

UNITED STATES DEPARTMENT OF TRANSPORTATION

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SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

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IN THE MATTER OF:

PUBLIC SERVICE COMPANY OF
COLORADO, d/b/a XCEL ENERGY,
Complainant

v.

STB Docket No. 42057

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,
Respondent.

Mercury Building
7th Floor Hearing Room
1925 K Street N.W.
Washington, D.C. 20423-0001

Thursday,
March 18, 2004

The above-entitled matter came on for hearing, pursuant to
notice, at 10:00 a.m.

BEFORE:

ROGER NOBER, Chairman, STB

APPEARANCES:

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C-O-N-T-E-N-T-S

ORAL ARGUMENT:	<u>PAGE</u>
On behalf of the Complainant By Mr. Wilcox	7
On behalf of the Respondent By Mr. Weicher	43
By Mr. Sipe	56
 <u>REBUTTAL</u>	
On behalf of the Complainant By Mr. Wilcox	95
On behalf of the Respondent By Mr. Weicher	102

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P-R-O-C-E-E-D-I-N-G-S

(10:01 a.m.)

CHAIRMAN NOBER: Well, good morning, everyone.

The Board will come to order and today we have an oral argument in the rate reasonableness case of Xcel vs Burlington Northern Santa Fe Railroad. Now, this is the third oral argument that's been held by the Board but I'm pleased to say that they have now become standard operating practice in every large rate case. We held oral arguments in two of the Eastern cases and found them to be productive in ways, I think, that were transparent to the folks at large and some that weren't. These arguments have given the Board an opportunity to probe the issues about which we have questions to hear from the parties about the points they want to highlight and I can assure you that in every one of these you've raised questions that we thought we knew the answer to that made us go back and take a second look and other matters which we thought we didn't understand which you had an opportunity to clarify and unfortunately, I can't tell you which was which.

So I'm pleased that we've done this and look forward to today's argument. Now, in their submissions to the Board, the parties have raised a number of subjects that they will raise at the hearing at issue in this case and in addition to the issues raised by the parties in their submissions, we have also put out some of our own. As you know from the Eastern decisions, we have worked hard to insure that our evidentiary decisions are

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consistent whenever possible from case to case.

I think the parties deserve consistency and predictability in their cases and we strive for that. Now, I'd like to bring the same kind of consistency to the Western cases. That's why one of the questions we pose today was to justify the road property and operating expenses in this case and why they differ significantly or should differ significantly from those in recent Western cases. Now, I recognize that departures from prior cases can be appropriate based on the circumstances of a particular case but in the interest of consistency and predictability, there should be reasons for such departures and I think we'll try to probe that some today or at least the royal we will.

Now the other issue we've asked you to focus on is whether the Board should alter or change its method used to set the maximum reasonable rate if the evidence shows that the revenues generated by the traffic group exceed the revenues of the stand-alone railroad. Now, I know that the railroad is advocating for the Board to continue using its current methodology and that the shipper proponent is asking for us to take two alternatives.

In the most recent -- in one of the recent Eastern cases, the Board listened to and welcomed proposals for feasible alternatives that would conform with the statute and the coal rate guidelines and I look forward to hearing your thoughts on that issue and maybe we'll even have some of our

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own. Now, I also understand that the parties intend to raise issues of their own regarding road property investments, including the inclusion of cross-over traffic, a density adjustment and the inclusion of the Jeffrey Energy Center traffic and we look forward to that discussion today as well.

Now, procedurally, each side has 45 minutes, although traditionally these have taken longer. Xcel has indicated that it will reserve some of this time for rebuttal and that's fine. And the Burlington Northern has asked to apportion some of its time between in-house and outside counsel, which is also fine. Now, I understand that the parties intend to use Powerpoint slides today as part of their presentations and I just want to say this; that while I welcome the use of technology in these arguments, I want to remind parties that Powerpoint slides are an aid to and should not be a distraction from the presentations and if we find that they are, we'll shut them off and you can submit them for the record.

So with that, thank you for coming and I look forward to your presentations, and Mr. Wilcox, I guess you are first.

MR. WILCOX: Yes, I'm Thomas Wilcox. I'm appearing on behalf of the Complainant. Also with me is Mr. David Benz from our firm. We also have a couple of representatives of Xcel Energy here today with us. I think the Chairman has met both of these gentlemen on one or two occasions. I do want to commend the Board for holding oral argument. I think that it is a good idea in these cases. I think it's an idea -- a good way

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to vet out the issues and have a little dialogue and get past all the paper and we've also had some staff involvement in the last couple of weeks on the computer modeling issues, which also I found to be very helpful as well.

We have a forum in this case. I'm going to talk about several key issues that I listed and I'm also prepared to talk about the issues that you listed in the order of the 11th. We've prepared some counsel's exhibits. They are in Powerpoint form. I'm going to hand those out to the Board and to opposing counsel because I agree, Powerpoint, I think, can help in these proceedings but I think that they can be a distraction. So these are designed to facilitate the discussion and I hand them out to you because if you see something you want to jump to, I'd be more than happy to do it.

We've also prepared a map. This is a map that's a little slightly different than what's in the record. It's more conceptual. There are more accurate maps in terms of the railroad at Exhibit III-A-1 of our evidence and then BNSF also has it as their evidence as well.

Overall -- some overall context. We filed our complaint in late 2000. Evidence was filed -- opening evidence was filed in January 2003 and briefs were filed in September 2003. So the evidence in this case post-dated the and decisions. It overlaps with the decision and preceded all three of the Eastern cases.

CHAIRMAN NOBER: Let me ask, would you have changed your presentation based on our decisions in the Eastern cases?

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MR. WILCOX: I don't think so. The one -- one of the issues, obviously, is the division of revenues issue that came up and the modification of the modified mileage block pro rate. We did use the modified mileage block pro rate in this case because that had been used in prior cases. We analyzed that and the use of the MSP and we don't -- I guess at the end of the day, we don't have a problem with the use of MSP in this case.

CHAIRMAN NOBER: Now, the Burlington Northern has asked for a different allocation of revenues --

MR. WILCOX: Yes. Well --

CHAIRMAN NOBER: -- than we did in the Eastern cases.

MR. WILCOX: Yes, but they also ask for the exact same allocation that all three of the railroads asked for in those cases and it's the exact same formula and it suffers from the exact same deficiencies. They filed what they called a clarification of their evidence in this case and we've responded to that. There's a -- so there's a very full record on what they want to do with cross-over traffic and this methodology but our position is, it's the same methodology. It suffers from the same -- the exact same deficiencies.

CHAIRMAN NOBER: And what would you say those are?

MR. WILCOX: They say that the fixed costs is the same

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for high density and lower density lines. They haven't fixed that yet and they try to say that, you know, use the URCS variable cost calculation to sort of bootstrap into that but I think we show convincingly in our reply to their clarification that even that shows that it's skewed towards giving revenues to the carrier because they use their own variable costs which are a lot lower than the stand-alone railroad so it had a deficiency going in as to allocation. So we don't think that they've -- clearly we think what they filed as a petition for reconsideration of the NS case. They haven't shown it's any different. It's the exact same experts and exact same formula. They even admit it's the same formula. So that's our position on that.

CHAIRMAN NOBER: I was trying to figure out, though, in looking at that proposal, what would happen in the real world, which I know in the stand-alone world isn't something that, you know, we always apply but that, you know, under our theory, I guess there's two carriers that originate out of the Powder River Basin and one carrier that's the terminating carrier, so I guess in the shipper world, that's the bottleneck carrier and so I guess in the real world, they would have the advantage in the negotiations, wouldn't they?

MR. WILCOX: Well, it depends if there's a true bottleneck, then a bottleneck goes --

CHAIRMAN NOBER: It would depend, right, if they could inter-line with the UP or not.

MR. WILCOX: But I think then you're getting into the

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discussion of -- sorry, of the market based rates versus cost based rates.

CHAIRMAN NOBER: No, I know, we can't let the real world get too far into this.

MR. WILCOX: Right. But I think the Board is trying to work to define what is a proper allocation of cross-over revenues to take into account densities, but I don't think that -- I mean, certainly not on this record, and I don't think we're there yet, so I think that the closest thing you've come to so far is MSP and we don't have an objection to using that in this case.

CHAIRMAN NOBER: Okay.

MR. WILCOX: Xcel has presented the Board with a very conservative, we think, straight forward, stand-alone cost analysis in accordance with the established SAC rules and policies behind the guidelines.

And those guidelines establish a balance between the carrier's statutory right to differentially price in the protection of captive shippers from monopoly pricing.

In contrast to us, BNSF's participation has been just a broad array of extreme positions trying to convince the Board to change the rules. In a nutshell, they want to change the rules to tip the balance away from protecting captive shippers more towards allowing them to engage in essentially unfettered monopoly pricing. They make a big deal about how demanding the Pawnee plan is and that they should be able to charge all the

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way up to the point where the plant stops burning coal but that's -- the SAC analysis stops way short of that. Anyway --

CHAIRMAN NOBER: That's true, although I was noting in your brief that -- I actually read them, that you spend the first part of your brief essentially saying BN has a policy to raise rates, right, that that's what, I think from the highest levels on down and I don't think there's any secret to that. I get, you know, every week analysts' reports and they all say raise rates. So let's just assume for the moment that that's probably true.

But on the other hand, say that we can't take into account, you know -- BN counters by saying that well, they're revenue inadequate which -- and that they should have unfettered right to raise rates.

MR. WILCOX: Right.

CHAIRMAN NOBER: As you said, and how do we take those considerations into account? I mean, typically, as you said, in a SAC case, we look at it on the merits and we look at it on the case and motives, for better or for worse, are not a part of it. But you, yourselves, try to bring motives into it. I mean, should we either look at them or not look at them? How do -- I've been kind of struggling with that. What do we -- what's the sort of relevance of all that?

MR. WILCOX: Well, the Board, I know, has been struggling in sort of the gaming issue, but the SAC analysis is designed when you conduct the analysis, to make the carrier revenue adequate for the issue

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traffic. It's designed to help them to become revenue adequate by determining the proper rate to the SAC analysis. And that rate, especially in this case, is above the jurisdictional threshold and in our rebuttal we're not at or below the jurisdictional threshold, we're above. This rate, if you were to accept our evidence, would be, you know, up around I think over 200 percent of their variable cost.

So we -- our position is that the policies and the guidelines in place and the ones in place when we evaluated the case to file the case, are sufficient to help them become revenue adequate without more, without changing the rules, fundamental policies like eliminating cross-over traffic, you know, fundamental part of the stand-alone cost guidelines. They want to just do away with it. And it's all designed to increase the amount of revenues they get out of a particular movement and our position is the standards as they are give them plenty of assistance.

CHAIRMAN NOBER: Fair enough.

MR. WILCOX: Speaking of the rates, we do allege and I think the evidence shows these rates -- the rates they implemented are extremely high in this instance. We've got a basically 24 mill rate which is twice -- over twice what the average is. It's much higher than what was prescribed at TMPA and this line is essentially a subset of that movement, so there's no question these rates are exorbitant and we believe that the evidence clearly shows that they are unreasonable.

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CHAIRMAN NOBER: Now, I'm sorry, the 113.6 mill, that's -- you're saying for the Western -- what's WCC?

MR. WILCOX: That's our traffic group. We have 37 coal shippers and we took the --

CHAIRMAN NOBER: Okay, that's -- it's not something else.

MR. WILCOX: Right.

CHAIRMAN NOBER: And you're saying the average for those captive plants is 13.6?

MR. WILCOX: Mills, yes.

CHAIRMAN NOBER: And this rate is 24.2.

MR. WILCOX: 24.2 mills, right, and then TMPA rate 12.9 and then we just added the -- there's a Board study that was done in 1999 showing the average rate which I assume includes captive as well as --

CHAIRMAN NOBER: Competitive.

