

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35506

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WESTERN COAL TRAFFIC LEAGUE – PETITION FOR DECLARATORY ORDER

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SUPPLEMENTAL COMMENTS OF  
CONSUMERS UNITED FOR RAIL EQUITY

Robert G. Szabo  
Executive Director  
Michael F. McBride  
Van Ness Feldman, PC  
1050 Thomas Jefferson Street, NW  
Suite 700  
Washington, DC 20007-3877  
(202)298-1800 (Telephone)  
(202)338-2416 (Facsimile)  
[rgs@vnf.com](mailto:rgs@vnf.com)  
[mfm@vnf.com](mailto:mfm@vnf.com)

Attorneys for Consumers United for Rail  
Equity

November 8, 2012

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Introduction and Summary

Consumers United for Rail Equity (“CURE”) hereby submits its Supplemental Comments in response to the Board’s Decision served herein on October 9, 2012 (“October 9, 2012 Decision”).

CURE has filed three rounds of Comments previously and participated in the March 22, 2012 oral hearing herein in support of the Petition for Declaratory Order filed herein by Western Coal Traffic League (“WCTL”).

The issues in this proceeding to this point could be resolved based on this fundamental question – should BNSF Railway Company (“BNSF”), which did not pay a penny of the multi-billion dollar premium paid by Berkshire Hathaway (sometimes referred to as “Berkshire”) for BNSF, be allowed to increase its URCS costs and its investment base by any of that premium? There is no Board precedent for allowing a jurisdictional entity to claim an expense it did not incur and pass it through to captive customers, let alone to permit it to use that pass-through to deprive the STB of jurisdiction over some the jurisdictional entity’s rates and to abuse the Board’s regulatory program further by then claiming that the jurisdictional entity is revenue-inadequate because of the premium that it did not pay!

If the Board, despite the fundamental objections of CURE and other rail customer groups, were otherwise inclined to allow the pass-through of any amount of the premium, the question it would have to answer is: should the specific amount of the pass-through sought (\$8.1 billion) be permitted without any witness – especially, without a BNSF witness -- providing an explanation of how the \$8.1 billion portion of the \$22 billion premium was derived, with the rest (\$14 billion) assigned to goodwill? There is no basis to allow a pass-through of an amount -- \$ 8.1 billion – without a detailed basis for that amount so that the Board could determine the basis on which it was calculated and its justification.

CURE also believes that the Board must either now expand this proceeding or require Berkshire Hathaway and BNSF to institute a new proceeding by filing an application seeking the Board's approval of Berkshire's acquisition of BNSF.

The reasons to expand this proceeding or to require Berkshire and BNSF to commence a separate proceeding by filing for approval of their transaction are several. First, the Board indisputably had and has authority to approve or disapprove the transaction. Second, in such a proceeding, Berkshire and BNSF indisputably would have the burden of proof, whereas in this proceeding, WCTL, as Petitioner, and those parties such as CURE who support the WCTL position, would, traditionally, bear the burden of proof.

The law requires that the Berkshire purchase of the BNSF be submitted to the Board for approval, after a public interest finding. That has not happened, despite both parties to the transaction recently acknowledging to the Board that the Board had and still has jurisdiction over this transaction. Had this transaction been submitted to the Board

for approval, as required by law, a public comment period would have occurred. During that public comment period, CURE and other rail customers would have argued – before the transaction occurred – that the transaction should not be approved because of the very real fear of rail customers at that time that BNSF was going to arrogate to itself at least part of the premium paid by Berkshire for the railroad. Rail customers at the time were aware of this possibility, understood its negative implications for rail customers and would have opposed this transaction if the possibility of “creative accounting” with the acquisition premium was allowed to exist. In the alternative, we would have argued -- before the approval of the transaction -- that the transaction should only be approved by the Board with a condition that BNSF could not use any portion of the premium in its URCS accounting.

Rail customers have been denied this opportunity by Berkshire’s failure to submit this transaction to the Board for approval, as required by law. Berkshire and BNSF should not be allowed to improve their position on the acquisition premium issue (force it to be raised in a context where rail customers, not Berkshire and BNSF, have the burden of proof) by failing to follow the law and avoiding the jurisdiction of the Board. If this result is allowed to occur, why would any similarly situated purchaser of a major railroad submit the transaction to the Board for approval?

