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June 9, 2003

EXPEDITED CONSIDERATION REQUESTED

208008
ENTERED
Office of Proceedings

JUN 09 2003

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Public Record

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VIA HAND DELIVERY

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



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

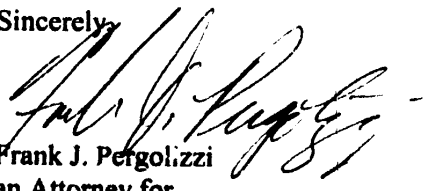
Dear Secretary Williams:

Enclosed for filing in the referenced proceeding, please find an original and 10 copies of a Petition to Stay Pending Petition for Reconsideration or to Reopen. As explained in the Petition, the special circumstances that attend this matter warrant consideration on an expedited basis.

An additional copy of the Petition 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,


Frank J. Pergolizzi
an Attorney for
AEP Texas North Company

Enclosure

208008

EXPEDITED ACTION REQUESTED
BEFORE THE
SURFACE TRANSPORTATION BOARD



WEST TEXAS UTILITIES COMPANY,

Complainant,

vs.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 41191
(Reopened)

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PETITION TO STAY PENDING PETITIONS
FOR RECONSIDERATION AND/OR TO REOPEN

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Dated: June 9, 2003

Attorneys & Practitioners

EXPEDITED ACTION REQUESTED
BEFORE THE
SURFACE TRANSPORTATION BOARD

WEST TEXAS UTILITIES COMPANY,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 41191
	)	(Reopened)
THE BURLINGTON NORTHERN AND	)	
SA'NTA FE RAILWAY COMPANY,	)	
	)	
Defendant.	)	

PETITION TO STAY PENDING PETITIONS
FOR RECONSIDERATION AND/OR TO REOPEN

INTRODUCTION

Pursuant to 49 C.F.R. Part 1115.3 and 1115.5, AEP Texas North Company ("AEP Texas"), successor in interest to Complainant West Texas Utilities Company ("WTU"), hereby petitions for a stay of the Board's May 29, 2003 decision ("*May 2003 Decision*") altering the rate prescription entered by the Board in 1996 for coal transportation from the Rawhide Mine to the Oklaunion Generating Station near Vernon, Texas. *West Texas Utilities Company v. Burlington Northern Railroad Company*, 1 S.T.B. 638, 679 (1996) ("*1996 Decision*"), *aff'd. sub nom, Burlington Northern Railroad Company v. Surface Transportation Board*, 114 F.3d 206 (D.C. 1997). If the *May 2003 Decision* is not stayed, AEP Texas will be required to pay an additional \$4.36 per ton for

movements from Rawhide. AEP Texas intends to seek reconsideration of the *May 2003 Decision* and/or petition to reopen this proceeding for the establishment of a new, lower rate prescription. As demonstrated below, a stay is warranted because there is no statutory mechanism otherwise available that would assure that AEP Texas could recover the difference between a new reasonable rate and the \$18.04 per ton rate set to take effect on June 28, 2003, in the event that AEP Texas is successful on reconsideration and/or reopening.

FACTUAL BACKGROUND

In the *1996 Decision* the Board "directed 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." 1 S.T.B. at 679. In so doing, the Board made clear that it was *not* setting a specific prescribed rate going forward based on a SAC analysis. As the Board stated: "[w]e decline to prescribe a rate for the future at a set dollar amount." *Id.*

In response to the *1996 Decision*, BNSF filed a Petition for Stay Pending Petition to Reopen and/or Petition for Judicial Review, and Alternative Petition to Establish Escrow Fund ("BNSF Petition for Stay"). BNSF asked the Board to stay the effectiveness of its rate prescription based on its claim that otherwise BNSF would have no means to recoup lost revenue in the event that the Board's ruling was reversed or

modified. BNSF Petition for Stay, dated May 13, 1996, at 2. BNSF's Petition for Stay made no mention of any purported "error" in failing to include specified future maximum rate levels under SAC as part of the Board's rate prescription.

BNSF followed its Petition for Stay with a Petition to Reopen. BNSF Petition to Reopen, dated May 23, 1996. BNSF's Petition to Reopen challenged several parts of the Board's SAC analysis, but once again the carrier chose not to raise the failure to prescribe the maximum rate at the higher of the SAC rate or the jurisdictional threshold as one of its alleged errors.

