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January 23, 2002

BY HAND DELIVERY

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



Re: Docket No. 42056, *Texas Municipal Power Agency v. the Burlington Northern and Santa Fe Railway Company*

Dear Secretary Williams:

I am writing in reply to the January 17, 2002 letter from counsel for TMPA in the captioned proceeding, which I received yesterday. TMPA contends that BNSF's filing of verified statements as part of BNSF's January 15, 2002 reply evidence in this proceeding was "unauthorized" and seeks "an order from the Board advising that the filing of separate verified statements is inappropriate. . . ." TMPA further states that it does not intend to file verified statements as part of its rebuttal evidence and seeks Board "confirmation that failure to do so will not be construed by the Board as a failure of proof in any respect."

As to TMPA's first point, neither the suggestion that BNSF had no right to submit verified statements as part of its reply evidence nor TMPA's assumption that the Board will not consider those statements makes any sense. TMPA acknowledges that BNSF's reply evidence "contained a Narrative that followed the [Board's] prescribed outline. . . ." Nothing in the Board's decision in Ex Parte 347 (Sub-No. 3), *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases* (served March 12, 2001) ("*General Procedures*") prohibits the filing of verified statements, or any other form of evidence. BNSF's rationale for filing the supporting verified statements, which TMPA ignores in its letter, was clearly set out in BNSF's reply submission:

In adhering to the Board's prescribed format, BNSF has presented its evidence in narrative format (BNSF's "Evidentiary Narrative" or "Narrative") and has also furnished verified statements of individual witnesses that underlie that Narrative so that the Board can confirm that BNSF's evidentiary presentation is grounded in

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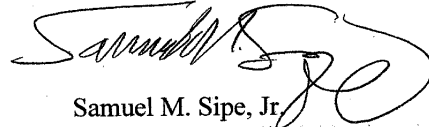
the analyses and opinions of individual witnesses and can assess the credibility of those witnesses.

BNSF Reply Argument at 39-40.¹

BNSF believes that having access to the verified statements of individual witnesses will facilitate the Board's assessment of the quality of BNSF's evidence. TMPA's alternative approach in its opening evidence was to submit a "narrative" drafted by counsel, augmented by exhibits. Neither portions of the narrative nor particular exhibits were attributed to individual witnesses, except by a general description at the end of the narrative of the subject matter covered by individual witnesses. This approach does not permit the attribution of particular testimony to individual witnesses. TMPA's approach undermines its proof because TMPA does not provide a sufficient basis for the Board to weigh particular evidence based on the expertise and reputation of its sponsor.² It would be appropriate for the Board to take into account this aspect of TMPA's presentation in deciding what weight to give it.

As to TMPA's second point, it would be improper for the Board to opine in advance on TMPA's decision not to file rebuttal verified statements or to indicate how the Board would construe TMPA's submission in the absence of such statements. The Board will not be able to determine what weight to give TMPA's rebuttal submission until it has seen it, regardless of the form that that submission may take.

Sincerely,



Samuel M. Sipe, Jr.

Cc: Honorable Linda J. Morgan
Honorable Wayne Burkes
David M. Konschnik, Director, Office of Proceedings
Ellen D. Hanson, General Counsel
Christopher A. Mills, Esquire

¹ BNSF's position is grounded in the provisions of the Administrative Procedure Act governing agency adjudications and cases decided thereunder. *See* 5 U.S.C. § 556(d).

² Many witnesses in SAC cases present what would be deemed in a federal court proceeding to be expert testimony. Reviewing courts have recognized in the agency context, as well as the court context, that "all expert testimony must be reliable" and that this proposition applies to "the weight a factfinder accords expert testimony." *Elliott v. CFTC*, 202 F.3d 926, 934 (7th Cir. 2000). It is difficult to determine the reliability of expert testimony and what weight to give it if the decisionmaker cannot ascertain what constitutes the expert testimony.