Fundamentally, the Board should protect its own jurisdiction; the shippers and other interested parties should not be prejudiced by the failure of Berkshire and BNSF to seek the Board’s authority for the transaction; and all the public interest issues associated with the transaction should all be considered in addition to the issues identified by the Board for determination in this proceeding. Unless and until the Board requires

Berkshire and BNSF to seek the Board's authority over the transaction, the Board will not have acted in accordance with the law that such a transaction may not occur without prior approval of the Board, and subject to any conditions that the Board may attach to its approval.

As of now, BNSF has said that Berkshire will divest itself of two short-line railroads, which give the Board jurisdiction over the transaction. Berkshire itself has not said that such divestiture will occur to the best of our knowledge. The Board should not rely on a promise by an entity (BNSF) that is not the entity that controls the short-line railroads, and where the owner (Berkshire) is not otherwise subject to the Board's jurisdiction, to determine in advance that the Board's precedents would allow the course of action the owner proposes (as the Board has apparently already decided<sup>1</sup>). Instead, the Board should convene the necessary proceeding to consider all of these issues so that shippers will not be prejudiced by BNSF's and Berkshire's unlawful actions here and the public interest will be protected, as is the responsibility of the Board.

In that proceeding, rail customers would raise at least two issues that we believe are central to the Board's application of its annual "revenue adequacy" determinations. First, rail customers would assert that the Board should require BNSF to provide its cost of capital, or that of Berkshire, so that the cost will be included in the industry-wide cost of capital calculation, as is required by the Board's rules. Among the numerous flaws in the current revenue adequacy determination formula is that the absence of a cost of capital for the BNSF possibly skewed the application of the formula with the result that

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<sup>1</sup> See Decision of OPAGAC Director Marvin in her October 9, 2012 letter to BNSF.

one of the four largest Class I railroads was not “revenue adequate” in the latest annual determination.

Second, rail customers would argue that a condition of the approval of the transaction should be that the BNSF is certified by the Board to be revenue adequate as long as it is owned by Berkshire Hathaway, a capital fund. Berkshire purchased all shares of the BNSF and the BNSF, now completely owned by the capital fund, Berkshire Hathaway, can no longer borrow funds from capital markets, except through Berkshire Hathaway. Rail customers would provide evidence that Berkshire Hathaway has assured BNSF that it will have all the capital it will need to operate the railroad profitably. The purpose of the annual “revenue adequacy” test of the Board is to determine if a Class I railroad is strong enough financially to raise capital by selling its stock or attract capital from the financial markets. 49 U.S.C. § 10704(a)(2). BNSF, so long as it is owned by Berkshire Hathaway, will have the ability to obtain capital from Berkshire Hathaway. The only realistic assumption is that Berkshire Hathaway will provide its wholly owned company the capital that will enable that company to be operated profitably, which of course is the purpose for owning BNSF in the first place. The fact that BNSF was considered by the Board to be “revenue-inadequate” when purchased by Berkshire Hathaway underscores the irrelevance of the Board’s “revenue adequacy” test with respect to whether BNSF can attract and retain the capital needed to operate.

Rail customers will be outraged if even one rail customer of the BNSF would be harmed by the proposal by BNSF to take credit in its URCS accounting for funds it did not even expend. Clearly, more than one rail customer would be harmed by the BNSF maneuver if it is allowed to stand. We believe the Board has the responsibility to do all

within its power to prevent BNSF from this proposed unilateral action that will harm rail customers.

### Factual Background and Transactional History

In early November 2009, Berkshire and BNSF announced that they had agreed that Berkshire would acquire the remaining shares of BNSF that it did not already own, for \$100/share. This was a substantial premium – over 40% of the closing price of BNSF stock the preceding day. The Board has stated that, at closing in February 2010, the transaction resulted in an expenditure of \$34.5 billion for a premium of approximately \$22 billion over the net book value of the BNSF stock of \$13.5 billion.<sup>2</sup> At the time of the announcement of the proposed transaction, there were immediate concerns in the shipping community about the amount of the premium and whether BNSF would seek to raise rates to compensate Berkshire for the premium it paid. Neither Berkshire nor BNSF addressed those concerns at any time between November 2009, when the transaction was announced, and February 2010, when it was consummated. Moreover, those issues were still not addressed, even after a number of United States Senators wrote the Chairman of the Board seeking answers, until March 2011, when BNSF filed its 2010 R-1 and included without explanation \$8.1 billion of the approximately \$22 billion premium paid, in BNSF's R-1 costs.

