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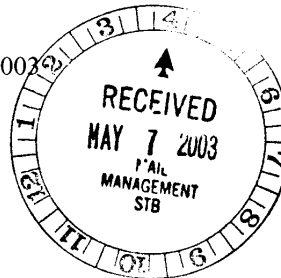
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May 7, 2003



VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

MAY 07 2003

Part of
Public Record

Re: Docket No. 41191, West Texas Utilities Company, v.
The Burlington Northern and Santa Fe Railway Company

Dear Secretary Williams:

Enclosed for filing in the referenced proceeding, please find an original and 10 copies of AEP Texas North Company's Reply In Opposition To Petition For A Declaration Regarding The Rate Prescription On Coal Movements From Rawhide, Wyoming To Oklahoma, Texas. Additionally, please find 3 WordPerfect Diskettes containing the filing in electronic form, as well as a compact disk containing workpapers supporting the Verified Statement of Thomas D. Crowley.

An additional copy of the Reply also is enclosed. Kindly indicate receipt and filing by time-stamping this extra copy and returning it to the bearer of this letter.

Thank you for your consideration in this matter.

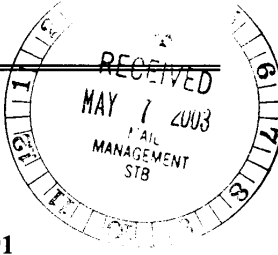
Sincerely,

Kelvin J. Dowd
an Attorney for
AEP Texas North Company

Enclosure

207756

BEFORE THE
SURFACE TRANSPORTATION BOARD

WEST TEXAS UTILITIES COMPANY,	)		
Complainant,	)		
v.	)	Docket No. 41191	
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,	)		
Defendant.	)		
			ENTERED Office of Proceedings MAY 07 2003 Part of Public Record

REPLY IN OPPOSITION TO
PETITION FOR A DECLARATION
REGARDING THE RATE PRESCRIPTION
ON COAL MOVEMENTS FROM RAWHIDE,
WYOMING TO OKLAUNION, TEXAS

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Dated: May 7, 2003

Attorneys & Practitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

WEST TEXAS UTILITIES COMPANY,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 41191
	)	
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

**REPLY IN OPPOSITION TO
PETITION FOR A DECLARATION
REGARDING THE RATE PRESCRIPTION
ON COAL MOVEMENTS FROM RAWHIDE,
WYOMING TO OKLAUNION, TEXAS**

AEP Texas North Company ("AEP Texas"), successor in interest to Complainant West Texas Utilities Company, pursuant to 49 C.F.R. Part 1104.13 (a), hereby replies in opposition to the Petition filed on April 17, 2003 by The Burlington Northern and Santa Fe Railway Company ("BNSF") seeking a "declaration" regarding the rate prescribed for the transportation of coal in unit trains from the Rawhide Mine in Wyoming to AEP Texas' Oklaunion Generating Station near Vernon, Texas ("Petition").

As explained in this Reply, there is no basis in law for the relief sought by BNSF. Indeed, in asking for a retroactive modification of a prescribed rate without a

hearing, BNSF would have the Board violate several tenets of the law governing common carrier railroad rate prescriptions. BNSF's Petition should be dismissed.

PRELIMINARY STATEMENT

BNSF styles its Petition as one seeking a "declaration" regarding the Board's 1996 rate prescription order in this proceeding.¹ See Petition at 3. In truth, however, there is no "controversy" or "uncertainty" as to the terms of that order that would justify exercise of the Board's power under 5 U.S.C. § 554 (e) and 49 U.S.C. § 721 to issue declaratory relief. See, e.g., F.D. No. 34259, *Chelsea Property Owners -- Petition for Declaratory Order -- Highline*, Decision served November 27, 2002 at 1-2.

The order is clear and unambiguous:

"[W]e direct BN to establish and maintain a common carrier rate for the movement of coal from Rawhide to Oklaunion that does not yield revenues in excess of the 180% r/vc limit set here."

1 S.T.B. at 679. The rate which BNSF established in compliance with this order was \$13.68 per ton, the same rate that has been maintained by BNSF (and paid by AEP Texas) since that time. See Petition at 3.

¹ *West Texas Utilities Company v. Burlington Northern Railroad Company*, 1 S.T.B. 678 (1996), *aff'd. sub nom., Burlington Northern Railroad Company v. Surface Transportation Board*, 114 F.3d 206 (D.C. Cir. 1997).

On its face, BNSF's Petition seeks a *modification* of the Oklaunion prescription, to permit the imposition of a \$4.00 + per ton rate increase on AEP Texas' coal shipments from Rawhide. *See* Petition at 3, 12. Certainly, BNSF is within its rights to request the Board to reopen and revisit a rate prescription, just as AEP Texas would be. BNSF, however, would go much farther: not only does the carrier ask that the Oklaunion prescription be modified, it requests that the Board do so and fix a new maximum rate level summarily, *without any hearing*, and that it authorize BNSF to impose its \$4.00 + per ton rate increase *retroactively*, to the date in 2002 when AEP Texas resumed shipments from the Rawhide Mine. *Id.* at 3-4, 11-13. These requests are without foundation in law or Board precedent, and should be rejected.

