

SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N.W.

WASHINGTON, D.C. 20036-3003

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:

June 18, 2014

OF COUNSEL
DONALD G. AVERY

dmj@sloverandloftus.com

VIA HAND DELIVERY

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0111

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

Dear Ms. Brown:

Enclosed for filing, please find an original and 10 copies of the corrected Public Version of Complainants' Initial Comments on Remand, which was filed yesterday, June 17, 2014. This correction removes an inadvertent notation at the top of page 1 that indicated that the document contained highly confidential information, which it does not. We have corrected this error and provided replacement copies of the filing.

Please date stamp the extra copy of this cover letter and the enclosed pleading and return it to our messenger. Thank you for your attention to this matter.



Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel M. Jaffe".

Daniel M. Jaffe
An Attorney for Complainants, Western Fuels
Association, Inc. and Basin Electric Power
Cooperative, Inc.

Enclosures

cc: Counsel for Defendant BNSF Railway Co.

PUBLIC VERSION

236200

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings

WESTERN FUELS ASSOCIATION, INC.)	June 17, 2014
and BASIN ELECTRIC POWER)	Part of
COOPERATIVE, INC.)	Public Record
)	
Complainants,)	
)	
v.)	Docket No. 42088
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	

COMPLAINANTS' INITIAL COMMENTS ON REMAND

WESTERN FUELS ASSOCIATION,
INC. and BASIN ELECTRIC POWER
COOPERATIVE, INC.

OF COUNSEL:

By: John H. LeSeur
Christopher A. Mills
Peter A. Pfohl
Daniel M. Jaffe
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: June 17, 2014

Attorneys for Complainants

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

COMPLAINANTS’ INITIAL COMMENTS ON REMAND

Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively “WFA/Basin”) tender these comments regarding the actions the Surface Transportation Board (“STB” or “Board”) should take in response to the remand order issued by the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) in *BNSF Ry. v STB*, 741 F.3d 163 (D.C. Cir. 2014) (“*BNSF 2014*”).¹ In support hereof, WFA/Basin state as follows:

¹ WFA/Basin have filed a separate petition asking for leave to file these Initial Comments on Remand.

PREFACE AND SUMMARY

WFA/Basin have spent over ten years, and \$10 million, to perfect their right to rate relief in this case. Much of this expense was incurred after the Board adopted new Stand-Alone Cost (“SAC”) rules in 2006, and retroactively applied those new rules in WFA/Basin’s then-pending case, an action that required WFA/Basin to retool their entire case. The Court’s remand order calls upon the Board to decide whether it should retroactively apply yet another new SAC rule, this one promulgated by the Board in 2013 – called Alternative Average Total Cost (“ATC”).

WFA/Basin are filing these comments because the issues raised on remand involve over \$328 million in consumer dollars. WFA/Basin request that the Board not retroactively apply Alternative ATC. If the Board decides otherwise, WFA/Basin request that the Board permit WFA/Basin to revise their SAC evidence in a manner that comports with fundamental principles of due process. Both requests are supported by the law as applied to the facts of this case.

In 2004, BNSF unilaterally imposed massive increases in the rail rates it was charging WFA/Basin to transport their coal in unit train service from the Wyoming Powder River Basin (“PRB”) to Basin’s Laramie River Station (“LRS”), an electric generating station located near Wheatland, WY. These increases were ultimately borne by the rural consumers served by LRS in nine Great Plains states as part of their monthly electric bills.

Left without any other options, WFA/Basin filed a rate complaint at the STB in 2004. In their complaint, WFA/Basin asked the Board to prescribe maximum

reasonable rates under the Board's SAC test. This complex test requires that a complainant shipper model a Stand-Alone Railroad ("SARR") that is designed to maximize revenues, minimize costs, and obtain the best maximum rate answer under governing Board SAC standards.

WFA/Basin proceeded to spend substantial time and effort to model a SARR to obtain rate relief under the SAC standards in effect in 2005. Most of WFA/Basin's SARR traffic was "cross-over" traffic – traffic that WFA/Basin's SARR originated and interchanged with the "residual" BNSF. WFA/Basin relied on a method called Modified Straight-Mileage Prorate ("MSP") to calculate SARR revenues on cross-over traffic. The Board had used MSP in recent cases for this purpose.

WFA/Basin's SAC evidence showed that WFA/Basin were entitled to a substantial rate reduction, but, after WFA/Basin submitted all of their SAC evidence, the Board decided to adopt new SAC rules and retroactively apply them in WFA/Basin's case. These rules, as revised for application in WFA/Basin's case, included a new method to allocate cross-over traffic revenues called Modified ATC. Retroactive application of the new rules to WFA/Basin's originally configured SARR ("Original SARR") wiped out all of WFA/Basin's rate relief because SARR revenues (calculated using Modified ATC) did not exceed SAC.

WFA/Basin opposed the Board's retroactive application of Modified ATC, arguing that they had reasonably relied on MSP and that they would have designed a different SARR under the new rules. The Board held that WFA/Basin had no reasonable reliance interests because the Board had never formally adopted MSP, but did find that

due process required that WFA/Basin be permitted to revise their SAC evidence because WFA/Basin “had designed its case under one standard, only to have it judged under another.”²

WFA/Basin proceeded to spend substantial amounts of time and effort to develop a revised SARR (“Revised SARR”) to obtain rate relief under the Board’s revised SAC standards, including Modified ATC. This evidence demonstrated that WFA/Basin were entitled to significant rate relief. This time around, the Board decided the case, and found, as WFA/Basin had twice proven, that BNSF’s tariff rates were substantially higher than the maximum SAC rates. In a series of decisions served in 2009, the Board prescribed maximum reasonable rates in the form of maximum annual revenue-to-variable cost (“R/VC”) ratios that were in the 250% of variable cost range and ordered BNSF to pay reparations to WFA/Basin.

BNSF appealed the Board’s 2009 rate relief orders to the D.C. Circuit. The Court rejected all of BNSF’s contentions, except one, holding that the Board had not addressed BNSF’s allegation that Modified ATC impermissibly double-counted variable costs.³ On remand, the Board held in June 2012 that Modified ATC did not impermissibly double-count variable costs, and reaffirmed its use of Modified ATC.⁴

² *W. Fuels Ass’n, Inc. v. BNSF Ry.*, Docket No. 42088, slip op. at 9 (STB served Feb. 18, 2009) (“*February 2009 Decision*”).

³ *BNSF Ry. v. STB*, 604 F.3d 602, 612-13 (D.C. Cir. 2010) (“*BNSF 2010*”).

⁴ *W. Fuels Ass’n, Inc. v. BNSF Ry.*, Docket No. 42088 (STB served June 15, 2012) (“*June 2012 Decision*”).

BNSF appealed for a second time, this time arguing that the Board had erred in not considering whether to retroactively apply a new cross-over traffic revenue allocation method the Board adopted in 2013 to replace Modified ATC, called Alternative ATC.

The D.C. Circuit, in a split panel decision, held that the Board was legally required to consider whether to apply Alternative ATC in this case, but, in so holding, emphasized that “[w]hile we do not suggest that all such changes [in SAC standards] must be made retroactively, we must at least know that the Board has exercised reason . . . in treating this Petitioner differently.”⁵ The Court’s remand order raises two issues: (1) whether the Board can retroactively apply Alternative ATC in this case and (2) if it does decide to do so, how it should do so.

The Board and the courts consider a number of factors in determining whether to retroactively apply new rules. These factors all point in one direction here – Alternative ATC should not be retroactively applied in this case:

- **Reasonable Reliance.** WFA/Basin relied on Modified ATC in developing their Revised SARR in 2007/2008. Indeed, WFA/Basin had no choice because the Board ordered WFA/Basin to use Modified ATC and, under the Board’s earlier rulings in this case, WFA/Basin’s reliance was clearly reasonable because by 2007 the Board had now settled on a cross-over traffic revenue allocation method – Modified ATC – which it continued to utilize until 2013, when the Board replaced Modified ATC with Alternative ATC for future cases.

- **Fair Notice.** When WFA/Basin designed their Revised SARR in 2007/2008, WFA/Basin had no notice, much

⁵ *BNSF 2014*, 741 F.3d at 168.

less fair notice, of Alternative ATC, which did not even exist at that time. WFA/Basin clearly could not have modeled a SARR using a non-existent cross-over traffic revenue allocation methodology.

- **Fair Results.** The Board's SAC test has many interrelated parts, and has evolved over time. The Board used state-of-the-art SAC standards, including Modified ATC, when it decided this case in 2009. This produced a fair result under the SAC standards then in effect, and the Board's general policy is not to retroactively apply new standards to set aside prior decisions made under older standards that reflect the Board's policy decisions at the time the decisions are made.

- **Accurate Results.** Retroactive application of Alternative ATC on the existing record will not produce accurate SAC revenues because WFA/Basin did not design their Revised SARR using Alternative ATC and because the record contains grossly understated forecasts of BNSF's through revenues (which Alternative ATC allocates).

- **Litigation Burdens.** WFA/Basin have already expended 10 years and \$10 million to prove their entitlement to relief (twice) and defend that relief in court. WFA/Basin will incur substantial additional costs to develop a third SARR in order to prove their entitlement to fair relief for a third time.

- **Manifest Injustice.** WFA/Basin filed their case to protect the interests of the consumers they serve. WFA/Basin have followed all governing Board SAC standards, but cases will never end fairly if the Board continues to change the standards, and then retroactively applies the changed standards. Requiring WFA/Basin to go back to the drawing Board for a third time in this case in order to obtain fair rate relief is manifestly unjust, and will send a chilling message to all captive shippers considering the exercise of their statutory right to reasonable maximum rates.

If the Board does decide to retroactively apply Alternative ATC (which it should not), it must do so in a manner that comports with administrative due process.

Due process requires that WFA/Basin be given the opportunity, as they were in 2007, to revise their SARR – this time to address the retroactive application of Alternative ATC. Otherwise, the Board will be doing exactly what it previously held it could not do: require WFA/Basin to prepare their case under one standard, only to have it judged under another.

Due process also requires that WFA/Basin be given the opportunity to revise the SAC record. Many of the key SAC inputs, including SARR revenues and SARR operating costs, and key inputs into the Board’s Maximum Markup Methodology (“MMM”) model, are derived from forecasts prepared nearly a decade ago. These forecasts have not produced accurate results, particularly the Board’s forecasts of BNSF’s real-world PRB coal revenues – revenues that Alternative ATC allocates between the SARR and the residual BNSF in determining SARR revenues.

The Board projected that between 2004 and 2013, BNSF’s actual real-world PRB coal revenues per ton on the Revised SARR’s cross-over traffic would increase by { }%. In fact, BNSF’s reports to this agency show BNSF’s revenues per ton on its PRB traffic (which includes the Revised SARR’s cross-over traffic) actually increased by approximately 95% during this time period. Application of Alternative ATC to vastly understated BNSF through revenues will produce vastly understated SARR revenues.

Other forecasts in the record, including forecasts of SARR operating costs and forecasts used to develop variable costs in the Board’s MMM model are also materially incorrect. If Alternative ATC – a methodology the Board adopted in 2013 – is

to be retroactively applied in this case, it must be applied to record inputs that are current at least through 2013 in order to obtain fair and accurate SAC results.

WFA/Basin are confident that if Alternative ATC is retroactively applied (which it should not be), and if WFA/Basin are given fair process, they can prove their entitlement to relief for a third time. Conversely, if Alternative ATC is retroactively applied, and WFA/Basin are not accorded fair process, the results will be devastating for WFA/Basin's electric consumers: retroactive application of Alternative ATC to WFA/Basin's current SARR (one not designed for Alternative ATC) using current record forecasts (which are incorrect) will arbitrarily and unfairly require WFA/Basin, and their customers, to pay an additional \$328,000,000 in freight charges to BNSF. The stakes here are high, and WFA/Basin appreciate the opportunity to present these Initial Comments to the Board.

BACKGROUND

Understanding the history of this case is essential to its proper disposition on remand.

A. BNSF Imposes Massive Rate Increases On WFA/Basin's Coal Traffic in 2004

Basin is a non-profit cooperative that owns (in part) and operates the LRS electric generating station.⁶ WFA is a non-profit cooperative that assists Basin in

⁶ WFA/Basin Opening Evidence at IV-A-1 to A-2 (filed Apr. 19, 2005) ("WFA/Basin Opening").

obtaining rail transportation service.⁷ LRS supplies electricity to over 200 non-profit cooperative, municipal, and public power systems that distribute power to businesses, farmers, ranchers, and other consumers in nine Great Plains states.⁸

LRS utilizes approximately seven to eight million tons of coal annually,⁹ all of which originates from coal mines located in the Wyoming PRB and is transported by BNSF from the PRB to LRS over distances between 140 to 188 miles, depending on the specific mine origin.¹⁰ BNSF exerts monopoly pricing power over the PRB-to-LRS service because rail service is WFA/Basin's only viable transportation option and BNSF is the sole rail carrier serving LRS.¹¹ The freight rates WFA/Basin pay BNSF are ultimately passed through to the customers served by LRS as part of their monthly electric bills.¹²

Shortly after LRS went into commercial service, BNSF and WFA entered into a twenty-year coal transportation contract for the PRB-to-LRS service.¹³ During the term of the contract, BNSF's rates dropped by 25% from \$4 per ton to \$3 per ton,¹⁴ but productivity-adjusted rail service costs dropped by a substantially higher percentage

⁷ *Id.*

⁸ *Id.* at IV-A-1 to A-2; IV-B-4.

⁹ *See id.* at I-2.

¹⁰ *Id.* at II-A-6.

¹¹ *See W. Fuels Ass'n, Inc. v. BNSF Ry.*, Docket No. 42088, slip op. at 7 (STB served Sept. 10, 2007) ("*September 2007 Decision*").

¹² WFA/Basin Opening at IV-A-8.

¹³ *Id.* at IV-A-4.

¹⁴ *September 2007 Decision*, slip op. at 2.

during the same time period.¹⁵ Overall, the contract proved to be a very lucrative one for BNSF, as BNSF recovered all of its variable service costs plus over \$311 million in contribution and profits.¹⁶

When this very profitable contract expired in September 2004, BNSF unilaterally imposed massive rate increases on the LRS traffic under a common carrier tariff. WFA/Basin estimated that at the time, left unchecked, payment of BNSF's tariff rates would increase their freight charges by \$1 billion over the next 20 years¹⁷ and initially produce rates with R/VC ratios of approximately 500%.¹⁸ The ultimate payor of these massive increases would be the customers served by LRS.

BNSF's massive rate hikes produced a firestorm of public outrage from the consumers served by LRS and their elected representatives, including thirteen United States Senators, nine members of the United States House of Representatives, three Governors, and two state Attorneys General.¹⁹

B. WFA/Basin's Ensuing Regulatory Odyssey (2004-2009)

1. WFA/Basin File A Complaint At The STB And Prove Their Entitlement to Rate Relief

Left with no other options, WFA/Basin turned to the STB as their last line of defense against BNSF's monopoly pricing abuses. On October 19, 2004, WFA/Basin

¹⁵ WFA/Basin Reply Evidence at IV-6 to IV-7 (filed July 20, 2005).

¹⁶ WFA/Basin Opening at IV-A-4.

¹⁷ *Id.* at IV-A-7.

¹⁸ *Id.* at II-A-30.

¹⁹ *Id.* at IV-B-1 to IV-B-4.

filed a complaint at the STB asking the Board to find that BNSF's rates exceeded a reasonable maximum under the Board's SAC constraint.

The Board's SAC constraint was first adopted by the STB's predecessor, the Interstate Commerce Commission ("ICC") in 1985.²⁰ The constraint generally calls for a shipper to model a SARR that maximizes revenues and minimizes costs.²¹ Under the SAC standards in effect when WFA/Basin filed their case in 2004, the greater the differential between SARR revenues and SAC over the analysis period (then 20 years), the greater the rate relief the Board accorded the complainant shipper.

WFA/Basin, like all complainant shippers in a SAC case, had to engage in a complex computerized modeling exercise to develop a SARR that maximized revenues and minimized costs. This is an iterative process with many moving parts.²² In addition, since 1985, the ICC and the Board had applied the SAC standard in many cases, and, in these cases, developed a detailed set of principles and formulas governing the calculation of SARR revenues and SAC. WFA/Basin's modeling also had to produce a SARR that conformed to the governing case law standards.

WFA/Basin expended substantial time and effort in 2004 and 2005 to develop and present a case to the Board that demonstrated WFA/Basin's right to

²⁰ *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985), *aff'd sub nom. Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987).

²¹ "The [SARR] should be designed to minimize construction (or acquisition) and operating costs and/or maximize the carriage of profitable traffic." *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d at 543.

²² See Verified Statement of Thomas D. Crowley ("Crowley V.S.") at 10-12.

substantial rate relief under the SAC test. The principal components of WFA/Basin's SAC evidence were:

- **Traffic Group/Configuration.** WFA/Basin designed a SARR that provided origin-to-destination service from the PRB to LRS. WFA/Basin's SARR also provided service to 47 other unit train shippers in cross-over traffic service.²³ WFA/Basin's cross-over traffic consisted of traffic their SARR originated in the PRB and interchanged with the residual BNSF. The physical configuration of the SARR generally followed BNSF's real-world lines and routing of the LRS trains.²⁴
- **SARR Revenues.** WFA/Basin calculated SARR revenues using then-standard procedures as developed in the STB case law. The LRS movement revenues were calculated for a base period using BNSF's challenged tariff rates (4Q04) and then forecasted over the 20-year Discounted Cash Flow ("DCF") period.²⁵ BNSF's real-world revenues for the cross-over traffic were calculated for a base forecast period (4Q04 to 4Q05), forecasted over the remaining 20-year DCF period, and allocated between the SARR and the residual BNSF using the Board's MSP methodology.²⁶ Under MSP, the defendant carrier's forecasted real-world revenues on each cross-over traffic movement were divided between the SARR, and the defendant carrier, using a mileage pro-rate formula that the Board had applied in all then-recent SAC cases.
- **SAC.** SAC generally consists of two components: the costs to construct the SARR and the costs to operate the SARR. WFA/Basin's SARR was constructed over a 30-month period (2002-2004).²⁷ WFA/Basin calculated the SAC construction costs and followed the Board's DCF model procedures to develop annual capital recovery charges for each year of the 20-

²³ WFA/Basin Opening at III-A-4 (corrected).

²⁴ *Id.* at III-B-1 to III-B-3.

²⁵ *Id.* at III-A-13 to III-A-14.

²⁶ *Id.* at III-A-15 to III-A-18.

²⁷ *Id.* at III-F-107; III-G-1.

year analysis period.²⁸ WFA/Basin also developed a detailed operating plan,²⁹ developed operating costs for the first year of the SARR,³⁰ and forecasted the operating expenses for each year in the 20-year DCF period.³¹

WFA/Basin presented their detailed SAC evidence in their opening and rebuttal filings in 2005. This evidence demonstrated that WFA/Basin were entitled to substantial rate relief because the present value of SARR revenues in each year of the 20-year analysis period (2004 to 2024) exceeded the present value of SAC in each year of the 20-year analysis period by wide margins.³² The parties submitted final briefs to the Board in December 2005, and the case was then ripe for decision. However, the Board chose not to decide the case.

2. The Board Retroactively Changes Its Maximum Rate Standards

In February 2006, the STB issued an order holding WFA/Basin's case "in abeyance" pending the Board's development of new SAC rules.³³ WFA/Basin immediately requested that the Board decide their case on the closed administrative record. BNSF opposed this request, and the Board denied it.³⁴

²⁸ *Id.* at III-G-1.

²⁹ *Id.* at III-C-1 to III-C-73.

³⁰ *Id.* at III-D-1 to III-D-132.

³¹ *Id.* at III-G-14 to III-G-15.

³² WFA/Basin Rebuttal Evidence at III-H-1 to III-H-3 (filed Sept. 30, 2005).

³³ *See Major Issues in Rail Rate Cases*, Ex Parte No. 657 (Sub-No. 1), slip. op. at 1 (STB served Feb. 27, 2006) ("*Major Issues NPRM*").

³⁴ *See Major Issues in Rail Rate Cases*, Docket No. Ex Parte 657, slip. op. at 1-2 (STB served Apr. 14, 2006).

