BEFORE THE
SURFACE TRANSPORTATION BOARD

INTERMOUNTAIN POWER AGENCY Complainant, v. UNION PACIFIC RAILROAD COMPANY Defendant.	)	Docket No. 42127

COMPLAINANT'S MOTION FOR LEAVE TO WITHDRAW COMPLAINT AND REQUEST FOR DISMISSAL OF PROCEEDING

By: C. Michael Loftus
Christopher A. Mills
Andrew B. Kolesar III
Daniel M. Jaffe
SLOVER & LOFTUS LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for Complainant Intermountain Power Agency

Dated: May 2, 2012

TABLE OF CONTENTS

BEFORE THE
SURFACE TRANSPORTATION BOARD

INTERMOUNTAIN POWER AGENCY Complainant, v. UNION PACIFIC RAILROAD COMPANY Defendant.	)	Docket No. 42127

COMPLAINANT'S MOTION FOR LEAVE TO WITHDRAW COMPLAINT AND REQUEST FOR DISMISSAL OF PROCEEDING

Complainant Intermountain Power Agency ("IPA") hereby moves for leave to withdraw its Complaint against Union Pacific Railroad Company ("UP") and requests that the Board dismiss this proceeding without prejudice. In light of the Board's April 4, 2012 Decision in this case, IPA no longer seeks relief under its pending Complaint. *See Intermountain Power Agency v. Union Pacific R.R.*, STB Docket No. 42127 (STB served April 4, 2012) ("*April 4 Decision*").

IPA instead intends to file a new complaint challenging UP's rates from only one of the three UP origins involved in its pending Complaint – *i.e.*, UP's rates from Provo, Utah to the Intermountain Generating Station ("IGS") ("Provo rates"). The SARR configuration that IPA will use in a new complaint proceeding will be substantially reduced in scope (as compared with the SARR system in Docket No. 42127), and will allow IPA to demonstrate that UP's Provo rates exceed a maximum reasonable level.

INTRODUCTION AND SUMMARY

The instant situation presents a combination of circumstances that, in the aggregate, lacks any precedent in the history of stand-alone cost ("SAC") litigation before the agency. However, the individual factual elements of the case touch on matters that the Board has previously addressed in several different respects: (i) the Board's routine practice of allowing parties to dismiss proceedings *without* prejudice; (ii) the deference the Board traditionally has afforded in situations in which technical or computational errors have occurred; (iii) the Board's historic willingness to allow a complaining shipper to file a new case against a defendant carrier upon request; and (iv) the standards that the Board adopted in its *Major Issues* proceeding to determine whether "unsuccessful" complainants can reopen a case or have a prior decision vacated. *See Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), at 69-70 (STB served Oct. 30, 2006), *aff'd sub nom. BNSF Ry. v. STB*, 526 F.3d 770 (D.C. Cir. 2008) ("*Major Issues*").

IPA respectfully submits that the appropriate standard to govern this situation is that the Board should dismiss the case without prejudice in the absence of some demonstrated "legal prejudice" to UP other than the need to defend against a new complaint. In any event, even if the Board were to conclude that this case should be treated under the reopening standard of *Major Issues*, the Board should find that the circumstances of this matter have changed substantially and that the proceeding should therefore be dismissed without prejudice to IPA's ability to file a new complaint.

This Motion presents a stark contrast to the Board; the Board can permit IPA to withdraw its Complaint and initiate a new case, or the Board can hold that the consequences of a complainant making a technical error that impacts the design of its stand-alone railroad are so severe and so immutable that they preclude any possibility of that shipper seeking relief from excessive railroad rates for an undetermined length of time. Again, while no prior line of Board authority specifically addresses the full set of factual circumstances presented by this case, IPA respectfully submits that the Board's role as "guardian of the public interest" and its traditional willingness to allow the correction of errors in complex SAC cases warrant a finding that IPA should be permitted to file a new complaint against UP.

The equities of the present situation also strongly militate in favor of allowing a new complaint. In particular, while UP reports that it has incurred substantial legal fees in defending IPA's Complaint in Docket No. 42127, UP simultaneously has enjoyed the benefit of rates set at levels well in excess of 400% of variable costs for service from Provo to IGA. *See* IPA Opening Evidence at II-5 (reflecting R/VC ratios for the challenged rates as high as 439% of variable costs). Allowing UP to charge rates at this level without even the possibility of a new rate challenge would fundamentally contradict the Board's duty to the general public that it recognized that it must uphold in *Major Issues NRPM*. *Id*. at 36. IPA respectfully submits that the Board has the inherent authority to approach the question presented by this Motion in a manner that precludes such a result.

IPA also notes at the outset of this Motion that UP raised a number of arguments in opposition to IPA's December 8, 2011 Petition to supplement the record in Docket No. 42127, some of which responded directly to the question of supplementing the record and others of which went well beyond the scope of that inquiry. IPA did not have an opportunity to address UP's arguments, but IPA will do so here to the extent relevant to the relief that IPA now seeks. In the event that UP raises other arguments in response to this Motion, IPA may seek leave to reply to those arguments.

BACKGROUND

IPA filed its Complaint on December 22, 2010, seeking the prescription of maximum reasonable rates for the transportation of coal in unit train service from one Utah coal loadout (the Savage Coal Terminal), one Utah mine (the Skyline Mine), and one point of interchange with the Utah Railway Company ("URC") (Provo, Utah) to IGS. URC provides upstream service on the interline movements with UP pursuant to a long-term rail transportation contract with IPA.

IPA filed Opening Evidence on August 10, 2011. IPA's Opening Evidence relied upon a stand-alone railroad configuration that could provide the subject service for each of the challenged rates (*i.e.*, the bottleneck Provo rate and the single-line rates from Skyline and Savage to the plant). The total system included 278.67 route miles, extending between Price, Utah on the east and Milford, Utah on the west.

UP filed Reply Evidence on November 10, 2011. Therein, UP argued that IPA had failed to demonstrate that the challenged rates were unreasonable. In the course

of its Reply, UP demonstrated that when IPA had attempted to calculate the ratio of the IRR's variable and fixed costs to the total variable and fixed costs for each movement for purposes of calculating ATC divisions, "IPA inadvertently excluded IRR's variable costs from the denominator." UP Reply at III.A-24. The effect of IPA's error (of which IPA was unaware until UP filed its Reply Evidence) was to overstate the share of cross-over movement revenues available to the SARR.

On December 8, 2011, IPA filed a Petition ("IPA Petition") seeking leave to supplement the record by substantially simplifying its SARR system. IPA argued that the most fair and informed basis on which to evaluate UP's common carrier rates would be to permit IPA to submit supplemental opening evidence based on a truncated version of its SARR that would replicate only the Provo to Milford portion of UP's system. *See* IPA Petition at 1-2. IPA explained that as a result of this change in its SARR, it would only challenge UP's Provo rates. *Id*. at 2.