When the Board found in 1996 that BNSF had violated the law by charging unreasonable rates for coal shipments to Oklaunion, the carrier lost the ratemaking initiative that it previously enjoyed, and the rate prescribed by the Board became the maximum legal rate. Under the ruling principles of *Arizona Grocery Company v. The Atchison, Topeka & Santa Fe Railway Company*,² a new hearing and a new rate order by the Board are necessary prerequisites to any departure by BNSF from the terms of the 1996 rate prescription.

BNSF argues that a hearing is unnecessary, because the Board can rest a new rate prescription on a seven year-old "electronic workpaper developed by the Board's

² 284 U.S. 370 (1932).

staff....” Petition at 3-4. However, this “workpaper” was not part of the Board’s 1996 prescription order, was never adopted by the Board or incorporated into its original Decision, and is unreliable as an indicator of current stand-alone costs for the Oklaunion movement,³ a finding that is an essential element of any new look at the 1996 prescription.⁴ BNSF’s irrelevant “workpaper” is a wholly inadequate surrogate for the contemporary hearing mandated by *Arizona Grocery*.

Equally unfounded is BNSF’s claim that the Board can allow the carrier to increase AEP Texas’ Oklaunion rate retroactively. Petition at 4, 11-12. The law governing rate prescriptions is clear that modifications can have *prospective* effect only, and the inapposite Eighth Circuit decision in *Iowa Power*⁵ upon which BNSF rests creates no exception to this rule. The focus of *Iowa Power* was the Board’s predecessor’s authority under former 49 U.S.C. § 10707 (d) to suspend new tariff publications -- an authority which no longer exists -- not the prerequisites for modification of a prescribed rate. Moreover, the relief approved in *Iowa Power* remedied the consequences of an

³ See the accompanying Verified Statement of Thomas D. Crowley. As indicated therein, a new hearing will show that in fact, both variable and stand-alone costs for the Oklaunion movement have declined since 1996.

⁴ *San Antonio, Texas v. Burlington Northern, Et Al.*, 364 I.C.C. 887, 893 (1981).

⁵ *Iowa Power and Light Company v. United States*, 712 F. 2d 1292 (8th Cir. 1983), *cert. denied*, 466 U.S. 949 (1984).

agency action outside the scope of its jurisdiction, a clear legal infirmity that has never been alleged in this case.⁶

Finally, there is no legitimate reason for expedited action in this matter, and no legal basis for an “interim” rate increase pending a hearing. *See* Petition at 5, 14. BNSF’s pleas for precipitous action ring hollow in light of the fact that it waited a year or more to bring its claims before the Board,⁷ and its assertions of revenue need (Petition at 5) are irrelevant.⁸ The request for an “interim” rate increase is flatly contradicted by *Arizona Grocery’s* bright line rule that a carrier in BNSF’s position “cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found reasonable.” 284 U.S. at 387.

In 1996, after a full evidentiary hearing, the Board found that BNSF had broken the law and overcharged AEP Texas’ consumers for coal transportation service. As a remedy, the Board prescribed a rate equal to 180% of variable costs as the lawful

⁶ The Board’s jurisdiction to issue the Oklahoma prescription was clear and unquestioned. Further, while BNSF *now* claims that the Board erred in prescribing the maximum rate on the basis of the 180% r/vc threshold, it never raised that argument before the Board or the Court of Appeals when it sought review of the order in 1996. BNSF’s allegation of error is entirely *post hoc*, and relies on rate prescription practices followed by the Board in certain cases decided *after* this one.

⁷ BNSF admits that AEP Texas resumed shipments of coal from the Rawhide Mine under the \$13.68 per ton prescribed rate in 2002.

⁸ Until a new hearing is held and a new rate order issued, any rate in excess of 180% of variable costs is presumptively unlawful. 49 U.S.C. § 10704 (a) (1); *Arizona Grocery*. It is well-settled that a carrier’s status as “revenue inadequate” is not a license to charge unreasonable rates. *E.g., Coal Rate Guidelines -- Nationwide*, 1 I.C.C. 2d 520, 536 (1985).

maximum charge. That ruling was upheld in all respects by the Court of Appeals. Under the law, AEP Texas and its ratepayers are entitled to the continued protection of that remedy unless and until evidence adduced at a new hearing warrants a modification.⁹ BNSF's Petition flies in the face of this lodestar principle.

ARGUMENT

A. The Board's 1996 Decision Was and Is a Valid Rate Prescription for the Rawhide - Oklaunion Coal Traffic

As noted, there really is no dispute over just what it was that the Board found in its 1996 Decision. Proceeding through its application of the stand-alone cost (SAC) constraint of the *Coal Rate Guidelines*, the Board reached a point where the next step involved determining maximum SAC rates for the Oklaunion movement into the future. However, the Board found it unnecessary to make that determination in order to decide the case:

Because BN's current rates produce revenues above the level needed to provide and sustain efficient service to this traffic group, we can conclude that BN is collecting excessively high rates on this traffic. However, to determine the extent to which the particular rate challenged by WTU in this case is excessive,

⁹ It is noteworthy that BNSF has never sought to adjust the Oklaunion rate in *compliance* with the Board's prescription order. Particularly in light of the evidence summarized by witness Crowley in his Verified Statement, this strongly suggests that BNSF likewise is aware that the variable costs of its coal service to Oklaunion have declined over the past seven years.

one must determine the portion of the SAC revenue requirements that should be allocated to the WTU traffic.