The Board proceeded to adopt several new SAC rules.³⁵ These new SAC rules included replacing the MSP method to allocate cross-over traffic revenues with a new method, now called Original ATC.³⁶ Under Original ATC, the average total cost for each segment of a cross-over move is calculated as the sum of the variable cost per ton and an allocated fixed cost per ton for that segment, and the through movement revenues are allocated to the segments based on a pro rata share of average total costs. For example, if the on-SARR segment average total cost was \$2 per ton, and the off-SARR segment average total cost was \$5 per ton, the SARR would be allocated 29% of the total movement revenue (\$2/\$7).

The Board also replaced its percent reduction method for determining SAC relief with a new methodology called MMM.³⁷ Under MMM, the SARR traffic group member's rates are arrayed on an R/VC ratio basis and the revenues on the highest R/VC ratio traffic are reduced until the total traffic group revenues equal total SAC on an annual basis. The R/VC ratio at which this equilibrium occurs then becomes the prescribed maximum R/VC ratio for the complainant shipper's traffic. For example, if the equilibrium or "maximum" R/VC ratio in a given year is 220%, the shipper's maximum reasonable rate is set at 220% of the incumbent carrier's variable costs for that

³⁵ See *Major Issues in Rail Rate Cases*, Docket No. Ex Parte 657 (STB served Oct. 30, 2006) ("*Major Issues*"), *aff'd sub nom. BNSF Ry. v. STB*, 526 F.3d 770 (D.C. Cir. 2008) ("*BNSF 2008*").

³⁶ *Major Issues*, slip op. at 31.

³⁷ *Id.*, slip op. at 14.

year (assuming that the R/VC ratio for the shipper's challenged rate in that year was above 220%).

WFA/Basin argued repeatedly in the rulemaking proceeding that it was both unfair and unlawful for the Board to retroactively apply its new SAC rules in their pending case because WFA/Basin reasonably relied on the SAC standards in effect in 2004/2005 in designing their Original SARR and because WFA/Basin would have designed a different SARR to obtain maximum rate relief under the Board's new SAC rules.

The Board addressed WFA/Basin's first contention in the rulemaking proceeding. It held that retroactive application of the new SAC rules was permissible because the Board had not prescribed the SAC standards it was now replacing and, as a result, the Board's retroactive application of the new standards in pending cases did not upset any "settled expectations."³⁸

The Board proceeded to reopen the WFA/Basin's case and directed the parties to re-calculate SARR revenues using Original ATC. WFA/Basin continued to argue in the reopened proceedings that the Board was denying WFA/Basin due process by retroactively applying its new SAC standards without affording WFA/Basin the opportunity to revise its SARR. Ultimately, the Board agreed with WFA/Basin. In its decision served September 10, 2007, the Board made three pertinent rulings.

³⁸ See *Major Issues*, slip op. at 75.

First, the Board found that its application of Original ATC to WFA/Basin's traffic group had produced "illogical and unintended" results when applied to certain through moves with low R/VC ratios, including as an example an allocation of on-SARR movement revenues less than on-SARR variable costs, even though the through movement R/VC ratio exceeded 1.0.³⁹ To remedy this "illogical and unintended result," the Board replaced Original ATC with Modified ATC.⁴⁰

Under Modified ATC, on through moves with R/VC ratios greater than 1.0, revenues are first allocated to cover on-SARR and off-SARR variable costs, and movement contribution (through revenues minus through movement variable costs) is allocated using the ATC percentages. On through moves with R/VC ratios less than or equal to 1.0, through movement revenues are allocated based on the ratio of on-SARR and off-SARR variable costs to through movement variable costs.

Second, the Board found that its application of Modified ATC to WFA/Basin's Original SARR would wipe out all of WFA/Basin's rate relief because SARR revenues would not exceed SAC.⁴¹ However, the Board also found that WFA/Basin's due process rights would be violated if the Board denied WFA/Basin the opportunity, as WFA/Basin had repeatedly requested, to develop new SAC evidence under the Board's new SAC rules.⁴² As the Board subsequently explained:

³⁹ *September 2007 Decision*, slip op. at 14.

⁴⁰ *Id.*

⁴¹ *Id.*, slip op at 139.

⁴² *Id.*, slip op. at 3.

By having changed the substantive standards, WFA had not had a fair chance to make its case. It had designed its case under one standard, only to have it judged under another. Following well-established legal precedent, we therefore provided WFA an opportunity to re-design pertinent aspects of its case and submit revised evidence under the new legal standards.⁴³

Third, the Board directed that WFA/Basin could submit revised SAC evidence, including a reconfigured SARR, and reconfigured SARR traffic group, and resubmit their case to the Board using Modified ATC and MMM.⁴⁴

BNSF filed a petition seeking reconsideration of the Board's *September 2007 Decision*. BNSF asked the Board not to allow WFA/Basin to revise their SARR. BNSF also asked the Board to apply Original ATC, not Modified ATC, to allocate cross-over traffic revenues. The Board denied both requests.⁴⁵

3. WFA/Basin Prove Their Entitlement To Rate Relief A Second Time

Following the Board's *September 2007 Decision*, WFA/Basin went back to the drawing board and started their SAC modeling process anew. WFA/Basin's new objective was to develop a SARR that produced the best regulatory outcome under the Board's new SAC standards including Modified ATC and MMM.

After extensive new computer modeling, WFA/Basin determined that their best case relief outcome came via a significantly revised SARR configuration and traffic

⁴³ *February 2009 Decision*, slip op. at 9.

⁴⁴ *Id.*, slip op. at 3, 5.

⁴⁵ *W. Fuels Ass'n, Inc. v. BNSF Ry.*, Docket No. 42088, slip op. at 3-5 (STB served Feb. 29, 2008) ("*February 2008 Decision*").

group. WFA/Basin's Revised SARR served fewer shippers, transported fewer tons, covered more route miles, and included some internally rerouted traffic:

- **Revised Traffic Group/Configuration.** WFA/Basin's Revised SARR served the LRS movement traffic, 19 shippers in cross-over traffic service (including some cross-over traffic that was internally "rerouted"), and one rerouted interchange move (*i.e.*, a move that traverses the SARR and is then interchanged with a carrier other than the defendant carrier).⁴⁶ WFA/Basin also extended the Original SARR east from Guernsey, WY to Northport, NE, principally to conform the Revised SARR configuration to the Board's rules governing the use of internally rerouted SARR traffic.⁴⁷

- **Revised SARR Revenues.** In its *September 2007 Decision*, the Board had calculated the base period LRS traffic revenues and forecasted the revenues for each of the remaining years in the 20-year analysis period.⁴⁸ WFA/Basin used these forecasted revenues to calculate LRS movement revenues for each year in the 20-year analysis period.⁴⁹ For the cross-over traffic movements, WFA/Basin used, for each cross-over traffic movement included in its Revised SARR, the same base year forecasted real-world through revenues the Board had used in its *September 2007 Decision*, with cross-over traffic revenues allocated using Modified ATC.⁵⁰ Finally, WFA/Basin calculated base year revenues, and forecasted revenues, for the new interchange move using Board-approved procedures for calculating and forecasting interchange traffic revenues.⁵¹

⁴⁶ WFA/Basin Third Supplemental Opening Evidence at III-A-1 to III-A-3 (filed May 13, 2008) ("WFA/Basin Third Supp. Opening").

⁴⁷ *Id.* at III-B-1 to III-B-2.

⁴⁸ *September 2007 Decision* at 30-31.

⁴⁹ WFA Third Supp. Opening at III-A-2 to III-A-4. WFA did adjust these calculations to conform to a technical correction the Board made in its *February 2008 Decision*. *Id.* at III-A-2 to III-A-3.

⁵⁰ *Id.* at III-A-3. The revenues were also adjusted to reflect the longer haul on the Revised SARR where applicable.

⁵¹ *Id.*

- **Revised SAC.** WFA/Basin developed Revised SARR construction costs to match its Revised SARR configuration (with construction still taking place from 2002 to 2004),⁵² developed a Revised SARR operating plan,⁵³ and developed Revised SARR operating expenses.⁵⁴ WFA/Basin used the same forecasts the Board had used in its *September 2007 Decision*, as corrected in its *February 2008 Decision*, to forecast the Revised SARR's quarterly levelized capital carrying charges in each quarter of the 20-year analysis period (with one exception)⁵⁵ and to forecast the Revised SARR's annual operating costs in each year of the 20-year analysis period.⁵⁶
- **MMM Model.** WFA/Basin developed an MMM Model that calculated R/VC ratios for each traffic group member for each year of the 20-year analysis period using the forecasted SARR revenues, and indexed 2004 BNSF URCS variable costs based on a Rail Cost Adjustment Factor adjusted for productivity ("RCAF-A") developed in 2006. As called for under the MMM procedures, WFA/Basin arrayed the R/VC ratios for the traffic group on a highest to lowest basis, and ran their MMM model for each year in the analysis period to develop the MMM ratio in each year.⁵⁷

WFA/Basin presented their detailed supporting SAC evidence in opening and rebuttal evidence filed in 2008. WFA/Basin's revised SAC evidence showed that WFA/Basin were entitled to substantial rate relief because Revised SARR revenues

⁵² *Id.* at III-F-1 to III-F-39.

⁵³ *Id.* at III-C-1 to III-C-36.

⁵⁴ *Id.* at III-D-1 to III-D-29.

⁵⁵ *Id.* at III-G-1. As requested by the Board, WFA presented, and quantified different methods to calculate the Revised SARR's capital costs. *Id.*

⁵⁶ *Id.* at III-G-12.

⁵⁷ *Id.* at III-H-2 to III-H-3; WFA/Basin Third Supplemental Rebuttal Evidence at III-H-2 (filed Aug. 15, 2008) ("Third Supp. Rebuttal").

exceeded SAC and the MMM R/VC ratios in each year of the 20-year analysis period were well below the corresponding forecasted tariff R/VC ratios for the LRS traffic.⁵⁸

All told, to make their case for SAC relief (twice), WFA/Basin submitted narrative evidence supported by 27 expert witnesses, over 10,000 pages of hard-copy materials and 27 gigabytes of supporting electronic materials. WFA/Basin also had to address BNSF's submissions, which included over 2,300 pages of hard-copy materials and over 3 gigabytes of electronic materials. WFA/Basin's litigation costs through the end of 2008 exceeded \$8 million.

4. The Board Finds BNSF's Rates Are Unreasonable And Awards Substantial Rate Relief To WFA/Basin

The Board addressed WFA/Basin's Revised SAC evidence in its decision served on February 18, 2009. The Board accepted the lion's share of WFA/Basin's revised SAC evidence and concluded that BNSF's tariff rates on the LRS movement were substantially higher than the maximum rates determined under the Board's revised SAC standards.⁵⁹

Following the issuance of a technical corrections decision, the Board issued an order prescribing maximum R/VC ratios on the LRS traffic over each year of the 20-year analysis period. These maximum R/VC ratios range between 230% and 269% of BNSF's variable costs.⁶⁰ The Board also ordered BNSF to refund to WFA/Basin

⁵⁸ Third Supp. Rebuttal at III-H-2 and Rebuttal Exhibit III-H-1.

⁵⁹ *February 2009 Decision* at 28-32.

⁶⁰ *W. Fuels Ass'n, Inc. v. BNSF Ry.*, Docket No. 42088, slip op. at 4 (STB served June 5, 2009) ("*June 2009 Decision*").

approximately \$120 million for overcharges BNSF collected during the pendency of WFA/Basin's rate case.⁶¹ Finally, the Board ordered that the parties calculate maximum rates on the LRS traffic each quarter by multiplying the applicable maximum MMM R/VC ratio in the quarter by BNSF's current URCS variable costs, not the forecasted variable costs in the MMM model.⁶²

The Board characterized its *2009 Rate Relief Orders*⁶³ as awarding WFA/Basin "the single largest reduction in rail rates ever ordered by this agency."⁶⁴ While the Board was correct that WFA/Basin obtained substantial rate relief, this relief was principally due to the fact that BNSF set its tariff rates at very high levels (approximating 500% of variable costs), and the fact that WFA/Basin is a high-volume coal shipper, not the level of the maximum prescribed R/VC ratios. These ratios were substantially higher than those the Board has set in many other western coal rate cases.⁶⁵

⁶¹ *W. Fuels Ass'n, Inc. v. BNSF Ry.*, Docket No. 42088 (Sub-No. 1), slip op. at 2 (STB served Oct. 22, 2009).

⁶² *W. Fuels Ass'n, Inc. v. BNSF Ry.*, Docket No. 42088 (Sub-No. 1), slip op. at 8 (STB served July 27, 2009) ("*July 2009 Decision*").

⁶³ The *February 2009 Decision*, the *June 2009 Decision*, and the *July 2009 Decision* are collectively referred to as the "*2009 Rate Relief Orders*."

⁶⁴ *February 2009 Decision* at 2.

⁶⁵ See *Ariz. Elec. Power Coop. Inc. v. BNSF Ry.*, Docket No. 42113, slip op. at 37 (STB served Nov. 22, 2011) (prescribing maximum coal rates at R/VC ratio of 180%), *aff'd sub nom. BNSF Ry. v. STB*, No. 12-1042, 2014 WL 2142115 (D.C. Cir. May 23, 2014); *Okla. Gas & Elec. Co. v. Union Pac. R.R.*, Docket No. 42111, slip op. at 8 (STB served July 24, 2009) (same); *Kan. City Power & Light Co. v. Union Pac. R.R.*, Docket No. 42095, slip op. at 9 (STB served May 19, 2008) (same); *Wis. Power & Light Co. v. Union Pac. R.R.*, 5 S.T.B. 955, 985 (2001), *aff'd sub nom Union Pac. R.R. v. STB*, 62 F. App'x 354 (D.C. Cir. 2003).

The ultimate beneficiaries of the Board's *2009 Rate Relief Orders* were the electric consumers served by LRS – most of whom are ranchers, farmers, and households – since the rate relief flows through to them.⁶⁶ And, while BNSF's freight rates were reduced, the annual maximum R/VC ratios prescribed allow BNSF to continue to earn very high returns on the LRS traffic, just not the monopoly returns BNSF attempted to unilaterally impose.

C. WFA/Basin's Odyssey Continues (2010 – 2014)

1. The D.C. Circuit Decides BNSF's First Appeal (2010)

BNSF filed petitions for review of the *2009 Rate Relief Orders* in the D.C. Circuit. In these petitions, BNSF asserted that the *2009 Rate Relief Orders* suffered numerous legal infirmities.⁶⁷

The Court, in a unanimous panel decision, rejected most of BNSF's arguments. BNSF's principal argument on appeal was that WFA/Basin's rate complaint had been automatically dismissed by operation of law three years after it was filed. The Court noted that BNSF's contentions raised serious due process concerns because WFA/Basin were not the cause of the case delays, and ultimately concluded that BNSF forfeited this argument by failing to raise it in a timely manner before the Board.⁶⁸

⁶⁶ WFA/Basin Opening at IV-A-8.

⁶⁷ WFA/Basin and BNSF entered into an agreement (“March 2009 Payment Agreement”) where each side agreed to pay the other any sums finally determined to be due as a result of appeals of the Board's *2009 Rate Relief Orders*.

⁶⁸ *BNSF 2010*, 604 F.3d at 608-11 (D.C. Cir. 2010).

The Court also summarily dismissed all of BNSF's assorted SAC arguments, except one: BNSF's contention that the Board failed to respond to its allegation that Modified ATC impermissibly double-counted variable costs. The Board argued on appeal that "modified ATC . . . does *not* give rise to a double recovery of variable costs"⁶⁹ but conceded that it had failed to specifically make this finding in the decisions under review.⁷⁰ The Court proceeded to remand, without vacating, the Board's 2009 *Rate Relief Orders* "so that the Board on remand can address BNSF's double-counting objection to modified ATC."⁷¹

BNSF filed petitions for rehearing and rehearing *en banc* of the unanimous panel decision, which were denied,⁷² and then filed a petition for a writ of certiorari that was also denied.⁷³

2. The Board Responds To The D.C. Circuit's Limited Remand Order (2010-2012)

In December 2010, the Board reopened the record in the WFA/Basin case to consider BNSF's Comments on Remand.⁷⁴ In this filing, BNSF urged the Board to

⁶⁹ See Joint Brief of Respondents STB and United States of America, *BNSF 2010* at 64 (Dec. 28, 2009) (emphasis in original).

⁷⁰ *BNSF 2010*, 604 F.3d at 613.

⁷¹ *Id.*

⁷² See *BNSF 2010* (Orders issued Sept. 2, 2010).

⁷³ See *BNSF Ry. v. STB*, 131 S. Ct. 2441 (2011).

⁷⁴ Comments of BNSF Railway Company on Remand (filed Nov. 22, 2010) ("BNSF 2010 Comments").

find that Modified ATC impermissibly double-counted variable costs, and to set cross-over traffic revenues using Original ATC.⁷⁵

As an aside, BNSF also tendered a new revenue allocation approach – one never seen before – and presented it to the Board, with the caveat that “BNSF does not advocate its use.”⁷⁶ This new approach, called Alternative ATC, utilizes the Modified ATC procedure to allocate cross-over traffic revenue for through moves with R/VC ratios less than or equal to 1.0: revenues are allocated based on the ratio of on-SARR and off-SARR variable costs to total through movement variable costs.⁷⁷ On through moves with R/VC ratios greater than 1.0, the Original ATC procedure is used unless it generates on-SARR segment revenues less than on-SARR segment variable costs, in which case on-SARR segment revenues are increased to equal on-SARR variable costs, and off-SARR segment revenues are decreased by a corresponding amount.⁷⁸

BNSF said it was tendering, but not advocating, use of Alternative ATC because, according to BNSF, Modified ATC addressed the Board’s concerns about revenue allocation on low-rated traffic moves in a way that was “disproportionate” to a problem BNSF said was perceived by the Board but not shared by BNSF: Original ATC’s under-allocation of revenues to SARRs on low-rated through moves.⁷⁹

⁷⁵ *Id.* at 2.

⁷⁶ *June 2012 Decision*, slip op. at 11; BNSF 2010 Comments at 30.

⁷⁷ BNSF 2010 Comments, Verified Statement of Michael R. Baranowski and Benton V. Fisher (“Baranowski/Fisher V.S.”) at 22.

⁷⁸ *Id.*

⁷⁹ BNSF 2010 Comments at 32.

As directed by the Board,⁸⁰ WFA/Basin submitted a reply to BNSF's Remand Comments. WFA/Basin argued that Modified ATC did not impermissibly double-count variable costs and that Modified ATC produced reasonable cross-over traffic revenue allocations.⁸¹

WFA/Basin also demonstrated that BNSF's request that the Board retroactively apply Original ATC or Alternative ATC to calculate the Revised SARR's cross-over traffic revenues would wipe out most of WFA/Basin's rate relief because WFA/Basin had modeled the Revised SARR to maximize MMM relief using Modified ATC to set cross-over traffic revenues not Original ATC or Alternative ATC.⁸²

Finally, WFA/Basin argued that any retroactive application of Original or Alternative ATC was unlawful and, even if permitted, at a minimum, due process would require that WFA/Basin be given the opportunity to revise their SARR for a third time if either approach was retroactively applied.⁸³

The Board decided the remand issues in a decision served in June 2013. The Board made five pertinent findings in this decision:

First, the Board reaffirmed its prior rulings that Modified ATC was a superior methodology for allocating cross-over traffic revenues than Original ATC

⁸⁰ *W. Fuels Ass'n, Inc. v. BNSF Ry.*, slip op. at 3 (STB served Feb. 1, 2011).

⁸¹ Complainants' Reply to Comments of BNSF Railway Company on Remand at 24-37 (filed Mar. 18, 2011) ("WFA/Basin 2011 Reply Comments").

⁸² *Id.* at 3, 38 n.18.

