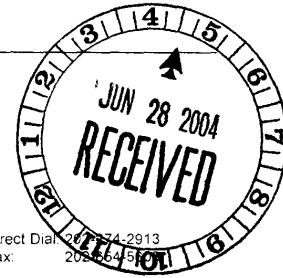


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June 28, 2004

By Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

FILED

JUN 28 2004

**SURFACE
TRANSPORTATION BOARD**

PUBLIC VERSION

211452

**Re: S.T.B 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 accept for filing on behalf of complainant Public Service Company of Colorado D/B/A Xcel Energy the original and 10 copies of the Public version of a Petition for Reconsideration of the Board's June 8, 2004 Decision in this proceeding. A PDF version of this filing is contained on the accompanying CDs.

A Highly Confidential version of this Petition is being filed under separate cover, along with a check for the requisite filing fee.

An extra copy of this filing is included for stamping and return to this office. If there are any questions concerning this matter, please contact the undersigned at 202-274-2913

Sincerely,

Thomas W. Wilcox

Thomas W. Wilcox

Counsel for Complainant

Cc: Bruce A. Colt, Esq.
Gerald D. Zimmerman
Counsel for Defendant

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JUN 28 2004

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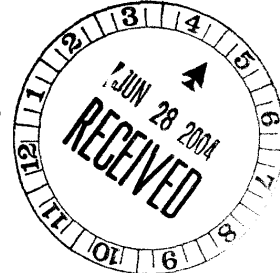
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211452

PUBLIC VERSION
HIGHLYCONFIDENTIAL AND CONFIDENTIAL MATERIAL REDACTED

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

PETITION FOR RECONSIDERATION

FEE RECEIVED

JUN 28 2004

SURFACE
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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

PETITION FOR RECONSIDERATION

Complainant Public Service Company of Colorado d/b/a Xcel Energy ("Xcel"), pursuant to 49 C.F.R. §1115.3, hereby respectfully petitions the Board to reconsider certain aspects of the decision served in this proceeding on June 8, 2004 ("Decision"), on grounds of material error.

I. Preface and Summary

In the Decision the Board determined that the rail transportation rates Xcel challenged in this proceeding were unreasonable and ordered BNSF to establish and maintain rates at the levels prescribed by the Board. The Board also ordered BNSF to pay Xcel reparations and interest for overcharges paid by Xcel since the challenged rates went into effect in January, 2001. However, the combination of the extraordinarily high levels of the challenged rates and the errors discussed in this Petition has resulted in the

rates prescribed by the Board in the Decision being well above what would be considered a simulated competitive price from a optimally efficient alternative. Guidelines 1 I.C.C. 2d at 542¹. Indeed, the average revenue-to-variable cost ratio produced from the prescribed rates and the variable costs for the issue movements calculated by the Board in Appendix E of the Decision is approximately 250%. The prescribed rates are also approximately 19 mills per ton mile, well in excess of the rates paid by the captive coal shippers in Xcel's SARR's traffic group, which Xcel demonstrated at oral argument averaged 13.6 mills per ton mile.

As set forth in this Petition, Xcel maintains that several material errors in the Decision caused the maximum reasonable rates prescribed by the Board for transportation of coal from mines in the PRB to the Pawnee Station to be established at a higher level than should have been established under a proper application of stand-alone cost principles. These errors are summarized below.

A. Stand-Alone Cost Errors

1. The Board erred in concluding that Xcel's operating plan for the WCC was infeasible because Xcel did not construct infrastructure at PRB mines to stage multiple trains for unloading. Requiring such construction is directly contrary to the Guidelines and would entail building back into the WCC the very inefficiencies and associated costs the Guidelines require a complainant to remove from the defendant's system in the SAC analysis.
2. The Board also erred in concluding Xcel's operating plan for the WCC was infeasible based on the grade and curvature data error in Xcel's rebuttal evidence. The effect of this error on the overall SAC analysis was not quantified by either the Board in the Decision or BNSF in its evidence, and Xcel demonstrated that such error in fact had little effect on the overall result.
3. The Board erred in excluding from the WCC traffic group coal tonnages from the Lower Colorado River Authority's Seymour plant and from LG&E's Ghent plant after 2003 despite the general presumption that BNSF would continue to transport

¹ Xcel continues to use in this Petition the abbreviations for case names and other abbreviations that the parties and the Board have used throughout this proceeding.

this tonnage in 2004 and beyond. The Board's reliance on a unreliable forecast, coupled with unsubstantiated, made-for-litigation statements by BNSF coal marketing personnel was contrary to established precedent, and there is specific evidence in the record demonstrating that BNSF would continue to move these tonnages in 2004 and beyond.

