

35917
EB

SERVICE DATE – JUNE 6, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42093

BP AMOCO CHEMICAL COMPANY
v.
NORFOLK SOUTHERN RAILWAY COMPANY

Decided: June 3, 2005

On May 23, 2005, BP Amoco Chemical Company (BP) filed a complaint against the Norfolk Southern Railway Company (NS), claiming that certain common carrier rates charged by the railroad to haul shipments of paraxylene from Decatur, AL, to Kingsport, TN, are unreasonable, in violation of 49 U.S.C. 10701(d)(1). To assess the reasonableness of the challenged rail rates, BP seeks to use the simplified and expedited procedures adopted by this agency in Rate Guidelines – Non-Coal Proceedings, 1 S.T.B. 1004 (1996) (Simplified Guidelines).

BP has proposed that the Board mediate to facilitate further negotiation between the parties, and has requested that we enjoin NS from charging a rate higher than that proposed by NS in its last contract offer for the issue traffic. NS has advised that it is amenable to mediation, provided that it is non-binding on the parties and is subject to confidentiality requirements and a protective order. NS asks that we hold the proceeding in abeyance during the mediation period, and BP has agreed with this request. NS opposes BP's injunction request.

Because both parties support mediation, and because we lack the authority to bind the parties in a mediation, we will provide for non-binding mediation in this proceeding. We will establish a 30-day period for mediation, and will also hold this proceeding in abeyance for that 30-day period. BP's request for an injunction, however, will be denied.

This is the first time that the simplified procedures have been invoked by a shipper. But the simplified procedures have been the subject of intensive recent Board scrutiny to ensure that they provide a practical means of examining the reasonableness of a challenged rate without undue expense or delay. We have devoted substantial staff resources in an exhaustive internal evaluation of this process. We have also held two public hearings and have consulted informally with other federal and state agencies to review their regulatory practices.

Even when the simplified guidelines were issued, the Board envisioned that they would be adjusted and refined over time as experience warranted. See Simplified Guidelines, 1 S.T.B. at 1057. And while the simplified procedures have not been used up to now, they contain elements that also arise in other contexts, such as how to calculate the variable cost of a rail transportation movement, which are an integral part of most rate reasonableness proceedings. Based on our experience in those other areas, and on our recent examination of the existing simplified guidelines, we believe several modifications and refinements are necessary to meet our statutory obligation to simplify and expedite smaller rail rate reasonableness cases.

Thus, as explained more fully below, we adopt a procedural schedule for this case that calls for a final Board decision on the merits in 200 days, a demanding but realistic schedule that is consistent with Congress' directive to resolve this type of dispute expeditiously. To meet this schedule, we limit discovery. Furthermore, to guide the parties in their pursuit of discovery and formulation of evidentiary submissions, we give notice of other policy changes or revisions that we propose to implement regarding the calculation of variable costs, the Revenue Shortfall Allocation Method (RSAM) range, and a process for quickly selecting the comparison group. Each of these changes is designed to keep this proceeding – the first brought under the simplified guidelines – from becoming as costly and time-consuming as a full stand-alone cost (SAC) rate case. As we gain further experience from this and other cases, we may consider further changes and may revisit some of those adopted in this proceeding.

BACKGROUND

The Board adopted the simplified guidelines for assessing the reasonableness of challenged rail rates in response to the Congressional directive to “establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full SAC presentation is too costly, given the value of the case.”¹ We briefly review key elements of the simplified guidelines that are discussed later in this decision.

Under these guidelines, the reasonableness of a challenged rate is determined by examining that challenged rate in relation to three benchmark figures. Each benchmark is expressed as a ratio of the revenues generated from particular traffic to the variable costs of providing the rail service – the revenue-to-variable cost, or R/VC ratio. Variable costs are that portion of railroad costs that have been determined to vary with the level of traffic, using the Board's Uniform Rail Costing System (URCS).²

The first benchmark is RSAM. It allows us to take into account the defendant railroad's overall revenue need by measuring the average markup that the railroad would need to charge all of its “potentially captive” traffic in order for the railroad to earn

¹ 49 U.S.C. 10701(d)(3).