The parties propose different methods for allocating the WTRR revenue requirements among the WTRR traffic group.⁸¹ However, as explained in Appendix E, in this case either method would yield a stand-alone rate that would be below 180% of the variable cost to BN of providing service to WTU. Because we have no rate reasonableness jurisdiction over rail rates below the 180% revenue-to-variable cost (r/vc) level, the 180% r/vc level constitutes a floor below which we may not set a maximum reasonable rate. Therefore, we set the maximum reasonable rate level of the WTU traffic at 180% of BN's variable cost of providing service to WTU.

1 S.T.B. at 677-78 (footnote omitted).

BNSF sought reconsideration of the Board's 1996 Decision, and subsequently appealed the ruling to the United States Court of Appeals for the District of Columbia Circuit. However, in neither its petition to the Board nor in its arguments to the Court did BNSF claim that the Board's failure to make a final determination of SAC rates, or its decision to base the prescription on the r/vc threshold, were in error. In reviewing the Board's ruling, the D.C. Circuit specifically noted the form of the rate prescription, and affirmed the 1996 Decision in all respects. *See*, 114 F.2d at 210, 215.

In its Petition, BNSF now for the first time¹⁰ suggests that the Board's Oklahoma prescription order is no longer valid or appropriate, because its form does not follow the "higher of SAC or the r/vc threshold" approach used in the Board's decision in the *APS* proceeding.¹¹ See Petition at 10, 13. However, the fact that in 1997 in *APS* the Board exercised its ratemaking discretion to set specific SAC rates for years into the future along with its variable cost findings in no way undercuts the validity of the 1996 Oklahoma prescription. Indeed, in a decision served some four years after *APS* in *Wisconsin*,¹² the Board followed an approach similar to that taken in this case.

In *Wisconsin*, the Board faced competing evidentiary claims directed to a variety of SAC issues, including operating expenses for the stand-alone railroad. As it did in the 1996 Decision, however, the Board declined to make specific findings on each of these issues, since no matter which side's evidence was accepted the resulting SAC rate was below 180% of variable costs:

Based upon a preliminary review of the parties' operating evidence, we believe that UP's cost figures are somewhat overstated,

¹⁰ BNSF *claims* that if coal had been moving from Rawhide in 2000, the carrier would have asked the Board at that time to change its prescription order in the manner it is requesting now. Petition at 8 n. 6. The *post hoc* nature of this rationalization aside, BNSF still doesn't explain why it waited until April, 2003 when by its own account AEP Texas resumed shipments from Rawhide a year earlier. *Id.* at 12.

¹¹ Docket No. 41185, *Arizona Public Service Company and PacifiCorp v. The Atchison, Topeka and Santa Fe Railway Company*, Decision served September 3, 1997.

¹² Docket No. 42051, *Wisconsin Power & Light Company v. Union Pacific Railroad Company*, Decision served September 13, 2001.

while WPL's are somewhat understated. However, we find it unnecessary to critique each individual element of the parties' competing evidence because, regardless of whose operating cost figures we accept, the resulting SAC rate would be less than 180% of UP's variable cost of providing service to WPL and we cannot prescribe a maximum rate below that level.⁷² Therefore, for administrative convenience we use UP's evidence regarding the operating plan that would be needed to serve the EWRR traffic group, and the associated operating expenses, with certain minor adjustments discussed in **Appendix C**.⁷³ Because we find in favor of WPL (that UP's challenged rate is unreasonable), using UP's evidence demonstrates that neither party is prejudiced by this administrative shortcut.⁷⁴

Wisconsin at 29 (footnotes omitted). The Board went on to prescribe maximum rates at the jurisdictional threshold, and directed the parties to adjust the prescription in future years as new variable cost data became available. *Id.* at 33-34.¹³ While both the complainant and the defendant sought Board reconsideration and, subsequently, court review, neither challenged the Board's approach to the prescription of rates for the future.

The Board possesses considerable discretion to fashion rate prescription orders that are particularly suited to the specific facts of each case and the evidence of

¹³ In *Wisconsin*, unlike the 1996 Decision, the Board included tables showing SAC rates that resulted from its "administrative shortcut." The Board made clear, however, that it expected that the SAC rate level would remain below the jurisdictional floor, which it said excused the need to resolve all competing SAC issues. *Wisconsin* at 71. The Board also emphasized the availability of a petition to reopen, should actual cost trends prove different from the projections used in its analysis. *Id.* at 33.

record. See, e.g., *Baltimore & Ohio Railroad Company v. United States*, 345 U.S. 146 (1953); *Popper-Morson Corporation v. Pennsylvania Railroad Company*, 276 I.C.C. 507, 512 (1949). Cf., *Chicago Board of Trade v. Illinois Central R. Co.*, 329 I.C.C. 529, 532 (1967). The Board's various prescriptions in the 1996 Decision, *APS* and *Wisconsin* are illustrative of this principle. And it is noteworthy that in each case, the Board (or the court) emphasized the availability of reconsideration or reopening and a prospective adjustment in the prescription as offering protection to both parties should circumstances change.¹⁴ The Oklaunion prescription was validly entered, affirmed on judicial review, and respected without further challenge by both BNSF and AEP Texas since its inception. If it is to be modified and another rate established for the Rawhide-Oklaunion coal movement, applicable legal prerequisites must be met. Those are discussed next.

