their own positions to the contrary in individual rate cases.¹⁴

Significantly, however, BNSF, NS and CSXT appear to disagree with the Board's second premise that any "disconnect" between ATC revenue allocations and SARR costs can be remedied only by banning all overhead cross-over traffic or by banning all single-car and multiple-car cross-over traffic. These carriers acknowledge that any such "disconnect" could be remedied by adjusting the variable cost calculations in ATC.

CSXT/NS state:

[I]f the Board were able to adjust its revenue allocation method to account for the unique attributes and characteristics of each particular SARR, the use of crossover traffic would not necessarily need to be limited in the manner the Board has proposed In particular, to address the distortions about which the Board is concerned would require movement-specific adjustments to URCS. *See* NPRM at 16. Contrary to the Board's suggestion, such adjustments are possible,

¹³ *See, e.g., W. Fuels Ass'n, Inc. v. BNSF Ry.*, NOR 42088, slip op. at 12 (STB served Sept 10, 2007) ("WFA 2007") ("the ATC method . . . is keyed to the defendant carrier's relative costs of providing service") (internal quotation marks omitted); *AEP Tex. N. Co. v. BNSF Ry.*, NOR 41191 (Sub-No. 1), slip op. at 13 (STB served Sept. 10, 2007) ("*AEP Texas*") ("the ATC revenue allocation we use here properly focuses on determining the relative costs to the defendant carrier of handling the movement on each part of its system"); *W. Fuels Ass'n, Inc. v. BNSF Ry.*, NOR 42088, slip op. at 13 (STB served Feb. 18, 2009) ("WFA") ("the objective of ATC is to reflect the defendant carrier's relative costs of providing service over the relevant segments of its network").

¹⁴ *See, e.g., AEP Texas*, slip op. at 13 ("BNSF argues that the purpose of ATC is to determine the defendant carrier's relative costs for various line segments, and because the defendant does not incur interchange costs with itself, those costs are irrelevant for purposes of calculating ATC. We agree.") (footnotes omitted).

although they would require that the parties submit additional evidence and argument.¹⁵

Similarly, BNSF states:

It might be possible to correct some of the distortion arising from the use of carload traffic as cross-over traffic by adjusting the variable cost calculations used in the revenue allocation and MMM calculations. Defendants in *AEPCO* proposed such an approach.¹⁶

C. The Board Should Reject the Railroads' Various Side-Bar Arguments Concerning Cross-Over Traffic Restrictions

BNSF and UP devote most of their discussions of cross-over traffic to side-bar arguments not directly responsive to the Board's proposals. The Board should reject these side-bar contentions.

- BNSF and UP argue that the Board should ban the use of all forms of cross-over traffic.¹⁷ The Board has considered – and consistently rejected – BNSF's and UP's arguments because inclusion of cross-over traffic is “an indispensable part of administering a workable [SAC] test.”¹⁸ Indeed, as Coal Shippers demonstrated in their

¹⁵ CSXT/NS Op. at 17-18.

¹⁶ BNSF Op. at 12.

¹⁷ See BNSF Op. at 3; UP Op. at 2-3. Coal Shippers note that the Board's proposals call for the exclusion of all non-trainload cross-over traffic and/or exclusion of all cross-over traffic that a SARR does not originate or terminate. Adoption of either proposal will end the viability of most SARRs. In addition, the only cross-over traffic scenario not covered by the Board's proposals is quite limited: trainload traffic that a SARR originates but does not terminate and trainload traffic that a SARR terminates but does not originate.

¹⁸ *Otter Tail Power Co. v. BNSF Ry.*, NOR 42071, slip op. at 12 (STB served Jan. 27, 2006); *WFA 2007*, slip op. at 11; *accord Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 589, 603 (2004) (without cross-over traffic, “[t]he

opening comments, the Board’s proposals in this proceeding to limit the use of cross-over traffic constitute an unexplained departure from the Board’s prior, correct rulings that use of cross-over traffic is an indispensable component of a viable SAC standard.¹⁹

- BNSF cites *WTU*²⁰ and *APS*²¹ for the proposition that shippers can prevail in Full-SAC cases without the use of cross-over traffic.²² BNSF’s citation to *WTU* is incorrect because the complainant shipper made extensive use of cross-over traffic.²³ Moreover, when the initial *WTU* rate prescription was vacated, the successor shipper (AEP Texas) reconfigured its SARR, and once again included significant volumes of cross-over traffic in its reconfigured SARR.²⁴

The *APS* SARR did not carry any cross-over traffic, but the *APS* case involved a unique set of facts: a SARR that originated coal traffic at a single origin mine in New Mexico and transported the coal to two utility coal plant facilities located near the

number of disputed issues would [] escalate, and the operating plans and computer simulation models would become so complicated as to risk being intractable”).