MR. WILCOX: -- competitive traffic. I think let's go through these next two real quickly. I just wanted to emphasize that you're not facing the same analysis you faced in the last four cases, very long railroads, some new concepts in terms of off-line reroutes and things like that. It's very straightforward. It's only about 400 miles long. It's clearly a coal handling railroad. We're not diverting from the way BNSF handles their traffic in the real world. It's very simply put together, single track,

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double track. It's only got one commodity. We don't have any joint line operations in the PRB.

We have -- it's directional. I have my -- I'll try not to burn a hole in opposing counsel but we have -- you know, it's very -- it collects the coal up in the mine areas, takes them down a loaded direction, drops some off here. Interchanges at the intercept this way, interchanges with UP. This is the Jeffrey traffic, comes further down, delivers to Pawnee. It interchanges traffic to go south to Texas and points down there. And then the empties come back up. They're staged in the yards, just as BNSF does and in the real world only more efficiently.

And the other thing that it seems you're getting lost in all the noise about computer models is that this railroad is based on a real live railroad. One of the experts Xcel used was Mr. Richard McDonald, a 42 year railroading guy who is the vice president of WRPI and who is responsible for planning -- for the planning, construction and operation of WRPI so we've argued with BNSF about how much the two are alike, but the fact of the matter is, they agree it's the original configuration that -- of WRPI and it serves the same function as Work B used to do and then we've shown that if you look at -- you know, when UP took over the line in 1999 it's comparable. In fact, we're having less trains and our double-tracking is more on a percentage basis. So the railroad is presumptively feasible and it's -- we question -- then we can argue about the proper operating parameters.

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CHAIRMAN NOBER: Let's just start with the construction of it. I mean, you in your brief, and one of the things that we look at is what -- how does this railroad compare in terms of its mileage and cost per mile to prior Western cases and we've had a number that are very similar to this. This one, I mean, how does your proposal compare to our prior cases versus what the defendant's proposals do and why should we differ?

CHAIRMAN NOBER: We have the one chart in our brief and we've included that in the stack of materials you have there.

CHAIRMAN NOBER: You have, yeah, the road property investment and the operating expenses.

MR. WILCOX: Right, and then we've reproduced it here as well, but our -- there is it. If you look at the more recent cases, and particularly TMPA, you know, that's \$1.7 million per track mile and BNSF is proposing that it be a million dollars more per track mile. Now, in -- if you think about it, the actual cost on a per track mile basis should be --

CHAIRMAN NOBER: Are these indexed or are these straight numbers? I mean, are these indexed for inflation? Are these --

MR. WILCOX: They're not indexed.

CHAIRMAN NOBER: So the earlier ones would be a little higher.

MR. WILCOX: Yes, yes, that's right, that's a good point.

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But the TMPA should actually even be -- we should even be lower than that because -- or at least comparable, because TMPA went through several major cities and there were some additional bridges, you know. So on a per mile basis, we should at least be comparable, perhaps even lower.

CHAIRMAN NOBER: Which one are you the closest to?

I know I should know this, but -- of those?

MR. WILCOX: TMPA, but I haven't -- if you -- as you say we haven't accounted for the inflation on the other two. I just don't know. But if you want to talk about the reasons, they have -- most of the difference between the two is in road grading. There's a \$500 million difference on, you know, road bed preparation and there's a number of things going on there where they want us to actually, you know, move a rail yard we don't think needs to be moved. There is -- they used a computer model to talk about movement of rock out of area for the Guernsey yard, yet they didn't produce the computer model, so we don't think that's probative evidence.

They -- other areas, they believe that where we're putting the Guernsey yard is solid rock the whole thing, whereas it's actually the aggregate, so there's a number of things we've laid out in the evidence that counters what they've done in terms of investment.

CHAIRMAN NOBER: Now, even if you take the Guernsey yard out, it's still well above the average for the most recent ones;

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is that right?

MR. WILCOX: Yes. We've got -- we've got that one here. Well, yes, it is.

CHAIRMAN NOBER: Okay. And why -- what do you attribute that to?

MR. WILCOX: I've got my cheat sheet here. Well, 515 million is in road bed preparation. Thirty-three million is in bridges. We don't agree with their evidence on the bridges. They have -- they've included 100 turnouts for the WCC to cross BNSF track up in the PRB and we -- I mean, that's clearly a barrier to entry. You know, the railroad does not -- the WCC is a replacement for the BNSF. It's not a new competitor of BNSF. That's a \$26 million item.

They added \$200 million in contingency fees, so, that gives you an idea.

Let's go to the Jeffrey. Now, one of the issues in the case which -- one of the issues in the case which we don't think should be an issue is the diversion of the Jeffrey Energy traffic, the reroute and essentially, what we're talking about is we're taking -- this is Eagle Butte where the -- most of the Jeffrey traffic comes from. They also take oil from Belle Ayr. It usually comes this way down the Edgemont Line. BNSF interchanges with Northport. We're going this way and interchanging with Northport, with the UP at Northport.

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So the starting place is the same. Ending place is the same. It's an on-SARR reroute. And this reroute was -- there was no question about it in WTU, no issue by the Board, no issue by BNSF -- excuse me, BN at that time, whether it was valid. And then even more significantly, this reroute, the same reroute occurred in TMPA in the case where reroute was a big issue -- rerouting was a big issue and had a bearing on the outcome of the case. And this is a large component of our movement.

It's about 10 percent of our first year tons and so we think if the reasons were there in TMPA it would have made the difference between whether that rate was reasonable or not.

CHAIRMAN NOBER: How would you respond to the railroad's reasons for excluding it here?

MR. WILCOX: Okay, that's what's next.

CHAIRMAN NOBER: Okay.

MR. WILCOX: All right, go back. First of all, we accounted for all the -- in our opening evidence, accounted for all the operation and cost of moving the traffic. And if you apply -- you know, when the Board began to talk about rerouting was the TMPA which came out between our opening round and reply round, if you apply -- and when there's discussions further about burdens and things like that. But if you apply that type of burden of proof, we have a very slight burden here. I mean, the routing is only about one percent longer down to the plant and it's actually

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shorter from the other line, although albeit they take most of the coal from Eagle Butte.

BNSF has used the route in the past. Now, they say, "Well, we don't use it very much", but the fact of the matter is they have used it. We provide the service that's superior to BNSF. It's simpler than real life. We're only hauling half of BNSF real- life tons in the base year. Most of -- I mean, 10 percent of that is Jeffrey. No joint line operations to deal with in terms of congestion and things like that. Directional running, you don't have to worry about, you know, trains going north and south. There's a helper service on the Edgemont line we're going to avoid.

You know, BNSF raised some congestion arguments in their brief and whereas in reply the only thing they talked about was cycle times, which I'm going to get to in a minute, but we've moved to strike that from BNSF's brief because we think that argument comes way too late in just trying to rehabilitate.

As to the cycle time, what BNSF did is they compared our peak period which is the busiest possible time on our railroad in the year 2020, they compared those cycle times to their average annual cycle times and there's really no comparison, I mean, because that's the busiest possible time on our railroad whereas average annual goes up and down. But even if you make that comparison for our opening evidence, we still are short for three out of the four quarters because we felt that you know, BN improperly

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weighted the time from the two mines and in if you weight them properly, we're actually lower, but so you can -- I think at a minimum on opening, I think you can say that we're -- it's comparable and I think even better but the fact of the matter is, that in response to their motion to dismiss in February of this year -- of last year, and in our rebuttal, some of the corrections we made to some of data errors on rebuttal, the cycle times go down and if you do the same study, if the Board looks at the same -- went through the same process where they took some of the output from the string model and did the cycle times, if you do that same analysis, the cycle times are much lower, so we think there's no question it's better service.

CHAIRMAN NOBER: This raises one of the most difficult issues we have which come now in virtually every case and something that we are struggling with which is the fact that on the one hand the sort of physical plant of the railroad is designed to handle a certain traffic group but we don't know what that traffic group is until down the line, so each of you have designed a railroad and have operating plans to address different traffic and ultimately as we've done in recent cases, we've picked a traffic group that might be different than what both sides have and neither of your operating plans or physical plans actually match those and then we're kind of left to, how do we mesh those and sync those up.

MR. WILCOX: Right.

CHAIRMAN NOBER: And I mean, that's a situation that,

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in theory could be happening here as well depending on what we do with the Jeffrey energy movement. You know, we have your operating plan, which, you know, with all due respect, I think we have never accepted in 12 straight cases and then we have on the other hand, the railroad's operating plan but it doesn't include 10 percent of the movements and how would we sync those up? What would you have us do?

Well, I think the Board is -- I mean, if we were to -- and I'm not saying that we would do that, but if we were to do that, how would we do that?

MR. WILCOX: Well, I think that in every case -- I mean, there's so many issues that in every case the Board is going to be called on to make some calls on what is the appropriate operating plan. As you point out, the Complainant's operating plan in whole has never been accepted. There's always arguments about how much -- whether the Complainant has put enough capacity on the line and then there's arguments that as in this case, where BNSF wants our railroad to look like the BNSF. They do it and just -- the railroads do that. They want you to be more complicated and less efficient. They don't think you can make it that efficient, so I think that the Board should do what it's always done, is to weigh the evidence, apply the -- and we believe you've got enough evidence in this case to make those decisions.

CHAIRMAN NOBER: But that would -- I mean, the issue

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for us then would be, you know, this is a slightly longer movement and whether we use that standard on our cross-over as opposed to -- you know, a cross-over we'll deal with later, but it's slightly longer so there would be some -- a slight burden of proof if we took that standard to show that this was feasible. The problem is, you know, we don't have an operating plan to show that, so we have to try to -- we have to look at, are the cycle times comparable? Can the railroad physical plant handle it and that's something that I guess we would have to extrapolate.

MR. WILCOX: Well, not necessarily.

CHAIRMAN NOBER: And how would we do that is the problem?

MR. WILCOX: Not necessarily because the Complainants in these cases, at least in our -- well, I can't speak for all Complainants, but in our case the stand-alone railroad in terms of capacity and operating is conservative in that it's all based off of, you know, the peak -- the busiest time on the railroad. And then all of the investment for that period 20 years in the future, is built in year one.

So you know, it's -- I think that -- and the same thing with cycle times, that if you look in the year 2020 and see that the cycle times are comparable or better than the actual times of 2001, I think that you can comfortably make that decision, that the routing is more efficient.

CHAIRMAN NOBER: Okay.

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MR. WILCOX: How am I doing on time?

Let me get to one issue. One of the things that we've asked for in --

CHAIRMAN NOBER: I'm sorry, go ahead.

MR. WILCOX: That's okay. One of the things we've asked for in this case is that the Board use the RCAF-A to escalate operating expenses over the life of the DCF model. We believe that we've shown that the WCC will enjoy enough -- a sufficient enough productivity over its life to justify using the RCAF-A rather than the RCAF-U.

CHAIRMAN NOBER: Where will you get those productivity gains from? Maybe I should take notes.

MR. WILCOX: Well, primarily -- primarily, this is something different than BNSF because our density is going to increase about 26 percent over the life of the railroad, yet, the investment, the full physical plant is going to be in place on the very first year.

CHAIRMAN NOBER: So how would that show up as a productivity improvement?

MR. WILCOX: Well, you've already -- you've made the investment and then that's a sunk cost in the first year and then your revenues and tonnages are increasing and density and your overall operating costs are kind of -- I mean, that's a significant productivity gain and that's something that I think is different than the real world, but and then we've also talked --

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this has come up in other cases, technology, more efficient operations, new locomotives, things like that. I think what I've seen or what we've seen in the cases is that the Board has shown a recognition that stand-alone railroads enjoy some kind of productivity but the question is, you know, whether to use the RCAF-U or RCAF-A and you've erred on the side of using RCAF-U.

