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May 17, 2010

BY MESSENGER

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

ENTERED
Office of Proceedings

MAY 17 2010

Part of
Public Record

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 "Supplemental 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, bs

Robert M. Jenkins III

RMJ/bs

Enclosures
cc: Richard E. Weicher
Jill K. Mulligan

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

RAILROAD COST OF CAPITAL—2009

SUPPLEMENTAL COMMENTS OF BNSF RAILWAY COMPANY

By order served March 29, 2010, the Board instituted this proceeding to determine the rail industry's cost of capital for 2009. In that decision, the Board requested comment on the following issues: (1) the railroads' 2009 current cost of debt capital; (2) the railroads' 2009 current cost of preferred equity capital (if any); (3) the railroads' 2009 cost of common equity capital; (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";[1] and (5) the 2009 capital structure mix of the railroad industry on a market value basis. *Railroad Cost of Capital*—2009, Ex Parte No. 558 (Sub-No. 13) (served March 29, 2010), slip op at 1. The railroads, through the Association of American Railroads ("AAR"), are jointly submitting comments addressing the five issues raised in the Board's decision. BNSF submits these supplemental comments addressing the fourth issue raised by the Board—whether the change in BNSF's share prices following the announcement of BNSF's proposed acquisition by Berkshire should be considered in calculating the 2009 cost of capital. For the reasons described

[1] As discussed below, throughout 2009 the stock of BNSF Railway Company's parent Burlington Northern Santa Fe Corporation was publicly traded (under the stock symbol "BNI"). We use "BNSF" herein interchangeably to refer to both the railroad and its parent.

here, BNSF agrees with the comments of the AAR that no artificial adjustment should be made to address any share price impacts in the 2009 period that may have resulted from the proposed Berkshire acquisition.

I. Background of the BNSF-Berkshire 2010 Merger Transaction

On February 12, 2010, Burlington Northern Santa Fe Corporation, of which BNSF Railway Company is a wholly-owned subsidiary, was acquired through merger by Berkshire Hathaway, Inc ("Berkshire"). As part of that transaction, Burlington Northern Santa Fe Corporation was merged into R Acquisition Corporation, an indirect, wholly-owned subsidiary of Berkshire ("Merger Sub") with Merger Sub continuing as the surviving entity. Merger Sub subsequently changed its name to Burlington Northern Santa Fe, LLC. BNSF Railway Company is now a wholly-owned subsidiary of Burlington Northern Santa Fe, LLC.

Prior to the merger, Berkshire owned 76,777,029 (or 22.5%) of the total issued and outstanding shares of Burlington Northern Santa Fe Corporation. On the occasion of a routine and long-scheduled visit to BNSF's headquarters in late October, 2009, Warren E. Buffett, Chairman and Chief Executive Officer of Berkshire, informed BNSF's Chairman, President and Chief Executive Officer, Matthew K. Rose, of Berkshire's interest in acquiring all of the outstanding BNSF shares. BNSF's Board of Directors convened three special meetings in October and November to discuss Mr. Buffett's proposal. With authorization from the Board of Directors, BNSF engaged in discussions with Berkshire regarding the proposed transaction and the terms to be contained in a merger agreement between the two companies.

On November 3, 2009, BNSF and Berkshire announced that a definitive merger agreement had been reached whereby Berkshire would acquire the remaining outstanding shares of BNSF for $100 per share in a combination of stock and cash. Pursuant to the merger agreement, shares of common stock of Burlington Northern Santa Fe Corporation were converted into the right to receive, at the election of the stockholder, either $100.00 in cash or a portion of a share of Berkshire Class A common stock. BNSF scheduled a special meeting of the stockholders of Burlington Northern Santa Fe Corporation for February 11, 2010, at which it asked its shareholders to approve the merger agreement between BNSF and Berkshire. At that meeting, Burlington Northern Santa Fe Corporation shareholders voted overwhelmingly in favor of the company's acquisition by Berkshire. The merger transaction was subsequently closed on February 12, 2010, and Burlington Northern Santa Fe Corporation, along with its subsidiary BNSF Railway Company, became an indirect, wholly owned subsidiary of Berkshire.

