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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35506

WESTERN COAL TRAFFIC LEAGUE—
PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF
BNSF RAILWAY COMPANY

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Dated: November 28, 2012

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Pursuant to the decision of the Surface Transportation Board ("STB" or "Board") served October 9, 2012, BNSF Railway Company ("BNSF") files the following reply comments.

INTRODUCTION

When BNSF was acquired by Berkshire Hathaway Inc. ("Berkshire") in February 2010, Berkshire and BNSF followed the same GAAP purchase accounting rules to value BNSF's asset base that the Board and its predecessor, the Interstate Commerce Commission ("ICC"), have consistently required in every other railroad merger or acquisition transaction for over two decades. In response to a petition from the Western Coal Traffic League ("WCTL"), the Board began this proceeding in September 2011 to determine whether it should deviate from its settled rules and exclude the "acquisition premium" paid by Berkshire from BNSF's net investment base for regulatory purposes. Other parties were permitted to participate, and the Board received comprehensive written opening, reply, and rebuttal arguments and evidence in October, November, and December 2011. The Board also conducted an oral hearing in March 2012.

In its October 9, 2012 decision, the Board requested supplemental comments on a narrow issue. As described in that decision, Berkshire and BNSF in September 2012 informed the Board that they had recently become aware that there were two small rail entities within the

Berkshire organizational structure, CBEC Railway Inc. ("CBEC") and WCTU Railway LLC ("WCTU"), which had been classified as common carriers when Berkshire acquired BNSF. That subjected Berkshire's acquisition of BNSF to the Board's jurisdiction, pursuant to 49 U.S.C. § 11323. The Board requested comments "addressing the effect, if any, of this discovery on the post-February 2010 valuation of BNSF's asset base." Slip op. at 1.

BNSF showed in its supplemental comments filed November 8, 2012, that neither CBEC nor WCTU has any relevance at all to the accounting treatment of *BNSF's* assets and liabilities. Neither is part of BNSF's system and neither has had or will have any impact on BNSF's financial reporting to the Board. Further, Berkshire has proposed, and the Board has accepted, Berkshire's plan for immediate divestiture of these entities. Indeed, CBEC has already been divested, effective November 15, 2012, and Berkshire remains on track to divest WCTU prior to December 31, 2012.[1]

WCTL and the other shipper interests that filed supplemental comments on November 8 suggest that the Board's permitting Berkshire to divest CBEC and WCTU is not "punishment" enough for Berkshire's inadvertent error.[2] Largely ignoring the narrow question posed by the Board, they suggest that the Board should use this proceeding as a platform to punish Berkshire and BNSF for Berkshire's noncompliance with Section 11323 in a variety of ways that have nothing to do with the appropriate valuation of BNSF's asset base. WCTL argues that the "remedies" it proposes are necessary to force Berkshire to "disgorge" its "ill-gotten gains." WCTL Supp. Comments at 9. CURE argues that the remedy it proposes, a new merger

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[1] *See* Letter from Roger Nober to Director Marvin, filed November 16, 2012, in this proceeding.

[2] In addition to WCTL, Consumers United for Rail Equity ("CURE"), the Alliance for Rail Competition, et al. ("ARC"), and Arkansas Electric Cooperative Corporation ("AECC") filed supplemental comments.

proceeding, is justified to allow special "conditions" to be imposed on Berkshire's acquisition of BNSF. CURE Supp. Comments at 5-6. ARC and AECC suggest that additional punishment is necessary to demonstrate the Board's intolerance for mistakes like Berkshire's. ARC Supp. Comments at 6; AECC Supp. Comments at 4-5.

These arguments are misguided. As we indicated in our first filing, there have been no consequences from this error whatsoever. And, as we discuss further below, the law is clear that the Board's authority to impose a remedy for unauthorized control is "corrective, not punitive." *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129-130 (1962) ("*Gilbertville*"). Berkshire's failure to identify CBEC and WCTU as common carrier subsidiaries within its corporate structure was wholly inadvertent, and divestiture of CBEC and WCTU is more than adequate and appropriate under the circumstances to remedy the technical noncompliance with the statute. The shippers' supplemental comments nowhere demonstrate how Berkshire's mistake regarding CBEC and WCTU has any bearing on the value of BNSF's investment base.

