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June 28, 2004



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Via HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

PUBLIC VERSION

211450

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:

Enclosed for filing on behalf of defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") in the above-captioned matter are the original and ten copies of the Public version of the defendant's Petition for Reconsideration. BNSF is also filing three copies of a CD containing a PDF version of this Petition. BNSF is filing a Highly Confidential version of this Petition under separate cover.

Please date stamp the extra copy of this cover letter and Petition and return it to the messenger who delivered this filing.

FILED

JUN 28 2004

**SURFACE
TRANSPORTATION BOARD**

Sincerely,

Samuel M. Sipe Jr.
Samuel M. Sipe, Jr.

Enclosures

cc: Counsel for Complainant

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TRANSPORTATION BOARD

WASHINGTON

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BRUSSELS

211450

PUBLIC VERSION

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

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY'S PETITION FOR RECONSIDERATION

ENTERED
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Public Record

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PREFACE AND SUMMARY OF ARGUMENT

In a decision served June 8, 2004 ("*June 8 Decision*"), the Board found that transportation rates charged by The Burlington Northern and Santa Fe Railway Company ("BNSF") for movements of PRB coal to the Public Service Company of Colorado d/b/a Xcel Energy ("Xcel") Pawnee plant exceeded a reasonable maximum rate. The *June 8 Decision* contained numerous material errors which BNSF asks the Board to remedy in the Petition for Reconsideration that follows this Preface. The Board misapplied fundamental tenets of SAC theory, leading to serious distortions in its SAC analysis. The Board failed in several critical instances to hold the complaining shipper to its burden of proof and in other instances failed to resolve issues based on the best evidence of record. The cumulative effect of these errors is an outcome that bears no resemblance to the outcome that would be realized under a proper application of the *Coal Rate Guidelines*.¹ These errors are summarized below.

The Board failed to discharge its statutory duty to give due consideration to BNSF's revenue inadequate status. The Board does not say one word about how its SAC analysis and the methodological decisions underlying that analysis took account of or would affect BNSF's revenue adequate status. The Board ignored substantial record evidence that the coal movement at issue is one of the most demand inelastic movements on BNSF's system and should therefore be expected to incur transportation charges that are much higher than those for other shippers.

The Board failed to dismiss Xcel's complaint even though it found that the complainant had completely failed to establish a feasible operating plan. The Board chose instead to relieve the complainant of its burden of proof, substituting BNSF evidence selectively to fill out the

¹ A list of abbreviations used in this pleading is attached to this Preface.

record. Dismissal of the complaint was also required under 49 U.S.C. § 11701(c), which provides for automatic dismissal of proceedings not completed within three years.

The Board permitted the complainant to rely heavily on cross-over traffic despite detailed evidence from BNSF that doing so would distort the SAC analysis and produce meaningless results. The Board did not confront BNSF's analysis, but instead opined that the "imprecision" introduced by cross-over traffic was to be expected from any "simplifying assumption." When the "imprecision" involves millions of dollars and drives the outcome of the case, as it does here, it cannot be justified on grounds of simplification.

The Board failed to adopt the best evidence of record concerning revenue divisions for cross-over traffic. Instead of accepting BNSF's well-supported DARA analysis, the Board again relieved the complainant of its burden of proof on the allocation issue and adopted a different approach for which there was no supporting evidence or analysis in the record. In doing so, the Board failed to undertake the careful analysis that its own precedent requires to ensure that the revenue divisions it uses are fair. The Board's rejection of DARA is based on the same flawed understanding of the Board's URCS costing methodology that also led the Board erroneously to accept Xcel's adjustment to road property variable costs in the Board's variable cost calculations.

The Board erred in including the rerouted Jeffrey traffic in the SARR traffic group. In violation of its own precedent, the Board required no showing from the complainant that the rerouted traffic would achieve the real-world service levels on the SARR. The Board also ignored evidence from BNSF that the traffic could not meet real-world service levels and mistakenly characterized BNSF's operating plan as demonstrating that the SARR could meet real-world service levels if the Jeffrey traffic was included in the shipper group. The Board also

ignored the subsidy created by using revenues from the Jeffrey movement to offset the cost of facilities not used by that traffic.

The Board ignored evidence from both BNSF and the complainant concerning annual rate escalation following the expiration of a contract. The Board instead relied on extra-record materials that produced a rate escalation more than twice as high as that submitted by either party.

Finally, the Board reached erroneous conclusions on a number of construction cost issues:

- The Board disregarded real-world evidence concerning the earthworks that would be required for yards, relying instead on an inapplicable presumption that was demonstrably incorrect.
- The Board failed to require the complainant to substantiate its earthwork unit costs and reached illogical conclusions about what equipment could be used.
- The Board, in violation of its precedent, permitted the complainant to transport construction materials over segments of the BNSF that were being replaced by the SARR.
- The Board permitted the complainant to assume artificially narrow roadbeds and steep side slopes without any demonstration that doing so would permit the SARR to achieve the same service that the incumbent provides with more extensive roadbed infrastructure.
- The Board declined to include all costs for daylighting a tunnel near Guernsey due to the mistaken belief that BNSF had failed to make the complainant aware of those costs.
- The Board purported to accept BNSF's highway overpass costs in its opinion but then used the complainant's costs for most overpasses in its workpapers.

