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PUBLIC VERSION
BEFORE THE
SURFACE TRANSPORTATION BOARD

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

**COMPLAINANTS' RESPONSE TO BNSF RAILWAY COMPANY'S REPLY
COMMENTS ON REMAND AND REQUEST FOR LEAVE TO RESPOND**

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INC. and BASIN ELECTRIC POWER
COOPERATIVE, INC.

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Dated: October 9, 2014

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I. APPLICATION OF ALTERNATIVE ATC IS IMPERMISSIBLY RETROACTIVE

BNSF claims that the Board should retroactively apply Alternative ATC in this case because: (i) WFA/Basin had no settled expectation that the Board would apply Modified ATC under the standards set forth in *Major Issues*; (ii) the Board always applies superior procedural rules retroactively; and (iii) retroactivity concerns fall outside the scope of the Court’s remand order. None of these assertions is correct.

- **Settled Expectations.** BNSF predicates its “no settled expectations” argument on an errant reading of *Major Issues*. According to BNSF, the Board held in *Major Issues* that a shipper can have no settled expectation that a specific cross-over traffic revenue allocation method will be applied in its case if that method is the subject of “continual challenge by *railroad defendants*.” BNSF Reply at 22 (emphasis added). But, that is not what the Board held in *Major Issues*. The Board held in *Major Issues* that a shipper could not have settled expectations when “*the Board* has not settled on any one method for allocating the revenue contribution of cross-over traffic.” *BNSF 2008*, 526 F.3d at 784 (emphasis added). Following *Major Issues*, the Board did “settle[] on one method for allocating the revenue contribution of cross-over traffic” – Modified ATC; the Board directed WFA/Basin to use Modified ATC in developing their Revised SARR; and the Board continued to use Modified ATC to allocate revenues in SAC cases until it decided to replace Modified ATC with Alternative ATC in 2013. These facts establish WFA/Basin’s settled expectations under the standards set forth in *Major Issues*.

Docket No. 35731, slip op. at 4 n.8 (STB served Aug. 1, 2013). For purposes of brevity, WFA/Basin will adhere to the short-form citations they used in their Initial Comments on Remand (“Initial Comments”).

- **Superior Procedures.** The Board’s usual policy is not to retroactively apply new rules where prior rules have been the subject of reasonable reliance.² BNSF argues that the Board’s policy does not apply in cases involving SAC rules, which BNSF characterizes as “procedural” in nature. BNSF Reply at 25-26. Of course, cross-over traffic rules are not procedural rules. They are substantive rules used to determine whether a carrier is charging rates that exceed a reasonable maximum under the Board’s SAC test. More importantly, the pertinent legal inquiry is not whether a new rule is subjectively labeled “procedural [or] “substantive,” but whether the new rule “attaches new legal consequences to events completed before its enactment” and “changes the law in a way that adversely affects a party’s prospects for success on the merits of the claim.” *National Mining*, 292 F.3d at 859-60 (internal quotation marks and citations omitted). Retroactive application of Alternative ATC in this case clearly “attaches new legal consequences to events taken before its completion” and “adversely affects” WFA/Basin’s prospects for relief, and therefore is impermissibly retroactive.

- **Scope of Remand.** BNSF contends that “the concerns of impermissible retroactivity [do not] even apply in the context of a remand.” BNSF Reply at 26 n.9. This contention ignores the express terms of the Court’s remand order. The Board decided in 2013 to replace Modified ATC with Alternative ATC for application in future cases, and the Court remanded this case for the Board to determine whether Alternative ATC should be “retroactively” applied in this case. *BNSF 2014*, 741 F.3d at 168. The Board cannot decide the issue remanded to it without addressing and resolving whether retroactive application of Alternative ATC in this case is permissible – which it clearly is not.

² See WFA/Basin Initial Comments at 38-39, 43-44, citing, *inter alia*, Board decisions not to retroactively apply superior RCAF procedures, not to retroactively apply superior cost-of-capital computation methods, and not to retroactively apply its 10-year Discounted Cash Flow (“DCF”).

II. THE BOARD MUST ALLOW WFA/BASIN TO REVISE THEIR SARR AND UPDATE THE ADMINISTRATIVE RECORD IF IT RETROACTIVELY APPLIES ALTERNATIVE ATC

BNSF argues that if the Board retroactively applies Alternative ATC, WFA/Basin have no due process rights to revise their SARR or to update the administrative record. Both arguments are premised on a fundamental misreading of governing Board precedent.

