

PUBLIC VERSION – CONFIDENTIAL INFORMATION
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BEFORE THE
SURFACE TRANSPORTATION BOARD

ARIZONA PUBLIC SERVICE COMPANY,
and PACIFICORP,

Complainants

v.

THE BURLINGTON, NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

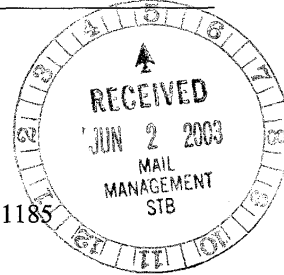
ARIZONA PUBLIC SERVICE COMPANY,
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v.

THE BURLINGTON, NORTHERN AND
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Defendant.



Docket No. 41185

FILED

JUN - 2 2003

**SURFACE
TRANSPORTATION BOARD**

Docket No. 42077

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PETITION FOR RECONSIDERATION

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**SURFACE
TRANSPORTATION BOARD**

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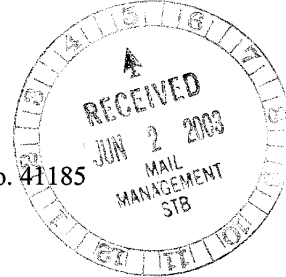
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PETITION FOR RECONSIDERATION

Complainants Arizona Public Service Company ("APS") and PacifiCorp (jointly referred to as "APS/PacifiCorp"), pursuant to 49 C.F.R. Part 1115.3, respectfully petition the Board to reconsider three aspects of its Decision served in this proceeding on May 12, 2003 ("Decision"), on grounds of material error.¹ These are (1) the Board's limitations of the scope of

¹ Counsel for APS/PacifiCorp conferred with Counsel for The Burlington Northern and Santa Fe Railway Company last week and advised that this Petition for Reconsideration would be filed. In light of this filing, the parties have not developed a procedural schedule to govern the reopened proceeding.

re-opening to the original stand-alone railroad (“SARR”) configuration and traffic group, (2) the Board’s vacation of its rate prescription and (3) the Board’s denial of APS/PacifiCorp’s petition for consolidation.

I.

PREFACE AND SUMMARY OF ARGUMENT

The Board’s Decision requires reconsideration and correction because its rulings threaten the integrity of one of the Board’s most important functions, the prescription of maximum reasonable rate levels where carrier initiated rates are found to be unlawfully high. By limiting the scope of reopening to the original SARR configuration and traffic group developed by APS/PacifiCorp in 1994, the Board imposes a new requirement on complainants in stand-alone cost (“SAC”) cases to design a traffic group and SARR that anticipates and accommodates every potentially significant variance that may occur over a twenty-year forward-looking discounted cash flow analysis in any of the numerous factors which must be forecast and projected over that extended period. This ruling is inconsistent with the Board’s earlier decisions in this case, in conflict with the precedent the Board relies upon in its Decision, and both unsound and unnecessary from a regulatory policy perspective. It should be corrected.

The Board should also re-examine and retract its action to lift its rate prescription. This prescription was the result of a proceeding that lasted over three and a half years and entailed a voluminous evidentiary record which was exhaustively analyzed by the Board. It has been set aside without an evidentiary hearing and indeed without any credible evidence to support the likelihood that consideration of changed circumstances will justify any increase in the prescribed rate levels. It is an arduous and expensive exercise for a shipper to undertake a

maximum rate case and obtain a rate prescription. To set a prescription aside, as the Board has here, without any meaningful evidentiary basis for doing so, is unfair, unwise and in violation of Supreme Court precedent.

If the Board reconsiders and changes its rulings on the scope of the reopened proceedings, it should also reconsider and grant APS/PacifiCorp's petition to consolidate Docket No. 41185 and Docket No. 42077, which was denied primarily as a result of the limited scope of the reopening.

II.

