

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

Samuel M. Sipe Jr.
202.429.6486
ssipe@steptoe.com

June 16, 2003

Via HAND DELIVERY

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

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

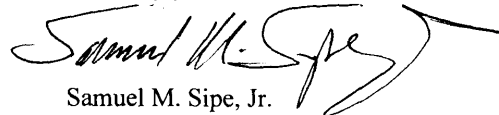
Dear Secretary Williams:

Enclosed for filing in the referenced proceeding, please find an original and 10 copies of BNSF's Reply to AEP Texas North's Petition to Stay.

Kindly date stamp the extra copy provided herein and return it to our messenger for our files.

If you have any questions, please contact the undersigned.

Sincerely yours,



Samuel M. Sipe, Jr.
Counsel for The Burlington Northern
and Santa Fe Railway Company

cc: Kelvin J. Dowd (By Hand Delivery)

ENTERED
Office of Proceedings

JUN 16 2003

Part of
Public Record

WASHINGTON

PHOENIX

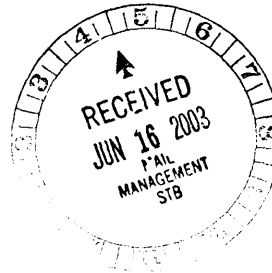
LOS ANGELES

LONDON

208078

1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Telephone 202.429.3000
Facsimile 202.429.3902
www.steptoel.com



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

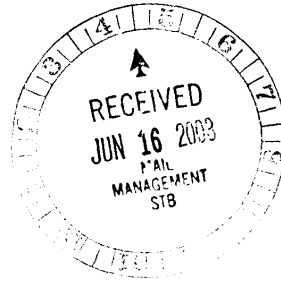
WEST TEXAS UTILITIES COMPANY,

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.



Docket No. 41191

**ENTERED
Office of Proceedings**

JUN 16 2003

**Part of
Public Record**

**REPLY OF THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY TO AEP TEXAS NORTH'S PETITION TO STAY**

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies in opposition to the Petition to Stay Pending Petitions for Reconsideration and/or to Reopen ("Petition") filed in this docket on June 9, 2003 by AEP Texas North ("AEP Texas").¹ By its Petition, AEP Texas asks the Board to stay the effective date of the Board's May 28, 2003 decision ("*May 2003 Decision*") revising its 1996 rate prescription pending a ruling by the Board "on reconsideration and/or reopening." Petition at 4.

AEP Texas' petition is fundamentally misconceived in two ways. First, AEP Texas has already benefitted substantially from the Board's error in failing timely to prescribe the maximum reasonable rate as the higher of the SAC rate or a rate set at the jurisdictional threshold. AEP Texas now suggests that BNSF should not yet be allowed to charge what is indisputably the maximum reasonable rate under the Board's 1996 decision. In effect, AEP

¹ AEP Texas is the successor in interest to West Texas Utilities Company, the original complainant in this docket.

Texas contends that the prior error should be perpetuated for its benefit and that BNSF should continue to forego revenues to which it is entitled under the law. But as the Board said in its *May 2003 Decision*, “[t]he party who benefitted from the mistake is not entitled to prolong the effects of that mistake while it relitigates the original case.” *May 2003 Decision* at 4.

AEP Texas’ petition is also misconceived because it jumbles together reconsideration and reopening, treating the possibility of a subsequent favorable decision on reopening as having the same legal significance as the possibility of a subsequent favorable decision on reconsideration. A subsequent decision on reopening based on the changed circumstances that AEP Texas alludes to would not overturn or otherwise affect the Board’s decision to revise the rate prescription. The revised rate prescription would remain in place until the time of such a decision on reopening, or, at a minimum, until the Board has decided that reopening is appropriate upon review of the petition for reopening.² It is improper for AEP Texas to apply the test for a stay in the context of a possible decision on reopening that would be unrelated to the merits of the Board’s *May 2003 Decision*. See, e.g., *St. Louis S.W. Ry. Co.—Trackage Rights over Missouri Pac. R.R. Co.*, Finance Docket No. 30,000 (Sub-No. 16), 1988 WL 225810, at *3 (I.C.C. Feb. 4, 1988) (denying request for stay of reopening pending petition for reconsideration, when the reopened issues did not include the error that would be challenged on reconsideration).

