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INFORMATION SUBJECT TO PROTECTIVE ORDER HAS BEEN REDACTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

WESTERN COAL TRAFFIC LEAGUE)	
- PETITION FOR DECLARATORY)	Docket No. FD 35506
ORDER)	
)	

**JOINT PETITION OF THE WESTERN COAL TRAFFIC LEAGUE,
WESTERN FUELS ASSOCIATION, INC., BASIN ELECTRIC POWER
COOPERATIVE, INC., AND ARIZONA ELECTRIC POWER
COOPERATIVE, INC. FOR A TECHNICAL CONFERENCE**

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Dated: December 12, 2013

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The Western Coal Traffic League, Western Fuels Association, Inc., Basin Electric Power Cooperative, Inc., and Arizona Electric Power Cooperative, Inc. (collectively “Coal Shippers”) request that the Surface Transportation Board (“STB” or “Board”) conduct a technical conference to obtain the Board staff’s views concerning the STB Annual Report Form ACAA-R-1 (“R-1”) inputs the Board plans to use to develop BNSF Railway Company’s (“BNSF”) Uniform Railroad Costing System (“URCS”) variable costs to comply with the decision the Board served in this proceeding on July 25, 2013.¹ In support hereof, Coal Shippers state:

1. In its July 2013 Decision, the Board directed BNSF to “refile its R-1 reports for 2010, 2011, and 2012 and remove entirely the markup of rail assets” resulting from Berkshire Hathaway, Inc.’s acquisition of BNSF in 2010. *Id.*, slip op. at 31.

¹ *Western Coal Traffic League – Pet. for Decl. Order*, FD 35506 (STB served July 25, 2013) (“July 2013 Decision”).

2. The Board also stated in its July 2013 Decision that it had “adjusted the 2010 BNSF R-1 reports used to develop URCS to remove the markup and re-ran our URCS software programs.” *Id.*, slip op. at 14 n.31. As the Board explained, “[t]his produced 2010 URCS results without the markup that we could compare directly to the 2010 URCS results with the markup.” *Id.* The Board found that “[o]ur analysis indicates that including the markup would increase BNSF’s URCS costs by approximately 9.8%.” *Id.*

3. Following the issuance of the July 2013 Decision, the Board provided Coal Shippers with a copy of the electronic workpapers supporting the Board’s URCS markup impact calculations (“July 2013 Workpapers”). The July 2013 Workpapers contained URCS worktables that identified the specific R-1 adjustments the Board made to remove the markup.²

4. BNSF filed restated R-1’s for calendar years 2010, 2011, and 2012.³ These restated R-1’s were posted on the Board’s website circa October 23, 2013. Since that time, materials on the Board’s website indicate:

² The July 2013 Workpapers were provided pursuant to the governing protective order in this case, so Coal Shippers are treating them as “highly confidential” for purposes of this filing.

³ See BNSF Railway Company Class I Railroad Annual Report Restatement To the Surface Transportation Board For The Year Ending December 31, 2010 (“restated 2010 R-1”), [http://www.stb.dot.gov/econdata.nsf/f039526076cc0f8e8525660b006870c9/f0bdc7fecba4bcef85257870003f6260/\\$FILE/ATT4OR7R.pdf/BNSF%202010%20Restated%20R-1.pdf](http://www.stb.dot.gov/econdata.nsf/f039526076cc0f8e8525660b006870c9/f0bdc7fecba4bcef85257870003f6260/$FILE/ATT4OR7R.pdf/BNSF%202010%20Restated%20R-1.pdf); BNSF Railway Company Class I Railroad Annual Report Restatement To the Surface Transportation Board For The Year Ending December 31, 2011, [http://www.stb.dot.gov/econdata.nsf/f039526076cc0f8e8525660b006870c9/f5521d8454c43da6852579db004c6c11/\\$FILE/BNSF%202011%20Restated%20R-1.pdf](http://www.stb.dot.gov/econdata.nsf/f039526076cc0f8e8525660b006870c9/f5521d8454c43da6852579db004c6c11/$FILE/BNSF%202011%20Restated%20R-1.pdf);

- The Board's staff informed BNSF that BNSF's restated R-1 reports were not in compliance with the Board's July 2013 Decision because the reports were not certified.⁴
- BNSF informed the Board's staff that it would make available certified copies of the R-1 reports no later than November 22, 2013.⁵
- The Board's staff has audited BNSF's certified R-1 reports.⁶

To the best of Coal Shippers' knowledge, the only publicly available versions of BNSF's restated R-1's are those initially posted on the Board's website circa October 23, 2013.

