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Office of Proceedings
September 19, 2014
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September 19, 2014

BY E-FILING

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: **Western Fuels Ass'n, Inc. and Basin Electric Power Cooperative
v. BNSF Railway Company, STB Docket No. 42088**

Dear Ms. Brown:

Enclosed for electronic filing in the above-captioned matter is the public version of BNSF Railway Company's Reply Comments on Remand, which includes the supporting Verified Statement of Benton V. Fisher and Robert O. Fisher ("Fisher/Fisher VS") of FTI Consulting. Please note that the documents contain color images.

BNSF is e-filing under separate cover letter the highly confidential version of BNSF Railway Company's Reply Comments on Remand and accompanying Fisher/Fisher VS. In addition, BNSF is filing under separate cover the electronic workpapers supporting the Fisher/Fisher VS.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Anthony J. LaRocca

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

BNSF RAILWAY COMPANY’S REPLY COMMENTS ON REMAND

BNSF Railway Company (“BNSF”) files the following Reply Comments on Remand pursuant to the Board’s July 21, 2014 Decision in the above-captioned proceeding. These Reply Comments respond to the Initial Comments on Remand filed by Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (“WFA/Basin”) on June 17, 2014 (“WFA/Basin’s Comments on Second Remand”).

I. Introduction and Summary of Argument

This is the second remand of the Board’s February 18, 2009 Decision in this proceeding from the U.S. Court of Appeals for the D.C. Circuit for the Board to address a flaw in the Board’s treatment of revenues on cross-over traffic. On this second remand, the Board should recalculate the SAC results underlying the 2009 Decision using the revenue allocation methodology that the Board adopted in *Rate Regulation Reforms* – referred to as Alternative ATC – and revise the rate prescription to reflect the recalculated SAC results.

The Board has already concluded that Alternative ATC is superior to the revenue allocation methodology used by the Board in the 2009 Decision – the Modified ATC methodology – and that it addresses the concerns raised by BNSF that led to this second remand. The Board has also previously found in this case that once it has identified a superior revenue allocation methodology, it would make no sense to continue applying the pre-existing inferior methodology. Indeed, the flaw in Modified ATC that led the Board in *Rate Regulation Reforms* to adopt a new revenue allocation methodology – namely, the double-counting of variable costs under Modified ATC – improperly inflated WFA/Basin’s award of rate by a substantial amount. It would be arbitrary and grossly unfair to BNSF for the Board to continue using Modified ATC in this case in light of the substantial and unjustified increase in rate relief produced by the improper treatment of variable costs under Modified ATC.

The Board can recalculate the SAC results using Alternative ATC without further proceedings and it should do so. The application of Alternative ATC in this case is straightforward, and WFA/Basin have already provided the Board with the calculations necessary to revise the 2009 SAC results using Alternative ATC.¹ The recalculation of SAC results using Alternative ATC will reduce WFA/Basin’s rate relief, but the reduced award based on a superior revenue allocation methodology will still amount to almost \$122 million in rate relief through April 2014 plus \$122 million in future relief from the rate prescription through 2024, making WFA/Basin the recipients of the largest award of rate relief by far in a rate case in the Board’s history.

¹ The necessary calculations are presented by WFA/Basin’s witness, Mr. Crowley. *See* WFA/Basin’s Comments on Second Remand, Remand Verified Statement of Thomas D. Crowley, at 8 (“Crowley VS”).

The Board's application of Alternative ATC to recalculate the 2009 SAC results in no way compels it to give WFA/Basin an opportunity to redesign the stand-alone railroad ("SARR") used in their second SAC presentation. The Board has an established test for determining when to give the complainant a chance to file new evidence after a change in SAC methodology, and WFA/Basin cannot meet that test here. The Board's test looks at whether the change in SAC methodology changes a complainant's incentives regarding the design of its SARR. In 2007, Board found that the change from the prior Modified Straight-Mileage Prorate ("MSP") methodology to the new ATC methodology changed WFA/Basin's traffic selection and SARR design incentives and therefore gave WFA/Basin an opportunity to redesign their SARR. But here, the use of Alternative ATC merely corrects the overstatement of revenue on high-rated cross-over traffic under Modified ATC without changing the traffic selection incentives that WFA/Basin had under Modified ATC. WFA/Basin's vague claim that they would have done something different had they known how the Board would rule on the disputed issue of revenue allocation does not justify the filing of new evidence. The Board should not prolong this case simply to give WFA/Basin an opportunity to try to improve their SAC results and increase their already unprecedented rate relief.

Moreover, WFA/Basin ask the Board to go far beyond the limited reopening of the record that the Board allowed in 2007. WFA/Basin seek to use the remand, which is focused on flaws in the 2009 SAC calculations, as an opportunity to file a completely new round of SAC evidence based on new discovery, a new SARR, and updated economic and market data. It would be inconsistent with the scope of the remand, inconsistent with the Board's prior decisions in this case, and inconsistent with Board policy and practices to further complicate this already-

prolonged case with a new round of discovery and the *de novo* filing of SAC evidence ten years into the 20-year rate prescription period.

The issue before the Board in this second remand involves the proper allocation of revenues on cross-over traffic in the Board's 2009 SAC calculations. The Board should address that issue by recalculating the 2009 SAC results using Alternative ATC and revising the rate prescription to conform to the new SAC calculations. That is the only action that the Board should take on remand. If WFA/Basin still believe, after the Board corrects the rate prescription to address the revenue allocation problem, that economic circumstances have changed so substantially that a reopening is appropriate, WFA/Basin would need to bring a new petition to reopen the corrected rate prescription. At that time, the Board would need to determine whether reopening is appropriate and, if so, whether the existing rate prescription should be modified or vacated under the Board's existing rules. If the Board concluded that vacatur was appropriate, the rate setting initiative would then be returned to BNSF, and the parties could determine whether they are able to resolve their differences through negotiation, without further resort to litigation before the Board.

II. Background

The complaint in this case was filed ten years ago. This is the oldest rate reasonableness case currently pending at the Board. A brief review of the relevant procedural history will help put the issue on remand in perspective.

A. WFA/Basin's Original SAC Evidence

The rates at issue in this case are for the movement of Powder River Basin ("PRB) coal a very short distance from multiple PRB mines to the Laramie River electric generating station in

Southeastern Wyoming. When the challenged rates were established, they were among the lowest rates charged by BNSF to any shipper of PRB coal.

WFA/Basin challenged the rates under the SAC test. The SARR that WFA/Basin designed was a geographically compact, high-density SARR that handled nearly all of the PRB coal traffic that BNSF originated as of 2005. The vast majority of the SARR traffic was cross-over traffic that the SARR handled for a very short distance and handed off to the residual BNSF to provide line-haul transportation for movements to destinations far beyond the PRB.² A major issue in the case – and a major driver of the results – involved the appropriate method for allocating through revenue on these cross-over movements between the SARR and the residual BNSF.

WFA/Basin allocated revenue on this cross-over traffic using the MSP methodology that had been applied in prior cases. Under MSP, revenues on cross-over traffic were allocated to the SARR based on the percentage of through miles on the SARR with an additional 100-mile credit to the SARR for originating the traffic. BNSF objected to this approach on grounds that it misallocated the revenues needed to cover the costs of the short-haul, high-density SARR versus those needed to cover the costs of the long-haul, lower density residual incumbent, thereby heavily biasing the revenue split in favor of the complainant. As a result of the bias created by MSP, even low-rated traffic (*i.e.*, traffic with low R/VCs) on WFA/Basin's SARR made substantial contribution to coverage of the SARR's fixed and common costs.

² Cross-over traffic refers to rail movements in the SARR traffic group that move over the SARR for only a portion of the movement and the remainder of the movement is on the residual defendant railroad.

B. The Board's *Major Issues* Proceeding

After the parties had submitted their SAC evidence but before the Board ruled on it, the Board initiated a rulemaking proceeding in *Major Issues In Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (STB served Feb. 27, 2006) (“*Major Issues NPRM*”). In *Major Issues*, the Board proposed two methodological changes to its SAC test that are important here. First, it proposed to abandon the MSP methodology for allocating revenues on cross-over traffic on grounds that “[t]he approach [] fails to take into account the defining characteristic of the railroad industry – economies of scale, scope and density.” *Id.* at 18. Instead, the Board proposed a methodology – the Average Total Cost methodology – that would allocate revenues based on the ratio of on-SARR average total costs to the average total costs of the through movement. The Board explained that such an approach “should address the railroads’ legitimate concerns about the need to take into account economies of density” in the allocation of revenues on cross-over traffic. *Id.* at 19.

The second methodological change proposed by the Board was to shorten the SAC discounted cash flow analysis period and the corresponding rate prescription period to ten years as opposed to 20 years. The Board noted that “[t]he logistics industry is dynamic, with changes in market conditions rendering obsolete the underlying assumptions in older SAC analyses well before the 20-year analysis period has ended.” *Id.* at 29. The Board was concerned that a 20-year rate prescription would inevitably lead to complex litigation over changed circumstances before the rate prescription period was over. *Id.* To avoid the litigation burdens that would result from parties seeking to update SAC results due to inevitable changes in market conditions, the Board proposed to model SAC analyses on a ten-year estimate of revenues and costs. *Id.*

After analyzing extensive comments on the Board’s proposals, the Board adopted both the ATC methodology and the 10-year rate prescription period. The Board also considered whether to apply the new ATC methodology and the 10-year rate prescription period in pending rate cases, including the *WFA/Basin* case. WFA/Basin had argued that application of ATC in the *WFA/Basin* case would be impermissibly retroactive. The Board rejected that argument, noting that “the parties were well aware when they litigated the pending cases that these issues were in dispute and that the agency could craft a solution such as these in their individual cases.” *Major Issues In Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), at 75 (STB served Oct. 30, 2006) (“*Major Issues Final Rules*”).

On the question of the proper SAC analysis period, the Board decided that given that evidence based upon a 20-year analysis period had already been filed, a change to a 10-year analysis period in the pending *WFA/Basin* case would unnecessarily complicate the case, contrary to the Board’s objective of reducing the complexity of SAC litigation by adopting a 10-year rate prescription period. The Board did, however, apply the 10-year analysis period to pending rate cases where evidence had not already been filed. *Major Issues Final Rules*, at 75; *see Kansas City Power & Light Co. v. Union Pacific R.R. Co.*, STB Docket No. NOR 42095, at 11 (STB served May 19, 2008).

The D.C. Circuit upheld *Major Issues Final Rules* on appeal and upheld the application of the ATC methodology in the pending *WFA/Basin* case. *See BNSF Ry. Co. v. STB*, 526 F.3d 770, 783-84 (D.C. Cir. 2008) (“*Major Issues Appeal*”).

C. The Board’s 2007 Decision in WFA/Basin

In September 2007, the Board ruled on WFA/Basin’s SAC evidence, finding that WFA/Basin had failed to show that the challenged rates were unreasonable. *W. Fuels Ass’n, Inc.*

& Basin Elec. Power Coop., Inc. v. BNSF Ry. Co., STB Docket No. NOR 42088, at 2 (STB served Sept. 10, 2007) (“*2007 Decision*”). In justifying its decision, the Board noted that the challenged rate “is one of the lowest transportation rates any utility pays to acquire PRB coal,” explaining that the rate is “low on a dollar-per ton basis . . . in comparison to other utilities” located near the PRB and is “low in comparison to other PRB rates that have been challenged” by other sole-served shippers. *Id.*

The Board nevertheless decided to give WFA/Basin the opportunity to revise their SAC evidence using a redesigned SARR, concluding that “fairness dictates that WFA have an opportunity to modify its SAC presentation” since the change in revenue allocation methodology from MSP to ATC “would affect the basic design of a SAC case.” *Id.* at 3. In addition, the Board announced it would apply a modified version of ATC and depart from the original ATC methodology adopted less than one year earlier in *Major Issues Final Rules*. The Board explained that it was concerned that the original version of ATC produced the “illogical and unintended result” of allocating high-density SARRs less revenue than the defendant’s variable costs for on-SARR portions of cross-over movements on low-rated traffic. *Id.* at 14. The Board therefore modified the ATC methodology by first allocating variable costs to the on-SARR and off-SARR segments and then allocating any contribution over variable costs using the ATC approach. *Id.*

Both BNSF and WFA/Basin sought reconsideration of the *2007 Decision*. BNSF challenged the use of Modified ATC, arguing that the Board’s concerns over the treatment of low-rated traffic under ATC were not justified, but in any event, “even if the Board’s concern about the effect of ATC on low-rated traffic justified suspension of the average total cost approach *on that traffic*, there is no conceivable justification for applying the modified ATC

methodology to *all cross-over traffic.*” BNSF Railway Company’s Petition for Reconsideration, at 3, STB Docket No. NOR 42088 (filed Oct. 22, 2007) (emphasis added). The Board denied BNSF’s request for reconsideration, emphasizing again that it “would not be rational” for the on-SARR portion of a cross-over movement of low-rated traffic to receive revenues less than the defendant’s variable costs for that segment. *W. Fuels Ass’n, Inc. & Basin Elec. Power Coop., Inc. v. BNSF Ry. Co.*, STB Docket No. NOR 42088, at 4 (STB served Feb. 29, 2008) (“*2008 Reconsideration Decision*”). The Board did not address BNSF’s concerns about the treatment of high-rated traffic under Modified ATC.

For its part, WFA/Basin argued that the Board’s use of any ATC-based methodology was impermissibly retroactive since WFA/Basin had originally filed its SAC evidence using MSP. The Board rejected WFA/Basin’s reconsideration request, noting that “once we had adopted a more accurate, cost-based revenue allocation methodology, it would not have been appropriate to apply a flawed or discredited approach.” *Id.* at 5-6.

D. The Board’s 2009 Decision in WFA/Basin

WFA/Basin accepted the Board’s invitation to refile SAC evidence. It redesigned the SARR to reflect the changed traffic selection incentives produced by the use of an ATC-based methodology. With the elimination of the 100-mile origination credit under MSP, short-haul traffic no longer appeared highly profitable, and WFA/Basin excluded it from the redesigned SARR. *See Verified Statement of Benton V. Fisher and Robert O. Fisher (“Fisher/Fisher VS”)* at 7-8. In addition, the use of a density-based revenue allocation approach made low-rated traffic much less profitable to the SARR, and WFA/Basin excluded low-rated traffic from the SARR. *See id.* at 10. For the cross-over traffic included in the second traffic group, WFA/Basin used the Modified ATC methodology to allocate revenues to the SARR.

BNSF repeated its objections to Modified ATC. BNSF argued that the Board adopted Modified ATC because of concerns about the treatment of low-rated traffic under the original version of ATC, but since WFA/Basin had redesigned the SARR to eliminate low-rated traffic, the concerns leading the Board to adopt a modified version of ATC no longer justified abandoning the original ATC approach.

In the February 18, 2009 Decision that is the subject of these remand proceedings, the Board concluded that WFA/Basin had now “succeeded in making its case.” *W. Fuels Ass’n, Inc. & Basin Elec. Power Coop., Inc. v. BNSF Ry. Co.*, STB Docket No. NOR 42088, at 2 (STB served Feb. 18, 2009) (“*2009 Decision*”). While recognizing that the “challenged rates are among the lowest transportation rates any utility pays to receive PRB coal,” and “appeared on their face to be commercially reasonable,” the Board nevertheless found that the challenged rates “exceed by a wide margin the level BNSF is permitted to charge under the SAC test.” *Id.* Under the Board’s revised SAC calculations, WFA/Basin’s redesigned SARR had approximately \$421 million in excess revenues, a swing of approximately \$684 million between the *2007 Decision* and *2009 Decision* in this case. *Compare 2007 Decision*, at 139, with *2009 Decision*, at 29. Based on the new SAC calculations, the Board made the “single largest reduction in rail rates ever ordered by [the] agency” – a “roughly 60% reduction.” *2009 Decision*, at 2. The Board estimated that WFA/Basin would receive approximately \$345 million in the award of reparations and rate prescription through 2024. *Id.*

On the question of the proper revenue allocation methodology, the Board acknowledged BNSF’s concern that Modified ATC was designed to deal with a problem arising from the treatment of low-rated traffic and that WFA/Basin’s redesigned SARR had “less traffic with revenue at or near its variable costs in this traffic group.” *Id.* at 13. The Board nevertheless

refused to abandon Modified ATC, stating that “[w]e seek a uniform revenue allocation method and remain convinced that the modification adopted in the *Sept. 2007 Decision* is reasonable and necessary to preserve the integrity of the ATC approach.” *2009 Decision*, at 13.

E. BNSF’s First Appeal of the Board’s 2009 Decision

BNSF filed a petition for review of the *2009 Decision* with the D.C. Circuit. Among other things, BNSF challenged the Board’s decision to apply Modified ATC. BNSF explained that the Board had adopted Modified ATC to deal with the treatment of low-rated traffic in WFA/Basin’s original SAC presentation, but WFA/Basin had eliminated traffic with low through R/VCS on BNSF from its second SAC presentation. The Board failed to explain why it was continuing to apply Modified ATC in this case “after WFA had overhauled its case to eliminate all low-rated traffic.” Final Brief of Petitioner BNSF in *WFA I Appeal*, at 25, *BNSF Ry. Co. v. STB*, Nos. 09-1234, 1190, 1092 (filed Dec. 28, 2009). Moreover, when applied to the high-rated traffic that WFA/Basin left in its new SAC presentation, Modified ATC produced a substantial bias in favor of the complainant by allocating excessive revenue to the SARR. BNSF explained that Modified ATC “tends to overallocate revenues to the SARR” by “double-counting variable costs” and thus “biases the allocation of cross-over revenues in favor of the complaining shipper.” *Id.* at 51-52, 55. The D.C. Circuit agreed with BNSF that the Board had failed to address BNSF’s “double-counting objection to modified ATC” and remanded the *2009 Decision* for the Board to do so. *BNSF Ry. Co. v. STB*, 604 F.3d 602, 612-13 (D.C. Cir. 2010) (“*WFA/Basin Appeal I*”).