In determining whether a stay is warranted, the Board should assess AEP Texas’ likelihood of prevailing on the merits only with reference to a possible petition for reconsideration of the Board’s *May 2003 Decision*. The likelihood that AEP Texas would succeed in overturning that decision is virtually nil. The decision to revise the rate prescription was based on a straightforward application of the law and did not represent a change in policy as

² See *Arizona Public service Co. v. The Burlington Northern and Santa Fe Railway Co.*, Docket No. 41185 (Decision served May 12, 2003) (“*2003 APS Decision*”)

AEP Texas contends. And because the issue of the proper method for determining what SAC rate to prescribe was solely a matter of law, there was no need for an evidentiary hearing.

AEP Texas' claim of irreparable injury fails because it is overreaching. AEP Texas claims that absent a stay it will not be made whole "in the likely event that the new prescribed rate is deemed to exceed maximum lawful levels on reopening." Petition at 14. But the effect of a different rate prescription on reopening would be prospective only and, at the earliest, would be in place prospectively from the effective date of a Board decision reopening the proceeding and suspending the effect of the prescribed rate pending a hearing on the reopening petition. *See Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 387-88 (1932); *2003 APS Decision*. AEP Texas apparently hopes that a grant of a stay would allow it to obtain retroactive application of a decision on reopening, notwithstanding the fact that the Board in its *May 2003 Decision* has denied retroactive relief to BNSF. The Board should not condone this effort. It would be error for the Board to hold out the prospect of retroactive relief to AEP Texas in the guise of a stay when the Board has already rejected BNSF's far more meritorious request for retroactive relief.

AEP Texas' arguments under the other prongs of the Board's stay test are equally unavailing. The equities weigh heavily in favor of BNSF here, both because the relief AEP Texas seeks would prolong the effects of the Board's error and because AEP Texas improperly seeks to use the possible outcome of a decision on reopening as the basis for a stay. The petition should be denied.

BACKGROUND

The Board is well aware of the background facts underlying its *May 2003 Decision* and they need not be repeated here.

ARGUMENT

I. AEP Texas Has Not Met the Board's Test for Granting a Stay

As AEP Texas notes, the Board set out the test for granting a stay in an earlier decision in this docket. Under the Board's test, the moving party must show

(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.

West Texas Util. Co. v. Burlington N. R.R. Co., No. 41191, 1996 WL 347102, at *3 (I.C.C. June 25, 1996) ("*June 1996 Decision*").

As discussed below, AEP Texas has not met this test. Its stay request should therefore be denied.

A. AEP Texas Has Not Shown a Strong Likelihood that it Will Prevail on the Merits

In assessing whether AEP Texas has satisfied the first requirement of the Board's stay test, it is necessary to identify what issue AEP Texas must show a strong likelihood of prevailing upon. AEP Texas' petition suggests it is entitled to a stay if it demonstrates a strong likelihood of success on either of two issues: (1) the issue raised on reconsideration of whether the Board erred in correcting its 1996 rate prescription in the *May 2003 Decision*, or (2) the issue raised on reopening of whether the rate prescription should be modified in light of changed circumstances. The alternative focus on the possible outcome of a reopening proceeding is improper. The Board cannot assess the likelihood that AEP Texas will prevail on reopening, much less conclude that AEP Texas has a "strong likelihood" of success on reopening. The Board has no way of knowing what evidence AEP Texas might present on reopening, if in fact it pursues reopening.

The focus of the “strong likelihood” of success analysis must be on the outcome of a possible proceeding on reconsideration.

AEP Texas has at most a very slim chance of prevailing on a petition for reconsideration of the Board’s *May 2003 Decision* or on a petition to review that decision, if one could be brought.³ The purpose and effect of the *May 2003 Decision* was to correct a material error of law in the Board’s 1996 rate prescription. The correctness of the Board’s decision on the legal issues addressed in the *May 2003 Decision* is beyond serious dispute.

First, there is no dispute that where the Board applies the SAC test and the challenged rate is found to exceed the SAC rate, the defendant railroad is permitted to charge a rate at the SAC level. The whole thrust of the SAC test is to determine “an appropriate rate cap.” *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 542 (1985). In its 1996 decision in this case, the Board found that the appropriate rate cap was initially below the jurisdictional threshold, which represents the absolute minimum at which the Board may prescribe a rate. See *West Texas Util. Co. v. Burlington N. R.R. Co.*, 1 S.T.B. 638, 677-78 (1996) (“*April 1996 Decision*”). The *May 2003 Decision* stands for the proposition that the Board could and should have said in 1996 that BNSF would be permitted to charge a rate up to the SAC level if and when the SAC rate exceeded the jurisdictional threshold. There is no element of legal error in this revision to the prior rate prescription.

