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April 12, 2004

Via Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St. N.W.
Washington, D.C. 20423



RE: STB Docket No. 42057, *Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*

Dear Secretary Williams:

Please find enclosed for filing the original and fifteen (15) copies of Complainant's Reply to BNSF's Post-Argument Brief in the above referenced proceeding. Also enclosed are three (3) diskettes containing the electronic version of the Reply.

An extra copy of this filing is enclosed for stamping and return to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

Thomas W. Wilcox
Counsel for Complainant

cc: Counsel for Defendant

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BEFORE THE
SURFACE TRANSPORTATION BOARD



PUBLIC SERVICE COMPANY OF COLORADO
D/B/A XCEL ENERGY,

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 42057

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COMPLAINANT'S REPLY TO BNSF'S
POST-ARGUMENT BRIEF

In response to the Board's March 18, 2004 decision in this proceeding ("March 18 Decision"), complainant Public Service Company of Colorado d/b/a Xcel Energy ("Xcel") hereby submits its Reply to BNSF's¹ Post-Argument Brief ("BNSF Brief"). For the most part, BNSF declined to respond to the Board's request for information on the three specific issues set forth in the March 18 Decision and instead improperly restated and expanded arguments BNSF has already raised in the evidence in this case. For example, BNSF devotes most of its response to the Board's first issue to rehashing BNSF's flawed and erroneous arguments as to why the coal tonnages Xcel's SARR would transport to Northport, Nebraska for interchange with UP for final delivery to Western Resources, Inc.'s Jeffrey Energy Center should be excluded from the SARR's traffic group. Similarly, in violation of the letter and spirit of the March 18 Decision BNSF responds to the Board's request for discussion on whether there is an alternative to the RCAF-A or RCAF-U for determining the future operating costs of the WCC with four pages of additional argument as to why the RCAF-U should be used in this case. The Board should

¹ The abbreviations in this Reply follow the abbreviations Xcel has used in its other briefs in this case.

ignore this additional argument. Indeed, as to this issue and the third issue listed in the March 18 Decision—possible alternative methods for establishing the maximum reasonable rates in this case if the SAC analysis demonstrates that the revenues of the WCC exceed its costs—BNSF goes so far as to brazenly state that Chairman Nober acted inappropriately in asking for any additional information from the parties, BNSF Brief at 7 and 13, an objection BNSF did not articulate at Oral Argument when the submittal of additional information was discussed. BNSF’s characterization of such information as “new evidence” is simply wrong. First, as BNSF is aware from the discussion between counsel for the parties and Chairman Nober at Oral Argument, the two alternatives to the RCAF-U or RCAF-A suggested by Xcel would entail using only (1) evidence already in the record in this case; and (2) established Board and EIA costing methodologies. This is also true of the alternative to the percent reduction method proposed by Xcel in its Post-Argument Brief. Thus, there is no “new evidence” issue. Indeed, under the Board’s broad discretion in adjudicating SAC cases and basic administrative law principles, the Board could have applied any of the alternatives suggested by Xcel without any input from the parties, as long as it adequately explained its rationale for doing so. See pages 4-5, *supra*.

Xcel responds below to the few points in BNSF’s Brief that are related to the Board’s requests.

I. BNSF’s Evidentiary Argument in Response to the Board’s First Request is Completely Meritless

As stated above, BNSF mostly uses the Board’s request for guidance on applying all or part of one party’s operating plan using all or part of the other party’s traffic group as an opportunity to restate its arguments why the JEC coal tonnages should be excluded from the WCC traffic group.² The record in this case outlines in great detail the many reasons why the

² BNSF begins its brief with a mis-characterization of the “best evidence rule,” which has utterly no application to the Board’s request. See Archie Comic Publ’ns, Inc. v. DeCarlo, 258 F. Supp.2d 315, 329 (S.D.N.Y. 2003) (“The best evidence rule ordinarily requires that the terms of a written instrument be proved by the instrument

WCC easily meets the needs of Western Resources at JEC, not the least of which is that the cycle times calculated by both BNSF and Xcel for the WCC's movement from Eagle Butte and Belle Ayr to and from Northport are faster than the real-world cycle times³ for BNSF's movement of this traffic to and from the Eagle Butte and Belle Ayr mines to Northport. See, e.g. BNSF spreadsheet "LUMs and Carmiles (PSC-BNSF).xls," level "crew districts," cells CJ33 and CJ5 (showing a cycle time of 37.4 hours for Eagle Butte originations and 34.7 hours for Belle Ayr originations moving to JEC). The reasons why the JEC traffic should be included in the WCC traffic group were also discussed during Oral Argument in this case on March 18, 2004.

