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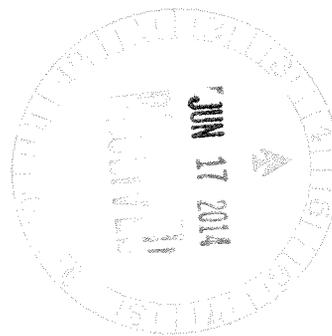
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## VIA HAND DELIVERY

Ms. Cynthia Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0111



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

Dear Ms. Brown:

Enclosed for filing, please find an original and twenty (20) copies of Complainants' Petition for Leave to File Initial Comments on Remand. In addition, enclosed for filing **UNDER SEAL** are an original and twenty (20) copies of Complainants' Initial Comments on Remand.

Also enclosed are an original and ten (10) copies of the Public Version of Complainants' Initial Comments on Remand, and three copies of a compact disc containing the filings and accompanying workpapers. The disc is designated as Highly Confidential.

Ms. Cynthia Brown  
June 17, 2014  
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Please date stamp the extra copy of this cover letter and the enclosed pleading and return it to our messenger. Thank you for your attention to this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. LeSeur". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

John H. LeSeur  
An Attorney for Complainants, Western Fuels  
Association, Inc. and Basin Electric Power  
Cooperative, Inc.

Enclosures

cc: Counsel for Defendant BNSF Railway Co.



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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**COMPLAINANTS' PETITION FOR LEAVE TO  
FILE INITIAL COMMENTS ON REMAND**

Pursuant to 49 C.F. R. § 1117, Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively "WFA/Basin") file this petition asking the Surface Transportation Board ("STB" or "Board") for leave to file the accompanying Initial Comments on Remand, and in support hereof state as follows:

1. In 2009, the Board issued a series of orders in this case prescribing maximum reasonable rates on WFA/Basin's coal traffic moving from the Wyoming Power River Basin to WFA/Basin's Laramie River Station ("LRS") located near Wheatland, WY.<sup>1</sup> The Board also ordered BNSF to pay reparations for overcharges WFA/Basin paid during the pendency of its case.<sup>2</sup>

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<sup>1</sup> *W. Fuels Ass'n, Inc. v. BNSF Ry.*, Docket No. 42088 (STB served Feb. 18, 2009, June 5, 2009 and July 27, 2009).

<sup>2</sup> *W. Fuels Ass'n, Inc. v. BNSF Ry.*, Docket No. 42088 (STB served Oct. 22, 2009).

2. The direct beneficiaries of the Board's 2009 rate relief orders were the consumers in nine Great Plains states who ultimately pay BNSF's freight charges as part of their monthly electric bills.

3. BNSF filed petitions for review of the Board's 2009 rate relief orders in the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit" or "Court"). In a decision issued in May 2010, the D.C. Circuit rejected all of BNSF's challenges to the 2009 rate relief orders, except one: the Court remanded the case, without vacating the 2009 rate relief orders, for the Board to address BNSF's allegation that the Modified Average Total Cost ("ATC") methodology the Board used to allocate cross-over traffic revenues in its Stand-Alone Cost ("SAC") analysis impermissibly double-counted variable costs. *BNSF Ry. v. STB*, 604 F.3d 602, 612-13 (D.C. Cir. 2010).

4. On November 22, 2010, BNSF filed its "Comments of BNSF Railway Company on Remand" ("Comments"). BNSF's Comments set forth its views "regarding the action the Board should take on remand." *Id.* at 1. The Comments included counsel's argument and a joint verified statement tendered by two of BNSF's expert witnesses.

5. In its Decision served on February 1, 2011,<sup>3</sup> the Board chastised BNSF for failing to seek leave to file its Comments, but accepted them anyway because of the importance of the ATC issues raised on remand:

BNSF . . . has not identified any similarly situated proceeding where a party filed comments on remand without an accompanying motion for leave to file or a petition . . . . Even so, the questions regarding modified ATC raised by this remand are important to this proceeding. In the interest of having the benefit of the parties' views on the ATC issue, . . . we will accept BNSF's comments into the record . . . .

*Id.* at 2.

6. The Board served its decision on remand in June 2012.<sup>4</sup> In that decision, the Board concluded that Modified ATC did not impermissibly double-count variable costs and reaffirmed its use of Modified ATC to allocate cross-over traffic revenues. BNSF sought judicial review of the Board's *June 2012 Decision* in the D.C. Circuit. In a divided panel decision, the Court vacated the Board's *June 2012 Decision* because, in the view of the panel majority, the Board erred in not addressing the merits of whether a new cross-over traffic revenue allocation method, called Alternative ATC, that

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<sup>3</sup> *W. Fuels Ass'n, Inc. v. BNSF Ry.*, Docket No. 42088 (STB served Feb. 1, 2011).

<sup>4</sup> *W. Fuels Ass'n, Inc. v. BNSF Ry.*, Docket No. 42088 (STB served June 15, 2012) ("*June 2012 Decision*").

the Board adopted in a 2013 rulemaking decision,<sup>5</sup> should be retroactively applied in this case:

If it is true, as [BNSF] asserts, that the Board has adopted an alternative revenue allocation method applicable to all future cases, we would expect its opinion to advise why that method is not equally applicable to this case. While we do not suggest that all such changes must be made retroactively, we must at least know that the Board has exercised reason . . . in treating [BNSF] differently.

*BNSF Ry. v. STB*, 741 F.3d 163, 168 (D.C. Cir. 2014). The D.C. Circuit issued its mandate remanding the case to the STB on May 7, 2014.

7. WFA/Basin request that the Board grant them leave to file their Initial Comments on Remand for the same reasons the Board permitted BNSF to file its Comments in 2010. The ATC issues in this case continue to be vitally important and continue to involve hundreds of millions of consumer dollars. The Board will also benefit from WFA/Basin's views since WFA/Basin are uniquely well-qualified to address the retroactivity and due process issues that lie at the heart of the Court's remand order.

## CONCLUSION

WFA/Basin respectfully request that the Board grant this Petition for the reasons set forth above.

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<sup>5</sup> See *Rate Regulation Reforms*, Docket No. Ex Parte 715, slip op. at 30 (STB served July 18, 2013), *appeal docketed sub nom. CSX Transp., Inc. v. STB*, No. 13-1230 (D.C. Cir. July 29, 2013).

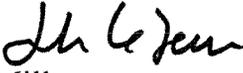
Respectfully submitted,

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

OF COUNSEL:

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Dated: June 17, 2014

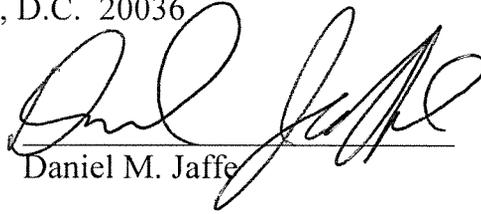
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Attorneys for Complainants

**CERTIFICATE OF SERVICE**

I hereby certify that this 17th day of June 2014, I served copies of the foregoing Petition by hand delivery on designated outside counsel for BNSF, as follows:

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



Daniel M. Jaffe