**B. The Oklaunion Rate Prescription Cannot
Be Changed Without a Prior Evidentiary Hearing**

Once the Board prescribed the maximum rate for coal service from Rawhide to Oklaunion, BNSF lost its ratemaking initiative and became statutorily compelled to conform AEP Texas' rate to the terms of the prescription. As set forth at 49 U.S.C. § 10704 (a) (1):

...When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a

¹⁴ See 114 F.3d at 215; *APS*, 3 S.T.B. 70, 79-82 (1998); *Wisconsin* at 33.

different rate and shall adopt the classification and observe the rule or practice prescribed by the Board.

In *Arizona Grocery*, the Supreme Court established the principles that govern how and when a Section 10704 rate prescription can be modified and a different rate established by the carrier:

[R]ates prescribed for the future take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers, and themselves become the legal rate. As to such rates, there is therefore no difference between the legal or published tariff rate and the lawful rate. *The carrier cannot change a rate so prescribed* and take its chances of an adjudication that the substituted rate will be found reasonable. *It is bound to conform to the order of the Commission.* If that body sets too low a rate, the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was unreasonably low. This is true because the Commission, in naming the rate, speaks in its quasi legislative capacity. The prescription of a maximum rate, or maximum and minimum rates, is a legislative quality as is the fixing of a specified rate.

284 U.S. at 387-388 (emphasis supplied). The *Arizona Grocery* principles have been applied consistently in a variety of contexts,¹⁵ and the Board invoked them in an earlier

¹⁵ See, e.g., *United Air Lines, Inc. v. Civil Aeronautics Board*, 518 F. 2d 256, 260 (7th Cir. 1975). Accord, *United States v. Corrick*, 298 U.S. 435 (1936).

phase of this case when BNSF argued -- successfully -- that the Oklaunion prescription only restricted its ratemaking freedom with respect to shipments from Rawhide (the shipments now at issue here). See Decision served November 7, 2000 at 4, citing *Arizona Grocery* and *Petition – Review of WV PSC Decision Pursuant to 49 U.S.C. 11501*, 2 I.C.C. 2d 48 (1986).

BNSF cites no authority to challenge the rule of *Arizona Grocery*; indeed, its Petition does not even acknowledge the doctrine and its application, as the Board already has.¹⁶ Ignoring binding legal authority does not make the authority any less binding, however. In this instance, the issue presented is straightforward and simple: there is a valid rate prescription order in effect that prohibits BNSF from charging a rate higher than 180% of its variable service costs to transport coal from Rawhide to Oklaunion, an order which BNSF now would like to change. The resolution of that issue is equally straightforward: under *Arizona Grocery* and its legacy, the prescription order can only be modified after an evidentiary hearing.

¹⁶ Clearly, BNSF is cognizant of the doctrine, as it weakly offers reasons why the action it seeks should be taken without a hearing. See Petition at 4-5. As shown in Part C, however, BNSF's "no hearing" position is without merit.

**C. An Irrelevant Staff “Workpaper”
Cannot Fulfill the Hearing Requirement**

While the type of hearing that is required before a rate prescription can be modified may vary depending upon the issues raised,¹⁷ it always must afford all parties a “full opportunity” to present evidence and argument in support of their positions. *San Antonio*, 364 I.C.C. at 896. Moreover, the evidence submitted must reflect “current cost data [and] current legal standards.” *Id.* at 893-94.

In its Petition, BNSF argues that the Board should dispense with a hearing and modify the Oklaunion rate prescription solely on the basis of a seven year-old “electronic workpaper” prepared by unnamed members of the Board’s staff. *See* Petition at 3-4, 7. This position is meritless, and should be rejected.

First, the “workpaper” in question has no legal significance in this case. It was not cited, adopted or relied upon by the Board in its 1996 Decision,¹⁸ and cannot be considered probative evidence. *See, Thomas v. Baker*, 925 F. 2d 1523, 1525 (D. C. Cir. 1991); *Ozark Gas Transmission System*, 68 FERC P 61.032 (1994), 1994 WL 363498 (FERC) at 6; Charles H. Koch, Jr., 2 *Admin. L & Prac.* 2d ed. § 5.23. In its

¹⁷ Rate proposals that call upon the Board to make determinations regarding railroad service costs based heavily on factual issues are best considered in a full evidentiary hearing. *See, Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad*, 294 U.S. 499, 510-511 (1935).

¹⁸ Throughout its Petition, BNSF tries to insinuate that the staff document is actually the Board’s work, and that the Board “already has calculated the SAC maximum rate level.” Petition at 4. As shown in the text, however, the *Board* made *no final findings* as to stand-alone costs.

Decision, the Board specifically *declined* to make final findings on stand-alone costs, or to calculate maximum rates based on the stand-alone model. *See* 1 S.T.B. at 677-79. The contents of the staff “workpaper” are not reflected or endorsed in the Board’s prescription order, which BNSF acknowledges was based solely on variable costs and the jurisdictional threshold. *See* Petition at 6-7. As the workpaper itself is not evidence, it hardly can serve as a legitimate surrogate for evidence that would be adduced in a proper hearing.

