

224818

**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 PERCOLIZZI  
ANDREW R KOLESAR III  
PETER A POHL  
DANIEL M JAFFE  
STEPHANIE P LYONS  
JOSHUA M HOFFMAN

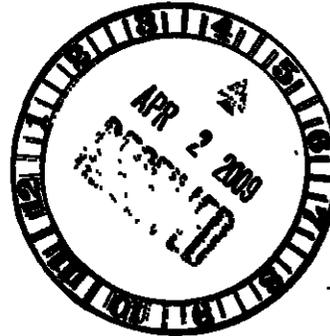
OF COUNSEL  
DONALD G AVERY

TELEPHONE  
(202) 347-7170

FAX  
(202) 347-3819

WRITER'S E-MAIL.

April 2, 2009



**VIA HAND DELIVERY**

The Honorable Anne K. Quinlan  
Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, D C 20423-0001

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

Dear Secretary Quinlan:

Enclosed for filing in the above-referenced proceeding please find an original and 20 copies of WFA/Basin's Reply to BNSF's Notice of Filing of Verified Notice of Compliance.

Also enclosed for filing are three (3) copies of a compact disc containing the filing and accompanying workpapers. The narrative written portion of the filing is public. The accompanying workpapers contained on the disc are HIGHLY CONFIDENTIAL and are being FILED UNDER SEAL.

Expedited handling of this matter is requested for the reasons set forth in the Reply.

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

Respectfully submitted,

John H. LeSeur  
An Attorney for Complainants

ENTERED  
Office of Proceedings

APR - 2 2009

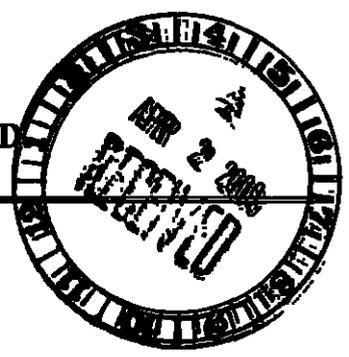
Part of  
Public Record

Enclosures  
cc: Counsel for Defendant

224818

**EXPEDITED ACTION REQUESTED**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



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

Complainants,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42088

**WFA/BASIN'S REPLY TO BNSF'S  
NOTICE OF FILING OF VERIFIED NOTICE OF COMPLIANCE**

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

OF COUNSEL:

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

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

ENTERED  
Office of Proceedings

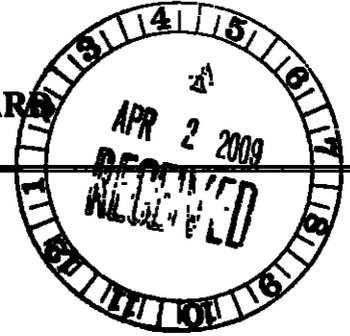
APR - 2 2009

Part of  
Public Record

Dated: April 2, 2009

Attorneys for Complainants

BEFORE THE  
SURFACE TRANSPORTATION BOARD



---

WESTERN FUELS ASSOCIATION, INC. )  
and BASIN ELECTRIC POWER )  
COOPERATIVE, INC. )  
 )  
Complainants, )  
 )  
v. )  
 )  
BNSF RAILWAY COMPANY )  
 )  
Defendant. )

---

Docket No. 42088

**WFA/BASIN'S REPLY TO BNSF'S  
NOTICE OF FILING OF VERIFIED NOTICE OF COMPLIANCE**

On March 20, 2009, Defendant BNSF Railway Company ("BNSF") filed a "Notice of Filing of Verified Notice of Compliance" ("Notice"). Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. ("WFA/Basin") file this Reply to BNSF's Notice and in support hereof state as follows:<sup>1</sup>

**PREFACE**

BNSF's Notice purports to set maximum rates on the issue traffic for the first quarter of 2009 that "compl[y]" with the Board's February 18, 2009 decision ("Decision"). Id., Verified Statement of Jill K. Mulligan ("V.S. Mulligan") at 1. In fact,

---

<sup>1</sup> This Reply is filed under 49 C.F.R. §1104.13 (party may file a reply to a pleading).

the rates set forth in BNSF's Notice substantially exceed the maximum rates permitted under the Board's Decision.