On June 25, 1996, the Board issued a decision denying BNSF's Petition to Reopen. Docket No. 41191, *West Texas Utilities Company v. Burlington Northern Railroad* (STB served June 25, 1996) at 6 ("*June 1996 Decision*"). The Board also responded to BNSF's request for a stay:

We will grant a stay, insofar as our decision would require BN to pay refunds with interest now, and will instead require BN to calculate the amount of refunds due and reimburse WTU, with interest, at the conclusion of the litigation. Otherwise, we will deny the petition for stay pending judicial review, provided that WTU keeps account of the funds at issue, and that WTU agrees, in writing, to reimburse BN, with interest, for the difference between the rate that we are ordering BN to establish in this case, and the rate that is ultimately found to be the maximum reasonable rate, after judicial review is completed.

Id. at 1-2.

Nearly four years later, BNSF returned to the Board seeking approval to increase its common carrier rates for non-Rawhide mine origins. *See* Notice and Justification for Increased Rates on Coal Movements from Non-rawhide Origins, Or, in the Alternative, Petition for Modification of Rate Prescription, Dated June 16, 2000 ("Notice"). As BNSF correctly noted in this Notice, "the Board did not address whether the SAC maximum rate resulting from the DCF analysis would continue to be below the jurisdictional threshold." *Id.* at 6. In support of its requested increase, BNSF admitted that the Board had not included SAC findings in the *1996 Decision*. *Id.* at 8. However, BNSF asserted that SAC maximum rates were set in an electronic workpaper prepared by the Board's staff. *Id.* BNSF argued that since the SAC rate under this staff workpaper then exceeded the jurisdictional threshold, "the appropriate rate under the Board's analysis is the SAC maximum rate set forth in Table L of the electronic workpapers." *Id.* at 9.

By decision served November 7, 2000, the Board addressed BNSF's Notice. Docket No. 41191, *West Texas Utilities Company v. Burlington Northern Railroad* (STB served November 7, 2000) ("*November 2000 Decision*"). The Board's *November 2000 Decision* declined BNSF's invitation to adopt the staff workpaper as part of its *1996 Decision*. Instead it noted that the original prescription (based solely on the r/vc ratio) applied only to the Rawhide origin, and that it "will . . . reopen this proceeding" to

address AEP Texas' opposition to BNSF's attempt to apply its new rate to the non-Rawhide origins. *November 2000 Decision* at 5.

AEP Texas sought reconsideration of the *November 2000 Decision*. In addressing this request, the Board *again* explained: "we prescribed the maximum reasonable rate level at the point that would produce revenues equal to 180% of BN's variable cost of service." STB Docket No. 41191, *West Texas Utilities Company v. Burlington Northern Railroad* (STB served March 21, 2001) at 1, *citing* 1 S.T.B. at 677-78.

In the seven years since the *1996 Decision*, BNSF has applied the Board's \$13.68 per ton rate to all movements from the Rawhide mine to Oklaunion. On April 17, 2003, BNSF submitted a Petition for Declaration Regarding the Rate Prescription on Coal Movements from Rawhide, Wyoming to Oklaunion, Texas ("BNSF Petition for Declaration"). Through this Petition, BNSF sought to alter the Board's existing rate prescription on these movements based solely on the staff workpaper. BNSF again acknowledged that the 1996 Decision expressly declined to prescribe future rates at a set dollar amount. BNSF Petition for Declaration at 6. BNSF also acknowledged that the staff workpaper it relied upon was not part of the Board's *1996 Decision*. *Id.* at 7.

In its *May 2003 Decision* the Board again recognized that the *1996 Decision* "prescribed the maximum reasonable rate level for the WTU traffic at 180% of the defendant's variable cost of providing service to WTU." *May 2003 Decision*, at 2. The Board further noted that there was disagreement between the parties concerning the

method for allocating the SARR's revenue requirements, and that the Board "found no need to revisit that issue because either method would have yielded a SAC rate below the jurisdictional threshold." *Id.* The Board recognized that in 1996 it consciously decided not to render a decision on how to allocate the SARR revenue requirements among the traffic group over time, and that the Board lacks the ability to modify a rate prescription absent an evidentiary hearing. Nevertheless, the Board concluded for the first time that it made a "material error" in not completing its SAC analysis in 1996. Labeling its adoption in 2003 of a staff workpaper as a "technical correction," the Board also concluded that it could lift the prior rate prescription and authorize an immediate \$4.36 per ton rate increase in AEP Texas' rate without any hearing or further proceedings. *May 2003 Decision* at 3-4.