UP replied in opposition to IPA's Petition to supplement on December 28, 2011 ("UP Reply"). In its Reply, UP argued that IPA had not met the threshold test the Board applies before allowing a party to supplement the record in a rate case. UP Reply at 3 (citing *Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070, at 4 (STB served March 25, 2003) ("*Duke/CSXT*")).

UP also requested that if the Board were to allow IPA to file supplemental evidence in Docket No. 42127, the Board should take three steps in order to ameliorate the impact of the procedural change on UP. *See* UP Reply at 3-4. Those steps included: (1) requiring IPA to waive any right to reparations for the period before the Board serves

its decision granting IPA's Petition; (2) precluding IPA from relitigating the cost-of-capital and terminal value issues the Board resolved in AEPCO and from making any other changes to its evidence that are not directly related to the decision to eliminate the portion of its SARR from Price to Provo, Utah; and (3) allowing the parties an opportunity to negotiate a procedural schedule that takes account of competing demands on the time of UP personnel and outside counsel and consultants. *Id*.

In addition, UP argued that the Board should declare that it would prohibit IPA from filing a new complaint. *Id.* at 12-15. In that regard, UP insisted that, "[l]ike any unsuccessful litigant, IPA should be required to show material error, new evidence, or substantially changed circumstances before it may file a new complaint challenging the same common carrier rates it had previously challenged." *Id*. at 3 (citing *Major Issues* at 69); *id*. ("IPA's dismissal of its case at this late stage should have the same effect as a Board decision finding that the challenged rates are reasonable.").

The Board denied IPA's Petition to supplement the record on April 4, 2011. *See April 4 Decision* at 4. In the *April 4 Decision*, the Board found that IPA's arguments in support of the filing of supplemental opening evidence did not meet the standard set forth in *Duke/CSXT*. *Id.* at 2. The Board held that "[a] complainant cannot claim that a technical error, brought on by the complainant's own mistake, is grounds for it to modify a core part of its evidence after the defendant carrier has already filed a reply to that evidence." *Id*. at 3. The Board set May 4, 2012 as the due date for IPA's Rebuttal Evidence and set June 18, 2012 as the due date for the parties to file Closing Briefs.

Significantly, despite UP's request that the Board declare that IPA is precluded from filing a new complaint (*see* UP Reply at 12-15), the Board proceeded in a restrained and narrow manner in issuing its *April 4 Decision*. Specifically, the Board resolved only the question of whether IPA could file supplemental evidence and declined UP's invitation to address the question of whether IPA could file a new complaint.

ARGUMENT

As noted above, the question of whether the Board should permit IPA to dismiss its Complaint without prejudice and to file a new complaint touches upon a number of different areas of STB practice and procedure, each of which militates in favor of a ruling that IPA should be permitted to file a new complaint against UP. In that regard, IPA respectfully submits that the Board should allow dismissal without prejudice in the absence of any demonstrated legal prejudice to UP other than the need to defend against the new complaint (of which there is likely to be none).[1] Moreover, even if the Board were to apply its *Major Issues* reopening standard to the present matter, Docket No. 42127 should be dismissed without prejudice. Any contrary finding would unjustifiably and harshly penalize IPA and would improperly excuse UP from the consequences of charging excessive rates.

[1] Under Title 49, rail carriers are permitted to set common carrier rates at the level of their choosing, and the burden falls upon shippers to demonstrate that those rates exceed a maximum reasonable level. It is reasonable to infer from that basic allocation of rights and responsibilities that a carrier's need to expend funds to defend its rates is an essential part of the basic balance of rights between shipper and carrier, rather than some improper burden imposed upon carriers by complaining shippers.

In addition, UP is wrong to claim (without the benefit of citation) that reparations dating back to January 1, 2011 would not be available to IPA in a new case. *See* UP Reply at 16 ("IPA would not have been entitled to any reparations for the period before the Board's ruling, even if it could file a new case immediately after the Board's ruling."). Relevant precedent confirms that such reparations would be available to IPA in a new case.

I. Withdrawal of the Pending Complaint and Dismissal of Docket No. 42127 without Prejudice are Appropriate Under Both STB and Supreme Court Precedent

Voluntary withdrawal and dismissal without prejudice are relatively straightforward matters before the Board, and relief in IPA's favor is warranted. In particular, the STB routinely permits parties to withdraw pleadings upon request for leave in the absence of some form of malfeasance or subversion. *See, e.g., Almono LP – Abandonment Exemption – In Allegheny County, PA*, STB Docket No. AB-842X, at 2 (STB served Jan. 28, 2004) (granting request to withdraw petition for exemption); *Canadian National Ry., Grand Trunk Western R.R., Illinois Central R.R., Burlington Northern Santa Fe Corp., Burlington Northern and Santa Fe Ry. – Common Control*, STB Finance Docket No. 33842 (STB served July 27, 2000) (discontinuing proceeding after applicants filed a request to withdraw); *cf. Trinidad Ry. – Abandonment Exemption*, STB Docket No. AB-573X (STB served Dec. 12, 2001) (denying a "request that we permit withdrawal of a notice of exemption to abandon a line . . . ." where it appeared to the Board that Trinidad was attempting to subvert the OFA process).

In addition, the STB routinely grants requests seeking the dismissal of complaint proceedings without prejudice. *See, e.g.*, *Ariz. Pub. Serv. Co. v. Burlington N. & S.F. Ry.*, STB Docket No. 42077, at 2 (STB served Dec. 31, 2003) (granting request to withdraw rate reasonableness complaint and dismiss proceeding without prejudice); *Bell Oil Terminal, Inc. v. BNSF Ry.*, STB Finance Docket No. 35302, at 6 (STB served Nov. 4, 2011) (dismissing complaint without prejudice); *Brampton Enters., LLC d/b/a Savannah Re-Load v. Norfolk Southern Ry.*, STB Docket No. 42118, at 1 (STB served Sept. 29, 2011) (dismissing complaint without prejudice); *State of Washington v. Palouse River and Coulee City R.R.*, STB Finance Docket No. 34892, at 1 (STB served Aug. 24, 2006) (granting complainant's request to dismiss its complaint without prejudice); *AG Processing Inc. v. Norfolk Southern Ry.*, STB Docket No. 42079, at 1 (STB served June 24, 2004) (granting complainant's motion to dismiss its complaint without prejudice).[2]

The Board's standard practice of allowing voluntary dismissal without prejudice is entirely consistent with authority from the United States Supreme Court on the subject of voluntary dismissal in agency proceedings. Specifically, in *Jones v. SEC*, 298 U.S. 1 (1936), the Supreme Court reached two conclusions with relevance to the instant case. First, the Court held that in the absence of a statute to the contrary, "the

[2] Conversely, the STB dismisses complaint proceedings *with* prejudice when it has been advised that the parties have reached a negotiated resolution of their dispute. *See, e.g., AEP Tex. N. Co. v. BNSF Ry.*, STB Docket No. 41191 (Sub-No. 1), at 2 (STB served Oct. 26, 2011); *South Mississippi Elec. Power Ass'n v. Norfolk Southern Ry.*, STB Docket No. 42128, at 1 (STB served Aug. 31, 2011). This form of dismissal – often requested by the parties themselves – operates as a confirmation of the parties' settlement agreement rather than as any particular holding with respect to the merits of the case.

power of a commission to refuse to dismiss a proceeding on motion of the one who instituted it cannot be greater than the power which may be exercised by the judicial tribunals of the land under similar circumstances." *Id*. at 19.