F. The Board’s 2012 Decision on Remand

On remand, BNSF explained why the double-counting of variable costs under Modified ATC – once in the initial allocation of revenues based on variable costs and a second time in the

allocation of remaining contribution based on average total costs, which include variable costs – was particularly inappropriate in WFA/Basin’s case in light of their redesign of their SARR to eliminate low-rated traffic. BNSF explained that after redesigning the SARR, there were only three movements on the SARR that would not receive sufficient revenue under Original ATC to cover the defendant’s URCS variable costs on the on-SARR portion of the movement, the concern leading the Board to adopt a modification to Original ATC. For those three movements, under Original ATC the total “revenue shortfall in 2005 was very small – just under \$600,000 in the aggregate.” BNSF’s Comments On Remand, at 28, STB Docket No. NOR 42088 (filed Nov. 22, 2010) (“BNSF’s Comments on First Remand”). But to address that relatively small revenue shortfall, Modified ATC shifted a total of \$12 million of revenue in 2005 from the residual BNSF to the SARR, *20 times* the amount of revenue needed to address the shortfall problem. *Id.* More than \$9 million of that inappropriate revenue transfer came from movements that fully covered their variable costs and therefore needed no adjustment at all to deal with the problem that led the Board to adopt Modified ATC in the first place.

BNSF explained that such a disproportionate response to the problem that led the Board to adopt Modified ATC, which resulted in a massive and unjustified increase in the amount of rate relief for WFA/Basin, was irrational and arbitrary. *Id.* at 28-29 & attached Joint Verified Statement of Michael R. Baranowski & Benton V. Fisher, at 8-9. BNSF also explained that the problem that led the Board to adopt Modified ATC could be dealt with through a much more targeted adjustment to Original ATC. Specifically, BNSF explained that the Board could first use Original ATC to allocate revenue on all movements and then adjust the revenue allocation on those movements that received revenues that were below the defendant’s URCS variable costs to

ensure that the revenue was sufficient to cover variable costs or, on the lowest rated traffic, to ensure that the on-SARR and off-SARR R/VC ratios were the same. *Id.* at 29-31.

In a 2-1 decision, the Board decided to “continue to use modified ATC in this case.” *W. Fuels Ass’n, Inc. & Basin Elec. Power Coop., Inc. v. BNSF Ry. Co.*, STB Docket No. NOR 42088, at 6 (STB served June 15, 2012) (“2012 Decision”). The Board refused to consider BNSF’s evidence on the disproportionality of Modified ATC as a response to the problem of below-cost revenue allocation on low-rated traffic, asserting that the issue was not within the scope of the remand. Nevertheless, the Board acknowledged BNSF’s concerns about the bias created by Modified ATC, and the Board announced that it would soon initiate a rulemaking to “consider whether a methodology similar to BNSF’s alternative ATC might be just such an approach.” *Id.* at 12. But the majority refused to apply the new procedure to WFA/Basin’s SAC evidence, concluding that “the alternative ATC approach was raised too late.” *Id.*

Commissioner Begeman dissented. She explained that, unlike the majority, she could not “ignore that valid concerns have been raised over” the use of Modified ATC—concerns that BNSF had “raised throughout the course of this case, not merely on remand.” *Id.* at 13 (Begeman, dissenting). She further stated that she could not “support maintaining a questionable allocation methodology for this case, while at the same time announcing plans to begin a rulemaking proceeding to develop a superior alternative (based on BNSF’s proposal) that would only be applied to future cases.” *Id.* at 14. Commissioner Begeman pointed out that the Board had deemed it “appropriate to hold [this] case in abeyance when the Board was creating original ATC in *Major Issues*,” but refused “to do so now for a proceeding to address the very problems posed as a result of ATC and modified ATC.” *Id.* at 13.

G. The Board's Adoption of Alternative ATC

A few weeks after the *2012 Decision*, the Board initiated a rulemaking proceeding, *Rate Regulations Reforms*, Ex Parte No. 715, in which it proposed, among other things, to adopt the Alternative ATC methodology. The Board acknowledged that “this alternative approach” was first “brought to [its] attention” by BNSF in this case. *Rate Regulation Reforms*, STB Docket No. Ex Parte 715, at 18 (STB served July 25, 2012) (“*Rate Regulation Reforms NPRM*”). After reviewing comments on this proposal, the Board adopted it on July 18, 2013.

The Board explained that under Alternative ATC, the Board first applies Original ATC if that approach “worked as intended in *Major Issues*—meaning it allocated revenue in accordance with relative average costs and thereby maintained the relationship between revenue and costs that would exist in a complete SAC analysis *without* driving the revenue allocation below variable costs.” *Rate Regulation Reforms*, STB Ex Parte No. 715, at 30 (STB served July 18, 2013) (“*Rate Regulation Reforms Final Rules*”). If applying Original ATC “on low-rated traffic resulted in driving the revenue allocation below variable cost, then (and only then) we would make an adjustment to correct that feature.” *Id.* The Board explained that Alternative ATC “will better accommodate two principles: (1) the important role that economies of density should play in any cost-based revenue allocation approach; and (2) the avoidance of the revenue allocation on any segment being below variable costs.” *Id.* The Board emphasized that Alternative ATC is “simply a variation on ATC,” and not a change in the basic principles underlying the allocation of revenue that were adopted in *Major Issues*. See *Rate Regulation Reforms Final Rules*, at 30. The Board rejected arguments by Coal Shippers, including WFA/Basin, opposing the adoption of Alternative ATC. The D.C. Circuit affirmed the Board’s decision to adopt Alternative ATC. *CSX Transp. & Norfolk S. Ry. Co.*, 754 F.3d 1056, 1062, 1068 (D.C. Cir. 2014).

H. BNSF's Second Appeal

BNSF appealed once again the Board's decision to continue applying Modified ATC in this case. BNSF challenged the Board's refusal to address BNSF's evidence on the disproportionality of Modified ATC as a solution to the Board's concerns about the allocation of revenue on low-rated traffic and the Board's refusal to consider applying in this case an alternative form of ATC that was a more proportional response to the problem that led the Board to adopt Modified ATC in the first place. The D.C. Circuit agreed with BNSF that the Board had erred by failing to consider BNSF's proportionality challenge to Modified ATC. *BNSF Ry. Co. v. STB*, 741 F.3d 163, 167 (D.C. Cir. 2014) (“*WFA/Basin Appeal II*”). The Court vacated the Board's decision and remanded the case to the Board. 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 *Rate Regulation Reforms Final Rules*—the Board would need to address on remand why that alternative methodology would not be applicable in the present case.

I. WFA/Basin's Comments On Second Remand

WFA/Basin make three arguments in their comments on this second remand. First, WFA/Basin urge the Board to leave the *2009 Decision* in place without any further changes. WFA/Basin argue that the D.C. Circuit did not prohibit the continued application of Modified ATC, and they further claim that the application of a new approach would be impermissibly retroactive. Second, WFA/Basin argue that if the Board decides to apply Alternative ATC, it should give WFA/Basin a third chance to design its SARR and traffic group since the application of Alternative ATC would substantially reduce the rate relief that the Board awarded in the *2009 Decision*. Third, WFA/Basin argue that if the Board applies Alternative ATC, WFA/Basin

should be permitted to conduct new discovery and essentially start the case over again with a new SAC presentation based on current market and economic conditions.

BNSF responds below to WFA/Basin's remand comments. BNSF explains that after two remands from the D.C. Circuit as a result of acknowledged flaws in Modified ATC, the Board should correct its SAC calculations from the *2009 Decision* by using Alternative ATC instead of Modified ATC. The correction can easily be made based on evidence already in the record. The correction should not give rise to the refile of SAC evidence since the change from Modified ATC to Alternative ATC does not change the traffic selection incentives that WFA/Basin had when they redesigned the SARR after the *2007 Decision* but merely corrects the erroneous double-counting of variable costs under Modified ATC. As to WFA/Basin's request to start the SAC process all over again ten years into the 20-year rate prescription period, the Board should reject such an overreaching request. If, after the Board corrects the rate prescription by applying Alternative ATC, WFA/Basin still believe that market and economic conditions have changed so substantially as to justify a reopening, WFA/Basin should file a petition to reopen the corrected rate prescription.

III. The Board Should Apply Alternative ATC And Recalculate The 2009 SAC Results.

BNSF has repeatedly argued since the Board first used Modified ATC in the *2007 Decision* that Modified ATC improperly biases SAC results in favor of complainants through a double-counting of variable costs on high-rated traffic, contrary to the explicit objective of the Board in *Major Issues* to find an unbiased approach to revenue allocation. In *Rate Regulation Reforms*, the Board finally acknowledged the bias created by Modified ATC, acknowledged that the bias was first brought to its attention by BNSF, and adopted a methodology that eliminates the bias. The use of Modified ATC substantially inflated the award of rate relief for WFA/Basin.

Since the Board has identified a superior revenue allocation methodology that eliminates the bias created by Modified ATC, it would be arbitrary and unfair to BNSF for the Board to refuse to apply the superior methodology in the present case.

A. It Would Be Arbitrary To Continue Applying A Flawed ATC Methodology Now That The Board Has Identified A Superior Approach.

The superiority of Alternative ATC over Modified ATC is undeniable. As the Board acknowledged when it adopted Alternative ATC, Alternative ATC “better approximates the appropriate revenue distribution” and “does a superior job of allocating revenues in accordance with economies of density than modified ATC.” *Rate Regulation Reforms Final Rules*, at 32. Alternative ATC gives “the maximum weight to relative economies of density while avoiding the illogical result of driving the revenue allocation on any segment below the variable costs of providing service over that segment.” *Id.* at 30. In the recent *Sunbelt* decision, the Board acknowledged that Alternative ATC is “a superior methodology to both Original ATC and modified ATC.” *Sunbelt Chlor Alkali P’ship v. Norfolk S. Ry. Co.*, STB Docket No. NOR 42130, at 25 (STB served June 20, 2014) (“*Sunbelt*”). Similarly, in *DuPont*, the Board explained that “[w]e will use Alternative ATC, which was developed through notice and comment rulemaking, because we believe it to be a superior methodology to both Original ATC and modified ATC.” *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry. Co.*, STB Docket No. NOR 42125, at 50-51 (STB served Mar. 24, 2014) (“*DuPont March 2014 Decision*”).

Indeed, WFA/Basin do not challenge the superiority of Alternative ATC to Modified ATC as a methodology for allocating revenue on cross-over traffic. Rather, they argue that “[t]he D.C. Circuit has never held that the Board’s use of Modified ATC is legally prohibited.” WFA/Basin Comments On Second Remand, at 39. But that observation is beside the point.

BNSF argued to the court that Modified ATC was not a valid methodology and should be prohibited, at least in the *WFA/Basin* case, because it was a disproportionate and arbitrary response to the Board's concerns about revenue allocation on low-rated traffic, which WFA/Basin had virtually eliminated from its redesigned SARR. The D.C. Circuit did not reach the merits of BNSF's disproportionality argument because there was a threshold flaw in the Board's decision on remand, namely the Board's refusal to address BNSF's disproportionality evidence and argument in the first place. The court could not strike down Modified ATC without first hearing from the Board on the issue, but the Board had refused to consider BNSF's evidence on the issue.

Nevertheless, it is now clear from the Board's adoption of Alternative ATC in *Rate Regulation Reforms Final Rules* that the Board recognized the validity of BNSF's concerns about the flaws in Modified ATC and addressed those flaws by adopting a superior version of ATC, namely Alternative ATC. Alternative ATC directly and effectively addresses BNSF's disproportionality concerns by eliminating the double-count of variable costs on movements where Original ATC works as originally intended with an adjustment only to movements where ATC allocates revenues below variable costs. Indeed, as the Board recognized in the *2012 Decision*, BNSF proposed its version of Alternative ATC as a specific fix to the disproportionality problem with Modified ATC. *2012 Decision*, at 11. By adopting Alternative ATC, the Board has already acknowledged and addressed BNSF's disproportionality concerns.³ The Board has specifically found in its two most recent SAC decisions that Alternative ATC is "a superior methodology to both Original ATC and modified ATC." *Sunbelt*, at 25; *DuPont*

³ In light of the Board's adoption of Alternative ATC, WFA/Basin do not even bother to address the merits of BNSF's disproportionality challenge to Modified ATC, relying instead on misguided arguments relating to retroactivity.

March 2014 Decision, at 50-51. Thus, even though application of Modified ATC has not been expressly prohibited, it would be irrational and arbitrary to apply it now in light of its acknowledged flaws and the availability of a superior revenue allocation methodology that corrects those flaws.

It is well established in the Board's SAC case law that once a superior methodology is identified, it would be improper to continue applying an inferior one. Indeed, the principle seems obvious on its face.⁴ When the Board first adopted ATC in *Major Issues*, it noted that since the Board had identified a superior revenue allocation methodology in ATC, the "continued use of the MSP approach would be on shaky ground." *Major Issues Final Rules*, at 34. The Board specifically rejected WFA/Basin's request that the Board continue applying the existing MSP methodology. The Board was particularly sensitive to the concerns of the D.C. Circuit in its recent decision in *BNSF Railway Co. v. STB*, 453 F.3d 473 (D.C. Cir. 2006) ("*Xcel Appeal*"), where the court upheld the use of the MSP methodology in that case but cautioned that "a decision to adhere to its MSP model would be on shaky ground indeed ... [w]ere the Board presented with a model that took account of both of the economies of density and of the diminishing returns thereto." *Xcel Appeal*, 453 F.3d at 484.

⁴ The cost recovery case cited on pages 38-39 of WFA/Basin's Comments on Second Remand is irrelevant. The issue there was whether to make a *future* adjustment to RCAF that would not be otherwise justified to make up for *past* RCAF calculations that were alleged to be inaccurate. *R.R. Cost Recovery Procedures*, 5 I.C.C.2d 350, 357 (1989). In *Canadian Pacific Ltd. – Purchase and Trackage Rights – Delaware & Hudson Railway*, STB Docket No. FD 31700, at 4 (STB served Mar. 2, 2000), a case also cited by WFA/Basin at 38, note 140, the issue involved retroactive application of a new rule to a final, closed decision. The issue here is completely different. The present case involves the application of a superior methodology in a pending case that has not become final after judicial review where the proper methodology has been a central issue in the case from the beginning, where the methodology applied by the Board has been remanded twice, and where the new, superior methodology was adopted at the urging of BNSF in this case.

The Board has frequently acknowledged that it would be improper to continue applying an inferior methodology once a superior one has been identified. Indeed, in its search for an appropriate revenue allocation methodology over several years and in several SAC cases, the Board has often identified improvements to the existing approach, and each time it applied the superior approach in the pending case.⁵ When WFA/Basin challenged at the D.C. Circuit the Board's decision in *Major Issues* to apply ATC rather than MSP, the Board argued to the court that "it would be inappropriate to apply flawed or discredited procedures once superior methods had been identified and adopted." Joint Brief of Respondents in *Major Issues Appeal*, at 58, *BNSF Ry. Co. v. STB*, No. 06-1372 (filed Nov. 8, 2007). The D.C. Circuit upheld the Board's decision to apply the superior ATC methodology in WFA/Basin, noting that the MSP had a "critical flaw" and concluding that it was appropriate for the Board to "immediately discard the flawed procedure and apply its new rule to pending cases." *Major Issues Appeal*, 526 F.3d at 784.

In the *2007 Decision* in this case, the Board stated that "[w]e do not believe it is appropriate to apply flawed or discredited procedures, rather than the superior procedures adopted in *Major Issues*." *2007 Decision* at 20; see also *AEP Texas N. Co. v. BNSF Ry. Co.*, STB Docket No. NOR 41191 (Sub-No. 1), at 23 (STB served Sept. 10, 2007). The Board

⁵ See, e.g., *McCarty Farms, Inc. v. Burlington N., Inc.*, 2 S.T.B. 460, 472 (Aug. 14, 1997) ("We find that the modified mileage proration method is superior to a straight mileage proration, because it takes into consideration differing handling costs."), *aff'd on reconsideration*, 3 S.T.B. 102, 104-05 (May 8, 1998) (refusing to address McCarty's challenge to the use of a new methodology after finding it made no difference in the result); *Duke Energy Corp. v. Norfolk S. Ry. Co.*, STB Docket No. NOR 42069, at 24 (STB served Nov. 6, 2003) ("As a result of these deficiencies [in the modified mileage block prorate ('Block Methodology')], it is appropriate to modify the Block Methodology here, and a 'Modified Straight-Mileage Prorate' (MSP) will be used instead."); *Sunbelt*, at 25 (applying Alternative ATC); *DuPont March 2014 Decision*, at 50-51 (applying Alternative ATC).

reiterated this principle when it denied WFA/Basin’s petition for reconsideration to apply the MSP methodology to this case. “[O]nce we have adopted a more accurate, cost-based revenue allocation methodology, it would not have been appropriate to apply a flawed or discredited approach.” *2008 Reconsideration Decision*, at 5-6. Commissioner Begeman stated in her dissent from the Board’s 2012 Decision in this case that “it would be inappropriate to apply flawed or discredited procedures once superior methods had been identified or adopted.” *2012 Decision*, at 13 (Begeman, dissenting).

WFA/Basin’s perception of what is “fair” in these circumstances is unfounded. Continued application of Modified ATC in this case would be enormously unfair to BNSF. As BNSF demonstrated in its Comments On First Remand, the use of Modified ATC in assessing WFA/Basin’s revised SAC evidence improperly inflated SARR revenues by \$68 million from 4Q 2004 through 2009 by double-counting variable costs in determining the amount of revenue to allocate to the SARR. BNSF’s Comments On First Remand, at 20. This resulted in an increase in BNSF’s reparation payments of \$63 million through 2009. *Id.* One reason for the huge swing in SAC results between the *2007 Decision* and the *2009 Decision* – going from a revenue shortfall of about \$263 million to a revenue overage of about \$421 million – was the improper double-counting of variable costs on high-rated traffic under Modified ATC. *Compare 2007 Decision*, at 139, *with 2009 Decision*, at 29. Fairness concerns clearly do not justify maintaining an improperly inflated award of rate relief.

B. Application of Alternative ATC Would Not Be Impermissibly Retroactive.

In *Major Issues*, WFA/Basin made the same legal argument they make here, relying on the same basic case law – that it would be impermissibly retroactive for the Board to apply a new revenue allocation approach to evaluate WFA/Basin’s SAC evidence where the new approach

was adopted after WFA/Basin filed its SAC evidence. The Board rejected WFA/Basin's retroactivity argument in *Major Issues*, and the grounds for rejecting it are even stronger here than they were in *Major Issues*.