⁸³ *Id.* at 38-40.

because Modified ATC addressed and solved the “unanticipated and illogical feature [of Original ATC] that may drive the revenue allocation below variable costs.”⁸⁴

Second, the Board specifically addressed BNSF’s double-counting objection to Modified ATC. The Board interpreted the double-counting objection to be that “‘modified ATC fails appropriately to consider economies of density and artificially inflates the revenues attributable to the SARR.’”⁸⁵ The Board rejected this objection because it found “‘modified ATC strikes a more appropriate balance than original ATC between sound revenue allocation and accounting for economies of density.’” *Id.*

The Board went on to explain that “sound revenue allocation” involves “two competing principles.”⁸⁶ The first principle is that the revenue allocation methodology should take into account “economies of density.”⁸⁷ The second principle is that the revenue allocation methodology “should not create the implausible result of driving the revenue allocation below variable costs.”⁸⁸

The Board concluded that Modified ATC reasonably accommodated both principles because “[b]y first allocating revenue to each section to cover variable costs, we accommodate the first principle by ensuring that we not drive revenue allocation below variable costs” and “[b]y then allocating the remaining contribution, we

⁸⁴ *W. Fuels Ass’n, Inc. v. BNSF Ry.*, Docket No. NOR 42088, slip op. at 9 (STB served June 15, 2012) (“*June 2012 Decision*”).

⁸⁵ *June 2012 Decision*, slip op. at 9 (quoting *BNSF 2010*, 604 F.3d at 612).

⁸⁶ *Id.*, slip op. at 9, 10.

⁸⁷ *Id.*, slip op. at 10.

⁸⁸ *Id.*

accommodate the important role that economies of density should play in the revenue-allocation method.”⁸⁹

Third, the Board found that the Court’s remand order did not direct the Board to consider, on remand, BNSF’s contention that Modified ATC was a disproportionate remedy to the problems caused by Original ATC and did not require the Board to address BNSF’s newly-created Alternative ATC methodology.⁹⁰ The Board also held that it had discretion under 49 U.S.C. § 722(c) to expand the scope of the issues on remand if there was “material error, new evidence, or substantially changed circumstances.”⁹¹ The Board concluded that BNSF’s raising of its disproportionate remedy/Alternative ATC contentions did not involve any “substantially changed circumstances” and that BNSF had forfeited any claims of material error or new evidence by not raising these contentions prior to the issuance of the Board’s *2009 Rate Relief Orders*.⁹²

Fourth, the Board stated that “[t]he process of ratemaking is inherently one of periodic review and improvement” and that it planned on instituting a rulemaking proceeding “to consider whether a methodology similar to BNSF’s alternative ATC” methodology might better balance the Board’s policy objectives.⁹³

⁸⁹ *Id.*

⁹⁰ *Id.*, slip op at 11.

⁹¹ *Id.* (quoting 49 U.S.C. § 722(c)).

⁹² *Id.*, slip op. at 12.

⁹³ *Id.*, slip op at 12.

Fifth, the Board stated that it had considered placing this case in abeyance for a second time pending completion of a new rulemaking proceeding to address cross-over traffic revenue allocation issues. The Board concluded that it would not do so “because that would encourage future litigants to also try out new theories at late stages of the process”⁹⁴ and any attempt to retroactively apply yet another new cross-over traffic revenue allocation procedure in this eight-year old case could “lead to still more litigation” including the possibility of WFA “revis[ing] its SARR once again.”⁹⁵

3. The Board Adopts New SAC Rules (2013)

In July 2012, the Board instituted a new rulemaking proceeding entitled *Rate Regulation Reforms* whose stated purpose was to “improve [the Board’s] rate review process to ensure that it is as fair and accessible as possible.”⁹⁶ The Board proposed several new rules, including a proposal to adopt Alternative ATC.⁹⁷

After receiving public comments, the Board issued a final decision in *Rate Regulation Reforms* the rulemaking proceeding in July 2013.⁹⁸ In its discussion of cross-over traffic issues, the Board once again concluded that “the modified [ATC] approach

⁹⁴ *Id.*, slip op. at 12.

⁹⁵ *Id.*, slip op. at 13 (emphasis in original).

⁹⁶ *Rate Regulation Reforms*, Docket No. EP 715, slip op. at 3 (STB served July 25, 2012) (“*Rate Regulation Reforms NPRM*”).

⁹⁷ *Id.*, slip op. at 17. The Board noted that its Alternative ATC proposal was “similar, but not identical” to the version BNSF proposed in WFA/Basin’s case, because the Board’s “proposal examines the revenue allocation to the on-SARR and off-SARR segments, whereas BNSF’s proposal examined only the on-SARR segment.” *Id.*, slip op. at 18, n.12. For ease of reference, we refer to both versions of Alternative ATC as “Alternative ATC.”

⁹⁸ *Rate Regulation Reforms*, Docket No. EP 715 (STB served July 18, 2013)

was superior to original ATC.”⁹⁹ The Board also concluded that Alternative ATC was superior to Modified ATC because, in the Board’s view, “alternative ATC [] does a superior job of allocating revenues in accordance with economies of density than modified ATC.”¹⁰⁰ However, the Board also emphasized that shippers “cannot be expected to litigate in regulatory quicksand, with the standard for relief constantly changing and shifting”¹⁰¹ and that its adoption of Alternative ATC was intended to create “more accurate” results in future rate cases.¹⁰²

Two eastern railroads appealed the Board’s *Rate Regulation Reforms* decision.¹⁰³ They have asked the D.C. Circuit to vacate the Board’s decision adopting Alternative ATC on grounds that the Board failed to address their criticisms of that methodology.¹⁰⁴ The appeal remains pending.

4. The D.C. Circuit Decides BNSF’s Second Appeal (2014)

BNSF appealed the Board’s *June 2012 Decision*. The gravamen of BNSF’s second appeal was that the Board erred in not considering the merits of its disproportionate remedy/Alternative ATC contentions. A divided panel of the D.C. Circuit agreed with BNSF.

⁹⁹ *Id.*, slip op. at 8.

¹⁰⁰ *Id.*, slip op. at 32.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See CSX Transp., Inc. & Norfolk S. Ry. v. STB*, No. 13-1230 (July 29, 2013, D.C. Cir.)

¹⁰⁴ *See Corrected Final Brief of Petitioners*, No. 13-1230 at 23-27 (March 28, 2014).

The panel majority found that the Court, in its *2010 Decision*, had not addressed the merits of BNSF's claims that the Board's use of Modified ATC in its *2009 Rate Relief Orders* was arbitrary and capricious.¹⁰⁵ The Court also held that BNSF had sufficiently raised and preserved its disproportionate remedy arguments in the proceedings before the Board and Court prior to the Court's 2010 decision.¹⁰⁶ The dissenting judge disagreed with both of the panel majority's rulings.¹⁰⁷

The panel majority proceeded to vacate the Board's *June 2012 Decision* and directed the Board on remand to address whether it should use Alternative ATC to set cross-over traffic revenues in this case. The panel majority very carefully observed, however, that it was not suggesting that the Board must retroactively apply Alternative ATC:

If it is true, as [BNSF] asserts, that the Board has adopted an alternative revenue allocation method applicable to all future cases, we would expect its opinion to advise why that method is not equally applicable to this case. While we do not suggest that all such changes must be made retroactively, we must at least know that the Board has exercised reason . . . in treating [BNSF] differently.¹⁰⁸

Elsewhere in its decision, the panel majority summarized the Board's *June 2012 Decision*. Significantly, the panel majority read the Board's *June 2012 Decision* as concluding that if the Board did decide to retroactively apply yet another cross-over

¹⁰⁵ *BNSF 2014*, 741 F. 3d at 166-67.

¹⁰⁶ *Id.*, 741 F.3d at 166-67.

¹⁰⁷ *Id.*, 741 F.3d at 168-69.

¹⁰⁸ *Id.*, 741 F.3d at 168.

traffic revenue allocation method in this case, WFA/Basin would be entitled to revise their SARR:

[T]he Board noted that applying yet another [cross-over traffic revenue allocation] method to this case would prolong it even further since WFA would then be entitled to revise its SARR again.¹⁰⁹

5. The Parties' Agree On *Premium Case* Relief (2014)

The Board instituted the *Premium Case*¹¹⁰ in 2011 to address the issue of whether the \$8.1 billion regulatory acquisition premium Berkshire Hathaway paid to acquire BNSF in 2010 should be included in BNSF's URCS variable costs. In January 2012, the Board issued an order temporarily lifting the prescriptive effect of the 2009 *Rate Relief Orders* pending the Board's resolution of the *Premium Case*.¹¹¹ The Board did so in order to perfect WFA/Basin's refund rights. In decisions served in July 2013, the Board held that the premium should be excluded from all prior and future computations of WFA/Basin's maximum prescribed rates.¹¹² The Board directed the parties to enter into discussions to implement this holding.¹¹³

¹⁰⁹ *Id.*, 741 F.3d at 165.

¹¹⁰ *Western Coal Traffic League – Petition for Declaratory Order*, Docket No. FD 35506 (“*Premium Case*”).

¹¹¹ *W. Fuels Ass’n, Inc. v. BNSF Ry.*, Docket No. 42088, slip op. at 3 (STB served Jan. 20, 2012).

¹¹² *Premium Case*, slip op. at 15 (STB served July 25, 2013); *W. Fuels Ass’n, Inc. v. BNSF Ry.*, Docket No. 42088, slip op. at 3 (STB served July 25, 2013) (“*July 2013 Decision*”).

¹¹³ *July 2013 Decision*, slip op. at 3.

In April 2014, WFA/Basin and BNSF jointly informed the Board that they had reached an agreement on premium-related relief and that the prescriptive effect of the *2009 Rate Relief Orders* could be reinstated.¹¹⁴ In May 2014, BNSF paid WFA/Basin all premium-related refunds due. This payment is subject to the parties' March 2009 Payment Agreement.

D. WFA/Basin's Litigation Costs To Date

As noted above, WFA/Basin incurred over \$8 million in litigation costs to secure the relief the Board granted it in the *2009 Rate Relief Orders*. Since that time, WFA/Basin have incurred additional litigation costs of approximately \$2 million defending the Board's rate relief orders in proceedings before this Board, the appellate courts, and the United States Supreme Court.

ARGUMENT

The Board must address two issues on remand. The first is whether to retroactively apply Alternative ATC in this case. If the Board decides to do so, the second issue is the due process that the Board must accord WFA/Basin.

I.

THE BOARD CANNOT RETROACTIVELY APPLY ALTERNATIVE ATC

The first issue the Court directed the Board to consider on remand is whether the Board should retroactively apply Alternative ATC to allocate cross-over

¹¹⁴ See *W. Fuels Ass'n, Inc. v. BNSF Ry.*, Docket No. 42088, Joint Report of the Parties at 2-3 (April 4, 2013).

traffic revenues in this case. The Court noted that BNSF had informed the Court that the Board had adopted Alternative ATC for application in future cases and said “we would expect its opinion to advise why that method is not equally applicable in this case.”¹¹⁵

The Court very carefully observed that it was not “suggest[ing]” that when the Board adopts changed standards, “all such changes must be made retroactively.”¹¹⁶ Instead, the Court asked the Board to provide a reasoned explanation if it decided not to retroactively apply Alternative ATC in this case.¹¹⁷

A. Retroactive Application Is Not Permitted Under Governing Board Standards

The Board determines whether to retroactively apply new rules in pending cases based on the equities of doing so.¹¹⁸ In prior proceedings the Board has considered a number of equitable factors in making these determinations, including the following: (1) reasonable reliance; (2) fair notice; (3) fair litigation outcomes; (4) accurate litigation outcomes; (5) litigation burdens; and (6) manifest injustice.

¹¹⁵ *BNSF 2014*, 714 F.3d at 168.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *See, e.g., Major Issues NPRM*, slip op. at 2 (Board asks the parties to pending cases “to comment here on whether or to what extent it would be inequitable to apply the [SAC standard] changes proposed herein, or parts thereof, to their pending cases”); *Major Issues*, slip op. at 75 (Board decides which newly adopted SAC rules to apply in pending cases based on “the equities of applying the proposed changes”); *Rate Regulation Reforms NPRM*, slip op. at 17 n.11 (Board proposes not to apply proposed limitations on cross-over traffic to pending or decided cases because “[w]e do not believe it would be fair to those complainants, who relied on prior precedent in litigating those cases.”).

1. WFA/Basin Reasonably Relied on Modified ATC

There is no doubt that WFA/Basin reasonably relied on Modified ATC when it developed its revised SARR in 2007/2008. Indeed, WFA/Basin had no other choice. In its *September 2007 Decision*, the Board ordered WFA/Basin to revise their Original SARR using Modified ATC¹¹⁹ and reaffirmed that ruling in its *February 2008 Decision*¹²⁰ and its *February 2009 Decision*.¹²¹ The Board's directive was clear and unmistakable: WFA/Basin had to use Modified ATC to develop cross-over traffic revenues.

The Board's directive was critically important in WFA/Basin's Revised SARR modeling. Most of WFA/Basin's Revised SARR traffic was cross-over traffic, and knowing how to calculate the SARR revenues on this traffic was a critical piece in all of the ensuing decisions WFA/Basin made in revising the Original SARR, including how to revise its traffic group, how to revise its SARR configuration, and how to maximize its rate relief under MMM. *See Crowley V.S.* at 10-17.

The Board's decision in *Major Issues* underscores WFA/Basin's reasonable reliance. In *Major Issues*, the Board ruled that coal shippers could not reasonably rely on SAC standards, such as MSP, that the Board had not formally endorsed.¹²² The D.C.

¹¹⁹ *Id.*, slip op. at 20.

¹²⁰ *Id.*, slip op. at 4-5.

¹²¹ *February 2009 Decision*, slip op at 9.

¹²² *See Major Issues*, slip op. at 75; *February 2008 Decision*, slip op. at 3 (prior to its adoption of final rules in *Major Issues*, the Board "had no established approach to allocating revenue from cross-over traffic . . .").

Circuit agreed, noting that prior to *Major Issues*, “the Board had not settled on any one method for allocating the revenue contribution of cross-over traffic.”¹²³ However, in its *September 2007 Decision*, the Board had not only “settled on . . . one method for allocating revenue contribution of cross-over traffic” – Modified ATC – it expressly ordered WFA/Basin to use it in devising their revised SARR.

2. WFA/Basin Had No Fair Notice Of Alternative ATC

WFA/Basin certainly had no fair notice in 2007/2008 that the Board would use Alternative ATC to allocate cross-over traffic revenues. The Board’s position was clear: use Modified ATC.¹²⁴ BNSF’s position was also clear – and one the Board had repeatedly rejected – use Original ATC.¹²⁵ Indeed, Alternative ATC did not exist in 2007/2008. BNSF created it in 2010 and even then “d[id] not advocate its use.”¹²⁶

The Board addressed fair notice in its recent decision in the *DuPont* case.¹²⁷ In *DuPont*, the complainant developed its SARR using Modified ATC and filed its opening evidence before the Board adopted Alternative ATC. The Board decided to apply Alternative ATC in that case because it concluded that DuPont had notice “fairly early on” that Modified ATC could be replaced with Alternative ATC and could have

¹²³ *BNSF 2008*, 526 F.3d at 784.

¹²⁴ *See February 2008 Decision*, slip op. at 4.

¹²⁵ *Id.*

¹²⁶ *June 2012 Decision*, slip op. at 11; BNSF 2010 Comments at 30.

¹²⁷ *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry.*, Docket No. NOR 42125, slip op. at 51 (STB served Mar. 24, 2014) (“*DuPont*”).

engaged in self-help by agreeing to “hold [its] case in abeyance” pending the Board’s consideration of Alternative ATC:

Although Alternative ATC had not been adopted prior to the start of this case, the parties were on notice fairly early on that the Board’s ATC methodology was potentially subject to modification. DuPont filed its opening evidence in April 2012, Western Fuels Remand was served in June 2012, and the Board proposed Alternative ATC in July 2012 in Rate Regulation Reforms, EP 715 (STB served July 25, 2012). While NS sought to hold this case in abeyance while the Board considered changes to its revenue allocation methodology, DuPont argued that the case should continue to move forward. The Board denied the motion for abeyance.¹²⁸

Unlike DuPont, WFA/Basin did not receive notice “fairly early on” that the Board might replace Modified ATC with Alternative ATC. WFA/Basin filed their case in 2004; submitted their revised SAC evidence in 2008; and BNSF first tendered Alternative ATC in 2010 – some six years after WFA/Basin’s case began. Nor did WFA/Basin have the opportunity in 2007-2008 to have their case held “in abeyance” because there was no pending proceeding at that time involving proposed changes in cross-over traffic revenue allocation rules.

WFA/Basin did have notice in 2008 that the Board had considered and rejected BNSF’s proposal to use Original ATC. WFA/Basin did not consider developing a SARR in 2008 using Original ATC because the Board ordered it to use Modified ATC.¹²⁹ In addition, had WFA/Basin considered doing so at the time, they would have

¹²⁸ *Id.*

¹²⁹ *September 2007 Decision*, slip op. at 20.

had to develop a second SARR in order to obtain their best case rate relief¹³⁰ and the Board has never encouraged, much less required, that a complainant shipper simultaneously present two different SARRs.¹³¹

3. Application Of Modified ATC Produced A Fair Result In This Case

The history of SAC cases teaches that cross-over traffic revenue allocation is an art, not a science, and one that reflects the Board's changing views on SAC policy and practice. The first case involving cross-over traffic was *Nevada Power*, a case decided in 1994.¹³² The ICC used the Mileage Prorate method to allocate cross-over traffic revenues in that case.¹³³ The Board proceeded to utilize a series of different methods to allocate cross-over traffic revenues, each of which the Board concluded was superior to the method it replaced. These methods, in chronological order, are: Modified Mileage Block Prorate,¹³⁴ MSP,¹³⁵ Original ATC,¹³⁶ Modified ATC,¹³⁷ and Alternative ATC.¹³⁸

¹³⁰ See WFA/Basin 2011 Reply Comments at 40.

¹³¹ See *W. Fuels Ass'n, Inc. v. BNSF Ry.*, Docket No. 42088, slip op. at 3 (STB served Mar. 14, 2005) (denying BNSF motion requesting that WFA tender two SARRs simultaneously)

¹³² *Bituminous Coal – Hiawatha, Utah, to Moapa, Nev.*, 10 I.C.C.2d 259 (1994) (“*Nevada Power*”).

¹³³ See *id.*, 10 I.C.C.2d at 268.

¹³⁴ See *McCarty Farms, Inc. v. Burlington N., Inc.*, 2 S.T.B. 460, 472 (1997), modified 3 S.T.B. 102 (1998), *aff'd sub nom. McCarty Farms, Inc. v. STB*, 158 F.3d 1294 (D.C. Cir. 1998) (“*McCarty Farms*”).

¹³⁵ See *Duke Energy Corp. v. Norfolk S. Ry.*, STB Docket No. 42069, slip op. at 24 (STB served Nov. 6, 2003).

When the Board applied Modified ATC in its 2009 *Rate Relief Orders*, it was applying what at that time was the superior methodology in the historical sequence – Modified ATC – and the Board’s SAC results, developed using Modified ATC, reflected a fair, accurate state-of-the art SAC result at that time.¹³⁹ In areas where regulatory policies and methodologies are subject to periodic review and change, the Board, and the ICC before it, have normally concluded the fair regulatory result is not to reopen, and change, prior agency decisions.¹⁴⁰ As aptly summarized by the ICC:

The fact that one aspect of the methodology is abandoned in favor of another procedure that yields more accurate results does not necessarily mean that the prior procedure was unfair. It simply means that the prior procedure, which appeared to be the best procedure at the time it was in use, has been supplanted by a better procedure that continuing study has developed. The

¹³⁶ See *Major Issues*, STB Docket No. EP 657, slip op. at 31 (STB served Oct. 30, 2006).

¹³⁷ See *September 2007 Decision*, slip op. at 14.

¹³⁸ See *Rate Regulation Reforms*, STB Docket No. EP 715, slip op. at 30 (STB served July 18, 2013).