The other fatal flaw in BNSF’s “no hearing” argument is that the workpaper is based on projections and forecasts made some seven years ago, which do not necessarily reflect the facts and circumstances relevant to a current determination of stand-alone costs for the Oklahoma coal movement. This is important, because under *Arizona Grocery* and its progeny an order modifying a rate prescription can have prospective effect only, and must be supported by “current cost data.” *San Antonio*, 364 I.C.C. at 893; Part D, *infra*.

When BNSF first advocated reliance on its selected workpaper in June, 2000, AEP Texas demonstrated that even then, the workpaper’s assumptions regarding coal volumes, revenues, inflation forecasts, capital costs, etc., were inaccurate as compared to actual data available at that time. *Reply of West Texas Utilities Company To Notice and Justification for Increased Rates*, June 29, 2000, Verified Statement of

Thomas D. Crowley at 5-6. Since that time, the disparities have grown even wider,¹⁹ and include the scope of the traffic group that would be served by the hypothetical carrier on which stand-alone costs are based.²⁰ The present relationship between stand-alone costs and the jurisdictional threshold based on “current cost data” specific to the Oklahoma movement²¹ can only be determined after receipt of updated evidence in an appropriate hearing format. In that evidentiary hearing, AEP Texas expects to show that stand-alone and movement-specific variable costs both have declined since 1996, and that any modification of the current rate should be in the form of a reduction. BNSF appears to harbor a different view. One thing that is clear, however, is that only after a hearing can the Board determine whether the existing prescription should be modified and, if so, how. As a matter of law, a staff workpaper that itself had no relevance to the original prescription cannot satisfy these established requirements.

¹⁹ See the Verified Statement of Thomas D. Crowley which accompanies this Reply.

²⁰ For example, the traffic of at least three coal shippers that currently moves along the route of the stand-alone railroad but was not handled by BNSF in 1996 or had not yet begun to move at that time, would be available for inclusion in a contemporary calculation of stand-alone costs. See Docket No. 42056, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company*, Decision served March 24, 2003 at 21.

²¹ See Decision served March 23, 2001 at 3 (before the Rawhide prescription could be revisited for possible application to other origins, “evidence is needed on...whether there are other significant changed circumstances that would affect the rate analysis.”).

**D. BNSF's Request for a Retroactive
Rate Increase Must Be Denied**

As shown above, the governing statute (49 U.S.C. § 10704 (a) (1)) and the *Arizona Grocery* doctrine preclude BNSF from charging a rate for coal transportation from Rawhide to Oklaunion that is higher than 180% of variable costs, unless and until a “new hearing” is held and a new rate limit is set. *Id.*, 284 U.S. at 387. Equally clear is that any change in the Oklaunion rate can only take effect *prospectively*. As the Supreme Court explained:

[W]hen [the Commission] prescribed a maximum reasonable rate for the future, it was performing a legislative function....[I]t was bound to recognize the validity of the rule of conduct prescribed by it, and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the Legislature itself.

Arizona Grocery, 284 U.S. at 389. *Accord*, *Newhall Land & Farming Co. v. Southern Pacific Company*. *Et Al.*, 205 I.C.C. 755, 757 (1934); *E.W. Briggs & Company v. Chicago, Rock Island & Pacific Railway Company*, *Et Al.*, 188 I.C.C. 11, 12 (1932). In its Petition (at 11-13), BNSF asks that it be allowed to raise the Oklaunion rate by over \$4.00 per ton *retroactively* to 2002, ostensibly on the basis of the Eighth Circuit's decision in *Iowa Power*. However, the unique circumstances of *Iowa Power* are wholly

inapposite to the case at hand, and BNSF's request for a retroactive rate increase must be rejected.

In *Iowa Power*, the Board's predecessor was found to have suspended a proposed rate increase when it lacked jurisdiction to do so. *Id.*, 712 F. 2d at 1294. See also, *Burlington Northern Railroad Company v. Interstate Commerce Commission*, 679 F. 2d 934, 941 (D.C. Cir. 1982). The operative event was a suspension order issued in the face of enactment of a new statute by Congress, not the retroactive repeal of a rate prescription by the agency. The suspension occurred over the carrier's protest, an appeal was taken by the carrier immediately, and upon remand it was found that the agency's "legal error alone had prevented the railroad from collecting the higher rate" from the effective date of the wrongly suspended tariff. Resting on the "reverse reparations" provision of former 49 U.S.C. § 10707 (d) (2), the court permitted the agency to allow the rate increase to take effect retrospectively.²² None of these elements are present here.

It is undisputed that the Board acted within its jurisdiction in 1996 when it prescribed the maximum rate level for coal service to Oklaunion, and its action was specifically upheld on appeal. *Burlington Northern Railroad Company, supra*. While BNSF challenged several components of the Board's 1996 ruling in court, the form of the rate prescription notably was *not* among them. To the contrary, BNSF established a rate

²² The Eleventh Circuit's decision in *Gun South, Inc. v. Brady*, 877 F. 2d 858 (11th Cir. 1989), also cited by BNSF, merely recites the holding in *Iowa Power*. See 877 F. 2d at 862. Its facts have nothing to do with the regulation of railroad rates.

in compliance with the prescription, and assessed it without protest or further, formal challenge for nearly *seven years*, including for at least a year after AEP Texas resumed shipments from the Rawhide Mine. Moreover, the statutory analogy relied upon in *Iowa Power* cannot apply, as the statute in question has been repealed. *Cf., Burlington Northern Railroad Company v. Surface Transportation Board*, 75 F.3d 685, 693 n.7 (D.C. Cir. 1996).

