227439

MAYER • BROWN

Mayer Brown LLP
1999 K Street, N.W
Washington, D.C. 20006-1101

Main Tel +1 202 263 3000
Main Fax +1 202 263 3300
www.mayerbrown.com

Robert M. Jenkins III
Direct Tel +1 202 263 3261
Direct Fax +1 202 263 5261
rmjenkins@mayerbrown.com

JUL 15 2010
RECEIVED

ENTERED
Office of Proceedings

JUL 15 2010

Part of
Public Record

July 15, 2010

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

Re: Ex Parte No. 558 (Sub-No. 13)
Railroad Cost of Capital-2009

Dear Ms. Brown:

Enclosed for filing in the above case are an original and ten copies of "Rebuttal Comments of BNSF Railway Company." Please date-stamp the extra copy of this pleading and return it to our representative. Thank you.

Sincerely yours,

Robert M. Jenkins III

RMJ/bs

Enclosures
cc: Richard E. Weicher
Jill K. Mulligan

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 558 (Sub-No. 13)

RAILROAD COST OF CAPITAL—2009

REBUTTAL COMMENTS OF BNSF RAILWAY COMPANY

BNSF Railway Company ("BNSF") files these rebuttal comments in response to the reply comments filed in this proceeding on June 15, 2010, by Western Coal Traffic League ("WCTL"), PPL Montana, LLC/PPL EnergyPlus, LLC ("PPL"), and National Grain and Feed Association ("NGFA"). BNSF joins generally in the rebuttal comments filed today by the Association of American Railroads ("AAR"). BNSF's own rebuttal is restricted to WCTL's, PPL's, and NGFA's comments concerning BNSF.

The Board in its March 30, 2010 order instituting this proceeding requested comments on five "narrow issues," including "(4) how the change in BNSF Railway Company's (BNSF's) share prices from November 2009 through December 2009, following the announcement of BNSF's acquisition by Berkshire Hathaway Inc., should be considered in calculating the 2009 cost of common equity capital." Slip op. at 1. In their opening comments filed May 17, 2010, BNSF and the AAR explained why no adjustment in the 2009 cost of capital calculation was necessary or appropriate as a result of any share price impacts that may have resulted from the proposed Berkshire acquisition. BNSF Supp. Comments at 3-7; AAR Comments at 2 n.1, Gray VS at 24, 44-47. WCTL in its reply comments agreed that no adjustment should be made.

WCTL Reply Comments at 3, Crowley/Fapp VS at 23-25. PPL supported WCTL's comments. PPL Reply Comments at 2.

NGFA's comments consisted of the verified statement of Gerald W. Fauth III, who conceded that the AAR's cost of equity calculations, using the market value of BNSF stock throughout 2009, "technically comply with the STB's current standards." Fauth VS at 14. He also agreed that market value, "in most cases, is best represented by the stock price." *Id.* Further, like every other party in this proceeding, he agreed that BNSF should be included in the 2009 cost of capital calculation. *Id.* Nevertheless, he concluded that "adjustments to the STB's calculations to reflect the Berkshire/BNSF transaction may be appropriate" and that "the Berkshire/BNSF transaction is an aberration which will have an impact on the 2009 cost of capital calculation, which (whether the result is up, down or minor) should be carefully evaluated and considered by the Board." *Id.* at 20. Nowhere did Mr. Fauth suggest ***how*** such an adjustment might be made, nor did he explain ***why*** the increase in BNSF's stock price is an "aberration" that might merit special treatment.

In fact, as BNSF and the AAR explained in their opening comments, there is nothing unusual about an increase in a railroad's stock price as a result of an offer to acquire the railroad. The STB has not in the past made an "adjustment" in its cost of capital calculations for such an increase, and there is no reason that it should. BNSF Supp. Comments at 4-6; AAR Comments at 2 n.1, Gray VS at 47, App. O. Moreover, there is nothing unusual about significant swings in railroad stock prices attributable to a wide variety of market factors. In fact, BNSF's stock price was higher in mid-2008 than it was after Berkshire Hathaway announced its proposed acquisition in late 2009; and the swings in some railroads' stock value in 2009 were greater than the swing in BNSF's stock value. BNSF Supp. Comments at 6; AAR Comments, Gray VS at 46, App. O.

There is no principled basis upon which to attempt to divine a value for BNSF's stock in November-December 2010 independent of the value the market itself actually placed on that stock. Accordingly, Mr. Fauth's unsupported suggestion that the Board may want to "adjust" its cost of equity calculation for 2009 in unspecified ways should be rejected.