BACKGROUND

Docket Number 41185 arises from a complaint filed by APS/PacifiCorp before the Interstate Commerce Commission ("ICC" or "Commission") on January 3, 1994, challenging rates for rail transportation between the McKinley Mine, located near Gallup, New Mexico, and the Cholla Electric Steam Generation Station, located near Joseph City, Arizona, which is jointly owned by APS and PacifiCorp. In July, 1997, over three and a half years later, after extensive motions, discovery, evidentiary filings, and analysis and deliberation by the agency, APS/PacifiCorp finally obtained a decision from the STB which declared the challenged rates to be unreasonable, awarded reparations for past movements and prescribed maximum reasonable rates for the future. See Arizona Public Service Co. v. Atchison Topeka & Santa Fe Ry., 2 S.T.B. 367 (1997) ("1997 Decision").

The parties presented detailed and voluminous evidence on the many issues entailed in a SAC maximum rate case in filings that numbered in excess of 5,400 pages, as well

as extensive data submitted to the Board in electronic format. The Board's 1997 Decision, reviewing and discussing the issues and evidence and setting forth the Board's rulings, occupies 85 printed pages of the second volume of STB Reports.²

Based on circumstances existing in 1993 and 1994, APS/PacifiCorp designed a SARR, the Arizona & Gallup Railroad, serving the McKinley Mine, the Cholla Station, and the Coronado Generating Station of the Salt River Project. This system involves 116.2 miles of track. See 1997 Decision at 398, Appendix A. With regard to the long-range future output of the McKinley Mine, APS/PacifiCorp relied upon testimony from a Vice President of P&M Coal Company (which owns the mine) that P&M had sufficient reserves to extend through 2007-2010 and expected to obtain additional reserves to allow continued production well beyond that point. See Rebuttal V.S. of M. William Dix, Jr. at 4-5. The Board found this evidence to be probative, concluding that "it is quite likely that coal would continue to be available from P&M at the McKinley Mine site through 2013 (the extent of our SAC analysis here)" 1997 Decision at 384.

Defendant, the Atchison, Topeka & Santa Fe Railway Company ("Santa Fe"), sought reopening of the Board's 1997 Decision on several grounds, including error in the Board's findings concerning the volume of coal that would be available long term from the McKinley Mine. In its decision ruling on Santa Fe's petition, the Board affirmed that it was reasonable to assume "that P&M will be successful in obtaining an adequate source of replacement coal from the coal reserves of the Navajo Nation." STB Docket No. 41185, Arizona Public Service Company and PacifiCorp v. The Atchison, Topeka and Santa Fe Railway

² 2 S.T.B. 367-452.

Company, 3 S.T.B. 70, 79 (1998) (“1998 Decision”).

In both the 1997 Decision and the 1998 Decision, the Board acknowledged uncertainty concerning the ultimate availability of coal from the McKinley Mine after existing reserves were depleted, but concluded that if it turned out coal was not available from McKinley, the SAC analysis could be revised based on the new circumstances. 1997 Decision at 385, 395; 1998 Decision at 79-80, 86.

In January 2003, Santa Fe’s successor, The Burlington Northern and Santa Fe Railway Company (“BNSF”), requested the Board to vacate its rate prescription on the grounds of substantially changed circumstances and new evidence relating to the volume of coal available to be shipped from the McKinley Mine. APS/PacifiCorp acknowledged changed circumstances with regard to coal volumes available to be shipped from McKinley Mine in the final few years (2010-13) of the original DCF analysis. However, APS/PacifiCorp demonstrated that BNSF’s evidence relating to the impact of the changed circumstances was woefully deficient on its face and provided no basis for lifting the Board’s rate prescriptions without the presentation by the parties, and consideration by the Board, of an evidentiary record fully addressing the new circumstances and the adjustments to the SAC analysis they might justify.

On May 9, 2003, the Board issued its Decision granting BNSF’s request for reopening, defining the scope of reopening as limited to the original 1994 SARR configuration and traffic group, and lifting its rate prescriptions.

III.