Altering the substantive rights of the parties under a validly entered rate prescription that has been in effect for nearly seven years is improper absent full consideration of all of the changed circumstances that properly should be considered on reopening. Moreover, because the product of this improper action itself is a modified rate prescription, AEP Texas faces immediate and irreparable harm if the new rate is allowed to go into effect pending reconsideration. Under these circumstances, a stay of the effectiveness of the modified prescription is warranted.

ARGUMENT

THE BOARD SHOULD STAY THE APPLICATION OF THE NEW RATE PRESCRIPTION PENDING ITS RULINGS ON AEP TEXAS' PETITIONS FOR RECONSIDERATION AND TO REOPEN.

The Board has outlined the standard for considering requests for stays of its decisions in earlier phases of this case. This test requires:

(1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay.

June 1996 Decision at 5, citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Cuomo v. United States Nuclear Regulatory Com'n*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); and *Virginia Petroleum Job. Ass'n v. Federal Power Com'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). In considering these criteria, the D.C. Circuit has made clear that none of these standards are absolutes:

To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*.

Cuomo, 772 F.2d at 974; *see also*, *Washington Metropolitan Area Transit Commission*, 559 F.2d at 843-844.

As will be shown below, a stay of the *May 2003 Decision* is clearly warranted. AEP Texas not only has a substantial likelihood of success on the merits, but the balance of the equities relating to the three other criteria for granting a stay all tip decidedly in favor of AEP Texas.

A. AEP Texas Is Likely to Succeed on the Merits.

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 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). As AEP Texas explained in its Reply in Opposition to BNSF's Petition for a Declaration, a validly entered rate prescription may not be overturned without a prior evidentiary hearing. AEP Opposition at 12-14, citing *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 387-388. AEP Texas further noted that BNSF's reliance on a staff workpaper that was not part of the original decision cannot serve as a substitute for the hearing requirement. *Id.* at 14-17.

In its *May 2003 Decision*, however, the Board makes an end-run around *Arizona Grocery* and uses the procedural guise of a "technical correction" as a predicate for changing the substantive effect of its original prescription. AEP Texas believes that the Board's decision to rewrite a clear decision by relying upon workpapers that were not

part of the initial decision is erroneous, arbitrary and capricious. As noted above, the Board has great discretion to craft rate prescriptions, and has historically used different approaches. The *May 2003 Decision* substitutes policy developed in rate case proceedings subsequent to the *1996 Decision* and the clear and unambiguous intent of the 1996 Board. There is no basis in the record to support the Board's conclusion that the 1996 Board did not mean its stated intent *not* to prescribe future rate levels.

Under the above circumstances, AEP Texas has a strong likelihood of success on the merits of its Petition for Reconsideration. As the Supreme Court has explained:

... the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in light of changing policies. Such was the case in *United States v. Seatrail Lines, supra*, where it was apparent that the Commission had not reopened prior proceedings to correct a mistake in the issuance of a certificate but to execute a subsequently adopted policy. Cf. *Watson Bros. Transportation Co. v. United States*, D.C. Neb., 132 F. Supp. 905, affirmed 350 U.S. 927, 76 S.Ct. 302, 100 L.Ed. 810.

American Trucking Ass'n, Inc. v. Frisco Trucking Ass'ns, 358 U.S. 133, 146 (1958); see also, *Consolidated Rail Corporation v. Surface Transportation Board*, 93 F.3d 793, 801 (D.C. Cir. 1996).

The Board's *May 2003 Decision* runs counter to the Supreme Court's decision in *American Trucking* because it is based on the post-hoc application of policy developed in rate cases decided *after* the Board had clearly and unambiguously *declined*

to prescribe future rate levels. For example, this decision calculates the rate BNSF will be permitted to charge based on the percentage rate reduction methodology applied in cases decided after the *1996 Decision*. *May 2003 Decision* at 4. Nothing in the Board's Decision supports the use of this methodology. The parties disagreed on the appropriate methodology, and as the *May 2003 Decision* reflects, the Board saw no need to resolve this issue in 1996 because it was basing its prescription on the jurisdictional threshold. *Id.*