TABLE OF ABBREVIATIONS

BNSF	The Burlington Northern and Santa Fe Railway Company
CMP	Constrained Market Pricing
CY	Cubic Yard
DARA	Density Adjusted Revenue Allocation
DCF	Discounted Cash Flow
EIA	Energy Information Administration
ICC	Interstate Commerce Commission
MP	Milepost
MSP	Straight Mileage Prorate
<i>Means</i>	<i>RS Means Cost Data</i>
PRB	Powder River Basin
R/VC	Revenue-to-Variable Cost
RSAM	Revenue Shortfall Allocation Method
SAC	Stand-Alone Cost
SARR	Stand-Alone Railroad
STB	Surface Transportation Board
URCS	Uniform Railroad Costing System
VS	Verified Statement
WCC	Wyoming Colorado Coal Railroad
Xcel	Public Service Company of Colorado d/b/a Xcel Energy

CASE NAMES

<i>April 2003 Decision</i>	<i>Public Service Company of Colorado d/b/a Xcel Energy</i> , STB Docket No. 42057 (served April 4, 2003)
<i>BNSF Final Brief</i>	Final Brief of the Burlington Northern and Santa Fe Railway Company, STB Docket No. 42057 (filed September 8, 2003)
<i>Bottleneck Case</i>	<i>Central Power & Light Company v. Southern Pacific Transportation Company</i> , 1 S.T.B. 1059 (1996)
<i>Coal Rate Guidelines</i>	<i>Coal Rate Guidelines, Nationwide</i> , 1 I.C.C.2d 520 (1985)
<i>DARA Petition</i>	Petition of the Burlington Northern and Santa Fe Railway Company For Leave to File Statement of Clarification, STB Docket No. 42057 (filed January 20, 2004)
<i>Duke/CSX</i>	<i>Duke Energy Corporation v. CSX Transportation, Inc.</i> , STB Docket No. 42070 (served February 4, 2004)
<i>Duke/NS</i>	<i>Duke Energy Corporation v. Norfolk Southern Railway Company</i> , STB Docket No. 42069 (served November 6, 2003)
<i>June 8 Decision</i>	<i>Public Service Company of Colorado d/b/a Xcel Energy</i> , STB Docket No. 42057 (served June 8, 2004)
<i>McCarty Farms</i>	<i>McCarty Farms, et. al. v. Burlington Northern Inc.</i> , I.C.C. Docket No. 37809 (served February 13, 1995), 1995 WL 55449 (ICC).
<i>TMPA</i>	<i>Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company</i> , STB Docket No. 42056 (served March 24, 2003)
<i>2002 Non-Coal Guidelines</i>	<i>Rate Guidelines—Non-Coal Proceedings</i> , STB Ex Parte No. 347 (Sub-No. 2) (served May 8, 2002).
<i>2004 Non-Coal Guidelines</i>	<i>Rate Guidelines—Non-Coal Proceedings</i> , STB Ex Parte No. 347 (Sub-No. 2) (served May 17, 2004)
<i>Adoption of URCS</i>	<i>Adoption of the Uniform Railroad Costing System As A General Purpose Costing System For All Regulatory Costing Purposes</i> , 5 I.C.C.2d 894 (1989)
<i>WPL</i>	<i>Wisconsin Power & Light Company v. Union Pacific Railroad</i> , STB Docket No. 42051 (served September 13, 2001)

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY'S PETITION FOR RECONSIDERATION**

Pursuant to 49 C.F.R. § 1115.3, defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby petitions for reconsideration of the Board decision served on June 8, 2004 ("*June 8 Decision*") in the captioned proceeding. The Board's decision contains material errors in a number of areas. These errors are summarized above in the separate Preface and Summary of Argument required by the Board's rules and are described in more detail below.

I. THE BOARD FAILED TO GIVE DUE CONSIDERATION TO THE POLICY THAT RAIL CARRIERS SHALL EARN ADEQUATE REVENUES

When it determines the reasonableness of a challenged rate, the Board is explicitly required to give "due consideration" to "the policy . . . that rail carriers shall earn adequate revenues." 49 U.S.C. § 10701(d)(2). The statute is unambiguous. It says that the Board must consider revenue adequacy in individual cases.

In its *June 8 Decision*, the Board did not say one word about how its SAC analysis took account of or would affect BNSF's revenue inadequate status. This failure to adhere to the statutory requirement is particularly troublesome here, where there is substantial, unrefuted evidence of record that Xcel is precisely the sort of shipper that should be expected to pay differentially higher rates than other shippers because of its highly inelastic demand for BNSF transportation on movements to the Pawnee electric generating station. See BNSF Op. Nar. at II-73 to 84. The undisputed evidence of record also showed that Xcel's demand for coal transportation at Pawnee is more inelastic than that of other BNSF traffic that generates revenues in excess of 180 percent of variable costs. *Id.* at II-84 to 89. The *Coal Rate Guidelines* recognize that being able to charge differentially higher rates to their most demand inelastic shippers is the only way that railroads can hope to achieve revenue adequacy. *Coal Rate Guidelines*, 1 I.C.C.2d at 526-7.

In the *June 8 Decision*, the Board prescribed maximum reasonable rates on the Xcel movement to Pawnee that generates R/VC ratios far below the level of those needed if BNSF is to become revenue adequate. In what was the Board's most recent RSAM calculation at the time BNSF submitted its Opening Evidence, the Board found that BNSF would have needed to achieve average revenues of 282 percent of its variable costs on traffic that produces R/VC ratios greater than 180 percent in order to achieve revenue adequacy.¹ Because the RSAM figure is an *average*, some rates must be set at levels well above the RSAM average for the overall rate structure to yield adequate revenues. The rates prescribed by the Board in this case produce R/VC ratios well below the RSAM level. The outcome is inconsistent with the goal and expectation of the *Coal Rate Guidelines* that the CMP maximum rate standards would allow rail carriers to achieve revenue adequacy through a regime of differential pricing.