A. Due Process Requires That The Board Afford WFA/Basin The Opportunity To Revise Their SARR

BNSF's Reply contains a convoluted and misleading discussion of the law governing retroactive application of SAC standards. The law is not complicated. Due process requires that when an agency "seeks to change a controlling standard of law and apply it retroactively in an adjudicatory setting, the party before the agency must be given notice and an opportunity to introduce evidence bearing on the new standard." *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981).

The Board's SAC decisions simply follow this standard. In cases where the Board has determined it has changed a controlling standard of law (or it concludes a shipper reasonably assumed the Board has changed a controlling SAC standard), it has always afforded the complainant shipper a fair opportunity to present new SAC evidence to address the new standard.³ Conversely, in cases where the Board has determined that it was not changing SAC

³ See, e.g., *February 2009 Decision*, slip op. at 9 (change to Modified ATC); *September 2007 Decision*, slip op. at 3 (same); *AEP Tex. N. Co. v. BNSF Ry.*, Docket No. 41191 (Sub-No.1), slip op. at 23-24 (STB served Sept. 10, 2007) (change to Modified ATC) ("*AEP Texas*"); *Arizona Elec. Power Coop., Inc. v. Burlington N. & S.F. Ry. & Union Pac. R.R.*, Docket No. 42058, slip op. at 6 (STB served Nov. 19, 2003) (change in SARR configuration standards); *Otter Tail Power Co. v. Burlington N. & S.F. Ry.*, Docket No. 42071, slip op. at 1 (STB served Nov. 21, 2003) (change to MSP) ("*Otter Tail*"); *accord DuPont*, slip op. at 56 (STB served March 24, 2014) (Chairman Elliott concurring) (shipper may petition to change SARR to address Alternative ATC).

standards, but simply applying existing SAC standards, it has denied shipper requests to modify their SARRs.⁴

The Board applied these principles earlier in this case. In 2007, the Board determined that the switch from MSP to Modified ATC was a change in a controlling SAC standard and it afforded WFA/Basin the opportunity to revise their SARR traffic group and configuration to address the new revenue allocation method. See *September 2007 Decision*, slip op. at 3; *February 2009 Decision*, slip op. at 9. The Board has taken similar actions in other cases where it has decided to retroactively apply new (or perceived to be new) SAC revenue allocation rules. See *AEP Texas*, slip op. at 23-24; *Otter Tail*, slip op at 1.

The Board has taken these actions because SARRs usually contain substantial amounts of cross-over traffic and changes in the revenue allocation method “could . . . affect[] the optimal size and configuration of the stand-alone railroad.” *February 2009 Decision*, slip op. at 2. This case is no different. Retroactive application of Alternative ATC on the current record reduces the revenues available to WFA/Basin’s Revised SARR and has no effect on costs. This revenue reduction ripples through the entire SAC model, increasing the maximum R/VC ratios from 250% to 350%.

BNSF argues the Board should carve out an exception here because the switch from Modified ATC to Alternative ATC fails to meet BNSF’s “traffic incentives” test. This test, as articulated by BNSF, generally proceeds along the following daisy chain:

⁴ See, e.g., *PPL Montana, LLC v. Burlington N. & Santa Fe Ry.*, 6 S.T.B. 752, 757 (2003) (holding that a complainant shipper is not entitled to revise its SARR to address a cross-subsidy test that “did not change a controlling standard of law”); *Intermountain Power Agency v. Union Pac. R.R.*, Docket No. 42127, slip op. at 3 (STB served April 4, 2012) (holding that a complainant shipper could not revise its SARR to address resolution of SAC issues in another case that “were consistent with Board precedent”).