Further, the use of a "technical correction" to authorize a \$4.36 per ton increase to a rate prescription flies in the face of *Arizona Grocery*. AEP Texas submits that there have been other shifts in policy and changed circumstances that will affect the calculation of the SAC rates that should apply. All of these changed circumstances should be considered on the record before a nearly 32% rate increase is imposed. For example, the staff workpaper that the Board and BNSF rely upon was based on projections and forecasts made more than seven years ago. As AEP Texas explained in its Reply to BNSF's Petition for Declaration, even in 2000 various workpaper assumptions regarding coal volumes, revenues, inflation forecasts, capital costs, etc., were inaccurate as compared to actual data available at that time. AEP Texas Reply at 16-17. Since that time, the disparities have grown even wider, and include the volume of coal traffic that would be available to the hypothetical carrier on which SAC is based. *Id.* at 17. As AEP Texas further explained, the present relationship between SAC and the

jurisdictional threshold based on "current data" specific to the Oklahoma movement can only be determined after receipt of updated evidence in an appropriate hearing format. *Id.*

Furthermore, AEP Texas is also likely to succeed on the merits of its challenge to the alteration of the rate prescription absent a proper reopening because the alleged "correction" is untimely. While it is generally recognized that agencies have the power to reopen administrative rulings to correct mistakes, this power is not without time limitation. Courts have generally imposed a one-year limitation on the time for agencies to correct mistakes in their decisions. *See e.g., Reich v. Youghiogheny and Ohio Coal Company*, 66 F.3d 111, 115 (6th Cir. 1995); *City of Long Beach v. Department of Energy*, 754 F.2d 379, 387-388 (Temporary Ct. App. 1985). This power has been analogized to the power of Federal Courts to modify judgments under Rules 59 and 60 of the Federal Rules of Civil Procedure. Courts have imposed the one year timeframe for such motions, and have prohibited the use of untimely motions under these rules to correct judgments containing errors of a substantive nature. *Id.*; *see also, Jones v. Anderson-Tully Company*, 722 F.2d 211, 213 (5th Cir. 1984)(noting that mistakes affecting the substantive rights of parties are governed by the Rule 60(b) one-year statute of limitations).

Here, the Board has waited seven years to correct its alleged technical error, despite the opportunity for correction at several earlier phases of this proceeding (*i.e.*, BNSF's Petition to Reopen and BNSF's appeal to the D.C. Circuit) and despite the fact that BNSF unsuccessfully raised this alleged technical error in connection with its Notice

in 2000. If it is correct that it was error to fail to include a calculation of the SAC rate for future years, that error was one BNSF should have appealed in 1996.

In sum, before applying new precedent to alter a validly entered rate prescription in an older rate case, the Board should allow for the development of a complete record to consider all of the changed circumstances and policy shifts that may impact on the calculation of the maximum reasonable rate level that may be charged. Accordingly, BNSF should not be authorized to charge more than 180% of its variable costs unless, and until, all evidence relating to what the appropriate SAC rate should be today is properly considered by the Board.

B. AEP Texas Will Suffer Immediate and Irreparable Harm Absent A Stay.

If the Board's modification to the prescription goes into effect on June 28, 2003, AEP Texas will be required to pay the higher prescribed rate pending a decision on any petition for reconsideration or to reopen. As a result, AEP Texas and its ratepayers will be subjected to increased costs with no opportunity for recovery in the likely event that the new prescribed rate is deemed to exceed maximum lawful levels on reopening.

AEP has been severely prejudiced by the Board's attempt to change the substance of its rate prescription. The workpaper that BNSF and the Board rely upon to calculate SAC rates going forward was not a part of the initial decision. It relies upon a methodology (the percentage reduction methodology) for allocating the SARR's revenue requirements among the SARR traffic group that was not part of the *1996 Decision*. Had

this workpaper been made part of the *1996 Decision*, and had the Board actually adopted the percentage reduction methodology, AEP Texas could have petitioned for reconsideration and/or appealed that decision. AEP Texas is severely prejudiced by the Board's making these findings seven years after the fact. It will now have to pay a rate that is \$4.36 higher than the prescribed rate. While the Board has noted that AEP Texas may seek reopening to present other changed circumstances and new evidence that may affect the appropriate rate levels, under *Arizona Grocery* AEP Texas would not be entitled to recover the difference between the rate it pays beginning on June 28, 2003 and the ultimate rate that the Board finds to be the maximum reasonable rate.

This scenario presents AEP Texas with exposure that would not have existed if the Board had not waited so long to "correct" the technical error that it now cites. Given that SAC calculations for future periods were not embodied in the rate prescription going forward, AEP Texas chose not to appeal the Board's findings on SAC. Likewise, AEP Texas did not endorse the percentage reduction methodology and likely would have challenged the Board's use of this methodology. While it is correct that the Board has endorsed this methodology in recent rate cases, it is also correct that substantial concerns raised have recently been raised about the appropriateness of this methodology given the incentive its use gives to carriers to "game" tariff rates. AEP Texas has been

deprived of the opportunity to point out these flaws in this methodology before its impacts would have driven the rates above the jurisdictional threshold.