II. XCEL FAILED TO PRESENT A VALID PRIMA FACIE CASE

In the *June 8 Decision*, the Board stated that “[b]ased on the record in this case, the Board finds that Xcel’s operating plan is infeasible.” *June 8 Decision* at 25. The Board identified various “fundamental deficiencies in Xcel’s operating plan.” *Id.* It concluded that Xcel’s operating plan and the string program that underlay that operating plan could not be fixed:

Given [the string program’s] proven unreliability, as shown in both this case and prior SAC cases, the Board has no reason to believe that it could successfully rewrite and then manipulate the program to obtain reliable results when its proponents have repeatedly failed to do so.

June 8 Decision at 27.

¹ *2002 Non-Coal Guidelines* at 2. The Board’s most recent RSAM determination calculates BNSF’s four-year average RSAM to be 316 percent of variable costs. *2004 Non-Coal Guidelines* at 3.

The Board's conclusions regarding Xcel's operating plan amount to a determination that Xcel failed entirely to meet its burden of proof on a critical element of its SAC case.² The positing of a feasible operating plan is an essential element of the presentation of a SAC case by a complaining shipper. Absent a feasible operating plan, it is impossible to determine whether the SARR has sufficient capacity to handle the traffic selected by the complainant and it is impossible to develop reliable operating statistics. Because Xcel failed to meet its burden of proof on its operating plan, it failed to present a viable stand-alone cost case. As the Board stated in *McCarty Farms*, "[w]e agree that a SAC model must be feasible, and a showing that a SAC model upon which a complainant bases its case is not feasible would ultimately be fatal to its complaint."³ Xcel's complaint therefore should be dismissed.

BNSF identified fundamental deficiencies in the operating plan that Xcel submitted in its Opening Evidence on January 10, 2003. On February 6, 2003, BNSF filed a motion for summary disposition based on the flaws in Xcel's operating plan. BNSF argued that Xcel's failure to present a feasible operating plan meant that Xcel had failed to make a prima facie case of a hypothetical SARR capable of serving in a feasible manner the traffic group selected by Xcel. In denying BNSF's motion, the Board expressed concern regarding "the submission of incomplete or erroneous evidence on opening in a SAC case," but concluded that "BNSF has not demonstrated that the alleged errors in Xcel's opening evidence are so large in magnitude or so egregious as to warrant dismissing the complaint at this early stage of the proceeding." *April 2003 Decision* at 2.

² In its discussion of the parties' operating plans, the Board expressly noted that Xcel was "the party with the burden of proof on this issue." *June 8 Decision* at 27.

³ *McCarty Farms*, 1995 WL 55449, *7.

Now, some 14 months after its *April 2003 Decision*, the Board *has* concluded that the errors in Xcel's evidence regarding its operating plan are both so large in magnitude and so egregious that they render Xcel's operating plan infeasible. The plain import of the *April 2003 Decision* was that the complaint would be dismissed if and when the Board concluded that Xcel had not met its burden of formulating a feasible operating plan. Having reached this conclusion, the Board should have dismissed Xcel's complaint in the *June 8 Decision*.⁴

III. XCEL'S EXTENSIVE USE OF CROSS-OVER TRAFFIC UNDERMINES THE VALIDITY OF THE SAC TEST AND PRODUCES MEANINGLESS RESULTS

The most glaring conceptual error in the *June 8 Decision* is the Board's uncritical acceptance of cross-over traffic. Xcel relied overwhelmingly on cross-over traffic for its revenues and its purported showing of revenue in excess of costs is entirely a function of the revenues it claims on cross-over traffic. But reliance on cross-over traffic is not consistent with the economic principles underlying SAC. As applied by the Board here, cross-over traffic leads to rate setting based on arbitrary allocations, which is precisely what the ICC thought it was avoiding when it adopted CMP.

In its Reply Evidence filed on April 4, 2003, BNSF submitted testimony sponsored by Professor Janusz A. Ordover that explained in detail why the use of cross-over traffic is not

⁴ The Board's refusal to dismiss Xcel's complaint in response to BNSF's January 2003 request gave rise to a separate basis for dismissal. Dismissal of Xcel's complaint is now required because the rate complaint proceeding was not completed within three years as the relevant statute requires: "A formal investigative proceeding begun by the Board under subsection (a) of this section is dismissed automatically unless it is concluded by the Board with administrative finality by the end of the third year after the date on which it was begun." 49 U.S.C. § 11701(c). Xcel filed its complaint under 49 U.S.C. § 11701(a), the subsection referenced in this provision, on December 20, 2000. The parties reported to the Board on January 8, 2001 the results of their conference pursuant to 49 C.F.R. § 1111.10(b). BNSF answered the complaint on January 9, 2001. The Board issued a protective order on January 29, 2001. The Board's decision was not issued until June 8, 2004, well over three years after the proceeding was initiated.

consistent with the economic principles underlying SAC.⁵ The essence of the SAC test is to compare the revenues generated by a traffic group with the full costs incurred to serve the group. The use of cross-over traffic precludes this comparison. The cross-over revenues assigned to the SARR are simply assumed to be available without any showing that there are sufficient revenues available to the residual incumbent to cover off-SARR costs. This creates the very real risk that the SARR will appear to be “profitable,” while the residual incumbent, whose profitability is not scrutinized, is left with insufficient revenue to cover its costs over the DCF period.

Furthermore, as Professor Ordoover explains, a SARR that employs cross-over traffic does not truly stand-alone. It depends on the residual incumbent to interchange cross-over traffic, but there is no showing that the residual incumbent can sustain itself and continue to interchange traffic with the SARR.