At the time WFA/Basin filed their original SAC evidence in 2005, the Board had applied the MSP methodology in several cases, rejecting defendant railroads' repeated challenges to the validity of the methodology.⁶ Nevertheless, in *Major Issues* the Board concluded that there was no "settled expectation[]" by complainants as to the revenue allocation methodology that the Board would apply in SAC cases because the issue was the subject of continual challenge by railroad defendants. *Major Issues Final Rules*, at 75. As the Board explained,

the parties were well aware when they litigated the pending cases that these issues were in dispute and that the agency could craft a solution such as these in their individual cases. Thus, we are not setting aside any settled expectations by applying these final changes to the pending cases.

Id. In defending its decision to apply ATC to pending cases on appeal to the D.C. Circuit, the Board stated that there "should not have been any settled expectations by the parties." Joint Brief of Respondents in *Major Issues Appeal*, at 58, No. 06-1372 (filed Nov. 8, 2007).

If WFA/Basin did not have a "settled expectation[]" before *Major Issues* that MSP would be used to allocate revenues on cross-over traffic, notwithstanding the Board's repeated application of MSP and its repeated rejection of challenges to its validity, WFA/Basin clearly did not have a "settled expectation[]" that Modified ATC would be applied to its redesigned SARR. Modified ATC was different from the methodology that the Board had recently adopted through

⁶ *Pub. Serv. Co. of Colorado d/b/a Xcel Energy v. The Burlington N. & Santa Fe Ry. Co.*, 7 S.T.B. 589, 604-06 (June 7, 2004) & STB Docket No. NOR 42057, at 8, 11 (STB served Jan. 19, 2005), *aff'd*, *Xcel Appeal*, 453 F.3d at 484; *Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. NOR 42070, at 21 (STB served Feb. 4, 2004); *Carolina Power v. Norfolk S. Ry. Co.*, STB Docket No. NOR 42072, at 20-21 (STB served Dec. 23, 2003); *Duke Energy v. Norfolk S. Ry. Co.*, STB Docket No. NOR 42069, at 17-18, 24 (STB served Nov. 6, 2003).

a notice and comment rulemaking and was defending on appeal to the D.C. Circuit. The validity of a new revenue allocation methodology that was substantially different from the recently adopted formal rules and that was adopted, *without notice and comment*, in the first case decided after the Board adopted ATC as a formal rule was clearly subject to dispute. WFA/Basin could not possibly have had a “settled expectation[.]” that Modified ATC, an approach that was different from the Board’s recently adopted notice-and-comment rule, was not subject to change.

Moreover, unlike MSP, which had been applied in several cases, Modified ATC had never been applied in another SAC case. There was no line of cases addressing and resolving concerns over the application of Modified ATC that might have led a complainant to have a “settled expectation[.]” that Modified ATC would survive any challenge to it. The new approach was completely untested. It was also clear that BNSF believed Modified ATC was not a valid methodology for allocating revenues on cross-over traffic and that BNSF would make a challenge to Modified ATC a centerpiece in its response to WFA/Basin’s new SAC evidence. *See* BNSF’s Petition for Reconsideration, at 2-3, 9-19, STB Docket No. NOR 42088 (filed Oct. 22, 2007). WFA/Basin knew that they would have to defend the reasonableness of Modified ATC. In short, the question of revenue allocation on cross-over traffic had clearly *not* been resolved when WFA/Basin refiled its SAC evidence and WFA/Basin had no “settled expectation[.]” as to the application of any particular revenue allocation methodology.

Also, the change from MSP to ATC in *Major Issues* reflected a fundamental change in the principles used to allocate revenues on cross-over traffic, but the Board nevertheless found that retroactivity considerations did not preclude application of the superior ATC methodology. MSP was a mileage-based revenue allocation methodology that allocated revenues based on distance as a proxy for variable costs. MSP did not even attempt to take account of economies of

density on rail lines in allocating revenues on cross-over traffic. In contrast, ATC reflected the Board's conclusion that the allocation of revenues on cross-over traffic must take account of economies of density. The adoption of a density-based methodology was a fundamental change in the Board's existing approach, yet the Board still found that it was appropriate to apply the new density-based approach in pending cases and that retroactivity concerns did not preclude the application of the superior approach.

In contrast, the Board has emphasized that Alternative ATC is "simply a variation on ATC," and not a change in the basic principles underlying the allocation of revenue that were adopted in *Major Issues Final Rules*. See *Rate Regulation Final Rules*, at 30.⁷ Alternative ATC corrects an important flaw with Modified ATC, namely the double-counting of variable costs on high-rated traffic, but the ultimate objective of all variations on the original version of ATC is to reflect economies of density in the allocation of revenue on cross-over traffic. If retroactivity concerns did not lead the Board in *Major Issues* to preclude application of ATC in the pending cases, where ATC reflected a fundamental change in underlying revenue allocation principles, retroactivity concerns would be even less significant now, since Alternative ATC is simply a variation on the original density-based approach adopted in *Major Issues*.

WFA/Basin's discussion of the case law on retroactivity also fails to recognize the distinction in the cases between the retroactive effect of new rules that govern primary conduct and the retroactive effect of new rules that are procedural in nature and apply only to decisions

⁷ See also *Intermountain Power Agency v. Union Pac. R.R. Co.*, STB Docket No. NOR 42136, at 3 (STB served Dec. 14, 2012) ("The proposals are modifications to these rate procedures, but the foundation remains the same," namely that "revenue allocation for [cross-over] traffic should be based on an average total cost methodology."); see also *id.* ("[T]he changes proposed in *Rate Regulation Reforms* are not fundamental departures from long established and consistent practices"); *E.I. DuPont de Nemous & Co. v. Norfolk S. Ry. Co.*, STB Docket No. NOR 42125, at 6 (STB served Nov. 29, 2012) (same).

made by parties in litigation. The courts are legitimately troubled when an agency changes rules that retroactively affect the legality of conduct that has already occurred outside of the litigation context. For example, in *Marrie v. SEC*, 374 F.3d 1196 (D.C. Cir. 2004), a case cited by WFA/Basin, the court found a rule adopted by the SEC to be impermissibly retroactive where the rule retroactively made unlawful certain conduct by accountants that had been lawful at the time it was taken. It is not uncommon for courts to deny retroactive application to new rules that change the treatment of such primary conduct, at least where there was reasonable reliance on a well-established legal standard when the conduct was taken.⁸

But these concerns do not apply in the context of litigation. As the Supreme Court explained in one of the cases relied on by WFA/Basin, “[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.... Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994). *See also Nat’l Mining Ass’n v. Dep’t of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002), another case cited by WFA/Basin: “[P]urely procedural rules often do not operate retroactively even when applied to

⁸ *Rail Fuel Surcharges*, STB Docket No. Ex Parte 661 (STB served Jan. 26, 2007, which WFA/Basin cite on page 38 n.140, is an example of primary conduct. In *Rail Fuel Surcharges*, the Board declined to make unlawful retroactively fuel surcharge practices that were lawful at the time they were implemented and applied. WFA/Basin also refer to the treatment of cost-of-capital in the *2009 Decision*, but the cost-of-capital determination is another example of concerns over the impact of a retroactive decision on primary conduct.

transactions predating their institution” because “such rules often regulate only secondary rather than primary conduct.”⁹

The rules at issue here are methodologies used by the Board to assess evidence submitted by a complainant seeking rate relief, not rules governing primary conduct. The courts have explained that “[c]ircumstances such as these are the stuff that adjudications are made of: the law is unclear; opposing parties mount reasonable arguments on both sides; the adjudicator says what the law is.” *United Food & Commercial Workers Int’l Union v. NLRB*, 1 F.3d 24, 35 (D.C. Cir. 1993) (quoting *Atchison, Topeka & Santa Fe Ry. Co. v. ICC*, 851 F.2d 1432, 1437 (D.C. Cir. 1988)).

IV. There Is No Valid Basis For Giving WFA/Basin An Opportunity To Design Yet Another SARR.

The Board’s use of Alternative ATC to recalculate SAC results in this case would not justify giving WFA/Basin another opportunity to file SAC evidence – their *third* SARR. There is a clear legal standard for determining when a complainant should be given an opportunity to submit new evidence in response to a change in SAC methodology, and WFA/Basin have not met and cannot meet that standard here. The Board allows a complainant to file new SAC

⁹ Nor do the concerns of impermissible retroactivity even apply in the context of a remand. The United States Supreme Court has recognized, as a general matter, that “[a]n agency, like a court, can undo what is wrongfully done by virtue of its order,” even though “judicial review at times results in the return of benefits received under the upset administrative order.” *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965). Agencies must have authority to correct errors in their decisions when their decisions are remanded on judicial review or “judicial review would be powerless.” *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1074-75 (D.C. Cir. 1992). Indeed, the Board has concluded that judicial review must be complete before parties can form settled expectations. The Board has stated that the parties’ “expectations are not settled, therefore, until the agency’s decision has moved through the entire administrative process, and judicial review is complete.” *W. Tex. Utils. Co. v. The Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 41191, at 5 (STB served June 27, 2003).

evidence only when a change in SAC methodology changes a complainant's incentives in designing an efficient stand-alone railroad. The Board found that this standard – which provides a rational basis for assessing the equities resulting from a change in SAC methodology from the standpoint of the complainant, the defendant and the administrative process – was met in 2007, because the change from MSP to ATC changed WFA/Basin's traffic selection incentives. But the change from Modified ATC to Alternative ATC simply corrects the overstatement of revenue on high-rated traffic without changing WFA/Basin's traffic selection incentives. The Board should not permit this case to drag on after nearly 10 years of litigation simply to give WFA/Basin an opportunity to look for new ways to improve on their already unprecedented reparations award.

A. New SAC Evidence Is Permitted Only When A Change in Methodology Changes A Complainant's SARR Design Incentives.

Not every change in SAC methodology gives rise to an opportunity under the Board's case law to file new SAC evidence. As the Board noted in the *2007 Decision*, “[g]enerally, it is not the Board's practice to permit complainants to redesign their case in light of subsequent Board decisions.” *2007 Decision*, at 20. The rationale for this general rule is straightforward. The SAC standard has evolved over the years where new issues are resolved in individual cases and existing methodologies are refined. The continued evolution of the SAC standard would be impossible if parties to SAC cases were permitted to refile SAC evidence every time the Board applies an improved methodology in a pending case. SAC cases would never end, and the Board would be reluctant to avoid getting bogged down in continuous litigation by making changes that improved the SAC standard.

Nevertheless, the legitimate reliance interests of parties to SAC cases must be protected when a party relies on established practices or methodologies to present its evidence. To protect these reliance interests without unnecessarily burdening the SAC process, the Board asks whether a change in methodology adopted after a complainant filed its SAC evidence changed the complainant's incentives to design an efficient SARR. If the complainant's SARR design incentives do not change, then a change in methodology will not give rise to the filing of new evidence.

The Board expressly applied this standard in the *2007 Decision* in deciding that WFA/Basin should be given the chance to file new SAC evidence. The Board concluded that

the change from MSP to ATC would affect the basic design of a SAC case. For example, WFA included in its traffic group considerable traffic offering limited revenue contribution, as those movements are to competitively served plants. This may have been a reasonable design choice under MSP, which over-allocated revenue to the SARR. But under ATC, WFA might not have included all that traffic or might have changed the configuration of the [SARR].

2007 Decision, at 20. In its decision on reconsideration of the *2007 Decision*, the Board reiterated this rationale for giving WFA/Basin a second chance: "Using ATC rather than MSP changes the incentives for a shipper in the selection of the traffic group to be used. Under such circumstances, fairness to Western Fuels persuaded us to permit it an opportunity to submit revised evidence to account for the use of ATC." *2008 Reconsideration Decision*, at 3 (footnote omitted).

The specific focus on a complainant's evidentiary incentives in deciding whether to allow new evidence reaches back to the Board's *PPL* decision. *PPL Montana, LLC v The Burlington N. & Santa Fe Ry. Co.*, 6 S.T.B. 752, 762 (2003) ("*PPL*"), *aff'd sub nom., PPL Montana, LLC v. STB*, 437 F.3d 1240, 1245 (D.C. Cir. 2006) ("*PPL Appeal*"). In *PPL*, the Board applied a cross-

subsidy test in the SAC analysis for the first time.¹⁰ In response to the adoption of the new cross-subsidy test, PPL asked the Board to reopen the case so that it could modify its evidence. PPL argued that when it filed its opening evidence, it was not on notice from prior cases that the Board might apply a cross-subsidy test. According to PPL, if it had known about the cross-subsidy test, it would have presented different evidence.

In response, the Board first made it clear that the relevant question was *not* whether a party would have done something different if it had known how the Board would assess its evidence on a particular issue – that will virtually always be the case when the Board rules against a party. As the Board stated in the *PPL* decision, “[w]ere we to allow a disappointed party to revise its case in response to our rulings, there could be no end to an administrative proceeding.” 6 S.T.B. at 762. Instead, the Board concluded that new SAC evidence would be permissible only when a change in SAC methodology changed the incentives that a party had when it originally filed its evidence. *See id.* at 759-60.

Applying this standard, the Board looked closely at the reasons PPL sought to file the new evidence and whether PPL’s incentives had changed as a result of the new cross-subsidy test. Specifically, PPL explained that it wanted to be able to add back to the low-density segment of the SARR certain traffic that PPL had previously concluded should be dropped. This would have increased the revenues that would be available to the SARR to cover the costs of the low-density segment and, presumably, would have given PPL a better chance to pass the cross-subsidy test. PPL contended that it would not have dropped the traffic from that segment when it

¹⁰ The basic principle underlying the cross-subsidy test is that a challenged rate cannot be unreasonably high if the revenues generated under that rate, plus the revenues generated by other traffic sharing the facilities used by the issue traffic, are insufficient to cover the cost of the facilities used by the issue traffic. A complainant cannot expect other traffic to “cross-subsidize” the costs of facilities used by the complainant.

designed the SARR had it known that the Board would adopt a new internal cross-subsidy test. Petition of PPL Montana, LLC for Reconsideration, Verified Statement of Thomas D. Crowley, at 2, STB Docket No. NOR 42054 (filed Sept. 30, 2002).

The Board rejected PPL's request because it found that the cross-subsidy test did not change PPL's incentives with respect to the traffic it had dropped: "PPL had every incentive from the outset of the case to maximize revenues for the [SARR] as a whole, and one way to do this would be to keep joint-line traffic on the [SARR] system for the greatest percentage of the haul possible." *PPL*, 6 S.T.B. at 760. As the Board subsequently explained, "the Board concluded that adoption of the internal cross-subsidy test did not alter the incentives of the complainant there." *2008 Reconsideration Decision*, at 3 n.3. Since the complainant's traffic selection incentives did not change, PPL was simply trying to use the benefit of hindsight to improve its SAC results. The Board's decision not to give PPL another chance to file SAC evidence was upheld on appeal to the D.C. Circuit. *PPL Appeal*, 437 F.3d at 1245, 1247.

The same "changed incentives" test produced a different outcome in *Otter Tail*. See *Otter Tail Power Co. v. The Burlington N. & Santa Fe Ry. Co.*, STB Docket No. NOR 42071, at 1 (STB served Nov. 21, 2003). In *Otter Tail*, the complainant's original SAC evidence allocated revenue on cross-over traffic based on evidence received in discovery from BNSF on BNSF's real-world division of revenues. Otter Tail claimed that the Board's practice at the time of Otter Tail's SAC evidence filing led it to believe that a divisions-based revenue allocation methodology would be accepted by the Board. However, in a separate case decided while Otter Tail's case was pending, *Duke Energy Corp. v. Norfolk Southern Railway Co.*, STB Docket No. 42069 (STB served Nov. 6, 2003), the Board explicitly stated that it would not accept divisions-based revenue allocations. In light of that decision, Otter Tail asked for permission to refile SAC

evidence, explaining that it had dropped 31.7 million tons of traffic from its original SARR that it could not justify using under the divisions-based revenue-allocation methodology that Otter Tail thought the Board would apply. *See* Otter Tail Power Company’s Motion to Modify Procedural Schedule & Petition To Supplement The Evidentiary Record, at 6, STB Docket No. 42071, at 6 (filed Nov. 12, 2003). Under the MSP approach, Otter Tail had the incentive to include that traffic. The Board gave Otter Tail the opportunity to file new SAC evidence based on this showing of changed incentives.

The Board most recently applied the changed incentives test in *Intermountain Power Agency v. Union Pacific Railroad Co.*, STB NOR 42127 (STB served Apr. 4, 2012) (“*IPA April 2012 Decision*”). After IPA filed its SAC evidence, but before the Board ruled on it, IPA asked for the opportunity to redesign its SARR, among other reasons, to account for a change in SAC methodology relating to cost-of-capital and the calculation of a SARR’s terminal value that was reflected in the Board’s decision in another SAC case, *Arizona Electric Power Cooperative v. BNSF Railway Co. & Union Pacific Railroad Co.*, STB Docket No. NOR 42113 (STB served Nov. 22, 2011). The Board denied IPA’s request to redesign its SARR, explaining that “IPA has not shown how either of the noted holdings in *AEPCO* would necessitate the reconfiguration of the SARR.” *IPA April 2012 Decision*, at 3.

The “changed incentives” test is also supported by case law outside the STB context. For example, WFA/Basin cite the D.C. Circuit’s decision in *Hatch v. FERC*, 654 F.2d 825 (D.C. Cir. 1981), in support of their claim that WFA/Basin must be given a new opportunity to file SAC evidence. WFA/Basin’s Comments On Second Remand, at 56. But *Hatch* is fully consistent with the “changed incentives” standard that the Board has developed in its own decisions. Under

Hatch, it is only when a party's evidentiary incentives change that "due process and fair play" require that the party be given an opportunity to file new evidence. 654 F.2d at 835.