BNSF's rate calculations are substantially overstated because BNSF has failed to properly calculate the maximum reasonable stand-alone cost ("SAC") rates on the issue traffic. In this Reply, WFA/Basin correct BNSF's calculation errors. Table 1 sets forth BNSF's overstated 2009 SAC calculations and WFA/Basin's corrected calculations.

Table 1 Maximum 2009 SAC Rates		
Mine Origin	BNSF Calculations (\$/ton)	WFA/Basin Corrected Calculations (\$/ton)
Antelope	\$3.89	\$2.74
North Antelope	4.07	2.83
Black Thunder	4.52	3.19
Jacobs Ranch	4.67	3.24
Cordero	4.95	3.49
Belle Ayr	5.10	3.62
Caballo Rojo	5.10	3.59
Caballo	5.17	3.65
Dry Fork	5.73	4.06
Rawhide	5.78	4.10
Eagle Butte	5.83	4.09
Buckskin	5.90	4.06

When it issued its Decision, the Board estimated that the prescribed 2009 SAC rates would be approximately 60% less than the projected 2009 BNSF tariff rates. See id. at 2. WFA/Basin's correctly calculated maximum SAC rates produce the forecasted 60% reduction. On the other hand, BNSF's overstated rates take away one-third of the forecasted relief. WFA/Basin request that the Board enter an order directing

BNSF to file a corrected compliance notice containing rates that do not exceed the correctly calculated maximum rates and directing BNSF to repay WFA/Basin, with interest, for the additional unreasonable charges BNSF will be collecting until the effective date of its corrected compliance notice.

Expedited consideration is sought because, as the Board emphasized in its news release (“News Release”) accompanying the Decision, the rates at issue here are ultimately paid by electric consumers in nine western states and “[t]hose customers have been bearing the burden of these unreasonably high transportation rates in their monthly electric bills, a burden they should no longer be forced to bear.” *Id.* at 1. Unfortunately, these customers will continue to bear “unreasonably high transportation rates” until the Board acts to set the correct maximum rates.

### **BACKGROUND**

In SAC cases, when the present value of the stand-alone railroad’s (“SARR”) revenues exceeds the present value of the SARR’s SAC over the discounted cash flow (“DCF”) model period, SARR traffic group revenues are reduced to equal SAC. In Major Issues,<sup>2</sup> the Board adopted the Maximum Markup Methodology (“MMM”) to distribute these reductions. Under MMM, SARR traffic group member rates are compared to their variable costs resulting in revenue-to-variable cost (“R/VC”)

---

<sup>2</sup> Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No.1) (STB served Oct. 30, 2006), aff’d sub nom. BNSF v. STB, 526 F.3d 770 (D.C. Cir. 2008) (“Major Issues”).

ratios for each involved time period. Through an iterative process, rates on high R/VC ratio traffic are reduced to a maximum MMM R/VC ratio that results in total SARR revenues equaling the SARR's SAC for the involved time period.

The Board applied these principles in its Decision. The Board found that in each year of the twenty-year DCF model the collective revenue contribution of WFA/Basin's SARR traffic group members exceeded the SARR's SAC. Id. at 29. The Board proceeded to allocate rate relief to qualifying members of the SARR traffic group for each involved time period using MMM.<sup>3</sup> To do so, the Board calculated R/VC ratios for each SARR traffic group member for each time period. The base year revenues used in these calculations were computed using the Board's SARR revenue calculation procedures and were indexed forward using the Board's SARR revenue forecasting procedures. The variable costs for these calculations were determined using a 2004 base period BNSF URCS indexed to 4Q04, and indexed forward through the DCF model life using the RCAF-A forecasting procedures adopted by the Board.

The Board calculated the SARR traffic group R/VC ratios for each involved time period, and using its iterative process, calculated maximum MMM R/VC ratios for each involved time period. Id. at 31. The Board's detailed MMM calculations are set forth in its workpapers accompanying the Decision.<sup>4</sup> The Board's calculation of

---

<sup>3</sup> See STB Electronic Workpaper "MMM Model Linked to III-H-3 Reb.xls," Worksheet "2009." A copy of this workpaper is included in WFA/Basin's Reply Electronic Workpapers at "STB Workpaper MMM Model Linked to III-H-3 Reb.xls."