The Board has a full record in this proceeding regarding the question whether it should adhere to its settled purchase accounting rules for URCS costing and revenue adequacy purposes. It should decide that question on that record and reject the shippers' suggestion that divestiture of CBEC and WCTU is an inadequate remedy for Berkshire's mistake.

ARGUMENT

I. SHIPPERS' CLAIMS THAT THE BOARD SHOULD USE THIS PROCEEDING TO "PUNISH" BERKSHIRE AND BNSF ARE WRONG AS A MATTER OF LAW AND GOOD PUBLIC POLICY

Both the ICC and the STB have confronted issues of unauthorized control in the past, and the Supreme Court has established clear guidelines for the agency's exercise of its authority to fashion a remedy for such a violation. The Court has emphasized that the choice of remedy is as important as the finding of unauthorized control. *Gilbertville*, 371 U.S. at 130. The STB must prescribe relief "with as little injury as possible to the interests of private parties or the general public." *Id.* The agency's power is "corrective, not punitive," and it must "tailor the remedy to the particular facts of each case." *Id.* at 129-30.

Here, the facts support the remedy chosen. As discussed in BNSF's opening comments, Berkshire is made up of more than 75 decentralized business groups with more than 2,000 subsidiary entities. Prior to the transaction, Berkshire and BNSF conducted an extensive due diligence and compliance review process, engaging the assistance of major law firms. As part of that review, in order to ensure compliance with the STB's control standards, Berkshire divested itself of all holdings in rail common carriers it was aware of—specifically, shares in Union Pacific Corporation and Norfolk Southern Corporation. CBEC and WCTU are extremely small entities owned by subsidiaries of subsidiaries within the Berkshire corporate structure, and their common carrier status was simply overlooked in the review process. At the time of the transaction, all parties believed that Berkshire was not a rail carrier and did not own or control any rail carriers (as defined by Title 49), and as a result the transaction was not submitted to the STB for review. BNSF Supp. Comments at 5-7.

Not only was Berkshire's failure to comply with Section 11323 an unintentional oversight, but Berkshire's unauthorized control of CBEC and WCTU created no possibility of "likely" and "substantial" lessening of competition or restraint of trade within the meaning of 49 U.S.C. § 11324(d)—which is the standard that would have governed any hypothetical STB review proceeding. Indeed, Berkshire's control of those two small railroads along with BNSF has not resulted in any anticompetitive effects at all, and none of the shippers filing supplemental comments claims otherwise.

Thus, even if this were a proceeding in which the STB had requested comments on the appropriate remedy for Berkshire's mistake, divestiture of CBEC and WCTU would be more than adequate to meet the Supreme Court's standards. As Director Marvin and Chairman Elliott both recognized in addressing Berkshire's proposed remedy, prompt divestiture is an appropriate remedy under agency precedent.[3]

WCTL, however, claims that divestiture is not an adequate remedy. WCTL acknowledges that *Gilbertville* requires the Board to do just what is required to correct the violation, with the least injury possible to private parties and the public interest. WCTL Supp. Comments at 9. However, WCTL asserts that the Board cannot "'sit idly by and wink at practices that lead to violations of [statutory] provisions.'" *Id.* at 6, 8 (citing *Am. Trucking Assn's, Inc. v. United States*, 344 U.S. 298, 311 (1953)). Nor, WCTL argues, can Berkshire "'retain the fruits of its unlawful conduct.'" *Id.* (citing *Cent. Of Ga. Ry. Control*, 307 I.C.C. 39, 43 (1958)). Citing an antitrust treatise and antitrust cases, WCTL argues that this is a case requiring "disgorgement of ill-gotten gains obtained through unlawful means." *Id.* at 9.[4]

Needless to say, the Board here did not "sit idly by and wink" at Berkshire's failure to comply with Section 11323. It demanded and promptly received from Berkshire an appropriate remedy for the violation. As to "disgorging ill-gotten gains," there are none to disgorge. Neither

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[3] *See* Letter from Director Marvin to Roger Nober, dated October 9, 2012, and Letter from Chairman Elliott to Senator Rockefeller, dated October 9, 2012 (citing *Ass'n of P & C Longshoremen v. Pittsburg & Conneaut Dock Co.*, 8 I.C.C.2d 280, 295 (1992); *Stagecoach Group PLC—Acquis. Of Control—Twin America, LLC*, MCF 21035, slip op. at 18 (STB served Feb. 8, 2011).