In its Petition, BNSF claims for the first time since entry of the Oklaunion prescription order in 1996 that the Board made a “legal error” in not prescribing the rate at the higher of the jurisdictional threshold or the applicable stand-alone cost. *See* Petition at 13. However, this allegation is supported solely by references to a coal rate decision issued *subsequent* to the Oklaunion prescription. *Id.* The fact that the Board may have followed a different approach in crafting a rate prescription in a different case involving different facts has no effect on the legitimacy of a prior order,²³ particularly one which was judicially affirmed at the time of its issuance. *Cf., Upjohn Company v. Pennsylvania Railroad Company*, 381 F. 2d 4, 5 (6th Cir. 1967). Indeed, it is well-settled that even an agency’s inherent power to correct inadvertent errors cannot be used as a “guise” to change prior decisions to comport with subsequent developments. *See,*

²³ As noted *supra*, in *Wisconsin*, decided after *APS*, the Board again declined to make detailed findings of stand-alone costs and instead based its rate prescription on the jurisdictional threshold.

American Trucking Associations, Inc. v. Frisco Transportation Company, 358 U.S. 133 (1958); *United States v. Seatrains Lines*, 329 U.S. 424 (1947).

BNSF has offered no legitimate justification or authority for retroactive action in this case, and none exists. Consistent with *Arizona Grocery* and the Board's own prior rulings in this docket, BNSF is entitled to seek a new hearing for the purpose of reconsidering the Oklaunion rate prescription.²⁴ Equally consistent with those authorities, however, any resulting orders only can be effective for the future.

E. BNSF's Request for "Alternate Relief" Should Be Denied

There is no basis in law for BNSF's request that the Board authorize an increase in the Oklaunion rate "during the pendency of [BNSF's] petition," or compel AEP Texas to agree to pay BNSF the difference between the prescribed rate and any higher rate that might be set by a later Board order. *See* Petition at 14.²⁵ The mandates of

²⁴ Naturally, this right is subject to AEP Texas' right to participate and present evidence in support of retention of the existing prescription or the establishment of a new, lower maximum reasonable rate.

²⁵ BNSF analogizes to the Board's June 25, 1996 "keep account" order in an earlier phase of this case. *See* Petition at 6. However, that order was issued in response to a request for a stay of the Board's prescription pending appeal. The Board clearly had authority to grant a stay, and as such could condition a decision not to exercise that authority on AEP Texas' agreement to take an action that the Board otherwise could not order AEP Texas to take. Here, by contrast, the Board has no authority to lift the 1996 prescription without a prior hearing. Moreover, since BNSF now bears the burden of proving that the Oklaunion rate prescription should be lifted, there is no "injustice" in requiring BNSF to continue to comply with the prescription while a hearing on its claim is conducted.

49 U.S.C. § 10704 (a) (1), *Arizona Grocery* and cases thereunder are clear: once the Board prescribes a maximum reasonable rate, a rail carrier *cannot* charge a higher rate unless and until a hearing is conducted and a new rate ceiling is set. *Id.*, 284 U.S. at 387.

BNSF argues that an interim rate increase is needed to avert subsequent litigation over retroactive relief should BNSF be found after a hearing to be entitled to raise the Oklaunion rate. However, the Board already has confirmed elsewhere that retroactive relief is not available to either a carrier *or* a shipper if a rate prescription is reopened and changed. In *APS*, BNSF's predecessor claimed that the right to seek to reopen a rate prescription was inadequate to protect its revenue collection opportunities should a full hearing later justify an upward adjustment. The Board rejected the argument:

Santa Fe argues that the opportunity to reopen this proceeding to revise our rate prescription in light of future developments does not adequately protect the carrier. Santa Fe Petition, at 14-16. Santa Fe reasons that we would not be able to reimburse it for reparations or reduced rates that are based on overly optimistic traffic volumes, but that the utility would be able to obtain further reparations and altered rate relief if traffic volumes are greater than predicted. Santa Fe argues that, in view of this alleged dichotomy of remedies for erroneous predictions, we should resolve any uncertainties over future traffic volumes in favor of the carrier.

We do not agree with Santa Fe's assertion that the utility would be able to obtain retrospectively altered rate relief if traffic

volumes are greater than predicted. The shipper's right to seek reparations for unreasonable rates on past movements does not extend to rates that were prescribed by the Board. To hold otherwise would mean that rate prescriptions could never be final. While the Board has the authority to reopen past decisions, that authority is seldom exercised retrospectively, and we know of no instance where the Board or its predecessor has routinely reopened administratively final rate prescriptions to order further, retroactive rate reductions. We expect that any possible further reduction in the rates prescribed for the Cholla plant in light of future developments would be restricted to prospective application. Thus, there is no disparity in treatment.

APS, 3 S.T.B. at 79-80 n. 42. The same ruling should be made here.

Finally, it must be noted that by its own admission, BNSF has been content to abide by the Oklaunion prescription for the past year, as shipments from Rawhide resumed. *See* Petition at 4, 12. Whatever may have prompted BNSF's Petition, the carrier's timing belies any exigency, and no grounds support an end-run around *Arizona Grocery*.