Berkshire and BNSF asserted at the time of the first announcement and thereafter, to investors, in public statements, and in filings with government agencies such as the Securities and Exchange Commission (“SEC”), that the STB did not have jurisdiction over the transaction. We know of no filing was ever made at the STB in 2009 or 2010

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<sup>2</sup> October 9, 2012 Decision at 1-2 n.1.

by Berkshire or BNSF taking that position. But BNSF's CEO Matthew Rose told investors in early November 2009, in a document filed with the SEC and available on its website, that he had been to Washington, DC to meet with the U.S. Department of Transportation and other government agencies, and with Members of Congress. He made no mention of meeting with the STB, but we assume that he and other BNSF representatives (and perhaps Berkshire representatives) did meet with Board Members at that time.

In addition to the obvious fact that BNSF would not want its regulator, the STB, to be in the dark about such a major transaction, it is clear that someone informed STB Chairman Elliott in November 2009 that Berkshire owned substantial shares in Union Pacific Railroad Company ("UP") and Norfolk Southern Railway Company ("NS"), because Chairman Elliott referred to Berkshire's ownership of such shares of UP and NS in a November 18, 2009 speech to the Washington Chapter of the Transportation Research Forum that is available on the STB's website. At that time, Chairman Elliott stated that he had been asked if the STB had jurisdiction "over any aspects [of the transaction]," and he said (at 2): "That is looking more and more remote. Under our rules for exploring mergers, it appears that Berkshire Hathaway would certainly be considered a non-carrier, because Berkshire has said it would divest its non-controlling number of shares in the Union Pacific Railroad and Norfolk Southern Railways."

Two weeks later, on December 1, 2009, still before the transaction was consummated, Chairman Elliott gave a presentation to the Wolfe Research Transportation Conference, quite similar to the one he had given to the Washington Chapter of TRF on November 18, 2009, except that, in the Wolfe Trahan speech,

Chairman Elliott remarked (at 3) about “whether the STB would have jurisdiction over any aspects [of the transaction].” Chairman Elliott said “The answer is no. Under our rules for reviewing mergers, Berkshire Hathaway would be a non-carrier, now that it has indicated that it would sell its small stakes in Union Pacific and Norfolk Southern.”

Finally, on January 11, 2010, again before the transaction was consummated, Chairman Elliott addressed the Transportation Research Board, and again said that it appeared that the transaction would not appear to require Board approval.

Clearly, Chairman Elliott relied, as he has a right to do under federal law and the Board’s Rules of Practice, on statements made to the Board, especially if counsel were involved (as they surely must have been).

As a result of the representations made to the STB, the transaction closed in February 2010, without Berkshire or BNSF ever having sought the STB’s authority to complete the acquisition and without any effort by the STB to assert its authority over the transaction.

In March 2011, BNSF filed its Form R-1 with the Board, asserting (in effect), and for the first time, that approximately \$8.1 billion of the \$22-23 billion acquisition premium paid by Berkshire should be treated as a cost incurred by BNSF, and thus necessarily reflected in (1) BNSF’s rates, (2) the Board’s jurisdictional threshold of 180% of variable costs, and (3) the net investment base of BNSF, subject to the Board’s determination of the appropriateness of those adjustments. Thereafter, in May 2011, Western Coal Traffic League filed its Petition for Declaratory Order, requesting that the Board consider whether what BNSF sought to do in its R-1 and with respect to rates and the Board’s jurisdictional threshold was appropriate. The Board instituted this

proceeding in response to WCTL's Petition. At BNSF's request, the Board also agreed to include the effect of the \$8.1 premium on BNSF's investment base for revenue-adequacy purposes. Again, CURE and other rail customers believe that BNSF should be considered to be "revenue-adequate" so long as Berkshire Hathaway owns the railroad. So long as it is owned by Berkshire Hathaway, BNSF has no stock to sell and no ability, except through Berkshire Hathaway, to approach capital markets for funds.