[4] Contrary to WCTL's suggestion, even in antitrust actions seeking equitable relief, the focus is on "control[ing] future behavior rather than punishing past acts." Phillip E. Areeda, et al., *Antitrust Law* ¶ 325a (3d ed. 2007). "Disgorgement" is required only "where appropriate," and "[t]he burden of demonstrating the appropriateness of any particular type of relief rests on the plaintiff, whether government or private." *Id.*

Berkshire nor BNSF derived any anticompetitive benefit, or any benefit of any kind, from Berkshire's simultaneous control of BNSF and what amounts to two small switching carriers (one of which does not interchange with BNSF at all). We discuss in more detail in Part II below just how misguided WCTL's specific requests for "disgorgement" are. The point here is that the fundamental predicate of WCTL's and the other shippers' requests for additional "punishment" of Berkshire and BNSF is wrong. There is and was nothing "ill-gotten" about the Board's application of its settled purchase accounting rules to value BNSF's asset base after its acquisition by Berkshire. The divestment remedy approved by the Board cures the statutory violation and more than adequately demonstrates the Board's disapproval of Berkshire's mistake.[5]

Furthermore, it bears emphasizing that the Board has not asked in this proceeding for the parties' views on whether the divestment remedy it approved was adequate. The question here is whether Berkshire's failure to come into compliance with Section 11323 until now had any impact on the proper valuation of BNSF's investment base. It did not, because WCTU and CBEC had nothing to do with that valuation. Berkshire and BNSF applied GAAP purchase accounting to Berkshire's acquisition of BNSF because it is required both for SEC reporting purposes and because it is required by the Board's rules.

Finally, insofar as the "remedy" the shippers seek in this proceeding is to have the Board single out BNSF for the use of outdated book values to calculate URCS costs and make revenue adequacy determinations, that would fly directly in the face of the Supreme Court's admonition in *Gilbertville* that any remedy fashioned by the Board minimize injury to the public interest.

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[5] Contrary to WCTL's suggestion, this is not a case like *Cent. Of Ga. Ry. Control*, 307 I.C.C. 39 (1958), where the ICC determined that the railroad it sanctioned had acted "in flagrant disregard of the law." *Id.* at 43.

The Board uses purchase accounting to value railroads' assets not simply because it is required by GAAP, but because it is more economically accurate than old book values. The Board makes the most accurate calculations of current cost that it can practicably make because it is in the public interest. The shippers' suggestion that the Board should use demonstrably uneconomic asset values as a way punish Berkshire and BNSF is not only wrong as a matter of law but perverse as a matter of good public policy.

II. THE SHIPPERS' SPECIFIC PROPOSALS ARE ILL-CONCEIVED AND SHOULD BE REJECTED

A. WCTL. Much of WCTL's supplemental comments and most of its supplemental evidence is devoted to an argument that the Board should calculate a separate 2009 cost of capital for BNSF and apply it in 2010, 2011, and 2012 to lower BNSF's URCS costs for those years and find BNSF revenue adequate in 2011 and 2012. WCTL Supp. Comments at 12-17; Crowley/Fapp Supp. VS at 3-16. WCTL's theory is that this radical departure from the Board's settled rules for calculating the rail industry's composite cost of capital is necessary in order to "remedy" BNSF's exclusion from the industry sample, pursuant to the Board's established rules, after BNSF was acquired by Berkshire. WCTL Supp. Comments at 14; Crowley/Fapp Supp. VS at 3-4. This theory is wrong for multiple reasons.

First, as discussed above, there is no basis for WCTL's suggestion that the Board should invent ways to "make whole" its cost of capital and revenue adequacy calculations for 2010, 2011, and 2012, because there were no "ill-gotten gains" or distortions that resulted from the Board's application of its normal rules after BNSF's acquisition by Berkshire. To be sure, there was a statutory violation resulting from Berkshire's failure to seek approval for the transaction under Section 11323, but that violation is in the process of being remedied by Berkshire's divestiture of CBEC and WCTU. The fact that Berkshire will not come into compliance with the statute until it completes those divestitures does not mean that the Board need turn back the clock and seek to unwind Berkshire's acquisition of BNSF. No one could reasonably claim that such a draconian remedy is required. Yet WCTL argues that the Board should attempt for regulatory purposes to pretend that the transaction did not take place, and will not take place until the divestiture of CBEC and WCTU is complete. There is no basis in law or equity for such an extreme "remedy."