II. BNSF Data Should Be Included in the 2009 Rail Industry Cost of Capital Sample Without Additional Modification

The Board's March 29, 2010 Decision requests comments regarding "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." The Board did not propose any specific modifications that could or should be made to the 2009 railroad sample to reflect impacts to BNSF's share price as a result of the Berkshire acquisition that was proposed in 2009 and consummated in 2010. BNSF believes that the Board should calculate the cost of capital for 2009 by including BNSF's data in the railroad sample in the standard manner provided for by its existing rules; any proposed modification to exclude or modify BNSF's data from the 2009 railroad sample would be inappropriate and contrary to the Board's rules and prior precedent.

On an annual basis, the Board calculates the railroad industry's cost of capital utilizing company-specific data for a sample of railroads meeting the following criteria: (1) the company is a Class I line-haul railroad; (2) if the Class I railroad is controlled by another company, the controlling company is primarily a railroad company and is not already included in the study frame[2]; (3) the company's bonds are rated at least BBB by Standard & Poor's and Baa by Moody's; (4) the company's stock is listed on either the New York or the American Stock Exchange: and (5) the company has paid dividends throughout 2009. *Railroad Cost of Capital—1984*, 1 I.C.C.2d 989, 1003-4 (1985). The Board's rules require that each railroad that meets these criteria in a given year be included in the sample base for calculating the industry's cost of capital for that year. Id. at 1005.

BNSF was and continues to be a Class I line haul railroad meeting the requirement of 49 C.F.R. Part 1201, Subpart A, General Instructions § 1-1. During the entire calendar year 2009, BNSF Railway Company was controlled by parent corporation Burlington Northern Santa Fe Corporation, which had more than 50% of its assets devoted to rail operations. BNSF maintained a bond rating with Standard & Poor's of at least BBB and with Moody's of at least Baa during the entire calendar year. In the same period, BNSF's stock was listed on the New York Stock Exchange under the stock symbol BNI, and BNSF paid four quarterly dividends to shareholders of BNSF common stock in 2009. BNSF meets the five specified criteria for inclusion in the 2009 cost of capital sample and, accordingly, has been included in the AAR's calculations of the 2009 industry cost of capital being simultaneously submitted to the Board in this proceeding.

While the Board does not outline any proposed adjustments to be made to BNSF's data, any suggestion that would remove or modify in some way the BNSF data for part or all of calendar year 2009 would be inconsistent with the approach previously observed by the Board. For example, when CSX Transportation, Inc. ("CSX") and Norfolk Southern Railway Company

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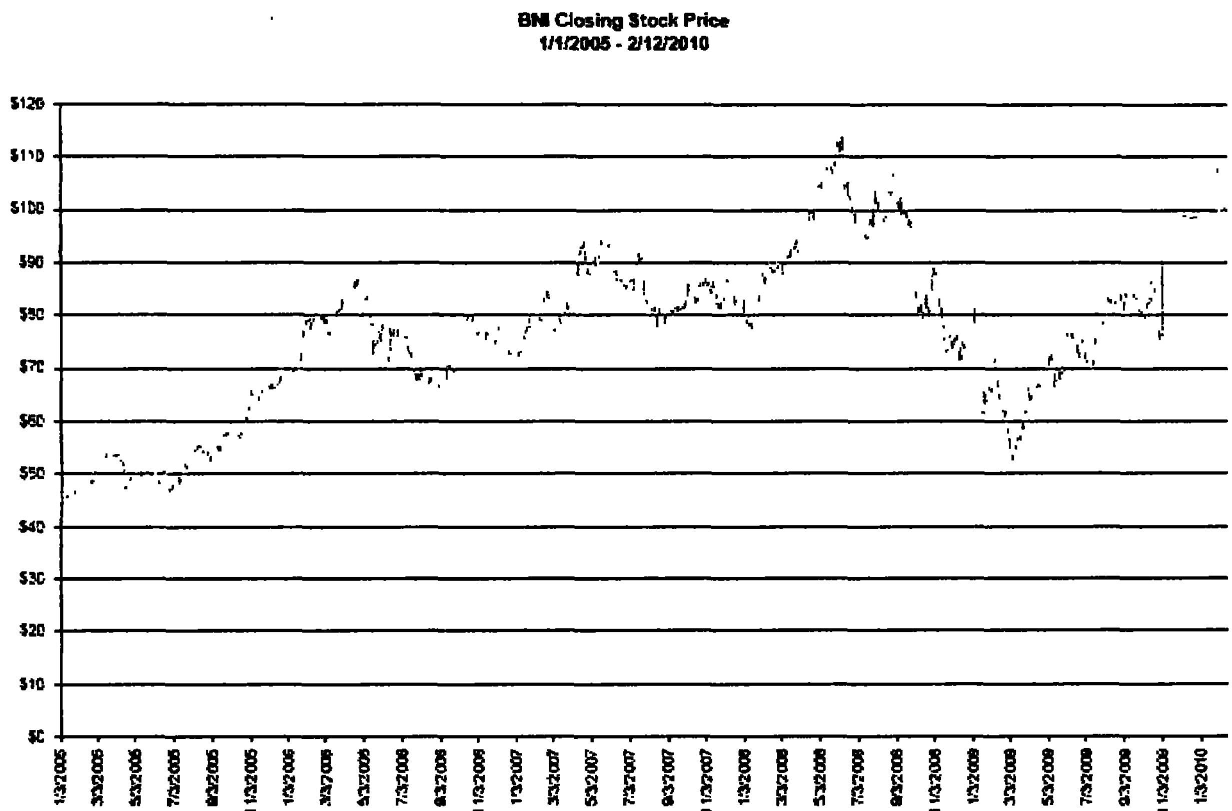
[2] A controlling company will be considered a company "primarily in the railroad business" if at least 50 percent of its total assets are devoted to railroad operations.