¹³⁹ See *id.*

¹⁴⁰ See, e.g., *February 2009 Decision*, slip op. at 19-24 (denying request to retroactively apply newly adopted cost-of-capital methodology to restate cost-of-capital figures established in prior agency decisions because of the “reliance by the railroad industry on our prior cost-of capital findings”); *Rail Fuel Surcharges*, Ex Parte No. 661, slip op. at 10 (STB served Jan. 26, 2007) (denying requests to retroactively apply new ban on percent-of-price fuel surcharges because “railroads may have reasonably relied [on past ICC] precedent” permitting percent-of-price fuel surcharges); *Canadian Pac. Ltd – Purchase and Trackage Rights – Delaware & Hudson Ry.*, Finance Docket No. 31700, slip op. at 4 (STB served March 2, 2000) (denying request to retroactively apply Board’s new Safety Integration Plan (“SIP”) procedure because “the SIP procedure was not in place at the time this case was decided”); *Railroad Cost Recovery Procedures*, 5 I.C.C.2d 350, 358 (1989) (denying requests to retroactively apply newly adopted change to the Rail Cost Adjustment Factor Index (“RCAF”) because “the better course is to treat all improvements in methodology prospectively . . .”).

undesirable consequences of adopting a policy of retroactive application are obvious: parties and the agency would be continually revisiting calculations made years earlier under entirely different circumstances, jeopardizing the sense of stability and the ability to plan which is the by-product of reasonably certain rules.¹⁴¹

There is an exception to this general rule. If a court finds that the Board's methodology is predicated on a legal error that renders the methodology itself unlawful the Board usually cannot adhere to the method on remand.¹⁴² For example, if the Board predicated a methodology on an erroneous statutory construction, the Board must not continue to use the methodology.

However, that exception does not apply in this case. The D.C. Circuit has never held that the Board's use of Modified ATC is legally prohibited. In BNSF's first appeal, the D.C. Circuit directed the Board on remand to address BNSF's double-counting objection to Modified ATC.¹⁴³ In BNSF's second appeal, the D.C. Circuit has directed the Board on remand to address whether the Board should apply Alternative ATC in this case.¹⁴⁴ In neither appeal did the Court hold, or otherwise indicate, that the Board's adoption and continued use of Modified ATC in this case was legally prohibited.

Significantly, the Board itself has repeatedly held, first in its *September 2007 Decision*, then in its *June 2012 Decision*, and finally in its 2013 decision in *Rail*

¹⁴¹ *Railroad Cost Recovery Procedures*, 5 I.C.C.2d at 358.

¹⁴² "An agency, like a court, can undo what is wrongfully done by virtue of its order." *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965).

¹⁴³ *BNSF 2010*, 604 F.3d at 613.

¹⁴⁴ *BNSF 2014*, 741 F.3d at 167-68.

Rate Reforms, that its adoption and use of Modified ATC was not only not unlawful, but constituted a permissible policy choice at the time the Board first developed Modified ATC in 2007 and remained a permissible policy choice until the Board adopted Alternative ATC in 2013.

Specifically, the Board found in its *September 2007 Decision* that Modified ATC fixed a flaw in Original ATC: the “illogical and unintended” revenue allocation results from the application of Original ATC to low R/VC ratio moves.¹⁴⁵ The Board reaffirmed its use of Modified ATC in its *June 2012 Decision*, holding that, unlike Original ATC, Modified ATC reasonably took into account two competing principles: economies of density and avoidance of implausible results (allocation of revenues below variable costs).¹⁴⁶ In *Rate Regulation Reforms*, the Board reiterated that “the modified approach was superior to original ATC,” but concluded, after first conducting a rulemaking proceeding, that Alternative ATC “will better accommodate [the] two principles.”¹⁴⁷

The Court’s second remand order does not compel a different result. The Court simply asked the Board to explain why it should exercise its policy judgment not to apply Alternative ATC in this case. The reason is clear: timing. In 2007, the Board used the best available methodology it had developed to date to allocate cross-over traffic revenues: Modified ATC. The Board did not adopt Alternative ATC until 2013 and, as

¹⁴⁵ *September 2007 Decision* at 14.

¹⁴⁶ *June 2012 Decision* at 10.

¹⁴⁷ *Rate Regulation Reforms*, slip op. at 8, 30.

discussed above, the Board's general practice is to not retroactively apply new rules to undo prior decisions made under prior permissible standards, particularly where, as here, it is manifestly unfair to do so.¹⁴⁸

Even assuming *arguendo* that the Court's second remand order requires the Board to transport itself back in time to 2007, and to determine how the Board would have proceeded if it had considered the merits of BNSF's disproportionate remedy argument at that time, the result would be the same under governing Board precedent.

The Board has consistently ruled parties cannot meet their burden of proof in SAC cases by simply criticizing Board-approved cross-over traffic revenue allocation methods. Instead, parties must present a superior alternative for the Board's consideration.¹⁴⁹ BNSF presented no superior alternative in 2007 to address its disproportionate remedy arguments – a fact BNSF itself has conceded.¹⁵⁰ It simply urged the Board to apply Original ATC, a methodology the Board concluded in 2007, and has reaffirmed in every decision since then, is inferior to Modified ATC.

¹⁴⁸ WFA/Basin note that the issue now is setting aside decisions the Board has already made – the *2009 Rate Relief Orders* – not, as was the case in 2006, holding this case in abeyance before a final merits decision was made.

¹⁴⁹ See, e.g., *Pub. Serv. Co. of Colo. v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 589, 604-06 (2004) (adhering to MSP because BNSF failed to present a superior alternative), *aff'd sub nom. BNSF Ry. v. STB*, 453 F.3d 473, 483-84 (D.C. Cir. 2006); *Otter Tail Power Co. v. BNSF Ry.*, Docket No. 42071, slip op. at 13 (STB served Jan. 27, 2006) (same), *aff'd sub nom. Otter Tail Power Co. v. STB*, 484 F.3d 959 (8th Cir. 2007).

¹⁵⁰ See BNSF 2010 Comments at 30 (conceding that BNSF “did not propose a specific methodology” in 2007/2008 to address its disproportionate remedy criticisms of Modified ATC); *June 2012 Decision* slip op. at 12 n.19 (holding that BNSF failed “to alert the Board to BNSF’s alternate ATC methodology” in 2007/2008).

Thus, under governing Board precedent, had the Board considered BNSF's disproportionate remedy arguments in 2007, it would have rejected them because BNSF failed to tender a superior alternative at that time. The Board did not adopt Alternative ATC until 2013 and it is fundamentally unfair to retroactively apply a cross-over traffic revenue allocation methodology adopted in 2013, which reflects the Board's policy views in 2013, to a SARR developed in 2007 using a different cross-over traffic revenue allocation method, which reflected the Board's different policy views in 2007.

4. Retroactive Application Of Alternative ATC Will Not Produce An Accurate Or Fair Result On The Present Record

The Board found in *Rate Regulation Reforms* that Alternative ATC produced more accurate revenue allocations than Modified ATC.¹⁵¹ However, as described in more detail below, use of Alternative ATC will not produce an accurate or fair SAC result in this case unless (i) WFA/Basin revises their Revised SARR and (ii) WFA/Basin updates the now ten-year old record with accurate revenue and cost information.

The Board's experience in this case provides compelling proof that accuracy in a SAC case is not a simple concept. The Board adopted Original ATC, and then Modified ATC, because it believed each method produced the most accurate allocation of cross-over traffic revenues. However, the Board found that retroactive application of Modified ATC to a SARR that was not designed using Modified ATC

¹⁵¹ See *Rate Regulation Reforms*, slip op. at 32.

produced an inaccurate SAC answer – no relief – whereas application of Modified ATC to a SARR designed using Modified ATC produced significant rate relief.¹⁵²

Thus, the lesson here is a simple one: the revenue allocation method is a key input in how a shipper designs a SARR and the retroactive application of an “accurate” revenue allocation method can produce totally inaccurate SAC results for other reasons. *See Crowley V.S.* at 14-17.

Retroactivity in the SAC context can be the equivalent to a carpenter being told to drill a hole for a round peg, and then being told after he drills the round hole that things have changed and the peg is now a square one. The square peg will not fit into the round hole, so the carpenter must regroup and drill a new hole. And, to make the analogy closer to SAC, further assume that the cost of drilling each hole is several million dollars.

5. WFA/Basin Will Incur Substantial Additional Litigation Costs To Develop A Third SARR

The Board is well aware that it costs complainant shippers millions of dollars to develop and defend a SARR.¹⁵³ The Board took this factor into account in *Major Issues*, holding that it would not retroactively apply its new rule reducing the DCF

¹⁵² Compare *September 2007 Decision* (retroactive application of Modified ATC to WFA’s Original SARR designed using MSP produces no rate relief) with *February 2009 Decision* (application of Modified ATC to WFA’s Revised SARR designed using Modified ATC produces significant rate relief).

¹⁵³ *See, e.g., Rate Regulation Reforms*, slip op. at 11 (estimating it costs complainant shippers “\$5 million to bring a Full-SAC case”).

period in SAC cases from 20 years to 10 years in WFA/Basin's case because "shortening the DCF period would require the parties to redesign their entire SAC presentation."¹⁵⁴

The Board subsequently learned in this case that changes in cross-over traffic revenue allocation methods can "affect the basic design of a SAC case."¹⁵⁵ To its credit, when the Board came to this realization it understood that WFA/Basin had to be given the opportunity to revise its SARR, and gave WFA/Basin that opportunity.

WFA/Basin then revised their SARR, which turned a result where WFA/Basin was going to obtain no relief into one where WFA/Basin obtained substantial relief.

The Board's realization came with a high price tag: WFA/Basin had to expend substantial sums to revise their SARR, and then defend that Revised SARR in proceedings before this agency, and in subsequent court proceedings. WFA/Basin spent approximately \$5 million to develop and defend their initial SARR and then have spent another \$5 million revising their SARR and defending their revised SARR in subsequent proceedings before the courts and the Board.

As discussed in more detail below, WFA/Basin will have to revise their SARR for a third time to perfect their right to appropriate rate relief using Alternative ATC. This will add to the already huge costs WFA/Basin have incurred to develop their Original SARR and then revise that SARR.

¹⁵⁴ *Major Issues*, slip op. at 75.

¹⁵⁵ *September 2007 Decision*, slip op. at 3.

6. It Is Manifestly Unjust For WFA/Basin To Have To Develop A Third SARR

WFA/Basin came to the Board in good faith in 2004. They were faced with a massive rate increases that ultimately would be paid by those who can least afford them: the electric ratepayers in nine Great Plains states. As the CEO's of WFA and Basin informed the Board at that time:

LRS customers ultimately pay BNSF's rates as part of their monthly electric bills. Even what to some may seem like small increases in these bills can have significant consequences, particularly for those customers that are already having difficulty making ends meet. The customers that receive LRS-generated power are, for the most part, small ranchers, farmers and households in the rural west, midwest and southwest. Many of these customers are of modest means and, in Basin Electric's service territory, all too many live in poverty.¹⁵⁶

Since 2004, WFA/Basin have at all times followed the Board's complex SAC rules. However, WFA/Basin have been caught up in a regulatory maelstrom where the Board keeps changing the rules, and the defendant railroad has engaged in a scorched-earth legal strategy designed to manipulate the rule changes to its benefit.

The WFA/Basin case is the longest, and most widely watched, coal rate case ever filed with the Board. WFA/Basin have already spent nearly \$10 million and proved their entitlement to relief twice. While WFA/Basin are prepared, if necessary, to prove their entitlement to fair rate relief a third time, there can be little doubt if WFA/Basin must do so, it will send a very chilling message to the shipping public: you may have to spend more than ten years, and \$10 million, and prove your case three times

¹⁵⁶ See WFA/Basin Opening at IV-A-8 (footnote omitted).

– through no fault of your own – to perfect your right to fair rate relief before the Board. Such an outcome also flies in the face of the Board’s stated objective to make its maximum rate case processes “as fair and accessible as possible.”¹⁵⁷

Under the circumstances presented in this decade-old case, it would be manifestly unjust for WFA/Basin to have to prove their entitlement to fair relief for a third time under the Board’s ever-shifting SAC rules.¹⁵⁸ Twice is more than enough.

B. Retroactive Application Is Not Permitted Under Governing Judicial Standards

Courts have used different tests to determine whether an agency can retroactively apply new legal standards. Retroactive application of Alternative ATC is not legally permissible under any of them.

1. Retroactive Application of Alternative ATC Is Impermissible Under *National Mining*

In *National Mining Ass’n v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002) (“*National Mining*”), the D.C. Circuit held that in the absence of express congressional authorization, an agency cannot apply a new rule, promulgated after notice and comment rulemaking, to decide claims in pending adjudications if the new rule

¹⁵⁷ *Rate Regulation Reforms*, slip op. at 2.

¹⁵⁸ *Cf. Iowa Power & Light Co. v. Burlington N., Inc.*, 647 F.2d 796, 806 (8th Cir. 1981) (holding that it would be a “manifest injustice” to retroactively apply new statutory market dominance standards because “[s]uch an exercise would vastly increase the burden on [the complainant shipper] in the context of a case that began more than two and one-half years ago and that has already seen one judicial remand to the Commission.”).

“changes the legal landscape in a way that affects substantive liability determinations”¹⁵⁹

Retroactive application of Alternative ATC does not pass muster under *National Mining*. The Board has no express Congressional authority to promulgate retroactive SAC rules, and the retroactive change from Modified ATC to Alternative ATC clearly “changes the legal landscape in a way that affects substantive liability determinations” because, at a minimum, WFA/Basin will have to prove their entitlement to rate relief – for a third time – if Alternative ATC is retroactively applied in this case in a manner that comports with their due process rights.

2. Retroactive Application Of Alternative ATC Is Impermissible Under *BNSF 2008*

In *BNSF 2008*, the D.C. Circuit held that “[a] new rule may be applied retroactively to the parties in an ongoing adjudication, so long as the parties before the agency are given notice and an opportunity to offer evidence bearing on the new standard, and the affected parties have not detrimentally relied on the established legal regime.” *Id.*, 526 F.3d at 784 (quoting *Consol. Edison Co. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003)).

¹⁵⁹ *Id.*, 292 F.3d at 859; accord *Marrie v. SEC*, 374 F.3d 1196, 1209 (D.C. Cir. 2004) (holding that rule change adopted in 1998 which “changed the legal landscape with respect . . . to conduct in 1994 was impermissibly retroactive”); *Arkema Inc. v. EPA*, 618 F.3d 1, 7 (D.C. Cir. 2010) (holding that “[t]he critical question[for retroactivity analysis purposes] is whether the interpretation established by the new rule changes the legal landscape”) (internal quotation and citation omitted).

The Court held that WFA/Basin had not “detrimentally relied on the established legal regime” when they used MSP to develop their Original SARR in 2005 because, at that time, “the Board had not settled on any one method for allocating the revenue contribution of cross-over traffic” and, as a result, “there was no *established* legal regime” for allocating revenues on cross-over traffic:

Here, there was no *established* legal regime on which the parties litigating before the Board could have reasonably relied: They were on notice that the Board had not settled on any one method for allocating the revenue contribution of cross-over traffic. As we said in *BNSF*, “[t]he appropriate allocation of revenue from cross-over traffic is a perennial issue in [Stand-Alone-Cost] proceedings and one the Board even now [in 2006] has not resolved definitively.” 453 F.3d at 483; *see also, e.g., Duke Energy Corp. v. Norfolk Southern Ry. Co.*, 2003 WL 22673026, at *10 (S.T.B. Nov.5, 2003) (“The Board has long recognized, however, that this methodology may not work in all cases, and it has been open to suggestions for other methods to allocate cross-over revenues.”). The shippers do not respond to the Board's argument that, before adopting the Average-Total-Cost method, the Board had repeatedly warned that it sought to adopt a methodology that would take density into account. As the Board made clear both in the rulemaking and in *Western Fuels*, the shippers had no basis for relying on the prior revenue-allocation formula. *See* STB Ex Parte No. 657, at 75; *Western Fuels*, 2007 WL 2590251, at *20.¹⁶⁰

In contrast, WFA/Basin clearly “detrimentally relied on the established legal regime” in 2007/2008 when they developed their Revised SARR using Modified ATC because, by that time, the Board had “settled on [] one method for allocating revenues on cross-over traffic” – Modified ATC – and Modified ATC continued to be the

¹⁶⁰ *BNSF 2008*, 526 F.3d at 784 (emphasis in original).

Board's established cross-over traffic revenue allocation method for the next six years until July 2013, when the Board replaced Modified ATC with Alternative ATC.

Indeed, as discussed above, WFA/Basin had to use Modified ATC to develop their Revised SARR because the Board ordered them to do so in its *September 2007 Decision* and reaffirmed that order in its *February 2008 Decision* and in its *February 2009 Decision*. The Board's decisions left no doubt that Modified ATC was clearly the established legal regime in this case for allocating cross-over traffic revenues.

3. Retroactive Application of Alternative ATC Is Impermissible Under The *Landgraf* “Hard Case” Standards

The Supreme Court observed in *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994), a case involving the legality of the retroactive application of a new statute in a pending court case, that in “hard cases,” judicial decisions concerning the retroactive application of new statutes should be guided by “familiar considerations of fair notice, reasonable reliance, and settled expectations”¹⁶¹

Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have ‘sound... instinct[s]’... and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.¹⁶²

Courts have similarly cited, and relied upon, the same “familiar considerations of fair notice, reasonable reliance and settled expectations” when

¹⁶¹ *Id.* at 270.

¹⁶² *Id.* (internal citation omitted).

reviewing agency decisions involving the retroactive application of new rules, developed after notice and comment rulemaking, to pending cases before an agency.¹⁶³

As discussed above, each of these factors weighs in favor of not retroactively applying Alternative ATC in this case: WFA/Basin had no fair notice of Alternative ATC, they reasonably relied on Modified ATC, and Modified ATC, at the time WFA/Basin applied it, was the Board's established cross-over traffic revenue allocation methodology.

4. Retroactive Application of Alternative ATC is Impermissible Under The *Retail, Wholesale* Case Factors

Many courts uses a five factor balancing test, set forth in *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972) (“*Retail, Wholesale*”), to determine whether “to give retroactive effect to new rules adopted in the course of agency adjudication”¹⁶⁴ The five factors are:

(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.¹⁶⁵

The five factor *Retail, Wholesale* balancing test does not directly apply here because the Board announced its adoption of Alternative ATC in a notice and comment rulemaking

¹⁶³ See, e.g., *Marrie v. SEC*, 374 F.3d at 1207 (D.C. Cir. 2004); *Nat'l Mining*, 292 F.3d at 859.

¹⁶⁴ *Id.*, 466 F.2d at 388.

¹⁶⁵ *Id.*, 466 F.2d at 390.

proceeding, not in an adjudication.¹⁶⁶ Nevertheless, all five of the factors cited support not retroactively applying Alternative ATC in this case.

This case is not one of first impression as many cases have involved application of cross-over traffic rules and the Board announced its adoption of Alternative ATC in a different proceeding: *Rate Regulation Reforms*. The law was not unsettled prior to the Board's adoption of Alternative ATC: Modified ATC was the established practice and Alternative ATC replaced Modified ATC.¹⁶⁷ WFA/Basin properly relied on Modified ATC as a fundamental building block in its Revised SARR. Retroactive application of Alternative ATC places substantial burdens on WFA/Basin because, at a minimum, WFA/Basin will have to devise a third SARR. Finally, the Board, as discussed above, typically implements its statutory duty to set maximum reasonable rates by applying the best available SAC methodologies in effect at the time it renders its decision, and does not retroactively reopen prior decisions to apply new methodologies developed later.

¹⁶⁶ See *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987) (*Retail, Wholesale* test does not apply in cases involving “rules adopted pursuant to rulemaking procedures under the [Administrative Procedure Act]”), *aff'd on other grounds*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (“*Bowen*”); 5 U.S.C. § 551(4) (Administrative Procedure Act (“APA”) defines a “rule” as “an agency statement of general and particular applicability and *future effect*”) (emphasis added); *Bowen*, 488 U.S. at 476 (Scalia, J., concurring) (rules promulgated under APA notice and comment procedures “have legal consequences only for the future”).

¹⁶⁷ See *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (where the retroactive change involves “substitution of new law for old law that was reasonably clear . . . it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule”) (internal quotation marks and citations omitted).

II.

THE BOARD MUST ALLOW WFA/BASIN TO REVISE THEIR SARR AND UPDATE THE RECORD IF IT RETROACTIVELY APPLIES ALTERNATIVE ATC

If the Board does decide to retroactively apply Alternative ATC (which it should not), it must accord WFA/Basin basic administrative due process. Due process requires that WFA/Basin be permitted to revise their SARR and to update the now stale administrative record. Otherwise, the Board will unfairly wipe out most of WFA/Basin's rate relief and manifestly reach the wrong maximum rate answer in this case.