In *Hatch*, the petitioner had filed an application with FERC seeking authorization to hold directorships of two corporations while continuing to serve as the Chairman of the Georgia Power Company. At the time of the application, the legal standard governing such applications was that the applicant had to establish only that the application would not adversely affect private or public interests. Nevertheless, the Commission rejected the application after determining that an affirmative showing of public benefits needed to be made. Such an affirmative showing of public benefits had never been required, so the applicant had not had an incentive to file any evidence on the issue of public benefits and it had not done so.

The D.C. Circuit found that the applicant had to be given an opportunity to meet the new standard because the applicant had not had any reason to file evidence on the subject of public benefits under the law in place at the time of the application. But the court also made it clear that an agency is not required to allow a litigant to submit new evidence in response to any change in law. In particular, no new evidence would need to be filed if the agency merely "revised the legal significance of the same kind of facts." *Hatch*, 654 F.2d at 835. In other words, if a litigant already had the incentive to file a particular type of evidence (e.g., evidence on public benefits), it would not be necessary to give the litigant an opportunity to file new evidence if the agency simply changed the legal significance of the evidence. The question in *Hatch*, therefore, was whether the litigant's incentives to file any evidence on public benefits changed, which it clearly did once a showing of public benefits became a requirement under the new legal standard. This question of changed incentives, however, is the same question that the Board asks

in SAC cases to determine whether a complainant should be given the opportunity to file a third SARR.

In short, a mere change in the methodology used by the Board to evaluate SAC evidence does not give rise to an entitlement to redesign its SARR, contrary to WFA/Basin's claim. The new methodology must change the incentives that a party had when it filed evidence originally. Vague or unsupported statements that the complainant would have done something different are not enough to justify the expense and complexity of further evidentiary filings. The focus must be on a complainant's SARR design incentives and whether they changed. As discussed below, the change from Modified ATC to Alternative ATC affects the amount of revenue that the SARR would receive from high-rated traffic, but it does not change the incentives that WFA/Basin had with respect to the traffic that should be included in an efficient SARR. It merely corrects an error in the Modified ATC methodology that resulted in double-counting variable costs.

B. The Adoption of Alternative ATC Does Not Change WFA/Basin's Traffic Selection Incentives.

WFA/Basin do not even try to show that their traffic selection incentives would change as a result of the Board's move from Modified ATC to Alternative ATC.¹¹ WFA/Basin merely state that "[i]f the Board decides to retroactively apply Alternative ATC, the situation WFA/Basis would find themselves facing today is no different than the one they found

¹¹ Indeed, it appears that the primary reason that WFA/Basin seek to present new SAC evidence is to take advantage of changes in market and economic conditions that they claim have occurred since evidence was originally filed in this case. As we explain below, if the changes in economic conditions are substantial enough to justify reopening as claimed by WFA/Basin, those changes would not justify the filing of another round of SAC evidence in this limited remand. Rather, after the Board corrects the rate prescription by applying Alternative ATC on remand, WFA/Basin can file a petition to reopen. The significance of alleged changed circumstances would have to be addressed under the Board's rules governing reopening.

themselves facing in 2007.” WFA/Basin’s Comments On Second Remand, at 55. In fact, the situation in 2007 was fundamentally different because the change from MSP to ATC changed WFA/Basin’s traffic selection incentives while the change here from Modified ATC to Alternative ATC does not.

Under the MSP methodology used before 2007, WFA/Basin had a strong incentive to include low-rated traffic on the SARR even if the traffic only barely covered its variable costs. Under MSP, revenues on cross-over traffic were allocated based on relative miles on-SARR and off-SARR, which was a crude way of estimating relative variable costs that are driven largely by distance. The mileage-based approach of MSP therefore treated the cost of moving traffic on high-density and low-density rail lines the same. But the total costs of handling traffic on high-density lines are actually much lower than the total costs of handling traffic on low-density lines due to economies of density. On high-density lines, there is more traffic available to cover fixed costs than on low-density lines. By failing to reflect economies of density, MSP made low-rated traffic handled on high-density lines appear to be highly profitable to the SARR and therefore gave WFA/Basin the incentive to include low-rated traffic in the SARR. *See Fisher/Fisher VS*, at 7.

Under MSP, WFA/Basin also had a strong incentive to include traffic that the SARR handled only a very short distance on the SARR before handing it off to the residual BNSF. MSP included 100-mile origination and termination credits that were supposed to compensate the originating and terminating carrier for the costs of originating and terminating traffic. But the 100-mile credit substantially over-allocated revenue to the SARR as compensation for the costs of originating unit coal trains. On movements that were handled a relatively short distance on the SARR, the 100-mile origination credit made the short-haul traffic more profitable on a

revenue per ton-mile basis and therefore created a strong incentive for WFA/Basin to include short-haul traffic in the SARR. *See id.*

Figure FTI-1 from the Verified Statement of Messrs. Fisher and Fisher, which is reproduced below, shows the SARR that WFA/Basin designed under the incentives created by MSP to include short-haul and low-rated traffic in the SARR traffic group. *See Fisher/Fisher VS*, at 6. As shown in the Figure, the SARR designed by WFA/Basin had { } tons of traffic in the base year 2005, of which { } was very short-haul traffic that exited the SARR at the north end of the SARR after moving on the SARR only a few miles.¹² Of the { } tons exiting the SARR at the south end in Guernsey, a significant portion of the traffic was low-rated, but appeared to be profitable under MSP.

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¹² Highly Confidential materials are designated by a single bracket – “{”.

The move to Modified ATC from MSP in 2007 completely changed WFA/Basin's incentive to include short-haul traffic and low-rated traffic in their SAC presentation. As to the short-haul traffic handled at the north end of the SARR in Figure FTI-1 above, Modified ATC eliminated altogether the 100-mile origination credit which had made the short-haul traffic in WFA/Basin's original SAC presentation appear to be highly profitable. As explained by Messrs. Fisher and Fisher, the change from MSP to Modified ATC reduced the revenues allocated to this short-haul traffic by over 50%. *Id.* at 9. WFA/Basin therefore eliminated all short-haul traffic from the redesigned SARR. Figure FTI-2 from the Verified Statement of Messrs. Fisher and Fisher, reproduced below, shows WFA/Basin's redesigned SARR under Modified ATC. *Id.* at 8.

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The move to Modified ATC in 2007 also eliminated WFA/Basin's incentive to include low-rated traffic. The change from MSP, a mileage-based approach, to Modified ATC, an approach that reflects economies of density, substantially reduced the revenues available to the SARR from low-rated traffic. As Messrs. Fisher and Fisher show, for movements that do not cover BNSF's variable costs or that only barely cover variable costs, the move from MSP to Modified ATC reduced the revenues available to the SARR by 31%. *See* Figure FTI-4 in Fisher/Fisher VS, at 10. Due to the reduced profitability of low-rated traffic, WFA/Basin excluded all southbound traffic from the redesigned SARR that had an R/VC ratio below 110%. *See* Figure FTI-5 in the Fisher/Fisher VS, at 12. Figure FTI-2 from the Verified Statement of Messrs. Fisher and Fisher, reproduced above, shows that the southbound traffic through Guernsey was substantially reduced after eliminating low-rated traffic from the SARR.

Thus, the change from MSP to Modified ATC changed WFA/Basin's traffic selection incentives with respect to short-haul and low-rated traffic, and WFA/Basin redesigned the SARR after the *2007 Decision* to reflect these changed traffic selection incentives. But the change from Modified ATC to Alternative ATC does not change the incentives that WFA/Basin had to exclude short-haul and low-rated traffic when they redesigned the SARR. As to the short-haul traffic, as noted above, the move from MSP to Modified ATC reduced the revenues by over 50%. But the move from Modified ATC to Alternative ATC does not substantially change the revenue allocation on this short-haul traffic. In fact, as Messrs. Fisher and Fisher explain, Alternative ATC would allocate *less* revenue than Modified ATC – 5% less for Donkey Creek and 10% less for Campbell to the short-haul traffic that WFA/Basin excluded in its redesigned SARR. *See* Fisher/Fisher VS at 14. In other words, if Alternative ATC had been in place when WFA/Basin redesigned the SARR after the *2007 Decision*, WFA/Basin's incentive to exclude

the short-haul traffic would have been even stronger. If anything, the reduction in revenues available to the excluded short-haul traffic under Alternative ATC would reinforce WFA/Basin's decision to exclude the short-haul traffic, not change WFA/Basin's traffic selection incentives.

The same considerations apply to the excluded low-rated traffic. As noted above, the change from MSP to Modified ATC reduced the revenues available to the SARR on the low-rated traffic by 31%, making that traffic far less profitable to the SARR and therefore leading WFA/Basin to exclude it from the redesigned SARR. But the change from Modified ATC to Alternative ATC has virtually no impact on the amount of revenues that would be allocated to this low-rated traffic. Messrs. Fisher and Fisher show that Alternative ATC and Modified ATC allocate almost the same amount of revenue to the excluded low-rated traffic. *See Fisher/Fisher VS*, at 17. WFA/Basin's incentive to exclude the low-rated traffic does not change with the use of Alternative ATC because the revenue allocation to the low-rated traffic does not change. In fact, Alternative ATC would allocate about 2% *less* revenue to the excluded low-rated traffic, thus reinforcing WFA/Basin's decision to exclude it from the SARR. *See id.*

In short, the move from Modified ATC to Alternative ATC does not significantly change the amount of revenue allocated to the SARR on the short-haul or low-rated traffic that WFA/Basin excluded from the redesigned SARR and therefore does not change WFA/Basin's SARR design incentives with respect to that traffic. That leaves the question whether the move from Modified ATC to Alternative ATC changes the traffic selection incentives with respect to the *high-rated* traffic that WFA/Basin chose to leave in the redesigned SARR after the 2007 Decision. As Mr. Crowley points out, the move from Modified ATC to Alternative ATC does substantially reduce the revenues available to the SARR on the high-rated traffic that WFA/Basin included in the redesigned SARR. But that difference does not change the

incentives that WFA/Basin had to include such traffic in the SARR traffic group. A complainant always has the incentive to include high-rated traffic in the SARR traffic group, whether or not the revenues allocated to the SARR on the high-rated traffic are overstated by double-counting variable costs, as they were under Modified ATC. Alternative ATC corrects the overstatement of SARR revenues on high-rated traffic that results from this double-counting, but it does not affect WFA/Basin's incentive to include the high-rated traffic in the SARR traffic group.

The reduction of revenues on the high-rated traffic resulting from the use of Alternative ATC might lead WFA/Basin to regret its decision to exclude the low-rated traffic when it redesigned the SARR after the *2007 Decision*. While that traffic was not very profitable, it nevertheless might have provided some contribution to offset the reduced contribution that results from the eliminating the double-count of variable costs under Modified ATC. But this would not justify giving WFA/Basin the chance to refile SAC evidence now. If WFA/Basin could show that the excluded low-rated traffic makes a net contribution to SARR revenues under Alternative ATC, that net contribution would have been virtually identical under Modified ATC (indeed, as shown above, slightly higher). In other words, WFA/Basin would have had the same incentive under Modified ATC to include that low-rated traffic in positing an efficient SARR that maximized revenue contribution from its traffic group as it does now under Alternative ATC. A complainant has the incentive to posit the most efficient SARR it can design when it files its original SAC presentation. As the Board explained in *PPL* discussed above, the Board does not give complainants an opportunity to file new SAC evidence so that the complainant can improve its SAC design with the benefit of hindsight.

C. WFA/Basin Have Presented No Valid Reason To Be Given The Chance To Refile SAC Evidence.

To support their request for another chance to file SAC evidence, WFA/Basin's witness Mr. Crowley tries to portray the change from Modified ATC to Alternative ATC as a fundamental change in revenue allocation by focusing on the impact of the change on WFA/Basin's prescribed rate. Mr. Crowley states that the application of Alternative ATC "increases the maximum MMM R/VC ratios by nearly 100 percentage points on average and reduces WFA/Basin's rate relief by over \$328 million." Crowley VS, at 15-16.

The impact of Alternative ATC on WFA/Basin's rate is irrelevant because it does not say anything about the incentives that WFA/Basin had in designing a new SARR after the *2007 Decision*. The Board's rulings on SAC evidence often change the results that parties hope for or expect. But the question in determining whether to give a complainant a chance to redesign the SARR is not whether the complainant had expected more rate relief but whether the Board's treatment of the evidence changes the incentives that the complainant had when it originally designed the SARR. As explained above, the change from Modified ATC to Alternative ATC would not change WFA/Basin's traffic selection incentives.

Moreover, as explained by Messrs. Fisher and Fisher, it is not surprising that the change from Modified ATC to Alternative ATC would significantly reduce the amount of rate relief for WFA/Basin. The double-counting of variable costs under Modified ATC had the direct effect of inflating the rate relief available to WFA/Basin, without significantly affecting the maximum rates that could be charged to any other shipper in the SARR traffic group. Correcting the double-count simply eliminates the inflated amount of WFA/Basin's rate relief.

Contrary to the impression that Mr. Crowley seeks to make, the overall change in SARR revenues produced by the change from Modified ATC to Alternative ATC is also relatively

small. As Messrs. Fisher and Fisher explain, and Mr. Crowley concedes, total SARR revenues are reduced by about 5%. *See* Fisher/Fisher VS, at 20; *see also* Crowley VS, at 16. In contrast, the overall change in revenues resulting from the change from MSP to Modified ATC in the *2007 Decision* was 34%. *See* Fisher/Fisher VS, at 20. In the *DuPont* case, DuPont looked at the overall change produced by moving from Modified ATC to Alternative ATC in its SAC evidence, and concluded that the overall change was about 5% – the same as in this case – a change that DuPont characterized as “very small” and insufficient to justify any change in the filing of SAC evidence. Reply of E.I. DuPont De Nemours & Co. to Norfolk Southern Railway Company’s Motion to Hold Case In Abeyance Pending Completion of Rulemaking, at 30, STB Docket No. NOR 42125 (filed Aug. 27, 2012).

Mr. Crowley also argues that the change from Modified ATC to Alternative ATC changes the “ranking” from high to low of movements that could potentially be included in the SARR traffic group. Crowley VS, at 16. But he never explains why the relative ranking of movements is relevant to the traffic selection process or how it would affect traffic selection decisions. As Messrs. Fisher and Fisher explain using examples from Mr. Crowley’s own work papers, the “rank” that a particular movement has relative to other movements is irrelevant if the movement generates sufficient revenue to justify including it in the SARR traffic group or insufficient revenue to justify inclusion in the traffic group. *See* Fisher/Fisher VS, at 18-19. The important question is not the relative ranking of movements but which movements generate enough revenue to justify including them in the traffic group.

Messrs. Fisher and Fisher show that while the change from Modified ATC to Alternative ATC changes the ranking of the movements that WFA/Basin included in its revised SARR relative to one another, none of the *excluded* low-rated movements generates a higher R/VC ratio

under Alternative ATC than under Modified ATC that might induce WFA/Basin to include that traffic in the SARR after previously deciding to exclude the traffic when WFA/Basin redesigned the SARR after the *2007 Decision*. See Figure FTI-8 in Fisher/Fisher VS at 16. Moreover, Alternative ATC ensures that all of the movements that WFA/Basin included in the redesigned SARR cover at least variable costs. WFA/Basin's traffic selection incentives do not change as a result of the move from Modified ATC to Alternative ATC, so there is no basis for giving WFA/Basin another chance to file SAC evidence.

D. Fairness Considerations Do Not Justify Giving WFA/Basin A Third Opportunity To Design A SARR.

Application of the "changed incentives" test that the Board has developed through its SAC decisions adequately addresses fairness concerns in considering whether to give a complainant a new chance to file SAC evidence after a change in SAC methodology. When a complainant designs a SARR, it has the incentive to design the most efficient SARR possible under the standards in place at the time. If the complainant's design incentives do not change as a result of a change in SAC methodology, there is no equitable reason to give the complainant another opportunity to file SAC evidence. A complainant's desire to try to improve its SAC results does not justify prolonging SAC litigation.

WFA/Basin claim that they relied on Modified ATC in designing their SARR and therefore fairness requires that they be given another opportunity to file SAC evidence if the Board uses a different revenue allocation methodology. But reliance on a particular revenue allocation methodology is irrelevant if the change in methodology did not change the complainant's traffic selection incentives. WFA/Basin may have had an expectation based on the use of Modified ATC of an inflated award of rate relief because of the distortions created by

the double-counting of variable costs on high-rated traffic. But the expectation of a windfall due to the biased revenue allocation resulting from Modified ATC does not create an entitlement to the windfall. The relevant question is whether WFA/Basin's incentives changed in selecting traffic for the SARR by the change from Modified ATC to Alternative ATC, and as shown above, those incentives were the same under both Modified ATC and Alternative ATC.

To the extent fairness considerations have any relevance, the equities would support the application of Alternative ATC to recalculate SAC results without giving WFA/Basin another opportunity to submit SAC evidence. BNSF originally showed in 2007 that WFA/Basin was not entitled to any rate relief. The Board expressly noted that the challenged rates were among the lowest rates charged to any shipper of PRB coal. *2007 Decision*, at 2. Without any change in the rate levels, the Board reversed that decision two years later with a decision that the Board acknowledged resulted in the largest award of rate relief in the history of the agency. BNSF has spent over four years in further litigation, with two successful appeals to the D.C. Circuit, to show that the Board's *2009 Decision* applying Modified ATC was flawed and that the award of rate relief was overstated. Alternative ATC was adopted in a rulemaking proceeding that was initiated as a result of concerns raised by BNSF in this proceeding about Modified ATC. Application of Alternative ATC will correct the error caused by the double-counting of variable costs in the Modified ATC revenue allocation methodology, but even with that correction WFA/Basin will have obtained almost \$122 million in rate relief through April 2014, not counting the value of future rate reductions, which will add an additional \$122.0 million of future relief. *See Fisher/Fisher VS*, at 21. The prescribed rate was still one of BNSF's lowest rates on a dollar-per-ton basis for PRB coal movements, and WFA/Basin will still be the beneficiaries of the largest award of rate relief in the history of the Board. *See id.* at 21, 23.

V. If Fundamental Changes In Economic and Market Conditions Have Occurred, As WFA/Basin Allege, Those Changed Circumstances Should Not Be Addressed In This Limited Remand.