4. The Board erred in rejecting both of the alternatives presented by Xcel to the RCAF-U for adjusting the WCC's operating expenses, and in declining to fashion a more accurate means of accounting for the WCC's productivity gains over the 20-year DCF period.
5. The Board erred in accepting BNSF's locomotive "peaking factor" for the WCC, which acceptance was directly inconsistent with its rejection of BNSF's crewing proposal.
6. The Board erred in determining the fuel consumption for WCC locomotives based on BNSF's flawed fuel study of locomotive fuel usage for variable cost purposes, since the use of such study in the SAC analysis incorporated BNSF's real world operating inefficiencies into the WCC.
7. The Board erred in sua sponte using certain updated, publicly available data in its DCF model while ignoring other updated, publicly available data that could have and should have been utilized.
8. The Board erred in its DCF analysis by assuming that the tariff rates charged to Xcel in 2003 were escalated by 100% of the RCAF-U in 2004 and then using the escalated rate levels as the basis for setting future prescribed rates. This error introduced inflated prescribed rate levels in 2004 which carry forward and result in excessively high rates in future years.

B. Variable Cost Errors

1. The Board erred in determining variable locomotive capital costs and significantly departed from prior precedent in establishing a 21-22% locomotive spare margin for Pawnee movements.
2. The Board erred in refusing to use BNSF's system average fuel consumption for this component of variable costs, and in accepting BNSF's fundamentally flawed locomotive fuel study for this purpose.
3. The Board erred in concluding that Xcel's movement-specific adjustment to BNSF's return on road property investment and depreciation data did not reflect only the running portion of the line-specific investment and depreciation expense, and in restating Xcel's adjustment so as to purportedly reflect only the running portion.

4. The Board erred in concluding that Xcel's adjustments to BNSF's system average locomotive maintenance variable costs should be rejected because Xcel did not take non-routine locomotive maintenance into account in making its adjustments.

II. Argument

A. Stand-Alone Cost Errors

1. The Board Erred in Finding that Xcel's Operating Plan for the WCC was Infeasible

The Board acknowledges in the Decision that numerous similarities exist between the actual PRB coal hauling operations of BNSF and the operations of the hypothetical SARR proposed by Xcel (the Wyoming Colorado Coal Railroad). See Decision at 24 (coal-only railroad, unit train service, two person crews, distributed locomotive power, train size the same as BNSF currently uses for its customers in the WCC shipper group). While the Board noted in dicta that the WCC's operating statistics changed over the course of the proceeding, id at 24-25, the Board did not find – despite BNSF's numerous claims to the contrary - that such changes were improper under the Board's evidentiary rules, including the rules governing proper scope of rebuttal. Changes and corrections to a complainant's opening operating plan over the course of the evidentiary phase of a SAC case are to be expected, given the fact that “[a] complaining shipper faces an enormous task to design a new transportation model to meet its transportation needs in order to test the reasonableness of the rates at issue,” McCarty Farms, (served February 13, 1995) at 8, and that “[g]iven the magnitude of the task associated with designing a stand-alone system, it is unrealistic to expect a complainant [on opening] to affirmatively demonstrate that each and every aspect of its model is feasible.” Id.

Nevertheless, despite the many similarities between the hypothetical WCC and BNSF's actual PRB coal operations, the Board determined that the operating plan for the WCC was infeasible. The Board articulated two reasons for its rejection of Xcel's operating plan; (1) that Xcel should have constructed additional facilities at mine origins to accommodate the staging of multiple trains for loading, Decision at 25, and (2) the improper application of actual BNSF grade and curvature data in the computer model utilized by Xcel to test the ability of the WCC to handle its traffic group's tonnages. Id. Neither of these reasons warranted rejection of Xcel's operating plan.

a. It Was Material Error to Require Xcel to Construct Infrastructure at PRB Mines to Stage Multiple Trains Awaiting Loading

The Board's determination that Xcel should have constructed extra track at the PRB mines served by the WCC "to stage multiple trains awaiting loading" is flatly inconsistent with one of the fundamental underpinnings of the stand-alone cost constraint in Guidelines that, if the defendant carrier is not optimally efficient, "a captive shipper can have its rates based on the lower costs of an alternate, 'stand-alone' system in which the plant size and traffic base are designed to maximize the efficiencies and production economies." Guidelines at 542. In order to design its SARR and adequately support it, the complainant must rely upon data of actual operations of the defendant, which is inherently and by definition less efficient than the SARR. Stated another way, a stand-alone railroad must be grounded in reality, and it is logical and convenient from an evidentiary standpoint for the complainant to draw on actual operating data in the possession of the defendant in designing the SARR. However, applying data from a less-

efficient railroad to a hypothetical, optimally efficient railroad will necessarily result in disconnects, or gaps, in the data. The gaps in question are the outcome of linking real world operating conditions (e.g., actual BNSF mine departure times) with the optimally efficient world of the stand-alone railroad (e.g., substantially lower traffic volumes resulting in less congestion, faster trains, less delays, etc.).

The most notable outcome of the SARR's more efficient operations is that its trains invariably complete their cycle from the mine to the destination and back more quickly than the defendant's actual cycle times. Thus, using actual loading times, interchange times, or unloading times to test the operational characteristics of the SARR will cause the SARR to hypothetically arrive back to the starting point before the actual train of the defendant arrived according to the defendant's records. In the tutorials with Board staff concerning the parties' respective computer models, staff referred to the selection of the starting point as the "seeding" of the movement for modeling purposes.

Such time gaps will be present in any stand-alone analysis that uses computer modeling and actual data inputs. In this case, Xcel "seeded" its modeling by using BNSF data showing actual times trains departed from PRB mines. This was logical because using actual departure times enabled Xcel's experts to test the feasibility of the entire WCC system by beginning each cycle based on known mine load out availability and customer demand for coal. Xcel Rebuttal Narrative at III-C-18. The more efficient operations of the WCC caused the trains to return to the mines more quickly than actually occurred on BNSF's system. These efficiencies were reflected throughout the lower overall costs of constructing and operating the WCC.

For its part, BNSF “seeded” its computer modeling analysis with the actual times an empty BNSF train reached an interchange point or destination. Using the RTC model, BNSF then flowed trains to the origin mines for loading and returned the loaded trains to the interchange point or destination. BNSF ignored actual loading times in its analysis. Similarly, to the extent the loaded train was interchanged with the residual BNSF or another rail carrier for final delivery to destination, which is the case for over 95% of the WCC trains, BNSF’s analysis simply ignored any disconnects between real arrival times and hypothetical arrival times that would occur at the destination. Such “de-linking” did occur, however. At the Pawnee Station, the more efficient operations of BNSF’s version of the WCC resulted in WCC trains arriving at the Pawnee Station more quickly than actual BNSF trains, causing them to spend an average of 66.9 hours at the Pawnee Station, where during actual operations in 2001 BNSF trains spent an average of only 15.9 hours. Id. at III-B-44. Xcel also demonstrated that similar disconnects occurred at the interchange points on the WCC. Id.

The time gaps caused by linking actual data to hypothetical operations exemplify the inefficiencies of the defendant’s actual operations that are removed during the stand-alone cost analysis. Accordingly, to close those gaps by requiring Xcel to construct hypothetical facilities at the mines to accommodate the actual arrival times for the trains in question simply puts back into the SARR the very inefficiencies (and associated costs) that the SARR has removed. Stated another way, to avoid any such gaps in the first instance would require the SARR to be as inefficient as the defendant, which is directly contrary to the Guidelines. Thus, it was error for the Board to reject Xcel’s operating

plan because it did not “construct” capacity at the mines that would infuse into the WCC the very inefficiencies that the Guidelines require Xcel to strive to obtain.

b. Grade and Curvature Data

The second reason for the rejection of Xcel’s operating plan was the presence of certain errors in the input of BNSF’s actual grade and curvature data into Xcel’s computer model used to test the feasibility of the WCC to handle the tonnages of its customer group. The Board overstates the significance of grade and curvature data in a SAC analysis. A computerized model (as opposed to a manual approach) enables the introduction of real-world resistance elements into the calculations, e.g., the impact of grades and curves. Resistance elements refine the costs but are not biased to either an increase or decrease in the costs. Stated differently, a computer model without grade and curve data (or any of the other resistance elements) can still be used to accurately demonstrate the feasibility of a stand-alone railroad. It is significant to note that nowhere in the Decision or in the record of this case is the purported negative impact of this data error quantified or otherwise explained in any detail.

In summary, the Board should reconsider its finding that Xcel did not meet its burden of presenting a feasible operating plan for the WCC, thereby triggering the Board’s use of BNSF’s alternative operating plan as the basis for making its determination of whether the rates challenged by Xcel were unreasonable. On reconsideration, the Board should recalculate the operating expenses and investment for the WCC using Xcel’s version of the WCC as the starting point.

2. The Seymour and Ghent Tonnages Should Not Have Been Excluded from the WCC Shipper Group after 2003

The Board erred in excluding from the WCC coal tonnages to be delivered to the

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Lower Colorado River Authority ("LCRA") Seymour Generating Station and to LG&E's Energy Ghent plant after 2003. There is insufficient evidence in the record of this case to overcome the general presumption that such traffic will continue to be available to the WCC in 2004 and beyond. WTU, 1 STB at 662 (1996).

a. LCRA

The Board committed two errors in removing the Seymour traffic after 2003. First, the Board relied upon an inaccurate BNSF internal forecast prepared in November, 2001 and further relied upon unsupported evidence sponsored by a BNSF coal marketing representative that he did not expect that BNSF would handle the Seymour traffic after 2003. See BNSF Reply Narrative at III.A-33. Second, the Board erroneously stated that that there was "no evidence of a [post 2003] contract with BNSF or any indication that BNSF will continue to move this traffic after 2003." Decision at 52.

On the first point, the November 2001 forecast produced by BNSF was unreliable. For example, this forecast showed that traffic to the Missouri Board of Municipal Utilities Sikeston plant

Thus, the forecast was shown to be inaccurate just five weeks after it was created. Moreover, the Board's acceptance of made-for-litigation assertions by BNSF's marketing personnel, unaccompanied by specific evidence, is directly contrary to the Board's rejection of such evidence in WTU. See, e.g., WTU at 661-662. ("The assertions made by BN's director of coal marketing, estimating the likelihood of retaining the traffic to each of these utilities, are not backed up by supporting evidence of utility-specific competitive options."). In WTU, the Board stated it would require "specific

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evidence to overcome the general presumption that this traffic would continue to be available.” WTU at 662. BNSF provided no such evidence concerning the Seymour plant.

As to the second point, Xcel introduced specific evidence post-dating the November 2001 forecast in which LCRA stated in its 2002 Annual Report that

Xcel Rebuttal Narrative

at III-A-35. Thus, the Board’s statement that there is no evidence in the record concerning post-2003 movements by BNSF to this plant was in error.

b. Ghent

The Board also erred in excluding from the WCC coal tonnages delivered to the LG&E’s Ghent plant after 2003. Specifically, the Board concluded that the “historical shipping patterns here suggest that the shipper is not dependent on PRB coal.” Decision at 53. However, undisputed evidence in this record shows that

Xcel Rebuttal

Narrative at III-A-33-34. These contractual commitments indicate that the Board’s conclusions regarding this plant’s dependence on PRB coal are in error. Moreover, the Board also erred by again relying on unsubstantiated statements from BNSF marketing personnel. Decision at 52-53.

3. The Board's Application of the RCAF-U to Adjust WCC Operating Expenses is Material Error

The Board's conclusion that the RCAF-U "may somewhat overstate the WCC's costs over the 20 year period," Decision at 33, seriously underestimates the significant adverse affect that using this index to adjust the WCC's operating expenses will have on the rates prescribed by the Board. Even though the Board recognized that the WCC will incur some productivity gains over the DCF period, the Board's ultimate holding on this point is that the WCC will incur zero productivity gains over the entire 20 year period. The financial impact of this position is enormous. As illustrated on Attachment No. 3 to Xcel's Post Argument Brief, the forecasted differential between the RCAF-A and RCAF-U between 2001 and 2020 is a steadily increasing gap of 2% to 59%. Applied to the rates prescribed by the Decision, this results in a disparity of \$0.15 to \$2.03 per ton over the DCF year period, which in turn produces a cumulative increase in Xcel's transportation cost of \$42.5 million.

The fact that the WCC will incur some degree of productivity gains over the 20 year period means that the most accurate means of indexing its operating expenses cannot be the RCAF-U. The significant impact of this issue on the prescribed rates to be paid over time requires that the Board use its considerable expertise to devise a mechanism that more accurately indexes SARR operating expenses. In response to the invitation of Chairman Nober in conjunction with oral argument and post argument briefs, Xcel submitted two methodologies for indexing operating expenses. These two methodologies provide sufficient basis from which the Board can devise a means that more accurately reflects the productivity gains of the WCC over the DCF period. See, Duke/NS at 22-25

(*sua sponte* development of Modified Straight-Mileage Prorate method to more accurately reflect cross-over traffic revenues).

4. WCC Locomotive Requirements

The Board accepted BNSF's operating plan and therefore accepted BNSF's determination of the number of locomotive units required by the WCC. Decision at 59. However, BNSF's calculation of the number of road locomotive units was impermissibly inflated by the application of a 43.5% "peaking factor." This factor increases the number of road locomotive units required to move all of the WCC's traffic in an entire year for each year of the DCF model to reflect the number of trains moving on the peak day of the peak year.² The Board also accepted BNSF's application of a 9.1 percent spare margin to the number of road locomotive units required. The combination of the "peaking factor" and the spare margin resulted in an increase in the number of road locomotive units required to serve WCC's traffic by an astounding 56.6 percent.³

Basing the number of locomotives required on the peak day requirements in the peak year is neither efficient nor rational. No railroad (or other transportation provider for that matter) would acquire a fleet of equipment capable of meeting the single busiest day of the year only to have much of that equipment sit idle waiting for that peak day to occur. Rather, it is common practice for railroads to acquire enough equipment to meet their average or normal needs and then acquire additional equipment (e.g., through short term leases) to meet their peak period needs. To have the WCC do otherwise makes no rational economic sense. There is no conceptual difference between BNSF's locomotive

² The peaking factor is equal to the number of loaded trains moving on the peak day (31 trains) divided by the average number of loaded train starts per day for the entire year (21.6 trains), or 43.5 percent. See STB electronic workpaper "WCC LUMs and Carmiles (BNSF) STB version", sheet "Summary".

³ $(1 - (1.435 \times 1.091)) \times 100 = 56.6\%$

peaking factor and BNSF's flawed proposal to base the required number of WCC train crews on crew needs for three days during the peak traffic week. The Board rejected BNSF's crewing proposal, agreeing with Xcel that it "is the equivalent of a retail store staffing for the December holiday season levels throughout the entire year." Decision at 62. BNSF's locomotive peaking factor is based on the same flawed logic. Accordingly, consistency requires the Board to reconsider its acceptance of BNSF's "peaking factor."⁴

5. WCC Locomotive Fuel Consumption

The Board erred in determining fuel consumption for WCC locomotives by relying upon BNSF's made-for-litigation fuel study used to compute BNSF's variable costs of service for the issue traffic. Id. at 60.⁵ The STB's imputation of BNSF's variable cost fuel consumption onto Xcel's SARR erroneously incorporated BNSF's real world operating inefficiencies into the WCC.

Specifically, Xcel argued that BNSF overstated its fuel consumption because BNSF failed to consistently isolate locomotives on the empty portion of the Pawnee Station cycle. See Xcel Rebuttal Narrative at II-A-89. The Board rejected this argument, stating that ". . . isolating locomotives on the empty return trip from Pawnee is purely hypothetical. *The variable cost calculation is addressed to actual - not hypothetical-operations.*" Decision at 138, (emphasis added). BNSF's primary argument against isolating locomotives on all BNSF empty trains returning from Pawnee was that trains with isolated locomotives would impede the flow of other trains in the PRB, resulting in

⁴ In contrast, an appropriate peaking factor is determined by accumulating the number of trains greater than the average number of trains on each day throughout the peak year and divide the number of these trains by total trains. In this instance, there were 480 "peak" or above average trains moving in the base year, which is 6.5% of total trains moving in the base year. The 480 "peak" trains and the 6.5% of total trains are derived from Xcel's Rebuttal electronic workpaper "PEAKTRAINSREB.123", Sheet "2001 Train List."

⁵ Xcel does not agree that BNSF's study is representative of true fuel consumption as discussed in Section B of this petition.

increases in cycle times and jeopardizing contract commitments, and by disrupting time sensitivities associated with mine loadings. BNSF Rebuttal Narrative at II-48. However, such time sensitivities would not impact the WCC. The record shows, and the Decision confirms, that WCC traffic densities, congestion, and cycle times would all be lower than BNSF real world densities, congestion, and cycle times. It was therefore error for the Board to simply adopt BNSF's made-for-litigation variable cost fuel study in the Board's SAC analysis without considering this opportunity for fuel cost savings on the more efficient WCC. Xcel's use of BNSF system average fuel consumption for the WCC was the best evidence of record on this point.

6. Selective Use of Publicly Available Data to Update DCF Model

The STB selectively updated certain elements of its DCF model for the WCC to incorporate publicly available, updated information that became available after rebuttal evidence was submitted in this case on May 19, 2003 but before the Decision was issued. Specifically, the STB incorporated into its analysis the 2004 EIA Aggregate PRB tonnage and rate forecasts and used them to adjust revenues and traffic volumes.

An adjudicative policy of updating the administrative record for decision with public information that becomes available after the parties have submitted their evidence should be applied consistently in order to ensure a fair result. In this case, it was material error for the Board to not utilize other publicly available information at its disposal that applied to two critical DCF components; railroad cost of equity and changes in other inflation indices. Each of these missing elements is discussed below.

a. Railroad Cost of Capital

The STB used the actual railroad cost of capital for the years 1998 through 2001. However, for 2002 through 2020, the STB used the simple average of the 1998 through 2001 annual cost of equity, or 13.18%.⁶ The Board inexplicably failed to incorporate into its analysis the 12.6% 2002 cost of equity it adopted on June 19, 2003 in STB Ex Parte No. 558 (Sub-No. 6), Railroad Cost of Capital-2002. Incorporation of the actual 2002 cost of equity to the Board's DCF model combined with the Board's simple average methodology results in a railroad cost of capital for years 2003 through 2020 of 13.06%.

b. Inflation Indices

Similarly, in the Decision the Board uses actual RCAF-U indexes to inflate the WCC's operating expenses for 1Q01 through 2Q03. For each quarter thereafter throughout the term of the DCF model, the STB relied upon a September 2003 Global Insight forecast of the RCAF-U to adjust operating expenses. However, actual RCAF-U index values were available for the 3Q03 through the 2Q04 time period prior to the Decision and should have been used in the STB's DCF model.

Also, to inflate road property assets other than land, the Board relied upon a September 2003 Global Insight forecast for all quarters in the 20 year DCF model even though actual indexes were available for all quarters through the 1Q04. Actual index values should have been substituted into the STB's DCF model for the 1Q01 through 1Q04 time period.

⁶ See, STB Electronic FOIA workpaper "FOIA DCF 42057 5-18.123 level "Cost of Capital," Column 0, Rows 17-36.

7. Establishment of Prescribed Rates over the DCF Period

Finally, the Board's projection of prescribed rates over the 20 year DCF period is incorrect because the Board erroneously assumed that the 2003 levels of the rates challenged by Xcel were escalated by BNSF in 2004 by 100% of the change in the RCAF-U. This was not the case. The 2003 rate levels BNSF charged Xcel under the challenged tariff were not escalated. Accordingly, the Board's escalation of the 2003 tariff rate levels by 100% of the RCAF-U and then using that year as the basis for establishing future prescribed rates based on the projected change in the RCAF-U was erroneous, and results in the prescribed rates over the term of the DCF model being set at excessively high levels.

B. Variable Cost Errors

The Board materially erred in its calculation of several components of BNSF's variable cost of providing service to the Pawnee Station. As explained below, these components are: (1) Locomotive Capital; (2) Fuel Usage; (3) Road Property Return on Investment and Depreciation; and (4) Locomotive Maintenance.

1. Locomotive Capital Costs

The Board committed two material errors in determining locomotive capital costs. First, the Board ignored undisputed data showing actual locomotive usage for Pawnee service. Second, the Board's determination of a locomotive spare margin was not supported by the evidence, and was also a significant departure from established agency precedent.

As to the first error, despite having undisputed data on the actual use of various locomotives in service for Pawnee, Xcel Reply Evidence at II-A-65, the Board

inexplicably elected to use only the capital cost data for one locomotive type – SD70MAC locomotives - as the “best evidence of record” for determining this variable cost item. Decision at 141. There is no basis for excluding the specific, more precise evidence as to the other types of locomotives used by BNSF to provide service to the Pawnee Station.

The Board’s determination of locomotive spare margin was a significant, departure from prior established precedent regarding the definition and establishment of locomotive spare margin. The spare margin of 21-22% adopted in this case is four times the spare margin adopted by the Board in the most recent western coal rate case, TMPA (5.5%). Indeed, in only one previous coal rate reasonableness case has the Board or the ICC used a spare margin greater than 10%. See Finance Docket No. 40581, Georgia Power Co. et. al. v. Southern Ry. Co. and Norfolk Southern Corp., (ICC Served November 8, 1993) at 21 (where ICC used 12.1%).

In previous maximum rate decisions the Board defined spare margin as “the number of diesel units a railroad keeps in reserve to cover diesel units that have power failures or require maintenance.” See, e.g., Georgia Power, at 41, note 11; See also, WTU at 690 (“we restate BN’s locomotive requirements to reflect a 10% spare margin markup for locomotives undergoing repairs.”). In WTU, the Board rejected BNSF’s attempt to use a 25% spare margin that included other times when locomotives were unavailable, such as “loading delays at PRB mines, idle times when locomotives are available but there is no train, peak period demands, and major and minor locomotive repairs.” Id. Significantly, the Board’s rejection of BNSF’s claims in WTU was not based on shortcomings in BNSF’s evidence, but on the Board’s determination as a matter of policy that (1) “cycle

time already includes time to cover delays for unloading and loading at PRB mines;" (2) "increasing the spare margin for idle time is inappropriate;" and (3) "BNSF's argument relative to peak-period demands is not convincing." Id. The claims made by BNSF in WTU had been repeatedly raised by BN and consistently rejected by the Board's predecessor in numerous prior cases. See discussion in Xcel's Reply Narrative at II-A-71 to 74. Indeed, perhaps in recognition that its past efforts had fallen on deaf ears, BNSF did not even attempt to raise its claims in TMPA. See TMPA at 61. Nevertheless, in direct contravention of its determination in WTU and of holdings by the ICC in prior cases, the Board in the Decision has expanded the scope of spare margin to include not just locomotives undergoing repairs, but all ". . . actual time that locomotives cannot be used for service *for any reason*." See Decision at 143 (emphasis added). It was error for the Board to base this significant departure from its prior precedent on a statement that the prior definition of spare margin was formed solely because of evidentiary shortcomings in prior cases.

Additionally, the Board erred in finding that the study produced by BNSF to justify its inflated spare margin is "well supported." Id. at 142. Among its many flaws, the study consists of a single spreadsheet that shows monthly totals according to maintenance responsibility. See BNSF Reply electronic file "loco spare margin_reply.xls." BNSF provided little verifiable data supporting this file. Moreover, this file only contains data used to calculate "Unavailable Hours" for the month of June 2002, but no data for the other 23 months of the study period. While the total number of locomotives and the "Available Hours" shown for June 2002 are the same in both files, the "Unavailable Hours" are different.

Finally, BNSF provided no actual evidence that its study of the Alliance Pool as a whole represents the spare margin for locomotives in service for transportation of PRB coal to the Pawnee Station. Prior agency decisions have rejected railroad spare margin procedures because they were not shown to be specific to the shipper at issue. Arkansas Power & Light v. BN, 3 I.C.C. 2d 757, 792-793 (1987). Among other differences shown by Xcel in the record of this case, BNSF service to Pawnee Station is different from other services relying upon the Alliance pool because its round trip mileage is much shorter (i.e. less than one-third) than other Alliance Pool movements. See Xcel Reply Narrative at II-A-19.