On September 13, 2012, BNSF's Executive Vice President, General Counsel, and Secretary Roger Nober, a former Chairman of the STB, sent the STB a letter, on behalf of both Berkshire and BNSF, and which subsequently was made available on the STB's website, informing it for the first time (insofar as we are aware, given the history recounted above) that Berkshire in fact controlled two Class III railroads in 2009-10 (during the entire time between the announcement of the transaction and its consummation) and still does to this day, and that the transaction is, therefore, subject to the STB's jurisdiction. On September 18, 2012, OPAGAC Director Marvin sent a response to Mr. Nober, directing BNSF to inform the Board within ten days how it proposed to comply with the statute. On September 25, 2012, Mr. Nober wrote to Director Marvin, informing her that Berkshire intended to divest itself of the two short-line railroads as quickly as possible, but in any event by December 31, 2010. On October 9, 2012, Director Marvin responded to Mr. Nober, informing him that divestiture was an "appropriate remedy" under Board precedent. On the same day, Chairman Elliott wrote a lengthier letter to Senate Commerce Committee Chairman Rockefeller, explaining what had transpired and explaining that the Board intended to consider, in this proceeding, what additional steps, if any, it may take.

This, then, is the only proceeding pending before the Board regarding the Berkshire Hathaway purchase of the BNSF. For that reason, we raise herein issues that were not raised in WCTL's original Petition or in BNSF's request to consider the impact, if any, of the acquisition premium on the investment base used by the STB to determine BNSF's revenue adequacy.

CURE believes that, as a result of these belated disclosures by BNSF (apparently on behalf of Berkshire as well), the Board should require Berkshire and BNSF to file an application for approval of their transaction or convene an additional proceeding, in which Berkshire and BNSF would have to submit themselves to the Board's authority over the transaction, explain their failure to comply with the law, explain their clear misstatements of fact to the government about the Board's authority to act, and provide the public, including interested shippers and shipper groups, with the opportunity to raise appropriate issues and seek appropriate remedies, including conditions on the transaction.

Berkshire Hathaway's unlawful failure to seek approval of its purchase of the BNSF has prejudiced rail customers in at least four ways. First, the acquisition premium would not yet have been paid if, in 2009-10, Berkshire and BNSF had sought the Board's authority to consummate the transaction, as the law required. In the proceeding to consider whether to approve the transaction, Berkshire and BNSF would have borne the burden of proof. Second, at that time, when BNSF customers strongly stated their opposition to any pass-through of the acquisition premium, the Board could have informed BNSF that, because it was not an expense incurred by BNSF, it would not be treated as a cost to BNSF if Berkshire paid the premium. Berkshire and BNSF could then have decided whether to consummate the transaction on this basis. Third, the Board could

have said that it was concerned that such a substantial premium would lead to pressure to increase rates and invite BNSF to demonstrate why the transaction, with part of the acquisition premium allocated to BNSF's URCS costs, would not adversely affect the Board's jurisdiction over BNSF's rates. Fourth, the issue of whether or not BNSF would have its capital needs assured by the Berkshire Hathaway purchase could have been reviewed thoroughly. Rail customers would have argued (1) that no acquisition premium paid by Berkshire Hathaway should be allowed to be allocated to BNSF URCS costs and (2) that the transaction should only be approved on the condition that BNSF would be considered to be a revenue-adequate rail carrier so long as it is owned by Berkshire Hathaway.

Today, as to the issues discussed above and other issues that may be raised by BNSF rail customers, rail customers must be in the same legal position they would have been in if Berkshire and BNSF had followed the law and sought Board approval of their transaction before it occurred. The Board must not avoid asserting the authority entrusted to it by Congress to approve jurisdictional transactions after providing a public comment period.