In its *June 8 Decision*, the Board did not even attempt to come to terms with Professor Ordoover’s critique of cross-over traffic. Instead, the Board offered the following rationale for allowing cross-over traffic:

Permitting Xcel to use cross-over traffic in its SAC presentation thus keeps the SAC analysis properly focused on the core inquiry – whether the defendant railroad is earning adequate revenues on the portion of its rail system that serves the complaining shipper.

June 8 Decision at 14. The justification is baseless because with cross-over traffic it is not possible to know what revenues are being earned on the portion of the defendant’s system that constitutes the SARR. The revenues claimed by/assigned to the SARR are not the revenues earned by the defendant on a portion of its system; those revenues are allocated portions of

⁵ BNSF Reply Nar. at III-A-4 to 21; BNSF Reply Exh. III.A-1 (“Declaration of Janusz A. Ordoover). Professor Ordoover is a former Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S. Department of Justice. He is one of the distinguished economists who signed the verified statement of economists supporting the principles of Constrained Market Pricing in June, 1983, in the *Coal Rate Guidelines* proceeding.

through rates. The Board's own *Bottleneck Decision* makes clear that the reasonableness of rates can be assessed only on a through basis, from origin to destination.⁶ Thus, the portion of the system whose revenues are being analyzed must be comprised of a subset of through movements; it cannot be a carve-out of severed movements. Arbitrary allocation of through rates for the purposes of assessing the adequacy of revenues on a subset of the defendant's system involves the same sort of segmentation that the Board found to be impermissible in the *Bottleneck Decision*, and it relies upon the same sort of arbitrary allocation that the Board's predecessor, the ICC, sought to avoid by adopting CMP and the SAC test.

The more candid rationale for allowing the complaining shipper to use cross-over traffic is that cross-over increases the shipper's chance of prevailing in a SAC case by engaging in cream-skimming. The Board notes that cross-over traffic "enables the SAC analysis to take into account the economies of scale, scope and density that the defendant carrier enjoys over the routes replicated." *June 8 Decision* at 13-4. These economies exist on the SARR only because the defendant carrier has built a network of less dense "feeder" lines that draws traffic from and delivers traffic to a vast geographic area. Cross-over allows the shipper to claim the benefit of these economies without incurring the costs required to achieve them. That is plainly unfair.

The undisputed record in this case is that use of cross-over traffic entails arbitrary allocations that distort the results of a true SAC analysis. BNSF Reply Nar. at III-A-18 to 24. The Board made no attempt to come to terms with this showing of distortion, acknowledging only that "[a]s with any simplifying assumption, the inclusion of cross-over traffic necessarily introduces some degree of imprecision into the SAC analysis." *June 8 Decision* at 16. How much "imprecision" is the Board willing to accept in these coal rate cases that are worth millions

⁶ *Central Power & Light Co. v. Southern Pacific Transp. Co.*, 1 S.T.B. 1059 (1996).

of dollars? The use of cross-over traffic in this case results in systematic distortion that renders the results of the Board's SAC analysis invalid.

IV. THE BOARD FAILED TO ADOPT THE BEST PROCEDURE AVAILABLE ON THE RECORD TO ALLOCATE REVENUES ON CROSS-OVER TRAFFIC

The Board stated that it "recognizes that, in permitting captive shippers to simplify their presentations by using cross-over traffic, it must carefully analyze the revenue allocation methodology used in these cases." *June 8 Decision* at 16. Such a careful analysis "should reflect, to the extent practicable, the defendant carrier's relative costs of providing service over the two segments" of cross-over movements and should "produce the fairest division between the carriers." *Duke/NS* at 20, 22.

The Board did not undertake such a careful analysis, nor did it hold Xcel, the proponent and beneficiary of cross-over traffic, to its burden of proof on the revenue allocation issue. Indeed, the revenue allocation methodology the Board adopted in this case was not even proposed by Xcel. The Board selected the MSP revenue allocation procedure based on its adoption of that procedure in another case after the evidentiary record in this case had closed.

There is no analysis by the Board in the *June 8 Decision* as to how the MSP procedure satisfies the *Duke/NS* standards that the revenue allocation procedure should reflect the defendant carrier's relative costs of on-SARR and off-SARR segments and should produce the fairest division between the carriers. The MSP procedure was simply deemed acceptable because it had been used in recent cases and because "Xcel stated at oral argument that it has no objection to the use of the MSP approach in this case." *June 8 Decision* at 17.⁷

⁷ If it had indeed been proper for the Board to look outside the record for its revenue allocation procedure, it could and should have looked for a procedure that more accurately reflects the costs of originating and terminating unit coal trains than the MSP procedure it chose. The MSP method assigns a credit equivalent to 100 miles of line-haul transportation for originating or terminating a carload of coal. However, the unit coal train adjustments calculated

The evidence of record establishes that BNSF's DARA procedure is the best allocation procedure available to the Board in this case because it provides for more precise coverage of attributable costs than MSP and takes account of the impact of differing densities on costs. DARA uses BNSF's URCS costs to develop attributable costs for the on-SARR and off-SARR portions of cross-over movements. The URCS costs more accurately reflect the costs to originate and terminate carloads of unit train traffic than the 100-mile origination and termination credit used in MSP. Moreover, DARA explicitly allocates revenue in a manner that reflects the fact that greater use of the fixed rail plant results in declining average costs. MSP takes no account of the impact of economies of density on costs.