¹⁹ See Coal Shippers Op. at 27.

²⁰ *W. Tex. Utils. Co. v. Burlington N. R.R.*, 1 S.T.B. 638 (1996) (“*WTU*”).

²¹ *Ariz. Pub. Serv. Co. v. Atchison, Topeka & Santa Fe Ry.*, 2 S.T.B. 367 (1997) (“*APS I*”), prescription vacated, 7 S.T.B. 1021 (2004) (“*APS II*”) (collectively “*APS*”).

²² BNSF Op. at 9.

²³ After the *WTU* complaint was filed, Burlington Northern Railroad Company merged with Atchison, Topeka and Santa Fe Railway Company, creating what is now BNSF. As a result of the merger, the *WTU* SARR carried cross-over traffic which interchanged with the residual incumbent (BNSF) at Fort Worth, Denver and Amarillo. *Id.*, 1 S.T.B. at 658. This cross-over traffic accounted for approximately 33% of the SARR’s total traffic. *Id.*

²⁴ See *AEP Texas*, slip op. at 11 (“As in many recent SAC cases, the complainant here relies extensively on ‘cross-over’ traffic in its SAC presentation.”).

mine.²⁵ Moreover, the *APS* rate prescription did not last long. The Board vacated the *APS* rate prescription when production at the mine declined.²⁶

Since the *APS* case was initially decided in July of 1997, the Board has decided 15 Full-SAC cases.²⁷ In each case, the complainant shipper has modeled its SARR with extensive cross-over traffic.²⁸ Complainant shippers have done so because inclusion of cross-over traffic is essential to make the SAC test work.

- BNSF and UP argue that when the ICC adopted the *Coal Rate Guidelines* in 1985,²⁹ the ICC intended shippers to construct SARRs to provide origin-to-destination service to all members of the traffic group.³⁰ They further contend that exclusion of cross-over traffic would return the SAC standard to the one the ICC envisioned in 1985.³¹ The Board need look no further than the ICC's first two post-

²⁵ See *APS I*, 2 S.T.B. at 381.

²⁶ See *APS II*, 7 S.T.B. at 1028.

²⁷ See *Rail Rate Cases at the STB*, http://www.stb.dot.gov/stb/industry/Rate_Cases.htm (listing cases).

²⁸ See, e.g., Reply of E.I DuPont de Nemours & Company to Norfolk Southern Railway Company's Motion to Hold Case In Abeyance Pending Completion of Rulemaking, Verified Statement of Thomas D. Crowley at Exhibit No. 1, *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry.*, NOR 42125 (filed Aug. 27, 2012) (cross-over traffic has ranged from 74% to 99% of total SARR traffic in Full-SAC cases decided since 1997 where public data exists to make the percentage calculation).

²⁹ *Coal Rate Guidelines – Nationwide*, 1 I.C.C.2d 520 (1985) (“*Coal Rate Guidelines*” or “*Guidelines*”), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987).

³⁰ See BNSF Op. at 9; UP Op. at 9.

³¹ *Id.*

Guidelines decisions – *OPPD*³² and *Arkansas Power*³³ – to conclude that this argument is wrong.

One of the principle issues in *OPPD* was whether *OPPD*'s SARR, which replicated only the facilities along the issue traffic route of movement from the PRB to an *OPPD* power plant in Nebraska,³⁴ also had to replicate the additional feeder and distribution lines needed to provide origin-to-destination service for all traffic group members. The ICC answered this question with an emphatic NO:

It is difficult and costly enough to construct an adequately documented stand-alone hypothetical system. Our guidelines encourage the grouping of traffic to ensure that the SAC system will take full advantage of economies of size, scope, and density. If we were to hold a complainant to a burden of precisely replicating the feeder and distribution network, as BN would have us do, we would place an insurmountable barrier to development of the SAC system, and vitiate the usefulness of the SAC test.³⁵

The ICC reaffirmed this holding in *Arkansas Power*. In *Arkansas Power*, the complainant shipper constructed its SARR from the PRB to the involved Arkansas Power destinations/interchange.³⁶ Relying on *OPPD*, the ICC again held that the complainant shipper did not need to construct “the auxiliary feeder and distribution lines

³² *Omaha Pub. Power Dist. v. Burlington N. R.R.*, 3 I.C.C.2d 123 (1986) (“*OPPD I*”), *aff'd*, 3 I.C.C.2d 853 (1987) (“*OPPD II*”) (collectively “*OPPD*”).