Now, I'll note that in the Eastern cases, the density didn't go beyond 10 percent. I mean, you didn't use the RCAF-A in those cases, it didn't increase, whereas in our case, it has.

CHAIRMAN NOBER: We struggled with this and this came up at a prior oral argument because, you know, on the one hand, you know, I'm sympathetic to the argument that over 20 years you're going to have increasing volumes, you're going to get better at running a railroad and, you know, even efficient firms have productivity increases. That just seems to me to be a, you know, perfectly logical argument.

MR. WILCOX: Right.

CHAIRMAN NOBER: Now, would you get as much as if you were an existing railroad that was replacing legacy assets with newer ones, you know, it seems like that would overstate the -- you know, to get that level of productivity increase would probably over-state it and you know, if let's just say we agreed that zero was too low and the full adjusted RCAF was too high, what would be a way of sort of striking a middle ground? Do you have any thoughts on that?

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MR. WILCOX: I do, in fact. Your request for a specific proposal came in one of the Eastern cases after our record was closed so --

CHAIRMAN NOBER: I don't think we got any, did we?

MR. WILCOX: No, you didn't get one.

CHAIRMAN NOBER: We didn't get any.

MR. WILCOX: You asked for one, you didn't get one.

Well, we have two --

CHAIRMAN NOBER: That's not uncommon, I have to tell you.

MR. WILCOX: We think there's two ways that you can test the propriety of using RCAF-A. And I -- before my colleagues jump up, they're not in the record because, you know, that request came after the record was closed.

CHAIRMAN NOBER: That's okay, I'm asking you now.

MR. WILCOX: All right, one way we think the Board could do it is the Board could apply its 290, Sub 4 total factor productivity procedures that it applies to all railroads to the stand-alone railroad and take the inputs that you would use for a -- you know, BNSF, take the same costing inputs and then the, you know, revenue for that output index and plug that into your existing formula and come up with what a productivity would look like. Now, we have given it some thought and I've got -- we have like a two-page summary that we could give to the Board and counsel later today.

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We can address it in post-argument briefs, if you want, but that's one way to do it and that's sort of the concept in a nutshell.

The other way to do it is that you know, the Board has moved towards using EIA pricing forecast for coal and that forecast has a productivity component in it. And there's a way -- there's -- the way to use that would be to take out that productivity component and replace the -- what the Board would use to adjust the RCAF, the STB's productivity adjustment, and replace that and that way, since the productivity is geared only to coal, because that's what your question was, was how do we know where the coal railroad would do versus the rest of the system.

CHAIRMAN NOBER: And a new railroad versus a legacy one.

MR. WILCOX: Right.

CHAIRMAN NOBER: I mean, they're both relevant, I think.

MR. WILCOX: Right, but you can -- and I'm not making stuff out of thin air because it actually has been proposed.

CHAIRMAN NOBER: We'd appreciate any suggestions on the subject.

MR. WILCOX: Some version of this, I've scanned it, but I haven't really digested it, some version of this has been proposed to the Board in the AEP Texas case. But we have some additional materials that we

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could submit and have the Board kind of talk about, but those are two ways that you could try to derive a coal movement only, you know, SAC graph, for want of a better term, on productivity and I think, because you've got -- you know, RCAF-U way up here and then RCAF-A somewhere down here, but you're trying to find out whether you should get right down to the RCAF-A which we think the evidence shows you should do in this case, but those methods can show you where -- we think, where it might fall.

CHAIRMAN NOBER: Well, sir, we appreciate having some innovative thought on the matter. I'm going to confess to not being immediately off-hand familiar with what 290 Sub 4 is, but we'll find out.

MR. WILCOX: Would you like us to -- I mean, we can submit something to the Board.

CHAIRMAN NOBER: We'll have to figure out exactly what form to take that in at the end of the argument. We'll try to probe whether or not you all want to do post-argument briefs or just have individual submissions.

MR. WILCOX: Okay.

CHAIRMAN NOBER: I think I'm open to either one. I'll leave it to you all what you think is the most helpful. I will say on that subject, I do think that since we have decided three cases since these briefs came in, you know, I am -- I hate to give more work but on the other hand, if there are issues that were raised in those and in the argument that you all

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would each want to address, I mean, I think it's fair to give you an opportunity to do that mindful of the fact that we have to decide the case in a couple of months.

MR. WILCOX: Well, we --

CHAIRMAN NOBER: But if you want to -- I mean, I don't want to impose new work on anybody.

MR. WILCOX: Well, I would say Xcel very much wants to give the Board some ideas on this. This is a big issue. I mean, the -- it tends to send a stand-alone rate up in a hurry and we -- we would be more than happy to do the little extra work.

I'm down to a couple of minutes, so let's just -- one thing you've -- on the operating expenses and investment we talked about it a little bit but I want to reinforce that predictability is the key. It's the key for all parties in a litigation and there should be some, at this point in time, predictability about what it costs to make a railroad out in the West. And so I agree with you that that's what we should be searching for and that's -- we sort of -- we hit that level, we thought in our evidence. I have a couple thoughts on gaming but I'm -- or there's a question you asked in the -- in the order of the 11th on methodologies but I'm about out of time.

CHAIRMAN NOBER: We'll give you two minutes to give that quickly.

MR. WILCOX: Okay, why don't you go to those slides?

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CHAIRMAN NOBER: Is that enough time?

MR. WILCOX: How much?

CHAIRMAN NOBER: Just a couple minutes.

MR. WILCOX: That's all, because, as I -- you know, reading the -- well, again, your request for another methodology to replace the percent reduction methodology came after this record was closed, so that's an extremely complicated undertaking and we didn't do it in the last four or five days, but we've thought about it and have some ideas. However, the question as I see it is, do you correct abuses or the percent reduction method individual abuses or adopt a completely new method because abuses are possible?

And we think and we said this in our -- this is in the record, that the Board has broad discretion if it finds a rate to be unreasonable to take whatever action it wants to afford relief and promote proper pricing. So -- and we came to the side of the fact that the percent reduction methodology can work, it has worked. So if you look at the ultimate goal of differential pricing while protecting customers from monopoly pricing practices, then the Board, we believe, can take action in individual cases and that can be a deterrent for future cases because what we're talking about is if a railroad has an existing pricing structure, and they send the rate way up here, above their existing pricing structure, there's something going on and we believe the Board can make that call as to whether that's permissible differential pricing

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or whether something else is going on.

CHAIRMAN NOBER: How would our percent rate reduction -- I mean, let's just say the railroad set a rate way up high.

MR. WILCOX: Right.

CHAIRMAN NOBER: How would that be reflected or not reflected in our percent reduction method? How is it subject to -- is it subject to manipulation by that or do you think or no?

MR. WILCOX: We think that the -- and we think that's what BNSF did in this case. We think the railroad can set a rate, have an idea of where it wants a rate to come out based on the guidelines and the rules that would apply, and then set the rate way up high and to -- so no matter what happens the rate would come down to a level that they're comfortable with and that we had some discussion of that in one of the Eastern cases.

CHAIRMAN NOBER: I mean, that's a supposition. Is there any evidence that the railroad did that in this case? That was the allegation in other cases as well.

MR. WILCOX: Well, that is the -- we believe there is because going back to that first slide, you don't have to but going back to the very first slide, it shows that the rate they put into place was over twice what we think their pricing structure would be, you know, which is the average rate for captive shippers. We think that the Board can look at the magnitude.

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There's basically three criteria; a smoking gun, which I admit, we do not have in this case, but a smoking gun where a memo or the kind of things you wrestled with in one of the other cases; a rate that substantially exceeds their pricing structure and you can -- and we think you can look at when the rate was in place the miles per ton mile for captive shippers and there -- and we think this is -- you can do this for coal only because their elasticities are relatively the same.

And then we also think you can look and see what evidence the railroad puts in. If they've put in operating expense and investment expense and it's clearly inflated for the purpose of justifying the higher rate, then that's another criteria. There may be others but we believe the Board can make that call and once it does, you can apply the percent reduction methodology and if -- kind of like a punitive damages type concept. I'm sorry.

CHAIRMAN NOBER: No, it's interesting. That takes us sort of full circle to the first question I asked, which is you know, you and the railroad have both raised motives and how would we take that into account and the answer originally was, well, you shouldn't in the SAC case, but I guess in the end, the answer is you think we should.

MR. WILCOX: Well, the first answer was in terms of I interpreted your question, what to do about revenue adequacy. I look --

CHAIRMAN NOBER: Well, it was really this question

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which was, you know, you assert the railroad just raised prices high because that's their policy and the railroad says, "Well, we're doing it because we're revenue inadequate", and I say, how would we take those kinds of, you know, non-SAC considerations into account. And then the answer is, I guess in the end you're saying that we should take them into account. We should look behind the parties and try to make adjustments to the case based on -- that's what -- the railroad says that in their brief. I'm going to ask them about that, too. But, you know, they openly say you should.

MR. WILCOX: Well, but they say you should take into account changing -- you know, change the rules to allow them to make -- to, you know, increase their revenues.

CHAIRMAN NOBER: Exactly. They say because we're revenue inadequate, so you should interpret SAC and --

MR. WILCOX: But we say --

CHAIRMAN NOBER: I don't want to put words in their mouth. They're going to speak in a minute.

MR. WILCOX: But and then the answer to that was you apply the rules in effect and that takes care of their revenue inadequacy for this movement. We're talking I think about a different issue where they're -- they're not using that existing process. They're going outside kind of abusing that existing process to try to game it, to try to get the right answers. So I think there's some distinction and I think that the Board can make that

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call in individual cases and I don't think you should lose sight of the deterrence effect that, you know, you do that in a couple of individual cases then the -- you know, the next carrier down the line is going to be less likely to try that because, you know, you'll see rates coming in more along the existing pricing structure and the percent reduction methodology will work the way it's supposed to.

CHAIRMAN NOBER: Okay, well, thank you. I'm sorry to keep you over.

Mr. Weicher, I guess you're going to speak first.

MR. WEICHER: Yes, Chairman Nober, thank you. The way we had divided our argument, if it's acceptable to the Board is I'm going to speak for a few minutes on the motives issues and some of the commercial issues. Mr. Sipe will address most of the more detailed cost issues. We have very few Powerpoints. We'll keep that as limited as possible and there are several representatives from our company here attending this argument. This is an important case as all our cases are to the railroad.

If I may, departing from what I just said, the principal areas I'm going to cover before it gets too far distant in the dialogue, I'd like to make a brief comment on the RCAF-A/U issue in keeping with -- you solicited comments. You made a couple of references to things off the record. I don't want to go too far afield, but if I may, I'd like to make an observation about that. From a railroad perspective, unit coal trains'

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operations are about as efficient as you get in this business. We always want to be more efficient but it's kind of hard to picture how you take -- at least from a railroad perspective, an already under-staffed, under-asset based super-lean SAC railroad that Xcel would propose and then expect to get tremendous productivity increases over time. I think that's a stretch, but they're entitled to their opinion. They're not even an old railroad that's -- we're always looking for new technology. But that just seems really way out there.

In any event, if I may, what I want to address is the commercial and pricing policy issues that are raised here throughout the brief. And Mr. Wilcox' manner is very professional and very calm and straightforward, but there are some pretty strident rhetoric in there, some either false or nasty accusations or ad hominem arguments throughout the brief and these slides. This is the political funny talk season and you know, I suppose it's fair to call our opponent anything but we are accused of everything from exorbitant pricing to gaming to punitive pricing to tying, to having a monopolistic policy of price increases and I've probably skipped a couple but it's that kind of stuff.