#### I.

**IRONICALLY, BNSF'S ARGUMENT, THAT THE NATURE OF THIS PROCEEDING IS NOT ONE TO DECIDE WHETHER ONE RAILROAD SHOULD BE PERMITTED TO MERGE WITH OR ACQUIRE ANOTHER RAILROAD, IS PRECISELY WHAT IS OR SHOULD BE BEFORE THE BOARD.**

Ironically, BNSF argued previously that the purpose of this proceeding is not one to decide whether to permit one railroad to merge with or acquire another, as was the

situation in the “precedent” BNSF cites.<sup>3</sup> In essence, BNSF is arguing that its failure to bring this transaction to the Board for approval denied rail customers the proper forum in which to argue whether the transaction should be allowed and that the Board should not now correct this problem created by the failure of Berkshire Hathaway and BNSF to abide by the law.

This is a declaratory proceeding, in which the issue WCTL raised is what effect, if any, the Berkshire-paid premium will have on BNSF’s URCS costs.<sup>4</sup> There is no precedent for allowing, in the face of opposition, a merger or acquisition premium paid by a financial investment company to be treated as if the premium were a cost incurred by the railroad itself.<sup>5</sup> URCS costs are the actual costs of the railroad in question, and BNSF simply did not incur the premium. That should be the end of the matter.

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<sup>3</sup> BNSF Reply Evidence and Argument at 4 (“The ICC and the STB have consistently used GAAP purchase accounting for mergers and acquisitions...”)–11. Unlike those contested merger and acquisition proceedings, Berkshire Hathaway neither sought the Board’s authority to acquire BNSF, nor was it required to do so (because it did not control another railroad). Berkshire could have sought a declaratory order from the Board on the effect of the acquisition premium, if any, on BNSF’s URCS costs or investment base, before consummating the acquisition of BNSF, but it did not do so, so neither it nor AAR can now object that the Board is reviewing the effect of the transaction on BNSF’s URCS costs or investment base in the first proceeding in which it was presented with those issues.

<sup>4</sup> At the request of BNSF, the Board also included the issue whether the Berkshire-paid premium should cause an increase in BNSF’s investment base for use in the Board’s annual revenue-adequacy determinations. Decision served September 28, 2011 at 2.

<sup>5</sup> In its Reply Evidence and Argument (at 8-9), BNSF makes much of the ICC’s treatment of the acquisition of the Chicago & North Transportation Company by the Blackstone Capital Partners L.P., but, to the best of our knowledge, no one challenged the inclusion of the very small premium associated with that transaction in C&NW’s URCS costs or investment base. BNSF acknowledges that the premium issue was not “even raised as an issue...” in that proceeding. *Id.* at 9. So, that transaction is not a “precedent” to determine the appropriate regulatory treatment of \$ 8.1 billion out of a \$22 billion premium that could materially affect the Board’s jurisdictional threshold, rate prescriptions, and determinations of the amount of the investment base used in the Board’s revenue-adequacy determinations.

Now that BNSF and Berkshire have acknowledged that they should have sought the Board's authority to consummate the transaction before it was consummated, not after, the Board should treat the issues as arising in a circumstance in which it is not presented with a *fait accompli* – what to do about a multi-billion dollar premium paid after an acquisition has been consummated – but rather whether to disapprove the transaction or approve it subject to the condition that captive shippers not be adversely affected by the acquisition premium to be paid. If Berkshire and BNSF had sought the Board's approval of their transaction, rail customers would have raised the acquisition premium issue and Berkshire and BNSF would clearly have borne the burden of proving that the proposed addition to its URCS costs is appropriate.<sup>6</sup>

Captive shippers of the BNSF are entitled to be put in no-less-advantageous circumstances with respect to the posture of their case before the Board than they would have been in had Berkshire and BNSF, in 2009-10, complied with the law requiring them to seek the Board's authority to permit Berkshire to acquire BNSF, given its control over two Class III railroads.

Assuming *arguendo* that the Board's precedents cited by BNSF are considered by the Board to have any applicability here, BNSF contends that the shippers' "attempts to distinguish that precedent as applied to the Berkshire acquisition are unavailing."<sup>7</sup> On the contrary, the shippers have shown that the prior precedents of the Board in which the treatment of the merger or acquisition premium was at issue were instances in which the

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<sup>6</sup> *E.g. Schaeffer v. Weast*, 546 U.S. 49, 56 (2005) ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.") (citing *McCormick on Evidence* § 337).

<sup>7</sup> BNSF Reply Evidence and Argument (at 5).