A. WFA/Basin's Revised SARR Does Not Work Properly Using Alternative ATC

WFA/Basin's Revised SARR was designed to obtain their best case rate relief under MMM using Modified ATC to allocate cross-over traffic revenues. However, straight retroactive application of Alternative ATC to WFA/Basin's Revised SARR as developed on the current record wipes out most of WFA/Basin's rate relief.

This can be demonstrated first on an R/VC ratio basis:

Table 1

MMM Revenue to Variable Cost Ratios – Current Record

<u>Period</u>	<u>MMM R/VC With Modified ATC Revenues</u>	<u>MMM R/VC With Alternative ATC Revenues</u>	<u>Percentage Point Increase in MMM R/VC -- Alternative ATC versus Modified ATC</u>
(1)	(2)	(3)	(4)
4Q04	241%	292%	51
2005	247%	347%	100
2006	230%	293%	63
2007	238%	314%	76
2008	244%	331%	87
2009	241%	327%	86
2010	245%	339%	94
2011	246%	340%	94
2012	248%	343%	95
2013	250%	348%	98
2014	255%	360%	105
2015	268%	402%	134
2016	269%	401%	132
2017	265%	386%	121
2018	262%	370%	108
2019	261%	365%	104
2020	261%	360%	99
2021	260%	348%	88
2022	261%	349%	88
2023	260%	343%	83
1Q-3Q2024	258%	327%	69
Average	253%	347%	94

As shown in Table 1 retroactive application of Alternative ATC on the current record increases the prescribed R/VC ratios by approximately 94 percentage points. *See Crowley V.S.* at 6.

The impact is even more graphic on a total payment basis:

Table 2

Difference in Payments Under 2009 Rate Relief Orders and Alternative ATC

	<u>Time Period</u>	<u>Modified ATC</u>	<u>Alternative ATC</u>	<u>Difference</u> ^{1/}
	(1)	(2)	(3)	(4)
1.	4Q04	\$8,030,374	\$9,729,748	\$1,699,374
2.	2005	\$32,652,113	\$45,871,592	\$13,219,479
3.	2006	\$36,777,083	\$46,850,806	\$10,073,723
4.	2007	\$41,018,999	\$54,117,502	\$13,098,504
5.	2008	\$46,376,511	\$62,912,398	\$16,535,887
6.	2009	\$34,733,886	\$47,128,550	\$12,394,665
7.	2010	\$38,749,727	\$53,616,969	\$14,867,242
8.	2011	\$41,111,580	\$56,820,883	\$15,709,303
9.	2012	\$38,150,132	\$52,764,093	\$14,613,962
10.	2013	\$37,551,543	\$52,271,747	\$14,720,205
11.	1/1/2014 – 4/23/14	<u>\$12,858,208</u>	<u>\$18,152,764</u>	<u>\$5,294,556</u>
12.	Subtotal ^{2/}	\$368,010,154	\$500,237,053	\$132,226,899
13.	4/24/14 – 12/31/14	\$28,674,942	\$40,482,271	\$11,807,329
14.	2015	\$46,202,222	\$69,303,333	\$23,101,111
15.	2016	\$44,040,041	\$65,650,768	\$21,610,727
16.	2017	\$45,338,211	\$66,039,809	\$20,701,598
17.	2018	\$47,150,446	\$66,586,507	\$19,436,062
18.	2019	\$48,175,334	\$67,371,636	\$19,196,302
19.	2020	\$49,331,857	\$68,043,940	\$18,712,084
20.	2021	\$50,010,028	\$66,936,499	\$16,926,471
21.	2022	\$51,500,680	\$68,864,895	\$17,364,214
22.	2023	\$52,452,211	\$69,196,570	\$16,744,360
23.	1Q2024 - 3Q2024	<u>\$39,546,004</u>	<u>\$50,122,261</u>	<u>\$10,576,257</u>
24.	Subtotal ^{3/}	\$502,421,975	\$698,598,488	\$196,176,513
25.	Total ^{4/}	\$870,432,129	\$1,198,835,540	\$328,403,411

^{1/} Column (3) – Column (2).

^{2/} Sum of Lines 1 through 11.

^{3/} Sum of Lines 13 through 23.

^{4/} Line 12 + Line 24.

As shown in Table 2, retroactive application of Alternative ATC on the current record would require WFA/Basin to repay BNSF approximately \$132 million for

undercharges incurred through April 2014,¹⁶⁸ and increase their total rate payments by approximately \$328 million over the 20-year prescription period. *See Crowley V.S.* at 8.

B. Due Process Requires that WFA/Basin Be Permitted To Revise Their SARR

The first reason why retroactive application of Alternative ATC to WFA/Basin's Revised SARR violates WFA/Basin's due process rights is that WFA/Basin did not design their Revised SARR using Alternative ATC. They designed it using Modified ATC. Had WFA/Basin known that the Board was going to use Alternative ATC, they would have designed a different SARR. *See Crowley V.S.* at 10-17.

If the Board decides to retroactively apply Alternative ATC, the situation WFA/Basin would find themselves facing today is no different than the one they found themselves facing in 2007. At that time, the Board was proposing to retroactively apply Modified ATC to WFA/Basin's Original SARR, a SARR designed using MSP cross-over traffic revenues. Retroactive application of Modified ATC to WFA's Original SARR would have wiped out all of WFA/Basin's rate relief. WFA/Basin argued that retroactive application of Modified ATC violated WFA/Basin's due process rights because WFA/Basin would have designed a different SARR using Modified ATC.

The Board agreed. It held that "by our having changed the substantive standards, WFA had not had a fair chance to make its case [because] [i]t had designed its

¹⁶⁸ Under the parties' March 2009 Payment Agreement, WFA/Basin are also obligated to pay an agreed upon amount of interest on principal amounts ultimately found to be due.

case under one standard, only to have it judged under another.”¹⁶⁹ The Board proceeded to follow “well-established legal precedent” by “provid[ing] WFA an opportunity to redesign pertinent aspects of its case and submit revised evidence under the new legal standards.”¹⁷⁰

The “well-established legal precedent” cited by the Board provides that when an agency “seeks to change a controlling standard of law and apply it retroactively in an adjudicatory setting, the party before the agency must be given notice and an opportunity to introduce evidence bearing on the new standard.” *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981).¹⁷¹ Stated more colloquially:

Due process and fair play do not permit us to say to (Petitioner): “Yes, you met all the requirements and standards about which we told you, but you did not meet the one about which we did not tell you. Therefore we deny your application.”¹⁷²

This well-established precedent is grounded in the constitutional guarantee of due process. *See id.*, 654 F.2d at 835 (“Supreme Court cases suggest that such notice and opportunity to meet the new standard is a constitutional imperative of due

¹⁶⁹ *February 2009 Decision*, slip op. at 9.

¹⁷⁰ *Id.*

¹⁷¹ *Accord BNSF 2008*, 526 F.3d at 784 (citing standard); *Port Terminal R.R. Ass’n v. United States*, 551 F.2d 1336, 1345 (5th Cir. 1977) (reversing ICC decision that retroactively applied new “costing methods” without first giving the parties “an opportunity to present the merits of their case” under the new standards).

¹⁷² *Hatch v. FERC*, 654 F.2d at 835.

process”).¹⁷³ Fundamental principles of due process also require that “where rules have changed in the middle of the case litigants must have a *meaningful* opportunity to submit conforming proof.”¹⁷⁴ What is a meaningful opportunity depends on the facts of each case, but the Board correctly recognized in its *September 2007 Decision*, its *February 2008 Decision* and its *February 2009 Decision*, when cross-over traffic revenue allocation rules are changed in this case, the meaningful opportunity encompasses SARR revisions.

The Board has reached similar results in other SAC cases. *See AEP Tex. N. Co. v. BNSF Ry.*, Docket No. 41191 (Sub-No.1), slip op. at 23 (STB served Sept. 10, 2007) (complainant shipper may revise SARR “to reflect the new [cross-over traffic] revenue allocation method”); *DuPont*, slip op. at 56 (Chairman Elliott concurring) (complainant shipper may petition to revise SARR if it would have changed its SAC case “had it known that Alternative ATC would be adopted and applied in its case”); *Otter Tail Power Co. v. Burlington N. & S.F. Ry.*, Docket No. 42071, slip op. at 1 (STB served Nov. 21, 2003) (complainant shipper may revise SARR “to conform with the Board’s method for allocating cross-over traffic revenues....”); *accord Arizona Elec. Coop., Inc.*

¹⁷³ It also implements the basic rule, set forth in the APA, “that a person involved in an agency adjudicatory hearing ‘shall be timely informed of . . . (the) law asserted.’” *Id.* (quoting 5 U.S.C § 554(b)(3)).

¹⁷⁴ *BNSF 2010*, 604 F.3d at 607 (emphasis added and internal quotation marks omitted); *accord Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner”) (internal quotation marks and citation omitted); *Kessler v. STB*, 635 F.3d 1, 6 (D.C. Cir. 2011) (same); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (“The Due Process Clause grants the aggrieved party the opportunity to present its case and have its merits fairly judged”).

v. Burlington N. & S.F. Ry., Docket No. 42058, slip op. at 6 (STB served Nov. 19, 2003) (complainant shipper may revise SARR based on “expectations that may have been created” by the Board in an earlier decision concerning what SAC standards were applicable).¹⁷⁵

C. Due Process Also Requires That WFA/Basin Be Permitted to Update The Stale Administrative Record

1. Actual Revenues Must Be Substituted for the Wildly Understated Forecasted Revenues

The Board’s Alternative ATC procedure develops on-SARR revenues by multiplying the on-SARR ATC revenue percentage by the defendant carrier’s forecasted real-world revenues for the entire through movement. The through movement revenues in the current record consist principally of BNSF’s internally forecasted real-world through movement revenues for a base year – 4Q04 to 3Q05 – which were then forecasted over the remaining years in the 20-year DCF period. *See Crowley V.S.* at 17-18.

The Board cannot obtain a fair or accurate revenue allocation if it applies Alternative ATC to the forecasted BNSF revenues because the forecasted revenues are

¹⁷⁵ The Board usually does not permit shippers to revise SARRs in cases where Board has not “change[d] a controlling standard of law.” *See PPL Montana, LLC v. Burlington N. & Santa Fe Ry.*, 6 S.T.B. 752, 757 (2003). However, that principle has no application here because a change in SARR cross-over traffic revenue allocation methods is a change in a controlling standard of law. *See February 2009 Decision*, slip op. at 9 (change in cross-over traffic revenue allocation methods involves a change in controlling “legal standards”); *Rate Regulation Reforms*, slip op. at 30 (holding that Board’s decision to replace Modified ATC with Alternative ATC was a “change [in] the revenue allocation approach used to allocate revenue from cross-over traffic”).

substantially lower than BNSF's actual revenues on the cross-over traffic in the forecast years. The reason for this is quite simple: the forecasts did not capture the substantial run-up in PRB coal transportation rates that occurred between 2004 to 2013.

The cross-over traffic shippers in WFA/Basin's Original SARR traffic group, and its Revised SARR traffic group, consisted entirely of BNSF unit train PRB coal shippers, the vast majority of whom were colloquially referred to as "legacy" PRB shippers.¹⁷⁶ Legacy PRB shippers, generally speaking, were utilities that had entered into PRB coal transportation contracts with BNSF prior to the large price run-up in BNSF's PRB coal transportation rates over the last decade.

When these legacy contracts expired, BNSF began imposing significant base price increases along with new rate adjustment provisions and new fuel surcharges, the combination of which produced skyrocketing PRB coal transportation rates and huge increases in revenues for BNSF. There is no dispute that this unprecedented run-up occurred, as all who were involved, or who have studied the market, acknowledge what happened:

- PRB coal shippers have publicly testified in proceedings before this Board that after 2003, they were hit uniformly with rate increases up to 300% following the expiration of their contracts.¹⁷⁷ They also testified that they

¹⁷⁶ See Crowley V.S. at 17.

¹⁷⁷ See *Competition In the R.R. Indus.*, Ex Parte No. 705, Comments of the Western Coal Traffic League, Verified Statement of Duane L. Richards at 16 (Apr. 12, 2011) ("WCTL Richards V.S."); Joint Initial Comments of Omaha Pub. Power Dist., *et al.*, at 8, 12, 14 (Apr. 12, 2011) ("OPPD Comments"); Tex. Mun. Power Agency Letter Comments at 1 (Apr. 12, 2011) ("TMPA Comments"); Comments of Ameren Corp. at 4-5 (Apr. 12, 2011).

were subjected to new fuel surcharges and non-productivity adjusted rate adjustment procedures.¹⁷⁸

- BNSF’s top managers have candidly admitted that they imposed significant price increases on their PRB shippers when their legacy contracts expired. For example, BNSF’s chief marketing officer acknowledged in a verified statement submitted to this agency that as legacy contracts expired, “some shippers faced significantly higher rates than they had enjoyed under their old contracts....”¹⁷⁹

- Similarly, BNSF issued internal directives in early 2004 stating that “[a]ll new and renewing contract negotiations should have a fuel surcharge as the goal.”¹⁸⁰ And any “contracts requiring the chief executive officer’s signature, ‘but excluding full fuel surcharge provisions *will not be signed.*’”¹⁸¹

- The Senate Commerce Committee prepared a report in 2010 referencing the “pricing renaissance”¹⁸² in the rail industry since 2004, and cited an industry research report finding that since 2004, increases on legacy coal transportation contracts could exceed “100%.”¹⁸³

¹⁷⁸ WCTL Richards V.S. at 18; OPPD Comments at 17-18; TMPA Comments at 1.

¹⁷⁹ *Competition in the R.R. Indus.*, Ex Parte No. 705, Reply Comments of BNSF Ry. Co., Verified Statement of John P. Lanigan at 11 (May 27, 2011).

¹⁸⁰ *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 287 F.R.D. 1, 51 (D.D.C. 2012) (quoting internal BNSF pricing guideline), *vacated and remanded on other grounds* 725 F.3d 244 (D.C. Cir. 2013).

¹⁸¹ *Id.*, 287 F.R.D. at 51 (quoting internal BNSF email) (emphasis added by the court).

¹⁸² Committee on Commerce, Science, and Transportation, Office of Oversight & Investigations Majority Staff, *The Current Financial State of the Class I Freight Rail Industry*, at 8 (Sept. 15, 2010) (internal quotation marks and citation omitted), *available at* http://www.mgfa.org/userfiles/file/Railroad%20Financial%20Report%209_15_10.pdf.

¹⁸³ *Id.* at 10.

- The Christensen Study Update¹⁸⁴ prepared for the STB in 2010 found that coal revenues per revenue ton mile “increased particularly rapidly in 2008” – a “22.1%” increase over 2007 levels, a result the study authors found “consistent with reports of large rate increases for some coal shippers as long-term ‘legacy’ contracts expired.”¹⁸⁵

The traffic statistics BNSF files with the Board confirm this run-up.

Between 2004 and 2013, BNSF’s coal revenues jumped from \$2.4 billion to \$4.9 billion and its average revenue per ton increased by 95%. *See* Crowley V.S. at 18. These increases, however, were not captured by the record forecasts in this case. For example, the Board forecasted only { }% increase in the Revised SARR’ cross-over traffic revenues per ton between 2004 and 2013. *Id.* at 18. Simply stated, the forecasts did not anticipate the massive run-up in PRB coal transportation rates that actually occurred.

Most of the PRB shippers in WFA/Basin’s two traffic groups (the original group from its 2005 evidence and the revised group from its 2008 evidence) had legacy contracts that were in effect in 2005 and which expired after 2005.¹⁸⁶ These are the very same shippers who saw their rates increase, on average, by 95% per ton. The bottom line is clear: application of Alternative ATC will not produce anything resembling an accurate, or fair, allocation of cross-over traffic revenues in this case if its applied to forecasted revenues that clearly – and grossly – understate BNSF’s actual through revenues.

¹⁸⁴ Laurits R. Christensen Assocs., Inc., *An Update to The Study of Competition In the U.S. Freight Railroad Industry* (Jan. 2010) (“Christensen Study Update”), available at http://www.lrca.com/projects/railroadstudy/Report_Update_2010_01.pdf.

¹⁸⁵ *Id.* at 6-2.

¹⁸⁶ Crowley V.S. at 19.

It is fundamentally unfair to retroactively allocate through revenues based on errant forecasts developed in 2005/2006. The fair process, and one that comports with WFA/Basin's due process rights, is one where the new revenue allocation methodology adopted in 2013 is applied to accurate through revenue data compiled at least through 2013. This fair process comports with governing agency precedent.

In *Nevada Power*, the complainant shipper filed two complaints, one in 1978 and a second in 1980. Following court remands in each case, and delays associated with the ICC's development of SAC guidelines, the ICC issued a decision in 1989 reopening the record and, among other things, directed the defendant carriers to produce actual revenue data for historic time periods (1978 to 1988):

we direct the carriers to provide such data as necessary to determine the traffic which may be diverted to the stand-alone facility and the revenues which may be earned from that traffic. The stream of actual earnings from 1978 to 1988 should be developed for this traffic.¹⁸⁷

The ICC emphasized that this directive “is consistent with the Data Integrity Principle established by the Railroad Accounting Principles Board (RAPB).”¹⁸⁸ The Data Integrity Principle requires that data used in SAC cases be “valid, accurate, and verifiable.”¹⁸⁹ The ICC subsequently calculated SARR revenues for the 1979-1989 time periods using the actual revenue data the defendant carriers produced in discovery.¹⁹⁰

¹⁸⁷ *Nevada Power*, 6 I.C.C.2d at 17 (footnote omitted).

¹⁸⁸ *Id.*, 6 I.C.C.2d at 17 n.42.

¹⁸⁹ Railroad Accounting Principles Board, *Railroad Accounting Principles Final Report* (Vol. 2—Detailed Report) at 21 (Sept. 1, 1987).

¹⁹⁰ *Nevada Power*, 10 I.C.C.2d at 271.

In *Coal Trading*,¹⁹¹ the complainant shippers filed their cases at the ICC in 1981. The ICC issued an interim SAC decision in 1990. The ICC's interim decision developed SAC revenues using eight years of actual revenue data:

Estimates of annual revenues are important in a multiple-period analysis since they must be compared with the calculated revenue requirements in the cash flow model to determine whether earnings are excessive. In the instant proceeding, the record contains historical data for 1979 through 1986, and data on tonnages and revenues for 1987 and 1988 should now be available. While the additional two years of data would increase the accuracy of the SAC calculations, the 1979-1986 data provide sufficient information to permit us to judge the reasonableness of past pricing practices.¹⁹²

In *McCarty Farms*, the complainant shippers initiated their case in 1978.

Following case delays, and a court remand, the ICC reopened the record in 1993 to permit discovery, among other things, of actual revenue data needed for a SAC analysis.

The defendant carrier produced actual revenue data for years 1981 to 1993, and the Board used this data to calculate SARR revenues for those years:

We start our analysis by measuring the revenues that would be available to the [SARR] under BN's rate structure. The parties estimate the tonnages and revenues that would be available to the [SARR] based on actual data for the years 1981 to 1993 . . . and forecast data for 1994 to 1998.¹⁹³

¹⁹¹ *Coal Trading Corp. v. Baltimore & Ohio R.R.*, 6 I.C.C.2d 361 (1990).

¹⁹² *Id.* at 412.

¹⁹³ *McCarty Farms, Inc.*, 2 S.T.B. at 469. The Board noted that “[b]ecause BN no longer has traffic data for 1979 and 1980, estimates were necessary for those years.” *Id.*, 2 S.T.B. at 469 n.25.