Second, the Court held that "[t]he general rule is settled for the federal tribunals that a plaintiff possesses the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant *other than the mere prospect of a second litigation upon the subject matter*." *Id*. (citing *Pullman's Palace-Car Co. v. Central Transp. Co.*, 171 U.S. 138 (1898)) (emphasis added); *see also id*. ("'It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases. . . . The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind.'") (quoting *City of Detroit v. Detroit City Ry. Co.* 55 F. 569, 572 (E.D. Mich. 1893)); *id*. at 21-22 ("[The] rule, as we have seen is, that the right to dismiss is unqualified unless the dismissal would legally prejudice the defendants in some other way than by future litigation of the same kind."); *see also In the Matter of United States Pollution Control, Inc.*, Docket No. TSCA-PCB-VIII-92-18, 1993 WL 256616, at *1 (May 13, 1993) (EPA, Office of the Administrator) (relying on *Jones v. SEC* and holding that "[d]ismissal without prejudice should be allowed unless defendant will suffer some prejudice other than the mere prospect of a

second lawsuit."); *id*. ("[A] dismissal or withdrawal 'with prejudice' is harsh sanction and should be resorted to only in extreme cases.").[3]

In *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), the Supreme Court addressed the *Jones v. SEC* case in the context of a discussion of Federal Rule of Civil Procedure 41(a)(2).[4] Notably, the Court emphasized that the purpose of the traditional practice in the courts was to permit claims to proceed where there has been a failure of proof – much like the instant case – but where the plaintiff had reason to believe it could "fill the crucial gap" in a new case:

> Take the case where a trial court is about to direct a verdict *because of a failure of proof in a certain aspect of the case*. At that time a litigant might know or have reason to believe that *he could fill the crucial gap in the evidence*. Traditionally, a plaintiff in such a dilemma has had an unqualified right, upon payments of costs, to take a nonsuit in order to file a new action after further preparation, unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit. *Pleasants v. Fant*, 22 Wall. 116, 122, 22 L.Ed. 780; *Jones v. S.E.C.*, 298 U.A. 1, 19, 20, 56 S.Ct. 654, 659, 80 L.Ed. 1015, and cases cited.

Id. at 217 (emphasis added).

---

[3] Notably, the Supreme Court's *Jones v. SEC* decision post-dated the ICC's decision in *Traugott Schmidt & Sons v. Michigan Central R.R.*, 23 I.C.C. 684 (1912) ("*Traugott*") by twenty-four years. As described below, the D.C. Circuit relied upon the *Traugott* decision as a basis for vacating and remanding the STB's *WTU 2004* decision.

[4] While Rule 41(a)(2) permits a court to impose terms it deems proper, the default assumption under the rule is that voluntary dismissal is to be without prejudice. *Id*. ("Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice."). The Board, of course, is not operating here under Fed. R. Civ. P. 41 and the Board's statutory authority is different from that of the federal courts. *See, e.g.*, *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994).

The Court added that under Fed. R. Civ. P. 41(a), as explained in the Report on Proposed Amendments to the Federal Rules of Civil Procedure, dismissal likewise should be permitted in the event of a "technical failure" of proof where there is nevertheless a meritorious claim:

> Rule 41(a)(1) preserved this unqualified right of the plaintiff to a dismissal without prejudice prior to the filing of defendant's answer. And after the filing of an answer, Rule 41(a)(2) still permits a trial court to grant a dismissal without prejudice 'upon such terms and conditions as the court deems proper.'
>
> . . . Rule 41(a)(2), Federal Rules of Civil Procedure, has been interpreted as authorizing a plaintiff to dismiss his action '*without prejudice where the court believes that although there is a technical failure of proof there is nevertheless a meritorious claim*.' Report of Proposed Amendments to Rules of Civil Procedure (1946) . . . .

Id. at 217 & n.5 (emphasis added).

Courts have continued to rely upon the same rationale set forth in the Supreme Court's *Jones v. SEC* decision when considering requests to dismiss without prejudice. For example, in a 2005 case that UP relied upon in its December 28 Reply, the court held that "[c]ourts generally grant voluntary dismissals 'unless the defendant would suffer prejudice *other than the prospect of a second lawsuit or some tactical advantage*.'" *Independence Fed. Sav. Bank v. Bender*, 230 F.R.D. 11, 13 (D.D.C. 2005) (emphasis added) (quoting *Piedmont Resolution v. Johnston, Rivlin & Foley*, 178 F.R.D. 328, 331 (D.D.C. 1998) and *Conafay v. Wyeth Labs.*, 793 F.2d 350, 353 (D.C. Cir. 1986)). Similarly, the United States District Court for the District of Columbia considered a claim earlier this year that the prospect of a second lawsuit would cause legal prejudice to the

defendants, and held that "[i]t is beyond cavil . . . that the prospect of a second lawsuit does not constitute legal prejudice under Rule 41(a)." *Busby v. Capital One, N.A.*, Civ. Action No. 10-1015, 2012 WL 164447, at *5 (D.D.C. 2012) (citing both *Cone* and *Jones v. SEC*).[5]

Elsewhere, courts applying the *Jones v. SEC* holding in light of Rule 41(a)(2) have attempted to develop lists of factors to consider in deciding whether to allow dismissal without prejudice. *See, e.g., Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990) ("Factors relevant to the consideration of a motion to dismiss without prejudice include the plaintiff's diligence in bringing the motion; any 'undue vexatiousness' on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss.").

Significantly, however, such lists of factors are most relevant to civil litigation between private parties and do not take into consideration the unique nature of a common carrier railroad or the rate review procedures that exist in STB jurisprudence. As noted above, it is reasonable to infer from the basic allocation of rights and responsibilities under Title 49 that a carrier's need to defend its rates is an essential part of the basic balance that Congress intended to strike between shippers and carriers. It would be improper – where the burden of proof rests upon shippers to demonstrate the

[5] *See also Conafay v. Wyeth Labs.*, 793 F.2d 350, 353 (D.C. Cir. 1986) ("[W]e simply observe that dismissals have generally been granted in the federal courts unless the defendant would suffer prejudice other than the prospect of a second lawsuit or some tactical advantage.").

unreasonableness of common carrier rates – to find that the prospect of a carrier actually having to defend its rates should preclude a shipper from revising its SARR configuration in a new complaint proceeding.