ICC or the Board permitted a merging or acquiring railroad to include in its costs the acquisition premium it paid in the URCS costs and investment base of the resulting single railroad. There is no instance of the ICC or the Board permitting the premium paid by a financial concern for a railroad to be included in the URCS costs or investment base of the acquired railroad over the objection of affected shippers. So, assuming *arguendo* that the policy of allowing merger and acquisition premiums to be included in an acquiring railroad's costs has merit, although we disagree with that policy, there is no merit in treating a premium paid by a non-railroad acquirer as a cost of the acquired railroad.

## II.

THE BOARD SHOULD NOT APPLY ITS POLICY OF PERMITTING MERGER AND ACQUISITION PREMIUMS PAID BY THE ACQUIRER TO AFFECT THE ACQUIRER'S URCS COSTS AND INVESTMENT BASE TO BE APPLIED TO BNSF, BECAUSE BERKSHIRE, NOT BNSF, PAID THE PREMIUM.

Fundamentally, the reason that the Berkshire-paid acquisition premium should not be included in BNSF's URCS costs and should not affect BNSF's investment base for use in the Board's revenue adequacy calculations for BNSF is simply this: BNSF did not pay the premium. In other words, BNSF should not be permitted to include in its URCS costs any expenditure that it did not make. There is no logical reason why the Board should treat BNSF in the real world as having incurred a cost it did not incur, or as being less revenue-adequate (or, according to the Board, more "revenue-inadequate"), based on a premium paid by a different entity (here, Berkshire) to acquire BNSF. That premium does not represent either costs incurred or investments made by BNSF.

If the Board prevents BNSF's URCS costs and investment base from reflecting any portion of the Berkshire-paid acquisition premium, BNSF would not be adversely affected. BNSF would be in precisely the same place as it was in before the acquisition.

BNSF is the same railroad, with the same costs and the same management, as it was before it was acquired by Berkshire. There is, therefore, no reason to treat BNSF, for regulatory purposes, any differently than before Berkshire paid an enormous premium to acquire BNSF.

### III.

THE BOARD SHOULD EXPAND THIS PROCEEDING TO CONSIDER WHETHER TO APPROVE THE TRANSACTION AND, IF IT DETERMINES TO APPROVE IT, WHAT CONDITIONS TO IMPOSE ON IT.

Had Berkshire and BNSF complied with the law, they would have sought the Board's approval of the transaction before it was consummated, rather than after (or not at all). But we now know that the Board had jurisdiction over Berkshire's and BNSF's transaction and continues to have that jurisdiction.

The Board should, therefore, expand this proceeding to consider the following issues:

- (1) Should the transaction be approved or disapproved? Certainly in light of Berkshire's failure to conduct the minimal due diligence required of it to determine whether the law required it to seek the STB's authority to consummate the transaction, the Board needs to determine if the Berkshire purchase of BNSF is in the public interest. Under the statute, Berkshire and BNSF should be obligated to file an application seeking the Board's authority to consummate the transaction. In that context, Berkshire and BNSF clearly would have the burden of proof.
- (2) If the transaction is to be approved, should that approval be conditioned? If the Board should decide, after the appropriate proceeding, to allow the

transaction to be consummated, the Board should also decide whether the transaction should be approved with conditions. We believe appropriate conditions on the transaction would include (a) the disallowance of any portion of the acquisition premium in BNSF's URCS costs, because BNSF did not incur those costs, and it would be inappropriate in any event for BNSF captive shippers, who played no part in the transaction, to bear the costs of the transaction; (b) disallowance of any portion of the premium in the variable costs used to calculate BNSF's statutory "jurisdictional threshold" under 49 U.S.C. § 10707; (c) disallowance of any portion of the acquisition premium being included in BNSF's net investment base for "revenue adequacy" purposes; (d) continued inclusion of BNSF's cost of capital in the Board's determination of the industry-wide cost of capital the STB was calculating before the acquisition, but which it was unable to continue to accomplish after the acquisition, because the STB was not able to calculate BNSF's cost of capital; and (e) recognition of BNSF as a revenue-adequate railroad so long as its stock is owned by Berkshire Hathaway. The first three conditions have been addressed in this proceeding by CURE in its earlier rounds of comments and in these Supplemental Comments.