Second, there is no dispute that the Board’s precedent establishes that the SAC maximum rate be determined on the basis of the pro rata reduction method advocated by BNSF in 1996 as opposed to the ton-mile allocation method advocated by AEP Texas. Although this issue was

³ For purposes of replying to AEP Texas’ stay petition, BNSF has not analyzed whether AEP Texas could satisfy requirements of finality and ripeness so as to obtain review of the *May 2003 Decision* by a United States Court of Appeals.

not resolved in the 1996 decision, it had been resolved by the time the Board issued its *May 2003 Decision*.⁴ There can be no legal error in the Board applying the law in effect at the time of its decision.

Third, there is no dispute that the Board can and did correct its material error and revise the rate prescription “without changing any of the findings in the original decision.” *May 2003 Decision* at 4. AEP Texas makes much ado about the Board’s supposed reliance on “a staff workpaper that was not part of the original decision,” as if the workpaper is somehow new evidence pulled out of a hat for purposes of the *May 2003 Decision*. See Petition at 10. But AEP Texas knows perfectly well that the workpaper, which was created in 1996 as a product of the Board’s DCF analysis, set forth the SAC rates that necessarily would be generated by the 1996 DCF analysis once the Board decided to prescribe the SAC rate based on the pro rata reduction method.

The foregoing propositions are the ones that led to the Board’s conclusion in the *May 2003 Decision* that it must, as a matter of law, revise its 1996 rate prescription. Each proposition is unassailable. AEP Texas argues that the Board erred by engaging in “the post-hoc application of policy developed in rate cases decided *after* the Board had clearly and unambiguously *declined* to prescribe future rate levels.” Petition at 11-12 (emphasis in original). But the principles relied upon by the Board in its *May 2003 Decision* were not the product of shifting

⁴ While it did not need to resolve the issue in 1996, the Board did note that “WTU’s method arguably relies upon an arbitrary allocation of stand-alone cost per net ton-mile that has been previously rejected.” *April 1996 Decision*, 1 S.T.B. at 716 n.171 (citing *Coal Trading Corp. v. Baltimore and Ohio R.R. Co.*, 6 I.C.C.2d 361, 380 (1990)).

policies, they were the product of established legal principles governing rate cases brought under the SAC test.⁵

AEP Texas also argues that, under *Arizona Grocery*, “a validly entered rate prescription may not be overturned without a prior evidentiary hearing.” Petition at 10. As applied to the present situation, this statement is incorrect for several reasons. First the Board’s *May 2003 Decision* did not “overturn” the prior rate prescription. It revised that rate prescription to make it conform with governing law. Second, *Arizona Grocery* does not require an “evidentiary” hearing. The decision merely refers to a “hearing” and AEP Texas itself acknowledged in a prior pleading the “the type of hearing that is required before a rate prescription can be modified may vary depending upon the issues raised. . . .”⁶ This comports with the ICC’s holding that “the type of hearing that is required and appropriate in particular circumstances depends on the issues involved.” *San Antonio, Tex. v. Burlington Northern, Inc.*, 364 I.C.C. 887, 896 (1981). When the parties have an opportunity to be heard that is fully adequate for the Board to resolve the questions pending before it, no further hearing is required. *See id.* Indeed, in *Howard Sober, Inc. v. ICC*, 628 F.2d 36 (D.C. Cir. 1980), no hearing was needed to correct an erroneous certificate of public convenience and necessity. The court stated that holding a hearing in these circumstances “would waste the Commission’s limited resources by forcing it to reconsider an

⁵ AEP Texas relies on the statement in *American Trucking Ass’n, Inc. v. Frisco Trucking Ass’n*, 358 U.S. 133, 146 (1958) that “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.” Petition at 11. That proposition is entirely inapposite here. This is not a case in which the Board doubted the wisdom of its 1996 rate prescription “in light of changing policies.” This is a case in which the Board concluded that it had failed to formulate the rate prescription fully in the prior decision. The revision was made to implement the law governing SAC rate prescriptions and not to give effect to a new Board policy.

⁶ AEP Texas’ Reply in Opp’n to Pet. for a Decl. Regarding the Rate Prescription on Coal Movements from Rawhide, Wyo. to Oklaunion, Tex. (May 7, 2003) at 5.

action that was already decided but improperly executed.” *Id.* at 42. *See also Chavez v. Balesh*, 704 F.2d 774, 776-77 (5th Cir. 1983) (no notice required when court corrects innocent omission that was apparent from the face of the record).

In the present case, AEP Texas had an opportunity to present its position fully on the legal issue of revising the rate prescription and it in fact did so. The Board’s decision to revise the rate prescription was made as a matter of law without the need to take new evidence or change any of the findings in the original decision.