ARGUMENT

1. **The Board Improperly Limited the Scope of Reopening to Original Traffic Group and SARR Configuration**

The Board's decision to restrict the scope of the reopened proceeding to the original SARR configuration and traffic group is (a) inconsistent with its earlier decisions in this case, (b) unsupported by and, indeed in conflict with, the authority cited by the Board for its action, and (c) counter to sound and reasonable regulatory policy and fundamentally unfair.

a. **The Board's 1997 and 1998 Decisions Support Consideration of Any Changes to the Sac That Are Appropriate in Light of Changed Circumstances**

In its Decision the Board quotes a passage from the 1997 Decision which it characterizes as addressing how the SAC constraint could accommodate Arizona's and Salt River's change in coal suppliers if McKinley shut down.

Our SAC constraint may be sufficiently flexible to accommodate a change in suppliers. Because coal from other origins might move over the same routes as the [SARR] (except for the spur from the McKinley Mine to the mainline at Defiance) in order to reach new coal source(s), it is neither necessary nor appropriate, on the record before us, to assume (as [BNSF] does) that the entire [SARR] system would be rendered obsolete if the P&M coal contracts were not renewed or if reserves at the McKinley Mine were exhausted. The reasonable rates to be charged under the new circumstances could be determined by examining any additional costs to the [SARR] to serve the new movement(s).

Docket No. 41185, Arizona Public Service Company and PacifiCorp v. The Burlington Northern & Santa Fe Railway Company, STB served May 12, 2003, at 5 ("Decision") (quoting 1997 Decision at 385 n.51). The Board ignored, however, the last sentence of the footnote it quoted, which reads as follows:

It would be better to make any necessary adjustments to the SAC analysis when we know how the shippers' traffic patterns will be changed, than to attempt to do so now, when any alternations (sic) in the design of the AGRR would be based on pure speculation.

1997 Decision at 385 n.51; see APS/PacifiCorp Reply To Petition To Reopen And Vacate Rate Prescription, at 5, 17, 25 ("Reply"). Obviously, this sentence confirms that the Board contemplated, in 1997 that in a reopened proceeding to deal with exhaustion of the McKinley Mine's reserves, there could be alterations in the design of the AGRR – the SARR system developed by APS/PacifiCorp. The Board's ruling here that the configuration of the SARR may not be changed on reopening thus directly conflicts with its advice to the parties in the 1997 Decision.

The ruling with regard to freezing the traffic group for the AGRR also conflicts with the Board's earlier decisions. As the 1997 Decision recognizes,

To make a SAC presentation, a shipper designs a hypothetical new carrier (a stand-alone railroad or SARR) that is specifically tailored to serve an optimum traffic group with the optimum physical plant or rail system needed for that traffic.

1997 Decision at 380. In its 1998 Decision the Board stated that "... if traffic from the McKinley Mine to the Cholla or Coronado plants were permanently reduced below the levels upon which our SAC analysis is predicated, then the parties can and should have this proceeding reopened and the SAC analysis revised appropriately." 1998 Decision at 79 n.42.

As the evidence before the Board establishes, much of the coal that will replace the McKinley Mine production will come from the Lee Ranch Mine. See Reply, V.S. of Kenneth S. Nordlander at 4, 7; Reply V.S. of Thomas D. Crowley at 3, 9. It is clearly appropriate, therefore, to alter the design of the SARR to add the 52 miles of track³ necessary to serve the Lee

³ See Reply V.S of Thomas D. Crowley at 9.

Ranch Mine. Since Lee Ranch coal also moves to the Springerville plant of Tucson Electric Power Company, it would also clearly be “appropriate” to expand the traffic group to include this tonnage, as well as other tonnage moving from Lee Ranch to other destinations.

It would be nonsensical to suggest that APS/PacifiCorp should be allowed to add trackage necessary to serve the Lee Ranch Mine, but be precluded from taking advantage of the production economies associated with additional traffic moving from that mine. This approach would deprive APS/PacifiCorp of one of the most basic benefits of SAC analysis.

The ability to group traffic of different shippers is essential to the theory of contestability. It allows the captive shipper to identify areas where production economies define an efficient subsystem or alternative system whose traffic is divertible to a hypothetical competitor. Without grouping, SAC would not be a very useful test, since the captive shipper would be deprived of the benefits of any inherent production economies.

Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 544 (1985) (“Coal Rate Guidelines”).

In short, both the 1997 Decision and the 1998 Decision contemplate reopened proceedings that would permit alteration of the SARR and revisions to the SAC analyses that are appropriate based on the changed circumstances. The limitations in the Board’s Decision conflict with these earlier rulings.

Under the Law of the Case Doctrine, the Board is bound by its 1997 and 1998 Decisions which allow modifications to the SARR in the event that future traffic volumes and movement patterns are altered. The Law of the Case Doctrine holds that “the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*.” LaShawn v. Barry, 87 F.2d 1389, 1389 (D.C. Cir. 1996) (emphasis in original). Both the Board

and the ICC have applied the Law of the Case Doctrine in their decisions.⁴ In the present case, the Board recognized in its 1997 and 1998 Decisions that changes to the SARR should be allowed in the event of reopening. The Board's rulings on the scope of reopening in the Decision conflict with the Board's earlier statements.⁵

b. The Precedent Relied Upon By The Board Does not Support Its Decision

In its Decision, the Board gave little explanation for precluding changes to the SARR's configuration or traffic group. The pertinent portion of the Decision states:

In all other respects, the reopening must be limited to the basic assumptions upon which Arizona based its SAC case in 1994. Accord Bituminous Coal-Hiawatha, UT to Moapa, NV, 10 I.C.C.2d 259, 263 (1994) (disallowing enlargement of the geographic scope of a SAC model beyond its original parameters). Arizona based its SAC case on a particular configuration and upon the assumption that the SARR would serve a traffic group limited to coal movements to only two utility plants. This reopening is not an opportunity to expand the configuration of the SARR, or to include new traffic, other than the re-sourced coal traffic destined to Arizona and Salt River.

Decision at 5. The case cited by the Board, Bituminous Coal-Hiawatha, UT to Moapa, NV,

("Nevada Power") does not support the limitations on reopening that the Board has imposed.

In Nevada Power, the ICC dealt with a situation where rate prescriptions entered

⁴ See Finance Docket No. 32717, Wisconsin Dep't of Trans. & East Wisconsin Counties Rail Consortium – Petition for Declaratory Order – Common Carrier Status of Certain Operations in the State of Wisconsin, STB served Dec. 8, 1997, at 3, 4 n.8; see also Pennsylvania R.R. Co. – Merger – New York Central R.R. Co. (Arbitration Review), 3 S.T.B. 834, 839-840 (Dec. 2, 1998); United States Dep't of Energy & United States Dep't of Defense v. Baltimore & Ohio R.R. Co., 10 I.C.C.2d 112, 132-133 (1994).

⁵ While the Law of the Case Doctrine allows for some discretion for a court or agency to reexamine an issue, such discretion is limited to cases in which there is a change of law, newly discovered evidence or manifest error. See Multi-Piece Rim Products Liability Litigation, 653 F.2d 671, 378 (D.C. Cir. 1981). These exceptions do not apply in this case. There are no changes in law or manifest errors, and the only "newly discovered evidence" is evidence that was anticipated by the Board in making its determination in the earlier decisions.

prior to the adoption of the Coal Rate Guidelines were struck down on judicial review by the 10th Circuit. Union Pacific Railroad Company v. United States, 637 F.2d 764 (10th Cir. 1981). In proceedings on remand, the ICC applied the Coal Rate Guidelines to examine the reasonableness of the rates, but concluded in a 1989 decision that additional evidence was necessary to apply the SAC analysis. Accordingly, it directed the parties to submit additional evidence. In evidence subsequently submitted by Nevada Power, it replaced its original SARR – a system of approximately 1,400 miles – with a greatly expanded system of roughly 2,800 miles. In the Nevada Power decision cited here by the Board, the ICC explained that:

UP objected to the doubling of the SARR, arguing that such a greatly enlarged system exceeded the scope of reopening and would needlessly delay the resolution of this dispute. We agreed and, in our January 8, 1991 decision, restricted the geographic scope of the model to its original parameters.

Bituminous Coal – Hiawatha, UT to Moapa, NV, 10 I.C.C.2d 259, 263 (1994).