In *APS*,¹⁹⁴ the STB prescribed maximum SAC rates in 1997.¹⁹⁵ The Board reopened the case in 2003 due to materially changed traffic circumstances. On reopening, the Board permitted the complainant shipper to engage in discovery to obtain actual revenues to substitute for previously forecasted revenues.¹⁹⁶ In its final decision on reopening, the Board used this actual data to develop SARR revenues “for what is now the historical period (1994-2002)” and used new revenue forecasts “for the new forecast period (2003-2013).”¹⁹⁷

In *TPI*,¹⁹⁸ the complainant shipper filed its SAC case in May 2010. The shipper initially obtained discovery of revenue data through June 2010.¹⁹⁹ The case was subsequently bifurcated, and following the Board’s decision in August 2013 addressing market dominance issues, the Board issued an order²⁰⁰ acknowledging the parties’ agreement that the defendant carrier would supplement its prior production of actual revenue data for three additional years “through 2012 and such part of 2013 for which data is available.”²⁰¹

¹⁹⁴ *Arizona Pub. Serv. Co. v. Burlington N. & Santa Fe Ry.*, Docket No. 41185 (“*APS*”).

¹⁹⁵ *APS*, 2 S.T.B. 367 (1997), *as revised*, 3 S.T.B. 70 (1998).

¹⁹⁶ *APS*, slip op. at 5-6 (STB served May 12, 2003).

¹⁹⁷ *APS*, slip op. at 4-8 (STB served Dec. 13, 2004).

¹⁹⁸ *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, Docket No. 42121 (“*TPI*”).

¹⁹⁹ *TPI*, slip op. at 1 (STB served June 23, 2010).

²⁰⁰ *TPI* (STB served July 19, 2013).

²⁰¹ *TPI*, Motion for Partial Dismissal of Complainant’s Third Motion to Compel at 1 (filed July 12, 2013).

Substituting actual, for forecasted, revenue calculations is also consistent with the Board's general views that use of actual traffic and revenue data is preferable to the use of forecast data in SAC cases.

[I]n this case as in past cases, traffic data from prior years is clearly ascertainable. Therefore, in all future cases, the Board will seek to have the parties update the record so that more recent traffic data is available to the Board. An updated record will simplify the rate case process by limiting the amount of forecasting required.²⁰²

WFA/Basin can obtain the information needed to accurately calculate SARR revenues through discovery of BNSF's traffic, revenue, and contract/pricing authority databases. Most, if not all, of this information is available in electronic databases, and can be readily collected and produced by BNSF. *See* Crowley V.S. at 22.

2. Forecasted SAC Is Also Inaccurate

The Board developed SARR operating costs in this case for a base period (4Q04) and SARR construction costs for the construction period (2Q02 to 3Q04). The Board then used a series of forecasts, most of which were prepared in the 2004 to 2006 time period, to project SARR operating expenses and SARR capital recovery costs over the 20-year period encompassed by its DCF model (4Q04 to 3Q24).

The forecasts the Board used in its DCF model have not closely tracked the actual forecasted values. For example, the Board forecasted that SARR operating expenses would increase by { }% annually. However, when actual index values used

²⁰² *Duke Energy Corp. v. CSX Transp., Inc.*, 7 S.T.B. 402, 446 (2004).

in the forecast are substituted for the forecasted values, the operating expenses increase by { }% annually.²⁰³

If Alternative ATC is to be applied, it cannot produce accurate SAC results unless the forecasted SARR costs are updated as well. The data needed to update the forecasts the Board used is publicly available. In addition, discovery may reveal that some of the base year operating unit costs can be accurately updated using actual unit costs, as opposed to forecasted costs. *See Crowley V.S.* at 22.

3. Forecasted MMM Model Inputs Are Wrong

WFA/Basin can obtain a fair result, consistent with basic principles of administrative due process, only if updated SARR revenues, and SAC costs, are properly inputted into the MMM model.

The MMM model in the current record uses 2004 BNSF URCS Phase III variable costs, which are indexed using the RCAF-A to develop variable costs for each subsequent year through 2024. The indexed URCS Phase III variable costs used in the MMM model substantially understate BNSF's actual URCS Phase III variable costs during the 2005 to 2012 time frame. *See Crowley V.S.* at 20-21.

To develop accurate and fair maximum MMM R/VC ratios, revised and accurately calculated SARR revenues for each SARR traffic group movement must be compared with accurately calculated variable costs for each movement in order to develop accurate R/VC ratios. This is not a complicated exercise. The Board has already

²⁰³ *See Crowley V.S.* workpaper "Exhibit_III-H-3 Reb w updated inf idx.xls."

published BNSF URCS data for 2005-2012 and the limited number of traffic and operating inputs for each move for each year will be contained in the BNSF data WFA/Basin need to calculate updated SARR revenues.

WFA/Basin's updating approach complies with the Board's holding in the *July 2009 Decision* that the variable costs in the MMM model could not be updated unless SARR operating costs were updated as well.²⁰⁴ WFA/Basin's approach would do just that: all pertinent SAC inputs, including operating costs, would be updated to produce fair and accurate results using Alternative ATC to allocate cross-over traffic revenues.

D. WFA/Basin Can Demonstrate Their Entitlement To Substantial Rate Relief For A Third Time If Afforded Fair Process

WFA/Basin are confident that if the Board does decide to retroactively apply Alternative ATC in this case, they can prove their entitlement to substantial rate relief for a third time if the Board permits WFA/Basin to revise their SARR and update the record in a manner that comports with their due process rights.

If the Board decides to retroactively apply Alternative ATC, WFA/Basin request that the Board enter an order containing the following instructions to the parties: (1) WFA/Basin may revise their SARR configuration, and SARR traffic group, to address Alternative ATC; (2) WFA/Basin may engage in discovery to obtain updated SARR volume, revenue and cost inputs; (3) the parties may not, on reopening, reargue other SAC issues the Board previously decided in this case; (4) discovery may commence

²⁰⁴ *Id.*, slip op. at 8 n.8.

immediately upon the issuance of the Board's order; and (5) the parties will meet, confer and provide the Board with a proposed procedural schedule.

These proposed instructions protect WFA/Basin's due process rights, conform to the procedures the Board followed in 2007, and recognize the record in this case – much of which is over a decade old – must be updated.

CONCLUSION

WFA/Basin respectfully request that the Board proceed on remand in accordance with these Initial Comments.

Respectfully submitted,

WESTERN FUELS ASSOCIATION,
INC. and BASIN ELECTRIC POWER
COOPERATIVE, INC.

OF COUNSEL:

Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

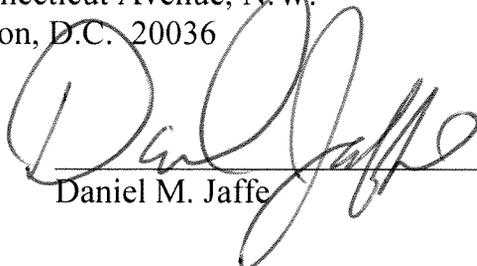
Dated: June 17, 2014

By: John H. LeSeur 
Christopher A. Mills
Peter A. Pfohl
Daniel M. Jaffe
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170
Attorneys for Complainants

CERTIFICATE OF SERVICE

I hereby certify that this 17th day of June 2014, I served copies of the foregoing Petition by hand delivery on designated outside counsel for BNSF, as follows:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036



Daniel M. Jaffe

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**WESTERN FUELS ASSOCIATION, INC.
And BASIN ELECTRIC POWER
COOPERATIVE, INC.**

Complainants,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42088

**REMAND
VERIFIED STATEMENT
OF
THOMAS D. CROWLEY
PRESIDENT
L. E. PEABODY & ASSOCIATES, INC.**

**ON BEHALF OF
WESTERN FUELS ASSOCIATION, INC.
AND BASIN ELECTRIC POWER
COOPERATIVE, INC.**

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LIST OF EXHIBITS

<u>Exhibit No.</u>	<u>Title</u>
(1)	(2)
1	Thomas D. Crowley Statement of Qualifications
2	Major SAC Components
3	Schematic of Original WFA/Basin SARR
4	Schematic of Revised WFA/Basin SARR
5	2009 LRR DCF Model Inflation Indexes

I. INTRODUCTION

I am Thomas D. Crowley, an economist and the President of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, transportation, marketing, financial, accounting and fuel supply problems. I have spent most of my consulting career of over forty (40) years evaluating fuel supply issues and railroad operations, including railroad costs, prices, financing, capacity and equipment planning issues. My assignments in these matters were commissioned by railroads, producers, shippers of different commodities, and government departments and agencies. I have previously presented evidence in this proceeding, including evidence on the calculation of stand-alone railroad revenues and revenue allocation methods. A copy of my credentials is included as Exhibit___(TDC-1) to this verified statement (“VS”).

I have been requested by Counsel for Western Fuels Association, Inc. and Basin Electric Power Cooperative (collectively “WFA/Basin”) to address three issues. First, I have been asked to quantify the impact on WFA/Basin’s current rate prescription of retroactively applying the Alternative Average Total Cost (“Alternative ATC”) methodology adopted by the Surface Transportation Board (“STB” or “Board”) in 2013¹ to allocate revenues to cross-over traffic shippers included in the revised Stand-Alone Railroad (“Revised SARR”) traffic group accepted by the Board in its rate relief orders served in this proceeding in 2009 (“2009 Rate Relief Orders”).² Second, I have been asked to address whether any such retroactive application would produce an accurate or reasonable regulatory outcome in this case. Third, I have been asked to address what

¹ STB Ex Parte No. 715, *Rate Regulation Reforms*, Served July 25, 2012 (“EP 715”).

² STB Docket No. 42088, *Western Fuels Association, Inc. and Basin Electric Power Cooperative v. BNSF Railway Company*, served February 18, 2009, June 5, 2009 and July 27, 2009 (“2009 Rate Relief Orders”).

actions the Board must take to facilitate an even-handed resolution of this case if it decides to retroactively apply Alternative ATC to allocate cross-over traffic revenues.

I conclude that retroactive application of Alternative ATC on the current record will eliminate most of WFA/Basin's rate relief. I also conclude that elimination of most of this rate relief is not a fair, accurate or reasonable outcome in this case: (1) because WFA/Basin did not design their Revised SARR to perfect rate relief using Alternative ATC; (2) because forecasted BNSF Railway Company ("BNSF") coal revenues in the current record to which Alternative ATC would be applied do not accurately reflect the huge run-up in BNSF's actual revenues that occurred after the forecasts were made³; and (3) because other forecasts used in the Discounted Cash Flow ("DCF") and Maximum Mark-up Methodology ("MMM") models the Board relied on in its *2009 Rate Relief Orders* have produced materially inaccurate stand-alone costs ("SAC") and MMM results. Finally, I conclude that if the Board decides to retroactively apply Alternative ATC in this case, a fair, accurate and reasonable outcome can be reached in this case only if: (1) WFA/Basin is given the opportunity to revise its SARR configuration and SARR traffic group using Alternative ATC to allocate cross-over traffic revenues; and (2) WFA/Basin is given the opportunity to update the record with accurate volume, revenue and cost data.⁴

My VS is discussed further below under the following topical headings:

- I. Results of Retroactive Application of Alternative ATC on the Current Record
- II. Retroactive Application of Alternative ATC on the Current Record Produces Inaccurate and Biased Results

³ The run-up was caused by aggressive re-pricing after contract termination and by aggressive implementation of BNSF's fuel surcharge program.

⁴ BNSF may argue that actual volumes shipped were significantly lower than the projected volumes. Although this may be true, the aggressive pricing increases more than made up for the reduced volumes.

III. If Alternative ATC is Retroactively Applied In This Case, Accurate and Reasonable Maximum Rates Can Be Determined Only If WFA/Basin Is Given the Opportunity to Revise its Revised SARR and Update the State Record

II. RESULTS OF RETROACTIVE APPLICATION OF ALTERNATIVE ATC ON THE CURRENT RECORD

The Board adopted its Modified ATC formula for allocating revenues on cross-over traffic in 2007.⁵ It contains two steps. First, revenue up to the equivalent of total through movement variable costs are allocated between the SARR and the residual incumbent based on the ratio of on-SARR-to-off-SARR segment variable costs.⁶ Second, any remaining contribution is allocated based on the ratio of on-SARR-to-off-SARR total costs.⁷

The Board adopted its Alternative ATC formula for allocating cross-over traffic revenues in 2013.⁸ Alternative ATC contains a different two step cross-over traffic revenue allocation procedure than Modified ATC. Under the first step in Alternative ATC, the through movement variable costs are calculated.⁹ If the through movement revenues are less than or equal to the through movement variable costs, then the through movement revenues are allocated to the on-SARR and off-SARR segments based on the ratio of on-SARR-to-off-SARR variable costs. Second if the through movement revenues are greater than the through movement variable costs, then the through revenues are allocated to the SARR and the residual incumbent based on the ratio of total (variable plus fixed) costs for the two segment components (on-SARR and off-SARR), unless this allocation results in revenue allocations to the on-SARR or the off-SARR segment that

⁵ See *Western Fuels Ass'n, Inc. v. BNSF Railway*, Docket No. 42088 (STB served Sept. 10, 2007) at 14.

⁶ Variable costs are developed using the STB's unadjusted Phase III costing program that requires nine (9) inputs identifying the characteristics of the individual movements.

⁷ Contribution is defined as revenue in excess of variable costs and total cost for the on-SARR and off-SARR segments is the sum of the variable costs for each segment plus an allocated share of fixed costs.

⁸ See *Rail Rate Reforms*, Docket No. EP 715 (STB served July 18, 2013) at 30.

⁹ Variable costs are developed using the STB's unadjusted Phase III costing program that requires nine (9) inputs identifying the characteristics of the individual movements.

are insufficient to cover the segments' variable costs in which case revenues are reallocated to ensure the variable costs of both segments are covered.

Retroactive application of Alternative ATC to WFA/Basin's existing SARR, and existing SARR traffic group, reduces WFA's SARR revenues in a manner that has severe adverse consequences for WFA/Basin. Table 1 below compares the final MMM model R/VC ratios the Board prescribed in its *2009 Rate Relief Orders* using Modified ATC (Column (2)) to the MMM model R/VC ratios that would result from retroactive application of Alternative ATC on the current record (Column (3)).

Table 1
MMM Revenue to Variable Cost Ratios – Current Record

<u>Period</u>	<u>MMM R/VC With Modified ATC Revenues</u>	<u>MMM R/VC With Alternative ATC Revenues</u>	<u>Percentage Point Increase in MMM R/VC -- Alternative ATC versus Modified ATC 1/</u>
(1)	(2)	(3)	(4)
1. 4Q04	241%	292%	51
2. 2005	247%	347%	100
3. 2006	230%	293%	63
4. 2007	238%	314%	76
5. 2008	244%	331%	87
6. 2009	241%	327%	86
7. 2010	245%	339%	94
8. 2011	246%	340%	94
9. 2012	248%	343%	95
10. 2013	250%	348%	98
11. 2014	255%	360%	105
12. 2015	268%	402%	134
13. 2016	269%	401%	132
14. 2017	265%	386%	121
15. 2018	262%	370%	108
16. 2019	261%	365%	104
17. 2020	261%	360%	99
18. 2021	260%	348%	88
19. 2022	261%	349%	88
20. 2023	260%	343%	83
21. 1Q-3Q2024	<u>258%</u>	<u>327%</u>	<u>69</u>
22. Average 2/	253%	347%	94

1/ Column (3) – Column (2).

2/ Simple average of Lines 1 through 21.

As shown in Table 1 above, retroactively applying the Alternative ATC approach to the system and traffic group WFA/Basin designed to achieve optimum results under the Modified ATC approach results in a significant and punitive escalation in MMM model R/VC ratios that averages 94 percentage points over the 20 year prescription period.

Table 2 below compares the payments WFA/Basin has made, or that it is projected to make, to BNSF under the maximum R/VC ratios prescribed by the Board in its *2009 Rate Relief Orders* (Column (2)), and the payments WFA/Basin would have made or will have to make if the maximum R/VC ratios are adjusted by retroactively applying Alternative ATC on the current record without updating other facets of the analyses (Column (3)).

Table 2
Difference in Payments Under 2009 Rate Relief Orders and Alternative ATC

<u>Time Period</u>	<u>Modified ATC</u>	<u>Alternative ATC</u>	<u>Difference 1/</u>
(1)	(2)	(3)	(4)
1. 4Q04	\$8,030,374	\$9,729,748	\$1,699,374
2. 2005	\$32,652,113	\$45,871,592	\$13,219,479
3. 2006	\$36,777,083	\$46,850,806	\$10,073,723
4. 2007	\$41,018,999	\$54,117,502	\$13,098,504
5. 2008	\$46,376,511	\$62,912,398	\$16,535,887
6. 2009	\$34,733,886	\$47,128,550	\$12,394,665
7. 2010	\$38,749,727	\$53,616,969	\$14,867,242
8. 2011	\$41,111,580	\$56,820,883	\$15,709,303
9. 2012	\$38,150,132	\$52,764,093	\$14,613,962
10. 2013	\$37,551,543	\$52,271,747	\$14,720,205
11. 1/1/2014 – 4/23/14	<u>\$12,858,208</u>	<u>\$18,152,764</u>	<u>\$5,294,556</u>
12. Subtotal 2/	\$368,010,154	\$500,237,053	\$132,226,899
13. 4/24/14 – 12/31/14	\$28,674,942	\$40,482,271	\$11,807,329
14. 2015	\$46,202,222	\$69,303,333	\$23,101,111
15. 2016	\$44,040,041	\$65,650,768	\$21,610,727
16. 2017	\$45,338,211	\$66,039,809	\$20,701,598
17. 2018	\$47,150,446	\$66,586,507	\$19,436,062
18. 2019	\$48,175,334	\$67,371,636	\$19,196,302
19. 2020	\$49,331,857	\$68,043,940	\$18,712,084
20. 2021	\$50,010,028	\$66,936,499	\$16,926,471
21. 2022	\$51,500,680	\$68,864,895	\$17,364,214
22. 2023	\$52,452,211	\$69,196,570	\$16,744,360
23. 1Q2024 - 3Q2024	<u>\$39,546,004</u>	<u>\$50,122,261</u>	<u>\$10,576,257</u>
24. Subtotal 3/	\$502,421,975	\$698,598,488	\$196,176,513
25. Total 4/	\$870,432,129	\$1,198,835,540	\$328,403,411

1/ Column (3) – Column (2).
2/ Sum of Lines 1 through 11.
3/ Sum of Lines 13 through 23.
4/ Line 12 + Line 24.

As shown in Table 2, if Alternative ATC is applied to the existing record, WFA/Basin will owe BNSF principal sums totaling approximately \$132.2 million for

undercharges on shipments moving between 4Q04 and April 23, 2014¹⁰ and pay a projected additional \$196.2 million for shipments moving thereafter. All told, retroactive application of Alternative ATC on the current record will reduce WFA/Basin's rate relief by approximately \$328.4 million.¹¹

¹⁰ WFA/Basin and BNSF entered into an agreement in March of 2009 that requires each party to refund to the other any principal sums the Board may find due following final resolution of court appeals of the *2009 Rate Relief Orders*, plus an agreed-upon amount of interest.

¹¹ This amounts to roughly a 50% reduction in the rate relief the Board accorded WFA/Basin in its *2009 Rate Relief Orders*. See workpaper "AATC Impact Evaluation June 2014.xlsx at level "Prem Adj - Table 2 Support."

III. RETROACTIVE APPLICATION OF ALTERNATIVE ATC ON THE CURRENT RECORD PRODUCES INACCURATE AND BIASED RESULTS

Retroactive application of Alternative ATC on the current record to allocate cross-over traffic revenues in a vacuum produces inaccurate and unfair results for two reasons: (1) WFA/Basin designed their Revised SARR using Modified ATC per the Board's explicit instructions; and (2) the forecasted revenues and forecasted SAC¹² contained in the current record DCF analysis and the forecasted R/VC ratios¹³ contained in the current record MMM model are materially inaccurate for both now-historical and forecast periods.

A. WFA/BASIN DID NOT DESIGN ITS REVISED SARR USING ALTERNATIVE ATC

1. SARR Design Is A Complex, Iterative Process

The existing regulatory framework used by the STB to decide major rail rate disputes has evolved from the general standards for judging the reasonableness of rail freight rates originally promulgated three decades ago.¹⁴ This framework is based on a set of pricing principles known as "constrained market pricing" ("CMP").¹⁵ Under the principles of CMP, one of the three main constraints on the extent to which a carrier may charge differentially higher rates on captive traffic is called the SAC test.¹⁶ The primary

¹² Along with the underlying per-unit revenues and unit costs.

¹³ Along with the underlying revenues and variable costs.