CONCLUSION

The Board's 1996 rate prescription order in this docket established the maximum lawful rate that BNSF may charge for coal transportation from the Rawhide Mine to Oklaunion. Under the governing statute and *Arizona Grocery*, before BNSF can

increase the Oklaunion rate above that lawful maximum, it must demonstrate in an appropriate evidentiary hearing that changed circumstances warrant modification of the Board's prescription.

WHEREFORE, for all the reasons set forth herein, BNSF's April 17, 2003 Petition should be dismissed. If it is not dismissed outright, it should be treated as a petition to reopen the Rawhide rate prescription and the Board should issue an appropriate order setting the matter down for hearing and establishing a schedule for the submission of evidence.²⁶

²⁶ In the interests of efficiency and economy, the Board may wish to consider consolidating any hearing on BNSF's request to reopen the Rawhide prescription with the hearing ordered by the Board in its November 7, 2000 Decision in this docket, to consider the reasonableness of the rates established by BNSF for coal transportation to Oklaunion from Powder River Basin origins other than Rawhide. AEP Texas and BNSF are negotiating over a schedule for that proceeding, per the Board's directive.

Respectfully submitted,

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Dated: May 7, 2003

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Attorneys & Practitioners

**VERIFIED STATEMENT
OF THOMAS D. CROWLEY**

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314. I am the same Thomas D. Crowley that filed a verified statement in this proceeding on June 29, 2000.

I have been asked by counsel for AEP Texas North Company ("AEP Texas"), successor to West Texas Utilities Company ("WTU"), to address the Burlington Northern Santa Fe Railway Company's ("BNSF") request to increase its rate on AEP Texas' coal traffic moving to Oklaunion, Texas on the assumption that stand-alone costs have increased faster than the jurisdictional threshold since the Surface Transportation Board's ("Board") 1996 decision in this proceeding.

BNSF's case for a rate increase to Oklaunion is based primarily upon its contention that the stand-alone cost for the hypothetical West Texas Railroad has increased to \$18.04 per ton in 2003 or a full \$4.36 per ton over the jurisdictional threshold determined by the Board (\$13.68) in its 1996 prescription decision. This contention is further advanced by BNSF's witness Michael Baranowski in a verified statement accompanying the BNSF petition.

I would first emphasize that the Board based its rate prescription on variable cost evidence and not stand-alone cost evidence. In its analysis of stand-alone cost, the Board found all stand-alone rate formulations in the record were below the jurisdictional threshold and therefore it made no stand-alone rate computation of its own. In other words, the Board made no stand-alone rate formulations in the prescription decision. When BNSF refers to "the Board's SAC maximum

rates” in the prescription decision, it misrepresents the facts. The Board truncated its stand-alone cost analysis well short of determining specific stand-alone maximum rates, once it concluded that the specific stand-alone rates proffered by the parties (\$11.82 per ton and \$12.73 per ton) each were below the jurisdictional threshold.

Mr. Baranowski includes as an attachment to his verified statement a Table L, which he states is a workpaper developed by the Board staff prior to the 1996 decision. The Table L presented by Mr. Baranowski is Table L from the workpapers which he says he corrected for a mathematical error. However, the Table L workpaper is not a basis for any of the Board’s treatment of stand-alone costs in the decision.

While Mr. Baranowski incorrectly attempted to demonstrate that BNSF’s variable costs of handling the Oklaunion coal traffic increased between 1995 and 2003, a point I address below, he made no similar attempt to restate stand-alone costs. Rather, Mr. Baranowski accepted the 1996 Workpaper L calculations, estimates and projections as representative of the traffic, operating and economic factors in a calendar year 2003 stand-alone cost determination. This approach is deeply flawed, as it ignores significant changes in key stand-alone cost determinants that have been experienced over the past seven years.

Table 1 below summarizes three (3) major stand-alone cost determinants that have changed since the Board’s 1996 decision. While these are by no means the only determinants that have changed, each of these stand-alone cost elements is included in the Board’s Table L calculations based on the values shown in Column (2). Utilizing publically available data, Table (2), Column (3) demonstrates that the projections used in the workpaper were not confirmed by actual

experience. The amount of the mis-statement of each stand-alone factor projection is expressed as a percentage in Column (4) below.

<u>Item</u> (1)	<u>DCF Factors Used In Decision</u> (2)	<u>Updated DCF Factors</u> (3)	<u>% Change</u> (4)
<u>Capital Costs</u> ^{1/}			
1. Time Period	1992-1994	2001	xxx
2. Cost of Capital	11.89%	10.2%	(-) 14%
<u>Inflation Indices</u> ^{2/}			
3. RCAF-U (5-Year) (quarterly rate)	0.69%	0.40%	(-) 42%
<u>Traffic - 2001</u> ^{3/}			
4. Traffic with additional coal traffic (millions)	49.6	53.7	(+) 8%
^{1/} The use of 1992-1994 average overstates actual capital recovery over the DCF model life. ^{2/} Both future revenues and future operating expenses are overstated in the STB model by using the Column (2) value. ^{3/} The use of 2001 traffic levels in the STB model (Column (2)) understates the traffic available for a current stand-alone analysis (Column (3)).			