As explained above, WFA/Basin have no valid basis for designing a third SARR because the change from Alternative ATC to Modified ATC does not change the traffic selection incentives that WFA/Basin had when they redesigned the SARR after the *2007 Decision*. In asking for the opportunity to refile another traffic group, WFA/Basin merely seek to improve their SAC results, not to legitimately deal with a change in SAC methodology that changed their design incentives. Moreover, their lack of any showing of changed traffic selection incentives is in sharp contrast to their extensive discussion of supposed changes in market and economic conditions. WFA/Basin appear to have concluded that the best way to improve their SAC results is simply to start over again with new discovery and new SAC evidence based on current market and economic conditions.

Rather than allow WFA/Basin to use the adoption of Alternative ATC as an excuse for updating the SAC evidence, the Board should restate the SAC results of the *2009 Decision* to address the flaws in Modified ATC and modify the rate prescription. Then, if WFA/Basin still believe that circumstances have fundamentally changed since they originally filed SAC evidence, the proper course, consistent with the Board's rules and practices, would be for WFA/Basin to seek a reopening of the rate prescription. At that time, it would be necessary for the Board to determine whether the purported changed circumstances are significant enough to warrant reopening, and if as significant as WFA/Basin allege, whether vacatur is appropriate. If the Board concludes that vacatur of the rate prescription is appropriate, it would return the rate-setting initiative to BNSF and allow the parties to seek a negotiated resolution as to rate levels going forward before resorting, if necessary, to new, costly and complicated SAC litigation. It

would be totally inappropriate, inconsistent with the Board's prior practice in this case, and contrary to Board policy and practices to further complicate this already-prolonged case with a new round of discovery and the *de novo* filing of SAC evidence ten years into the 20-year rate prescription period.

A. Even When The Board Found In 2007 That A Redesign Of The SARR Was Appropriate Due To Changed Traffic Selection Incentives, The Board Limited The Scope Of New Evidence.

As discussed above, in 2007, the Board provided WFA/Basin with the opportunity to modify its SARR in light of the change from the MSP to the ATC revenue allocation methodology for cross-over traffic, concluding that such a change in SAC methodology had changed WFA/Basin's traffic selection incentives. However, the Board made it clear that when they submitted evidence of a redesigned SARR, WFA/Basin were not entitled to bring an entirely new SAC presentation with new and updated evidence. Rather, they were limited to modifying their prior SAC presentation for the sole purpose of addressing the change in the Board's revenue allocation methodology. As the Board explained, "WFA may increase or decrease the traffic group, change the configuration of the [SARR], and submit evidence on all related issues (such as the revenue from new traffic or construction costs avoided or added due to a new configuration). However, neither party will be allowed to use the reopening of the record to relitigate unrelated issues...." *2007 Decision*, at 20.

At that time, the parties disagreed about the scope of the evidence that the parties could use in the limited reopening. WFA/Basin proposed that the supplemental evidence "be limited to the use of material already in the administrative record (including the discovery record) as well as any other public or commercial material that is equally available to each side without discovery against one another." WFA/Basin's Supplemental Evidence Notice, at 1-2, STB

Docket No. NOR 42088 (filed Oct. 22, 2007). WFA/Basin opposed additional discovery because it would “greatly add to [the] complexity, delay and expense” involved with making SAC changes permitted by the Board. *Id.* at 2. While BNSF agreed that supplemental evidence “should generally be limited to material already in the administrative and discovery record,” it did not agree that the parties should be allowed to use “any other commercial material that is equally available to each side” because that formulation was too abstract and unclear regarding “the types of information that would be covered or the uses to which such information would be put in the SAC evidence.” BNSF’s Reply to Supplemental Evidence Notice, at 1-2, STB Docket No. NOR 42088 (filed Nov. 13, 2007). Ambiguity over the type of evidence that could be submitted would complicate what was supposed to be a limited and narrow undertaking.

The Board agreed with BNSF, finding that

the supplemental evidence should be limited to what is already in the administrative record, including the discovery record, except information the parties need to develop cost-of-capital calculations under CAPM. *This is not an opportunity to submit a new case, but instead is an opportunity to allow WFA to modify its SAC presentation in light of the new revenue allocation methodology applied in the September '07 Decision.*

2008 Reconsideration Decision, at 8 (emphasis added). In response to a petition from WFA/Basin seeking to use specific public or commercially available information that BNSF did not oppose, the Board later clarified this decision to allow the parties to use specified public and commercially available data in addition to the material already in the administrative and discovery record in their modified SAC presentations. *See W. Fuels Ass’n, Inc. & Basin Elec. Power Coop., Inc. v. BNSF Ry. Co.*, STB Docket No. NOR 42088, at 4 (STB served Mar. 12, 2008) (“*March 12, 2008 Decision*”). Specifically, the Board also authorized the parties to use public or commercially available information regarding “land value data; ICC Engineering

Report data; geodetic map data; mileage data; R.S. Means Manual data; and new field observations evidence not currently in the record.” *Id.*

Even with the Board’s careful limitation on the scope of evidence on reopening, the evidentiary filings were complex and extensive, and the proceeding took several months before a decision was reached on reopening. Five years later, the case is still active. If the Board were to allow new discovery and new SAC evidence reflecting current market and economic conditions, as requested by WFA/Basin, the level of complexity would be orders of magnitude greater. *See Fisher/Fisher VS, 24-25.* Indeed, the issues that would need to be addressed in such a broad reopening would be among the most controversial and difficult issues in SAC cases. This proceeding could continue several more years. If any new SAC evidence is permitted in this narrow remand (and BNSF does not believe it should be), the Board should not permit new SAC evidence to be based on information outside the existing administrative and discovery record as WFA/Basin request but rather would need to carefully circumscribe the scope of new SAC evidence, as it did after the *2007 Decision*.

B. WFA/Basin’s Request To File New, Updated SAC Evidence Is Directly Contrary To The Board’s Policies And Practices Regarding Changed Circumstances.

The Board has recognized on multiple occasions that railroad markets are dynamic and that economic and market conditions change substantially over time. But the Board has made it clear that the way to deal with changing conditions in rail markets is not to allow updating of SAC evidence and results when conditions change. To the contrary, the Board has adopted rules specifically designed to avoid having to update SAC evidence as conditions change.

In *Major Issues*, a primary reason for shortening the rate prescription period in a SAC case from 20 years to 10 years was precisely to avoid having to undertake the complex and

costly task of updating SAC evidence. As the Board explained, “[t]he Board proposed to require the use of a 10-year analysis period in SAC cases for several reasons. First, as a practical matter the benefits of a 20-year analysis and potential rate prescription are illusory. Rate prescriptions have tended to endure no longer than 10 years because of inevitable and substantial changes in circumstances.” *Major Issues Final Rules*, at 62. Indeed, if WFA/Basin are correct that circumstances have changed dramatically in rail markets for PRB coal transportation in the 10 years since the complaint in this case was filed, that would only prove the Board’s point that rate prescriptions should not last more than 10 years because of “inevitable and substantial changes in circumstances.” *See id.* The existence of fundamentally changed circumstances 10 years after proceedings began would not justify undertaking a new round of SAC discovery and evidentiary filings in order to prolong further a rate prescription. Instead, after the rate prescription is corrected using Alternative ATC and if WFA/Basin thereafter filed a petition to reopen, the Board would need to consider whether to vacate it for future years.

The Board’s rules governing reopening of existing rate prescriptions are also expressly intended to avoid having to update SAC evidence as circumstances change. In *Major Issues*, the Board adopted new rules for addressing the impact of changed circumstances on existing rate prescriptions. *Major Issues Final Rules*, at 73-74. Under the new rules, the Board asks whether changes in circumstances are substantial enough to warrant reopening. If so, the Board must decide whether the existing rate prescription should be modified or vacated. If the changed circumstances alter so fundamentally the grounds for the rate prescription that there is no longer any valid basis for continuing the rate prescription, then the proper response is to vacate the rate prescription. The Board’s rules do not allow an updating of the record to conform the rate prescription to current market and economic circumstances, but rather direct that the rate

prescription be vacated to return the rate-setting initiative to the railroad. Indeed, the Board was very clear that it wanted to avoid getting dragged into continuous litigation over SAC results as circumstances change. As the Board explained, “[w]hile we recognize that, due to the rate prescription, there inevitably will be changes to the forecasts and projections, we will be vigilant in ensuring that the standard we put in place today does not become a mechanism for serial reopening based on updated figures.” *Id.* at 72.

The cases cited by WFA/Basin do not support WFA/Basin’s request to update the SAC record with new discovery and new, more current SAC evidence. The only case cited by WFA/Basin where any SAC evidence had previously been submitted is *Arizona Pub. Serv. Co. & PacifiCorp v. The Burlington N. & Santa Fe Ry.*, 6 S.T.B. 851 (2003) (“*APS*”). But in *APS*, the Board ultimately decided that the changes in circumstances did not justify an updating of the rate prescription to reflect changed circumstances but rather required vacatur of the rate prescription. *Arizona Pub. Serv. Co. & PacifiCorp v. The Burlington N. & Santa Fe Ry. Co.*, 7 S.T.B. 1021, 1023 (2004). After the prescription was vacated, the parties resolved their dispute over rates through negotiation without further resort to litigation at the STB.

All of the other cases cited by WFA/Basin are inapposite because they do not deal with any updating of previously submitted SAC evidence. In all of the other SAC cases cited by WFA/Basin, historical data on traffic and revenue were used because it was the first time that any SAC evidence had been filed in the case. See *Bituminous Coal – Hiawatha, Utah, to Moapa, Nevada*, 6 I.C.C 2d 1, 2-3, 45 (1989) (SAC evidence was presented for the first time after a court of appeals set aside a rate prescription that was not based on the SAC test); *Coal Trading Corp. v. Baltimore & Ohio R.R.*, 6 I.C.C. 2d 361, 376-377, 409, 411 (1990) (SAC evidence was not presented until the SAC test had been developed and affirmed in the Third

Circuit); *McCarty Farms, Inc., v. Burlington N., Inc.*, 2 S.T.B. 460, 465, 469 (1997) (no SAC evidence had been filed until the ICC's prior decision based on a non-SAC standard had been struck down by the D.C. Circuit); *Total Petrochemicals & Ref. USA, Inc. v. CSX Transp., Inc.*, STB Docket No. NOR 42121, at 1-2 (STB served Sept. 26, 2013) (SAC evidence was not filed until market dominance issues had been resolved several years after the case was filed); *Duke Energy Corp. v. CSX Transp., Inc.*, 7 S.T.B. 402, 446 (2004) (same).

A case not cited by WFA/Basin but far more on point here is *West Texas Utilities Co. v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. NOR 41191 (STB served May 29, 2003). In that case, the Board had originally prescribed a 20-year rate at the jurisdictional threshold – 180% of the variable cost of the challenged movement. BNSF asked the Board to reopen the proceeding and correct that prescription so that it was established at the higher of the jurisdictional threshold or the SAC rate. In response, WTU asked to be afforded the opportunity to present evidence of changed circumstances in the reopened proceeding, including that “the projections upon which the SAC analysis was based – projections regarding coal volumes, revenues, inflation forecasts, capital costs and other factors – are now inaccurate and outdated as compared to actual or current data.” *Id.* at 3-4. The Board rejected WTU's request, finding that the changes that WTU identified were not “related to the material error identified by BNSF, which can be corrected without changing any of the findings in the original decision. In contrast, WTU's proposed adjustments would involve relitigating almost the entire SAC case.” *Id.* at 4. The Board corrected the error in the existing rate prescription but concluded that “[i]f WTU wishes to have this proceeding reopened based on new evidence or substantially changed circumstances, it may file an appropriate petition to reopen on that basis.” *Id.*

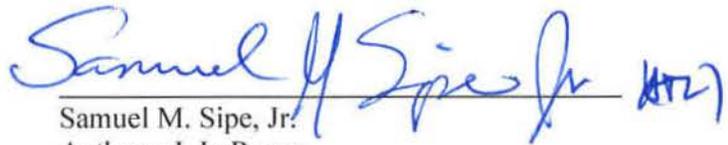
Four years later, WTU did seek to reopen based on changed circumstances. Citing the same types of changes in conditions that WFA/Basin cite now, namely differences between actual traffic volumes and forecasted traffic volumes and differences between actual costs and forecasted costs, WTU asked that the rate prescription be reopened and vacated, and the Board agreed. *W. Tex. Utils. Co. v. The Burlington N. & Santa Fe Ry. Co.*, STB Docket No. NOR 41191, at 5 (STB served Sept. 10, 2007). The Board did not update the previous SAC calculations to reflect changes in economic and market conditions. It terminated the rate prescription to allow the market to function. Once again, the parties were able to resolve their differences over rate levels without further resort to litigation.

As in the *WTU* case, the Board should fix the rate prescription in this case, which it can do with the straightforward and limited application of Alternative ATC to the 2009 SAC calculations. After the Board fixes the rate prescription in this limited remand, if WFA/Basin believe that economic and market conditions have changed so substantially that reopening is justified, they should then seek to reopen the corrected rate prescription. It would be inappropriate to expand the scope of this narrow remand by providing WFA/Basin the opportunity to prolong further this case with new discovery and new SAC evidence that updates evidence previously submitted.

VI. Conclusion

The sole issue before the Board in this second remand involves the proper allocation of revenues on cross-over traffic in the Board's 2009 SAC calculations. The Board should address that issue by recalculating the 2009 SAC results using Alternative ATC and revising the rate prescription to conform to the new SAC calculations. That is the only action that the Board should take on remand.

Respectfully submitted,



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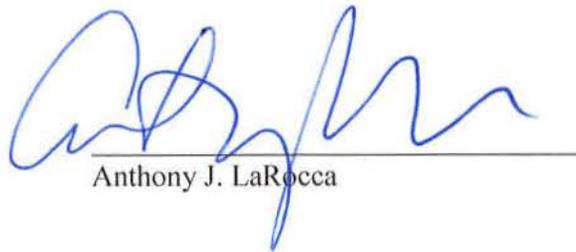
September 19, 2014

Attorneys for BNSF Railway Company

CERTIFICATE OF SERVICE

I hereby certify that this 19th day of September, 2014, I served a copy of BNSF Railway Company's Reply Comments on Remand on the following by e-mail:

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BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. 42088

Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc.

v.

BNSF Railway Company

Verified Statement of

Benton V. Fisher and Robert O. Fisher

I. Introduction

We are Benton V. Fisher and Robert O. Fisher. We are Senior Managing Director and Senior Director, respectively, of FTI Consulting, an economic consulting firm. Our offices are located at 1101 K Street, N.W., Washington, DC 20005. Statements describing our background, experience, and qualifications are attached hereto as Exhibits FTI-1 and FTI-2. We are actively involved in various aspects of transportation consulting, including economic studies of costs and revenues, traffic and operating analyses, and work with costing and financial reporting systems. Much of our work for the railroad industry has required a detailed understanding of the costing approaches and models that are used by the Surface Transportation Board (“STB” or “Board”) for a variety of regulatory purposes. We have testified at the STB regarding rates and costs for individual movements, traffic groups, and entire networks. We have sponsored evidence regarding railroad revenues and the allocation approaches used to assign revenues to a stand-alone railroad (“SARR”) that is the subject of analysis in stand-alone rate cases. We have also

sponsored evidence regarding costs, both the costs of stand-alone railroads (stand-alone costs, or “SAC”) and railroads’ URCS costs, which are developed from the Uniform Railroad Costing System, the STB’s general purpose costing system. We have extensive experience with detailed railroad traffic data. Benton Fisher has previously submitted testimony for defendant BNSF Railway Company (“BNSF”) in this proceeding.¹

We have been asked by BNSF to review and respond to Complainants’ Initial Comments on Remand, filed by Complainants Western Fuels Association and Basin Electric Power Cooperative (“WFA/Basin” or “WFA”) on June 17, 2014 (hereafter “Remand Comments”). Those Remand Comments were accompanied by a Verified Statement of Mr. Thomas D. Crowley (“Crowley VS”). In particular, we were asked to respond to the claim by WFA/Basin that the Board’s use of the Alternative ATC revenue allocation methodology adopted in Ex Parte 715² to recalculate SAC results in this case should give WFA/Basin the opportunity to file new SAC evidence. We explain below why there would be no valid reason for the Board to give WFA/Basin another chance to file SAC evidence in this case. Alternative ATC merely corrects a flaw with the prior Modified ATC approach used in the 2009 SAC calculations but it does not change any design or traffic selection incentives that WFA/Basin had when they designed the SARR used in the 2009 SAC analysis.

The only confidential materials that we relied upon for this Reply VS were the Highly Confidential versions of WFA’s Remand Comments (including the Crowley VS) and the

¹ See, e.g., Reply Evidence and Argument of BNSF Railway Company, STB Docket No. NOR 42088 (filed July 20, 2005); Comments of BNSF Railway Company on Remand, STB Docket No. NOR 42088 (filed November 22, 2010).

² *Rate Regulation Reforms*, STB Docket No. EP 715 (STB served July 18, 2013) (“EP 715”).

accompanying workpapers, and the workpapers supporting the Board's prior stand-alone cost decisions in this case, specifically the September 2007 decision³ ("*WFA I*") and the February 2009 decision⁴ ("*WFA II*").⁵

II. Background

In this section, we provide as background a brief review of the events in this case that are relevant to WFA/Basin's argument regarding new SAC evidence.

- In 2005, WFA designed its initial SARR network and selected its traffic group based on the assumption that the defendant's through revenues would be allocated to the SARR based on the Modified Straight Mileage Prorate approach, or "MSP."⁶
- In October 2006, after a notice-and-comment rulemaking proceeding, the Board adopted the Average Total Cost revenue-allocation methodology, or "ATC."⁷
- The following month (November 2006), the Board instructed WFA and BNSF to submit evidence calculating SARR revenues based on ATC. The parties each filed such evidence in early 2007.⁸
- One year later, in September 2007, the Board published the *WFA I* decision, finding that WFA had failed to establish that the challenged rates were unreasonably high, and also

³ STB Docket No. 42088 (STB served September 10, 2007). References to "*WFA I*" also incorporate certain "Technical Matters" that were addressed by the Board in a subsequent decision served February 29, 2008.