The situation in Nevada Power was not at all comparable to the situation here. In the unpublished January 8, 1991 Decision in Nevada Power, which rejected the greatly enlarged SARR, the ICC explained that:

We permitted additional discovery following the reopening so that the parties would be able to respond to our questions concerning the existing network, not so that a new network could be designed. If parties in proceedings of this type could change their fundamental network designation every time they received additional data, there might be no end to the analytical process and it would be difficult to bring a proceeding of this nature to a conclusion.

Docket No. 37038, Bituminous Coal – Hiawatha, Utah, to Moapa, Nevada, ICC served January 8, 1991, at 3-4 (“January 8, 1991 Decision”). In contrast to the situation in Nevada Power, the Board is dealing here with a reopening occasioned by changes to the amounts of coal that will be available for shipment from the McKinley Mine during the period beginning in

approximately 2010 and ending at the end of 2013. As the Board's decisions in 1997 and 1998 reflect, there was good reason to believe, when the original case was tried, that the production of coal from McKinley Mine would continue until at least 2013. It cannot reasonably be suggested that allowing APS to add additional traffic in this reopened proceeding because of changes to McKinley Mine volumes occurring some 15 or more years after APS originally designed its SARR threatens the interest of finality in the manner described by the Board in Nevada Power.

Apart from the very different procedural and factual setting in Nevada Power, it is notable that the ICC there actually condoned both reasonable changes to the SARR configuration and the expansion of the traffic group. The Commission made it clear that it did not object to reasonable changes to the original configuration of the SARR. In fact, the decision states:

We recognize that, over a period of time, the traffic available to a SARR will change and that some network changes are legitimate to accommodate this traffic. UP, however, does not contend that no changes in the previous configuration are permitted. Indeed UP itself modified the previous configuration by adding some 400 miles of new branch lines. . . .

UP's changes, however, do not alter the fundamental character of the configuration previously analyzed. They are merely additions of branch lines that adapt the configuration to handle new traffic for which it is suited, not additions of main lines extending into new territory. NPC would be permitted to make the same kinds of modifications.

What NPC proposes, and we reject, is a wholesale departure from the previous configuration.

January 8, 1991 Decision at 3. With regard to the addition of new traffic to the traffic group on reopening, the ICC's Nevada Power decision reflects that "[o]n this reopened record, NPC has offered evidence . . . with a traffic base considerably expanded beyond what was before us in the 1989 Decision." Nevada Power at 262. The ICC accepted the expanded traffic group as proposed by Nevada Power. Id. at 262-268. Thus, the Nevada Power precedent provides no

support for the Board's decision here to exclude evidence of any traffic that was not included in the original traffic group, even if it were otherwise viewed as supporting exclusion of changes to the configuration of the SARR.

**c. Policy Considerations Support Permitting Changes To
The SARR Configuration And The Traffic Group**

The methodology the Board has adopted for SAC computations relies upon a twenty year discounted cash flow analysis. This approach necessarily requires forecasts and projections of traffic volumes, operating costs and revenues for an extended period. It is entirely foreseeable that actual events will play out differently than even the best and most reasonable forecasts and projections. As a result, it is also entirely foreseeable that SAC decisions will need to be reopened.

The Board recognized in its 1997 and 1998 Decisions that this might occur with regard to exhaustion of the reserves available to the McKinley Mine. The Board has also referred to the possibility of reopening in other SAC decisions for consideration of factors that may vary significantly in later years from assumptions relied upon in its DCF analyses. See, e.g., Docket No. 42022, FMC Wyoming Corporation & FMC Corporation v. Union Pacific Railroad, STB served May 12, 2000, at 33 ("We base our SAC analysis on the best projections that are available on the record . . . we remain available to revisit and adjust, as necessary, our findings and actions here."); Docket No. 42051, Wisconsin Power And Light Company v. Union Pacific Railroad Company, STB served September 1, 2001, at 33 ("These projections are the best evidence of record . . . UP . . . may petition to reopen and adjust the rate prescription should these trends shift.").