<sup>4</sup> See id.

the maximum MMM R/VC ratio in 2009 is illustrative of the Board's MMM calculation process.

The Board calculated the on-SARR revenues for the SARR traffic group in 2009 at \$270,036,467. The Board also calculated the SARR SAC in 2009 at \$223,976,142. Decision at 29. The Board proceeded to adjust the highest R/VC ratios produced by each member of the SARR traffic group until it calculated a maximum MMM R/VC ratio that produced total SARR revenues equaling SAC. For 2009, that maximum MMM R/VC ratio equaled 240%. See id. at 31. Stated differently, under MMM, traffic group member rates on traffic with R/VC ratios above 240% were reduced to 240% and, with these reductions, the total revenues collected from the traffic group members (\$223,976,142) equaled the SARR's SAC (\$223,976,142).<sup>5</sup>

The STB's MMM calculations showed that WFA/Basin were entitled to rate relief in 2009 because the R/VC ratios on their traffic were above the maximum MMM R/VC ratio of 240%. Table 2 below shows the inputs used in the Board's MMM model for the forecast 2009 issue traffic shipments before application of the 240% maximum MMM R/VC ratio.<sup>6</sup>

---

<sup>5</sup> See STB Electronic Workpaper "MMM Model Linked to III-H-3 Reb.xls," Worksheet "2009," cells M3 to M6.

<sup>6</sup> See id. at cells C5 to C8, G31 to G34, I31 to I34, and J31 to J34.

Table 2 Pre-Reduction MMM Issue Traffic Inputs (2009)				
Origin Mine	Rate (\$/ton)	Revenue	Variable Cost	R/VC Ratio
Antelope	\$8.06	\$32,109,727	\$4,547,883	706%
Caballo Rojo	8.46	10,493,550	1,860,009	564
Caballo	8.46	2,761,461	497,071	556
Dry Fork	8.71	23,184,473	4,510,569	514

Table 3 below shows the maximum MMM rates for the forecast 2009 issue traffic shipments after application of the 240% maximum MMM R/VC ratio.<sup>7</sup>

Table 3 Post-Reduction MMM Issue Traffic Inputs (2009)				
Origin Mine	MMM Rate (\$/ton)	Revenue	Variable Cost	R/VC Ratio
Antelope	\$2.74	\$10,909,018	\$4,547,883	240%
Caballo Rojo	3.60	4,461,608	1,860,009	240
Caballo	3.65	1,192,326	497,071	240
Dry Fork	4.07	10,819,514	4,510,569	240

In its Decision, the Board includes a chart summarizing the maximum MMM R/VC ratios calculated using its workpaper procedures for every year of the DCF period. *Id.* at 31. For 2009, the maximum MMM R/VC ratio shown is 240%. *Id.* The Board also estimated that because BNSF's forecast tariff rates were so high, these rates would need to be reduced by "roughly 60%" to produce rates at the 240% maximum MMM R/VC ratio level. *Id.* at 2.

The Board directed the parties to work together to implement the relief set forth in the Board's Decision, subject to Board resolution of any disputes. *Id.* at 31 ("[i]f

---

<sup>7</sup> See *id.* at cells D5 to D8, O31 to O34, I31 to I34, and L31 to L34.

the parties cannot agree on the amount of reparations due, or if there is a dispute over how to calculate the variable costs of the movements at issue, WFA should bring those disputes to our attention"); News Release at 1 ("[f]ollowing its usual practice, the Board instructed the parties to confer and resolve the precise amount of damages due the Utilities, and bring any disputes to the Board's attention for resolution").

After the Decision was served, BNSF counsel informed WFA/Basin counsel that BNSF did not read the Board's decision as imposing any meet-and-confer obligations on BNSF prior to BNSF's establishing compliance common carrier rates.<sup>8</sup> Instead, on March 20, 2009, the effective date of the Decision, BNSF unilaterally filed its Notice with the Board. The Notice sets forth the following rates, effective on March 20, 2009, on the issue traffic:

---

<sup>8</sup> The parties did submit a "Joint Petition To Correct Technical and Computational Errors" to the Board on March 10, 2009 ("Technical Corrections Petition").

<b>Table 4 BNSF 2009 Notice Rates</b>	
<b>Mine</b>	<b>Rate (\$/ton)</b>
<b>Antelope</b>	<b>\$3.89</b>
<b>North Antelope</b>	<b>4.07</b>
<b>Black Thunder</b>	<b>4.52</b>
<b>Jacobs Ranch</b>	<b>4.67</b>
<b>Cordero</b>	<b>4.95</b>
<b>Caballo Rojo</b>	<b>5.10</b>
<b>Belle Ayr</b>	<b>5.10</b>
<b>Caballo</b>	<b>5.17</b>
<b>Dry Fork</b>	<b>5.73</b>
<b>Rawhide</b>	<b>5.78</b>
<b>Eagle Butte</b>	<b>5.83</b>
<b>Buckskin</b>	<b>5.90</b>

Id., V.S. Mulligan (attaching Common Carrier Pricing Authority BNSF 90077, Version 6 at 1).

BNSF stated that it developed these rates using base year 2007 BNSF

URCS costs indexed using specified price indices:

To calculate the applicable rate, BNSF determined variable costs using the most recent available URCS – 2007 – and the variable cost methodology specified by the Board in *Major Issues* . . . . Costs were indexed to current levels using the Board’s standard URCS indexing procedure and the most recent quarterly AAR Railroad Cost Indexes for the Western Region.

Notice at 1. BNSF also claimed that these calculations resulted in “rates that are consistent with [the Board’s Decision].” Id., V.S. Mulligan at 1.

BNSF’s Notice did not contain any supporting workpapers. WFA/Basin requested these workpapers on March 20, 2009 and received them on March 26, 2009.<sup>9</sup> As shown in its workpapers, BNSF multiplied its developed variable costs for each PRB mine by the 2009 maximum MMM R/VC ratio of 240% to develop its asserted “compliance” rates.

### **ARGUMENT**

BNSF has not calculated maximum MMM rates that conform to the Board’s Decision because BNSF has not followed the Board-directed procedures for calculating MMM variable costs for rate prescription purposes. These procedures, as applied by the Board itself in its workpapers, call for the calculation of maximum MMM rates equal to (i) variable costs per ton for each origin-to-destination pair developed using a base period 4Q 2004 BNSF variable costs employing URCS Phase III procedures, indexed forward to the involved year using the RCAF-A and multiplied by (ii) the maximum MMM R/VC ratio for the involved time period developed using the same variable cost procedures.

BNSF does not acknowledge that it is changing the Board’s MMM variable costing procedures. Instead, BNSF simply applies different procedures than those the

---

<sup>9</sup> A copy of these workpapers is included in WFA/Basin’s Reply Electronic Workpapers at “2009 Rates.”

Board adopted in Major Issues and the Board applied in its Decision. BNSF utilizes a bifurcated approach where it develops the maximum MMM R/VC ratios using one set of costs, but then applies the ratio to a different set of costs to set the maximum MMM rates. Not surprisingly, BNSF's bifurcated procedures produce 2009 maximum MMM rates that are substantially higher than the correctly calculated maximum MMM rates. Not only is such a result grossly unfair to WFA/Basin, BNSF's proposed new procedures, if adopted, would fundamentally undermine the integrity of the Board's SAC analysis and produce absurd results – e.g., traffic group members' revenue contributions not being reduced to equal SAC.

In this Reply, WFA/Basin correct BNSF's rate calculation errors and present to the Board correctly calculated maximum MMM rates for application to the issue traffic moves in 2009. WFA/Basin request that the Board reject BNSF's Notice, which contains inflated "compliance" rates; direct BNSF to submit a second, corrected compliance notice containing rates that do not exceed the correctly calculated maximum MMM rates permitted under the Board's Decision; and order BNSF to pay WFA/Basin additional reparations, and interest, for WFA/Basin's payment of rates that exceed a reasonable maximum between March 20, 2009 and the effective date of BNSF's corrected compliance notice.

**I.**  
**BNSF MISCALCULATED THE 2009 MAXIMUM MMM RATES**

BNSF has clearly miscalculated the 2009 maximum MMM rates. This miscalculation is most easily demonstrated by comparing the maximum 2009 MMM rates the Board calculated in its workpapers<sup>10</sup> to the corresponding maximum MMM rates set forth in BNSF's Notice. This comparison is made in Table 5.<sup>11</sup>

Mine Origin	BNSF MMM Rate (\$/ton)	STB MMM Rate (\$/ton)
Antelope	\$3.89	\$2.74
Caballo Rojo	5.10	3.60
Caballo	5.17	3.65
Dry Fork	5.73	4.07

BNSF's 2009 maximum MMM rate calculations are wrong because BNSF did not use the correct variable costs to calculate the maximum MMM rates. As discussed above, the Board calculated the R/VC ratios for each 2009 SARR traffic group member using 4Q04 BNSF variable costs indexed forward by the RCAF-A to 2009 levels. The resulting costs per ton for the forecast issue traffic moves were multiplied by 240% to develop the issue traffic maximum MMM rates. These computations are shown in Table 6.

---

<sup>10</sup> Compare BNSF 2009 Notice rates to the rates calculated by the Board in STB Electronic Workpaper "MMM Model Linked to III-H-3 Reb.xls," worksheet "2009," cells D5 to D8.

<sup>11</sup> Application of the changes set forth in the Technical Corrections Petition reduces the STB MMM rates for Caballo Rojo and Dry Fork by \$0.01 per ton. See WFA/Basin Electronic Workpaper "impact of tech corrections.xls."

Table 6 STB Development of Its 2009 MMM Calculations		
Mine Origin	STB MMM Variable Cost (\$/ton)	STB MMM Rate Variable Cost x 2.4 (\$/ton)
Antelope	\$1.14	\$2.74
Caballo Rojo	1.50	3.60
Caballo	1.52	3.65
Dry Fork	1.70	4.07

BNSF did not follow the Board's MMM costing procedures in its calculation of the 2009 issue traffic maximum MMM rates. Instead, BNSF calculated the variable costs using base year 2007 URCS costs; indexed the base year costs to 4Q08 levels using a market-basket price index; and then multiplied the resulting costs per ton by the 2009 STB-calculated maximum MMM R/VC ratio.<sup>12</sup> BNSF's computations for the forecast issue traffic movements costed by the Board are shown in Table 7.

Table 7 BNSF's Development of Its 2009 MMM Calculations		
Mine Origin	BNSF Variable Cost (\$/ton)	BNSF MMM Rate Variable Cost x 2.4 (\$/ton)
Antelope	\$1.62	\$3.89
Caballo Rojo	2.12	5.10
Caballo	2.16	5.17
Dry Fork	2.39	5.73

BNSF's calculation of maximum MMM rates is wrong because BNSF did not follow the Board's procedures, as set forth in its workpapers, for calculating variable costs for MMM purposes.

---

<sup>12</sup> See BNSF 2009 Notice Electronic Workpaper "WFA 2009 Rate.xls," included in "WFA 2009 Rates.zip."

BNSF’s failure to follow the correct procedures for calculating variable costs for MMM purposes produces inflated maximum MMM rates. The Board forecasted in its Decision that the issue traffic maximum rates in 2009 would be “roughly 60%” less than the forecast tariff rates. Table 8 shows the percentage reductions calculated by the Board in its workpapers<sup>13</sup> and the corresponding reductions calculated by BNSF.

Table 8 Reductions in Forecast 2009 Rates		
Mine Origin	Board Calculation	BNSF Calculation
Antelope	66%	52%
Caballo Rojo	57%	40%
Caballo	57%	39%
Dry Fork	53%	34%
Simple Average	58%	41%

As shown in Table 8, BNSF’s rate calculations produce rate reductions that are approximately one-third less than the reductions ordered by the Board.

**II.  
THE BOARD SHOULD NOT CHANGE IT’S MMM  
VARIABLE COST CALCULATION PROCEDURES**

While not stated in BNSF’s truncated Notice, it appears that BNSF is asking the Board to change the method the Board used to calculate maximum MMM rates in the Decision workpapers and in Major Issues. The Board’s approach uses the same set of base year indexed costs to calculate both the maximum MMM R/VC ratios and the resulting maximum MMM rates. BNSF, on the other hand, uses a bifurcated

---

<sup>13</sup> See STB Electronic Workpaper “MMM Model Linked to III-H-3 Reb.xls” worksheet “2009.”

procedure where the maximum MMM R/VC ratios are calculated using one set of costs and the maximum MMM rates are determined by applying the maximum MMM R/VC ratios to a second set of costs. The Board should reject this request, which is in effect a request to reopen and modify the Decision and Major Issues, for several interrelated reasons:

**First**, the Board's use of a single set of costs to calculate the maximum MMM R/VC ratios, and the corresponding maximum MMM rates, conforms to the Board's express directives in Major Issues. In Major Issues, the Board stated that under the MMM procedure, the "maximum contribution [by a SARR traffic group member] will be expressed as an R/VC ratio." Id. at 14. The Board also held in Major Issues that the parties should use the same set of indexed base year costs to calculate the maximum MMM R/VC ratios and the resulting prescribed maximum MMM rates. See id. at 14 n.19 ("[t]o calculate [MMM] rate prescriptions, the parties should project the initial (base-year) URCS variable costs forward").

The Board's approach uses a single set of base year costs (4Q04), indexed going forward using the RCAF-A. Under the Board's approach, these costs are used to calculate the maximum MMM R/VC ratios and these ratios are then multiplied by issue traffic variable costs, which are calculated using the same procedures (i.e., 4Q04 costs indexed using the RCAF-A).

BNSF's bifurcated approach is far different than the Board's approach. BNSF uses one set of costs (4Q04 costs, indexed using the RCAF-A) to calculate the

maximum MMM R/VC ratios, but BNSF then multiplies the maximum MMM/R/VC ratios by issue traffic variable costs calculated using different procedures. This second set of costs has a different base year (2007 vs. 2004) and uses a different indexing procedure (price index vs. RCAF-A).<sup>14</sup> The sole purpose of BNSF's convoluted bifurcation exercise is to produce higher maximum MMM rates than those called for under the Board's MMM procedures.

**Second**, both WFA/Basin and BNSF understood how to calculate maximum MMM rates under the Major Issues standards. In their pre-Decision filings, WFA/Basin developed maximum MMM R/VC ratios, and maximum MMM rates, using indexed 4Q04 variable cost computations. See, e.g., WFA/Basin, Third Supplemental Opening Evidence, Electronic Workpaper "MMM Model Linked to III-H-2.xls" (May 13, 2008). BNSF agreed that use of indexed 4Q04 costs was the correct approach to make these MMM calculations. See BNSF, Third Supplemental Reply Evidence at p. III.-H-19 (July 14, 2008) (public version). Neither party advocated use of the bifurcated cost approach BNSF now utilizes.

**Third**, the Board ruled in Major Issues, and reaffirmed in the Decision, that it would not permit parties to collaterally attack Major Issues procedures in rate cases. See Major Issues at 77; Decision at 5. BNSF's use of bifurcated MMM costing

---

<sup>14</sup> In calculating the 2009 rates, BNSF ends its calculations at 4Q08 levels thereby not factoring into its calculations the high reduction in costs between 4Q08 and 1Q09 identified, for example, by the RCAF-A. See Quarterly Rail Cost Adjustment Factor, STB Ex Parte No. 290 (Sub-No. 5) (STB served Dec. 22, 2008).

procedures is the very type of collateral attack that is barred under Major Issues from being raised in this case.

**Fourth**, the Board was clearly correct in Major Issues in not considering, much less adopting, BNSF's bifurcated MMM costing procedures. BNSF's proposed bifurcated costing approach, as applied here, violates the fundamental SAC principle that traffic group revenues be reduced to equal SARR SAC. For example, the Board's MMM model calculates the maximum MMM rate for issue traffic movements from Dry Fork at \$4.07 per ton in 2009. However, under BNSF's calculations, the maximum MMM rate from Dry Fork in 2009 is \$5.73 per ton. Substituting BNSF's proposed Dry Fork rate of \$5.73 per ton into the MMM model will result in forecasted revenues on the Dry Fork traffic exceeding the allocated SAC for this movement in 2009 which would translate into a windfall for BNSF.

**Fifth**, BNSF's costing procedures appear to be modeled after procedures parties have used in prior cases to calculate the jurisdictional threshold ("JT"). The JT is set by statute at 180% of the carrier's variable service costs. See 49 U.S.C. §10707(d)(1)(A). In past cases, parties have updated JT calculations on a periodic basis using the most recently available calendar year URCS. This cumbersome procedure is arguably permissible for purposes of calculating the JT because the JT calculations are not included in the Board's SAC computations and the JT results are separate and distinct from the SAC results. Indeed, the Board's SAC standards call for maximum rates to be set at the greater of SAC or the JT. See Major Issues at 14, 47.

The procedures that have been used in the past to calculate the JT cannot, and should not, be used in the development of SAC rates because, unlike the calculation of the JT, the maximum MMM rates are the product of the SAC DCF model process, where all elements in the calculation are predicated upon a linked, interdependent set of forecasts of traffic group revenues, SAC and variable costs. Unlike the JT calculations, substituting a new set of variable cost computations not used in the SAC MMM model for the ones used in the SAC MMM model will hopelessly skew the resulting SAC maximum rates (if any) because it changes a key element in the MMM calculation, while leaving all others the same.

For example, BNSF proposes here to substitute its 2007 indexed URCS costs for the 2004 indexed URCS costs used in MMM. The 2007 indexed costs, as calculated by BNSF, are higher than the 2004 indexed URCS costs used in the MMM model. However, for all other elements in the MMM model (e.g., the SARR revenues, the maximum MMM R/VC ratios for other traffic group shippers, the variable costs for other traffic group members, etc.) are not similarly updated. The result is to mix apples with oranges since an element that is not included in model calculations of the maximum rate is added, but not added in a methodologically consistent manner, with the result that the SARR modeling exercise is completely undermined. WFA/Basin do not believe that the Board intended that its Decision be implemented in such an errant manner.

### **III. CORRECTING BNSF'S ERRORS**

The Board calculated the maximum MMM rates in 2009 from the four forecasted WFA/Basin traffic origins (Antelope, Caballo Rojo, Caballo, and Dry Fork). WFA/Basin include these Board calculated maximum MMM rates in their corrected maximum MMM rate calculations.

For the remaining traffic origins, WFA/Basin have corrected BNSF's variable cost calculations by using the same variable costing procedures the Board utilized to develop the maximum MMM rates for the four forecast origins, including the use of the correct base year variable costs; the correct RCAF-A indexing procedure; the correct origin-to-destination mileages; and a methodologically consistent approach for developing traffic and operating inputs, which are derived either from origin-to-destination specific base period data or average base period data covering all base period origin-to-destination issue traffic movements. WFA/Basin then multiplied the resulting variable costs for each of the remaining issue traffic origin-to-destination pairs by the 240% maximum R/VC ratio to develop the maximum MMM rates for 2009.

WFA/Basin's corrected maximum MMM rates are shown in Table 9.

<b>Table 9 Maximum 2009 MMM Rates</b>	
<b>Mine Origin</b>	<b>Corrected MMM Calculations (\$/ton)</b>
<b>Antelope</b>	<b>\$2.74</b>
<b>North Antelope</b>	<b>2.83</b>
<b>Black Thunder</b>	<b>3.19</b>
<b>Jacobs Ranch</b>	<b>3.24</b>
<b>Cordero</b>	<b>3.49</b>
<b>Belle Ayr</b>	<b>3.62</b>
<b>Caballo Rojo</b>	<b>3.59</b>
<b>Caballo</b>	<b>3.65</b>
<b>Dry Fork</b>	<b>4.06</b>
<b>Rawhide</b>	<b>4.10</b>
<b>Eagle Butte</b>	<b>4.09</b>
<b>Buckskin</b>	<b>4.06</b>

Table 9 also incorporates the corrections set forth in the parties' Technical Corrections Petition. The detailed calculations supporting the Table 9 results are set forth in WFA/Basin's reply electronic workpapers.<sup>15</sup>

In the most unlikely event that the Board did intend for the parties to use a 2007 base year URCS to calculate the 2009 maximum rates on the issue traffic, BNSF clearly used the wrong procedure to index the 2007 base year costs. The Board emphasized in its Decision that in calculating the MMM ratios, the proper procedure was

---

<sup>15</sup> See WFA/Basin Reply Electronic Workpapers "2004 URCS phase inputs and outputs\_\_2009 correction.xls," "MMM Model Linked to III-H-3 Reb(STB final corrected revenues).xls" and "STB BNSF WFA EP657 PH3 2004 URCS\_1 WFA BASIN.xls."

to index the base period variable costs using the RCAF-A. Id. at 30. The same procedure can and should be applied to index the 2007 base year URCS costs for MMM purposes.<sup>16</sup>

Finally, BNSF misapplied the indexing procedure it did select by mistakenly including index items that do not apply in cases where, as here, shippers are supplying the railcars and by failing to index costs to 1Q09 levels. These errors are specifically identified and corrected in the electronic workpapers accompanying this Reply.<sup>17</sup>

#### **IV** **EXPEDITED RELIEF REQUESTED**

WFA/Basin request that the Board reject BNSF's Notice because the rates set forth therein do not comport with the Board's Decision. Next, WFA/Basin request that the Board direct BNSF to submit a new compliance notice containing rates that do not exceed the correctly calculated maximum MMM rates set forth in Table 9.<sup>18</sup> Finally,

---

<sup>16</sup> WFA/Basin's calculation of the maximum MMM rates using 2007 URCS costs indexed by the RCAF-A to 1Q09 levels is set forth in WFA/Basin Reply Electronic Workpaper "2007 to 1Q09 RCAF-A MMM Rates.xls."

<sup>17</sup> WFA/Basin's calculation of the maximum MMM rates using 2007 URCS costs indexed by using the procedures set forth in BNSF's Notice (and incorporating the most recently available 1Q09 index data) is set forth in WFA/Basin Reply Electronic Workpaper "correction to bnsf 1Q09 max rates.xls." The actual index level for 1Q09 using BNSF's indexing procedures is significantly less than the 4Q08 index level. See WFA/Basin Reply Electronic Workpapers "BNSF07 4Q08 Phase III Index INC ROI\_WFA.xls" and "BNSF07 1Q09 Phase III Index INC ROI\_WFA.xls."

<sup>18</sup> These rates remain well above the JT, with the JT calculated using (i) 2007 URCS costs indexed to 1Q09 by the procedures set forth in BNSF's Notice (and

WFA/Basin request that the Board order BNSF to reimburse WFA/Basin for amounts collected between March 20, 2009 and the effective date of BNSF's corrected compliance notice that exceed the correctly calculated maximum reasonable rates, plus applicable interest calculated in accordance with 49 C.F.R. Pt. 1141.

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

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

Dated: April 2, 2009

Attorneys for Complainants

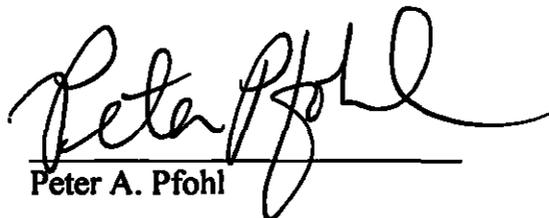
---

incorporating the most recently available 1Q09 index data) or (ii) 4Q04 or 2007 URCS costs indexed to 2009 levels using the RCAF-A forecast data in the record prior to the Decision. See WFA/Basin Reply Electronic Workpaper "URCS COSTS to 1Q09 JT.xls."

## **CERTIFICATE OF SERVICE**

I hereby certify that this 2nd day of April, 2009, I served copies of the foregoing Reply to BNSF's Notice of Filing of Verified Notice of Compliance by hand delivery on designated outside counsel for BNSF, as follows:

Samuel M. Sipe, Jr., Esq.  
Anthony J. LaRocca, Esq.  
Frederick J. Horne, Esq.  
Steptoe & Johnson, LLP  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036-1795



Peter A. Pfohl