³³ *Ark. Power & Light Co. v. Burlington N. R.R.*, 3 I.C.C.2d 757 (1987) (“*Arkansas Power*”).

³⁴ *See OPPD I*, 3 I.C.C.2d at 136 (“Omaha Power replicated only the lines of Burlington Northern between its own origin and destination”).

³⁵ *OPPD II*, 3 I.C.C.2d at 861.

³⁶ *Arkansas Power*, 3 I.C.C.2d at 772.

outside the stand-alone system”³⁷ because to do so would “mak[e] the SAC system so large that it is unmanageable from a data perspective,”³⁸ while limiting a SARR to traffic moving between the issue traffic origin and destination would produce “traffic densit[ies that] will be unnecessarily light and the computed SAC rate will be higher than would be expected for an efficient new entrant seeking to maximize cost economies.”³⁹

- BNSF argues that cross-over traffic should be limited for use only in Simplified-SAC cases.⁴⁰ This argument twists Board theory beyond recognition. The key simplification in Simplified-SAC is that the shipper forgoes its right to group the traffic to maximize efficiency and instead takes the incumbent’s traffic as it stands.⁴¹ BNSF’s proposal ironically results in Simplified-SAC affording complainant shippers broader grouping rights (by requiring their use of cross-over traffic) than those BNSF would accord shippers in Full-SAC cases (by barring their use of cross-over traffic).

Moreover, the Board never intended Simplified-SAC to be a replacement for Full-SAC. A Full “SAC analysis computes the rate level for a completely different carrier (a hypothetical, optimally efficient carrier transporting only a highly select group

³⁷ *Id.*, 3 I.C.C.2d at 774.

³⁸ *Id.*, 3 I.C.C.2d at 773.

³⁹ *Id.*

⁴⁰ BNSF Op. at 9.

⁴¹ *See Simplified Standards For Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), slip op. at 15 (STB served Sept. 5, 2007) (“*Simplified Standards*”) (“The Simplified-SAC presentation will differ from a Full-SAC presentation by eliminating or restricting the evidence parties can submit on certain issues.”).

of traffic.)”⁴² Full-SAC is intended to be “the most accurate procedure available for determining the reasonableness of rail rates where there is an absence of effective competition.”⁴³

In contrast, the Board’s Simplified-SAC analysis seeks to determine the rate level that the defendant carrier needs to collect “to cover operating expenses and a reasonable return on the replacement value” of the defendant carrier’s “existing facilities used to serve the captive shipper” and requires use of a “traffic group . . . consist[ing] of all movements that traveled over the selected route.”⁴⁴ Simplified-SAC is – by design – “less precise” than Full-SAC because “it will not identify inefficiencies in the current rail operation.”⁴⁵

Finally, BNSF’s proposal is most likely directed at expected outcomes, which, not surprisingly, favor BNSF, not the public interest, which the Board is charged with protecting.⁴⁶ The Board rejected the initial versions of Simplified-SAC because they produced ridiculously high maximum rates.⁴⁷ The Board has not tested the current

⁴² *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1026 (1996).

⁴³ *Simplified Standards*, slip op. at 13.

⁴⁴ *Id.*, slip op. at 15.

⁴⁵ *Id.*, slip op. at 14.

⁴⁶ *See Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry.*, NOR 42057, slip op. at 4 (STB served Jan. 19, 2005) (Board is “the guardian of the public interest”).