The Board criticized DARA, saying that it "appears to overstate the revenues that would be attributed to light-density segments, by calculating the variable costs using BNSF's system-average numbers (from URCS)." *June 8 Decision* at 17. This criticism is flatly inconsistent with the evidence submitted by BNSF in its January 20, 2004 DARA Petition (never mentioned by the Board) which shows that far greater revenue for recovery of road property investment is allocated to high density segments using DARA than to light density lines. DARA Petition at Klick/Fisher VS, Attachment 5. More fundamentally, the Board's statement that "there is no basis to assume that the fixed investment costs are the same for light- and heavy-density lines," *June 8 Decision* at 18, is inconsistent with a basic precept of URCS. As the ICC explained when it adopted URCS, "variable cost measures the level of those costs that change with changes in

by the ICC in Ex Parte No. 270 (Sub-No. 4) indicate that the costs of terminating a carload of unit train coal in shipper owned cars are the equivalent of only 25 miles of line haul movement. *See Investigation of Railroad Freight Rate Structure Coal*, 344 I.C.C. 71 (1974). Given the prevalence of relative short-haul movements for which Xcel's SARR is the originating carrier, the system average 100-mile credit over-assigns revenue to the SARR under the logic of MSP.

volumes.”⁸ Fixed costs are those costs that remain the same regardless of volume. Moreover, the Board’s statement that the use of BNSF’s system-average costs “underestimates the road property component of variable costs for high-density lines,” *June 8 Decision* at 18, is squarely inconsistent with its acceptance of Xcel’s adjustment to road property variable costs for the high-density Xcel route in the variable cost calculation, which assumes that the system-average costs are too *high* for high density lines. *See id.* at 136-37.

The Board acknowledges that “[t]here may be merit to allocating revenues based on relative variable and average fixed costs . . . if those costs can be fairly approximated.” *June 8 Decision* at 19. But BNSF’s DARA methodology is based on an approximation of variable and fixed costs using the Board’s own regulatory costing methodology, URCS. By rejecting BNSF’s evidence, the Board is repudiating URCS and effectively concluding that URCS does not present a “fair approximation” of rail costs. Such a conclusion is irrational.

The Board’s treatment of the revenue allocation issue in this case represents a significant departure from standards of fair and reasoned decision making. Not only did the Board fail to analyze carefully the evidence on revenue allocation, it effectively imposed on BNSF the burden of coming forward with a flawless revenue allocation procedure, while exonerating Xcel from any burden on this issue. The issue is not whether DARA is the ideal revenue allocation procedure but whether it accounts for costs in a more precise way than MSP and produces fairer results. DARA is superior to MSP on both counts.

⁸ *Adoption of URCS*, 5 I.C.C.2d at 901. Indeed, the Board’s illustration on page 19 of the *June 8 Decision* recognizes that fixed costs (or “threshold investment”) are the same for light- and heavy-density lines. See also the graph at page II-53 of BNSF’s Opening Narrative, which depicts the relationship between variable costs, fixed costs and density. The Board’s rejection of DARA is based on the same flawed understanding of URCS fixed and variable costs that led the Board erroneously to accept Xcel’s adjustment to road property variable costs. *See June 8 Decision* at 136-37.

V. THE BOARD ERRED IN INCLUDING THE REROUTED JEFFREY TRAFFIC

The Board's inclusion of the rerouted Jeffrey traffic in the SAC traffic group is inconsistent with the test articulated in *TMPA* and rests on erroneous conclusions about the evidence in the record. It was error to include the Jeffrey traffic in the SAC traffic group.

In *TMPA*, the Board stated that "the SARR must meet the transportation needs of the traffic in the group by providing service that is equal to (or better than) the existing service for that traffic." *TMPA* at 16. BNSF showed that WCC's service on the Jeffrey movement over a different route than that used today by BNSF would be inferior to BNSF's real-world service because the rerouted movement was longer than the real-world movement, involved congestion that does not exist on the real-world route, and is inconsistent with the terms of the contract. There is no competent offsetting evidence. The Board could not (and did not) rely on Xcel's evidence to support a conclusion that service would not deteriorate since the Board threw out Xcel's operating plan altogether. This fact alone should result in the exclusion of the Jeffrey traffic. Xcel had the burden of demonstrating that its SARR could provide service as good as that provided by the defendant and it failed to do so. The Board also erroneously concluded that "BNSF's own operating plan demonstrates that the shipper would not be disadvantaged by the proposed rerouting." *June 8 Decision* at 21. The Board's decision makes clear that this assertion is incorrect. In discussing the need for a tonnage calibration, the Board acknowledges that BNSF's operating plan did not include the Jeffrey movement, noting that "adding the JEC traffic [to BNSF's operating plan] could add congestion to those lines. . . ." *Id.* at 29.

The inclusion of the rerouted Jeffrey traffic is also inconsistent with the second prong of the *TMPA* test, that the rerouting of traffic must be consistent with the purposes and objectives of the SAC test. Several recent Board decisions have emphasized that a complainant cannot rely on non-issue traffic to contribute to the costs of facilities that the non-issue traffic does not use. *See*

BNSF Final Brief at 14. An impermissible subsidy is created whenever a complainant obtains revenues from a shipper to offset the cost of the issue-traffic facilities when that shipper does not use the issue traffic facilities. The Board's statement that the Jeffrey traffic does share facilities with the issue traffic does not address the substance of the subsidy issue. The portion of the Jeffrey movement from Eagle Butte to Donkey Creek over shared facilities represents only 3.6 percent of the issue traffic movement from Eagle Butte to Northport. But the Jeffrey movement generates in excess of \$ { } million a year in revenue for the SARR, which far exceeds the capital costs of the limited facilities it shares with the issue traffic. The Jeffrey traffic is paying for facilities it does not use and is providing a huge subsidy to the SARR. This violates one of the key underlying premises of the SAC test.