¹⁴ See Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines, Nationwide*, 1 ICC. 2d 520 (1985) ("*Guidelines*").

¹⁵ CMP states that "a captive shipper should not be required to pay more than is necessary for the carrier involved to earn adequate revenues. Nor should it pay more than is necessary for efficient service. And a captive shipper should not bear the cost of any facilities or services from which it derives no benefit". See *Id* at pages 523-524.

¹⁶ The SAC test is made up of multiple analytical components aggregated together to produce a simulated competitive price that would result if the market for rail service were contestable and all unnecessary costs and barriers from entry or exit were removed from the analysis.

focus of the SAC test is the development of a hypothetical SARR that serves the traffic at issue if the rail industry were free from barriers to entry or exit.¹⁷

Over the past three decades, the SAC test has evolved into an intricate, expensive, and time-consuming process. Exhibit ____ (TDC-2) identifies eighteen distinct major SAC components (i.e., analytical modules) and the order in which they must be performed and validated (i.e., process flows). It illustrates the iterative and complicated nature of the work that must be completed to perform the SAC test.

As shown, these SAC components start with the development of the carrier's traffic, revenue, and train/car movement data (Module 0 – Data Prep) and identification of SARR traffic (Module 1 – ID SARR Traffic) and ends with the calculation of reparations (assuming that the challenged rate(s) are determined to be unreasonably high) (Module 17 – Reparations). The first and most fundamental task in the development of a SARR is the identification of the routes traversed by the issue and other traffic. After the routes of movement are identified, the complainant can begin testing combinations of traffic (and the revenues allocated to it) and physical plant that would provide end-to-end service for the issue traffic while moving other traffic that contributes revenues in excess of its collective expenses to determine the scenario in which the complainant's rate is as low as possible while the SARR covers all of its costs and earns a reasonable return on investment.

The development of a SARR is an iterative process wherein the complainant seeks to determine the lowest possible maximum rate under the STB's established framework. Different groups of traffic and different SARR configurations will determine

¹⁷ Under the SAC constraint, the rate at issue cannot be higher than what the SARR would need to charge to serve the complaining shipper while fully covering all of its costs, including a reasonable return on investment. This analysis produces a simulated competitive rate against which the challenged rate is judged. *See Guidelines* at 542.

the SARR revenues and expenses that produce different SAC results. Any STB decision or action that alters any of the methodologies used to develop the analyses underlying any individual SAC component shown in Exhibit ___(TDC-2) can alter the equilibrium of the efficient result that was produced by the extant methodology. A change in the result produced by any SAC component impacts the results produced by downstream SAC components, including the ultimate maximum rate determination.

**2. For this Iterative Process to Work As Intended
In this Case, WFA/Basin Must Know How the
Board Will Allocate Cross-Over Traffic
Revenues Before It Designs Its SARR**

**a. The Importance of
Revenue Allocation**

The SAC constraint is based on the premise that a captive shipper may have its rates established based on the lower costs of an alternate, stand-alone system in which the plant size and traffic base are designed to maximize the efficiencies and production economies.¹⁸ The STB's predecessor agency, the Interstate Commerce Commission ("ICC"), recognized when it adopted the SAC test in 1985 that the ability to group traffic of different shippers is essential to the workings of SAC as it allows a captive shipper to identify areas where production economies identify an efficient alternative system whose traffic is divertible to a hypothetical carrier.¹⁹ In subsequent decisions, both the ICC and the STB recognized that shippers have broad rights to group traffic, and configure their SARRs, in a manner that results in the best-case regulatory relief.²⁰

¹⁸ See *Guidelines* at 542.

¹⁹ *Id* at 544.

²⁰ See, e.g., STB Docket No. 42088, *Western Fuels Association, Inc. and Basin Electric Power Cooperative v. BNSF Railway Company*, service date February 18, 2009 at 7; STB Docket No. NOR 42113, *Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company*, service date November 22, 2011 at 9; STB Docket No. NOR 42057, *Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*, service date June 7, 2004 at 9; STB Docket No. NOR 42056, *Texas Municipal Power Agency v. The*

Shippers' broad grouping rights include selection of traffic that would be originated and terminated by the SARR (so-called local traffic), as well as traffic that the SARR would interchange with other railroads, and interchange with the residual incumbent carrier. This latter group of traffic is known as cross-over traffic, and, as indicated by the ICC in *Nevada Power*,²¹ it is a critical component of SAC presentations because excluding cross-over traffic would "... weaken the SAC test because it would deprive the SARR of the ability to take advantage of the same economies of scale, scope and density that the incumbents enjoy over the identical route of movement."²²

Just as important, the STB has also deemed cross-over traffic to be a critical simplifying tool for SAC analyses. As explained by the STB in *Xcel*²³ the use of cross-over traffic provides a reasonable measure of simplification that allows SAC presentations to be more manageable.²⁴ Cross-over traffic therefore allows a shipper to enjoy similar economies of scale, scope and density the incumbent carrier enjoys without requiring the replication of the incumbent's railroad system. As the STB observed in *Xcel*, without the use of cross-over traffic, the SARR could eventually grow to near the same size as the incumbent carrier's system, defeating the purpose of the SAC test.²⁵

Under the Board's SAC test, SARR revenues must exceed SAC on a present value basis, so an accurate calculation of SARR revenues is critical. The total SARR traffic group revenues are made up of: (1) all revenues from the issue traffic; (2) all

Burlington Northern and Santa Fe Railway Company, service date March 24, 2003 at 16 and n.28, citing *Guidelines*, 1 I.C.C.2d at 543-44.

²¹ STB Docket No. 37038, *Bituminous Coal – Hiawatha, Utah to Moapa, Nevada*, 10 ICC 2d (259) ("*Nevada Power*").

²² See *Nevada Power* at 265, n. 12.

²³ STB Docket No. 42057, *Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*, 7 STB (589) ("*Xcel*").

²⁴ See *Xcel* at 603.

²⁵ *Id* at 602 "The cascading analysis could result eventually in a complainant having to replicate almost all of BNSF's system."

revenues from traffic where the complete movement of the traffic is local to the SARR trackage; and (3) a share of revenues from traffic where the movement of the traffic is not local to the SARR (cross-over traffic). The share of revenue received by the SARR for cross-over traffic is dependent on the revenue allocation method applied to the total carrier revenues. The more cross-over traffic included in the SARR traffic group, the more important the revenue allocation method selected.

**b. WFA/Basin Designed Its Original SARR
Using MSP and Designed its Revised
SARR Using Modified ATC**

WFA/Basin modeled its Original SARR in 2004/2005, using the cross-over traffic revenue methodology the Board had used in its most recent SAC decisions: Modified Straight-Mileage Prorate (“MSP”). Relying on that methodology, WFA/Basin used the iterative process described above to develop its Original SARR, a SARR designed to obtain the lowest SAC rate relief using MSP, and the Board’s then current method for allocating SAC relief within the SARR traffic group.

WFA/Basin’s Original SARR traffic group included most of BNSF’s real world Powder River Basin, Wyoming (“PRB”) traffic moving over the PRB joint line south through Guernsey WY. The Original SARR provided service to the issue traffic as well as 47 other unit train shippers in cross-over traffic service. It was designed to move over 200 million tons of PRB coal per year²⁶ over 218 route miles.²⁷ A schematic of the Original SARR routing is included in my Exhibit ___(TDC-3). WFA/Basin’s evidence demonstrated that its Original SARR would produce substantial rate relief.

²⁶ STB Docket No. 42088, *Western Fuels Association, Inc. and Basin Electric Power Cooperative v. BNSF Railway Company*, served September 10, 2007, (“September 2007 Decision”) at 30.

²⁷ *Id* at 25.

Following the Board's decision to retroactively apply Modified ATC²⁸ in this case, WFA/Basin's Original SARR configuration and traffic group did not produce optimal (or any) relief: the Board found in its *September 2007 Decision* that SAC exceeded SARR revenues on the record developed to date, but also held that WFA/Basin should be permitted to revise its SARR within the framework established by its new rules, including the use of Modified ATC. WFA/Basin did so, and applying the same iterative process described above, developed its significantly Revised SARR.

This Revised SARR continued to consist primarily of cross-over traffic but with significant changes: there were fewer shippers in the traffic group, the total amount of tonnage transported annually was reduced, some internally re-routed traffic was added,²⁹ and one interchange move was added.³⁰ To accommodate the re-routed traffic, the SARR footprint was also expanded by 86 route miles, while the network facilities, equipment, and staffing were streamlined to align with the reduction in volumes.³¹ A schematic showing the Revised SARR routing is included in my Exhibit ___(TDC-4). WFA/Basin's evidence demonstrated that its Revised SARR would produce substantial rate relief, and the Board so held in its *2009 Rate Relief Orders*.

**c. WFA/Basin's Revised SARR Was
Not Designed to Perfect Relief
Using Alternative ATC**

Alternative ATC allocates cross-over traffic revenues differently than Modified ATC, and, as shown above, retroactive application of Alternative ATC on the current record (holding all other variables constant) increases the maximum MMM R/VC ratios

²⁸ Along with select other elements of its *Major Issues Decision*.

²⁹ WFA/Basin's internally re-routed traffic originated in the PRB and was interchanged with BNSF at Northport, NE.

³⁰ The Revised SARR originated this traffic in the PRB and interchanged it with Union Pacific Railroad Company at Northport, NE.

³¹ The footprint was expanded from Guernsey, WY east to Northport, NE.

by nearly 100 percentage points on average and reduces WFA/Basin's rate relief by over \$328 million. Retroactive application of Alternative ATC in this manner is fundamentally biased, and will not produce accurate MMM R/VC ratios, because WFA/Basin did not use the iterative process described above to develop its best case SAC relief using Alternative ATC.

Importantly, the SARR configuration and traffic group WFA/Basin developed in 2007/2008 using Modified ATC is very sensitive to changes in revenues. Retroactive reductions to the SARR revenue allocations (including ones as small as a few cents per ton) require revisiting the iterative process WFA used to develop the SARR system and traffic group, because reduced movement revenues for each cross-over shipper coupled with static costs of providing service to the shippers throws the cost-to-revenue relationship out of balance. As shown in my electronic workpapers,³² 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.

WFA/Basin's revised SARR MMM Model developed using Modified ATC is also extremely sensitive to changes in SARR revenues, so that changes in revenues will have a significant impact on the maximum MMM R/VC ratios. For example, in 2005, retroactive substitution of Alternative ATC revenues for Modified ATC revenues reduces WFA/Basin's currently configured SARR revenues by 5 percent,³³ but increases the maximum MMM R/VC ratios by 40 percent.³⁴

³² See workpaper "Updated Rankings 06-2014.xlsx."

³³ $221.0M \div 232.5M - 1.0 = 0.05$. See workpaper "BNSF Coal Statistics (2004-2013).xlsx," at level "STB 2009 LRR."

³⁴ $3.47 \div 2.47 - 1.0 = 0.40$. See Table 1 above.

I was actively involved in developing WFA/Basin's revised SARR in 2007 and 2008, and, for the reasons set forth above, WFA/Basin would not have presented the same SARR configuration and traffic group to STB in 2007/2008 if it had used Alternative ATC to allocate cross-over traffic revenues.³⁵

B. THE FORECASTED REVENUES AND FORECASTED COSTS CONTAINED IN THE CURRENT RECORD ARE MATERIALLY INACCURATE

1. Forecasted Revenues

The Board's cross-over traffic revenue allocation methods are applied to allocate the defendant carrier's forecasted real world revenues on the cross-over traffic. In this case, over 95% of WFA/Basin's Original SARR traffic and over 70% of WFA/Basin's Revised SARR traffic was cross-over traffic.³⁶ All of this cross-over traffic was BNSF PRB traffic that WFA/Basin's SARRs originated and interchanged with the residual BNSF.

The through revenues the Board developed for WFA/Basin's Original SARR cross-over traffic started with through revenues from BNSF's internal forecast for a base period (4Q04 to 4Q05 for most traffic), which the Board then forecast over the 20-year DCF model period using a combination of forecasts including, most notably, EIA's AEO 2006 forecasts, and Global Insight's RCAF forecasts. All of these forecasts were developed and published in the 2004 to 2006 time period. The Board used the same procedures and the same forecasts in developing revenues for WFA/Basin's Revised

³⁵ As I discussed in my Verified Statement submitted to the Board in this case on March 18, 2011 at pp. 48-52, WFA/Basin also would not have presented the same SARR configuration and traffic group to the STB in 2007/2008 if the Board had used its "Original ATC" methodology to allocate cross-over traffic revenues.

³⁶ Based on 2005 volumes. See workpapers "STB LRR Traffic and Revenues BNSF 3-26-07 Reply (with OATC AATC and MATC).xls" at level "SARR Traffic_2005" cell BX6, and "STB LRR Traffic and Revenues BNSF 3-26-07 Reply_1.xls" at level "SARR Traffic_2005" cell BK7.

SARR cross-over traffic revenues in 2009: the base period remained the same and the Board applied the same vintage forecasts (developed in 2004 to 2006) to project Revised SARR revenues.

In its *2009 Rate Relief Orders*, the Board projected that per-unit through revenues for SARR (PRB) cross-over coal traffic would increase by approximately { } between 2004 and 2013.³⁷ These through revenue projections have proved to be way off the mark. BNSF’s actual revenues per unit on its coal traffic (most of which is PRB coal traffic)³⁸ actually increased by 95% per ton between 2004 and 2013 as shown in Table 3 below.

Table 3
BNSF Coal Statistics (2004-2013)

Year	BNSF QCS Reports			BNSF Rev per Ton 1/	STB 2009 Cross-over Traffic Through Rev per Ton 2/
	No. of Cars	Annual Tons	Annual Revenues		
(1)	(2)	(3)	(4)	(5)	(6)
1. 2004	2,225,621	256,497,354	\$2,382,446,406	\$9.29	{ }
2. 2005	2,248,560	260,133,392	\$2,628,234,542	\$10.10	{ }
3. 2006	2,470,794	288,184,081	\$3,110,714,403	\$10.79	{ }
4. 2007	2,476,749	291,324,603	\$3,441,553,980	\$11.81	{ }
5. 2008	2,524,478	297,439,530	\$4,197,708,529	\$14.11	{ }
6. 2009	2,395,528	283,073,155	\$3,756,828,043	\$13.27	{ }
7. 2010	2,216,095	263,223,407	\$3,901,625,529	\$14.82	{ }
8. 2011	2,313,183	274,975,800	\$4,969,552,892	\$18.07	{ }
9. 2012	2,180,376	259,630,331	\$4,755,926,775	\$18.32	{ }
10. 2013	2,236,543	265,989,430	\$4,828,295,080	\$18.15	{ }
11. 2004-2013 percent change				95%	{ }

1/ Based on QCS; column (4) ÷ column (3).
2/ See workpaper “BNSF Coal Statistics (2004-2013).xlsx”.

³⁷ See workpaper “BNSF Coal Statistics (2004-2013).xlsx” at level “BNSF Coal Statistics.” The percentage increase per ton for WFA/Basin’s Original, and larger, PRB cross-over traffic group is even smaller – { }. *Id.*

³⁸ “[M]ore than 90 percent of all BNSF Railway’s coal tons originat[e] from the Powder River Basin of Wyoming and Montana.” 2013 BNSF Form 10-K, p. 6.

If the Board retroactively applies Alternative ATC to the current record forecasts of BNSF's PRB revenues, it will result in inaccurate, and vastly understated, SARR revenues on cross-over traffic because the forecasted through revenues, to which Alternative ATC will be applied, are demonstrably inaccurate and vastly understated.

The principal reason why these cross-over SARR traffic revenues would be understated is that the forecasts used to project the cross-over SARR through revenues did not accurately predict either the large rate increases that BNSF imposed on legacy PRB coal transportation contract shippers³⁹ or the extent to which BNSF would implement its fuel surcharge program on its coal traffic base.

WFA/Basin's Revised SARR included approximately { } million tons⁴⁰ of cross-over traffic moving under legacy contracts in 2005 that were subject to re-pricing before 2014. According to publicly available materials, when BNSF's legacy contracts expired, BNSF frequently increased the expiring contract rates by 100% or more through a combination of higher base rates and new fuel surcharges.⁴¹ These huge increases simply are not captured in the forecasts in the current record.⁴²

2. Forecasted SAC

The Board's DCF model uses a series of indices to forecast SARR capital costs (including replacement costs of capital assets) and operating costs over the 20 year DCF

³⁹ Legacy contract shippers as used herein refers to cross-over traffic shippers with coal transportation contracts in effect during the forecast base period (4Q04 to 4Q05 for most traffic), most of which went into effect prior to 4Q04.

⁴⁰ See workpaper "STB LRR Traffic and Revenues BNSF 3-26-07 Reply_1.xls" at level "SARR Traffic_2005," column BN.

⁴¹ WFA/Basin's counsel discusses this re-pricing in detail in the Argument portion of WFA/Basin's Comments.

⁴² The same holds true for WFA/Basin's Original SARR. The Original SARR had { } million tons of cross-over traffic moving under legacy contracts that expired prior to 2014. See workpaper "BNSF Coal Contracts Repricing summary table.xlsx" at level "Repricing Summary," column F. The revenues on the issue traffic moves, and the interchange move, also should be updated, so all revenues are calculated using the most recent available actual data.

period. With one exception,⁴³ the Board used the same forecasts in the DCF model it used to calculate SAC for WFA/Basin's Original and Revised SARR's. Exhibit ___(TDC-5) compares the 2006 forecast values with the updated (actual through 2013) index values for each index used in the DCF model. As shown in Exhibit ___(TDC-5), the forecasted operating and capital recovery cost indices are lower than the corresponding now-historical and forecasted indices. Use of the updated indices in concert with updated volume and revenue data would increase SAC costs and produce more accurate SAC calculations. In addition, substitution of actual operating expense values, where available, for forecasted values, may produce more accurate SAC results.⁴⁴ If Alternative ATC is retroactively applied, SAC capital carrying and operating costs must be revised as well (along with updated volumes and per-unit revenues) to obtain accurate SAC results.

3. MMM Model

As discussed above, application of Alternative ATC to current record revenues will not produce accurate revenue allocations because BNSF's through revenues in the current record are materially understated. Thus, to obtain accurate revenue allocations, Alternative ATC must be applied to updated, accurate through revenues.

This updating will also require updating the MMM Model because SARR revenues are used to calculate MMM R/VC ratios.⁴⁵ In addition, to obtain correct MMM R/VC ratios, the forecasted variable costs in the MMM model must also be updated. The current record MMM Model uses 2004 base year variable costs that are indexed using a

⁴³ The Board updated its prior cost-of-capital forecast in the *2009 Rate Relief Orders*.

⁴⁴ WFA/Basin constructed its Original and Revised SARRs during a 30 month period (2Q02 to 3Q04). WFA/Basin would construct a third SARR using the same construction period, so construction unit costs previously developed should not change.

⁴⁵ This updating would also include updating the issue traffic and interchange movement R/VC ratios as well.

forecast of the RCAF-A developed in 2006. That forecast, however, has not come close to accurately tracking actual changes in BNSF's variable costs.

Table 4 below demonstrates the disconnect between projected variable costs and actual variable costs for a representative cross-over movement included in the 2009 SARR traffic group.

Time Period	URCS Phase III VC		Percent Increase (Actual vs. Forecast) 3/
	STB 2009 Workpapers 1/	Actual 2/	
(1)	(2)	(3)	(4)
1. 4Q04	{ }	{ }	{ }
2. 2005	{ }	{ }	{ }
3. 2006	{ }	{ }	{ }
4. 2007	{ }	{ }	{ }
5. 2008	{ }	{ }	{ }
6. 2009	{ }	{ }	{ }
7. 2010	{ }	{ }	{ }
8. 2011	{ }	{ }	{ }
9. 2012	{ }	{ }	{ }

1/ 2004 URCS costs escalated using forecasted RCAF-A index.
2/ Actual based on historical URCS data for each year.
3/ Column (3) ÷ Column (2) - 1.0.

As shown in Table 4 above, the actual variable costs for this movement are shown to have been up to { } higher than the projections included in the STB's 2009 MMM model through 2012. The results were similar for all SARR movements—the 2009 projections have proved to be dramatically understated.⁴⁶

⁴⁶ See workpapers in directory \TDC 062014 WP\Compare to Actual\URCS.