⁴ STB Docket No. 42088 (STB served February 18, 2009). References to "*WFA II*" also incorporate certain "technical and computational errors" that were addressed by the Board in a subsequent decision served June 5, 2009.

⁵ Details of our calculations supporting this Reply VS are included in our workpapers, which are being provided to WFA and the Board with this statement. The workpapers are Highly Confidential pursuant to the protective order.

⁶ WFA/Basin's Remand Comments at 3.

⁷ Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1) (STB served October 30, 2006). The revenue-allocation approach adopted in this decision is referred to as "Original ATC."

⁸ STB Docket No. 42088 (STB served November 22, 2006). For this supplemental evidence, both parties relied upon Original ATC.

offering WFA an opportunity to reconfigure its SARR network and modify its selected traffic group, in light of the change in revenue-allocation methodologies from MSP to ATC. The Board applied a modified version of the Original ATC methodology, referred to as Modified ATC. The Board noted that the change in methodology had changed WFA/Basin's incentives in designing an efficient SARR.

- In 2008, WFA took up the Board on its offer to redesign the SARR after ATC was adopted, and developed a revised SARR based on the new traffic selection incentives created by the ATC approach for allocating revenues on cross-over traffic. For this evidence, WFA submitted revenues based on the Modified ATC approach.
- In 2009, the Board published the *WFA II* decision, prescribing maximum rates based on Modified ATC.
- In 2010, the Board's 2009 *WFA II* decision was remanded to the Board by the U.S. Court of Appeals for the D.C. Circuit to address the revenue-allocation issue. In our Joint Verified Statement with our colleague Mike Baranowski in support of BNSF's November 22, 2010 Comments on Remand, we showed that Modified ATC was an erroneous and disproportionate response to the problem that led the Board to adopt Modified ATC, and we identified an alternative approach.
- In July 2013, the Board acknowledged the flaws in the Modified ATC approach in the separate Ex Parte 715 rulemaking proceeding, and concluded that the ATC formula should be changed back to the Original ATC approach for all movements that would receive a Revenue-to-Variable Cost ("R/VC") ratio of at least 100%, with a secondary check for certain low-rated moves.⁹ The new approach is referred to as Alternative ATC.
- In a January 31, 2014 decision, the D.C. Circuit remanded the Board's 2009 Decision once again to the Board to address flaws in the Board's treatment of revenue allocation on cross-over traffic in the 2009 SAC calculations.

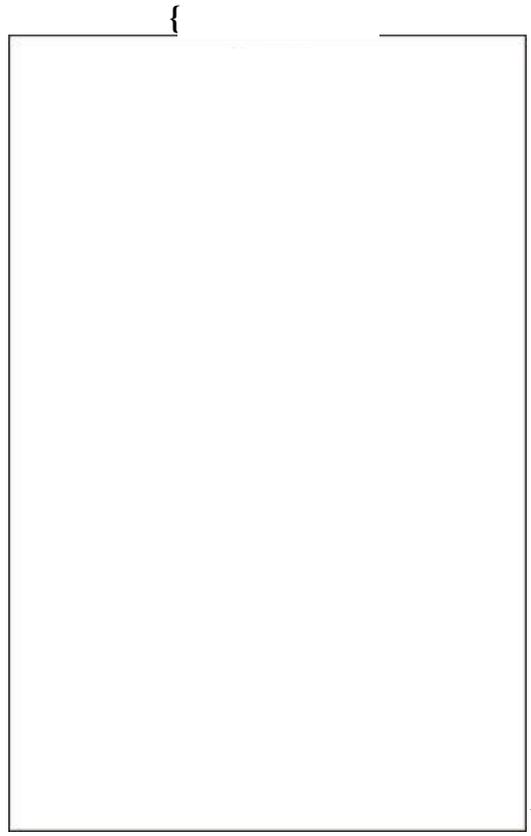
⁹ *EP 715* at 30. While the newly-adopted approach has been referred to as "Alternative ATC," the Board stated "As alternative ATC is simply a variation on ATC—in which we have now defined the exact computational method—in future decisions we will refer to the method simply as the Board's ATC methodology." *Ibid.* As we discuss the results of calculations of three different ATC variants in this Reply VS, we will use the Original, Modified, and Alternative labels to differentiate the approaches.

III. The Shift from Modified ATC to Alternative ATC Does Not Change WFA/Basin's Traffic Selection Incentives.

As noted above, when the Board changed from the use of MSP to allocate revenues on cross-over traffic to an ATC-based revenue allocation methodology in 2007, the Board gave WFA/Basin an opportunity to redesign the SARR after concluding that the methodological change substantially changed WFA/Basin's incentives in designing a SARR and selecting traffic for it. In this section, we explain how the change in revenue allocation methodology in *WFA I* from MSP to an ATC-based methodology changed WFA/Basin's traffic selection incentives, and how WFA/Basin responded to those changed incentives with a redesigned SARR. We also show that the change from one version of the ATC methodology – Modified ATC – to another version of ATC – Alternative ATC – does not change WFA/Basin's design incentives. While WFA/Basin may have had a valid reason to redesign the SARR after *WFA I*, they do not have a valid reason to do so now.

WFA’s Changes to Networks and Traffic from Initial 2005 SARR to Revised 2008

SARR: In its initial 2005 SARR developed using MSP, WFA selected virtually all traffic that BNSF originated from Southern Powder River Basin (“SPRB”) mines, and constructed a 218-mile network between the mines and Guernsey, entirely in the state of Wyoming. Figure FTI-1 below shows this “WFA I” network.



Two aspects of the MSP methodology were important factors in WFA/Basin’s original design incentives. First, MSP allocated revenue based on on-SARR and off-SARR miles. MSP did not consider the relative traffic density or the impact of density on the fixed costs per ton of the on-SARR or off-SARR line segments. The use of mileage to allocate revenues favored high-density SARRs by failing to reflect the lower costs per ton of high-density SARR lines. Under a

¹⁰ Highly Confidential materials are designated by a single bracket – “{”.

mileage-based approach, high-density SARR lines were allocated a disproportionate amount of revenue while the off-SARR lines of the residual incumbent were allocated too little revenue relative to the high costs of the low-density off-SARR lines.

Second, MSP allocated a 100-mile origination credit to the SARR to compensate the SARR for costs supposedly incurred to originate the traffic.¹¹ However, the 100-mile credit overcompensated the SARR for the costs to originate unit train shipments of coal, giving WFA/Basin the incentive to include as much short-haul traffic as possible in the SARR.

In response to the design incentives created by MSP, WFA/Basin's original SARR had very large amounts of short-haul traffic and low-rated traffic. As shown above in Figure FTI-1, { } of the WFA I traffic exited the SARR at the northern end, via either Campbell or Donkey Creek. This traffic averaged less than 30 miles on the SARR.

In addition to the incentive to include as much short-haul traffic as possible in the SARR, MSP created the incentive to include low-rated traffic by making that traffic much more profitable to the SARR. A substantial portion of the { } million tons¹² of southbound traffic shown on Figure FTI-1 was very low-rated traffic. As explained below, over {

} million tons had through R/VC ratios on BNSF below 110%. Under MSP, the traffic had higher R/VC ratios for the on-SARR portion of the movement, making it profitable to the SARR.

When the Board decided to abandon MSP and adopt a density-based ATC approach, WFA/Basin's design incentives changed. We explain below that under an ATC approach, WFA/Basin no longer had the incentive to include short-haul traffic or low-rated traffic on the

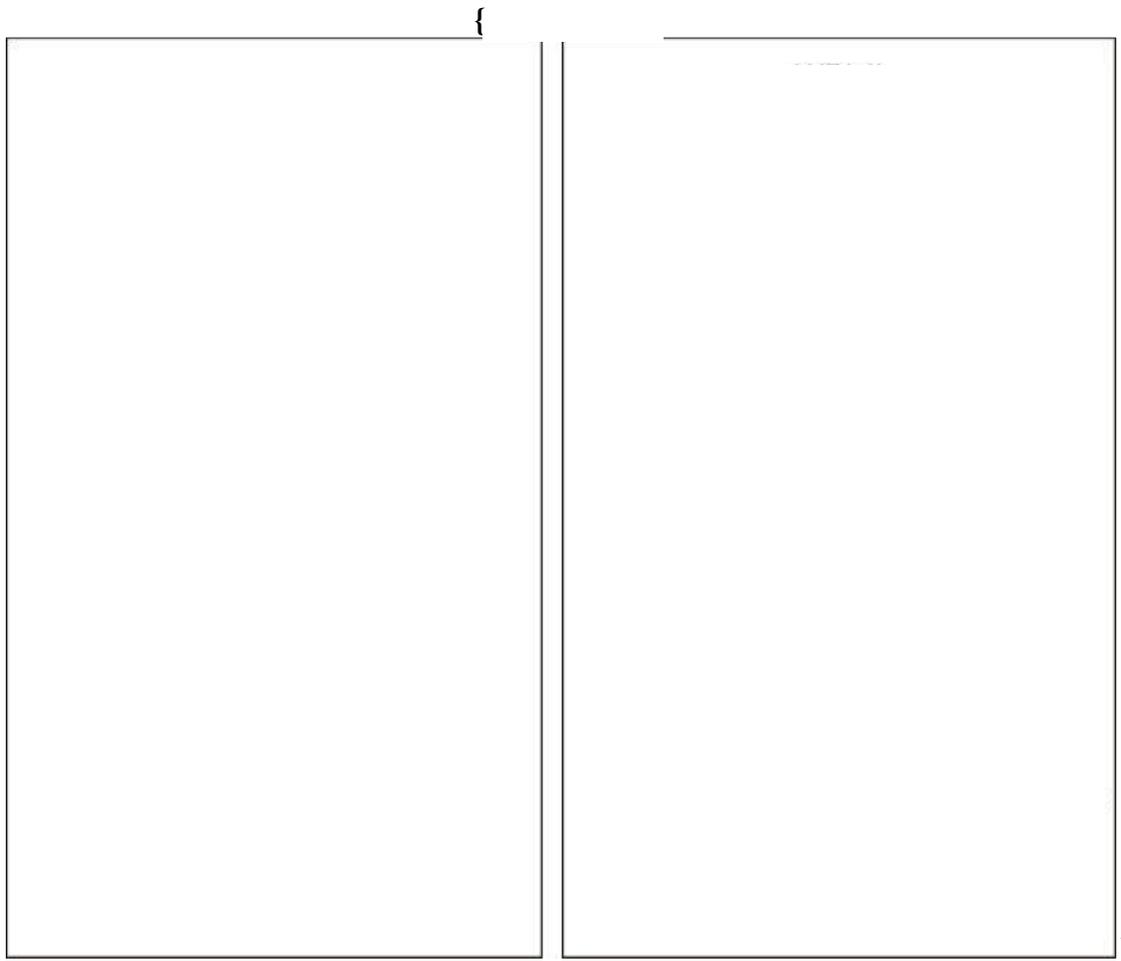
¹¹ A comparable 100-mile credit was also provided to the residual incumbent to terminate the traffic.

¹² Tonnage figures in this VS refer to annual totals for the SARR's base year, 2005.

SARR. As a result, when WFA/Basin redesigned the SARR in 2008, it eliminated both types of traffic. We briefly summarize the results of WFA’s redesign decisions below and explain further why the shift from MSP to ATC led to these revised design choices:

1. WFA eliminated all traffic that exited the SARR at the northern end, *i.e.*, removed any shipments that would be interchanged at Campbell or Donkey Creek;
2. WFA extended its SARR network 86 miles further, to Northport, NE in order to accommodate certain rerouted traffic that WFA/Basin chose to handle on a longer-haul basis over the SARR line through Guernsey.
3. WFA excluded all traffic moving on the SARR’s lines through Guernsey that had R/VC ratios below 110%.

Figure FTI-2 below shows the redesigned SARR and the design changes that WFA/Basin made after the 2007 Decision.



Northern End Shipments: The first and most obvious redesign choice made by WFA/Basin was to eliminate the short-haul shipments that exited the SARR from the northern end. Figure FTI-3 below shows that the change from the MSP methodology to Modified ATC had dramatically reduced the amount of revenues allocated to the SARR for that traffic.

**Figure FTI-3
Modified ATC Significantly Reduced SARR Revenues for WFA I
Northern End Shipments, and WFA Eliminated Them for WFA II**

Off SARR Junction	BNSF Through R/VC	WFA I Miles	SARR R/VC		
			MSP	Mod. ATC	% Diff. from MSP
Campbell	{ }	33	292%	129%	-56%
Donkey Creek	{ }	28	305%	128%	-58%

In the original SARR, { } of the WFA I traffic exited the SARR at the northern end, either at Campbell or Donkey Creek. Shipments that exited the SARR at Campbell had an average on-SARR length of haul of 33 miles, and benefited significantly from the 100-mile origination credit in MSP. The change to Modified ATC reduced SARR revenues for this traffic by 56%, as shown in Figure FTI-3. When WFA redesigned its SARR for ATC, it dropped all of this traffic, and eliminated the Campbell interchange.

Similarly, shipments that exited the original SARR at Donkey Creek averaged even fewer on-SARR miles than the Campbell traffic, and benefited slightly more from MSP’s 100-mile origination credit. The change to Modified ATC reduced SARR revenues on this traffic by 58%. When WFA redesigned its SARR for a density-based ATC approach, it routed no shipments out of the northern end of the SARR, and eliminated the Donkey Creek interchange.¹³

¹³ While WFA eliminated entirely from its WFA II SARR all of the shipments that its WFA I SARR interchanged at Donkey Creek, it re-routed a minority of the movements {

Modified ATC reduced by 31% the revenues available to the SARR for traffic with R/VC ratios below 110%.

Due to the reduced profitability of low-rated traffic under a density-based ATC approach, WFA/Basin's redesigned SARR eliminated all traffic with R/VC ratios below 110%, as shown in Figure FTI-5 below. As WFA/Basin stated in their Third Supplemental Rebuttal evidence, "Common sense dictates that traffic moving at R/VC ratios of less than one is not traffic that a SARR would be interested in carrying. That WFA/Basin did not include traffic moving, on average, at 0.88% of costs[sic], is not surprising."¹⁴

¹⁴ WFA/Basin's Third Supplemental Rebuttal Evidence at III-A-5 (filed Aug. 15, 2008).

Figure FTI-5 shows that, in addition to eliminating from WFA II all of the low-rated southbound traffic it had included in WFA I, WFA/Basin included in WFA II nearly all { } of the southbound shipments with R/VC ratios above 110%.¹⁵

Traffic Incentives Do Not Change With The Use Of Alternative ATC: Unlike the shift from MSP to Modified ATC, the shift from Modified to Alternative ATC does not change WFA/Basin's design incentives. If anything, the change to Alternative ATC reinforces WFA/Basin's decision to exclude the short-haul traffic and the low-rated traffic. While Alternative ATC also reduces the revenues available to the SARR on the high-rated traffic that WFA/Basin retained in the redesigned SARR, WFA/Basin's incentives to include the high-rated traffic in the SARR do not change. While Alternative ATC makes the SARR somewhat less profitable because of the reduced revenues on the high-rated traffic, WFA/Basin have the same incentive to include that traffic in the SARR as they did under Modified ATC.

¹⁵ Of the small number of southbound shipments with R/VC ratios above 110% that WFA/Basin excluded from its redesigned SARR, most were very low-volume movements – all less than { } trainloads. The only other cases were shipments to { } destinations that WFA/Basin's earlier evidence had forecasted would { }. See WFA/Basin Opening Evidence at III-A-7 (filed April 19, 2005).

To demonstrate why WFA/Basin’s traffic selection incentives do not change with the adoption of Alternative ATC, we examined the impact of the revenue allocation under Modified ATC and Alternative ATC on the excluded short-haul traffic and the excluded low-rated traffic. For the northern short-haul traffic that WFA/Basin excluded from the redesigned SARR, Figure FTI-6 shows that the use of Alternative ATC further reduces the revenues that would be allocated to the SARR for this traffic, although the difference is relatively small.

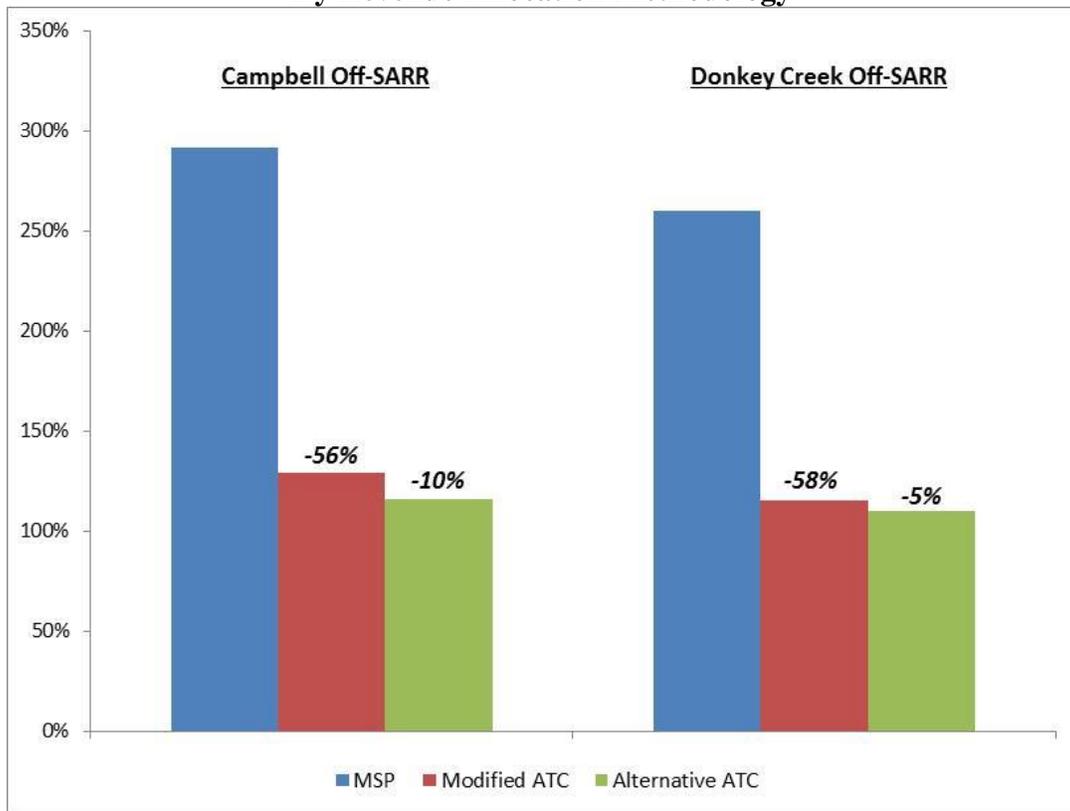
**Figure FTI-6
Alternative ATC has Limited Impact on WFA I’s Northern End Shipments**

Off SARR Junction	SARR R/VC		
	Modified ATC	Alternative ATC	% Difference from Mod. ATC
Campbell	129%	116%	-10%
Donkey Creek	128%	123%	-5%

WFA/Basin excluded the short-haul traffic from the 2008 redesigned SARR because Modified ATC substantially reduced the revenue available from that traffic. But Alternative ATC reduces even further the revenue available from the short-haul northern traffic, which reinforces WFA/Basin’s decision to exclude these shipments.