Each of the variances in the items in my Table 1 results in an overstatement in the stand-alone rate projections for 2003 in the workpaper. The specifics of these variances are as follows:

1. **Cost of Capital** -- The cost of capital used in the workpaper represents the 1992-1994 weighted average cost of debt and equity for the railroad industry (Table 1, Lines 1 and 2, Column (2)). The Board's 2001 cost of capital findings for the railroad industry are shown in Table 1, Lines 1 and 2, Column (3) and are fourteen (14) percent less than the 1992-1994 average projected in the workpaper.
2. **RCAF-U Indexes** -- In the workpaper calculations, inflation was estimated in future revenues and operating expenses by using a five (5) year historical trend in the change in the Rail Cost Adjustment Factor excluding consideration of productivity changes ("RCAF-U"). The Board's RCAF-U future inflation factor equaled 0.69% per

quarter (Table 1, Line 3, Column (2)) which is 42% greater than actual RCAF-U inflation of 0.40% per quarter during the five years ending 4Q01 time period (Table 1, Line 3, Column (3)).

3. **Traffic Group** -- The workpaper's stand-alone model included annual projections of traffic handled by the stand-alone railroad. For calendar year 2001, the workpaper projected that the stand-alone railroad would handle 49.6 million tons of coal traffic based on its forecast of traffic growth. Utilizing publicly available FERC Form 423 data, I was able to identify 53.7 million actual tons of coal available for inclusion of the stand-alone railroad in 2001 (Table 1, Line 4, Column (3)). My identification of 53.7 million tons of coal in 2001 represents an eight (8) percent increase in traffic levels which can share in the substantial stand-alone investment to benefit all of the stand-alone users.

As demonstrated above, the stand-alone costs included in Table L of the workpapers are not representative of the traffic, operating, and economic factors that exist in 2003. The 1996 workpaper's stand-alone costs overstate stand-alone costs for AEP Texas' traffic in calendar year 2003, very likely by significant measure.

In Paragraph 9 of his verified statement, Mr. Baranowski also suggests that BNSF's variable costs of hauling coal to Oklahoma have increased since 1996, though not as fast as he says (incorrectly) that stand-alone costs have increased. Here, too, however, Mr. Baranowski and BNSF are making assumptions that are not borne out by actual data.

Two straight forward analyses based on publically available data demonstrate that Mr. Baranowski's position on variable costs is also incorrect. First, when the BNSF's 1996 calendar year variable unit costs from the Board's Uniform Railroad Costing System ("URCS") formula are compared to BNSF's 2001 URCS variable unit costs, a decline (not an increase) is shown.

Between 1996 and 2001 (the latest year available), the BNSF variable unit costs declined by approximately 14%.^{1/}

The change in railroad variable costs between 1996 and 2001 also can be approximated by measuring the change in the Rail Cost Adjustment Factor adjusted for productivity changes ("RCAF-A"). The RCAF-A measures the change in railroad costs, while the RCAF unadjusted for productivity ("RCAF-U") measures changes in railroad input prices.^{2/} From 1996 to 2001, the RCAF-A has declined by 15.8%^{3/} which supports the actual decline in BNSF variable costs from 1996 to 2001 discussed above.

The stand-alone and variable cost analyses summarized above and based on publicly available data demonstrate both that BNSF's variable costs (and resulting jurisdictional threshold) and stand-alone costs for the Oklaunion traffic in 2003 are lower than these estimated in 1996, if all the current available costing and revenue data are utilized.

^{1/} Based on the Board's BNSF 1996 and BNSF 2001 URCS formulas -- Total variable costs (D8L614) divided by total gross ton-miles (A1L122). In 1996, the BN total variable costs equaled \$5,392 million and total gross ton-miles equaled 587 billion or a 1996 variable unit cost of \$9.186 per thousand gross ton-miles. In 2001, BNSF total variable costs equaled \$7,122 million and total gross ton-miles equaled 896 billion or a 2001 variable unit cost of \$7.949 per thousand gross ton-miles. When the 2001 variable cost per thousand gross ton-miles (\$7.949) is divided by the same unit cost in 1996 (\$9.186), a reduction of 13.5% results.

^{2/} Mr. Baranowski (p. 5) is incorrect when he implies that the RCAF-U should be used to measure railroad cost changes. As has been well documented over the years in the Ex Parte 290 proceedings, the RCAF-U measures the change in railroad input prices and the RCAF-A measures the change in railroad costs.

^{3/} The 3Q96 RCAF-A equaled 0.626 and the 3Q01 RCAF-A equaled 0.527 or a change of (-) 15.8%.

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, THOMAS D. CROWLEY, verify under penalty of perjury that I have read the foregoing Verified Statement of Thomas D. Crowley, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.


Thomas D. Crowley

Sworn to and subscribed before me
this day of May 5, 2003.

Anthony V. Evanshaw III
Anthony V. Evanshaw III
Notary Public for the State of Virginia

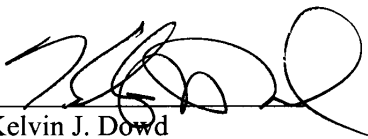
My Commission expires: September 30, 2003



CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2003, I caused three (3) copies of the foregoing Reply In Opposition To Petition For A Declaration Regarding The Rate Prescription On Coal Movements From Rawhide, Wyoming To Oklaunion, Texas to be served by hand upon:

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Kelvin J. Dowd