5. BNSF's restated 2010 R-1, as posted on the Board's website, contains many entries that are different than the corresponding R-1 entries in the STB's July 2013 Workpapers. For example, the Board's July 2013 Workpapers supporting the Board's calculation of BNSF's variable costs without the asset mark-up calculate BNSF's total accumulated deferred income tax credits at { }⁷ whereas BNSF's

BNSF Railway Company Class I Railroad Annual Report Restatement To the Surface Transportation Board For The Year Ending December 31, 2012, [http://www.stb.dot.gov/econdata.nsf/f039526076cc0f8e8525660b006870c9/0c2ea96fedde563985257b41004c7d41/\\$FILE/BNSF%202012%20Restated%20R-1.pdf](http://www.stb.dot.gov/econdata.nsf/f039526076cc0f8e8525660b006870c9/0c2ea96fedde563985257b41004c7d41/$FILE/BNSF%202012%20Restated%20R-1.pdf).

⁴ See Letter from William F. Huneke, STB Director & Chief Economist, to Jon Stevens, BNSF AVP and Assistant Controller (Nov. 19, 2013) at 1.

⁵ *Id.*

⁶ *Id.*; see also Letter from Jon I. Stevens to William F. Huneke (Nov. 26, 2013) at 1-2 (discussing the audit procedures); *Quarterly Rail Cost Adjustment Factor*, EP 290 (Sub-No. 5) (2013-4), slip op. at 1 (STB served Nov. 27, 2013) (“BNSF has now certified its revised R-1 Annual Reports for 2010, 2011, and 2012, and the Board has audited the certified schedules.”).

⁷ See July 2013 Workpapers, “BNSF 2010_WithPrem.pdf,” Worktable A4 Part 3 Line 202 (referencing R-1 Schedule 200).

restated 2010 R-1 calculates BNSF's total accumulated deferred income tax credits at \$9,922,234.⁸

6. Based upon their review to date, Coal Shippers believe that use of BNSF's restated R-1 inputs for 2010 will produce significantly higher URCS variable costs than the corresponding variable costs (without the markup) calculated by the Board in its July 2013 Workpapers. Coal Shippers also believe that application of BNSF's restated R-1 inputs for years 2011 and 2012 will produce significantly higher variable costs than the corresponding costs (without the markup) developed using the procedures followed by the Board in its July 2013 Workpapers.

7. Among other things, increased variable costs produce higher jurisdictional thresholds (shipper's variable cost x 1.80), thus "placing an additional amount of BNSF's rates outside [the Board's] authority to review."⁹ Increased variable costs also produce higher rates for BNSF shippers with rate prescriptions tied to BNSF's variable costs.

8. In light of these developments, Coal Shippers request that the Board convene a technical conference. Coal Shippers need guidance from the Board's staff on how it plans to address the differences between its July 2013 Workpapers' R-1 inputs and the corresponding R-1 inputs contained in BNSF's restated R-1's. The most efficient way to accomplish this objective is through a technical conference with the Board's staff. *See, e.g., Ariz. Elec. Pwr. Coop., Inc. v. BNSF Ry.*, NOR 42113 (STB served May 31,

⁸ See BNSF restated 2010 R-1 Schedule 200, Line 49, Column (b).

⁹ See July 2013 Decision, slip op. at 14.

2011) (Board convenes a technical conference to discuss how the Board's staff plans to develop variable costs).

9. A technical conference is also particularly important because the Board's staff possesses highly relevant materials concerning the R-1 inputs that Coal Shippers do not. For example, the Board's staff has access to, and has reviewed, the valuation report BNSF utilized to make its purchase accounting adjustments.¹⁰ As a second example, the Board's staff knows the results of its recent audit of BNSF's restated R-1's.

10. Coal Shippers suggest that the technical conference be open to all parties in this proceeding that have executed the governing protective order; that conference participants (other than BNSF's representatives) be limited to outside counsel and consultants that are permitted to see material designated as "highly confidential" under the governing protective order; and that the conference be convened in a timely manner prior to the Board's reissuance of the BNSF 2010 and 2011 URCS, and its issuance of the BNSF 2012 URCS.

¹⁰ See July 2013 Decision, slip op. at 22-23.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE,
WESTERN FUELS ASSOCIATION, INC.,
BASIN ELECTRIC POWER COOPERATIVE, INC.,
AND ARIZONA ELECTRIC POWER
COOPERATIVE, INC.

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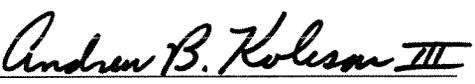
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Dated: December 12, 2013

Their Attorneys

CERTIFICATE OF SERVICE

I hereby certify that this 12th day of December, 2013, I have caused Redacted, Public copies of the forgoing Joint Petition to be served via first-class mail, postage prepaid upon all parties of record to this case, and have caused a Highly Confidential version to be served upon counsel for BNSF Railway Company by email and first-class mail, postage prepaid.


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