I assume it has two purposes, to sort of either inflame or attempt to prejudice the tribunal that we should be somehow otherwise treated than fairly under the standards or it links into -- I will be addressing in some respects your first issue. I guess this whole gaming thing is sort of a

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basis to say, well, the Board should adopt a different methodology for the revenue allocation, leaving aside that, of course, from our position there aren't any revenues in excess of stand-alone costs, but that's the other bulk of the phone book volumes you get. But if there were, then I guess they're saying that we should somehow be punished or treated differently than the basis that the Board has been following.

CHAIRMAN NOBER: Well, I think that there's a theoretical concern that has been raised in the last couple of cases and in this one, that because of the way we apportion re -- let's just for the sake of argument say we find that you know, the stand-alone railroad is getting revenues or, you know, in excess of its costs and we need to reduce the rate, that because of the way we apportion the revenues across all of the traffic on it, that the actual Complainant gets less of the relief than, you know, at least the Complainants feel they deserve. And so because of that, you know, the railroad -- the end point is a function of the starting point and wherever the tariff rate is set. That's, I think, the argument that's been raised but, you know, what I've been struggling with and asked in the last case and this one is, there's theoretical arguments and this is a very theoretical process and then there's, you know, practical reality. In the contract negotiations was that a consideration or not and you know, how do we -- it puts us in a very difficult position, how do we take account of what's the theory versus, you know, the reality of the case.

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MR. WEICHER: I think I understand the issue you're raising and I see the conceptual conundrum or if one is looking for a totally --

CHAIRMAN NOBER: I'm not saying we believe that, but that's the argument that's been raised.

MR. WEICHER: If that argument is pointing to there should be a mechanistic way to find every element of what goes into this massive SAC thing, that means that something does start with the price initiated or proposed or established by the carrier, I guess two responses. One, I'll address whether there's any reason to think there's something funny here, this gaming thing, but as a more conceptual thing, this does start with under the statute, the carrier's right to propose a rate. I mean, that -- and then the burden of proof and I know you've said various things and the Board has said things in its orders about where the burden really is and whether the Board should help the Complainant's burden but fundamentally the statute says the carrier establishes its rate, it's subject to challenge and then the Complainant can make its case against it. So to the extent Congress says, where does this thing start, I think it starts with the carrier's rate and I don't think that's necessarily appropriate.

If I may, I think -- excuse me.

CHAIRMAN NOBER: That is what the statute says.

MR. WEICHER: If we look at where we are in this, and I don't want to turn this into a tale of two plants, but I think we have to talk

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about where we came from on this to understand this -- the lack of basis for this gaming allegation or how we got to how we are. This plant, as well as another plant, the Comanche plant, were both covered by -- and I'm not going to talk super details but it's all over the record, a united contract -- excuse me, a consolidated contract for several years. And upon the -- one of the plants, Pawnee and if I may take advantage of Complainant's map, if you don't mind my referring to your map, is shown on the map at that Pawnee signal, you know, clearly the way up. The other one is down near Pueblo, the so-called Comanche plant. It's about 50 percent farther away.

The Comanche plant has been subject to a build-in threat for many, many years. When the contract expired, Xcel asked for separate bids to the two plants. There is some stuff in here about tying. I think it's totally baseless. They -- BNSF complied. We never said we wouldn't quote a rate to either or both plants together or separately. Obviously, like a normal business, we'd like to get more business under contract for as long as we can. That is a good thing for us. That's what we're trying to do.

What I think is important is when they came to us -- I'm not quite ready for that slide yet because that might confuse this for a second. When they came to us and asked for contract proposals, the record reflects that the Pawnee rate we offered them was lower, it was lower, we didn't ask for more, than the prior rate to Pawnee under the old contract and the Pawnee and Comanche rates together under the contract proposals were lower than

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what they had been paying before. Obviously, we were trying to protect our competitive risk position to the second plant and get more tonnage. And in the final contract we agreed to for the Comanche plant, we kept that business under contract for the time being and we provided trackage rights for future competitive access to that plant in response to Xcel's request.

When the negotiations fell apart for Pawnee or were unsuccessful --

CHAIRMAN NOBER: You can go ahead and finish.

MR. WEICHER: Thank you, and then --

CHAIRMAN NOBER: We'll give you a couple extra minutes.

MR. WEICHER: Mr. Sipe might give me a couple, if I need it and then you can --

MR. SIPE: If he asks me nicely, I will.

MR. WEICHER: We did establish a higher common carrier rate than the contract proposals we had been making to Pawnee for the Pawnee plant. We didn't refuse a quote to either one. We never declined a quote to either one. I can't think of anything more common or rational in business than to quote a lower rate for a contract with a term of commitment or to quote a lower rate for more business to two plants than for individual pieces of business.

And I think what's really key, and now you can put that

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slide up, again, we're not putting numbers. There's a lot of confidential stuff in the docket, you can pick apart all this, but these relationships are important. The post-contract rates, when you put together what we are proposing as the established rate for Pawnee or what's under litigation here and what they're paying in Comanche on the right under contract, are lower than the old contract rates. They're getting a good deal here. The percentage increase in that Pawnee rate compared to the old contract, it is higher but it's modest. It's -- I won't talk the numbers but it's less than was talked about for those phasing things for one year a few years ago. I mean, it's a little over single digits. It's not -- do we have a policy at BNSF to raise rates where we can? Yes. Has our management said, "We are revenue inadequate and wherever we can, we need to try to improve our revenue posture". Yes, but --

CHAIRMAN NOBER: Whoa, Mr. -- how would you respond to the slide they put up at the beginning that showed that the -- I understand what you're saying here that the combined rate is lower and you know, I'll ask them to respond to that, but in the end, they put up a slide earlier that said that -- you know, that showed how much higher the tariff rate was than, you know, some other bench marks, and --

MR. WEICHER: Two things if I may. Their bench marks, several of them were their own bench marks from their case. They're entitled to show those, the Xcel case, the WCC stand-alone. TMPA is a

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much longer move, short haul moves -- and you asked for a response, I think this is in these various dialogues, but I mean, a 12 to 1500 miles move is going to look better on a mills per ton-mile, that's TMPA, than a short-haul move. And I would also say that this slide is a much better depiction of the commercial context of this move than either a regulated rate set by the Board for a 14 or 1500 mile or other case, or a composite of stand-alone railroads. It would not be unreasonable from our standpoint to have a presumption of reasonableness that the past prior contractual context, I'm sure that we will be accused that we were onerous 10, 15 years ago in the contract or something, I don't know, but I mean, that was something that was out there for these moves and this is the kind of relationship we have today to what's at issue before this Board to what was moving this quote in the past.

CHAIRMAN NOBER: Would your view be then that any rate you charge for Pawnee up to the level of the combined rate was okay?

MR. WEICHER: At least that, if I understand your question, yeah.

CHAIRMAN NOBER: You're saying that the yellow dots go all the way up to the dotted line, essentially.

MR. WEICHER: Oh, certainly. I mean, I'm not saying it couldn't go higher than that, depending upon -- I do not -- contrary to counsel's assertion, we do respect SAC guidelines, there are maximum reasonable standards. A lot of it has to do with the elasticities of demand.

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Pawnee, if we look at the old contract relation, Comanche is farther in subject to competitive alternatives. In the past more distant space, sort of the old-fashioned rate kind of thing. In the more modern era Pawnee is more inelastic. I think that's one thing we both -- both sides agree on and drive it to different purposes. Comanche is less inelastic as shown by the built-in.

CHAIRMAN NOBER: I mean, I'll just say that, you know, your initial premise was one that I would just come back to which is, I understand what you're saying about, you know, we should take into account the combined rate and that may go to motive but again, our job is to look at is an individual rate reasonable. That's what the statute asks us to do, that's what Congress asks us to do and you know, and in prior cases it's been asserted that we shouldn't have a reasonableness standard. That, you know, whatever the commercially justifiable rate is ought to be the rate and that's -- you know, for better or for worse, Congress has not said that. Our job is to review each rate and see whether it's reasonable.

Now, I appreciate the context you're trying to put it in and you know, I'm always unhappy when parties that ought to be working together and settling these things are litigating before us, but that's the world in which we live and that's why we're here and that's what we're here to decide. And we do have to look at each rate on its own.

MR. WEICHER: I think -- I don't disagree with that and I wouldn't purport to substitute any of our judgment for the general marketing

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sense of how much is too much. I mean, our marketing people are trying to understand what will move coal, what will work with the plant. I think it is interesting if you look at what is really going on here, how modest this is. Is this a relatively high rate? In some context compared to longer haul rates and things of that, yes. Is it unreasonable in no way in light of this commercial context or in light of the Board's standards?

I don't think there's anything here in this case that suggests a reason to change the revenue allocation method based on this kind of allegation or this kind of -- whether that's the perfect method for all time, I don't know. It's what the Board has used. If you were going to change that, it would seem to me, maybe it's a thing for a rulemaking or maybe it's a thing for a particular case if there's some really -- something going on. I'm not sure what kind of smoking gun he's referring to but it's clearly nothing here let alone of gaming.

This is commercial practice to try to move tonnage. I will stop, excuse me, and defer to -- unless you have any other questions.

CHAIRMAN NOBER: No, I will -- I appreciate that, thanks.

MR. WEICHER: Thank you, Mr. Sipe, for the time.

MR. SIPE: Good morning, Chairman Nober, Sam Sipe for BNSF. I've got a little bit of a cold here so I apologize if I have to clear my throat from time to time. I want to say two things preliminarily about being

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here at the oral argument this morning. First of all, I wasn't sure for awhile I was going to make it and if anybody doubts that in the real world there are unplanned outages --

CHAIRMAN NOBER: You mean, like the Red Line being out?

MR. SIPE: Like that, for example.

CHAIRMAN NOBER: Being on Rock Creek Parkway for an hour.

MR. SIPE: Even though it is a gold-plated, double-tracked railroad.

CHAIRMAN NOBER: If it's any solace, if you weren't here, I wouldn't be here either.

MR. SIPE: I was lucky to find a cab. On a serious note, I think the oral arguments are a worthwhile endeavor and I think the reason they're worthwhile is that it gives us a chance to talk to you about what's on your mind and I have a few things that I want to say this morning but I'm not going to let them get in the way of your questions. And I'm happy to spend virtually all my time responding to your questions, and if there's something in our case that we haven't made clear, an aspect of our position that you need to understand better, I will give it my best shot.

I will also tell you right now that I am not a master of all the minutiae in the record, but I believe I have a good handle on the

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conceptual issues and most of the larger factual issues.

I want to make one more preliminary point that has to do with the legal context. We've been talking about motives here and to some extent we've been talking about how those motives relate to the legal context as it has to do with BNSF's right to engage in differential pricing and as it has to do with your obligation to protect captive shippers.

The statute and the case law including the guidelines, of course, are very clear that those are competing responsibilities that the Board has and what the statute and case law also make clear is that BNSF has the right and I would say virtually the obligation to price differentially to captive shippers. And we tried to establish a context in the record of this case to explain to you that Xcel is a very highly demand inelastic shipper and they didn't dispute it. So that's the fact that we're coming at this case from.

CHAIRMAN NOBER: And that's the point I was raising earlier, which is, you know, I don't think the law or I agree that just because a shipper is demand inelastic which is another way of saying captive and that the railroad ought to be able to charge the commercially reasonable rate that -- the commercially viable rate, that there's a rate reasonableness test and that's our job to apply it.

MR. SIPE: I agree with you 100 percent. In some perverse kind of way, I'm a beneficiary of the existence of the rate reasonableness test. I'm here arguing the case. You know, the SAC

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constraint is a matter of law and we believe that there is an appropriate cap on rates. I believe it not only as a matter of the statute but as a matter of sound economics.