(i) WFA/Basin designed their Original SARR using MSP; (ii) the Original SARR had Low-Rated, Short-Haul and High-Rated traffic; (iii) the switch from MSP to Modified ATC changed WFA/Basin's "traffic incentives;" (iv) WFA/Basin responded to the changed traffic incentives by not including the Low-Rated and Short-Haul traffic in their Revised SARR and by including the High-Rated traffic; (v) the switch to Alternative ATC from Modified ATC will not significantly impact the revenue contribution made by the Short-Haul traffic and Low-Rated traffic using Modified ATC; (vi) the switch to Alternative ATC from Modified ATC will significantly reduce the revenue contribution that High-Rated traffic makes using Modified ATC but it would still remain high-rated; (vii) if Alternative ATC was in existence when WFA/Basin designed their Revised SARR, they would have been incented not to include the Low-Rated and Short-Haul traffic in a revised SARR because the revenue contributions for this traffic under Modified ATC and Alternative ATC remained generally the same; (viii) if Alternative ATC was in existence when WFA/Basin designed their Revised SARR, they would have been incented to retain the High-Rated traffic in a revised SARR because a shipper always is incented to include high-rated traffic; and (ix) WFA/Basin should not be entitled to revise their Revised SARR because they were incented to develop the same revised SARR using either Modified ATC or Alternative ATC.

BNSF's convoluted "traffic incentives" test contains a basic error in logic that renders the dizzying array of details irrelevant. BNSF's test assumes that shippers can revise SARRs simply by retaining traffic that remains high-rated under the new revenue allocation method, while eliminating traffic that becomes low-rated under the new revenue allocation method. This myopic view ignores the many other key components that a shipper must take into account when developing a revised SARR to address a change in the revenue allocation procedure, such as changing the existing SARR configuration, adding internally rerouted traffic, developing the best match differentials between revenues and SAC, determining the optimum revenue-to-variable cost ("R/VC") results under the Board's Maximum Mark-up Methodology ("MMM"), and evaluating how each of these discrete items interacts with each other. *See* WFA Initial Comments, Crowley V. S. at 10-12.

When WFA/Basin revised their Original SARR to address Modified ATC, they did not simply rearrange their traffic group to retain high-rated traffic and remove low-rated traffic. They also expanded the geographic footprint of their SARR from Guernsey, WY east to Northport, NE, reduced the size and scope of other SARR facilities within the footprint of their Original SARR, included new internally rerouted traffic, and did all of this with a focus on obtaining the optimum MMM rates. *Id.*, Crowley V.S. at 14-15. WFA/Basin's revisions were the product of extensive computer modeling that factored in numerous inputs that interact with each other to produce a SARR that maximizes revenues, minimizes costs and produces the best MMM result. There are no shortcuts here. The only way to do a SAC analysis is to do a SAC analysis. The analysis cannot be replicated, as BNSF attempts to do, by including a few diagrams showing R/VC ratios on high-rated and low-rated traffic.

Moreover, the Board already rejected BNSF's truncated "traffic incentives" standard earlier in this case. Following WFA/Basin's development of their Revised SARR in 2008, BNSF objected to WFA/Basin's inclusion of rerouted traffic and the extension of the Revised SARR to Northport. BNSF argued that WFA/Basin had been incented to include the rerouted traffic and expanded SARR footprint, when they developed their Original SARR, and were now estopped from doing so in developing their Revised SARR. *See* BNSF Third Supp. Reply at III.A.5-6 (July 14, 2008). The Board rejected BNSF's incentive contentions, holding that "[t]he shipper has the right to specify the traffic group and, here, WFA properly changed the traffic group and configuration of the SARR because of the new revenue allocation procedure." *February 2009 Decision*, slip op. at 3. Similarly, in *Otter Tail*, BNSF argued that Otter Tail should not be permitted revise to its SARR to address the anticipated retroactive application of MSP because, according to BNSF, Otter Tail had the incentive to make the same revisions in

developing its initial SARR.⁵ The Board did not adopt or apply BNSF's "incentives" test, but instead permitted Otter Tail to change its SARR to address MSP. *Otter Tail*, slip op. at 1. The Board must take the same action here to protect WFA/Basin's right to a fair hearing.

B. Due Process Also Requires That WFA/Basin Be Afforded The Opportunity To Correct Clearly Erroneous Forecasted Record Revenues And Costs

WFA/Basin demonstrated in their Initial Comments that retroactive application of Alternative ATC on the existing record will produce arbitrary and unfair revenue allocations because the projected through movement revenues to which Alternative ATC is applied are grossly understated. WFA/Basin also demonstrated that other key SAC inputs are based on demonstrably incorrect projections. BNSF does not dispute the fact the projected revenues and costs are wrong, but nevertheless asks the Board to deny WFA/Basin's request to correct the projections when they revise their SARR. None of the arguments BNSF presents support such a blatant trampling of WFA/Basin's due process right to a fair hearing.