² See Uniform Railroad Costing System, 5 I.C.C.2d 894, 899 (1989).

adequate revenues as measured by the Board under 49 U.S.C. 10704(a)(2). Potentially captive traffic is defined as all traffic priced above the 180% R/VC level, which serves as the statutory floor for regulatory rail rate interventions. See 49 U.S.C. 10707(d).

The second benchmark is called $R/VC_{>180}$. This benchmark measures the average markup applied by the defendant railroad on its potentially captive traffic. It can be tailored to focus on a subset of the railroad's traffic that has transportation characteristics similar to the traffic moving under the challenged rate.

The third benchmark is called R/VC_{COMP} . This benchmark is used to compare the markup being paid by the challenged traffic to the average markup assessed on other potentially captive traffic involving the same or a similar commodity moving similar distances.

Each year, we publish the most recent RSAM range (discussed below) and the most recent $R/VC_{>180}$ ratio for each Class I railroad, as well as regional averages. The R/VC_{COMP} ratio for appropriate comparison traffic is to be computed after a shipper files a rate complaint, using traffic data from the rail industry Waybill Sample and applying URCS costing.³

DISCUSSION AND CONCLUSIONS

BP's Request for Mediation

Except in rate cases handled under the SAC methodology, our regulations provide for the use of alternative dispute resolution (ADR), including mediation, only upon the mutual consent of the parties. Compare 49 CFR 1109.1 (ADR processes available upon mutual consent) with 49 CFR 1109.4 (60-day non-binding mediation process mandatory in SAC proceedings). Because BP seeks rate relief pursuant to the Board's simplified guidelines, our procedures provide for mediation here only if NS agrees to the request. On May 26, 2005, NS informed us that it is amenable to non-binding mediation. Accordingly, we will provide for a 30-day period for non-binding mediation, and will designate a Board staff member to serve as mediator. The procedural schedule will be held in abeyance for 30 days. Within 5 business days of the effective date of this decision, the mediator shall contact the parties to discuss ground rules and the time and location of any meetings. At least one principal of each party, who has the authority to commit that party, shall participate in the mediation and be present at any session at which the mediator requests that the principal be present.

We will, as is customary in our rate proceedings, impose confidentiality requirements and will issue a protective order similar to those issued in cases considered under the SAC methodology.

³ The Waybill Sample is a statistical sampling of railroad waybills that is collected and maintained for use by the Board and by the public (with appropriate restrictions to protect the confidentiality of individual traffic data). See 49 CFR 1244.

BP's Request for Injunction

BP's request for an injunction pursuant to 49 U.S.C. 721(b)(4), which NS opposes, will be denied. To obtain an injunction, the party seeking it must show that: (1) it is likely to succeed on the merits; (2) it will be irreparably harmed in the absence of the requested relief; (3) issuance of the injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest. See DeBruce Grain, Inc. v. Union Pacific RR, 2 S.T.B. 773, 775 n.3 (1997), citing Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977). Moreover, a party seeking an injunction "carries the burden of persuasion on all of the elements required for [such] extraordinary relief" San Joaquin Valley Railroad Company – Abandonment Exemption – In Tulare and Kern Counties, CA, STB Docket No. AB-398 (Sub-No. 5X), slip op. at 4 (STB served Apr. 3, 1998), citing Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

Here, BP has not shown that an injunction is necessary or appropriate. Although BP states that it cannot absorb the subject rate increase indefinitely, such a statement is inadequate by itself to persuade the Board that BP will suffer irreparable injury. If the Board finds that the challenged rates are unreasonable, it will order reparations to BP reflecting the difference between the challenged rate and the maximum reasonable rate along with interest. BP does not explain why such reparations would not provide an adequate remedy without an injunction, and BP has not otherwise established that it will suffer irreparable injury absent such Board action.

BP has not directly addressed, and has not introduced adequate evidence and argument on, any of the other criteria necessary to obtain injunctive relief. Other than its brief request for an injunction in a cover letter accompanying the complaint, and passing mention of it in its June 1, 2005 letter, BP has not discussed the injunction in any of its filings. Additionally, we are unaware of any circumstances here that would justify the extraordinary injunctive relief envisioned by section 721(b)(4). Accordingly, BP's request for an injunction will be denied.