The Board should not, at a broad public policy level, put parties to SAC cases into a straightjacket that limits them to the same SARR configuration and traffic group that were addressed in the initial case, regardless of the nature or the timing of subsequent changed circumstances that may warrant reopening. Where, as here, the changes in circumstances that justify reopening occur many years after the complaining shipper made the numerous judgments entering into the definition of the traffic group and the design of the SARR, there is clearly no policy imperative to preclude changes to the SARR traffic group or configuration in order to prevent unreasonable delays in the administrative process. Nor are there any grounds for treating APS/PacifiCorp as though they are guilty of any unreasonable behavior in the original development of their SAC analysis which should be penalized.

Very simply, basic principles of fairness support allowing any changes to the SAC analysis that are reasonably related to the changed circumstances justifying the reopening.⁶ The Board's rulings on the scope of reopening in this case effectively impose a burden on complainants in SAC cases to define in their opening evidence the optimal stand-alone traffic group and SARR configuration not based on what they believe to be the most reasonable, or most likely, projections of what will occur over a twenty-year period, but rather based on all possible future outcomes for multiple independent variables. This is not sound and balanced regulatory policy, but one which is heavily and unjustifiably skewed to the benefit of railroads which are only subject to a rate prescription because their rates have been found to be unlawful.

⁶ The Board stated in its 1998 Decision that it "must approach petitions to reopen [on grounds of changed traffic volumes] cautiously, on a case-by-case basis, striving to achieve an appropriate balance between the interests of fairness to all parties and of administrative finality and repose." Id. 3 S.T.B. at 75.

2. The Board Improperly Vacated the Prescriptive Effect of Its Rate Order without a Sufficient Hearing

The Board and both parties agree that Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370 (1932) ("Arizona Grocery"), is the seminal case for application of rate prescriptions. The Board's Decision asserts that its actions are consistent with Arizona Grocery, which states that the ratemaking function is a legislative act and prescribed rates cannot be changed retroactively. Decision at 8. The Decision implies that since the Board's action affects only future rates (that is, the rates which will govern after the effective date of the Decision), it complies with the principles of Arizona Grocery.

The Board's reading, however, ignores the language in Arizona Grocery which states that "[i]f [the Commission] 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." Arizona Grocery at 387; see also Burlington N. R.R. Co. v. Interstate Commerce Comm'n, 679 F.2d 934, 940 n.13 (D.C. Cir. 2000) ("Burlington Northern") (requiring a hearing before modifying a previously prescribed rate). In the Burlington Northern case, the Commission relied upon Arizona Grocery in stating that a carrier was required to demonstrate its need for increased revenues at a hearing in order to justify lifting a prescribed rate. Id. The appellate court agreed that, subject to exceptions not applicable in this case, Arizona Grocery requires a "hearing to set a new rate in place of an outstanding maximum reasonable rate prescription" Id.

In the present case, no hearing has been provided on how, if at all, the changed circumstances may warrant any change to the prescribed rates. The Board explicitly acknowledges uncertainty as to whether the rate should increase, decrease, or even change at all in light of the new circumstances. Decision at 8. The reason for such uncertainty is that the Board has not afforded a hearing to receive and evaluate evidence as to "[t]he reasonable rates to

be charged under the new circumstances . . . by examining any additional costs to the AGRR to serve the new movement(s)” and “any necessary adjustments to the SAC analysis.” 1997 Decision at 385 n.51.

The party seeking relief, BNSF, has clearly not made any credible evidentiary showing to justify a conclusion that (a) the rate prescription should be lifted or, (b) if it should, that the maximum rates appropriate to the new circumstances would be any higher than the prescribed rates. In fact, the Decision notes, at p. 4, that BNSF’s calculations submitted in support of lifting the prescription are based on an “improper assumption” concerning the obsolescence of the SARR. This is a critical foundation of BNSF’s calculations. See Reply, V.S. of Thomas D. Crowley at 4-5, and Table 1, p.7.