- **2007 Developments.** BNSF observes that the revenues and costs were not updated in 2007 to address the retroactive application of Modified ATC. BNSF Reply at 45-47. BNSF's observation is correct, but irrelevant. WFA/Basin did not request the Board to update projected revenues and costs in 2007, and the Board did not do so, because there was no reason to at that time. The record was only three years old and WFA/Basin obtained a fair hearing to address the retroactive application of Modified ATC without updating revenues and costs. It is now 2014, not 2007. The record is now ten years old; the projected record revenues and costs are demonstrably wrong; and WFA/Basin cannot obtain a fair hearing to address the retroactive application of yet another revenue allocation method (Alternative ATC) unless the record revenues and costs are corrected.

⁵ See *Otter Tail*, BNSF's Reply to Otter Tail Power Company's Motion to Modify the Procedural Schedule and Petition to Supplement the Evidentiary Record at 7 (Nov. 14, 2003).

- **Finality.** BNSF argues that since this case is now ten years old, finality principles dictate that it end now, even if the retroactive application of Alternative ATC produces manifestly understated revenue allocations to WFA/Basin’s Revised SARR. BNSF Reply at 47. WFA/Basin did not cause the delays in this case, they have been the victims of the delays. The length of this case is directly attributable to (i) the Board’s decision in 2006 to develop and retroactively apply new SAC rules (over WFA/Basin’s repeated objections), and (ii), since 2009, the extended sparring between BNSF and the Board over the Board’s decision to utilize Modified ATC to set cross-over traffic revenue allocations in this case. WFA/Basin’s due process rights cannot be extinguished due to delays caused by the Board and BNSF.

- **Complexity.** BNSF argues that correcting projected revenues and costs would be “controversial and difficult.” BNSF Reply at 47. What is most controversial and difficult in SAC cases is determining the procedures for calculating revenues and unit costs. The Board has already made most of these determinations in its *September 2007* and *February 2009 Decisions*. Applying the Board-approved procedures using corrected revenue and unit cost inputs will require new discovery, but the necessary information is readily accessible in BNSF’s electronic databases and any burden associated with obtaining and utilizing this data is far outweighed by need to reach an accurate and fair resolution of this case, particularly when \$328 million consumer dollars are at stake.

- **Board Policy.** BNSF argues that correcting projected revenues and costs is contrary to Board decisions addressing “changed circumstances.” BNSF Reply at 47. But none of the cases cited by BNSF addresses the two “changed circumstances” at issue in this case: (i) the proposed retroactive application of Alternative ATC in a pending case and (ii) the existence of a SAC record that is now ten years old. The Board’s policies here are clear. The Board permits shippers to revise their SARRs in pending cases to address retroactively changed

cross-over traffic revenue allocation standards and governing Board precedent holds that administrative records in long-running SAC cases must be updated to include accurate historic-period revenue and cost information before the Board decides the case. Both policies have the same objective – reaching fair and accurate SAC results in pending cases – and WFA/Basin’s request to revise their SARR, and update the record, complies with both.

III. BNSF’S MISGUIDED FAIRNESS ARGUMENTS

BNSF claims that it is fair to increase WFA/Basin’s payments by \$328 million because WFA/Basin’s rates are low and WFA/Basin will retain some rate relief. BNSF Reply at 43. As shown in Attachment 1, WFA/Basin’s prescribed rates determined using Modified ATC are already extraordinarily high when measured using industry-standard metrics such as mills per ton-mile and R/VC ratios. Retroactively raising these already high rates would be manifestly unfair to the rural consumers served by WFA/Basin who ultimately pay BNSF’s rates in their monthly electric bills.

Respectfully submitted,

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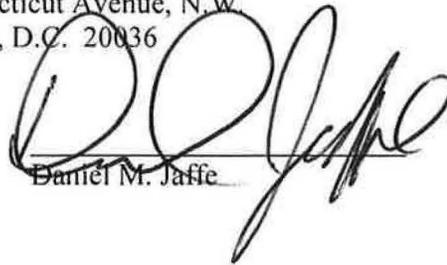
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**ATTACHMENT 1
REDACTED**

CERTIFICATE OF SERVICE

I hereby certify that this 9th day of October 2014, I served copies of the foregoing
Response by e-mail on designated outside counsel for BNSF, as follows:

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