⁴⁷ *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. at 1019 (noting that the initial models “allow (indeed assist) a carrier to charge whatever the market will bear”).

version of Simplified-SAC to determine what rate levels it would produce,⁴⁸ but, as shippers demonstrated in *Simplified Procedures*, Simplified-SAC will – by design – produce higher SAC rates than those calculated under current Full-SAC procedures.⁴⁹

- UP argues that if the Board does not reject use of all cross-over traffic, it should ban the use of rerouted cross-over traffic and ban the use of cross-over traffic if the issue traffic is rerouted.⁵⁰ The Board has repeatedly rejected carrier attacks on the use of rerouted cross-over traffic, most recently in *AEPCO*.⁵¹ Rerouting of traffic in Full-SAC cases is “well-established”⁵² and comports with fundamental SAC precepts that a SARR can “provide service in a different way . . . and [can] use rail configurations different from the actual operations of the defendant railroad.”⁵³

⁴⁸ *Simplified Standards*, slip op. at 54.

⁴⁹ Joint Written Comments of American Chemistry Council, *et al.* at 29-30, *Simplified Standards* (filed Oct. 24, 2006) (“By definition . . . Simplified-SAC procedures will always result in a maximum rate higher than the rate calculated under the Full-SAC procedures. . . . What is unknown is: how much higher a rate will the Simplified-SAC procedures produce?”) (emphasis in original). In response, the Board itself acknowledged that in some cases “a Simplified-SAC case may not provide the same amount of rate relief as would be achieved in a Full SAC case.” *Simplified Standards*, slip op. at 72.

⁵⁰ UP Op. at 10-12.

⁵¹ *Ariz. Elec. Power Coop., Inc. v. BNSF Ry. & Union Pac. R.R.*, NOR 42113, slip op. at 10-15 (STB served Nov. 22, 2011) (“*AEPCO*”).

⁵² *Id.*, slip op. at 10.

⁵³ *Id.* at 10.

D. Pending Cases

UP argues that “[t]he Board should apply its proposals for restricting the use of cross-over traffic to pending cases.”⁵⁴ The Board has already rejected this contention. In its *July 2012 Decision*, the Board ruled that it would not apply any proposals it might adopt in this proceeding “retroactively to existing rate prescriptions . . . or to any pending rate dispute that was filed with the agency before the [*July 2012 Decision*] was served.”⁵⁵ The Board reached this result because it did “not believe it would be fair to those complainants, who relied on our prior precedent in litigating those cases.”⁵⁶

The Board recently reaffirmed this ruling. See *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry.*, NOR 42125, slip op. at 4-5 (STB served Nov. 29, 2012) (“*DuPont*”) (“We have already clearly stated that we do not propose to apply any new limitation that may be adopted in EP 715 retroactively to any pending rate dispute that was filed with the agency before the decision was served.”) (internal brackets, ellipses, and quotations omitted). These rulings also comply with governing law, which holds that rules adopted in notice and comment rulemaking proceedings can only be applied prospectively.⁵⁷

⁵⁴ UP Op. at 14 (bolding omitted).

⁵⁵ *July 2012 Decision* at 17 n.11.

⁵⁶ *Id.*

⁵⁷ See 5 U.S.C. § 551(4) (defining a “rule” as “an agency statement of general or particular applicability *and future effect*”) (emphasis added); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 217 (1988) (Scalia, J. concurring) (“a rule is a statement that has legal consequences only for the future”); *Clark-Cowlitz Joint Operating Agency v. FERC*,

UP also makes several assertions concerning the application of the Board's proposals in one pending case where it is a defendant – *IPA*.⁵⁸ UP's assertions appear to be a thinly veiled attempt by UP to file a reply to IPA's reply⁵⁹ opposing UP's motion to hold the *IPA* case in abeyance. The Board should address UP's motion in the *IPA* case, not this proceeding.⁶⁰ Coal Shippers simply note here that holding the *IPA* case in abeyance would severely prejudice IPA for the reasons set forth in IPA's reply to UP's motion.⁶¹

II.

THE BOARD SHOULD NOT ADOPT ITS PROPOSED ALTERNATIVE ATC PROCEDURE

Coal Shippers demonstrated in their opening submission that the Board should not adopt its proposed Alternative ATC procedure because, among other reasons: (1) Alternative ATC produces illogical and unintended results when applied to low, medium and high contribution moves; (2) Modified ATC properly weights economies of density; and (3) constant changing of cross-over traffic revenue allocation procedures to decrease SARR revenues is unfair to captive coal shippers.