In any event, it is evident that IPA has proceeded with complete good faith in all respects in the instant matter, and has not engaged in any sort of improper delaying tactics. Moreover, it is evident that UP would suffer no "legal prejudice" as a result of dismissal without prejudice. While it is undoubtedly true that both parties already have made significant efforts and expenditures in this case, those efforts will not have been wasted insofar as IPA will continue to seek relief regarding UP's Provo rates for service to the IPA plant. UP will benefit in a future case from the work that it performed in the present case, both in terms of its advanced preparation for filing reply evidence in a new complaint case and in the sense that IPA no longer intends to challenge UP's rates from Skyline and Savage.[6]

There is therefore no basis in the instant situation for dismissing IPA's Complaint with prejudice. Instead, withdrawal and dismissal without prejudice are entirely appropriate.

II. The Board Routinely Allows the Correction of Technical or Computational Errors in Complex Matters

Dismissal without prejudice also is appropriate in the instant proceeding because the Board repeatedly has permitted parties to correct technical and computational

[6] In addition, IPA will continue to bear the burden of proof in a new complaint proceeding to demonstrate that UP's rates are excessive.

errors in SAC rate cases (or other complex matters) and the Board repeatedly has had occasion to correct its own errors in analyzing such matters as well. *See, e.g.*, *Otter Tail Power Co. v. BNSF Ry.*, STB Docket No. 42071, at 1-2 (STB served May 26, 2006) (granting the parties' request to correct technical errors in the Board's SAC decision regarding BNSF's locomotive unit costs); *Western Fuels Ass'n, Inc. v. BNSF Ry.*, STB Docket No. 42088, at 10-13 (STB served Feb. 29, 2008) (granting joint petition to correct technical and computational errors in the Board's prior decision regarding debt amortization, the Board's inadvertent omission of data regarding the rail industry's 2005 cost of capital, and the Board's inadvertent inclusion of BNSF values for switch crews and work train crews); *Western Fuels Ass'n, Inc. v. BNSF Ry.*, STB Docket No. 42088, at 9 (STB served July 27, 2009) (correcting BNSF's approach to calculating variable costs and stating that "the railroad has made some significant technical errors [regarding indexing] in its variable cost calculations."); *US Magnesium, L.L.C. v. Union Pac. R.R.*, STB Docket No. 42115, at 1 (STB served Feb. 10, 2010) (adjusting the procedural schedule in the case because UP had "provided a corrected second disclosure to USM on January 29, 2010, but that UP has since determined that the disclosure contains additional errors that will have to be addressed in a second disclosure").[7]

[7] *See also Simplified Standards for Rail Rate Cases – Taxes in Revenue Shortfall Allocation Method*, STB Ex Parte No. 646 (Sub-No. 2), at 3 (STB served Nov. 21, 2008) (finding that there is a material error in the Board's development of the Revenue Shortfall Allocation Method ("RSAM") insofar as it "improperly mixes pre-tax and after-tax revenues" and adjusting the method to correct the Board's error); *E.I DuPont de Demours and Co. v. CSX Transp., Inc.*, STB Docket No. 42099, at 1 (STB served Nov. 21, 2008) (reopening rate reasonableness case to address the effect of the material error in the RSAM formula).

In the course of allowing or making such corrections, the Board has explicitly recognized the difficulties associated with SAC case evidence (and electronic spreadsheets). For example, in *Otter Tail*, the Board explained that "SAC cases involve the resolution of myriad technical, fact-based issues regarding the construction and operation of a railroad, a multitude of complex computer calculations, and the review of thousands of pages of evidence." *Otter Tail* at 1. The Board added that "[w]hile we make every effort to ensure that our final decisions accurately reflect all of the relevant evidence, errors can occur" and that "[w]e stand ready to correct any errors brought to our attention." *Id*.

The Board was even more explicit regarding the difficulties associated with electronic spreadsheets in SAC cases in its *Duke/NS* proceeding:

> In complex rate cases such as this, the Board encourages parties to bring computational or technical errors to its attention. . . . *The record in a SAC case includes thousands of pages of evidence and workpapers, along with massive electronic spreadsheets which are used by the parties to calculate the costs to build and operate the [SARR]*. As a practical matter, the Board cannot verify each individual calculation performed by those spreadsheets. Rather, the Board generally relies on the adversarial process to bring computational problems in the spreadsheets to light. Unfortunately, however, as this case shows, the parties do not always detect computational errors in the spreadsheets prior to the close of the record and the issuance of the Board's decision. Nevertheless, it is not too late to correct those errors now.

Duke Energy Corp. v. Norfolk Southern Ry., STB Docket No. 42069, at 2 (STB served Feb. 3, 2004) ("*Duke/NS*") (emphasis added).

One prior example of error correction is particularly relevant to the instant dispute insofar as it relates to a technical error by the Board in performing the ATC calculation, which similarly is the subject of the error in Docket No. 42127. Specifically, in its June 5, 2009 decision in *Western Fuels*, the STB corrected errors in the density and variable cost calculations the Board used to calculate divisions in accordance with the ATC procedures. *See Western Fuels Ass'n, Inc. v. BNSF Ry.*, STB Docket No. 42088, at 1 (STB served June 5, 2009) ("[W]e agree that errors were made in certain density and variable cost calculations in the *February '09 Decision* which affect the application of the Board's discounted cash flow (DCF) model"). The Board explained that it had utilized data for modified routings for the ATC calculation despite the fact that the Board had intended to utilize data for the original routings:

> The *February '09 Decision* contained certain density and variable cost calculations in applying the average total cost (ATC) procedure for calculating revenue divisions for cross-over traffic. WFA posited that some traffic would traverse its stand-alone railroad (SARR) via a different routing than that by which that traffic actually moves over BNSF's system. *In reliance on BNSF's evidence, the Board mistakenly calculated the revenues allocated to the SARR based on the costs and densities associated with the new SARR re-routings of those movements, not, as the Board intended, over the actual, historical routing*. . . .
>
> We agree with the parties that the revenue divisions for these six movements were incorrectly calculated and now fix the error to reflect the actual routing, as described in the *February '09 Decision*.

WFA, Docket No. 42088 at 1-2 (emphasis added). As occurred here, the *WFA* case involved the inadvertent use of an incorrect data set in performing the ATC divisions calculations.

In light of the number of instances in which it has been required to address technical errors in SAC cases, the Board has even gone so far as to implement specific procedures to govern the correction of technical and computational errors in rate case decisions. Specifically, in the 2004 *Xcel* case, the Board held that in future rate proceedings, parties would be required to file joint petitions to correct technical errors:

> In complex rate cases such as this, parties are encouraged to bring computational or technical errors to the Board's attention. In recent SAC cases, the parties have uncovered errors in the spreadsheets that had been provided by the parties and relied upon by the Board, as well as technical mistakes made by the Board itself in its calculations. The Board is committed to promptly correcting any such technical errors. . . .
>
> In the future, parties to SAC cases may file a separate petition to correct technical and computational errors within 20 days of the Board's decision. However, to ensure that this process is limited to matters clearly requiring technical corrections and does not become an avenue for addressing substantive issues, a petition to correct technical errors should be submitted by the parties jointly.

Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. and S.F. Ry., STB Docket No. 42057, at 2 (STB served Dec. 14, 2004). Likewise, in its annual decisions in Ex Parte No. 290 (Sub-No. 4), the Board routinely encourages parties to file comments addressing any "perceived data and computational errors" in the Board's calculation. *See, e.g.*,

Railroad Cost Recovery Procedures – Productivity Adjustment, STB Ex Parte No. 290 (Sub-No. 4), at 2 (STB served Feb. 6, 2012).

Finally, the Board has drawn a sharp distinction between legitimate errors and intentional deception. In particular, in a discontinuance proceeding involving BNSF Railway, the Board found that BNSF had not engaged in any action that would violate the integrity of the Board's process, but instead, only had made a mistake:

> The Board has declined to revoke exemptions in cases where a party made a misstatement through mistake or inadvertence.[] In contrast, when the Board has revoked exemptions to protect the integrity of Board processes, it has found that a party has intentionally deceived the Board or that a party has used Board processes to improperly circumvent state and local laws.[]
>
> Here, it appears that BNSF simply made a mistake. . . . In opposing TP&W's request for a stay, BNSF candidly admitted that it erred when it indicated that TP&WE still retained those trackage rights and could use those rights to implement direct interchange. . . [W]e accept BNSF's statement that its reference to the availability of alternative means of direct interchange for TP&W was a mistake rather than an abuse of Board process.

BNSF Ry. – Discontinuance of Trackage Rights Exemption – In Peoria and Tazewell Counties, IL, STB Docket No. AB 6 (Sub-No. 470X), at 8 (STB served April 26, 2011) (footnotes omitted).

IPA's error in the instant proceeding likewise was a genuine mistake, rather than any sort of effort to deceive the Board or to undermine the integrity of its process. Moreover, IPA candidly admitted its mistake and has proceeded in good faith before the

Board. The mistake relates to the application of the Board's ATC procedures, and is of the same nature that the Board repeatedly has referenced in SAC decisions in the past.

IPA's Opening Workpapers were large and complex. In fact, the workpapers supporting only IPA's traffic and revenue calculations (*i.e.*, the Part III-A e-workpapers) consisted of 161 gigabytes of data, including a variety of "raw" traffic files, database programming files, URCS input files, URCS output files, traffic forecasting data, traffic selection data, mileage data, routing data, and ATC calculation data. The spreadsheets and associated pivot tables necessary to utilize this data are extremely complex and voluminous.

Most notably, the Opening e-workpaper in which IPA calculated ATC divisions, "Expanded_Waybill_Data_ATC_Percentages_080411.xlsx," includes over 50 columns and over 5,600 rows of data that mix waybill data, URCS batch file output data, and individual calculations for the various elements of ATC. Properly coordinating the data, formulas and individual characteristics of particular movements from multiple sources into one spreadsheet is a complex task as each record contains many data points. As noted, the referenced spreadsheet includes over 5,600 records representing single car, multiple car and unit train movements, which equates to well over 280,000 data points (*i.e.*, 5,600 rows x 50 columns).

As the Board itself repeatedly acknowledged in both *Otter Tail* and *Duke/NS*, SAC cases require parties to present "a multitude of complex computer calculations," "thousands of pages of evidence and workpapers," and "massive electronic spreadsheets which are used by the parties to calculate the costs to build and operate the

[SARR]." The Board has routinely permitted parties to address errors that occur in working with these complex spreadsheets.

The principal distinction in the present case is that the error in question was made in the preparation of a shipper's opening evidence (overstating the cross-over revenue divisions available to the SARR) and was of a magnitude that would have resulted in IPA submitting a different SARR configuration had the error been discovered. In each instance of a good faith mistake noted above, the Board has taken the steps necessary to allow the party responsible for the error to deal with it. IPA respectfully submits that it would be improper to prevent it from reconfiguring its SARR to the design it would have used in the absence of the ATC calculation error. In the present situation, upon determining in late 2011 that it would be necessary to modify its SARR system in order to demonstrate that UP's Provo rates are, in fact, unreasonable, IPA proceeded in good faith and in what it regarded as the least disruptive and most efficient manner. IPA declined to go beyond the scope of proper rebuttal evidence without STB authorization, and instead, sought permission from the agency to file supplemental opening evidence. The Board denied that request in its *April 4 Decision*.

IPA did not seek reconsideration of that determination, but instead, is attempting to proceed on the basis of the logical consequence of the STB's finding; namely, by filing a new complaint that challenges only UP's Provo rates.[8] Based upon

[8] IPA does not intend to move any coal in UP single-line UP service from the Skyline Mine or Savage loadout in the foreseeable future. All of its Utah coal purchases will move either in joint URC/UP service or in UP single-line from the Sharp loadout (IPA did not challenge UP's rates from Sharp in the pending Complaint).

the Board's policies regarding limited rebuttal evidence and upon its *April 4 Decision*, no other option exists through which IPA can obtain relief from UP's excessive Provo rates.

III. Dismissal Without Prejudice is Likewise Appropriate Under the Board's Historic "New Complaint" Approach and its *Major Issues* Standards

In addition to its jurisprudence regarding the dismissal of complaints without prejudice and the correction of technical errors that arise in complex SAC cases, the Board also has developed principles that govern the questions of whether complainants may file new rate complaints and whether any party (*i.e.*, a shipper or a carrier) may reopen a final Board merits decision. The Board's historic evaluation of the rights of a complaining shipper clearly supports dismissal without prejudice. Moreover, while the Board's standards regarding reopening are not directly applicable to the present circumstance (given the absence of a final merits decision), IPA nevertheless would be entitled to file a new complaint if the Board were to apply its *Major Issues* standard to the present facts.

A. The Board Historically has Allowed Complainants to File New Complaints on Request

Historically, the Board has recognized that a rate case complainant may file a new complaint on request. For example, in 2003, the Board held in *PPL Montana* that "the appropriate procedure for a complainant who believes that it would make a better case, if given the opportunity, is to file a new complaint." *PPL Montana LLC v. Burlington N. and Santa Fe Ry.*, 6 S.T.B. 752, 762 (2003) ("*PPL Montana*").

Similarly, in 2004, the STB reiterated its position that "nothing prevents an unsuccessful complainant from pursuing a new complaint immediately, and nothing binds that shipper to its prior evidentiary presentation." *West Tex. Utilities Co. v. Burlington N. and Santa Fe Ry.*, STB Docket No. 41191 (STB served March 19, 2004) ("*WTU 2004*"), *vacated sub nom. Burlington N. and S.F. Ry. v. STB*, 403 F.3d 771 (D.C. Cir. 2005) ("*BNSF 2005*").