In fact, the hearing that AEP Texas wants is entirely unrelated to the merits of the *May 2003 Decision*:

[T]he 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.

Petition at 14. Such a hearing would have no bearing on the legal correctness of the *May 2003 Decision*. The Board did not err in revising the rate prescription prior to reopening the proceeding to consider changed circumstances or new evidence.

Finally, AEP Texas argues that it “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.” Petition at 13. AEP Texas cannot prevail on this point.

By statute, the Board can reopen a proceeding to correct a material error “at any time.” 49 U.S.C. § 722(c). The *May 2003 Decision* held that the failure to prescribe a maximum rate at the higher of the statutory jurisdictional rate or the SAC rate was a material error. *May 2003*

Decision at 3. AEP Texas does not dispute that the Board's omission constitutes material error.

The Board was therefore within its authority to correct that error at any time.

AEP Texas incorrectly analogizes this case to federal rules that would have no application to this correction. Under Rule 60(a) of the Federal Rules of Civil Procedure, courts may correct clerical errors, omissions, and oversights at any time. The one-year limitation identified by AEP Texas applies only to certain kinds of errors listed in Rule 60(b), such as excusable neglect, newly discovered evidence, and fraud or other misconduct of a party. This case concerns an inadvertent omission more properly analogized to errors under Rule 60(a), not the errors of judgment identified in Rule 60(b).⁷

Moreover, the cases cited by AEP Texas are inapposite here. Neither *Reich v. Youghioghenny and Ohio Coal Co.*, 66 F.3d 111 (6th Cir. 1995), nor *City of Long Beach v. Department of Energy*, 754 F.2d 379 (Temp. Emer. Ct. App. 1985), imposed a one-year limitation on agencies' ability to correct accidental omissions of this kind.⁸

⁷ AEP Texas wrongly relies on *Jones v. Anderson-Tully Co.*, 722 F.3d 211 (5th Cir. 1984) (per curiam) as support for the argument that a one-year limitation applies to the correction of mistakes that affect the substantive rights of parties. *See* Petition at 13. *Jones* involved a district court's order in a quiet title case that, as was discovered several years later, incorrectly described the boundaries of certain property. The court held that this was not a clerical error under Rule 60(a), but "one of substance" governed by Rule 60(b)(1). *See id.* at 212. The court's decision to apply the time limitation of that rule depended on the nature of agency's conduct in making the mistake—not upon the error's effect on the parties. Indeed, AEP Texas' reading of this case cannot be correct, because only those errors that substantively affect the parties are likely to be noticed or contested in the first place.

⁸ In *Reich*, the Sixth Circuit held that an agency's correction was not barred by the theory of administrative finality, which prevents a litigant from obtaining review of an administrative rulemaking after the statutory deadline for the appeal has lapsed. *Reich*, 66 F.3d at 115-16. The court rejected the argument that the agency's adjustment to the amount of interest owed by the defendant was an administrative rulemaking. *Id.* at 116. In dicta, the court observed that the agency corrected its error within one year. *Id.* The court did not hold that inadvertent omissions could not be corrected after this period. (Footnote continued on next page.)

For all the foregoing reasons, there is scant likelihood that AEP Texas would prevail on the merits if it seeks reconsideration or judicial review of the *May 2003 Decision*.

B. AEP Texas' Irreparable Harm Argument Is Unavailing

Given the weakness of AEP Texas' position under the likelihood of success prong of the Board's stay test, it should not be entitled to a stay even if it could show substantial irreparable harm. In fact, AEP Texas' irreparable harm argument is erroneous and overreaching.

The proper focus of the irreparable harm inquiry should be the effect on AEP Texas of a subsequent decision by the Board on reconsideration that the Board erred in revising its rate prescription. But AEP Texas' focus is different and improperly broad. AEP Texas claims that absent a stay it will not be made whole "in the likely event that the new prescribed rate is deemed to exceed maximum lawful levels on reopening." Petition at 14.

AEP Texas in effect contends that, but for the *May 2003 Decision*, it would have the right to be made whole retroactively as a result of a subsequent modification of the rate prescription on reopening, notwithstanding the fact that the Board denied retroactive relief to BNSF in the *May 2003 Decision* that AEP Texas complains about. Indeed, the Board has ruled twice within recent weeks that it lacks authority to "repeal its own enactment [of a rate prescription] with retroactive effect." *May 2003 Decision* at 6; *see also 2003 APS Decision* at 8. Therefore, even if the Board were to modify or suspend the prescriptive effect of the current rate prescription at some point in the future after deciding that reopening is warranted, it would be inconsistent with

(Continued) In *City of Long Beach*, the court addressed an agency's correction of an arithmetic error by analogizing the agency's authority to correct its mistakes to the district court's power under Rule 60(a) of the Federal Rules of Civil Procedure. *See City of Long Beach*, 754 F.2d at 387. The court did not impose any time limitation on the agency to correct this mistake. *See id.* Indeed, this case was a review of a district court decision affirming an agency correction that occurred over three years after the agency had first made the mistake. *See id.* at 382-84.

the Board's recent rulings to give retroactive effect to such a decision. AEP Texas should not be permitted to obtain retroactive revocation of a rate prescription by obtaining a stay of a decision that is unrelated to the merits of a possible new rate reasonableness determination on reopening.