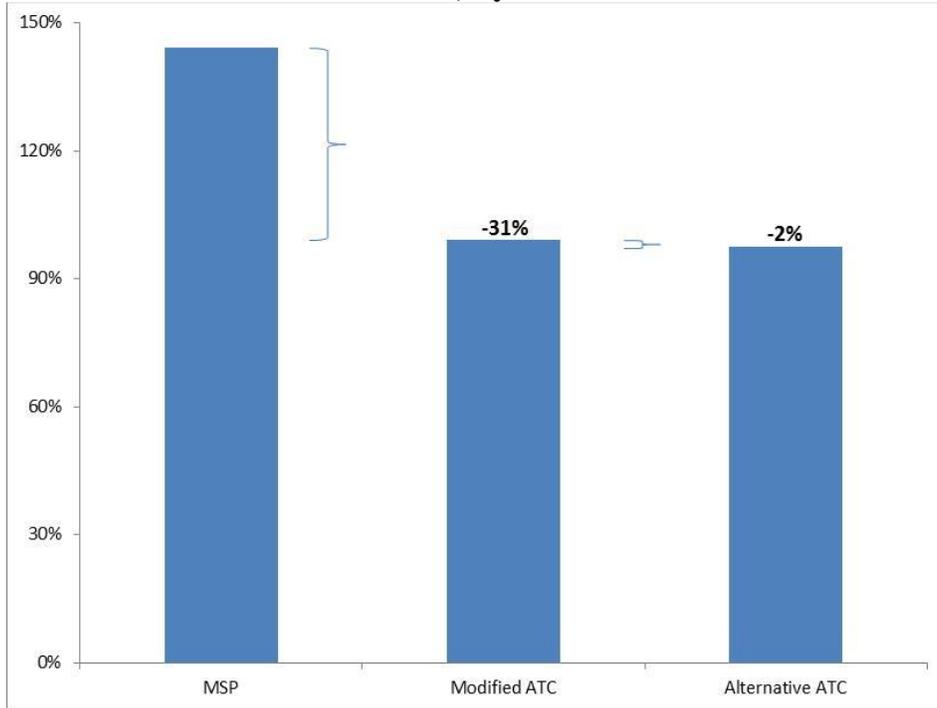
Figure FTI-7 below shows that the change from MSP to Modified ATC had a very large impact on the R/VC ratios of the short-haul traffic, leading WFA/Basin to exclude it from their redesigned SARR. In contrast, the change from Modified ATC to Alternative ATC has a relatively small impact on the R/VC ratios, and to the extent there is any impact on revenues, the change to Alternative ATC reduces further the revenues allocated to the SARR for the short-haul traffic.

Figure FTI-7
Average SARR R/VC Ratios for WFA I Northern End Shipments,
By Revenue-Allocation Methodology



As shown in Figure FTI-9, the change in R/VC ratios on the low-rated southbound traffic resulting from the change from MSP to Modified ATC was very large while the change in R/VC ratios resulting from the change from Modified ATC to Alternative ATC is small. Moreover, to the extent there is any change in R/VC ratios when the Modified ATC revenues are corrected to use Alternative ATC, the move to Alternative ATC reduces the revenues that would be allocated to the SARR, thereby reinforcing WFA/Basin's decision to exclude the low-rated southbound traffic from the 2008 redesigned SARR.

Figure FTI-9
Average SARR R/VC Ratios for WFA I Southbound Shipments
that WFA Excluded From WFA II, By Revenue-Allocation Methodology



The Purported Change in Revenue Per Ton and R/VC Rankings Does Not Change

WFA's Traffic Selection Incentives: Throughout Mr. Crowley's verified statement, he asserts that the SAC analysis is an "iterative process" that is dependent on the cross-over revenue methodology. However Mr. Crowley does not attempt to explain how the use of Alternative ATC would change his incentives to select certain traffic. The closest he comes to such an explanation is the following statement:

As shown in my electronic workpapers, the change in revenue allocation methods impacts the revenue per ton and R/VC ratio rankings of the PRB moves that are potentially subject to inclusion in the traffic group, which changes ripple through the entire iterative process of designing a SARR.

Crowley VS, at 16.

The referenced workpaper does not demonstrate at all how such rankings impact WFA/Basin's traffic selection incentives.¹⁶ In fact, WFA/Basin fails to explain how the relative rank of movements based on revenue per ton and R/VC are meaningful criteria for selecting traffic for the SARR. The relevant factor in selecting traffic for the SARR is the amount of contribution that the traffic generates to cover SARR costs. The fact that the amount of contribution on some movements may change "rank" relative to other movements does not answer the question whether the contribution on the traffic is sufficient to justify including the traffic in the SARR.

The following examples show why the change in the revenue per ton or R/VC ranking of a particular movement relative to other movements does not affect traffic selection incentives.

As one example, WFA's workpaper indicates that the {

}, which was retained in the WFA II SARR (as shown in Figure FTI-5),

¹⁶ See WFA/Basin Remand Comments workpaper "Updated Rankings 06-2014.xlsx."

would move up in the ranking from 34th under Modified ATC to 31st under Alternative ATC.¹⁷

The workpaper also indicates, however, that the SARR revenues for this movement *decrease* from { } per ton (a 5% reduction) when revenues are allocated using Alternative ATC. This movement's improved ranking says nothing about the incentives to include the movement in the SARR.

As another example, the { } is a low-rated movement that WFA/Basin excluded from the 2008 redesigned SARR as it did all other shipments with R/VC ratios below 110%. WFA/Basin's workpaper indicates that the ranking for this movement would increase with the use of Alternative ATC, as the movement's SARR revenue per ton placed it 51st under Modified ATC, and 49th under Alternative ATC.¹⁸ The SARR revenue per ton for this movement is the same under Alternative ATC as under Modified ATC. In both cases, the R/VC ratio is under 100%, making it unattractive to the SARR. The change in ranking makes no difference.

IV. The Impact of Alternative ATC on SARR Revenues and the Prescribed Rate Do Not Justify Allowing a Redesign of the SARR.

WFA/Basin rely primarily on the impact of Alternative ATC on SARR revenues and WFA/Basin's prescribed rate as a justification for their request to redesign the SARR. As noted above, WFA's argument does not represent a valid reason to be permitted to resubmit SAC evidence. The appropriate question, as the Board explained in 2007 when changing from the MSP to the ATC methodology, is whether there has been a change in the complainant's traffic

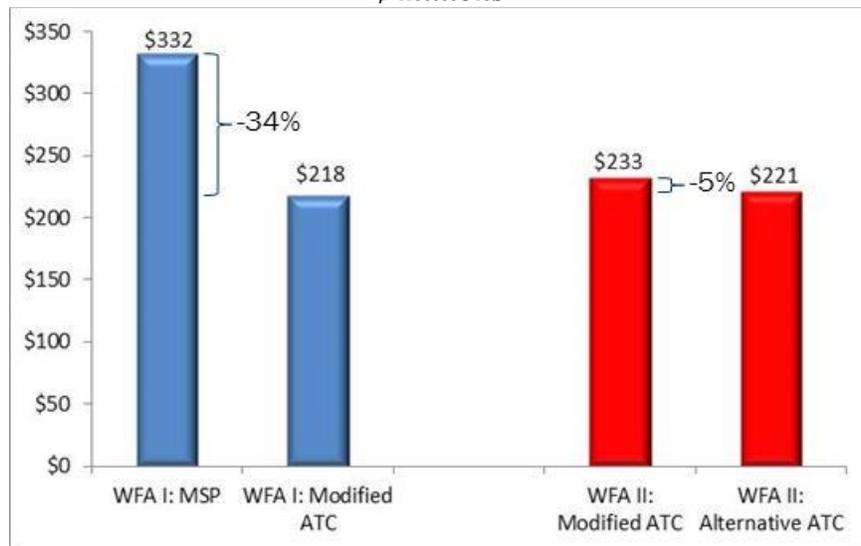
¹⁷ *Ibid.*

¹⁸ *Ibid.*

selection incentives as a result of the new revenue allocation methodology. In any event, nothing that WFA/Basin has presented regarding the impact of Alternative ATC on SARR revenues or the prescribed rate justifies allowing them to redesign their SARR.

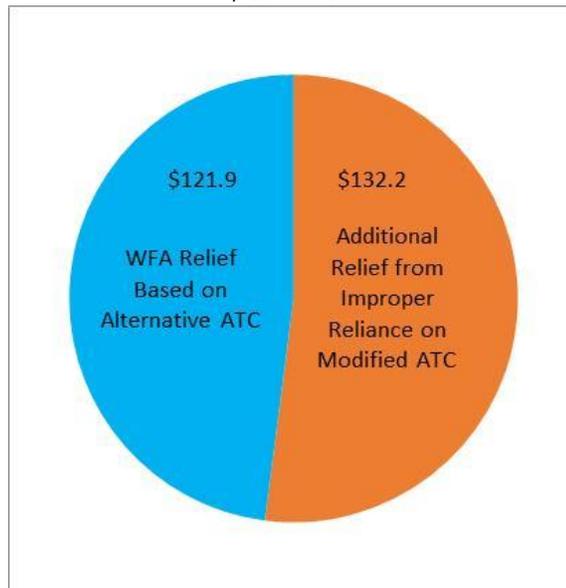
Impact on Revenues: The change in revenue-allocation approach from MSP to Modified ATC produced considerably different SARR revenues for the traffic group that WFA selected for its original SARR designed using the MSP revenue allocation methodology. By accounting for total costs (as its name suggests), a density-based ATC approach was a significant departure from the prior MSP methodology and it produced a very different allocation of revenues to the SARR. As shown in Figure FTI-10 below, when the Board adopted the Modified ATC methodology to calculate the results for *WFA I*, total SARR revenues were reduced by 34% – *more than one-third lower* than when calculated based on MSP. In contrast, the change from Modified ATC to Alternative ATC reduces overall revenues by a modest 5%.

Figure FTI-10
2005 SARR Revenues Based on Revenue-Allocation Methodology
\$ millions



Impact on Relief: Mr. Crowley first claims that the application of Alternative ATC “will eliminate most of WFA/Basin’s rate relief.” Crowley VS, at 2. Later in his statement, however, he acknowledges that the impact on rate relief is “roughly a 50% reduction.” *Id.* at 9 n. 11. As Figure FTI-11 shows, application of Alternative ATC would leave WFA/Basin with rate relief amounting to \$121.9 million for shipments through April 2014.¹⁹ This \$121.9 million of rate relief under Alternative ATC would still represent the largest rate-case award that the STB has ever granted to a shipper. And that amount does not include an additional \$122.0 million of future relief that WFA/Basin would receive for shipments beyond April 2014, through the end of the 20-year prescription period.²⁰

Figure FTI-11
WFA/Basin Rate Relief (through 4/23/2014)
\$ millions



¹⁹ In his Verified Statement, Mr. Crowley presents separate totals for shipments before and after April 23, 2014. *See, e.g.*, Table 2 to Crowley VS, at 8. For ease of comparison, we adopt this breakpoint for figures in this Reply VS.

²⁰ WFA/Basin’s workpapers contain an error that overstates the amount of future revenues under the tariff rates, and as a result also overstates the amount of relief estimated for future periods. *See* BNSF Reply workpaper “AATC Impact Evaluation June 2014 BNSF.xlsx.”

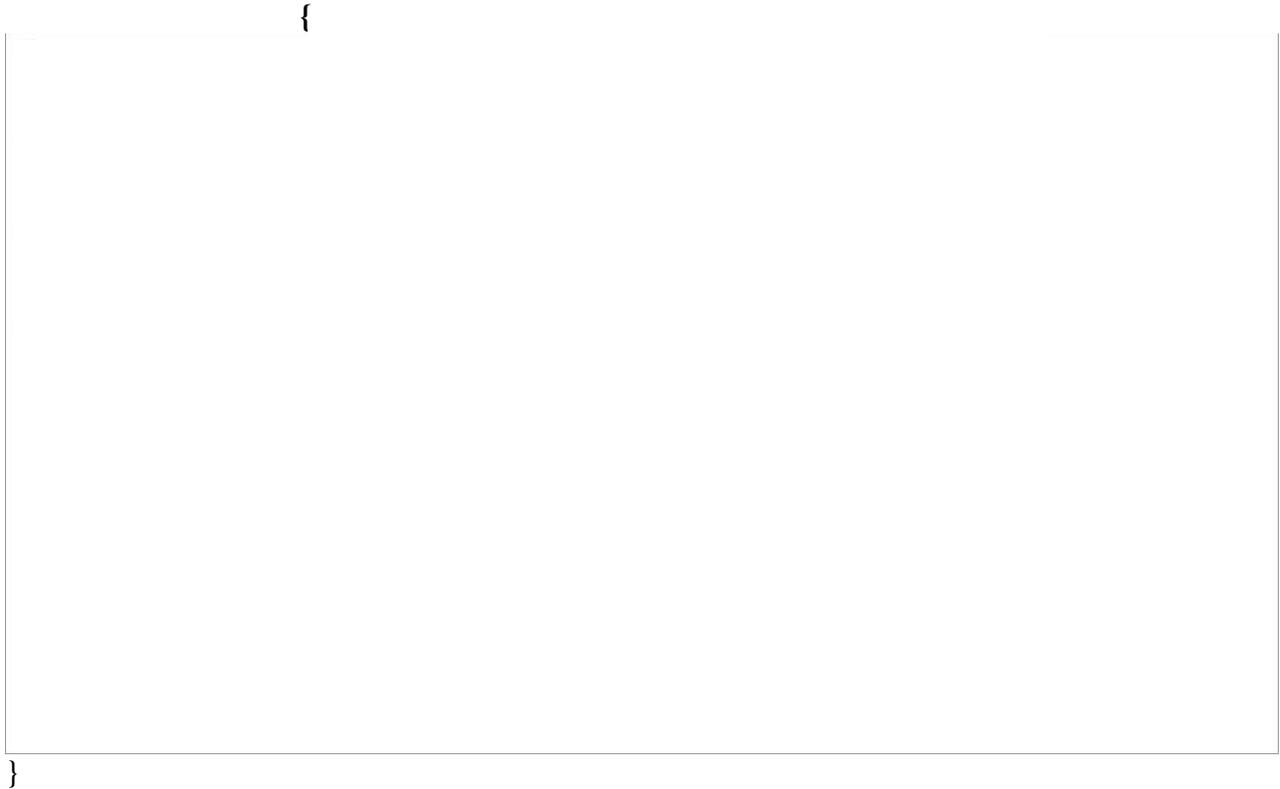
While the overall change in SARR revenues resulting from application of Alternative ATC is a relatively modest 5% reduction (shown in Figure FTI-10 above), WFA/Basin's rate relief is reduced by about 50%. Mr. Crowley suggests that this large change in WFA/Basin's rate relief somehow justifies being given a chance to file new SAC evidence. But the change in the amount of rate relief available to WFA/Basin is irrelevant to the question of whether WFA/Basin should get another chance to file SAC evidence. Correcting errors in SAC calculations will inevitably affect the amount of rate relief available to a complainant. For example, if the Board had substantially understated the SAC costs of an important element of the SARR, such as yard investment, a correction of the error could have a similar impact on the calculated rate relief, but it would not justify refiling SAC evidence.

Moreover, it is not surprising that the impact of correcting the double-count has a substantial effect on the rate relief available to WFA/Basin. As Messrs. Baranowski and B. Fisher explained in their joint verified statement in support of BNSF's November 2010 remand comments, the incremental SARR revenues resulting from the double-count of variable costs under Modified ATC flowed through the MMM rate reduction process almost exclusively to reduce the rates on the WFA/Basin traffic.²¹ Correcting the double-count simply eliminates the inflated amount of rate relief.

²¹ See Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher, supporting Comments of BNSF Railway Company on Remand, at 20-21, and Figure 9 (filed November 22, 2010).

Impact on Maximum Rates: The prescribed rates that resulted from the use of Modified ATC caused WFA/Basin to have the { } for BNSF's SPRB shipments. Figure FTI-12 below shows that even with the shift to Alternative ATC, WFA/Basin's { } SPRB rates on the BNSF system in 2005.

Figure FTI-12



V. A Supplement of the Existing Administrative and Discovery Record Would Complicate the Case and Could Lead to Distorted Results.

If the Board applies Alternative ATC, WFA requests permission to file new evidence.

When WFA filed new evidence in 2008 to apply Modified ATC rather than MSP as the revenue allocation methodology, the new evidence was based on the existing administrative and discovery record as well as some specified public or commercially available data. But rather than relying on the existing record, WFA seeks to base that new evidence on a substantially expanded discovery record. Mr. Crowley includes a request for extensive discovery information from BNSF, in order to supplement the record with new traffic, revenue, and cost data.²² Among other items, he specifically requests “updates of BNSF’s actual tonnage, revenue and coal contract information for PRB coal moves for periods from the close of initial discovery period in this case through mid-2014.”²³ As the initial discovery period closed before WFA filed its initial Opening evidence in April 2005, this request seeks nearly a decade’s worth of data.