WTU 2004 involved a situation where the shipper-complainant had filed a petition to vacate an existing rate prescription because it wanted to file a new SAC case on new evidence and including additional origins. *WTU 2004* at 3. The STB characterized the shipper as the beneficiary of a rate prescription and attempted to ensure that a victorious complainant would be permitted to file a new case as easily as an unsuccessful complainant:

> As the proponent and beneficiary of the rate prescription, the complaining shipper should be entitled to have that prescription vacated upon request, without having to show that the prescription is now defective. This policy is appropriate to ensure that a captive shipper who prevails on its rate complaint in the first instance does not later end up in a worse position – by having to bear a higher rate than would be justified under a new SAC analysis – than if it had not earlier challenged the rate *or had been unsuccessful in its earlier challenge*. . . .
>
> BNSF expresses concern that allowing a shipper to file a new rate complaint would subject the carrier to repetitive rate litigation over the same traffic. *But nothing prevents an unsuccessful complainant from pursuing a new complaint immediately, and nothing binds that shipper to its prior evidentiary presentation*. A successful complainant that is no longer satisfied with a rate prescription should have the same opportunity.

WTU 2004 at 3 (emphasis added). To reiterate, the underlying premise of the STB's conclusion in *WTU 2004* was that an unsuccessful complaint had unfettered discretion to file a new complaint and to modify its SARR system in such a new case.

B. Review of the *WTU 2004* Decision

On judicial review, the D.C. Circuit rejected the STB's premise, vacated the *WTU 2004* decision, and remanded the case back to the STB. *BNSF 2005*, 403 F.3d at 773. The chief finding in the D.C. Circuit opinion was that the Board had failed to justify disparate treatment regarding the vacation of rate prescriptions at the request of carriers as opposed to shippers. *Id.* at 777. The court also questioned the Board's expressed views regarding the completely unchecked ability of an unsuccessful shipper to file a new complaint, and the court insisted that the Board had "overlooked binding precedent [*Traugott*] in stating that nothing constrained a shipper from filing repeated litigations." *Id*. at 778.

In criticizing the STB's approach, the court relied upon the 1912 ICC decision in *Traugott Schmidt & Sons*, *supra*, incorrectly claiming that the ICC had:

> . . . dismissed "as a matter of course," a complaint because it contained identical claims by the same party whose complaint had been dismissed one year and three months earlier. *Id*. at 685. "[W]hen a matter has been once fully considered and decided it must be regarded as settled unless it appears from new facts presented that the Commission was wrong." *Id*.

BNSF 2005, 403 F.3d at 778.[9]

The court's characterization of the result of the *Traugott* case is questionable; the ICC did not dismiss the second complaint "as a matter of course," but instead, issued a split decision on the merits finding that the Detroit rate had not been shown to be unreasonable in the second case, but nevertheless finding that the complainant in the second case had demonstrated that improper discrimination existed in the subject rates. In fact, when addressing the question of whether the former case had been decided upon any misapprehension of fact, the ICC found in *Traugott* that "[u]pon the present record it clearly appears that this fact [regarding the supposed influence of competition on rates at St. Louis and Chicago], testified to by representatives of the carriers in the former case and assumed as a fact by the Commission, is not correct." *Traugott*, 23 I.C.C. at 687. On the basis of this determination, the ICC was "therefore forced to the conclusion that wool rates should be adjusted in accordance with the general scheme of rates applied . . . and that the rate from Detroit should not exceed 78 per cent of that contemporaneously in effect from Chicago." *Id*. at 688.[10]

In any event, the D.C. Circuit ultimately held in *BNSF 2005* that the Board's *WTU 2004* decision was arbitrary and capricious and remanded the case to the Board. *Id*. at 778.

---

[9] The D.C. Circuit observed that "[c]ounsel for the Board conceded during oral argument that *Traugott Schmidt & Sons* is binding on the Board." *BNSF 2005*, 403 F.3d at 778.

[10] Moreover, as noted above, the ICC issued its *Traugott* decision twenty-four years before the Supreme Court's decision in *Jones v. SEC*.

C. The Board's *Major Issues* Proceeding

The Board addressed the D.C. Circuit's concerns with *WTU 2004* on remand in the *Major Issues* proceeding (Ex Parte No. 657 (Sub-No. 1)). In its *Major Issues NPRM*, the Board proposed to modify a number of its rules regarding stand-alone cost cases and to adopt a uniform standard for reopening or vacating rate case decisions. *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), at 31-39 (NPRM served Feb. 27, 2006) ("*Major Issues NPRM*"). The Board explained that it had "given considerable thought not only to the particular matters discussed by the court and returned to us on remand, but also to the implications for related policies." *Id*. at 34; *see also id.* ("Our continuing goal is to strike the 'appropriate balance between the interests of fairness to all parties and of administrative finality and repose.'") (citing *Arizona Pub. Serv. Co. v. Atchison, T. & S.F. Ry.*, 3 S.T.B. 70, 75 (1998)).

On the basis of the D.C. Circuit decision in *BNSF 2005*, the Board proposed that, when seeking either to reopen a proceeding or to vacate a rate prescription, a shipper or carrier "should be required to demonstrate that reopening is warranted based on the standard set forth in [49 U.S.C. § 722(c)] (material error, new evidence, or substantially changed circumstances) . . . ." *Id*. at 35. Similarly, the Board proposed that "an unsuccessful litigant should have to make that showing *before it may reopen a case or have the prior decision vacated* so that it may file a new complaint challenging the same common carrier rates it had previously challenged." *Id*. (emphasis added).[11]

[11] In the instant proceeding, of course, IPA is not seeking to "reopen a case or have [a] prior decision vacated."

The Board also explained that "[o]nce a party has justified reopening a rate case under section 722(c), the Board must then consider whether the changes can be reasonably addressed in a reopened proceeding, or if the further step of vacatur is required." *Id*. The Board commented that certain types of changes can be integrated into an old SAC analysis without undue complications, but that other kinds of changes may be ill-suited to "working within the framework of an old SAC analysis." *Id*. at 36. In this regard, the Board proposed that it would apply a "needed to conduct a proper investigation" standard in deciding whether it would be appropriate to permit a shipper to file a new complaint, and the Board suggested that allowing a party to file a new complaint could be less complex and more reliable than attempting to modify the SARR in an existing case:

> At some point, attempting to interweave the old and new SAC presentations [in a reopening scenario] would be so complicated and convoluted that it would be preferable to vacate the old decision and permit the complainant to design a new SARR in a new SAC proceeding. *In that circumstance, a new SAC analysis would be less complex and would yield a more reliable result.*
>
> Therefore, upon reopening, the Board would vacate the old rate decision (and any resulting rate prescription) if it concludes that extensive changes to the traffic group or the configuration of the SARR would be needed to conduct a proper investigation into the challenged rates. Similarly, an unsuccessful litigant would be permitted to file a new rate complaint, and present a new SAC analysis, *if the Board were to conclude that extensive changes to the traffic group or SARR configuration were needed to conduct a proper investigation into the challenged rates*. Because we expect that changes substantial enough to warrant vacatur *would entail in nearly all instances* extensive changes to either the traffic group or SARR configuration, we have focused our

> proposed vacatur standard upon these two core components of a SAC analysis.