In a different circumstance, if AEP had indicated that the only relief it would request was reconsideration of the Board's May 28, 2003 decision on grounds of alleged material error, it might be appropriate to impose a keep account order, so long as BNSF were entitled to collect the prescribed SAC rate (\$18.04 per ton in 2003) pending a Board decision on reconsideration. Here, however, AEP Texas suggests under its keep account proposal that it would continue to pay the \$13.68 rate. More important, AEP Texas has made clear that it may well seek both reconsideration and reopening and claims that it should never have to pay more than what the Board determines to be the maximum reasonable rate at the conclusion of a reopening proceeding. The proposed keep account order goes too far and could provide AEP Texas with a retroactive recovery to which it is not entitled.

It is particularly inappropriate – and inequitable – for AEP Texas to seek to preserve the opportunity to be made whole retroactively when the Board has already ruled that BNSF is barred from retroactive recovery of revenue on Rawhide movements since Rawhide reopened in 2002. BNSF was denied such recovery despite the fact that it was entitled to assess the higher rates and would have done so but for the Board's material error. In contrast, there is no realistic prospect that the *May 2003 Decision* will be found to constitute material error. There can be no irreparable harm to AEP Texas in denying its stay request under these circumstances.

C. The Stay Proposal Entails Risk of Harm to BNSF

AEP Texas claims that "BNSF will not suffer any harm if the effective date of the decision is stayed and the parties are required to keep account. . . ." Petition at 17. That assertion is not accurate. If AEP Texas obtained a stay until the conclusion of a Board decision

on reopening, which is what AEP Texas seeks, BNSF could be substantially harmed if the Board prescribed a new SAC rate lower than that in effect under the revised prescription because BNSF would be required to forego revenues that it is entitled to collect under the Board's formulation of the rate prescription in the *May 2003 Decision*.

D. There Are No Public Interest Considerations that Support a Stay

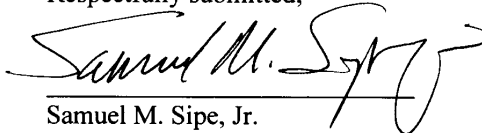
Under the public interest prong of the Board's stay test, AEP Texas asserts that "[t]here is a strong public policy in favor of administrative finality of rate prescription orders." Petition at 17. But the public interest is not served by perpetuating a legally erroneous rate prescription. The public interest is served by a correct application of the law, and the Board correctly applied the law regarding rate prescriptions under the SAC standard when it revised the original 1996 prescription.

AEP Texas also refers, under the public interest heading, to "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 *[April] 1996 Decision*." Petition at 18. As BNSF has explained, the prospect of a new rate prescription on reopening is not the proper focus of the stay petition. There is no legitimate public interest that would be served by granting the requested stay.

CONCLUSION

For all the foregoing reasons, BNSF respectfully requests that the Board deny AEP Texas' stay petition.

Respectfully submitted,



Samuel M. Sipe, Jr.
Linda S. Stein
STEPTOE & JOHNSON, LLP
1330 Connecticut Ave. N.W.
Washington, D.C. 20036
Phone (202) 429-6486
Facsimile (202) 429-3902

OF COUNSEL:

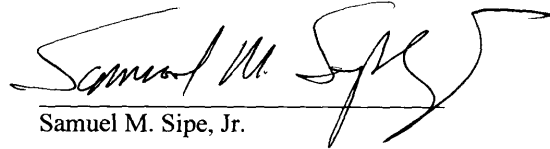
Richard E. Weicher
Michael E. Roper
THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY
2500 Lou Menk Drive
P.O. Box 961039
Ft. Worth, TX 76131-0039
Phone (817) 352-2353
Facsimile (817) 352-2397

June 16, 2003

CERTIFICATE OF SERVICE

I hereby certify that this 16th day of June 2003, a copy of the foregoing was served by
hand delivery on:

Kelvin J. Dowd
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036


Samuel M. Sipe, Jr.