Instead of providing a constructive response to the substance of the Board's question, BNSF responds with a not-so-nuanced accusation that the Board would exceed the "legal limits on the ability of the Board to create new evidence" if it completed its SAC analysis in this case by adjusting BNSF's operating plan to accommodate tonnages BNSF excluded from Xcel's traffic group for the WCC. BNSF Brief at 5. However, BNSF tellingly does not back up its accusation with a single citation to any STB decision, court case, or administrative law principle that establishes the limit to which BNSF has referred, or even if a principle governing an agency's "creation of evidence" exists. In fact, BNSF's unsupported claim is contrary to fundamental administrative law principles governing adjudications by agencies and their experts, and the overwhelming body of ICC and STB decisions implementing the Guidelines and adjudicating SAC decisions.

First, hornbook administrative law dictates that the Board's expert staff can use the evidence of record in the course of an adjudication to perform analyses that enable the agency to

itself."). Because BNSF's discussion of the rule amounts to a circular argument that the Board should use BNSF's evidence because BNSF believes that its own evidence is "best," Xcel will not spend additional time on this point.

³ BNSF's real-world cycle times range between 45 and 56 hours, BNSF Reply Narrative at III.A-26.

reach a decision. For example, in Bear Lake Watch, Inc. v. FERC, 324 F.3d 1071 (9th Cir. 2003), the court rejected petitioner's challenge to FERC's method of determining the effect of water flow from a reservoir on the electrical output of certain hydroelectric power plants: "Bear Lake Watch complains that FERC should have sliced time into smaller segments and considered daily or even hourly flow data. But even if that were a more sophisticated approach, as opposed to a more cumbersome one, we are not able to say that FERC's approach was incorrect." Id. at 1077. In particular, the court noted that "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts." Id. at 1076-77; accord City of Carmel-by-the-Sea v. United States DOT, 123 F.3d 1142, 1151 (9th Cir. 1997); Earth Island Inst. v. United States Forest Serv., 351 F.3d 1291, 1301 (9th Cir. 2003); Lee v. United States Air Force, 354 F.3d 1229, 1242 (10th Cir. 2004). This activity is not the impermissible "creat[ion] of new evidence," but rather the application of the agency's specialized expertise.

The Board is no different than any other agency in this regard. See STB Ex Parte No. 346 (Sub-No. 34), Rail General Exemption Authority—Exemption of Hydraulic Cement, 1997 STB Lexis 83 at *5-6 (Served April 23, 1997) ("[I]t was not improper for us to perform our own R/VC analysis, particularly given [petitioner's] failure to support its allegations that its traffic moved at R/VC ratios equal to or above national average rates...We are clearly entitled to rely on our own expertise and analysis in this proceeding, as both the Board and the former ICC have frequently done in analogous contexts.") (emphasis added). Applied in the context of a rate case, the foregoing principle necessarily authorizes the Board (and its expert staff) to analyze and develop evidentiary data in reaching a decision. It is perfectly acceptable, then, for the Board to rely on its informed judgment and the agency's expertise in making adjustments to operating

expenses and road property investment in order to reconcile one party's operating plan with the other's traffic group.

The Board's exercise of this discretion is given broad deference by reviewing courts, which have recognized the Board is at the "zenith of its powers" when it determines market dominance and rate reasonableness. Burlington Northern Railroad Company v. STB, 114 F.3d 206, 210 (D.C. Cir. 1997). Hence, the Board is entitled to "particular deference" and need only articulate a "rational connection" between its decision and the underlying facts. Id. The Board's legal obligation is to "adequately explain its result" and to "take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." Jost v. STB, 194 F.3d 79, 85 (D.C. Cir. 1999). The Board's decision "must be upheld as long as the [the agency] examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Western Coal Traffic League v. STB, 216 F.3d 1168, 1171 (D.C. Cir. 2000) (internal quotations omitted); Salt River Agric. Improv. and Power Dist. v. United States, 762 F.2d 1053, 1058 (D.C. Cir. 1985). See Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 445 (D.C. Cir. 1991). ("[J]udgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review."). The Supreme Court agrees that deference of "particular force" may be due when the subject matter is technical and complex, as rate reasonableness cases obviously are. Aluminum Company of America v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 390 (1984).

BNSF well knows that the ICC and the Board have in nearly every stand-alone case relied upon their own expertise and analysis to resolve evidentiary issues presented by the parties in order to fulfill their primary role as adjudicator in these cases: a determination of whether the

challenged rates are reasonable. This has often involved utilizing or manipulating data submitted by the parties in order to reach a decision. For example, “In processing SAC cases, the Board often restates portions of each party’s cost and revenue evidence. In this regard, so that substitute data may be efficiently incorporated into the parties’ electronic spreadsheets to produce restatements, electronic spreadsheets must be set up so that the spreadsheets will readily recalculate with inclusion of the substitute data.” STB Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, 2002 STB Lexis 96 at n.3 (Served Feb. 6, 2002). In that proceeding, the Board admonished the parties (and future parties) to submit spreadsheets that are “capable of being easily manipulated and restated.” Id. (emphasis added). Similarly, in CP&L, the Board rejected the complainant’s operating plan, but nevertheless incorporated numerous parts of the complainant’s evidence:

Having accepted NS’s operating plan, the SAC analysis here necessarily uses NS’s operating assumptions for the P&SH to determine such matters as the number of locomotives, freight cars, and train crew personnel that would be needed. But the costs of those resources are determined based on the quality of the record presented in this case...For some costs, the shipper’s evidence is used here, while for other costs the railroad’s evidence is used.