- (3) The fifth condition is one that the Board must undertake, following its own procedures. Until the acquisition of BNSF by Berkshire, the Board had consistently determined that its task was to calculate the industry-wide cost of capital, including BNSF. Now that BNSF's cost of capital is determined differently, as part of Berkshire, rather than in the public financial markets,

does not mean that BNSF's cost of capital is not a reflection of the industry's cost of capital. Indeed, the acquisition itself demonstrates that the industry-wide cost of capital is arguably lower than the Board has been calculating it, because of the reduced risk of raising capital for use in the Class I railroad industry that Berkshire perceived when it acquired BNSF. In other words, Berkshire's perceived, lower cost of capital should be reflected in the industry-wide determination, rather than ignored, as is now, in effect, the approach the Board is following by not including it.

- (4) The sixth and final condition follows from the fact that the Board's methodology for determining revenue adequacy is tailored to the circumstances of the return required in the public markets. BNSF does not need to earn a return necessary to attract public investors, unlike other Class I railroads. Rather, BNSF must earn a return that is adequate for its owner Berkshire. And we know that its return is more than adequate to its owner Berkshire, because Berkshire has said so, repeatedly, in its annual letters to shareholders, and to investors and the public after the acquisition was announced in November 2009.<sup>8</sup> Accordingly, the Board should determine

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<sup>8</sup> <http://www.berkshirehathaway.com/letters/2010ltr.pdf>;  
<http://www.berkshirehathaway.com/letters/2011ltr.pdf>

The link below is to transcript of a call with investors in November 2009 in which Mr. Warren Buffett, Chairman and CEO of Berkshire, and Mr. Matthew Rose, Chairman and CEO of BNSF, had the exchange that follows:

<http://sec.gov/Archives/edgar/data/934612/000095015709001025/form425.htm>

MKR: Next question. Will Berkshire continue to invest the capital needed to maintain the BNSF infrastructure?

that, based on the statements of BNSF's owner Berkshire, and Berkshire's actions in allowing BNSF to retain all the capital necessary to run the railroad in a satisfactory manner, BNSF is more than revenue-adequate, by definition.

#### Conclusion

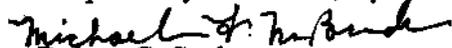
For the foregoing reasons, and those stated by WCTL in its Petition filed herein, and by the USDA, CURE, and the other shipper entities and associations in their previous filings herein, as well as the portions of BNSF's Reply Evidence and Argument cited herein, the Board should (1) grant the relief sought by WCTL, and (2) deny the relief sought by BNSF. Specifically, the Board should ensure that the assets of BNSF are not written up to account for the premium paid for BNSF by Berkshire, for both URCS costing purposes and for purposes of determining BNSF's investment base used in determining BNSF's revenue adequacy. The Board must also commence a proceeding to consider whether to approve the transaction, in which Berkshire and BNSF would have the burden of proof. If the Board should decide, in such a proceeding, to approve the transaction, it would be required to consider whether to approve only if the conditions proposed herein were adopted.

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WB: Well, it'd be crazy if we didn't. You know, we're not going to, we're not going to buy a business and starve it. You got where you are because you were willing to make the investments ahead of time to pay it off 3, 5, 10 years down the road, and that's, that's part of the railroad business, and it'll stay part of the railroad business.

No further proof of BNSF's long-term revenue adequacy is needed, than that quotation.

Respectfully submitted,

  
Robert G. Szabo

Executive Director

Michael F. McBride

Van Ness Feldman, PC

1050 Thomas Jefferson Street, NW

Suite 700

Washington, DC 20007-3877

(202)298-1800 (Telephone)

(202)338-2416 (Facsimile)

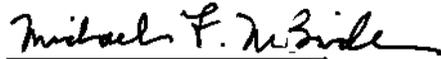
[rgs@vnf.com](mailto:rgs@vnf.com)

[mfm@vnf.com](mailto:mfm@vnf.com)

Attorneys for Consumers United for Rail  
Equity

#### Certificate of Service

I hereby certify that I have served, this 8<sup>th</sup> day of November, 2012, a copy of the foregoing Supplemental Comments of Consumers United for Rail Equity on each person shown on the Board's official service list in this proceeding.



Michael F. McBride