Procedural Schedule

We propose to use the following procedures to expedite and simplify this proceeding. Our general procedures, set forth at 49 CFR Part 1111-1115, are also applicable. If there is a conflict between our general regulations and the more specific procedures set forth here, the procedures set forth here will govern.

We are proposing an expedited procedural schedule for this proceeding, using Board staff (staff) designated by the Chairman to assist in resolving discovery disputes and to chair technical conferences. We will consider deviations from this procedural schedule at the joint request of the parties. If a deadline falls on a weekend or holiday, that deadline will be extended until the next business workday, and the remaining deadlines would remain unchanged. The schedule is set forth below:

Procedural Schedule

Phase 1	
Effective Date of Procedural schedule	Day 0
Complainant's Supplemental Filing on Eligibility and Initial Disclosure	Day 10
Defendant's Answer to Complaint, Reply to Eligibility, and Initial Disclosure	Day 25
Complainant's Rebuttal on Eligibility	Day 30
Board Decision on Eligibility	Day 50
Phase 2	
Tender of Initial Comparison Groups	Day 60
Discovery and Technical Conference	Day 70
Discovery Closes	Day 80
Tender of Final Comparison Groups	Day 80
Cross Replies to Comparison Groups	Day 90
Phase 3	
Opening Evidence	Day 121
Reply Evidence	Day 135
Rebuttal Evidence	Day 142
Technical Conference (Market Dominance and Merits)	Day 149
Final Briefs	Day 156
Board Decision	Day 200

The procedural schedule envisions three separate stages of this case. The parties will have the opportunity to make arguments and present evidence in each of the three phases. Discovery on all issues will commence at the end of the 30-day abeyance period, and will close 80 days after this procedural schedule becomes effective.

In the first phase, BP must demonstrate that its case is eligible for handling under the simplified guidelines. NS will have the opportunity to argue in its answer that the case is not eligible for the simplified guidelines. The Board will decide that threshold issue within 50 days of this procedural schedule becoming effective.

In the second phase, each party will tender its proposed comparison groups for use in applying the R/VC_{COMP} benchmark. Staff will then conduct a technical conference to discuss the differences in the proffered comparison groups. If the parties fail to agree on a comparison group, we will select which of the proffered groups to use. The procedures to be followed for the submission of the comparison group are discussed below.

Because both the complainant and defendant should restrict their comparison groups to movements contained in the Waybill Sample,⁴ there is no need for discovery to formalize the initial comparison groups they will tender on Day 60, before the close of discovery.

In the third phase, the parties will be required to submit evidence on both the issue of market dominance (i.e., whether the Board has authority under 49 U.S.C. 10707 to rule on the reasonableness of the rate) and the merits of the case.

Discovery

Meet or Confer Requirement. The parties shall meet or confer by telephone to discuss discovery within 3 business days of this procedural schedule becoming effective. The parties should inform us as soon as possible thereafter whether there are unresolved disputes that require our intervention and, if so, the nature of such disputes.

Initial Conference. The parties to this case shall appear at the Board's offices for an initial conference with staff to discuss this litigation 3 days after this procedural schedule becomes effective.

Staff Conferences. Staff will conduct discovery and technical conferences to resolve disputes. We have seen the value of such conferences since we instituted them in SAC cases.⁵

Complainant's Initial Disclosures. BP will provide certain initial disclosures within 10 days of the procedural schedule becoming effective. At that time, the shipper must set forth its preliminary estimate of the variable cost of the challenged movements, using the unadjusted figures produced by the URCS Phase III program.⁶ This will require BP to identify the following annual characteristics of the complaint movement to

⁴ See Simplified Guidelines, 1 S.T.B. at 1055.

⁵ See 49 CFR 1111.8(b); Procedures to Expedite Resolution of Rail Rate Challenges To Be Considered Under the Stand-Alone Cost Methodology, STB Ex Parte No. 638 (STB served Apr. 3, 2003), amended by (STB served Sept. 24, 2004).