IV. IF ALTERNATIVE ATC IS RETROACTIVELY APPLIED IN THIS CASE, ACCURATE AND REASONABLE MAXIMUM RATES CAN BE DETERMINED ONLY IF WFA/BASIN IS GIVEN THE OPPORTUNITY TO REVISE ITS REVISED SARR AND UPDATE THE STALE RECORD

If Alternative ATC is applied, WFA/Basin must be given the opportunity to develop a revised SARR using Alternative ATC. Specifically, WFA/Basin must be given the opportunity to revise the SARR configuration and traffic group. In addition, an accurate result can only be obtained if other facets of the record are updated as well.

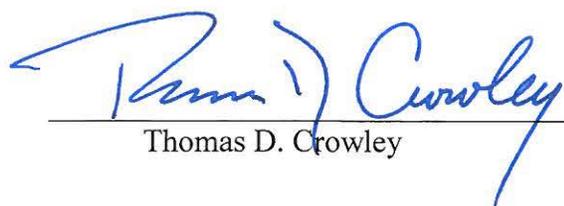
To make the required adjustments, the parties will need to update the record through discovery to include updates of BNSF's actual tonnage, revenue and coal contract information for PRB coal moves for periods from the close of initial discovery period in this case through mid-2014 (or latest available). WFA/Basin will also need to obtain discovery of updated operating cost information for the same time period.

BNSF should be able to respond to these discovery requests promptly. The tonnage and revenue information involves only one commodity – PRB coal – and is located in electronic databases BNSF maintains and regularly archives in the ordinary course of business. The contract requests would be limited to BNSF's PRB coal transportation contracts, and these contracts are readily accessible by BNSF. Most of the SARR operating cost information the Board relied upon in its *September 2007 Decision* and its *2009 Rate Relief Orders* to develop SARR operating costs comes from BNSF electronic databases as well, such as its crew wage and fuel supply databases.

If the Board permits WFA/Basin to revise its SARR using Alternative ATC, and to properly update the record, I expect that WFA/Basin will be able to prove its entitlement to substantial rate relief – for a third time.

VERIFICATION

I, Thomas D. Crowley, verify under penalty of perjury that I have read this Remand Verified Statement, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.


Thomas D. Crowley

Executed on June 16, 2014

THOMAS D. CROWLEY
STATEMENT OF QUALIFICATIONS

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314, 760 E. Pusch View Lane, Suite 150, Tucson, Arizona 85737, and 7 Horicon Avenue, Glens Falls, New York 12801.

I am a graduate of the University of Maine from which I obtained a Bachelor of Science degree in Economics. I have also taken graduate courses in transportation at George Washington University in Washington, D.C. I spent three years in the United States Army and since February 1971 have been employed by L. E. Peabody & Associates, Inc.

I am a member of the American Economic Association, the Transportation Research Forum, and the American Railway Engineering and Maintenance-of-Way Association.

The firm of L. E. Peabody & Associates, Inc. specializes in analyzing matters related to the rail transportation of all commodities. As a result of my extensive economic consulting practice since 1971 and my participation in maximum-rate, rail merger, service disputes and rule-making proceedings before various government and private governing bodies, I have become thoroughly familiar with the rail carriers that move coal over the major coal routes in the United States. This familiarity extends to subjects of railroad service, costs and profitability, cost of capital, railroad capacity, railroad traffic prioritization and the structure and operation of the various contracts and tariffs that historically have governed the movement of traffic by rail.

THOMAS D. CROWLEY
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As an economic consultant, I have organized and directed economic studies and prepared reports for railroads, freight forwarders and other carriers, for shippers, for associations and for state governments and other public bodies dealing with transportation and related economic problems. Examples of studies I have participated in include organizing and directing traffic, operational and cost analyses in connection with multiple car movements, unit train operations for coal and other commodities, freight forwarder facilities, TOFC/COFC rail facilities, divisions of through rail rates, operating commuter passenger service, and other studies dealing with markets and the transportation by different modes of various commodities from both eastern and western origins to various destinations in the United States. The nature of these studies enabled me to become familiar with the operating practices and accounting procedures utilized by railroads in the normal course of business.

Additionally, I have inspected and studied both railroad terminal and line-haul facilities used in handling various commodities, including unit train coal movements from coal mine origins in the Powder River Basin and in Colorado to various utility destinations in the eastern, mid-western and western portions of the United States and from the Eastern coal fields to various destinations in the Mid-Atlantic, northeastern, southeastern and mid-western portions of the United States. These operational reviews and studies were used as a basis for the determination of the traffic and operating characteristics for specific movements of numerous commodities handled by rail.

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I have frequently been called upon to develop and coordinate economic and operational studies relative to the rail transportation of various commodities. My responsibilities in these undertakings included the analyses of rail routes, rail operations and an assessment of the relative efficiency and costs of railroad operations over those routes. I have also analyzed and made recommendations regarding the acquisition of railcars according to the specific needs of various shippers. The results of these analyses have been employed in order to assist shippers in the development and negotiation of rail transportation contracts which optimize operational efficiency and cost effectiveness.

I have developed property and business valuations of privately held freight and passenger railroads for use in regulatory, litigation and commercial settings. These valuation assignments required me to develop company and/or industry specific costs of debt, preferred equity and common equity, as well as target and actual capital structures. I am also well acquainted with and have used the commonly accepted models for determining a company's cost of common equity, including the Discounted Cash Flow Model ("DCF"), Capital Asset Pricing Model ("CAPM"), and the Farma-French Three Factor Model.

Moreover, I have developed numerous variable cost calculations utilizing the various formulas employed by the Interstate Commerce Commission ("ICC") and the Surface Transportation Board ("STB") for the development of variable costs for common carriers, with particular emphasis on the basis and use of the Uniform Railroad Costing System ("URCS") and its predecessor, Rail Form A. I have utilized URCS/Rail form A

THOMAS D. CROWLEY
STATEMENT OF QUALIFICATIONS

costing principles since the beginning of my career with L. E. Peabody & Associates Inc. in 1971.

I have frequently presented both oral and written testimony before the ICC, STB, Federal Energy Regulatory Commission, Railroad Accounting Principles Board, Postal Rate Commission and numerous state regulatory commissions, federal courts and state courts. This testimony was generally related to the development of variable cost of service calculations, rail traffic and operating patterns, fuel supply economics, contract interpretations, economic principles concerning the maximum level of rates, implementation of maximum rate principles, and calculation of reparations or damages, including interest. I presented testimony before the Congress of the United States, Committee on Transportation and Infrastructure on the status of rail competition in the western United States. I have also presented expert testimony in a number of court and arbitration proceedings concerning the level of rates, rate adjustment procedures, service, capacity, costing, rail operating procedures and other economic components of specific contracts.

Since the implementation of the *Staggers Rail Act of 1980*, which clarified that rail carriers could enter into transportation contracts with shippers, I have been actively involved in negotiating transportation contracts on behalf of shippers. Specifically, I have advised shippers concerning transportation rates based on market conditions and carrier competition, movement specific service commitments, specific cost-based rate adjustment provisions, contract reopeners that recognize changes in productivity and cost-based ancillary charges.

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I have been actively engaged in negotiating coal supply contracts for various users throughout the United States. In addition, I have analyzed the economic impact of buying out, brokering, and modifying existing coal supply agreements. My coal supply assignments have encompassed analyzing alternative coals to determine the impact on the delivered price of operating and maintenance costs, unloading costs, shrinkage factor and by-product savings.

I have developed different economic analyses regarding rail transportation matters for over sixty (60) electric utility companies located in all parts of the United States, and for major associations, including American Paper Institute, American Petroleum Institute, Chemical Manufacturers Association, Coal Exporters Association, Edison Electric Institute, Mail Order Association of America, National Coal Association, National Industrial Transportation League, North America Freight Car Association, the Fertilizer Institute and Western Coal Traffic League. In addition, I have assisted numerous government agencies, major industries and major railroad companies in solving various transportation-related problems.

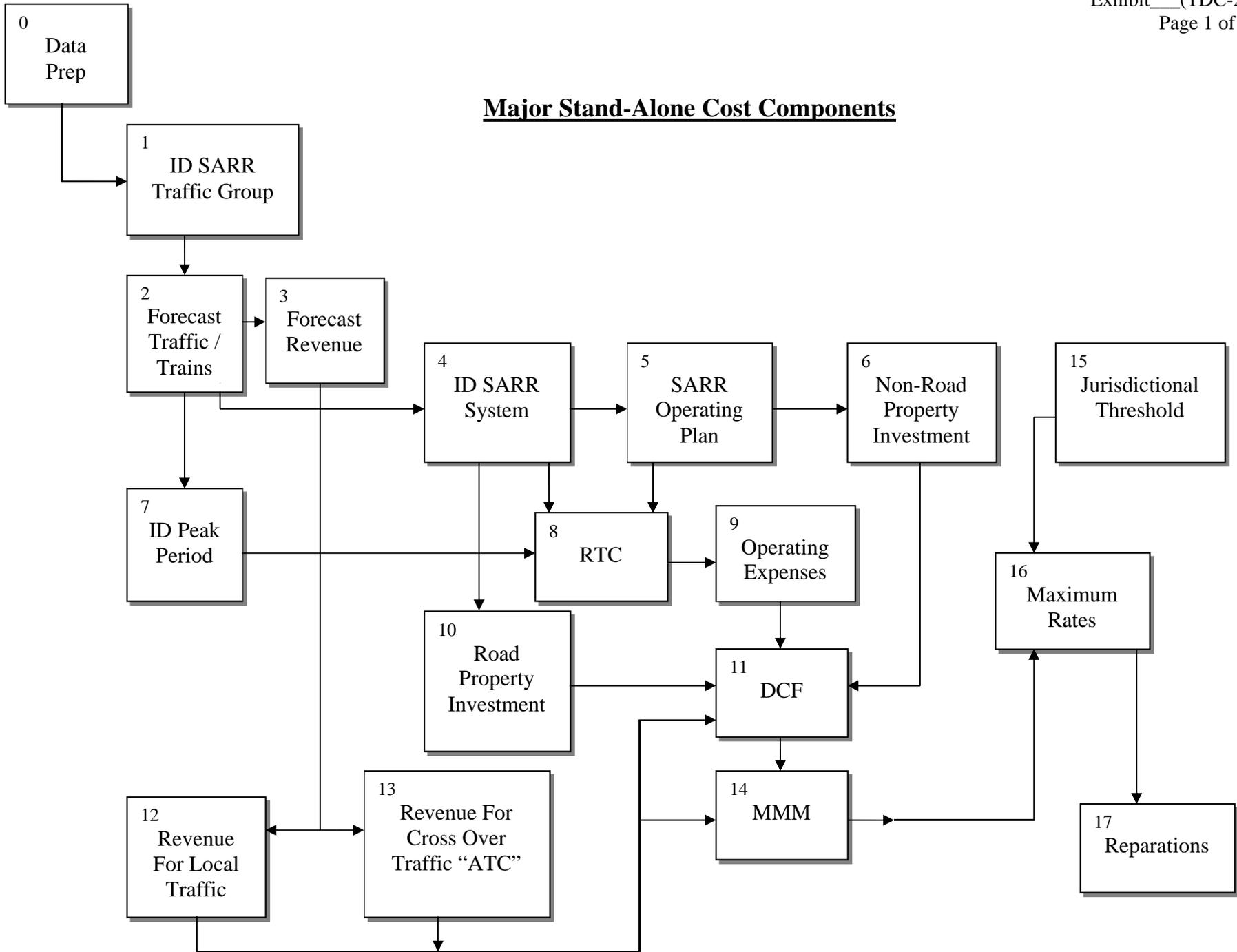
In the two Western rail mergers that resulted in the creation of the present BNSF Railway Company and Union Pacific Railroad Company and in the acquisition of Conrail by Norfolk Southern Railway Company and CSX Transportation, Inc., I reviewed the railroads' applications including their supporting traffic, cost and operating data and provided detailed evidence supporting requests for conditions designed to maintain the competitive rail environment that existed before the proposed mergers and acquisition.

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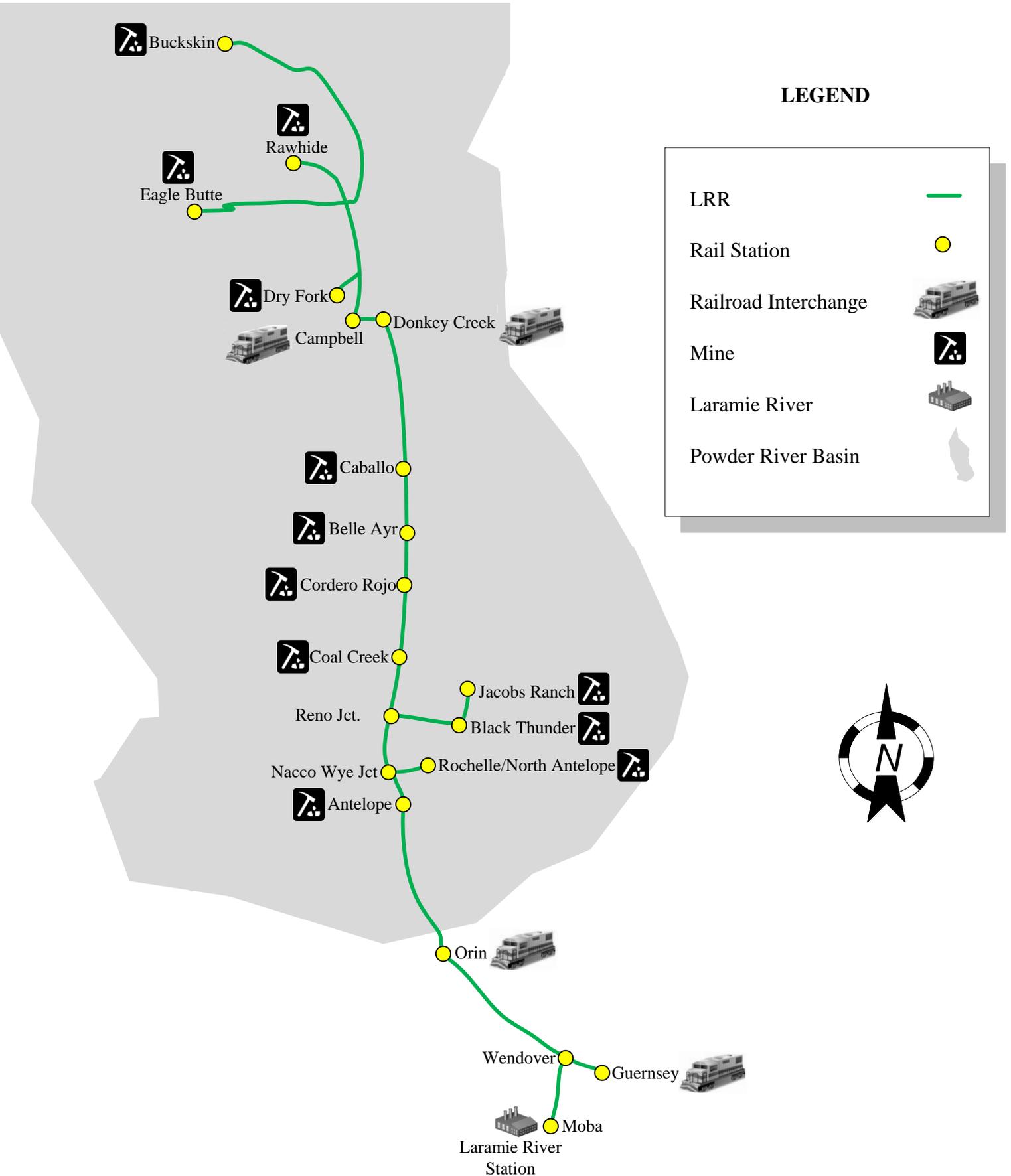
In these proceedings, I represented shipper interests, including plastic, chemical, coal, paper and steel shippers.

I have participated in various proceedings involved with the division of through rail rates. For example, I participated in ICC Docket No. 35585, *Akron, Canton & Youngstown Railroad Company, et al. v. Aberdeen and Rockfish Railroad Company, et al.* which was a complaint filed by the northern and mid-western rail lines to change the primary north-south divisions. I was personally involved in all traffic, operating and cost aspects of this proceeding on behalf of the northern and mid-western rail lines. I was the lead witness on behalf of the Long Island Rail Road in ICC Docket No. 36874, *Notice of Intent to File Division Complaint by the Long Island Rail Road Company.*

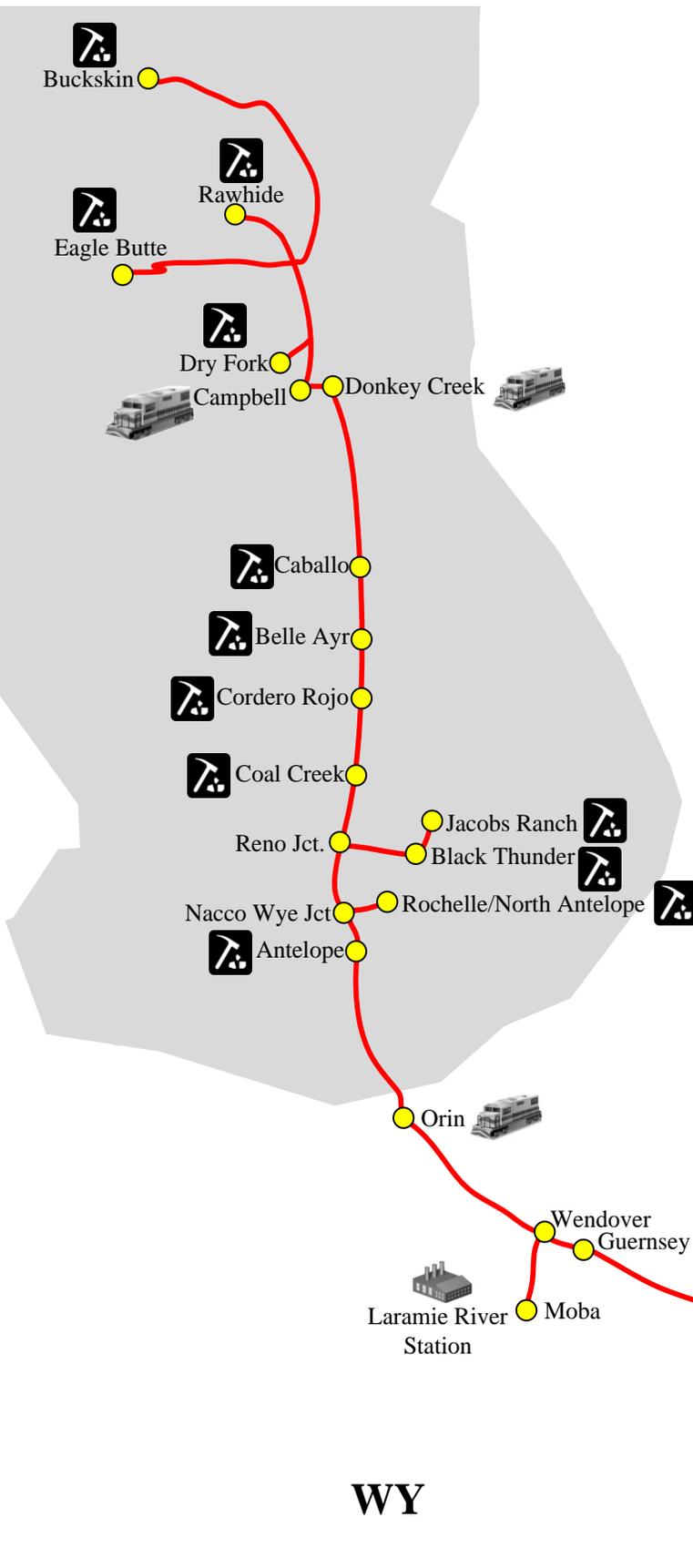
Major Stand-Alone Cost Components



Schematic of Original WFA SARR



Schematic of Revised WFA SARR



LEGEND

LRR	
Rail Station	
Railroad Interchange	
Mine	
Laramie River	
Powder River Basin	

SD

NE



WY

Northport

EXHIBIT_(TDC-5)
REDACTED