CHAIRMAN NOBER: Well, let me ask you then, because I -- in your brief, you say, "The SAC test is not a self-executing formula, it's not like winding up a clock. The Board's statutory obligation to take revenue adequacy into account means that the Board must assure itself that the SAC analysis being implemented in particular cases consistent with economic principles and policies that underlie SAC", and then you go on to say, "When forced to resolve questions of methodology, it needs to consider how its methodological decisions will advance the policies that led to the SAC test", which as I understand it, is essentially saying, "If we're not revenue adequate, give us the benefit of the doubt in applying the test". Is that what you're saying?

MR. SIPE: I actually wrote that myself and I had hopes to be saying something a little more nuanced.

CHAIRMAN NOBER: I skipped out some parts in the middle. The nuance was there.

(Laughter)

MR. SIPE: But maybe Mr. LaRocca edited out the nuances.

MR. SIPE: I'm just reading it word for word. It's right

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here.

CHAIRMAN NOBER: I recognize the language. I think the message I would like to leave the Board with, with that passage is if you decide in this case that a maximum reasonable rate is something that comes out let's say at the level of 195 or 200 percent of variable costs, then I think you need to look hard at your SAC decision and say this is concededly one of the most demand inelastic shippers on the system.

If they're going to get differentially higher rates, this is one of the few guys you're going to get it from. They've got other plants where we're not going to get that. We're not going to get it at Pawnee. We're not going to get it at other plants in the Xcel system. This is one of the few and the statute says we should get it. And if you decide that we're only entitled -- I'll pick a number, to 200 percent of variable costs, then I don't think that's consistent with the statute. That was the flavor I was trying to convey.

CHAIRMAN NOBER: Whatever, just --

MR. SIPE: I'm not saying there's no cap here. There could be a cap. I don't think we have priced up to that cap.

CHAIRMAN NOBER: I mean, I will say that I think there is a perception that sometimes what we do is pick a number and make the case fit the number, that you know, 220, 180, whatever, is what's reasonable and that's not really how it works. It's much more what you imply which is that we look at the evidence that comes in, you know. We

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start with the physical plant, we start with the traffic group and look at what the traffic group is and then decide what -- how much railroad do we need to move it and then what kind of operational plan do we need to have to have it and look at both the evidence and pick some and one and not the other, and you know, try to piece it together and then from the ground up, see what that shows. And if we were to apply the statement to that, you'd be saying, well, you know, there's a dispute over whether or not we should allow cross-over traffic. We're revenue inadequate so we shouldn't allow it. There's a dispute between the operating plant. We're revenue inadequate so we shouldn't allow it. So I guess I raise this on both sides because, you know, on one hand the shippers allege, you know, I guess sticker shock if you will at the rates that they were charged and say, well, it must be unreasonable, fix it. And on the other hand, you say we're not revenue inadequate so when these things come in, try to adjust the test to take into account that, and I don't think we can do either one or if we did, I would -- you know, from what -- I don't think we can do either one.

MR. SIPE: I don't want the Board to think that we're here saying that you should cut us some slack because we're revenue inadequate. The Board obviously has to take revenue inadequacy into account because the statute says it has to. I think if you apply the SAC test properly in this case, you're going to get to the right result and that would be my segue into the evidence.

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CHAIRMAN NOBER: Okay.

MR. SIPE: On the cross-over traffic, we have taken the position in this case that the Board really needs to think hard about whether stand-alone models that rely on cross-over traffic to the overwhelming extent that Xcel's do, really is consistent with the underlying economics of SAC. Now, I don't know how much anybody up there wants to hear it and if you tell me we don't want to hear it, I'll move on, but I will --

CHAIRMAN NOBER: What would you say is the underlying economics of SAC? How would you characterize that?

MR. SIPE: The underlying economics of SAC is a full comparison of revenues and costs.

CHAIRMAN NOBER: For that route, right, not for the whole system.

MR. SIPE: For the traffic group, for the traffic group. It's not for the route. If you go back and read the guidelines, there is not word one about cross-over traffic in the guidelines. There are words about grouping and there have been cases where traffic has been properly grouped end to end to allow a full comparison of revenues and costs.

And what the testimony that we have submitted in this case from Professor Ordoover, who is a heavy duty serious economist, who was the chief economist at the Antitrust Division in the early 1990's and who looked hard at this and thought about it, is that when you use cross-over, you're not

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doing the full comparison of revenues and costs. And let's take a look at slide number 2 and this will illustrate vividly why that's the case.

The routes in yellow are the routes of all the movements that Xcel selected for its stand-alone railroad. The route in red is the stand-alone and what they've done is basically taken revenue from all that traffic branching out all over the upper Midwest and south central United States and they haven't explicitly accounted for any of the costs. That's what cross-over does. And we've got a showing in our reply narrative, it's a stick diagram that we've referred to in the brief and if you haven't read it, I hope you will read it, that shows when you use cross-over you're at peril from getting -- of getting the wrong result, of getting a different answer.

CHARIMAN NOBER: Now, in the last five or six, I mean, haven't we pretty much accepted cross-over traffic in all of our cases?

MR. SIPE: Yes, yes, you have. And what I'm --

CHAIRMAN NOBER: And you think that's wrong.

MR. SIPE: What I'm -- I'm saying that conceptually it hasn't been justified and that the likelihood of distortion increases as the percentage of cross-over traffic increases. This railroad is overwhelmingly cross-over traffic. If you exclude the Jeffrey movement which I will talk about, and we believe strongly it should be excluded, 97.6 percent of the traffic by volume in this group is cross-over. You don't know anything about the costs incurred to handle those movements, of just taking some

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allocation of revenues.

Now, obviously, you have accepted cross-over. If you're going to accept cross-over here, the critical issue is to get the revenue allocation correct.

CHAIRMAN NOBER: You proposed a different one.

MR. SIPE: We have proposed a revenue allocation approach that entails a density adjustment and what we tried to make clear to the Board and I hope this came through, I don't know if it did in our filing in February, is that the density adjustment only applies to a portion of the revenue that gets allocated. In this case, 70 percent of the revenue that we allocated was allocated on basically conceptually the same base that you do under one of the mileage based approaches except that we used URCS rather than a proxy for costs.

So we thought it was a little more specific and that's the revenue we allocate to cover the attributable costs of the movement. There is about 30 percent of revenue in this case left over and that's in the aggregate but on individual movements, it's approximately that on most of them and that we allocate in inverse proportion to density to cover costs that are by definition unattributable. It's the existence of these unattributable costs that the Board has said in its decisions gives rise to this phenomenon of decreasing total average prices. So the average prices are lower on high density segments and you'll notice here that the stand-alone railroad is for the

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most part a high density segment but there's also a very high density segment on BNSF from Northport over to Kansas City and we don't give BNSF any more revenue on those segments.

CHAIRMAN NOBER: Now, why do you think this is a fairer approach than what the Board's accepted in 15 -- I mean, admittedly we modified it some because the hundred mile block thing created some crazy incentives.

MR. SIPE: Why don't you put up the next slide, the next one after this. Next one after this. I think it is a -- you used the word fairer and I think it is both superior from an economic point of view and for that reason fairer if that's appropriate and these are the reasons why. First of all, this approach distinguishes between attributable and unattributable costs and you said in a footnote in the TMPA decision that at a minimum you need to cover -- you need to cover attributable costs of both the off-line and on-line segments and then you find some fair way to split --

CHAIRMAN NOBER: Remember, my general policy is I don't read the footnotes.

MR. SIPE: Well, you know, you mentioned that and I've tried to be careful in our footnotes.

CHAIRMAN NOBER: You have been good, there were none in the brief, I appreciate that.

MR. SIPE: I still read yours very carefully because --

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(Laughter)

MR. SIPE: -- sometimes that where you find some of the gems.

CHAIRMAN NOBER: Yeah, you won't find too many more footnotes in our decisions either.

MR. SIPE: But we think it's more precise to make this distinction between attributable and unattributable costs which is a characteristic of the railroad cost structure and we do that.

Second, the --

CHAIRMAN NOBER: The thing about the -- I mean, do you think that there's a correlation between how we attribute costs for traffic, the cross-over traffic and then how we attribute any revenue reduction once we -- if, you know, for the sake of argument we find that the SARR's revenues exceed its costs. I mean, do you see that there's -- that they are kind of a matched set if you will?

MR. SIPE: If I understand the question correctly, I think there is a correlation but not one that is sort of a strictly rigorous mathematical correlation. I think that using an arbitrary revenue allocation gives the shipper an opportunity to game the revenue side of the SAC analysis as the Board recognized in the CP&NL case that the shipper could --

CHAIRMAN NOBER: You guys objected to the use of gaming when it came to you and you know, now your going to let -- the

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shippers themselves can game the SAC analysis which is the same thing you objected to.

MR. SIPE: Absolutely. The Board recognized the possibility ran both ways. I'm not saying in this case at the end of the day there will be any basis for acting on gaming precisely because I think if you do what we think you should do to the traffic group, that gaming will have been eliminated but the possibility is there. The possibility is there in taking a revenue allocation that accords disproportionately high revenue to the stand-alone railroad.

CHAIRMAN NOBER: Let me just, the revenue reduction method, assuming that we have one, accords disproportionate relief to the cross-over traffic as well. Even assuming -- you know, not that we ever make errors, but even assuming if there's a bias one way or another, aren't the biases consistent?

MR. SIPE: Why is it disproportionate? Everybody gets the same rate reduction across the board.

CHAIRMAN NOBER: But if 97 or 98 percent of the traffic is cross-over traffic, then 98 percent of the rate reduction goes to the cross-over traffic, right?

MR. SIPE: Well, sure, but I don't see why that's disproportionate. Are you saying that somehow cross-over traffic gets less of a break in the rate reduction than the --

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CHAIRMAN NOBER: No, but your initial premise was that cross-over traffic is wrong because it creates artificial densities, if you will, on the stand-alone railroad. But that sort of -- I guess you could argue the corollary of that is that whatever sort of hypothetical relief we give them, most of it goes to the cross-over traffic as well so what you get on one end, you kind of lose on the other; is that -- at least that's at least one way of looking at it.

MR. SIPE: I understood from the CP&NL case and from the discussion here this morning, that the potential problem with the percentage rate reduction approach is where either the railroad or the shipper quote "gamed the process going in", in the railroad's case by setting a rate that was not really a commercially realistic rate, but a rate that was only established at a high level in anticipation of litigation.

I think if the rate is what I will call a real rate, as this rate clearly is, it's only modestly higher than an expired contract rate, well within the range of what's observed all the time in the rail industry when you move from contract to common carrier service. If the rate's at a real commercial level then there's no possibility of gaming and if there's something else going on that I'm not understanding then, I guess, I'm just not understanding.

CHAIRMAN NOBER: It's probably not explained in my -- anyway, go ahead.

MR. SIPE: Okay, I had one more point about -- two more

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actually about our revenue allocation and then I'll move on. We do take --

CHAIRMAN NOBER: Go ahead.

MR. SIPE: That's okay. We do take account more precisely of the cost of originating and terminating traffic under our method and even with MSP you've still got this hundred mile block of credit which overstates the costs of originating efficient unit coal train traffic. There is, as we showed in the TMPA case, there's an Ex Parte 270 adjustment that's made for unit coal trains that results in about a 25-mile block of credit for originating that traffic and the reason that works to Xcel's advantage and our disadvantage here is most of their movements are relatively short haul, so you give them a hundred miles worth of credit for originating the traffic and you're going to overstate the revenue. Since we cost it out, we don't have that problem.

And finally, we do take account of the economies of density, which, I think, you have to do if you're going to try to be fair about allocating revenue because they exist in the industry. Let me just show you a slide that reflects the effects of using our DARA approach. And Mr. Wilcox had some allegations in his paper that he filed last week about how we get a windfall out of this. That's just not the case. We have here their MMP methodology and I realized he said that they would probably be able to live with MSP but I wouldn't think he has much of a choice in light of your recent decisions.