Id. (emphasis added).

After recounting these considerations, the Board acknowledged in its *NPRM* that "[t]he decision to vacate a prior Board decision is unavoidably discretionary and must be made on a case-by-case basis." *Id*. The Board added that once a party had justified a reopening, "it is the Board's responsibility to determine whether a new investigation can be conducted within the framework of the old SAC analysis, or whether the broader public interest is better served by starting afresh through vacatur and a new SAC analysis presented in a new complaint." *Id*.

The Board also emphasized that its new *Major Issues* approach is intended to be "consistent with this agency's regulatory responsibility to be 'the guardian of the general public interest,' with a duty to see that this interest is at all times effectively protected." *Id.* at 36 & n.52 (NPRM served Feb. 27, 2006) ("*Major Issues NPRM*") (quoting H.R. Doc. No. 678, Practices and Procedures of Governmental Control of Transportation, 78th Cong., 2d Sess., at 53 (1944) and *Southern Class Rate Investigation*, 100 I.C.C. 513, 603 (1925) ("The Commission is the guardian of the general public interest, and it must have in mind not only the carriers and the large shipping interests but also the small communities and the great body of consumers.")).

Following its evaluation of comments from interested parties, the Board issued its *Major Issues* decision adopting "procedural and substantive" changes regarding the proper application of the stand-alone cost test. With regard to the standards for

reopening and vacation of rate prescriptions, the Board stated that it "will adopt the uniform standards for reopening, vacating and filing a new case proposed in the NPRM." *Major Issues* at 72. The D.C. Circuit affirmed the Board's *Major Issues* decision on review. *See BNSF v. STB*, 526 F.3d 770 (D.C. Cir. 2008).

The Board applied its new standard to the *WTU* proceeding in 2007, finding that WTU had shown the existence of substantially changed circumstances. *See West Tex. Utils. Co. v. Burlington N. and S.F. Ry.*, STB Docket No. 41191, at 5-7 (STB served Sept. 10, 2007). WTU had argued that reopening was justified for four reasons: (1) coal traffic levels had increased along BNSF's Front Range route; (2) major mergers of western railroads had occurred; (3) the forecasts used by the Board for rates of inflation and the cost of capital in the railroad industry had proven inaccurate; and (4) the Board had changed its approach to applying the discounted cash flow model. *Id*. In reaching its decision in WTU's favor, the Board observed that it "[did] not need to determine whether each, or even any one, of the changed circumstances, standing alone, would necessarily merit reopening" because it was clear that the "cumulative impact of all of the changes identified by WTU" was substantial and warranted reopening. *Id*. at 7.

D. Dismissal Without Prejudice is Appropriate Under the Board's *Major Issues* Standard

IPA respectfully submits that the rationale that prompted the STB's declarations in *PPL Montana* and *WTU 2004* regarding the filing of a new case at the complainant's discretion (and the rationale of the *Jones v. SEC* decision) should apply in the present context, rather than the "reopening" standard of Section 722. The concerns

that the D.C. Circuit raised in *BNSF 2005* and the STB's subsequently-adopted *Major Issues* standards for reopening or vacating a rate prescription are not applicable to this case because there has been no merits determination in this case and there is therefore no sense in which parity between the complainant's and defendant's rights to reopen a prior case must be preserved.

Nevertheless, if the Board were to conclude that IPA should proceed on the basis of the new standard for reopening as an unsuccessful complainant, the Board's discussion of whether to permit the modification of an existing SARR or the filing of a new complaint in *Major Issues* demonstrates that dismissal without prejudice and the filing of a new complaint would be appropriate in the present circumstances. The circumstances associated with IPA's rate complaint have changed substantially, and on the basis of the Board's *April 4 Decision*, the only recourse available to IPA is to file a new complaint.

In order to demonstrate that UP's Provo rates exceed a maximum reasonable level under the STB's *Coal Rate Guidelines*, it will be necessary for IPA to present a SARR system different from that it presented in Docket No. 42127. *See* IPA Petition at 2. IPA's original SARR system provided origin-to-destination service from Skyline and Savage, as well as service from the point of interchange with the URC at Provo. IPA designed that system while under the impression that the associated SARR revenues exceeded the SARR costs. While subsequent events have demonstrated that IPA's analysis was based upon an error in cross-over revenue calculation that led to an

overstatement of the available SARR revenues, that fact does not imply that UP's Provo rates are reasonable.

Instead, as IPA has explained, a SARR system that replicates the portion of UP's system from Provo to Milford will demonstrate that UP's bottleneck rates for service in conjunction with upstream URC contract service are excessive. The SARR that IPA will utilize does not entail substantial costs associated with the eastern portion of the SARR system that IPA advanced in Docket No. 42127. That terrain east of Provo was far more rugged than the terrain on the Provo to Milford SARR route. The new SARR system will benefit from lower construction costs and lower operating costs. While the new SARR will have lower revenues than those of the SARR in Docket No. 42127, it will also have significantly lower costs.

Notably, in its Reply Submission in the *Major Issues* proceeding, UP itself argued that the Board should employ a "common sense" approach to determining whether to allow reopening of a rate case decision. *See* Reply Submission of Union Pacific Railroad Company, *Major Issues in Rail Rate Case*, STB Ex Parte No. 657 (Sub-No. 1), at 54 (filed May 31, 2006) ("UP expects that the Board will use common sense in determining when circumstances have changed sufficiently to warrant reopening of a rate proceeding."). While UP acknowledged that the Board should "of course" give "due regard to the importance of finality and repose," UP cautioned about the dangers of leaving a rate prescription in place that is "plainly inconsistent with current facts" or "lock[ing]" a party into an outdated decision. *Id*. Moreover, UP conceded that "a shipper should have the option of bringing a new rate complaint if there have been substantial

changes in the circumstances since the Board rejected an earlier complaint." *Id*. Finally, UP suggested that "no particular form of hearing is required in connection with" a finding that "there has been a substantial change in circumstances." *Id*. at 55, 57.

Applying UP's "common sense" characterization of the reopening standard to the facts of this situation, it is evident that there has been a substantial change in the circumstances that IPA faces in presenting its evidence to the Board. While IPA acknowledges that its own error has been a significant cause of the present situation, it is unquestionably true that a SARR configuration decision made on the basis of the best information available at the time has now created a circumstance in which IPA is precluded from presenting evidence in Docket No. 42127 that would demonstrate that UP's Provo rates are excessive.

As the Board suggested in its application of the *Major Issues* standard to the facts of the *WTU* case, it is not necessary to engage in an item-by-item analysis of changed circumstances. Instead, the Board has recognized that it will engage in a broader assessment of changes in circumstances in order to evaluate whether reopening is appropriate. Such a broad assessment of the changing circumstances in the present situation shows that it is appropriate to dismiss Docket No. 42127 without prejudice in order to permit the filing of a new complaint.