As APS/PacifiCorp’s evidence demonstrates, BNSF’s SAC calculations suffer from numerous major defects and are grossly overstated. Id. In the short twenty-day period afforded to APS/PacifiCorp for reply, it was able to demonstrate that BNSF’s calculations are completely unreliable, yet the Board, in its Decision, entirely ignores this fact and lifts its prescription based solely on the sentiment that “we no longer have the same level of confidence in the current rate prescription as we did when we prescribed that rate.” Decision at 7. This statement is sufficient grounds for reopening the case for a determination of whether the prescription should be changed and, if so, how. It is not a valid basis for lifting a rate prescription entered after a three and a half year process based upon careful consideration of a voluminous evidentiary record and detailed cost findings by the Board’s staff.

In effect, the Board’s Decision imposed an obligation on APS/PacifiCorp to demonstrate that no change/increase of the prescription would be appropriate after an evidentiary hearing. This is not only improper, it violates Arizona Grocery and is inconsistent with the

Board's statements in its 1997 and 1998 Decision which made it clear that if the McKinley Mine's reserves were exhausted, the prescription should not be viewed as presumptively invalid. 1997 Decision at 385 n.51; 1998 Decision at 79 n.42.

a. The San Antonio Case Is Distinguishable from the Present Case

The Board relies upon San Antonio, Tex. Acting By and Through Its City Public Service Board v. Burlington Northern, 364 I.C.C. 887 (1981) ("San Antonio"), as authority on the standard it should apply in determining whether to vacate a rate prescription on reopening. See Decision at 6 (quoting San Antonio at 896). San Antonio does not support the Board's action here. If anything, it confirms the error in failing to afford a hearing in this case to determine if the rate prescription should be lifted.

In San Antonio, the ICC was addressing a situation where it had prescribed rates in one decision and then reconsidered and modified the prescription in two subsequent decisions. The United States Court of Appeals for the District of Columbia Circuit vacated the two latter decisions and remanded to the agency. The issue before the ICC was whether the original rate prescription governed under these circumstances.

The procedural background in the instant case is vastly different. Unlike San Antonio, the instant rate prescription has not previously been reviewed and modified by the Board, nor has any Board order relating to the prescription been vacated by an appellate court. In fact, BNSF did not appeal the Board's rate prescription and [REDACTED]. See Reply at 26, V.S. of Thomas D. Crowley at 10.

Further, it is clear that in San Antonio, the parties had far greater opportunity to be heard and exercised that opportunity. As the Commission noted:

In this case, we believe the parties have had and have exercised an opportunity to be heard that is fully adequate to resolve the question before us. In filing a rate increase following the Commission's decision in I. & S. No. 9253, supra (i.e., Suspension Docket No. 70225), the railroads filed a justification statement, including evidence on the cost of service, to which San Antonio replied, challenging that evidence and setting forth its arguments as to why the rate should not be allowed to become effective. Indeed, the carriers and San Antonio have been given a full opportunity to present their arguments concerning the continuing validity of the San Antonio I prescription in three separate forums, I. & S. No. 9253, supra, Suspension Docket No. 70225, and, most importantly, the instant petition for clarification. The issues have been fully addressed.

San Antonio at 896 (emphasis added).

Obviously, there was no comparable opportunity afforded to address the issues concerning "the continuing validity" of the rate prescription in this case. It cannot seriously be suggested that "[t]he issues have been fully addressed," as the ICC found in San Antonio.

BNSF requested expedited action on its petition. APS/PacifiCorp responded to the petition within the 20 days allowed under the rules. APS/PacifiCorp thoroughly discredited BNSF's evidence concerning recalculation of the SAC, but this process obviously did not allow APS/PacifiCorp to address fully the relevant issues, which will require the opportunity for discovery and adequate time for the development of evidence.

b. Other ICC Precedent Confirms that When a Case Is Reopened due to Changes In Economic Conditions a Hearing Is Required Prior to Changing or Vacating Prescribed Rates.