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Under what they've proposed, they get a division that's 38 percent higher than the stand-alone residual incumbent and it's driven by the way the mileage blocks worked there. Under our DARA, it's not as if we made a big revenue grab and left them destitute. They still get overall proportionately higher revenue per ton mile on the stand-alone railroad than the residual BNSF does.

CHAIRMAN NOBER: Now we rejected the very same proposal or very similar proposal in several eastern cases. Why should we disregard that and adopt it here?

MR. SIPE: Because it's the best evidence of record here. It's frankly conceptually just a couple of steps beyond the MSP approach. I think to use a phrase we've all heard from time to time, you know, the perfect should not be the enemy of the good. I don't think the burden is on the railroads to go out and decide -- design a mileage pro rate methodology that is -- satisfies every possible question anybody might have. It's better than MSP or MMP.

CHAIRMAN NOBER: Even though we evaluated it in the last case and --

MR. SIPE: You didn't evaluate it on a -- you did not evaluate it on a competitive basis in the sense of comparing it to the other standard and sort of unpacking what do we do under MSP versus what do we do under the density approach. You said there was this conceptual flaw and

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we tried to explain why -- what the Board saw as a conceptual flaw isn't there and it's not there.

Let me move onto the Jeffrey traffic. It's a big issue in this case. We think the Jeffrey traffic should be excluded and there are basically two reasons. The Board in TMPA had a two-part test for excluding rerouted traffic. One had to do with inferior service. The other had to do with principles, underlying principles of stand-alone costs and we think the Jeffrey traffic should be excluded under both prongs of that TMPA test. Do you want to put up the next one?

The Jeffrey route of movement in the real world is over Edgemont and Alliance to Northport.

CHAIRMAN NOBER: Is this movement exactly the same as what we disallowed in TMPA?

MR. SIPE: As what you disallowed?

CHAIRMAN NOBER: Yeah, the standard we set in TMPA, was that applied to the same kind of movement, one that originated and terminated on the --

MR. SIPE: No.

CHAIRMAN NOBER: So what was --

MR. SIPE: No, you were talking about a different kind of reroute in TMPA. What we're saying is two things though. First of all, the underlying SAC theory is a complaining shipper should not rely on traffic

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that doesn't use facilities to share the cost of those facilities. And the Jeffrey traffic in the real world, does not use any of the facilities from Donkey Creek down to Northport, does not.

CHAIRMAN NOBER: But haven't we allowed in prior cases that kind of movement, putting aside whether or not we should?

MR. SIPE: You allowed it in the TMPA case and --

CHAIRMAN NOBER: So why should we differ from that here if we allowed that?

MR. SIPE: Because we've shown a bright spotlight on it and we didn't even shine a flashlight on it in TMPA. We've focused on it in light of your recent precedent and it's a big issue in this case. It's a big driver. Basically, what they've done is they've grabbed about 50 million in revenue per year to contribute to the costs of a route that it doesn't use. And our evidence also shows that it wouldn't use it in the stand-alone railroad because they don't provide service to the shipper that's comparable to what the shipper gets on the real world BNSF.

We had detailed evidence in our reply evidence about the cycle times on the Jeffrey movement. The cycle times are substantially shorter on the real world BNSF --

CHAIRMAN NOBER: Can I ask a question? If you object to cross-over traffic as a general theory which you do, there's lots of cross-over traffic in this case. The only cross-over traffic you didn't show in

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your model was this one. Why didn't you not show everything. If your theory is, as you say it is, you shouldn't have cross-over traffic. You shouldn't have included anything.

MR.SIPE: Because we wanted to present the Board with a record that the Board could work with. If the Board was willing to --

CHAIRMAN NOBER: That's not what I asked. I asked if your theory is, don't allow Jeffrey because reroutes are wrong and cross-over traffic is wrong by SAC theory, then your operating plan shouldn't have shown any of them, but it showed every one of them but this one. Why?

MR. SIPE: Well, I was trying to answer it in a nuanced way, but it -- frankly, it's a matter of how the litigation unfolds. You need a record on which you can decide the case. You said to me a few moments ago, we've accepted cross-over traffic in all our recent cases. Did we judge that there was a realistic possibility that the Board was going to say, "You know, BNSF is right, let's throw out the complaint because of cross-over traffic". No. I mean, we're in a different kind of real world here.

CHAIRMAN NOBER: The reality of a SAC case, I understand, such as it is.

MR. SIPE: It's the real unreality of a SAC case. The evidence on cycle times is probative under one of the two prongs of your TMPA test and I would point out that their attempt to fix the cycle times on

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their rebuttal simply doesn't carry any water because the rebuttal string diagram has the same defects and new defects. Each time they file the string diagram, we identify different defects. They say, "Well, we can fix it". The fact is that the cycle times constructed via the string program are unreliable. Why don't you go to the next slide, please?

The Jeffrey traffic doesn't use the SARR route. The SARR route is less efficient. It's shorter. There is congestion with the empties fighting their way up the stand-alone railroad from the south. Mr. Wilcox claims our argument on that should be stricken from the record, but it's just argument based on the facts that we had in our reply evidence. The transit times are longer as I've mentioned and there's also a contract issue that bears on this. I won't get into it further here because the contract is confidential.

CHAIRMAN NOBER: Well, let me ask, if for the sake of argument -- I'm not saying that we would find this, but if we somehow decided we would follow precedent on this one, aren't we still left with the problem that you're -- we followed precedent, we allowed this. We would accept the railroad's operating plan but we're still left with an operating plan that doesn't include these movements. How would we then -- this is the very issue where the traffic group doesn't meet the operating plan that we've had in four straight cases where we've had to go back for more evidence or I guess extrapolate. What would you have us -- if hypothetically that were the

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situation here, what would you have us do?

MR. SIPE: Well, there is a possibility in this case that's different and I don't think anybody has looked into the full legal ramifications of this, but the Board has the model we used to develop our capacity and to develop our operating statistics, that's true. The RTC model, it's transparent in the sense that you can see the -- you can understand the output, you can see the results of the analysis and I think the Board staff is probably capable of using the model. Whether as a legal matter, the Board could in effect generate evidence of record by running the model itself with a different traffic group, that's not something we've looked at but it's something we might all think about and if you're going to ask for further briefing, that's something we might address.

CHAIRMAN NOBER: Well, that's a chronic problem we have in every SAC case now, which is as I mentioned in the beginning, a traffic group that doesn't -- you know, you decide the traffic group toward -- you know, later in the case and it doesn't match either the physical plant of the SARR or the operating plant and that's -- you've seen us struggle with that and go out for more evidence in cases and that's sort of a fundamental issue of these cases that we're struggling with. However we decide on Jeffrey, that's an issue that will be in this case as it's been in every other -- as we've had in recent cases.

MR. SIPE: I understand and there are lots of tough issues

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in these cases.

CHAIRMAN NOBER: And that's been a struggle for, you know, the royal us here which is what to do about that.

MR. SIPE: I think this model may be a way out. You know, Mr. Wilcox referred to noticing something in the evidence in the AEP Texas case. I noticed that the Complainant in that case has used the same model that we advocate in this case and is going to make it available to the Board and if that becomes that way these cases are litigated in the future, there may be a way of addressing this problem.

Let me just -- you probably don't want to hear anything more about the string program, do you, but I want to put up my -- I want to put up my slide because --

CHAIRMAN NOBER: You don't have to spend a lot of time on it.

MR. SIPE: I won't. I'll be really quick. Do you want to put up the next one? I just want you to read the caption. There are standards of admissibility of expert testimony that apply in agency proceedings under the APA just as they do in Federal court and I think the evidence is overwhelming clear that the string program would not be admitted into evidence as expert testimony in a Federal court proceeding.

Let me -- I've totally lost track of how much time I have.

UNIDENTIFIED SPEAKER: Eight minutes.

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MR. SIPE: Oh, I have eight minutes.

CHAIRMAN NOBER: Well, like with Mr. Wilcox, we'll let you finish your presentation within reason.

MR. SIPE: Okay. Well, I want to address your two questions now. And we've already talked a little bit about the first one which is the rate reduction method. And I'm not sure I understand -- based on our earlier colloquy, Chairman Nober, I'm not sure I understand all the Board's thinking underlying the CP&NL decision but I think I understand what I read there and what I read there was that the Board said that there's a threshold question whether there has been a showing of manipulation.

And I think if you've got a case where there hasn't been a showing of manipulation then you don't need to reach the issue of whether the percentage rate reduction methodology is wrong, but that may be something I misunderstand. The point I wanted to make is there has not been a threshold showing here. There's been a naked allegation on their part but where we establish a rate that is only modestly higher and you know how much higher it was than the expiring contract rate and is more or less in the zone of what common carrier rates -- the relationship they bear to contract rates. I don't think anybody can infer any manipulation. Whether there's been manipulation on their part in the construction of the traffic group --

CHAIRMAN NOBER: Can we just have people shut off their cell phones until we're done? Is that all right? Thanks. My old

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bosses used to have that as a general rule.

MR. SIPE: It's a good rule. Whether what they have done in selecting their revenues could be construed as manipulation, I don't think you necessarily need to get there because I think if you do the right thing in terms of the stand-alone traffic revenues, you're not going to have that manipulation and if you exclude the Jeffrey traffic, if you do the right thing with the revenues here, I think it's highly unlikely that you would end up with a finding that revenues exceed stand-alone costs, but if that were to be the case, I do have one concrete suggestion. If the Board were to find revenues that exceed SAC, it would be appropriate at that point for the Board to ask whether any PPL-type cross-subsidy among different segments of the stand-alone railroad is shown to exist as a consequence of its application of the percentage reduction method.

If the rates prescribed for traffic on the relatively low density Northport to Pawnee segment do not, after the rate prescription, generate sufficient revenue to cover the costs of constructing that segment, then the prescribed rates on traffic that uses that segment would have to be adjusted upward to allow for coverage of costs and to avoid a cross-subsidy. I don't know if you want to talk about that, but we'd be prepared to elaborate on it at some point.

CHAIRMAN NOBER: Please do. I mean, do you think that's -- the evidence shows that here?

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MR. SIPE: In the current state of the record, the evidence doesn't because in order for a PPL-type cross-subsidy analysis to be done, as I understand it, the Board has to make some determination as to at least the cost of constructing the railroad and you'll recall that's what happened. The Board said, "We found that the costs on the western lobe of the PPL stand-alone are such and such", and once we know that, then we can look at whether the revenues are sufficient to cover those costs.

What we're saying is that in this case, given the way they've constructed their stand-alone railroad, at the end of the day if you applied the percentage rate reduction approach, it's very possible that you might end up with insufficient revenue to cover the segment of the railroad from Northport to Pawnee. And if that were the case, some adjustment would have to be made.

Now, if the Board wants to think about alternatives to the percentage reduction approach, i.e. doing away with it, one possibility if the Board found that the challenged rates violated the SAC test, would be to go outside the SAC construct and impose a rate such as the RSAM rate, for the carrier in question. Because the RSAM is developed with reference to the carrier's revenue adequacy short-fall, this approach would have the virtue of addressing the statutory requirement that the Board take revenue adequacy into account in determining the reasonableness of rates, justify it.

CHAIRMAN NOBER: We appreciate that. We'll look at

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it. Now, the second -- I just want to make sure before you wrap up you address the second part which is, you know, looking at the -- we've asked about the cost of this case for road property investment and operating as compared to other ones, and I think yours show to be quite a bit higher.

MR. SIPE: Yeah.

CHAIRMAN NOBER: How would you address that?

MR. SIPE: That's where I am.

CHAIRMAN NOBER: Okay, go ahead.