CP&L at 26. In Duke/NS, the Board used data submitted by the parties and the Board’s expertise to develop and apply the Modified Straight-Mileage Prorate (“MSP”) method for calculating cross-over revenues, a methodology that neither party had proposed. Duke/NS at 22-23. See also TMPA at 77, n.134 (where the STB “used BNSF’s spreadsheets to restate the operating expenses for the GCRR . . . and changed the operating assumptions contained in BNSF’s spreadsheets as appropriate to take into account the TMPA evidence that we accept.”)

BNSF’s attempt to carve out a special category for evidence on track and yard capacity has no merit. BNSF Brief at 5. Arguments over the SARR’s appropriate capacity are part of every SAC case and the Board has not hesitated to add or delete track and related facilities in order to determine the appropriate configuration and investment of a particular SARR in order to

complete the SAC analysis. In WTU, for example, the Board determined that the complainant's SARR required "approximately twice as many passing sidings" due to the Board's adoption of BN's slower cycle times. WTU at 666. In WPL, the Board addressed a situation similar to the one presented here. In that case, the Board used the defendant's operating plan for the most part, but adopted the complainant's traffic group, whose peak year tonnages were approximately 17,681,000 tons greater than the defendant's peak year tons for its alternative traffic group. WPL at 15. The Board utilized its expertise and the evidence of record to resolve UP's claims that the higher traffic group required additional track capacity, mostly in yards (as in this case). See WPL at 61-70. See also FMC at 102-104. In TMPA, the Board added track to the SARR by double tracking certain line segments that had a load factor in excess of 100%. TMPA at 69. See also id. at 68 (in the context of resolving track capacity questions, "BNSF's 'RAILS' program was not made available to us for our review and manipulation, nor was any documentation supplied.")(emphasis added). As Xcel noted in its Post-Argument Brief, as recently as Duke/CSX, the Board used the defendant's operating plan but completed its SAC analysis using the restated, larger traffic group determined by the Board. None of the foregoing instances involved the "creation" of new evidence by the Board. On the contrary, the Board rationally applied its expertise to the evidence in the record to address certain contingencies and to complete the SAC analysis.

As explained in Xcel's Post-Argument Brief, the Board has sufficient evidence in the record of this proceeding to resolve the operating plan and capacity issues posed by the differences between the parties' respective traffic groups. On this score, Xcel notes that BNSF's citation to the Board's requests in Duke/CSX, CPL/Duke, and Duke/NS is inapposite. BNSF Brief at 6. Unlike those proceedings, where the record did not contain certain evidence related to proposed reroutings the Board needed to complete its analysis, the Board has all the movement characteristics, operating parameters, track configuration, and operating expense and road property investment data it needs to resolve the issue over the appropriate operating plan and

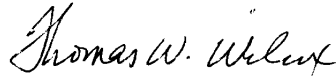
traffic group. The Board also has the expertise, and ample authority to apply that expertise, to complete the SAC analysis in this proceeding.

II. BNSF's Post-SAC Analysis Cross-Subsidy Test is Improper and Unnecessary

BNSF responds to the Board's request for discussion on how the Board should compute maximum reasonable rates in this case with (1) a "theoretical" argument pertaining to cross-over traffic that BNSF admits has nothing to do with this case (BNSF Brief at 11); and, (2) a short, vague statement that the Board should use the percent reduction method but, prior to setting maximum reasonable rates, it should also undertake a cross-subsidy analysis "of the sort that was performed" in STB Docket No. 42054, PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Co. (Served August 20, 2002). Id. BNSF mentions that the Board should apply this test to the "traffic using the segment of the SARR from Northport NE, south to the Pawnee generating station." BNSF Brief at 14. BNSF provides no other details about this vague suggestion. In the first place, the procedure the Board adopted in PPL tests at the outset of a case whether a complainant's proposed SARR contains any impermissible cross-subsidies. Once that threshold is met, the Board conducts its usual SAC analysis based on the revenues and costs of the SARR as a whole. Out of an abundance of caution, Xcel performed this analysis on the segment of Xcel's SARR identified in BNSF's brief in Xcel's Opening Evidence and demonstrated that no cross-subsidy existed. Xcel Opening Evidence at I-14 to I-16. Second, BNSF gives no indication that application of this test at this stage of the proceeding would have any bearing on the outcome. Xcel strongly maintains that application of the PPL test to the

segment at issue would still reveal no impermissible cross-subsidies requiring adjustment of the prescribed rate.

Respectfully submitted,



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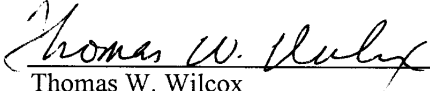
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April 12, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2004, I served a copy of the Complainant's Reply to BNSF's Post-Argument Brief by hand delivery to counsel for Defendant at the following address:

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