VI. THE BOARD SHOULD RECONSIDER CERTAIN FORECASTING ISSUES

The Board should reconsider its methodology for projecting revenues upon the expiration of a contract. By relying on evidence outside the record, the Board produces an annual rate escalation of about 1.8 percent, which is more than double the annual rate escalation projected by both Xcel and BNSF.

For competitively-served plants, both Xcel and BNSF agreed that the rates to such plants would decline upon expiration of a contract based upon BNSF's recent experience.⁹ Without explanation, the Board assumed that the new contract rate will equal the expiring contract rate with no downward adjustment. Separately, without explanation, the Board rejected the methodology proposed by both Xcel and BNSF for projecting future revenues for competitively-served plants after determining the starting rate under the new contract.¹⁰ The "composite marketplace rate adjustment mechanism" proposed by both parties is better evidence of future

⁹ See Xcel Opening Nar. at III-A-19; BNSF Reply Nar. at III.A-87 to 91.

¹⁰ See Xcel Opening Nar. at III-A-19; BNSF Reply Nar. at III.A-91.

revenues to BNSF competitively-served plants than the extra-record EIA forecast used by the Board because it is specific to BNSF. The Board's use of the EIA forecast resulted in much higher rate escalation than either party assumed.

For sole-served plants, the Board should reconsider its assumption that the rate at contract expiration will equal the last contract rate. In *WPL*, the Board stated that "[i]n the absence of better evidence, we assume that the rate trends in existing contracts will continue." *WPL* at 28. BNSF provided ample "better evidence" demonstrating that rate trends in BNSF's PRB contracts for sole-served plants do not continue after the expiration of their contracts and the Board ignored this evidence.¹¹

Finally, the Board should reconsider its decision to use the EIA forecast rather than BNSF's own business forecast to project volumes for non-Xcel plants for the years 2005 through 2007. *See June 8 Decision* at 53. The Board's decision to ignore the BNSF internal business forecast is inconsistent with its decision to use Xcel's internal business forecast to project volumes for Xcel's plants and with prior Board precedent in which the Board has expressed a preference for rail carrier internal forecasts prepared in the ordinary course of business.¹²

VII. THE BOARD SHOULD RECONSIDER SEVERAL CONSTRUCTION COST ISSUES

A. Earthwork in Yards

The Board should reconsider its Guernsey Yard analysis and accept the earthwork quantities sponsored by BNSF. While the Board accepted BNSF's proposed layout for the Guernsey Yard, the Board found that earthwork costs for the facility would be less than one

¹¹ *See* BNSF Reply Nar. at III.A-81 to 85.

¹² *See Duke/CSX* at 42, 45; *WPL* at 30, 31. The Board's rationale for its decision -- that the EIA forecast is PRB specific while the BNSF Macro Coal Forecast is not -- is unpersuasive given that the vast majority of BNSF coal business involves PRB coal.

percent of the earthwork costs calculated by BNSF: \$2,700,939 according to the Board compared to \$341,272,676 demonstrated in BNSF's evidence.¹³ According to the Board, *no* excavation costs would be incurred in the construction of Guernsey Yard and the only earthwork costs would result from the spreading of 1 foot of borrow over the Guernsey Yard area. This result is patently wrong and grossly unfair.

The Board's assumption that the Guernsey Yard would require only one foot of "borrow" fill is an extension of the methodology that the Board used to address certain deficiencies in the 1915 engineering reports that are used to develop earthworks quantities on some SARR lines. Those reports set out only the total earthwork quantities for a valuation section. To allocate those total quantities between mainline tracks and yards, the Board adopted an arbitrary assumption that yards contain one foot of "borrow" fill. BNSF did not object to this convention when assessing earthwork quantities for SARR mainline tracks and yards that were in existence at the time of the engineering reports. But there is no rationale for applying this convention to SARR tracks and yards that were not in existence at the time of the engineering reports and there is no basis whatsoever for presuming, as the Board did in this case, that the amount of grading in new yards would be no different "from what was historically undertaken in the yards accounted for in [the engineering reports]." *June 8 Decision* at 94.

Xcel chose to site the Guernsey Yard at a completely different location than the yard that existed at Guernsey in 1915.¹⁴ BNSF calculated earthwork for this new yard based on the actual topography that would be encountered by a railroad attempting to construct a yard at that site. BNSF Reply Nar. at III.F-48. The topographical maps and cross sections submitted with

¹³ Compare STB electronic workpaper "STB GRADING.XLS," tab "IIIF_12 Yards," cell S16 to BNSF Reply electronic workpaper "III F 2 Grading.xls," tab "Guernsey," cells D15 and D17.

¹⁴ BNSF Reply Nar. at III.F-46; BNSF.RP.WP.III-F-00254.

BNSF's evidence demonstrate the impossibility of the Board's assumption that no excavation would be needed to construct this new yard and that only one foot of borrow fill would be needed.¹⁵ Attachment 1, which highlights the topographical information contained in BNSF's evidence, demonstrates that construction of the SARR's Guernsey Yard would require the leveling of several substantial hills.¹⁶ Moreover, Attachment 1 shows that the topography for the site of the pre-1915 yard is, in fact, quite different from that for the site of the proposed yard. The yard between mileposts 95 and 94 parallels the existing contours of the site, thus demonstrating that the pre-1915 yard, in contrast with the proposed yard, was built in a relatively flat area that avoided the necessity for leveling the hills found to the north of that yard.¹⁷

The Board's rejection of BNSF's Guernsey Yard evidence is also inconsistent with Board precedent. In *Duke/CSX*, the Board accepted evidence that a yard built in a gorge would require substantial earthwork quantities, well-beyond those that would result if a one-foot fill rule were applied. *Duke/CSX* at 77 (accepting defendant's earthworks calculation based on topographical maps where plaintiff sited yard at bottom of gorge). There is no basis for a rule that accepts evidence based on topographical data if a proposed yard is sited at the bottom of a gorge but

¹⁵ See BNSF.RP.WP.III-F-00256 to 00270.