826 F.2d 1074, 1082 (D.C. Cir. 1987) (“when [an agency] . . . employs rulemaking procedures, its orders ordinarily are to have only prospective effect”); *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 860 (D.C. Cir. 2002) (rule operates retroactively when it “adversely affects a party's prospects for success on the merits of the claim”) (internal quotation marks and brackets omitted).

⁵⁸ *Intermountain Power Agency v. Union Pac. R.R.*, NOR 42136 (“*IPA*”).

⁵⁹ IPA's Reply to Motion to Hold in Abeyance, *IPA* (filed Sept. 4, 2012).

⁶⁰ *See DuPont*, slip op. at 2 n.4.

⁶¹ *Id.* at 12-23.

All other shippers addressing this proposal agree: the Board should not adopt Alternative ATC. *See, e.g.*, Chemical Shippers Op. at 21 (“Alternat[ive]-ATC will produce . . . illogical results Because this would be a step backwards, the Board should not adopt Alternat[ive] ATC”); CURE Op. at 4 (opposing the “change [to] the revenue calculation associated with ‘cross-over traffic’”); ARC Op. at 2-3 (agreeing with Coal Shippers that Alternative ATC should not be adopted); AECC Op. at 7 (Alternative ATC “lacks a foundation in . . . economic theory”).

The railroads devote little attention to the Alternative ATC issue, and to the extent they do address it, they generally provide no, or only tepid, support for Alternative ATC.⁶² Instead, the railroads urge the Board to adopt alternative cross-over traffic revenue allocation procedures the Board has repeatedly rejected, including setting cross-over traffic revenues using the SARR’s costs,⁶³ Original ATC,⁶⁴ or ECP.⁶⁵ The railroads

⁶² *See* CSXT/NS Op. at 17 and at 17 n.8 (supporting Alternative ATC over Modified ATC, but arguing both methods “produce imperfect and inaccurate cross-over traffic revenue allocations” and advocating the use of “the SARR’s revenues and the SARR’s variable costs” in allocating cross-over traffic revenues); UP at 12 (advocating replacing ATC with Efficient Component Pricing (“ECP”)); KCS Op. at 11 (expressing “no specific comment” on ATC issues); AAR Op. at 22 (“AAR does not believe any amendment to [Original] ATC is necessary” but supports adoption of Alternative ATC to address the Board’s “illusory” concerns with Original ATC); BNSF Op. at 13 (supporting use of Alternative ATC).

⁶³ *See, e.g.*, *WFA 2007*, slip op. at 11.

⁶⁴ *See, e.g.*, *WFA*, slip op. at 6-9 (STB served June 15, 2012).

⁶⁵ *See, e.g.*, *Bituminous Coal – Hiawatha, Utah to Moapa, Nev.*, 10 I.C.C.2d 259, 266 (1994) (rejecting ECP as “inconsistent with the nature and purpose of the SAC constraint” because ECP-based SARR revenue allocations “would allow for only minimal contribution to [the SARR’s] joint and common costs”); *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 37-39 (STB served Oct. 30, 2006) (“ECP conflicts with [SAC] theory and was properly rejected in Nevada Power”

also present the same tired arguments in support of these requests that the Board has repeatedly rejected.

The purpose of this proceeding is “to improve ways to protect captive rail shippers from unreasonable rates.”⁶⁶ Shippers agree: adoption of Alternative ATC will not only not protect shippers, it will hurt them.

III.

OTHER MATTERS

A. The Board’s Proposed Changes to its Simplified-SAC and Three-Benchmark Procedures are Insufficient

The Board’s Simplified-SAC and Three-Benchmark procedures are seldom used. There has only been one Simplified-SAC case brought, and that case settled before it was decided. The Board’s Three-Benchmark procedure is also seldom invoked.

The Board is going down the right path in its consideration of changes to Simplified-SAC and Three-Benchmark case procedures. However, Coal Shippers demonstrated in their opening submission that the Board’s proposed changes to these

because, among other reasons, “cross-over traffic could not provide any contribution to the threshold, joint and common costs”). UP asks the Board to reconsider these decisions. UP Op. at 12-14. However, UP offers no response to the Board’s prior correct concern that ECP allocates too little revenue to the SARR cross-over traffic other than to suggest that the Board eliminate cross-over traffic. *Id.* at 13 (“ECP does not prevent shippers from capturing the incumbent’s full contribution: a shipper can capture the incumbent’s full contribution by designing the SARR to handle the movement from origin to destination.”).

⁶⁶ STB News Release No 12-13 at 1 (July 25, 2012) (initial caps and bolding omitted).

procedures are insufficient to achieve the Board's objective: providing meaningful regulatory protections for captive shippers.

As Coal Shippers explained in their opening submission, the Board's proposal to eliminate relief caps in Simplified-SAC cases is a step in the right direction, but the Board's condition for doing so – requiring complainant shippers to make a full RPI calculation – would be a major step backwards, as would be the Board's failure to increase the rate prescription period from 5 years to 10 years. On balance, Coal Shippers concluded the Board's proposed changes in Simplified-SAC did more harm than good, and did not advance the Board's overall objective: “to improve ways to protect captive rail shippers from unreasonable rates.”⁶⁷

Coal Shippers concerns are shared by all other shippers participating in this proceeding,⁶⁸ as well as USDA, and are aptly summarized in USDA's comments:

USDA agrees with the Board that the limitations on relief for cases brought under the Simplified SAC procedures should be removed. In addition, USDA recommends that the prescribed rate be used for 10 years rather than only five. USDA notes that only one Simplified SAC rate appeal has been filed with the Board, and it was settled before adjudication by the Board. No agricultural shippers have attempted a Simplified SAC rate appeal due to its high costs and complexity relative to the limitations on relief. The lack of cases brought under the Simplified SAC procedures provides evidence that the current Simplified SAC procedures do not work for shippers.

⁶⁷ STB News Release No 12-13 at 1 (July 25, 2012) (initial caps and bolding omitted).

⁶⁸ *See, e.g.*, Chemical Shippers Op. at 24-26; ARC Op. at 6; Grain Shippers Op. at 6-8; USM Op. at 8-11; Chlorine Shippers Op. at 4-5; PPG Op. at 5-9; CURE Op. at 3-4; AECC Op. at 3; Occidental Op. at 2.

USDA does not agree that the accuracy of the Road Property Investment component of the Simplified SAC procedures is something the Board should address. The Board admits this change would have the effect of adding complexity and costs to the Simplified SAC procedures. Adding additional costs and complexities may make a simplified SAC rate appeal even more inaccessible to some shippers who might otherwise consider it with the removal of limits on relief.

USDA Op. at 3.

Coal Shippers also demonstrated in their opening submission that the Board's proposal to raise the rate cap in Three-Benchmark cases was not enough to make Three-Benchmark relief of practical use to captive shippers. Coal Shippers recommended that the Board eliminate all caps on Three-Benchmark relief. All other shippers participating in this proceeding agree with Coal Shippers' concerns and most support eliminating all rate caps on Three-Benchmark relief or substantially increasing those caps.⁶⁹

Some of these shippers also point out – correctly – that the Three-Benchmark procedure has other significant flaws that need to be corrected, including its reliance on comparison group prices (called R/VC_{comp}) that are subject to carrier manipulation in the form of across-the-board comparison group rate increases.⁷⁰

Once again, shippers concerns are aptly summarized by USDA:

⁶⁹ See, e.g., Chemical Shippers Op. at 27-29; ARC Op. at 7-12; Grain Shippers Op. at 8-10; USM Op. at 5-8; Chlorine Shippers Op. at 5; PPG Op. at 9-10; CURE Op. at 1-2; OxyChem Op. at 2.

⁷⁰ See, e.g., Chlorine Shippers Op. at 6-7; Grain Shippers Op. at 11; USM Op. at 5-6.

USDA agrees that the relief available under the Three-Benchmark procedures should be increased to a minimum of \$2 million over a 5 year-period, and is not certain whether any cap is necessary. No agricultural shipper has appealed rates under the Three-Benchmark procedures, which indicates that the limitations on relief are set too low in relation to the costs of litigating these cases.

In addition, USDA is concerned with the Board's reliance upon the revenue-to-variable cost ratio for comparable shipments (R/VC_{comp}) in the Three-Benchmark procedures. Carriers are increasing rates across the board for agricultural shippers. As a result, the Three-Benchmark procedures that rely on R/VC_{comp} to determine whether a rail rate is reasonable are undermined.

USDA Op. at 3-4 (footnote omitted).

Not surprisingly, the Railroads generally oppose any changes in the Board's current Three-Benchmark standards that would increase or eliminate rate caps, and, with the exception of KCS, support the Board's proposal requiring the use of detailed RPI calculations in Simplified-SAC cases.⁷¹ The Railroads offer a variety of

⁷¹ See BNSF Op. at 15-17 (BNSF supports the Board's proposal to require a full RPI showing, but opposes any increases in current Simplified-SAC, and Three-Benchmark relief caps unless the Board bans the use of cross-over traffic in Full-SAC cases in which event, BNSF would not oppose "modest" increase in the caps); UP Op. at 17-18 (Board should not modify Simplified-SAC and Three-Benchmark relief caps); CSXT/NS Op. at 1, 13, 20 (Board should not modify Simplified-SAC and Three-Benchmark relief caps, but should adopt full RPI showing proposal); AAR Op. at 11 (Board should not modify relief caps in Simplified-SAC cases); KCS Op. at 9-11 (KCS opposes any changes in the current Simplified-SAC and Three-Benchmark case procedures at this time).

reasons for their positions, but the bottom line is clear: the railroads have no interest in any changes to the Board's current regulatory policies that would help captive shippers.⁷²

B. Interest on Reparation Awards Should be Increased

Coal Shippers support the Board's proposals on increasing interest rates on reparation awards. However, as Coal Shippers emphasized in their opening submission, the Board's proposal may be moot for Coal Shippers if the Board adopts its Full-SAC proposals, as there will likely be no future relief orders for captive coal shippers.

Other shippers, and USDA, support the Board's proposals,⁷³ and, of course, the railroads oppose them.⁷⁴ Coal Shippers continue to urge the Board to look at how its sister agency, the Federal Energy Regulatory Commission ("FERC"), sets interest awards. FERC uses the prime rate. So should the Board.

As FERC has explained, the measure of interest on reparation awards should meet three policy objectives: "(1) provide just compensation for the losses, or costs, imposed upon those who have paid excessive rates; (2) reflect the benefits which

⁷² Some railroads argue that the Board is required under 49 U.S.C. § 10701(d) to impose relief caps in non-Full-SAC cases. *See, e.g.*, CSXT/NS Op. at 2. By its plain terms, § 10701(d) does not impose a rate cap requirement, nor is one necessary, since, proper use of the involved procedures should produce the following result: most relief (Full-SAC case); medium relief (Simplified-SAC case); least amount of relief (Three-Benchmark case). *See* Coal Shippers Op. at 74-76; Chemical Shippers Op. at 27-29.

⁷³ *See, e.g.*, Chemical Shippers Op. at 30; USDA Op. at 4.

⁷⁴ *See, e.g.*, BNSF Op. at 18; UP Op. at 18-19; AAR Op. at 23; KCS Op. at 12.

were available to companies which collected excessive rates; and (3) not provide incentives for any party to prolong litigation.”⁷⁵

FERC chose the prime rate because it takes “all of the above-mentioned considerations into account;”⁷⁶ “will neither unduly prejudice nor advantage any party to a rate case;”⁷⁷ and “should provide a positive incentive for all parties to seek an early resolution of rate proceedings.”⁷⁸

⁷⁵ See Natural Gas Policy and Procedures, Final Regulation and Request for Comments, 44 Fed. Reg. 53,493, 53,494 (Sept. 14, 1979).

⁷⁶ *Id.* at 53,495.

⁷⁷ *Id.*

⁷⁸ *Id.*

CONCLUSION

Coal Shippers respectfully request that the Board decide the issues raised in this proceeding in the manner described in their opening and reply comments.

Respectfully submitted,

C. Michael Loftus
Andrew B. Kolesar III
Stephanie M. Archuleta
Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

*Counsel for Concerned Captive
Coal Shippers*

William L. Slover
John H. LeSeur
Robert D. Rosenberg
Peter A. Pfohl
Daniel M. Jaffe
Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

*Counsel for Western Coal Traffic League,
American Public Power Association,
Edison Electric Institute, National Rural
Electric Cooperative Association,
Western Fuels Association, Inc., and
Basin Electric Power Cooperative, Inc.*

Dated: December 7, 2012

CERTIFICATE OF SERVICE

I hereby certify that this 7th day of December, 2012, I have caused a copy of the foregoing to be served via first-class mail, postage prepaid, upon the parties of record to this case.

Andrew B. Kolesar III