("NS") sought to acquire Consolidated Rail Corporation ("Conrail"), the value of Conrail's stock rose from $71 to $115 per share. *Erie-Niagara Rail Steering Comm. v. STB*, 247 F.3d 437, 442 (2nd Cir. 2001) ("*Erie-Niagara*"). In that context, as discussed in the Verified Statement of the AAR's witness John T. Gray, STB Vice Chairman Owen sought comment in Ex Parte No. 558, *Railroad Cost of Capital—1996*, concerning whether payment of a "substantial premium above market price" for a carrier may adversely affect the cost of capital calculation. Gray VS at 46-47 and App. O. The AAR submitted comments explaining that the price paid for a railroad, including any "premium," *is* the market price. The STB made no adjustment to its cost of capital calculation to alter the price of Conrail's stock. *Id.*

The STB was similarly unpersuaded in the subsequent CSX/NS/Conrail merger proceedings that the so-called "acquisition premium" paid by CSX and NS for Conrail's stock reflected anything other than the "real value" of the property. *CSX Corp., Et. Al.—Control—Conrail Inc., Et al.*, 3 S.T.B. 196, 265 (1998). The STB emphasized that the Railroad Accounting Principles Board had endorsed the use of acquisition cost, and that the Board's Uniform System of Accounts, adopted in conformity with generally accepted accounting principles (GAAP), also required the use of acquisition cost. *Id.* at 262.

Further, when the STB later conducted its rulemaking in Ex Parte No. 582 (Sub-No. 1), *Major Rail Consolidation Procedures*, 2001 WL 648944 (served June 11, 2001), and some parties argued vigorously for a rule that would exclude any "acquisition premium" from the Board's regulatory calculations, the Board again found "no sound economic justification" for the approach suggested by those parties. *Id.* at *18. "Suffice it to say that we do not believe that railroads have any regulatory incentive to overpay for rail properties." *Id.* Berkshire likewise had no incentive to overpay for BNSF. As noted above, Berkshire had long had a substantial investment in BNSF stock and was well-positioned to evaluate the long-term worth of the company.

Moreover, a review of BNSF's stock price over a five year period from 2005 through 2009 demonstrates that the price for BNI stock in the two months following the November 3, 2009 announcement of the proposed transaction was entirely within the prior historical ranges of stock price experienced in that five-year period.



In fact, while the BNI stock price saw an increase following the November 3 announcement, the highest closing stock price between November 3 and December 31, 2009 -- $98.95-- was still well below the mid-2008 price. There is nothing to suggest that the price increase following the Berkshire transaction announcement was not an appropriate representation of the market value of BNSF's stock.

In sum, as the STB has held repeatedly before under these circumstances, there is no economic or regulatory reason for the Board to discount, adjust, or eliminate any increase in BNSF's stock price in the November-December 2009 time frame associated with Berkshire's tender offer. The industry's cost of equity capital for 2009 should be calculated with the share prices that willing buyers and willing sellers were prepared to pay for each of the sample railroads' shares throughout the year.

Respectfully submitted,

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Counsel for BNSF Railway Company

Dated: May 17, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May. a copy of the foregoing "Supplemental Comments of BNSF Railway Company" was served by United States first-class mail on the following:

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