Second, this is not WCTL's first attempt to argue that the Board should change its cost of capital rules in light of Berkshire's acquisition of BNSF. In the Board's recent proceedings in *Railroad Cost of Capital—2010*, Ex Parte No. 558 (Sub-No. 14) (served Oct. 3, 2011), WCTL argued that BNSF's exclusion from the composite railroad sample as the result of its acquisition by Berkshire would likely lead to higher costs of equity and capital, and WCTL offered an approach to compute a surrogate cost of equity for BNSF to be included in the composite calculation. Slip op. at 7. The Board found that WCTL's proposal conflicted with both the Board's criteria in *Railroad Cost of Capital—1984*, 1 I.C.C.2d 989 (1985), for calculating the cost of capital for a "composite railroad" and the Board's cost-of-capital methodology adopted in *Methodology To Be Employed in Determining the Railroad Industry's Cost of Capital*, Ex Parte No. 664 (served Jan. 17, 2008). *Id.* The Board admonished WCTL that it should not attempt to use annual cost-of-capital proceedings to advocate for a change to the Board's cost-of-capital model. *Id.* at 8. In any event, the Board found that WCTL had not demonstrated that its suggested methodology, which would have required BNSF's inclusion in the industry cost of capital, was a more accurate approach than the Board's current process. *Id.*

Having failed to convince the Board in *Railroad Cost of Capital—2010* that including BNSF in the composite industry cost-of-capital calculation would improve the accuracy of that calculation, WCTL now argues that it would be appropriate for the Board to ignore its industry cost-of-capital calculation altogether, calculate a separate 2009 cost of capital for BNSF, and apply that separate 2009 cost of capital for URCS costing and revenue adequacy purposes in 2010, 2011, and 2012. This is an impermissible collateral attack on the Board's established cost-of-capital and revenue adequacy standards, as well as on the Board's decision in *Railroad Cost of Capital—2010* itself. The Board does not make its cost-of-capital determinations in a vacuum. The purpose of those determinations is to establish the annual cost of capital that is used for URCS costing and revenue adequacy determinations for every Class I railroad operating in the United States, regardless of whether it qualifies for the sample used in the cost-of-capital calculation.[6] The Board does not permit individual railroad cost-of-capital determinations to be made or used for those regulatory purposes. Moreover, the Board in *Railroad Cost of Capital—2010* specifically rejected the notion that any adjustment to the composite cost-of-capital calculation was necessary to respond to WCTL's claim that BNSF has a lower cost of equity, much less that the use of an entirely separate cost of capital could be justified.[7]

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[6] Thus, although there are three companies currently in the sample (CSX Corporation, Norfolk Southern Corporation, and Union Pacific Corporation), the Board uses the composite industry cost of capital to determine revenue adequacy for those three as well as BNSF, Kansas City Southern Railway Company, the U.S. affiliates of Canadian National Railway Company, and the U.S. affiliates of Canadian Pacific Railway Company. *See Railroad Revenue Adequacy—2011 Determination*, Ex Parte No. 552 (Sub-No. 16) (served Oct. 16, 2012), slip op. at App. A.

[7] WCTL claims that it is not asking the Board to modify its cost-of-capital rules, but only to use its "broad remedial powers" to punish Berkshire during the "unlawful control years." WCTL Supp. Comments at 15. But WCTL *is* asking the Board to jettison its rules for three years, and it goes so far as to offer up a calculation of the impact that would have in a particular case. *Id.* at 15-16; Crowley/Fapp Supp. VS at 12. WCTL asserts that these same types of "corrective impacts" would apply across the board to all STB proceedings involving the calculation of BNSF costs during those years. WCTL Supp. Comments at 16; Crowley/Fapp Supp. VS at 10-11. This is pure sophistry. WCTL's proposal is no less a collateral attack on the Board's cost-of-capital standards for being limited to a three-year period that if WCTL were seeking its permanent application, and WCTL leaves no doubt with its references to other STB proceedings that it has