IV. UP is Wrong Regarding the Supposed Unavailability of Reparations

Although the question of the availability of reparations in a new complaint case is beyond the scope of this motion, IPA nevertheless offers a response to the

argument that UP raised in that regard in its December 28 Reply. Therein, UP argued – without any supporting authority – that "[i]f the Board has completed its analysis in this case and found that UP's rates were reasonable, IPA would not have been entitled to any reparations for the period before the Board's ruling, even if it could file a new case immediately after the Board's ruling." UP Reply at 16. UP's argument is mistaken.

A shipper can obtain reparations for a period of up to two years prior to the filing date of its complaint, assuming that the agency has not previously approved the carrier's rate. *See* 49 U.S.C. § 11705(c) ("A person must file a complaint with the Board to recover damages under section 11704(b) of this title within 2 years after the claim accrues."); *Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932) ("*Arizona Grocery*"). In *Arizona Grocery*, the United States Supreme Court held that a carrier should not be subject to the possibility of paying reparations when it charges a rate that the agency itself has set:

> Where the Commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.

Id. at 390.

If IPA had succeeded under the pending complaint in Docket No. 42127, UP would have been liable for reparations dating back to the date of the first shipment under the challenged rates (*i.e.*, January of 2011). Pursuant to a new complaint

challenging UP's existing common carrier rates, IPA likewise would be entitled to receive reparations (on movements using the Provo rate) for that same period since all shipments under the challenged rates will have moved within the two-year period. *Arizona Grocery* is not an impediment to such reparations.[12]

In particular, relevant precedent demonstrates that the *Arizona Grocery* prohibition on awarding reparations is not applicable in the absence of an STB order prescribing the maximum reasonable rate a carrier may charge. *See B.P. West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1304 (D.C. Cir. 2004) (per curiam) ("*Arizona Grocery* applies only where the Commission has 'declared what is the maximum reasonable rate to be charged by a carrier.'"); *Western Fuels Ass'n, Inc. v. BNSF Ry.*, STB Docket No. 42088, 8-9 (STB served Feb. 18, 2009) (denying BNSF's request to limit the damages available to WFA on the basis of *Arizona Grocery* and finding that the STB did not "conclusively resolve WFA's rate complaint in the *Sept. 2007 Decision*")), *review granted on other grounds and denied in all other respects, BNSF Ry. v. STB*, 604 F.3d 602 (D.C. Cir. 2010); *Halifax Coal & Wood Co. v. Atlantic & Yadkin Ry.*, 219 I.C.C 594, 597 (1936).[13]

---

[12] It is true, of course, that if the new complaint were not filed until a date more than two years after the effective date of the challenged rates from Provo, the rates paid by the Complainant for the period more than two years before the filing would not be subject to reparations.

[13] As the Commission explained in its *Halifax* decision, the *Arizona Grocery* prohibition on an award of reparations does not apply in situations in which the Commission previously had found a rate not to be unreasonable, and instead, applies only where the Commission had set the carrier's rate:

Notably, in 2008, the STB itself advanced this same view of *Arizona Grocery* in its Brief to the D.C. Circuit in response to BNSF's argument that reparations should not be available where the complainant made a revised SAC presentation (albeit in the same proceeding as the initial SAC presentation):

> Relying on *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370 (1932) (*Arizona Grocery*), BNSF contends that a decision on the parties' revised SAC presentations could have only prospective effect. But *Arizona Grocery* only "bars reparations that retroactively change a final Commission-approved rate."[] Here, the Board did not approve the challenged rates; it simply found that they had not yet been shown to be unreasonable. . . . Because the Board has not approved the challenged rates, it may award full relief should it find the rates to be unlawful after considering the parties' revised SAC evidence.

> Defendants contend that, in view of the decision of the Supreme Court in *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, we are without authority to award reparation of shipments to Elkin that moved at the $3.12 rate in effect prior to March 19, 1936, inasmuch as the latter rate was included in the rates found not unreasonable by division 5 in *North Carolina Corp. Comm. v. Aberdeen & R.R. Co., supra*. This contention is unsound, for the Commission has found in a number of proceedings that the principle announced in *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co., supra*, has no application where the assailed rate is a carrier-made rate which has been merely found not unreasonable by the Commission and has not been established in compliance with an order by the Commission. *Parkersburg Rig & Reel Co. v. Chicago & N.W. Ry. Co.*, 198 I.C.C. 709.

Id. at 597.

See STB Reply Brief, *Western Fuels Ass'n v. STB*, Docket No. 08-1167, at 9-10 (D.C. Cir. filed June 6, 2008) (quoting *BP West Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1304 (D.C. Cir. 2004) (per curiam)).

Here, there has been no STB prescription of a maximum reasonable rate governing UP's movement from Provo to the plant and *Arizona Grocery* therefore does not apply.

CONCLUSION

In light of the foregoing, IPA respectfully requests that the Board grant IPA leave to withdraw its complaint and further requests that the Board dismiss this proceeding without prejudice. Such dismissal will permit IPA to challenge UP's Provo rate on the basis of a new complaint. This new complaint, and the new stand-alone railroad system to be used in such a case, will permit the Board to analyze UP's rates on a basis that is equitable to both parties.

An STB decision prohibiting IPA from filing a new complaint against UP effectively would insulate UP's Provo rates from challenge. The inequitable consequences of a decision precluding any further challenge of UP's Provo rates are significant. IPA recognizes that UP has expended significant resources in defending its common carrier rates, but UP should not obtain an improper and ongoing windfall through its 400%+ R/VC-level rates simply because of an error in IPA's Opening presentation.

IPA respectfully submits that such a blanket, ongoing prohibition on complaint-filing would be unprecedented before the agency and would have significantly adverse consequences for the shipping public (in addition to raising questions about the propriety of such a prohibition under governing law). *See* 49 U.S.C. § 11701(b) ("A person . . . may file with the Board a complaint about a violation of this part by a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part."). Given the unreasonableness of any outcome that prevents IPA from challenging UP's Provo rates, the Board should dismiss Docket No. 42127 without prejudice.

Respectfully submitted,

By: /s/ C. Michael Loftus
C. Michael Loftus
Christopher A. Mills
Andrew B. Kolesar III
Daniel M. Jaffe
SLOVER & LOFTUS LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for Complainant Intermountain Power Agency

Dated: May 2, 2012

CERTIFICATE OF SERVICE

I hereby certify that this 2nd day of May, 2012, I caused copies of the foregoing to be served upon counsel for Defendant Union Pacific Railroad Company via email and by first-class mail, postage prepaid at the following addresses:

Michael L. Rosenthal, Esq.
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Louise A. Rinn, Esq.
Union Pacific Railroad Company
1400 Douglas Street, Stop 1580
Omaha, NE 68179

/s/ Andrew B. Kolesar III
Andrew B. Kolesar III