MR. SIPE: And what I was planning to do was answer the question that you posed in your decision and I'll answer any further follow-up questions you have. The question is whether operating and road property investment costs differ significantly from the evidence accepted in recent stand-alone cost cases in the west can be justified, not -- you know, maybe you also want to know have they been justified here. Fair enough, but at least conceptually, I'll tell you why they can be justified and then I'll talk a little bit about why I think they have been.

Clearly, they can be justified because the Board and its predecessor have made clear from the get-go that SAC is not a formula. SAC is a result of decisions on numerous issues in individual cases and when you issued or set forth your evidentiary standards in the recent CSX/Duke case. I think you made it clear to the litigants at least I thought I understood that the Board was saying, "We are going to continue to decide cases based

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on the best evidence of record and here are the considerations that affect the quality of evidence, and we think the quality of evidence on particular issues varies from case to case.

I will tell you that we are always trying to get better. We've done a bunch of these things and I think we do get better. Sometimes we think we have the right answer and the Board doesn't seem to like our evidence even though we've given it our best shot. In that case, we're going to change our evidence and try to prove to you that something like in this case crew wages ought to be substantially higher. In a prior case, we said it's ridiculous to assume that everybody on this stand-alone railroad is going to get up 270 days a year and go to work. "We won't accept your crew starts.

The Board didn't like our evidence on that. In this case we've said, "Fair enough. You've got a bunch of people out there willing to get up and go to work 270 days a year. Let's pay them what the market will pay them if they go to work 270 days a year. We're putting in evidence that's fully justified about what you would have to pay in crew wages to run this hypothetical efficient stand-alone railroad. There are a host of issues like that. There are issues on the construction side which vary from case to case due to the different configuration of the stand-alone railroad. Now you have said, you know, these involve Powder River Basin and they are similar to some extent but the reality is that each stand-alone railroad we've seen has substantially different features that may have yards in different locations. In

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this case, a huge driver of construction costs is earthwork in the yards and what we've showed is that if you build the yards where you have to build them, you're not going to be able to rely on the engineering reports that Xcel relied on. You're going to have to build these yards with enough dirt fill to actually make them feasible.

And I would like to say something, Chairman Nober, about the issue of least cost hypothetical stand-alone railroads versus feasible lease cost stand-alone railroads. I think in these cases it's really easy for the Complainant at the end of the day to say, "Well, our evidence is the better evidence because the costs are lower and everybody said we're supposed to be the least cost stand-alone railroad. How can you argue with that"? The answer is, they have at least the minimal burden of showing feasibility and you have to show feasibility with reference to the real world because there's no other standard that you can apply to show feasibility. Just as it's wrong for the Defendant to posit a gold-plated stand-alone railroad, it's wrong for the Complainant to posit an unrealistic efficient stand-alone railroad that is not feasible and I've got two slides I'd like to finish up with.

CHAIRMAN NOBER: We see that on -- I mean, I'm not going to say in this case, but we see that on both sides in every case, you know, that's just a fact of litigation. I think we try to, at least in the cases, evaluate the best evidence of record.

MR. SIPE: Well, I'd like to --

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CHAIRMAN NOBER: That's just a fact of the litigation.

MR. SIPE: I'd like to end by giving you a framework in which to assess this issue of feasibility and the quality of evidence in cases. And this is sort of -- this is a kind of big picture sort of thing akin to what Mr. Wilcox has done. This is not in the record, just as the charts in his brief were not in the record. We put this together for the hearing and we'll give you a copy of it.

What you see here is expenses, operating expenses for Class I railroads in mills per ton mile in the year 2001 and I think both Mr. Weicher and I are proud to note that the lowest operating expenses on any real world railroad are on BNSF, which that seems to suggest that maybe we're the most efficient.

MR. WEICHER: And there's a lot of coal in there as you know.

MR. SIPE: Look at what Xcel is on its hypothetical stand-alone railroad. Operating expenses about a third of what BNSF, the most efficient Class I, has been able to achieve. And look where we are, vis-a-vis, Xcel. Sure, we're higher than they are, significantly higher but look how much lower we are than real world operating expenses. I mean, these guys are getting cut a great deal of slack when they come in and hypothesize an efficient hypothetical stand-alone railroad.

CHAIRMAN NOBER: Well, I appreciate this. Although

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I guess if you put operating ratio up it would look a little bit different but --

MR. SIPE: Well, their operating ratio is like 30 percent.

I mean, Mr. Moreland would be chairman of the board if he could deliver that.

CHAIRMAN NOBER: That having been said, I do think that the parties, you know, have asked for, one of the things I get, and deserve predictability from case to case and that's where, you know, I think as a benchmark, we need to look at what we've done in prior cases and, you know, be cognizant of that, and that's one of the starting points that I look at. It's important to me that our cases be consistent, be not just internally consistent but consistent across cases and now, whether or not that means that each of our decisions is perfect, I don't know, and, you know, we'll try to -- obviously, the arguments you make are ones that we'll have to take into account.

MR. SIPE: The final slide here pulls in both the revenue side and the cost side, really because it's a measure of operating revenue per employee. And what it sort of shows is what can you do with unfettered imagination? Voila, you can hypothesize an efficient stand-alone railroad that generates revenues of over a million dollars a year per employee.

Now, we said -- we said, "You know, you can be pretty efficient", but compare what they have to what anybody has in the real world.

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CHAIRMAN NOBER: What -- I mean, you compared them to Class I's and I guess that stand-alone railroad here would be a Class I, but what would it look like compared to, you know, some of the larger short lines or regional railroads?

MR. SIPE: I don't know that off the top of my head. I wouldn't --

CHAIRMAN NOBER: That might not be -- you don't have some of the agreement issues that --

MR. SIPE: I wouldn't think it would differ materially but we can take a look at that. Anyway, I've taken a lot of time and I have tried to respond to your questions.

CHAIRMAN NOBER: We appreciate that. Mr. Wilcox, in response?

MR. WILCOX: Yeah, I have another 10 minutes. I have a few points I want to hit in response to Mr. Weicher and Mr. Sipe. First, Mr. Weicher said that -- and we're talking about the Comanche plant, that there was a build-out threat at the Comanche plant for many years. It's absolutely not true. BNSF -- it's in the record that BNSF fought that build-in tooth and nail up until the year 2000, so to say that there was a threat for many, many years and that's part of what we've countered their bundling argument with in terms of the prior contract, that's -- the competition was not there.

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The comparison of the rates, you know, tying in the Comanche plant and the Pawnee plant, the gist of it seems to be that now that Comanche seems to have -- now that Comanche has competition, they've -- you know, Xcel did what it needed to do to get competition at that plant. Now that they have it, to the extent that they take advantage of that competition, BNSF should be able to raise the rates at Pawnee as high as they possibly can to offset any benefit to competition. That seemed to be what Mr. Weicher was saying, that the Comanche bar, that graph went down, the Pawnee graph could expand.

CHAIRMAN NOBER: Yeah, he didn't tell an upper limit on how high it could expand.

MR. WILCOX: Exactly, so, I mean, that's -- and it dovetails into what Mr. Sipe said, that what they're looking for is two sets of rules or a range of rules, depending on the elasticity of the shipper. That if a shipper like the Pawnee plant was really inelastic, then the rules should be changed or skewed towards giving more revenues to the BNSF and we have to keep going back to the guidelines. The guidelines are for the purpose of giving some certainty to the parties. That's why they were passed or why they were adopted. They're guidelines so that -- and there's -- the -- here's a quote from the Guidelines.

"The negotiated contracts can often produce an agreement which is more advantageous to both the railroad and to the shipper than the

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rate we would otherwise prescribe. Thus a benefit of these guidelines is to enable both the shipper and the railroad to estimate the maximum rate we would prescribe if the matter were brought to us for adjudication. We believe that this will encourage contract solutions. So if you have -- they have two sets of rules, there's -- where's the certainty that a shipper like Pawnee -- or Xcel at the Pawnee plant could go to BNSF and say, "We've done our analysis under these guidelines that have provided a reasonable level of certainty. Let's negotiate a contract.

They would say, "Well, we're going to the Board because we can -- we're going to get a different rate for you because you're more inelastic.

CHAIRMAN NOBER: I mean, a lot of this is under seal, so we can't get into it, but, you know, the evidence about the contract offers is what it is.

MR. WILCOX: Well, and what that shows is that under our analysis, the rate that was offered for Pawnee, our analysis said that that exceeded a reasonable level that would have been prescribed by the Board and the rate that was offered for Comanche was above a market rate that would be gotten if we went out for an RFP. As the record also shows, at the end of the day, the rate for Comanche went down substantially because of the competition, because BNSF would not reflect the market rate, one bundled or separated the plants, I don't like to use the word "bundling" because I don't

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think they were bundled, but we separated them out because Xcel wanted to take advantage of the competition. As soon as that happened, the rate that BNSF had offered went up substantially and it kept going up.

CHAIRMAN NOBER: I mean, unfortunately, what we find -- what I find is that both in formal proceedings like this and in informal ones, that the commercial relationship between shipper and carrier can be complicated and unfortunately our statutory doctrines don't easily take into account the subtleties and complexities of the total business relationship between shippers and carriers and you know, I don't know how we do it. That's a -- I mean, how would we?

MR. WILCOX: Well, the Board can establish guidelines that are predictable so that the parties, when they're talking about their commercial relationships can have an idea of what would happen if they don't agree?

CHAIRMAN NOBER: I think that's fair and both the railroad and you all and the shippers have asked us to do that and you know, I think that that's a fair request.

MR. WILCOX: But if the landscape is changing or -- then it's hard to get that certainty. So on cross-over revenues, the elimination of cross-over, they're arguing policy for the most part. I mean, it's -- as you point out, that's -- cross-over revenues have been in every case. In fact, in the CP&L case the cross-over was about 90 percent, if I remember correctly.

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And it's -- there's no reason to take cross-over traffic out of this case or any other case. It's an integral part of the guidelines and don't lose sight of the practical aspect of it.

If you had their way, every stand-alone case that came before this Board would cover all those lines that you saw and one of the practical benefits of cross-over traffic is to make these cases more manageable. They're already huge enough. On the revenue allocation, on this record, the modified mileage pro-rate by default is better because you've already rejected DARA in three cases but we've said we could live with MSP and so that should be what is applied in this case.

We -- as far as the technical arguments that Mr. Sipe raised for why DARA, I think we've addressed those very thoroughly in our response to their clarification. On the operating plan, as far as how the Board could fashion a result, the distinction between our program and the RTC program is that the Board has the program. It has all the algorithms, all the logic. We each had our respective tutorials.

CHAIRMAN NOBER: And when you say you're all doing that, that was a new innovation in this case, if you will, and I'll leave it all to you all to decide if it was innovative or not, but it was a difference that we did.

MR. WILCOX: Yeah, and we've had that and you can go in and change the program. You can test the algorithms. The problem with

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the RTC is it violates the rules that you announced at TMPA, which is we've got to have the program to be able to test the algorithms, have documentation on the program but with the RTC, you just get the program. You can't go in there and see what makes it work. And the AEP Texas Complainants have used the model and I've seen that as well, but they recognized that it doesn't do that. They basically -- they recognized that it does not meet the standards of -- and they have arguments for why and we shouldn't overlook that but the fact of the matter on this case, you have a program that you can use.

Finally, on the BNSF, the charts that Mr. Sipe put up, they are not in evidence and the evidence supporting the charts are not in evidence. And what is not on the charts is a comparison to stand-alone operating expenses and our chart shows that BNSF operating expenses are two times what the Board approved in -- what the Board found acceptable in TMPA over -- well, they're over twice that of what the Board approved in TMPA and they're almost twice what the Board approved in WPL, in terms of operating expenses. So I think that's all I had on rebuttal.