⁶ URCS consists of a series of computer programs and manual procedures organized into three phases. Phase I develops the raw data base into a useable format, and then employs statistical estimation procedures to determine the proportion of specific expense account groupings that vary with changes in the volume of activity (such as running track maintenance, which varies with gross ton-miles). These relationships are then used in Phase II to develop the unit variable costs. Finally, Phase III permits expeditious application of these unit costs to the specific rail movements. This application can be performed using the Phase III program or it can be accomplished manually. The computer program is interactive, in that it permits the user to enter data for the specific movements under consideration.

calculate the variable cost of the challenged movement: (1) the carrier or region identifier; (2) the type of shipment (local, received-terminated, etc.); (3) one way distance of the shipment; (4) type of car by URCS code; (5) number of cars; (6) car ownership (private or railroad); (7) commodity type (Standard Transportation Commodity Code or STCC code); (8) weight of shipment in tons per car; and (9) type of movement (individual, multi-car, or unit train). BP should serve on the railroad all documents that it relies upon to determine these inputs that are used in the URCS Phase III program.

Concurrent with the tender of its initial comparison group, BP must furnish to NS a narrative addressing the issue of whether there is any feasible transportation alternative for the challenged movements and all documents relied upon in formulating that narrative.

Defendant's Initial Disclosures. NS must provide initial disclosures with its answer. Like the shipper, the railroad will set forth its preliminary estimate of the variable cost of any challenged movement. Its estimate would also be required to be based on the variable cost of the movement, calculated using the unadjusted figures produced by the URCS Phase III program. NS will be required to serve on BP all documents that it relied upon to determine the inputs used in the URCS Phase III program.

Discovery and Interrogatory Requests. We will limit the number of discovery requests that either party may submit to the other party without obtaining advance authorization. Each party is limited to 10 interrogatories (including subparts) and 10 document requests (including subparts). The parties are encouraged to make initial tenders of material as soon as possible in the discovery process. Any disputes on this matter will be handled by staff on an expedited basis. Appeals of staff discovery decisions are not favored.

We believe these limits are reasonable given the scope of the issues in this case. Although discovery may be necessary regarding market dominance, no discovery should be needed regarding issues such as traffic movements (because, as noted above, selection of the comparison group is limited to movements included in the Waybill Sample) and managerial inefficiencies (because the Board will use the published RSAM benchmark in these proceedings).

Motions to Compel. We are proposing a process for handling motions to compel that is based on the process for larger rate cases. See 49 CFR 1114.31. We have found that this process has expedited discovery in SAC cases and therefore believe that such a process will similarly help expedite proceedings under the simplified guidelines. Accordingly, a reply to a motion to compel must be filed with the Board within 5 business days after it is served. Within 3 business days after a reply to a motion to compel is filed, staff may convene a conference with the parties to discuss the dispute, attempt to narrow the issues, and gather any other information needed to render a ruling. Within 2 business days after such a conference, the Secretary will issue a summary ruling on the motion to compel. If no conference is convened, the Secretary will issue a

summary ruling within 5 business days after the filing of the reply to the motion to compel.

Interlocutory Appeals. Appeals of any ruling by the Secretary or staff on discovery issues must be filed with the Board within 3 business days of the ruling. Replies to the appeal must be filed within 3 business days after the appeal is filed. The criteria for eligibility to file an appeal are set forth in 49 CFR 1115.9(a).

Oral Argument. We will schedule an oral argument if we determine it is appropriate.

Variable Cost Calculations

We will calculate the variable cost of the traffic covered by the complaint, as well as the variable costs of all movements included in the comparison group, by using the Phase III URCS program. Although the simplified guidelines indicated that movement-specific costing should be allowed for both the issue traffic and the comparison traffic,⁷ upon further reflection we believe that the better policy is not to consider any movement-specific adjustments.

We now believe that our mandate to create simplified guidelines may be best achieved by adhering strictly to the URCS model to calculate variable costs. The statute calls for using unadjusted URCS costs unless the Board specifies adjustments.⁸

Our experience in SAC cases demonstrates how substantial the discovery and litigation over movement-specific adjustments can be. For example, in Northern States Power,⁹ the only issues in the case were arguments for or against particular movement-specific adjustments. The parties in that case submitted 17 volumes of evidence on movement-specific adjustments to only one movement. This type of extensive and expensive litigation over such adjustments is inconsistent with the statutory charge to establish a “simplified and expedited method.”