Third, WCTL's effort to justify using a frozen 2009 cost of capital for BNSF to make URCS and revenue adequacy calculations for three following years only underscores the weakness of its position. WCTL's witnesses Crowley and Fapp acknowledge that the cost of capital for the industry *increased* in 2010 and 2011, and that they have no way of calculating an individual cost of capital for BNSF in those years or any other year after 2009, but they claim nevertheless that the Board should presume that a frozen cost-of-capital calculation for 2009 is an adequate stand-in for 2010, 2011, and 2012. Crowley/Fapp Supp. VS at 11. This does not pass the "red face" test. Even if, contrary to the Board's settled position, it were appropriate to use an individual railroad cost-of-capital calculation to set URCS costs and make revenue adequacy calculations, it is highly unlikely that a railroad's cost of capital in one year would be the same in succeeding years. The Board's own calculations for the industry show otherwise.

Although WCTL's primary focus in its supplemental comments is on its ill-conceived cost-of-capital "remedy," WCTL also argues that the Board should punish Berkshire and BNSF by removing the purchase accounting acquisition premium from BNSF's investment base, at least until Berkshire's divestiture of CBEC and WCTU is complete. WCTL Supp. Comments at 10-12. WCTL repeats some of the arguments it made in its earlier pleadings for the Board to reverse its settled position regarding the use of GAAP purchase accounting for regulatory purposes, but its principal claim here is that the acquisition premium should be removed for 2010, 2011, and 2012 to prevent Berkshire and BNSF from enjoying the fruits of their "ill-gotten" gains. *Id.* at 12. We addressed above why WCTL is wrong to claim that there is anything "ill-gotten" about the Board's application of its normal rules to Berkshire's acquisition of BNSF, and why the divestiture of CBEC and WCTU is a fully adequate remedy for

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very concrete ways in which it would attempt to take advantage of its "corrective" proposal if it were adopted by the Board.

Berkshire's mistake. Those reasons apply equally to WCTL's proposal regarding BNSF's investment base as to WCTL's proposal regarding the use of a special, frozen 2009 BNSF cost of capital. They both should be rejected.

B. CURE. CURE devotes much of its supplemental comments to repeating positions that it and others took in their prior pleadings in this proceeding. CURE Supp. Comments at 2-3, 14-16. We will not repeat our responses to those positions, which were fully addressed in BNSF's prior comments and evidence. CURE does, however, make some new arguments, which we address here.

The principal new argument that CURE makes is that the Board should require Berkshire and BNSF to file an application seeking the Board's approval of Berkshire's acquisition of BNSF, either in this proceeding or in a separate new proceeding. The reasons CURE gives are (1) that the Board has the authority to do so and (2) that Berkshire and BNSF would have the burden of proof in such a proceeding. *Id.* at 3. With respect to the Board's authority, we discussed above that it is not unbounded. It is corrective, rather than punitive, and the Board "bears a heavy responsibility to tailor the remedy to the particular facts of each case." *Gilbertville*, 371 U.S. at 130. The Board has correctly chosen here to approve as the appropriate remedy for Berkshire's mistake the divestiture of CBEC and WCTU, and nothing in CURE's supplemental comments provides any ground for second-guessing the Board's decision.

That is particularly true of CURE's claim that shippers would gain an advantage in such a proceeding because Berkshire and BNSF would have the burden of proof under Section 11323. While that may technically be true, any acquisition proceeding that does not involve two Class I railroads is governed by the "presumptive grant standard" of Section 11324(d). *Kansas City Southern—Control—Kansas City Southern Ry. Co, Gateway Eastern Ry. Co., and Texas*

Mexican Ry. Co., STB Fin. Dkt. No 34342 (served Nov. 29, 2004), slip op. at 23. It must be approved unless the Board finds that as a result of the transaction, there will be a "likely" and "substantial" lessening of competition, creation of a monopoly, or restraint of trade. No such finding would be possible with respect to the "combination" of BNSF, CBEC, and WCTU. In the first place, Berkshire will shortly have divested both CBEC and WCTU, so the issue would be moot.[8] In any event, CBEC and WCTU are inconsequential. CURE makes no claim of *any* anticompetitive effects, much less likely and substantial anticompetitive effects, that would result even if Berkshire simultaneously controlled BNSF, CBEC, and WCTU.

CURE claims nevertheless that it could seek conditions in a merger proceeding, such as disallowance of the acquisition premium, a certification that BNSF be deemed revenue adequate as long as it is owned by Berkshire, and alteration of the Board's cost-of-capital standards to include BNSF in the composite calculation for the industry. CURE Supp. Comments at 16-19. With respect to disallowance of the acquisition premium, CURE and the other shipper interests in *this* proceeding have had every opportunity to present evidence and make arguments in support of their position. There have been three rounds of filings and an oral hearing where the Board took additional evidence. CURE can make no claim that it has suffered the slightest disadvantage as a result of not being able to advance its arguments in a merger proceeding instead.

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[8] CURE makes a silly argument that the Board should not rely on BNSF's statements about Berkshire's plan to divest CBEC and WCTU. CURE Supp. Comments at 5. BNSF's Executive Vice President Law and Secretary, Roger Nober, has made clear from the time he initially notified the Board of Berkshire's mistake regarding CBEC and WCTU that he speaks in this matter on behalf of Berkshire as well as BNSF. *See* Letter from Roger Nober to Chairman Elliott, dated September 13, 2012. The Board, of course, has taken this representation at face value, and the fact that Berkshire has already divested CBEC demonstrates beyond any doubt that the Board's reliance on Mr. Nober's representation is justified.

With respect to an argument that CURE has raised for the first time in its supplemental comments—that BNSF should be deemed revenue adequate as long as it is owned by Berkshire—that argument is essentially a collateral attack on the Board's revenue adequacy standards, and it has no more place here than it would have in a merger proceeding. If CURE wishes to reopen the Board's revenue adequacy standards, it can certainly seek to do so with a request for declaratory order directed to those standards, but as a matter of good law, economics, and policy, CURE would have little chance of success. The agency long ago rejected the notion that revenue adequacy could be determined on any basis other than a cost-of-capital return on rate base. *See Standards for Revenue Adequacy*, Ex Parte No. 393, 364 I.C.C. 803 (1981). Regardless of whether railroads are acquired by other railroads or by non-railroads, they must provide the same opportunity to investors for a competitive return. Those investors may be the shareholders of a publicly traded railroad or the shareholders of a publicly traded non-railroad like Berkshire. The economic costs are the same and they must be treated the same for revenue adequacy purposes.[9]

CURE also claims, like WCTL, that BNSF should be included in the Board's composite cost-of-capital calculation. CURE Supp. Comments at 5-6. As discussed above, this is a collateral attack on the Board's settled cost-of-capital standards and has specifically been

[9] By the same token, CURE's oft-repeated argument that the costs involved in acquiring BNSF were costs to Berkshire, not BNSF, misses the point entirely. CURE Supp. Comments at 2, 11-13, 15-17. The asset values determined in the GAAP purchase accounting process are *BNSF's* asset values. They represent the real values on which the railroad must have the opportunity to earn a competitive return if it is going to continue to attract and retain capital. *CSX Corp.—Control—Conrail Inc.,* 3 S.T.B. 196, 265 (1998). That includes the $8.1 billion purchase accounting adjustment, which was calculated on the basis of the fair value of BNSF's assets. *See* Hund VS, filed October 28, 2011 in support of BNSF's Opening Comments, at 3-8.

rejected by the Board. It would fare no better in a hypothetical minor merger proceeding than in this proceeding.

C. ARC. ARC does not seek a new merger proceeding. It largely repeats its prior arguments in this proceeding about why the Board should reverse its settled position regarding the use of GAAP purchase accounting for URCS costing and revenue adequacy purposes. ARC Supp. Comments at 3-6. Without saying so directly, ARC appears to argue that the Board should weigh Berkshire's failure to identify CBEC and WCTU against Berkshire and BNSF in making its decision on the acquisition premium question before the Board. *Id.* at 6.[10] As we discussed earlier, the idea that Berkshire and BNSF need more "punishment," particularly in the form of reversing years of settled law and policy regarding acquisition premiums, is wrong as a matter of law and equity. ARC's apparent argument to the contrary should be rejected.

D. AECC. Like ARC, AECC does not seek a new merger proceeding. Nevertheless, AECC, which is not even a BNSF shipper, speculates about what might have been revealed in such a proceeding. AECC claims that it is possible that Berkshire paid an inflated price for BNSF because Berkshire also owns MidAmerican/PacifiCorp. AECC's theory is that Berkshire would have an incentive to foreclose Union Pacific Railroad from providing competitive service to MidAmerican's plants in order to enable BNSF to increase prices to MidAmerican—Berkshire's own subsidiary. In anticipation of this possibility, AECC suggests,

[10] ARC also makes an odd argument that it is only BNSF, not Berkshire, that appears to care about the acquisition premium, since Berkshire itself has filed no comments in this proceeding. ARC Supp. Comments at 3. BNSF, of course, is the appropriate company to file comments in this proceeding, since BNSF is the carrier regulated by the Board and it is the valuation of BNSF's assets that is directly at stake here. In any event, as a wholly owned subsidiary of Berkshire, BNSF does not take positions before the Board that are not supported by Berkshire. ARC's suggestion that a separate filing by Berkshire would be necessary to demonstrate Berkshire's position is completely unfounded.

Berkshire could have paid more for BNSF than it otherwise would have paid. AECC Supp. Comments at 3-4.

AECC's suggestion is both counterintuitive and unsupported by a shred of evidence. AECC attaches a verified statement to its pleading, but that statement is simply a copy of the rebuttal statement it filed in December 2011.[11] Nothing in that statement mentions AECC's new theory or otherwise provides any support for AECC's speculation, which is simply wrong. Berkshire's business philosophy is for each of its subsidiaries to run independently; there is no directive for subsidiaries to do business with each other and, where they do, it is as a result of competitive, arms-length negotiations.

AECC does not suggest any proceedings to test its theory, and none would be justified. Like ARC, AECC appears to claim that divestiture of CBEC and WCTU is an inadequate "punishment" for Berkshire's failure to seek control authority under Section 11323.[12] AECC Supp. Comments at 4-5. We discussed above why divestiture is a more than adequate remedy, both as a matter of law and as a matter of equity. AECC's suggestion that the Board should

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[11] AECC did not attempt to become involved in this proceeding until the last round of comments in December 2011. On the last day, without any prior notification, AECC filed a motion for leave to file rebuttal comments, and attached its proposed comments to that motion. BNSF opposed AECC's motion, not only because it was so out of time but also because it engaged in unsupported speculation about issues that had become settled in the course of the proceeding. *See* BNSF Railway Company's Opposition to Arkansas Electric Cooperative Corporation's Motion for Leave to File Rebuttal Evidence and Argument, filed December 28, 2011, in this proceeding. The Board has yet to rule on AECC's motion.

[12] AECC raises a cryptic "question how Berkshire could even find a bona fide buyer for CBEC in a transaction outside the Board's jurisdiction, since it is understood that CBEC was constructed to enable UP to compete for coal movements to a MidAmerican plant that formerly was captive to BNSF." AECC Supp. Comments at 3-4. The short answer to that question is that MidAmerican found such buyers in the other two owners of CBEC—Central Iowa Power Cooperative, which now owns 94% of CBEC, and Corn Belt Power Cooperative, which now owns 6% of CBEC. Neither is a rail carrier and neither owns or controls another rail carrier. *See* Letter from Roger Nober to Director Marvin, filed November 16, 2012, in this proceeding.

rescind its rules regarding GAAP purchase accounting as an additional sanction should be rejected.

CONCLUSION

The Board has a full record in this proceeding regarding the question presented by WCTL's petition—is there a persuasive rationale for the Board to depart in this case from its rules and established practice of flowing through purchase accounting adjustments to railroads' asset values and URCS costs? That question can and should be decided on that record. Berkshire's mistake in failing to identify CBEC and WCTU has no relevance to the issue here, and its inadvertent non-compliance with the statute is in the process of being fully remedied pursuant to an approved plan (indeed, as previously noted, CBEC has already been divested). The Board's remedial authority is corrective, not punitive. The Board should reject the shippers' arguments that Berkshire's mistake with respect to CBEC and WCTU provides any basis for altering the Board's settled position regarding the use of GAAP purchase accounting, much less for collaterally attacking the Board's cost-of-capital and revenue adequacy standards.

Respectfully submitted,

/s/

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Dated: November 28, 2012

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Comments of BNSF Railway Company were served on November 28, 2012, by U.S. mail, on all parties of record.

/s/

Robert M. Jenkins III