CHAIRMAN NOBER: Okay, well, go ahead.

MR. WEICHER: Chairman Nober --

CHAIRMAN NOBER: Yes.

MR. WEICHER: And I certainly defer that Mr. Wilcox is entitled to the last word, if I may make one comment because I think he started -- misstated the record. May I make a brief comment to that, to

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which I would -- if I do, he's certainly entitled to have the last word.

I think he said that I made a misstatement or a false statement about the threat of a build-in to Comanche. We acknowledge there was no build-in and indeed in fighting off a build-in to the plant, we were fighting off what we perceive to be a threat and that is clearly how that plant is more competitive. I've struggled with that part of his brief because I'm not sure what we're missing between ourselves on that but we believe we're characterizing a threat of a build-in that's been there and that resulted in access. But he's entitled to --

CHAIRMAN NOBER: To a certain extent motives really aren't at issue. I mean, there was a -- you all agreed to trackage rights for whatever reason, if it was a threat of a build-in or out of the goodness of your hearts or for whatever reason and that's -- that is what it is.

MR. WEICHER: I don't believe we're misstating the record. Maybe we don't understand it the same way. Excuse me.

MR. WILCOX: Since I do get the last word, I --

CHAIRMAN NOBER: Yes, sir. Actually, I get the last word.

(Laughter)

MR. WILCOX: I get the last word on this side of the bench. The response to that is, that there's absolutely no evidence in the record that BNSF considered that UP was a competitive threat to the

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Comanche plant prior to 2000. They made the argument that it was -- you know, they tried to fashion this bundling argument to justify what they did and we came back and showed that there's not a shred of documentation or evidence that BNSF thought there was a threat from UP when it was contracting the last time around, and acted on it. So that's -- I mean, I just want to be clear, that's what the record says.

Mr. Weicher may think otherwise but the record says what it says.

MR. SIPE: Chairman Nober, I don't want to address this issue, but I want to complete a response to a question you asked me, if I may, that I don't think I gave a complete response to and maybe I did --

CHAIRMAN NOBER: Mr. Wilcox, you object.

MR. WILCOX: I guess we could just go on all day --

MR. SIPE: Well, this is in the spirit --

MR. WILCOX: -- since there are two of them and one of me.

MR. SIPE: This is in the spirit of a dialogue and trying to be responsive to the Chairman's questions. You asked me why -- about the Jeffrey traffic, why we excluded Jeffrey and left all the other stand-alone traffic in and I gave you an answer that was basically -- that basically was an answer that was a litigation decision. But there's another dimension to that which is much more kind of obvious and I may have overlooked it and that is

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the Jeffrey traffic was the only traffic rerouted. Everything else goes over the route that they put it on and what they did, in fact, they chose the denser route. They rerouted their own issue traffic so as to get the benefit of those densities. And what we're saying is, you can't bring the Jeffrey along too because it doesn't share the facilities. So that's what I should have said earlier.

CHAIRMAN NOBER: Mr. Wilcox, this will be the last word for all of you.

MR. WILCOX: Yes. I'm not quite sure it's accurate that we rerouted the Pawnee traffic. That traffic sometimes goes over to the Edgemont, goes over the Edgemont line, but most of the time comes down through Northport and so I think just I will stop.

CHAIRMAN NOBER: Okay, well, first I want to thank everyone for their arguments and I know this took over two hours and that's a testament to the fact that there are a lot of complicated issues and that you know, these are valuable for both -- for the Board and for all of you.

I would like to say first of all, you know, ultimately, and I think there was a lot of discussion today about the contract negotiations that both sides engaged in and what both sides' motives were and I think that there's a reason for that which is that this is ultimately a commercial relationship between the two of you that's got to be ongoing. I mean, these plants are served by the BN and you're going to keep generating electricity

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out of them and you're going to keep needing to have coal hauled to them and you know, BN is a railroad and their job is to -- you know, what they exist for is to haul traffic.

And I'm always sorry to see what are commercial relationships wind up here. I mean, I can -- I know from all of you and I've met with you know, each of you privately, that no one -- there's no place that folks would rather be left than in litigation before us. And I don't take it personally. It's -- you know, I understand and you know, we've tried to make it -- you know, tried to streamline the process but the fact is, it's not a place where anyone wants to be.

Now, we have these oral arguments and it's the first time we all have to engage sort of publicly and talk about -- talk things out and it turns out that in my view a lot of frustration gets aired with the relationship as well as presenting the cases. But we do this so that in the process, essentially, the case is a sunk cost. I mean, you've all sunk all the money you're going to spend in it and it's just a matter of getting a decision. But that's a long way of saying I still wish rather than seeing a decision come out, you all were able to work this out and negotiate a rate that everybody could live with that wasn't the product of litigation or wasn't, you know, imposed upon you or, you know, or permitted because of litigation however the decision comes out and so I guess the first question is, you know, is that possible here? Is it still possible for you to talk and work something out?

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If it's not, you know, we accept it. We're going to make a decision either way but -- I mean, I know that folks in both the companies are here beside counsel for a moment.

MR. WEICHER: I don't want to -- is it appropriate to respond or --

CHAIRMAN NOBER: If you can speak for your railroad, sure.

MR. WEICHER: I'm not sure the right commercial people are here today for that substantive a negotiation. We're always prepared to talk. I think this case predates your mediation proposal that we've been involved with in another situation. I think that's always helpful and could work. Certainly, we're prepared to have that dialogue. I don't know if --

CHAIRMAN NOBER: If you want a mediator we can assign one, but is there the ability to work this out? I know there are folks from Xcel here. Can I recognize them?

MR. WILCOX: Sure. I think that would be the better way to go.

UNIDENTIFIED SPEAKER: We're always willing to talk about it.

CHAIRMAN NOBER: I mean, if you all don't think you can work it -- that's fine. I don't want to -- you know, but I wish that you would at least try to talk and see if it's possible, because that's the better

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solution here rather than have the Board decide it. And I'll tell you that the way these rate cases go, once they're decided, for whatever reason in many of the -- if you look at many of the prior cases, they don't just end, you know, they keep coming back and people come back on reconsideration and then they come back for adjustments to the rate and, you know they seem to be -- they seem to go on and on and on. So while maybe most of the litigation costs are sunk, not all of them based on my experience here. We seem -- we decide three cases and we get them back in various forms. So perhaps, that's an incentive to try to work together, but you know, I would ask that you at least try that.

MR. WEICHER: We'll be happy to make sure that we have a follow-up shortly discussion or conference call or whatever is appropriate to find out if there's anything to report back, yes or no, within a matter of days or something. I mean, just --

CHAIRMAN NOBER: But on the chance that that does not work, I would like to give -- ask both sides if they would like the opportunity to submit briefs. Now, I'm very mindful of generating more legal fees and more -- you know, but I think here there are two circumstances. One is we've had an oral argument and a number of issues have been raised and both sides have offered some, you know, new ideas on things that were just briefly outlined here that I think the Board would benefit from some more expanded view of. And secondly, we had three cases

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decided from when the evidence was put in and you know, I think everyone deserves an opportunity to adjust their presentations or at least to let the Board know what they -- you know, if those have changed things at all.

So I would propose, you know, time is short before the statutory deadline, that we give each side two weeks to submit supplementary briefs and then one week each to reply to the others. Is that -- that's going to have to be sufficient in this case.

MR. SIPE: I have a question. That is, do you think it's possible the Board could identify the areas on which it would like to hear further briefing, because there's such a vast canvas here and we've, you know, written the 40-page briefs where we necessarily have to go lightly over some issues. I think it would help us a lot if we were able to focus in on the issues where the Board thinks it needs further help.

CHAIRMAN NOBER: I mean, clearly the two issues that were raised today, Mr. Sipe, yours on a new method for revenue allocation you know, for any rate reduction allocation and Xcel's on how we would -- on a new proposed method for the rail cost adjustment factor are two of the things that we would obviously want to hear about. Let me -- perhaps we could put out something a little later today that would, you know, let us be more specific like we do before the oral arguments, just to give you some areas to look at.

MR. WILCOX: Yeah, I would confer with --

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CHAIRMAN NOBER: Yeah, we'll try to give you some guidance on that.

MR. SIPE: And I know time is short, Chairman Nober, but I also know we have a major filing next Monday in another rate case and wouldn't even be able to start thinking about this until next Tuesday at the earliest. So if you could maybe make it three weeks rather than two, I would appreciate that.

CHAIRMAN NOBER: Let's see, that would be about a month before the case has to be decided.

MR. SIPE: Or just another three days, so you know, we'd have another couple of weeks to actually do it.

CHAIRMAN NOBER: How about two weeks from Monday?

MR. SIPE: Okay.

MR. WILCOX: For the record, I mean, two weeks is fine with us.

CHAIRMAN NOBER: Okay, we'll give you the weekend. Is that acceptable to you?

MR. WILCOX: We'll give Mr. Sipe the weekend.

CHAIRMAN NOBER: And we'll try to put something out later today to let everyone get started on that, just to go through -- I would say that, you know, some of the -- there were some new issues that we

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addressed in the Eastern cases dealing with, you know, off-SARR traffic and some evolutions of our standard which were addressed today. You know, for example --

MR. WILCOX: Well, here we have no off-SARR reroutes here so --

CHAIRMAN NOBER: No, true, but you were addressing the standard we used for the off-SARR reroutes about, you know, the length and the presumption and --

MR. WILCOX: Right.

CHAIRMAN NOBER: So those were some of the concepts we have in those cases have been at issue today and you know, in fairness to all of you, the three cases is usually a several year diet of rate cases, so you know, there were some different things that came up there.

MR. WILCOX: Is the -- are you going to impose a page limit on those briefs, which is fine with me. I'm sure it's fine with my client. Well, let me see what the issues are first.

CHAIRMAN NOBER: Well, a 40-page limit are a typical page limit for these and I will say that I've now read briefs in many cases and I don't think -- I think 40 pages is more than sufficient to say what needs to be said.

MR. WILCOX: So do I.

CHAIRMAN NOBER: If folks would rather it be 25,

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that's fine, too.

MR. WILCOX: Right, 25 or 30, depending on the issues but I think -- I thought the 40 pages last time around was -- I didn't think we needed that many.

CHAIRMAN NOBER: Okay, 25.

MR. SIPE: We're comfortable with whatever the Board wants.

CHAIRMAN NOBER: All right, we'll pick a number and put it out but --

MR. WEICHER: The longer your list, perhaps you'll add a couple of pages. The shorter your list, great.

MR. WILCOX: Right.

CHAIRMAN NOBER: Okay. And again, I want to thank everyone for their presentations. Every time we have one of these, I never ceased to be impressed by, you know, the quality of the presentations that the folks make and how helpful they are to us. Now, I will tell you that this is hopefully the last one of these that I do alone and that's, I guess the good news and the bad news. The bad news is that we took two hours and 15 minutes with just me here, and so if you had, you know, two other Board members, you know, I would settle in for a longer day. But on the other hand, I do think that it's very important for us to be able to have -- for us at the Board generally, to be able to have an opportunity to have a dialogue

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about these cases. You know, these records were put back in, in September.

You know, sometimes things said on paper aren't always able -- you know, we have questions about and you see in the dialogue that I think it's very helpful.

So I appreciate your coming in and I know that it was a lot of work to get prepared for these. These records are very, very long and you know, I can ask you about anything and you have to be prepared to answer about anything and -- but I do think that they are very valuable and you know, I'm very mindful of not just having these for the sake of having them, but having them because they help the Board make better decisions.

So with that, unless there's anything further from either of you, we'll stand adjourned.

MR. SIPE: Thank you, Mr. Chairman.

MR. WEICHER: Thank you.

(Whereupon, at 12:08 p.m. the above entitled matter concluded.)

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