¹⁶ There is a 4460-foot peak near the middle of the yard right-of-way (due North of milepost 93 on the existing mainline) which would need to be reduced by nearly 100 feet to bring it level with the grade of the proposed yard at that point. Moreover, the 4400-foot contour line runs east-west through the center of the yard between the points marked as MP 93 and MP 92 on Attachment 1. Again, 50 feet or more would need to be excavated to bring this segment down to the elevation specified for the yard. Similar cuts across contour lines can be observed in the eastern portion of the yard near the point marked as MP 91 and between MPs 91 and 92.

¹⁷ The topographical map in Attachment 1 extends slightly to the east of the map included at BNSF.RP.WP.III-F-00256 to respond to the Board's reference to a comparison of the new yard to the pre-1915 yard. See *June 8 Decision* at 95.

ignores topographical data if a yard runs through a series of hills that would need to be leveled.¹⁸

The Board's decision to ignore BNSF's evidence and rely instead on a one-foot-fill assumption was arbitrary.

The Board should accept BNSF's earthwork quantities for the Wendover Yard for the same reasons as described above for the Guernsey Yard. BNSF's evidence demonstrated that construction of the Wendover Yard at the location chosen by Xcel would require cutting into a high rock bluff adjacent to BNSF's existing main line. BNSF Reply Nar. at III.F-45. The cliffs that would need to be cut away are clearly visible on the topographic maps submitted by BNSF.¹⁹ As with the Guernsey Yard, application of the one-foot-fill presumption to the Wendover Yard is unreasonable.

B. Earthworks Unit Costs

The Board should reconsider its decision to calculate common excavation costs using the cost of a 11CY elevating scraper as designated by Xcel instead of a 14CY self-propelled scraper as designated by BNSF. BNSF demonstrated that the 11CY elevating scraper cannot handle much of the soils that would be encountered along the SARR route. BNSF Reply Nar. at III.F-50 to 52. The elevating scraper is used for loose materials but much of the soil on the SARR route would be cohesive and semi-cohesive, *i.e.*, clay and silt. The Board appears to have misunderstood BNSF's argument on this issue. BNSF did not argue, as the Board asserts, that the use of an elevating scraper would produce a "lack of versatility [that] would lead to reduced production." *June 8 Decision* at 96. Rather, BNSF demonstrated that while the elevating scraper chosen by Xcel might be able to handle common excavation on *some* portions of the SARR

¹⁸ Indeed, complainants in recent SAC cases have also begun to base yard earthwork quantities on estimates of actual earthwork requirements. *See, e.g.*, AEPCO Supplemental Rebuttal Nar., Docket No. 42058, at III-F-24 to III-F-31 (filed Apr. 2, 2004)(Public Version).

¹⁹ BNSF.RP.WP.III-F-00225 to 00231.

route, it could not handle common excavation on *all* portions of the route. The *Means* data relied on by the Board demonstrates only that the elevated scraper can be used for some types of soil, not for all soil types. Xcel's assumption that an elevated scraper could be used for the entire route is not feasible.

The Board should also reconsider its decision to exclude from solid rock excavation unit costs the costs for secondary handling of large boulders that result from blasting and drilling. *See* BNSF Reply Nar. at III.F-64 to 65. BNSF explained in its Reply Evidence that blasting and drilling operations produce boulders of various sizes, including boulders that are too large to be used in embankments without further blasting and some larger boulders that are too massive to be handled by a 3CY shovel. Xcel's assertion that all boulders produced by its blasting would be small is based on nothing more than wishful thinking. The fact that Xcel and the Board used *Means* excavation costs for solid rock excavation is irrelevant since *Means* does not state when additional processing is required to use the excavated rock in embankments.²⁰ BNSF presented evidence from a construction site near the route of the SARR demonstrating that blasting and drilling produces large boulders that must be further processed.²¹ The Board's rejection of that evidence on grounds that the construction project was not "potentially similar to the WCC" is unreasonable. *June 8 Decision* at 97. There are no construction projects that are similar to the WCC. The rejection of BNSF's evidence on this issue reflects an unwillingness to adopt the best evidence of record.

²⁰ *Means* does include a separate cost for blasting and drilling boulders, a clear indication that such secondary handling is contemplated. *See* BNSF.RP.WP.III-F-00384.

²¹ BNSF.RP.WP.III-F-00392 to 00394.