AEP Texas submits that a stay is the only way to avoid this irreparable harm. AEP Texas, however, also recognizes that BNSF may be harmed if the effective date of the Board's modification of the rate prescription is delayed and the rate is ultimately set at a level above the \$13.68 per ton level established in the *1996 Decision*. Under the circumstances, AEP Texas asks that the Board grant its request for a stay of the effective date of its modified rate prescription, subject to the requirement that each party "keep account" of the amounts paid during the pendency of the petitions for reconsideration and to reopen and to make the other party whole at the conclusion of the reopening.¹ The Board has adopted a similar approach in earlier phases of this proceeding (*see June 1996 Decision*), as well as in recent decisions in Docket No. 41185, *Arizona Public Service Co. & PacifiCorp v. The Burlington, Northern and Santa Fe Railway Company*, at 8-9 (STB served May 12, 2003) ("APS") (ordering "the removal of prescriptive effect of prior rate order, but instructing parties to keep account of amounts paid during pendency of reopening and to make the other party whole at the conclusion of the reopening, with respect to the amounts paid during the interim, based on what we ultimately find to be the maximum reasonable rate").

¹ AEP Texas has discussed its proposed "keep account" procedure with counsel for BNSF. BNSF was not agreeable to this approach.

In the current situation, if the modification of the rate prescription is allowed to become effective, it will expose the shipper to irreparable harm from a "massive and unexpected" increase in the transportation rate. *Id.* at 8. The immediate impact of the Board's ruling, as noted *supra*, is to increase AEP Texas' rates by \$4.36 per ton as of June 28, 2003. Neither side, however, will be unduly prejudiced or harmed by adopting the keep account approach suggested above.

**C. BNSF Will Not Suffer Irreparable Harm
If the Effective Date of the Decision Is Stayed.**

BNSF will not suffer any harm if the effective date of the decision is stayed and the parties are required to keep account, as suggested in the previous section. If the Board ultimately concludes that the current rates are within the maximum reasonable limits, BNSF will be made whole.

D. The Public Interest Favors a Stay Pending Reconsideration.

The public interest is favored by a stay pending reconsideration and/or reopening. The Board's *May 2003 Decision* raises issues of extreme importance to captive shippers. Congress has vested the Board with the important role of protecting captive shippers from unreasonable rates.² There is a strong public policy in favor of administrative finality of rate prescription orders. That policy is seriously jeopardized if

²The relevant national transportation policy goal is Section 10101(6), which calls upon the Board to "maintain reasonable rates where there is an absence of effective competition."

the Board circumvents this policy by applying new policy and precedent to old rate prescriptions under the guise of making "technical corrections."

Staying the effective date of the *May 2003 Decision* will assure an opportunity for a full consideration of the extent to which all of the changed circumstances warrant a revision to the rate prescription contained in the *1996 Decision*. It will also enable this important matter to be decided by a fully constituted Board, rather than a Board consisting of a single member, as at present. A stay pending reconsideration on reopening is thus in the public interest.

CONCLUSION

For all of the foregoing reasons, a stay of the effective date of the *May 2003 Decision* should be granted expeditiously. In connection with this Stay, the Board should impose a requirement that instructs the parties to keep account of the amounts paid during the pendency of reconsideration and reopening and to make the other party whole, at the conclusion of the reopening, with respect to amounts paid during the interim, based on what the Board ultimately finds to be the maximum reasonable rate.

Respectfully submitted,

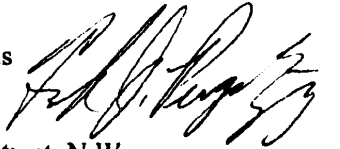
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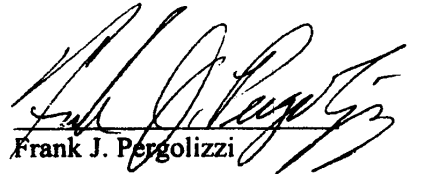
Dated: June 9, 2003

Attorneys & Practitioners

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2003, I caused three (3) copies of the foregoing Petition to Stay Pending Petition for Reconsideration or to Reopen to be served by hand upon:

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Anthony J. LaRocca
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Frank J. Pergolizzi