2. Locomotive Fuel Usage Study

The Board materially erred by adopting the results of BNSF's fundamentally flawed and biased event recorder fuel study. Xcel provided compelling evidence of at least six serious deficiencies in BNSF's fuel study that rendered it useless as evidence in this proceeding. Xcel Reply Narrative at II-A-79-96. The Board made the following additional material errors in adopting BNSF's fuel consumption evidence: whereas in determining locomotive ownership costs the Board elected to use data from only SD70MAC locomotives, the Board readily accepted fuel data from other locomotive types in BNSF's fuel study. Moreover, BNSF's own evidence confirms that the fuel consumption table used by BNSF in this proceeding was the same fuel consumption table rejected by the Board in TMPA. BNSF Rebuttal Narrative at II-40. The TMPA fuel consumption table accuracy was based on a study performed jointly by BNSF, TMPA and Xcel. In TMPA, the Board rejected this table, stating that "BNSF has not shown that the figure it used is superior." See TMPA, at 58, note 101.

3. Adjustments to BNSF Return on Investment and and Depreciation Data

The Board erred in restating Xcel's line-specific adjustment factor to BNSF's return on investment and depreciation expenses to purportedly reflect only the running portion of the line-specific investment and depreciation expense, Decision at 136, because Xcel already made this adjustment in its evidence in this case. Specifically, as shown in Xcel Rebuttal Exhibit II-A-40, page 2, Xcel derived a running only portion of the road property investment and depreciation data received from BNSF in response to the Board's September 25, 2002 order compelling BNSF to produce all of such data (both running and yard) responsive to Xcel's discovery requests. Because no yard investment could be segregated out of the data BNSF provided, the ratio of Pawnee line-specific investment to URCS system average investment was applied. Id. Accordingly, the Board erred in concluding that this adjustment had not been made by Xcel.

4. Locomotive Maintenance

Finally, the Board erred in concluding that Xcel's adjustments to BNSF's system average locomotive maintenance costs should be rejected because Xcel did not take non-routine locomotive maintenance into account in making its adjustments. Decision at 137. Xcel demonstrated in its Rebuttal evidence that its adjustments did reflect non-routine maintenance. As exemplified by Xcel Rebuttal Exhibit II-A-41, non-routine expenses at the system average level without adjustment. Xcel's adjustments covered Locomotive Maintenance Costs in two analogous parts: (a) the GTM part and (b) the LUM part. The adjustment is discussed in more detail below.

Road Operations expenses are recorded in URCS core number D3L191C10, that is, Work Table (WT) D3, Part 1, Line 191, C10 which is reported in Xcel Rebuttal Exhibit

II-A-41, Page 5 of 12, line 6.b. This sum in URCS is calculated by adding the distinct expense components of Total Road Operations from Line 101, C10 through Line 190, C10. Locomotive Equipment Damaged from WT D3, Part 1, Line 136, C10 is included in this range and is thus included in Line 6.b. Road Operations. See Xcel Opening electronic file "BNSF01.UR2" which is the Board's official BNSF URCS run for 2001. The next 4 lines, Lines 6.b.1 through 4 separate out the routine portion of Locomotive Repairs for later adjustment. Tracing through Line 6.b. in Exh. II-A-41 shows that Locomotive Equipment Damaged from Work Table (WT) D3, Part 1, Line 136, C10 is never eliminated from the GTM costs and it is never adjusted, thus demonstrating that "non-routine" maintenance is included.

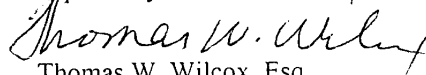
Non-routine maintenance expenses are recorded in the Board's Uniform System of Accounts (USOA) as "Equipment Damaged," not as "Repair and Maintenance." See Xcel Reply Narrative at II-A-78, note 120. Repair and Maintenance expenses are included in sub-function "41" in the USOA while Damaged Equipment is included as sub-function "48." Equipment Damaged is defined at of 49 C.F.R. §1201.3 (b)(2)(48) to include non-routine Locomotive Maintenance. As such, such expenses are included in Xcel's Locomotive Repair Costs.

IV. Conclusion

For all the reasons set forth hereinabove, the Board should reconsider the aspects of its Decision discussed herein and modify the Decision accordingly.

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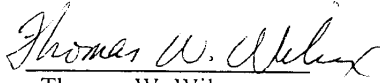
Attorneys for Complainant

June 28, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2004, I served a copy of the Complainant's Petition for Reconsideration by hand delivery to counsel for Defendant at the following address:

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