C. Materials Transportation

The Board should reconsider its rejection of BNSF's materials transportation unit costs. The Board appears to have misunderstood the parties' arguments on this point. The issue here is not, as the Board appears to believe, whether PC*Rail or a railroad atlas should be used to calculate the mileages for materials transport. Rather, the issue is whether Xcel is entitled to assume that transportation can occur over BNSF line segments that the WCC is assumed to replace. On this issue, the Board mistakenly asserts that "Xcel complains that BNSF assumed transportation over the residual BNSF." *June 8 Decision* at 107. The Board has it backwards. Xcel sought to reduce its materials transportation costs by assuming that the WCC would route materials over BNSF segments that were being replaced by the WCC. Xcel Reb. Nar. at III-F-79. BNSF, not Xcel, argued that this assumption was improper. Materials transportation costs must be calculated based on rail distances over railroads other than BNSF since it would not be proper to assume that the lines being replaced by the SARR are available to provide material transportation. BNSF's approach, which assumes that the SARR replaces the existing railroad, is consistent with Board precedent and with other parts of the decision in this case. *See June 8 Decision* at 105 (disallowing highway crossovers "because the SAC analysis assumes that the WCC would replace the defendant carrier"); *TMPA* at 137 ("During construction the GCRR would have to pay a third party to deliver materials to the construction sites").

D. Side Slopes And Roadbed Width

The Board should reconsider the specifications for WCC side slopes and roadbed widths. BNSF assumed that the WCC would need the same side slopes and roadbed widths as the incumbent has on the replicated line segments. Since the WCC must provide the same level of service as the incumbent, it cannot afford to have an inferior roadbed infrastructure. *See BNSF Reply Nar.* at III.F-20 to 21, 23. Xcel, on the other hand, assumed that the WCC would have

side slopes that were much steeper on average than those in the real world and roadbeds that were much narrower than in the real world. The Board accepted Xcel's evidence because Xcel showed that in some places BNSF had steep side slopes and narrow roadbeds. *June 8 Decision* at 90-91. But there is no logical basis to conclude that steep slopes and narrow roadbeds, just because they exist on some portions of the line, can be used on all portions of the line without any degradation in service. The best evidence of the side slopes and roadbed widths required by the WCC is the side slopes and roadbed characteristics on the real-world lines being replicated.

E. Guernsey Tunnel #2 Daylighting Costs

The Board should include the costs for side slope protection and raising the track grade in connection with daylighting Guernsey Tunnel #2. The Board excluded these costs because BNSF allegedly "failed to make Xcel aware of these project components." *June 8 Decision* at 93. The Board is in error. Xcel did not make any discovery requests concerning tunnel daylighting so there was no deficiency in BNSF's discovery responses. Moreover, Xcel's own Opening Narrative states that the Guernsey daylighting project "included raising the track grade 6-8 feet," so Xcel was obviously aware of this component. Xcel Opening Nar. at III-F-17 n.33.

Xcel was also clearly aware of the need for slope protection. Xcel's workpapers on this issue²² are part of a slide presentation entitled "Guernsey Tunnel #2 Daylighting" that was used by complainants in *TMPA*.²³ In the workpapers Xcel submitted in this case, it appears to have modified the "Summary" sheet from that presentation to remove two references to "shotcreting" – a procedure used in slope protection. The Board can compare the "Summary" slide used in

²² Xcel Opening workpapers 3886-88.

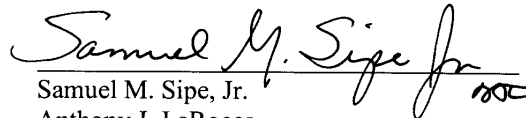
²³ *TMPA* Reb. Nar. at 516; *TMPA* Reb. workpaper 10338.

TMPA to the document submitted in this case, which suggests that Xcel deleted material from the slide before copying it to remove the references to the need for slope protection.²⁴

F. Highway Overpass Bridge Costs

The Board should reconsider its costs for grade separations and use the costs presented by BNSF. The Board accepted BNSF's costs for certain overpasses. *June 8 Decision* at 116. The Board used BNSF's total cost per overpass of \$2,135,863 to calculate the SARR's 10 percent share for the overpasses on Interstate 76 and U.S. Highways 26 and 87 and it used this same amount to calculate cost of the Guernsey State Park overpass.²⁵ For all other overpasses, however, the Board, without explanation, used Xcel's much lower per unit cost of \$539,225. Given the Board's acceptance of BNSF's costs, this appears to be a mistake in the Board's calculations. In any event, there would be no rationale for accepting BNSF's cost figure for some overpasses but not all overpasses.

Respectfully submitted,



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June 28, 2004

²⁴ Compare TMPA Rebuttal workpaper 10388 to Xcel Opening workpaper 3888.

²⁵ STB electronic workpaper "STB WCC Construction Costs1.xls," tab "Overhead."

Location

EXISTING YARD
BUILT IN 1970's

20 contours
33
PROPOSED
GUERNSEY
YARD

EXISTING
BUSINESS MAIN →

Produced by the United States Geological Survey
Control by USGS and NOS/NOAA

Compiled from imagery dated 1947 and 1948
dated 1990. PLUS and survey control current
map reflect 1995. Contours and land elevations
not been revised and may conflict with other
data.

North American Datum of 1983 (NAD 83) is
blue 1000-meter ticks; Wyoming Coastline System
10 000-foot ticks; Geological Survey 1:50,000
scale ticks.

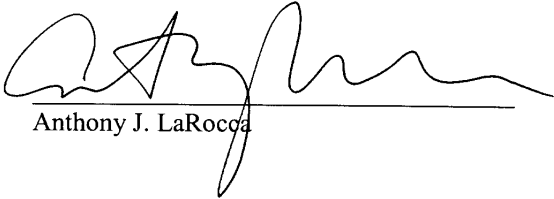
North American Datum of 1983 (NAD 83) is
North 1546. The values of the shift between
NAD 83 and WGS 1984 are shown in the
National Geodetic Survey NADCON software.

There may be private inholdings within the b
The National or State reservations shown on

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2004, a true and correct copy of the Petition for
Reconsideration was served by hand upon the following counsel for Public Service Company of
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