Prior cases dealing with changing or vacating rate prescriptions recognize a distinction between the treatment of situations where a rate prescription is vitiated by a change in

law as opposed to new evidence of changed circumstances.⁷

While in some cases the ICC lifted prescribed rates based on limited evidence, most of these rates were no longer applicable due to changes in law. In Consolidated Rail Corp. – Petition to Eliminate Docket No. 28300 Class Rate Prescription, 364 I.C.C. 615 (1981) (“Conrail”), the Commission vacated the prescribed rate because the prescription was inconsistent with new requirements of the Staggers Act. See id. at 619. Similarly, in Southwestern Millers’ League v. Atchison Topeka & Santa Fe Ry. Co., 364 I.C.C. 724, 728-29 (1981), the ICC vacated a rate prescription because it was contrary to newly enacted law and recent case law.

The ICC also provided a limited amount of process to cases where the rate did not meet the jurisdictional R/VC threshold. The ICC vacated a rate prescription by its own motion with minimal evidence in McCarty Farms, Inc. v. Burlington Northern, 1991 WL 246202 (Nov. 20, 1991). The Commission found that Burlington Northern’s rates never exceeded the R/VC standard and thus a maximum reasonable rate prescription was not warranted. Id. at *3; see also Burlington Northern at 940 n.13.

By contrast, in cases where a change in economic circumstances prompted the question of whether the rate should be modified or vacated, the ICC required a showing that economic circumstances warranted a change or vacation of the prescribed rate. In Trainload Rates on Radioactive Materials, Eastern Railroads, 1991 WL 108082 at *5 (Jan. 9, 1991) (“Trainload”), the ICC found that the prescribed rates should not be vacated without a showing by the petitioners that the rate was harmful to them and that a change in circumstances justified

⁷ “[T]he type of hearing that is required and appropriate in particular circumstances depends on the issues involved.” San Antonio at 895 (citing United States v. Florida East Coast Ry., 410 U.S. 224 (1973)).

an increase in rates. Id. In Aggregate Volume Rate on Coal, Acco, Utah to Moapa, Nevada, 365 I.C.C. 389 (1981), the parties moved to reopen the case and reconsider a rate prescription due to error after an appellate court granted a stay of the Commission decision prescribing the rate. The Commission reopened the case subject to court approval (which was granted) and required the railroads to file updated cost schedules and their underlying workpapers that showed the computation of the revised rate prescription they requested. After sufficient evidence was provided, (“The railroads have supplied all necessary evidence.”) the rate was modified. Id. at 392.

The vacation of the rate in the Decision is based on changed economic circumstances, not changes in law.⁸ Both Arizona Grocery and ICC precedents dealing with such situations require a hearing before the rates prescribed by the Board in this case may be changed or vacated.

3. The Board Should, After Correcting The Scope Of The Reopened Proceeding, Consolidate Docket Nos. 41185 and 42077

The Board denied APS/PacifiCorp’s petition for consolidation of Docket No. 41185 with Docket No. 42077 due to “the limited scope of reopening . . . and the different time periods that would be used in the SAC analysis in the two cases.” Decision at 8-9. If the Board reconsiders and corrects its rulings on the scope of reopening as requested above, APS/PacifiCorp submits that consolidation of the two proceedings is appropriate notwithstanding the different DCF periods they entail. There would be an overlap of approximately eleven years,

⁸ Nor can this situation be viewed as entailing “in effect a technical correction” as the board characterized its recent action in Docket No. 41191, West Texas Utilities Company v. The Burlington Northern and Santa Fe Railway Company (Served May 29, 2003) at 3.

(2003-2013) in the two DCF periods and many of the same issues would apply to both SAC analyses. Accordingly, efficiency and economy support consolidation of the two actions.

IV.

CONCLUSION

For all of the foregoing reasons, the Board should reconsider and reverse its May 12, 2003 Decision in this proceeding insofar as it (1) limits the scope of reopening to the original SAC configuration and traffic group, (2) vacates the prescriptive effect of the prior rate, and (3) denies the consolidation of Docket Numbers 41185 and 42077.

Respectfully submitted,

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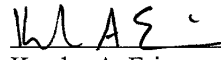
Dated: June 2, 2003

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June 2003, I served a copy of the foregoing
Petition for Reconsideration by hand delivery on designated outside counsel for BNSF, as
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