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June 30, 2014  
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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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**BNSF RAILWAY COMPANY’S REPLY TO COMPLAINANTS’  
PETITION FOR LEAVE TO FILE REMAND COMMENTS**

BNSF Railway Company (“BNSF”) hereby replies to the Petition for Leave to File Initial Comments on Remand (“*Petition for Leave to File*”) filed by complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (“WFA/Basin”) on June 17, 2014. As discussed below, BNSF does not oppose WFA/Basin’s *Petition for Leave to File* so long as the Board provides BNSF with adequate time to submit comments in response to the remand comments that are attached to WFA/Basin’s *Petition for Leave to File*. Based on the procedural schedule established in the prior round of remand filings in this matter and the high level of activity at the Board over the next several months involving BNSF, its counsel, and its consultants, BNSF requests that the Board provide BNSF with 60 days to file responsive comments from the date of a decision granting WFA/Basin’s *Petition for Leave to File*.

## ARGUMENT

On January 31, 2014, the U.S. Court of Appeals for the District of Columbia Circuit remanded to the Board for the second time the Board's finding that the rates charged by BNSF to WFA/Basin for the transportation of coal to the Laramie River Station exceed reasonable maximum levels. In its January 31, 2014 decision, the D.C. Circuit concluded that the Board had erred by failing to consider BNSF's proportionality challenge to the Modified Average Total Cost ("Modified ATC") methodology. The Court vacated the Board's decision and remanded the case to the Board for further proceedings. The Court also noted that if the Board were to adopt an alternative revenue allocation methodology for future cases that addressed the problem that BNSF had identified with the Modified ATC methodology—which the Board has now done in Ex Parte No. 715, *Rate Regulation Reforms*—the Board would need to address on remand why that alternative methodology would not be applicable in the present case.

On June 18, 2014, WFA/Basin filed their *Petition for Leave to File*. Attached to the *Petition* are the remand comments that WFA/Basin seeks permission to file.<sup>1</sup> The remand comments consist of a lengthy, 67-page counsel argument which is supported by a verified statement of Thomas D. Crowley of L.E. Peabody & Associates. The Crowley V.S. includes analyses of the impact of alternative revenue allocation methodologies on the results of the SAC analysis and analyses of reparations and forecasted rate relief under alternative scenarios. The Crowley V.S. is supported by electronic workpapers that purport to include among other things analyses of the impact of different revenue allocation methodologies on revenue per ton and

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<sup>1</sup> WFA/Basin style their remand comments as "Initial" comments on remand presumably because WFA/Basin is asking the Board, among other things, for an opportunity to submit new SAC evidence on remand. BNSF will explain in its reply comments why the Board can and should end this proceeding without allowing WFA/Basin to further prolong the case with what would be their *third* SAC presentation.

R/VC ratio ranking of coal movements and analyses of alternative revenue and cost assumptions in the SAC calculations. BNSF's counsel and consultants will need to devote substantial time and effort to analyzing the contentions in WFA/Basin's counsel argument and the Crowley V.S. and to prepare a response.

This case is only one of several important proceedings that are currently pending before the Board, including *Rail Transportation of Grain, Rate Regulation Review*, STB Docket No. EP 665 (Sub-No. 1); *Rail Fuel Surcharges (Safe Harbor)*, STB Docket No. EP 661 (Sub-No. 2); *Railroad Revenue Adequacy*, STB Docket No. EP 722; and *Petition of the Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry's Cost of Equity Capital*, STB Docket No. EP 664 (Sub-No. 2). The Board's docket has become very active in recent months. BNSF and its counsel are devoting substantial attention and resources to these pending proceedings, and BNSF will need to devote additional time and resources to respond to the WFA/Basin remand comments.

There is precedent in this case for addressing the schedule for filing comments on remand. After the first remand of the Board's rate reasonableness determination in this case from the D.C. Circuit, BNSF submitted remand comments without waiting for the Board to establish a schedule for remand filings. WFA/Basin moved to strike BNSF's remand comments.<sup>2</sup> In response to the motion to strike, the Board noted that there was no regulation or established procedure for addressing issues on remand. The Board criticized BNSF for simply filing its remand comments instead of asking for leave to file its comments, a process that would have given the Board an opportunity to determine how best to proceed on remand. *See Western*

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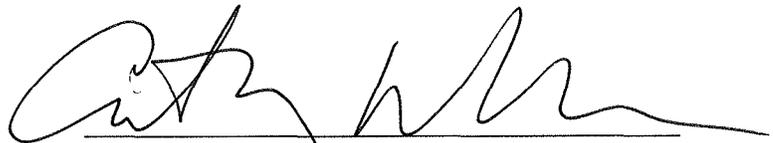
<sup>2</sup> In the alternative, WFA/Basin requested 60 days to reply to BNSF's comments. *See* WFA/Basin Motion to Strike, at 3 (filed Nov. 29, 2010).

*Fuels Association, Inc. v. BNSF Ry. Co.*, STB Docket No. 42088, slip op. at 2-3 (STB served Feb. 1, 2011). The Board nevertheless denied WFA/Basin's motion to strike BNSF's comments, concluding that it would be appropriate to consider comments on remand from both parties, and the Board established a schedule for WFA/Basin to reply to BNSF's comments within 45 days of the Board's decision, which was 116 days after the filing of BNSF's comments. BNSF does not believe that it would be necessary or appropriate to establish such a lengthy reply schedule in this second remand. However, given the numerous other proceedings that are pending at the Board and the importance of the issues that BNSF would need to address in its reply, BNSF believes that it would be appropriate for the Board to give BNSF 60 days from the date of a Board decision on WFA/Basin's *Request for Leave to File* to submit reply comments.

#### CONCLUSION

BNSF does not oppose WFA/Basin's *Petition for Leave to File* but BNSF requests 60 days to file comments in response to the remand comments attached to WFA/Basin's *Petition*.

Respectfully submitted,



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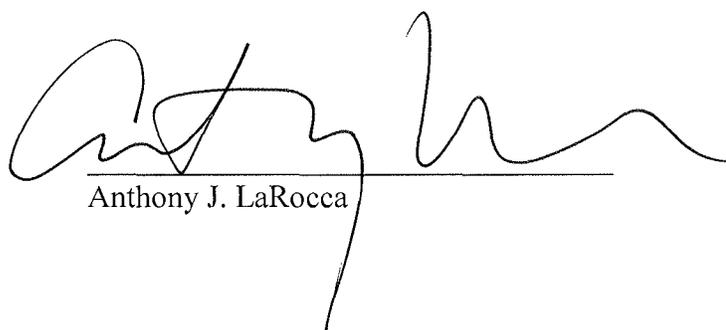
Attorneys for BNSF Railway Company

June 30, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that this 30th day of June, 2014, I served a copy of BNSF's Reply to WFA/Basin's Petition for Leave to File Initial Comments on Remand on the following by e-mail:

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