Not only would responding to even this one group of requests be burdensome, the volume of information produced in response to the requests would be time- and resource-consuming for either party to evaluate. Any update with newer data would have to encompass a broad scope of detailed information, as selectively or partially updating the record with only a subset of the data necessary to conduct a SAC analysis would produce invalid results, as the Board has previously recognized.²⁴ Further, assuming that the parties could agree to the

²² Crowley VS, at 22.

²³ *Ibid.*

²⁴ STB Docket No. 42088 (Sub-No. 1) (STB served July 27, 2009) at 8 n. 8. (“We conclude that the selective updating by WFA to recalculate new maximum R/VC ratios is inappropriate.”)

information that would be produced to supplement the record and that BNSF could reasonably locate and provide such information, disputes regarding the new data would be virtually guaranteed. In addition to having to resolve questions regarding how the various data should be incorporated into the existing SARR, the Board would effectively be required to “start-over” and evaluate essentially a new SARR contained in the evidentiary submissions, and to expend considerable effort to decide individual traffic, revenue, and cost inputs to the SAC analysis. While the following is by no means a complete list of all potential areas of dispute, it identifies a variety of issues that typically require detailed analysis and receive extensive scrutiny in a SAC case and that would likely arise if Mr. Crowley’s request for a decade of updated discovery is granted.

SARR Traffic & Revenue

SARR traffic group identification
Volume growth – EIA v. BNSF internal forecast, and application of forecast
Revenue escalation terms
Fuel surcharge terms
Assumptions following contract expiration

SARR Operating Plan

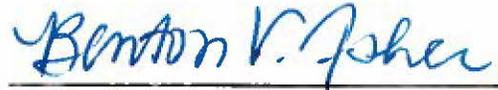
Routing analyses (Alliance v. Northport)
Train sizes
Locomotive requirements (including helpers)
Fuel consumption
Train crew requirements (including re-crews)

SARR Operating Expense

Locomotive maintenance (including overhauls)
Train crew payroll
Maintenance of Way
General & Administrative

I declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to sponsor and file this testimony.

Executed on September 18, 2014



Benton V. Fisher

I declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to sponsor and file this testimony.

Executed on September 18, 2014



Robert Fisher

Exhibit FTI-1

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EDUCATION

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Benton V. Fisher is a Senior Managing Director of FTI's Economic Consulting group, located in Washington, D.C. Mr. Fisher has more than 20 years of experience in providing financial, economic and analytical consulting services to corporate clients dealing with transportation, telecommunications, and postal subjects.

North America's largest railroads have retained FTI both to assist them in making strategic and tactical decisions and to provide expert testimony in litigation. FTI's ability to present a thorough understanding of myriad competitive and regulatory factors has given its clients the tools to implement and advance their business. Mr. Fisher has worked extensively to develop these clients' applications for mergers and acquisitions and expert testimony justifying the reasonableness of their rates before the Surface Transportation Board. In addition to analyzing extensive financial and operating data, Mr. Fisher has worked closely with people within many departments at the railroad as well as outside counsel to ensure that the railroads' presentations are accurate and defensible. Additionally, Mr. Fisher reviews the expert testimony of the railroads' opponents in these proceedings, and advises counsel on the course of action to respond.

AT&T and MCI retained FTI to advance its efforts to implement the Telecommunications Act of 1996 in local exchange markets. Mr. Fisher was primarily responsible for reviewing the incumbent local exchange carriers' (ILEC) cost studies, which significantly impacted the ability of FTI's clients to access local markets. Mr. Fisher analyzed the sensitivity of multiple economic components and incorporated this information into various models being relied upon by the parties and regulators to determine the pricing of services. Mr. Fisher was also responsible for preparing testimony that critiqued alternative presentations.

Mr. Fisher assisted in reviewing the U.S. Postal Service's evidence and preparing expert testimony on behalf of interveners in Postal Rate and Fee Changes cases. He has also been retained by a large international consulting firm to provide statistical and econometric support in their preparation of a long-range implementation plan for improving telecommunications infrastructure in a European country.

Mr. Fisher has sponsored expert testimony in rate reasonableness proceedings before the Surface Transportation Board and in contract disputes in Federal Court and arbitration proceedings.

Mr. Fisher holds a B.S. in Engineering and Management Systems from Princeton University.

TESTIMONY

Surface Transportation Board

January 15, 1999	Docket No. 42022 FMC Corporation and FMC Wyoming Corporation v. Union Pacific Railroad Company, Opening Verified Statement of Christopher D. Kent and Benton V. Fisher
March 31, 1999	Docket No. 42022 FMC Corporation and FMC Wyoming Corporation v. Union Pacific Railroad Company, Reply Verified Statement of Christopher D. Kent and Benton V. Fisher
April 30, 1999	Docket No. 42022 FMC Corporation and FMC Wyoming Corporation v. Union Pacific Railroad Company, Rebuttal Verified Statement of Christopher D. Kent and Benton V. Fisher
July 15, 1999	Docket No. 42038 Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Company, Opening Verified Statement of Christopher D. Kent and Benton V. Fisher
August 30, 1999	Docket No. 42038 Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Company, Reply Verified Statement of Christopher D. Kent and Benton V. Fisher
September 28, 1999	Docket No. 42038 Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Company, Rebuttal Verified Statement of Christopher D. Kent and Benton V. Fisher
June 15, 2000	Docket No. 42051 Wisconsin Power and Light Company v. Union Pacific Railroad Company, Opening Verified Statement of Christopher D. Kent and Benton V. Fisher
August 14, 2000	Docket No. 42051 Wisconsin Power and Light Company v. Union Pacific Railroad Company, Reply Verified Statement of Christopher D. Kent and Benton V. Fisher
September 28, 2000	Docket No. 42051 Wisconsin Power and Light Company v. Union Pacific Railroad Company, Rebuttal Verified Statement of Christopher D. Kent and Benton V. Fisher
December 14, 2000	Docket No. 42054 PPL Montana, LLC v. The Burlington Northern Santa Fe Railway Company, Opening Verified Statement of Christopher D. Kent and Benton V. Fisher
March 13, 2001	Docket No. 42054 PPL Montana, LLC v. The Burlington Northern Santa Fe Railway Company, Reply Verified Statement of Christopher D. Kent and Benton V. Fisher
May 7, 2001	Docket No. 42054 PPL Montana, LLC v. The Burlington Northern Santa Fe Railway Company, Rebuttal Verified Statement of Christopher D. Kent and Benton V. Fisher
October 15, 2001	Docket No. 42056 Texas Municipal Power Agency v. The Burlington Northern Santa Fe Railway Company, Opening Verified Statement of Benton V. Fisher
January 15, 2002	Docket No. 42056 Texas Municipal Power Agency v. The Burlington Northern Santa Fe Railway Company, Reply Verified Statement of Benton V. Fisher
February 25, 2002	Docket No. 42056 Texas Municipal Power Agency v. The Burlington Northern Santa Fe Railway Company, Rebuttal Verified Statement of Benton V. Fisher
May 24, 2002	Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company, Opening Evidence and Argument of Norfolk Southern Railway Company
June 10, 2002	Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Opening Evidence and Argument of Norfolk Southern Railway Company

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July 19, 2002	Northern States Power Company Minnesota v. Union Pacific Railroad Company, Union Pacific's Opening Evidence
September 30, 2002	Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company, Reply Evidence and Argument of Norfolk Southern Railway Company
October 4, 2002	Northern States Power Company Minnesota v. Union Pacific Railroad Company, Union Pacific's Reply Evidence
October 11, 2002	Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Reply Evidence and Argument of Norfolk Southern Railway Company
November 1, 2002	Northern States Power Company Minnesota v. Union Pacific Railroad Company, Union Pacific's Rebuttal Evidence
November 19, 2002	Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company, Rebuttal Evidence and Argument of Norfolk Southern Railway Company
November 27, 2002	Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Rebuttal Evidence and Argument of Norfolk Southern Railway Company
January 10, 2003	Docket No. 42057 Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Railway Company, Opening Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
February 7, 2003	Docket No. 42058 Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Opening Evidence of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad
April 4, 2003	Docket No. 42057 Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Railway Company, Reply Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
May 19, 2003	Docket No. 42057 Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Railway Company, Rebuttal Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
May 27, 2003	Docket No. 42058 Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Joint Variable Cost Reply Evidence of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad
May 27, 2003	Docket No. 42058 Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Reply Evidence of The Burlington Northern and Santa Fe Railway Company
June 13, 2003	Docket No. 42071 Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, Opening Evidence of The Burlington Northern and Santa Fe Railway Company
July 3, 2003	Docket No. 42058 Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Joint Variable Cost Rebuttal Evidence of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad
October 8, 2003	Docket No. 42071 Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, Reply Evidence of The Burlington Northern and Santa Fe Railway Company

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October 24, 2003	Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company Supplemental Evidence of Norfolk Southern Railway Company
October 31, 2003	STB Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company, Reply of Norfolk Southern Railway Company to Duke Energy Company's Supplemental Evidence
November 24, 2003	STB Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Supplemental Evidence of Norfolk Southern Railway Company
December 2, 2003	STB Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Reply of Norfolk Southern Railway Company to Carolina Power & Light Company's Supplemental Evidence
January 26, 2004	STB Docket No. 42058 Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, Joint Supplemental Reply Evidence and Argument of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company
March 1, 2004	STB Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company, Opening Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
March 22, 2004	STB Docket No. 42071 Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, Supplemental Reply Evidence of The Burlington Northern and Santa Fe Railway Company
April 29, 2004	STB Docket No. 42071 Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, Rebuttal Evidence of The Burlington Northern and Santa Fe Railway Company
May 24, 2004	STB Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company, Reply Evidence of The Burlington Northern and Santa Fe Railway Company
July 27, 2004	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company, Rebuttal Evidence of The Burlington Northern and Santa Fe Railway Company
March 1, 2005	Docket No. 42071 Otter Tail Power Company v. BNSF Railway Company, Supplemental Evidence of BNSF Railway Company
April 4, 2005	Docket No. 42071 Otter Tail Power Company v BNSF Railway Company, Reply of BNSF Railway Company to Supplemental Evidence
April 19, 2005	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Opening Evidence of BNSF Railway Company
July 20, 2005	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Reply Evidence of BNSF Railway Company
September 30, 2005	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Rebuttal Evidence of BNSF Railway Company
October 20, 2005	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Surrebuttal Evidence of BNSF Railway Company
June 15, 2006	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Reply Supplemental Evidence of BNSF Railway Company

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June 15, 2006	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Reply Supplemental Evidence of BNSF Railway Company
March 19, 2007	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Reply Third Supplemental Evidence of BNSF Railway Company
March 26, 2007	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Reply Second Supplemental Evidence of BNSF Railway Company
July 30, 2007	Docket No. 42095 Kansas City Power & Light v. Union Pacific Railroad Company, Union Pacific's Opening Evidence
August 20, 2007	Docket No. 42095 Kansas City Power & Light v. Union Pacific Railroad Company, Union Pacific's Reply Evidence
February 4, 2008	Docket No. 42099 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSXT
February 4, 2008	Docket No. 42100 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSXT
February 4, 2008	Docket No. 42101 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSXT
March 5, 2008	Docket No. 42099 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Reply Evidence of CSXT
March 5, 2008	Docket No. 42100 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Reply Evidence of CSXT
March 5, 2008	Docket No. 42101 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Reply Evidence of CSXT
April 4, 2008	Docket No. 42099 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Rebuttal Evidence of CSXT
April 4, 2008	Docket No. 42100 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Rebuttal Evidence of CSXT
April 4, 2008	Docket No. 42101 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Rebuttal Evidence of CSXT
July 14, 2008	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Third Supplemental Reply Evidence of BNSF Railway Company
August 8, 2008	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Fourth Supplemental Evidence of BNSF Railway Company
September 5, 2008	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Fourth Supplemental Reply Evidence of BNSF Railway Company
October 17, 2008	Docket No. 42110 Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc., CSX Transportation, Inc.'s Reply to Petition for Injunctive Relief, Verified Statement of Benton V. Fisher
August 24, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Opening Evidence of Union Pacific Railroad Company

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September 22, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company
October 22, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Rebuttal Evidence of Union Pacific Railroad Company
January 19, 2010	Docket No. 42110 Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
May 7, 2010	Docket No. 42113 Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company, Joint Reply Evidence of BNSF Railway Company and Union Pacific Railroad Company
October 1, 2010	Docket No. 42121 Total Petrochemicals USA, Inc. v. CSX Transportation, Inc., Motion for Expedited Determination of Jurisdiction Over Challenged Rates, Verified Statement of Benton V. Fisher
November 22, 2010	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Comments of BNSF Railway Company on Remand, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
January 6, 2011	Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition for Enforcement of Decision, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
July 5, 2011	Docket No. 42123 M&G Polymers USA, LLC v. CSX Transportation, Inc., Reply Market Dominance Evidence of CSX Transportation, Inc.
August 1, 2011	Docket No. 42125 E.I. DuPont De Nemours and Company v. Norfolk Southern Railway Company, Norfolk Southern Railway's Reply to Second Motion to Compel, Joint Verified Statement of Benton V. Fisher and Michael Matelis
August 5, 2011	Docket No. 42121 Total Petrochemicals USA, Inc. v. CSX Transportation, Inc. , Reply Market Dominance Evidence of CSX Transportation, Inc.
August 15, 2011	Docket No. 42124 State of Montana v. BNSF Railway Company, BNSF Railway Company's Reply Evidence and Argument, Verified Statement of Benton V. Fisher
October 24, 2011	Docket No. 42120 Cargill, Inc. v. BNSF Railway Company, BNSF Railway Company's Reply Evidence and Argument, Verified Statement of Benton V. Fisher
October 28, 2011	Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Opening Evidence of BNSF Railway Company, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
November 10, 2011	Docket No. 42127 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company
November 28, 2011	Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Reply Evidence of BNSF Railway Company, Joint Reply Verified Statement of Michael R. Baranowski and Benton V. Fisher
December 14, 2011	Docket No. 42132 Canexus Chemicals Canada L.P. v. BNSF Railway Company, BNSF Motion to Permit Consideration of 2011 TIH Movements from BNSF Traffic Data in Selecting Comparison Group, Verified Statement of Benton V. Fisher

Benton V. Fisher

- February 13, 2012 Docket No. 42132 Canexus Chemicals Canada L.P. v. BNSF Railway Company, Opening Evidence of BNSF Railway Company, Verified Statement of Benton V. Fisher
- March 13, 2012 Docket No. 42132 Canexus Chemicals Canada L.P. v. BNSF Railway Company, Reply Evidence of BNSF Railway Company
- April 12, 2012 Docket No. 42132 Canexus Chemicals Canada L.P. v. BNSF Railway Company, Rebuttal Evidence of BNSF Railway Company
- May 10, 2012 Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition to Reopen and Modify Rate Prescription, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
- November 30, 2012 Docket No. 42125 E.I. DuPont De Nemours & Company v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
- January 7, 2013 Docket No. 42130 SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
- April 12, 2013 Docket No. 42136, Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company
- June 20, 2013 Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Comments of the Association of American Railroads, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
- September 5, 2013 Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Reply Comments of the Association of American Railroads, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
- June 26, 2014 Ex Parte 665 (Sub-No. 1) Rail Transportation of Grain, Rate Regulation Review, Joint Verified Statement of Benton V. Fisher and Kaustuv Chakrabarti Supporting BNSF Opening Filing
- July 21, 2014 Docket No. NOR 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
- August 25, 2014 Ex Parte 665 (Sub-No. 1) Rail Transportation of Grain, Rate Regulation Review, Joint Verified Statement of Benton V. Fisher and Kaustuv Chakrabarti Supporting BNSF Reply Filing

U.S. District Court for the Eastern District of North Carolina

- March 17, 2006 Civil Action No. 4:05-CV-55-D, PCS Phosphate Company v. Norfolk Southern Corporation and Norfolk Southern Railway Company, Report by Benton V. Fisher

U.S. District Court for the Eastern District of California

- January 18, 2010 E.D. Cal. Case No. 08-CV-1086-AWI, BNSF Railway Company v. San Joaquin Valley Railroad Co., et al.

Arbitrations and Mediations

- July 10, 2009 JAMS Ref. # 1220039135; In the Matter of the Arbitration Between Pacer International, Inc., d/b/a/ Pacer Stacktrain (f/k/a APL Land Transport Services, Inc.), American President Lines, Ltd. And APL Co. Pte. Ltd. And Union Pacific Railroad Company; Rebuttal Expert Report of Benton V. Fisher

Exhibit FTI-2

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EDUCATION

MBA (with distinction) from
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BS from School of Foreign
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Rob Fisher is a senior director in the Network Industries Strategies group of the FTI Economic Consulting practice and is based in Washington, D.C. Mr. Fisher provides financial and economic consulting services to the transportation, energy and telecommunications industries.

Mr. Fisher develops expert testimony for railroad clients in litigation disputes involving the delivery of large coal and chemical shipments. He directs the volume and revenue forecasts and financial analysis to demonstrate the reasonableness of railroad rates before the Surface Transportation Board. He manages the discounted cash flow model that determines the profitability of the railroad operations and investment over a 10-year timeframe.

In addition, Mr. Fisher has supported a consortium of manufacturers to gain anti-leakage provisions in the pending greenhouse gas legislation. His methodology for measuring the energy and trade intensity and the emissions of each industry was adopted as the framework for allocated allowances to manufacturers in the bill passed by the House in 2009.

Prior to joining FTI, Mr. Fisher worked for two technology companies, most recently as Vice President of Strategic Marketing, where he held P&L responsibility for the company's largest product. Before that, he spent 10 years as a strategy consultant, working with dozens of telecom clients on financial analysis, marketing strategy and operational improvement.

TESTIMONY

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| May 7, 2010 | Docket No. 42113 Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company, Joint Reply Evidence of BNSF Railway Company and Union Pacific Railroad Company |
| November 10, 2011 | Docket No. 42127 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company |
| September 24, 2012 | Docket No. 42130 SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Company, Norfolk Southern Railway Company's Motion to Hold Case in Abeyance Pending Completion of Rulemaking, Verified Statement of Robert Fisher |

- November 30, 2012 Docket No. 42125 E.I. DuPont De Nemours & Company v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
- January 7, 2013 Docket No. 42130 SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
- April 12, 2013 Docket No. 42136, Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company
- July 21, 2014 Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.