By relying exclusively on the URCS Phase III program to calculate variable costs, we can eliminate the very significant expense and delay associated with discovery and the use of costing experts to propose adjustments to URCS and to respond to adjustments to URCS by the other party. This will allow the Board to establish a simplified and expedited method. The information needed to run the URCS Phase III program is readily

⁷ See Simplified Guidelines, 1 S.T.B. at 1038.

⁸ 49 U.S.C. 10707(d)(1)(B).

⁹ Northern States Power Co. Minnesota d/b/a Xcel Energy v. Union Pacific Railroad Co., STB Docket No. 42059 (settled by the parties prior to a decision on the merits).

available and the parties would be required to provide this information to one another in their initial disclosures.

Any benefit that might be gained by permitting movement-specific adjustments would be greatly outweighed by the delay and costs associated with allowing the discovery needed to argue for such an adjustment and with the litigation over such adjustments. For example, in Xcel,¹⁰ the parties proposed many movement-specific adjustments to URCS to estimate the variable cost of the challenged movements. According to the complainant, its proposed adjustments would have lowered the variable cost of the challenged movements by approximately 20%. On the other hand, the railroad's proposed adjustments would have raised the unadjusted URCS variable costs by roughly 15%. Once we resolved all the disputes, there was only a 1-3% differential between the variable cost with or without movement-specific adjustments, and yet a considerable amount of time and expense had been expended in the process. Based on our experience, we do not believe that the minimal revisions that would likely result from the use of movement-specific adjustments here warrant their use.

If we permit adjustments to the complaint and comparison traffic, the similar movements would likely get similar adjustments, which could cancel each other out. See Burlington N. R.R. v. ICC, 985 F.2d 589, 601 (D.C. Cir. 1993) ("Thus, if the adjustment were made on both sides, it might well be pointless; if on only one side, it would create phony discrepancies."). Moreover, because the $R/VC_{>180}$ and RSAM benchmarks published by the Board are based on unadjusted URCS calculations, the R/VC_{COMP} benchmark should be computed in a consistent manner. Finally, the 17 volumes of evidence in Northern States Power addressed adjustments to only the issue movement. In a small case, parties might argue for adjustments to the issue movement and to each movement in the comparison group.

RSAM

The simplified guidelines provide for the calculation and publication of an RSAM range. The upper end of the range reflects the average markup that the railroad would need if it were to replace all of its assets as they wear out. The lower end subtracts out any shortfall related to movements priced below the 100% R/VC level in an attempt to capture managerial inefficiencies. In Simplified Guidelines, however, the Board recognized that an R/VC ratio below 100% does not necessarily reflect improper pricing or a money-losing service. The RSAM benchmark the agency would use was therefore left unresolved, but was expected to fall within this range.

We propose to use only the unadjusted RSAM figure in this proceeding. The RSAM benchmark is intended to measure the average markup that the carrier would need to charge its potentially captive traffic to meet its own revenue needs. However, when the simplified guidelines were adopted in 1996, the Board "[did] not believe that the

¹⁰ Public Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. & S.F. Ry., STB Docket No. 42057 (STB served June 8, 2004), modified (STB served Jan. 19, 2005).

industry ha[d] yet become so efficiently sized that all of its current assets were used and useful and would warrant replacement as they wear out,” and it suggested that the revenue contribution that should be required of the captive shipper group was therefore less than what would be needed to provide for the replacement of all existing assets.¹¹ Toward that end, the Board decided to look at the effect on a carrier’s revenue needs of subtracting out any shortfall related to movements priced below the 100% R/VC level (the “managerial efficiency adjustment”), even though the Board recognized that an R/VC ratio below 100% did not necessarily reflect improper pricing or a money-losing service.¹² The end result was an RSAM range that the guidelines would treat “as the relevant starting range for our consideration.”¹³

The uncertainty created by this range does not appear justified by the objectives of a managerial efficiency adjustment. The amount of revenue shortfall attributed to traffic with an R/VC ratio below 100% cannot provide any reasonable approximation or useful surrogate for other inefficiencies in a carrier’s system.¹⁴ And while specific inefficiencies can be brought to light in a SAC analysis under the Coal Rate Guidelines,¹⁵ any attempt to measure carrier-specific inefficiencies under the simplified guidelines would add undue cost and complexity to an inquiry that must necessarily sacrifice some precision to achieve simplicity.