Although the Board made clear in its March 30, 2010 order that it was seeking comment only on issues concerning the calculation of the cost of capital for 2009, Mr. Fauth raised a host of extraneous issues concerning BNSF. These included whether BNSF should be included in the railroad sample for the 2010 cost of capital calculation (Fauth VS at 11), how that would be possible after its stock is no longer publicly traded (*id.* at 12-13, 15-17), and what impact the Berkshire/BNSF transaction will have on BNSF's return on investment, revenue adequacy and URCS costs (*id.* at 17-19). Mr. Fauth himself appeared to recognize that these topics are outside the scope of this proceeding, since he calls for "open[ing] a proceeding, or proceedings" to address them.[1] *Id.* at 21. Furthermore, each of the issues he raises concerns well-established and long-standing rules of the Board that affect the entire industry.[2] If NGFA wishes to see any of those rules reopened and reconsidered, it should file a petition with the Board addressed to that rule, explaining why it should be reopened, and describing the relief NGFA seeks.

---

[1] WCTL also noted that the issue of how to calculate the cost of capital in future years was not properly noticed or implicated in this proceeding. WCTL Reply Comments at 4.

[2] For example, the criteria for a railroad's inclusion in the railroad sample for purposes of the STB's cost of capital calculation have been in place since 1985. *See Railroad Cost of Capital—1984*, 1 I.C.C.2d 989, 1003-4 (1985). Similarly, the Board's Uniform System of Accounts, adopted in conformity with Generally Accepted Accounting Principles, has long required the use of acquisition cost, regardless of whether a railroad's assets increased or decreased in value as the result of a purchase transaction; and the Board's URCS cost calculations and revenue adequacy calculations have long followed that rule. *See CSX Corp., Et Al.—Control—Conrail Inc., Et Al.*, 3 S.T.B. 196, 262-65 (1998).

Similarly, WCTL suggested that there is a "discrepancy" which should "concern" the Board between discount rates used by financial analysts in connection with the Berkshire/BNSF transaction and the industry-wide cost of equity capital determined by the Board under its cost of capital methodology. WCTL Comments at 9-10. BNSF believes that WCTL's ostensible "concern" is misplaced; however, as WCTL itself acknowledged, issues concerning the Board's cost of equity methodology are beyond the scope of this proceeding. *Id.* at 9.[3] If WCTL wishes the Board to revisit its recently completed broad rulemaking concerning its cost of capital methodology, WCTL should file the appropriate petition, to which BNSF and other interested parties can respond.

Respectfully submitted,

Robert M. Jenkins III
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006

Richard E. Weicher
Jill K. Mulligan
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131

Counsel for BNSF Railway Company

Dated: July 15, 2010

---

[3] *See* Ex Parte No. 558 (Sub-No. 12), *Railroad Cost of Capital—2008* (served Sept. 25, 2009), slip op. at 2 (rejecting WCTL's effort to collaterally attack the Board's cost of capital methodology and observing "[i]t is settled administrative law that an agency need not, and as a matter of sound procedure should not, permit parties to relitigate generic rules in individual proceedings that apply those rules.")

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2010, a copy of the foregoing "Rebuttal Comments of BNSF Railway Company" was served by United States first-class mail on the following:

John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
1825 K Street, NW, Suite 700
Washington, DC 20037

Andrew P. Goldstein, P.C.
McCarthy, Sweeney & Harkaway, P.C.
1825 K Street, NW, Suite 700
Washington, DC 20006

Kim Hillenbrand
Snavely King Majoros O'Connor & Lee, Inc.
1111 14th Street, NW, Suite 300
Washington, DC 20005

Paul G. Moates
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005

William A. Mullins
Baker & Miller PLLC
2401 Pennsylvania Ave, NW, Suite 300
Washington, DC 20037

Louise A. Rinn
Union Pacific Railroad Company
1400 Douglas Street, Stop 1580
Omaha, NE 68179

David C. Reeves
Kansas City Southern
P.O. Box 219335
Kansas City, MO 64121-9335

Robert D. Rosenberg
Slover & Loftus
1224 Seventeenth St., NW
Washington, DC 20036-3003

Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Ave, NW
Washington, DC 20004-2401

Louis P. Warchot
Association of American Railroads
425 3rd Street, SW, Suite 1000
Washington, DC 20024

James W. Wochner
Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

Robert M. Jenkins III