Moreover, the Board’s 1996 assessment of the state of the rail industry’s assets is outdated. There is no longer significant excess capacity in the rail industry. Indeed, the rail service crisis in the western United States in the late 1990’s was directly related to decaying, outdated and insufficient infrastructure.¹⁶ Additional concerns have been expressed about inadequate rail infrastructure in Congressional testimony.¹⁷

Finally, the concern that a railroad may elect not to replace some assets as they wear out does not appear to support an adjustment to RSAM. If a carrier makes a prudent investment in a rail line or facility that will last 20 years, our revenue adequacy

¹¹ Simplified Guidelines, 1 S.T.B. at 1029.

¹² Id. at 1028.

¹³ Id. at 1030.

¹⁴ Id. at 1029.

¹⁵ Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), aff’d sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

¹⁶ See Joint Petition for Service Order, 3 S.T.B. 44 (1998), citing 3 S.T.B. 28 (1998).

¹⁷ Hearings of the Rail Subcommittee of the Transportation and Infrastructure Committee, U.S. House of Representatives, May 20, 2003.

determination should include a reasonable return on the depreciated value of that investment over the entire life of that asset, even if the railroad may elect not to replace that asset when it wears out because the asset is no longer used or useful. As Congress declared, revenue adequacy is the level of revenues “that are adequate, under honest, economical, and efficient management, to cover operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business.”¹⁸

Selection of Comparison Group

We propose that each party be required to submit a final proposed comparison group. We would then select one of the two groups as the most reasonable comparison group, which would then be used to calculate the R/VC_{COMP} benchmark. This would be an “either/or” selection, with no modifications made by us.

Pursuant to this procedure, BP and NS would simultaneously tender their initial evidence regarding an appropriate comparison group. Any movement set forth in both sides’ initial tenders would be automatically included in each side’s final comparison group, unless the parties later agreed to exclude the movement. Shortly after receipt of the initial tenders, Board staff would convene a technical conference with the parties to discuss and attempt to resolve any disputes as to the appropriateness of movements in the comparison groups.

Each party would then tender its “final offer” group of the movements it believes should comprise the comparison group. No movements that had not previously been submitted by one of the parties could be included. Rather, the parties would be limited to selecting their final comparison group from only those movements which were contained in the original comparison groups of at least one of the parties.

After the submission of the final offer comparison groups, each party would be given an opportunity to challenge the other party’s comparison group and support its own in their simultaneous reply filings. We would then select the comparison group that we conclude is most similar in the aggregate to the complaint movements. Comparability would be determined by reviewing a variety of factors, which may include length of movement, commodity type, terrain involved, and other factors which could affect demand characteristics and operating costs. See Simplified Guidelines, 1 S.T.B. at 1035 n.90 (a properly selected comparison traffic will have a similar degree of demand elasticity).

Use of this final offer procedure should encourage both parties to submit a reasonable comparison group. Any final tender that is skewed too far in either direction might well result in the selection of a more reasonable final tender presented by the opposing party. By having two rounds of tenders and a technical conference, both sides would have participated in the winnowing process. Each side therefore should be able to

¹⁸ 49 U.S.C. 10704(a)(2)(emphasis added).

provide a reasonable final offer comparison group, even if the groups differed in certain respects. Thus, it is expected that the Board would only have to determine which is more reasonable. This should enable a prompt, expedited resolution of the comparison group selection.

The schedule for the initial tender of comparison groups, for the technical conference on the comparison groups, for the final tender of comparison groups, and for the submission of cross replies on the final comparison groups is set forth above.

Comments from the Parties

BP and NS may comment on the variable cost calculations, RSAM, and selection of comparison group sections of this decision 10 days from the service date of this decision. Reply comments are due 5 days thereafter. The due dates for these comments have not been held in abeyance.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Mediation is ordered as described above. A member of the Board staff is designated to serve as mediator pursuant to the instructions set forth above.
2. BP's request for an injunction governing the rates that NS may charge for the issue traffic is denied.
3. Comments on the variable cost calculation, RSAM, and selection of comparison group sections of this decision are due 10 days from the service date of this decision. Reply comments are due 5 days thereafter.
4. The procedural schedule becomes effective on July 6, 2005, absent a further Board order.
5. This decision is effective on the date of its service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary