

SLOVER & LOFTUS
ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036-3003

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
KAREN HASSELL HERREN
KENDRA A. ERICSON

June 18, 2003

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TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:

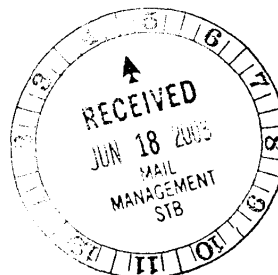
fjp@sloverandloftus.com

EXPEDITED CONSIDERATION REQUESTED

VIA HAND DELIVERY

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

208115



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 the Petition for Reconsideration of AEP Texas North Company. As explained in the Petition, the special circumstances that attend this matter warrant consideration on an expedited basis. We have enclosed a check in the amount of \$150 to cover the applicable filing fee.

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

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JUN 18 2003

**SURFACE
TRANSPORTATION BOARD**

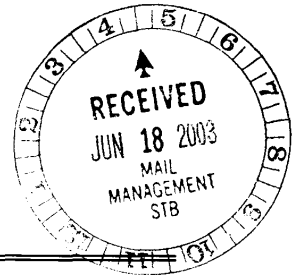
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FILED

JUN 18 2003

**SURFACE
TRANSPORTATION BOARD**

EXPEDITED ACTION REQUESTED
BEFORE THE
SURFACE TRANSPORTATION BOARD



WEST TEXAS UTILITIES COMPANY,

Complainant,

v.

**THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,**

Defendant.

Docket No. 41191

FILED

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**SURFACE
TRANSPORTATION BOARD**

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PETITION FOR RECONSIDERATION

AEP TEXAS NORTH COMPANY
1 Riverside Plaza
Columbus, Ohio 43215

FEE RECEIVED

JUN 18 2003

**SURFACE
TRANSPORTATION BOARD**

Timothy P. Stanley, Director of
Transportation and Marketing
David M. Cohen, Senior Counsel
155 West Nationwide Boulevard
Suite 500
Columbus, OH 43215

OF COUNSEL:

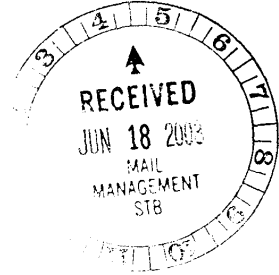
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

William L. Slover
Kelvin J. Dowd
Christopher A. Mills
Frank J. Pergolizzi
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: June 18, 2003

Attorneys & Practitioners

EXPEDITED ACTION REQUESTED
BEFORE THE
SURFACE TRANSPORTATION BOARD



WEST TEXAS UTILITIES COMPANY,

Complainant,

v.

**THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,**

Defendant.

Docket No. 41191

PETITION FOR RECONSIDERATION

I.

SUMMARY

Pursuant to 49 C.F.R. Part 1115.3, AEP Texas North Company ("AEP Texas"), successor in interest to Complainant West Texas Utilities Company ("WTU"), hereby petitions for reconsideration 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. Cir. 1997).

Reconsideration is warranted because the Board committed material error by: (i) altering the rate prescription seven (7) years after-the-fact without the benefit of a hearing and careful consideration of all of the factors impacting the prescription; and (ii) altering the substantive rights of the parties to the dramatic detriment of AEP Texas under the improper guise of the correction of a “ministerial” or “technical error.” As explained below, the Board’s *May 2003 Decision* goes well beyond the mere correction of a “technical error” and has a major and adverse substantive impact on AEP Texas’ rights under the rate prescription.

II.

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.*

BNSF had several opportunities to seek review of this deliberate decision by the 1996 Board *not* to set a specific prescribed rate going forward. *See, e.g.*, BNSF Petition for Stay Pending Petition to Reopen and/or Petition for Judicial Review, and Alternative Petition to Establish Escrow Fund, dated May 13, 1996 (making 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 Petition to Reopen, dated May 23, 1996 (challenging several parts of the Board’s SAC analysis, but not raising the failure to prescribe the maximum rate at the higher of the SAC rate or the jurisdictional threshold). Likewise, BNSF chose not to raise this issue when seeking review of the Board’s 1996 *Decision* at the D.C. Circuit (*Burlington Northern Railroad Company*, 114 F.3d at 206), which affirmed the 1996 *Decision* in all respects.

Four years after the 1996 *Decision* was issued and three years after the D.C. Circuit affirmed the decision, 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 observed 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 reflected 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 declined BNSF's invitation to adopt the staff workpaper as part of its *1996 Decision*. Docket No. 41191, *West Texas Utilities Company v. Burlington Northern Railroad* (STB served November 7, 2000) ("*November 2000 Decision*"). Instead it noted that the original prescription (based solely on the r/vc ratio) applied only to the Rawhide origin, and held 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 prescribed 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 again 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 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 acknowledged that in 1996 it consciously decided *not to* calculate specific SAC rates into the future, 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 its SAC analysis in 1996. Labeling its adoption in 2003 of a 1996 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 without consideration of all of the changed circumstances that affect the continued vitality of that prescription is improper and inconsistent with the law. Moreover, because the product of this action itself is a modified rate prescription, AEP Texas faces immediate and irreparable harm if the new rate is allowed to go into effect. The Board should reconsider and reverse its ruling.

III.

ARGUMENT

A. The Imposition of Retroactive Substantive Changes under the Guise of a “Technical Correction” is Improper

In its *May 2003 Decision*, the Board recognized that BNSF’s request for declaratory relief was inconsistent with the plain terms of the *1996 Decision*. The Board rejected BNSF’s claim that the *1996 Decision* prescribed the maximum reasonable rate at the higher of the SAC rate or the jurisdictional threshold. *May 2003 Decision* at 2. As the Board noted: “[t]he prior decision was unambiguous, so it is inappropriate to declare that it said something different from what it clearly said.” *Id.* at 2. The Board was correct to this point – the *1996 Decision* clearly and unambiguously prescribed rates based on the jurisdictional threshold, and deliberately “decline[d] to prescribe a rate for the future at a set dollar amount.” *Id.* at 679.

AEP Texas submits that the Board should have stopped there and denied BNSF’s request for relief on this basis. Instead, however, the Board proceeded to rewrite the *1996 Decision* retroactively, and introduce new conditions on the prescription that it specifically had declined to adopt when previously invited. The Board’s attempt to justify this substantive change to the *1996 Decision* as a mere “technical correction” is improper, for several reasons.

**1. The Board Cannot Substantively Change
a Rate Prescription Without a Proper Hearing**

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). A validly entered rate prescription, however, may not be overturned without an evidentiary hearing. *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 387-88 (1932).

The Board's retrospective revision of the *1996 Decision* based on a single workpaper that was not part of the initial decision is erroneous, arbitrary and capricious. It is clear on the record that the original prescription in the *1996 Decision* did not prescribe rates for the future at set dollar amounts. It is equally clear on the law that the Board cannot now summarily re-write that decision by re-naming a substantive change a "technical correction." 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 Corp. v. STB*, 93 F.3d 793, 801 (D.C. Cir. 1996).

In *Upjohn Company v. Pennsylvania Railroad Company*, 381 F.2d 4 (6th Cir. 1967), the court properly denied similar arguments that the ICC's action was a correction of "ministerial errors":

In arriving at this conclusion we are mindful that the Commission has authority to correct purely inadvertent ministerial errors. However, such is not the case in the present proceeding. No inadvertent error is cited by the Commission. The Commission's only basis for reversal of its prior decision is that, after some three years of elapsed time in a proceeding in another matter with the same factual situation, it has adopted a different policy, and therefore seeks to apply retroactively its new policy. To permit such retroactive action would result in chaos and uncertainty of action for those who must rely on its findings.

Id. at 5. There is no "technical correction" here. The *May 2003 Decision* deliberately altered the Board's unambiguous prescription that BNSF establish and maintain a common carrier rate for the movement of coal from Rawhide to Oklaunion based on the 180% r/vc jurisdictional threshold limit. BNSF did not appeal this ruling in either its administrative or federal court appeals, and AEP Texas relied on the finality of this important holding in assessing the legal impacts of the decision. The Board's *May 2003 Decision* retroactively applies a regulatory policy developed *after* the Board had clearly and unambiguously *declined* to prescribe future rate levels. The 1996 Board never

addressed the question whether the SAC rate for the subject traffic would fall below the jurisdictional threshold in any future year. *1996 Decision* at 677. That decision was affirmed by the D.C. Circuit Court of Appeals. The current Board now opines that the prior Board should have applied the principles developed and applied in subsequent SAC cases and set the prescribed rate at the higher of SAC or the jurisdictional threshold. *See, e.g., Arizona Pub. Serv. Co. v. The Atchison, Topeka and Santa Fe Ry.*, 2 S.T.B. 367, 442-52 (1997) (wherein the Board engaged in its first explicit discussion of the relationship between SAC rate levels and the jurisdictional threshold for each of the years in the DCF model). Essentially, the *May 2003 Decision* is premised on the notion that since the Board ruled differently in later cases, it must have inadvertently erred in the *1996 Decision*. This type of post-hoc rationalization to alter administratively final decisions has been soundly rejected by the Courts. *See United States v. Seatrail Lines, Inc.*, 329, U.S. 424, 428-29 (1947) (rejecting ICC's attempt to characterize prior decision as inadvertent error in order to apply new policy developed in later cases).

As the clear record and language in the *1996 Decision* reflect, the Board's decision not to include a SAC-based future rate prescription was by no means inadvertent. It was a conscious and deliberate decision to prescribe the rate based on the jurisdictional threshold, which was reaffirmed on at least three subsequent occasions. Significantly, in 2000 BNSF asked the Board to correct the same "technical error" that the Board uses as its linchpin to authorize a \$4.36 per ton increase to the Oklaunion rate prescription. The

fact that it rejected BNSF's request at that time is compelling evidence that the *1996 Decision* was not the product of some oversight.

The *May 2003 Decision* flies in the face of *Arizona Grocery*, which requires 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 Northern R.R. Co. v. ICC*, 679 F.2d 934, 940 n.13 (D.C. Cir. 2000) (“*Burlington Northern*”) (requiring a hearing before modifying a previously prescribed rate). In *Burlington Northern*, the Commission relied upon *Arizona Grocery* in holding 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 D.C. Circuit agreed, noting that *Arizona Grocery* requires a “hearing to set a new rate in place of an outstanding maximum reasonable rate prescription . . .” *Id.* The *May 2003 Decision* ignores this mandate.

In seeking to cast its action as mere correction, the Board said that it could reach its decision to increase AEP Texas' rate by \$4.36 per ton “without changing any of the findings in the original decision” (*See May 2003 Decision* at 4). In fact, however, new findings are the fundamental basis of the *May 2003 Decision*. The adoption of a staff workpaper as part of the *1996 Decision* is a new finding, as is the adoption and application of the percentage reduction methodology to the Board's new SAC findings. This is undeniable – the 1996 Decision clearly stated that it was *not* resolving the parties dispute with regard to the proper methodology for allocating SARR revenues over the life

of the DCF Model. Such a substantive change to a rate prescription cannot be effectuated without a hearing.

In addition, there are many aspects of the Board's SAC findings that could, and would, have been challenged had the Board prescribed rates in 1996 in the manner now contemplated through the *May 2003 Decision*. In 1996, the SAC calculations had no impact on the prescription crafted by the Board, so AEP Texas had no cause to seek reconsideration and/or appellate review of any of these findings. Now of course, it is too late for AEP Texas to contest these calculations *before* being exposed to a rate increase that it believes is unjustified. Moreover, since 1996 myriad changes have occurred in many areas that affect key components of the SAC analysis. All of these changed circumstances can, and should, be considered on the record before a nearly 30+% rate increase is imposed.

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; Verified Statement of Thomas D. Crowley at 2-5. Since that time, the disparities have grown even wider, and include long-term changes in traffic patterns that directly affect the volume of coal traffic that would be available to the hypothetical carrier on which

SAC is based. *Id.* at 17. As AEP Texas 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.* AEP Texas submits that a 2003 ruling that relies on 1996 vintage assumptions that are demonstrably inaccurate in the face of actual experience is fundamentally flawed, and should be reconsidered.

2. The Board’s “Correction” is Untimely

The *May 2003 Decision* also should be reconsidered and reversed 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 generally have imposed a one-year limitation on the time for agencies to correct mistakes in their decisions. *See, e.g., Reich v. Youghioghney and Ohio Coal Co.*, 66 F.3d 111, 115 (6th Cir. 1995); *City of Long Beach v. DOE*, 754 F. 2d 379, 387-88 (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 time frame for such motions, and have prohibited the use of untimely motions under these rules to correct judgements alleged to contain errors of a substantive nature. *Id.*; *see also, Jones v. Anderson-Tully Co.*, 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).

As set forth above, BNSF had more than an ample opportunity to raise its claims before the Board in its administrative and appellate review of the *1996 Decision*. Indeed, BNSF raised the claim in 2000, had it rejected by the Board, and neglected to press it any further. It is not now proper for BNSF and the Board to belatedly revive the issue. See, e.g., *McLaughlin v. Jung*, 859 F.2d 1310, 1312 (7th Cir. 1988) (“[i]t is well-established that carelessness or a lack of due care on the part of a litigant or her attorney [in raising an issue on appeal] does not provide a basis for relief under Rule 60(b)”; *United States v. 329.73 Acres of Land*, 695 F.2d 922, 925-26 (5th Cir. 1983) (even obvious errors of law may not be corrected where they were not properly raised on appeal as such corrections “would undermine the concepts of orderly procedure and desirable finality in judgments”).

Here, the Board has waited seven years before modifying its rate prescription based on BNSF’s “technical error” claim, despite the opportunity for correction on administrative appeal in 1996 and despite BNSF’s previous belated attempt to “correct” this alleged error in 2000. If it truly was error to fail to include a calculation of the SAC rate for future years, that error was a consequential one that BNSF should have appealed in 1996.

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 the

calculation of the maximum reasonable rate level that may be charged. To selectively pick and choose which new developments will be recognized and which will not smacks of arbitrary decision-making. BNSF should not be authorized to charge more than 180% of its variable costs unless and until all evidence relevant to the SAC analysis is properly considered by the Board.

**B. AEP Texas has been Severely
Prejudiced by the Board's Error**

If the Board's modification of the prescription goes into effect on June 28, 2003, AEP Texas will be required to pay the higher prescribed rate pending a decision on this petition for reconsideration and/or a petition 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 Texas has been severely prejudiced by the Board's modification of the 1996 rate prescription seven years after the fact. 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 would have petitioned for reconsideration and/or appealed that decision. 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.¹ Likewise, since the Board expressly noted that it was not reaching the issue of the proper methodology for allocating SARR revenues, AEP Texas had no basis to appeal the workpaper’s apparent reliance on the percentage reduction methodology. While it is correct that the Board has endorsed this methodology in recent rate cases, it is also correct that substantial concerns 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 the flaws in this methodology before its impacts would have driven the rates above the jurisdictional threshold.

¹ AEP Texas could not have appealed the findings in this now critical workpaper in 1996 because the Board clearly did not include it in its findings.

CONCLUSION

For all of the foregoing reasons, reconsideration of the *May 2003 Decision* should be granted expeditiously, and the Board should enter an order restoring the rate prescription entered in the *1996 Decision*.

Respectfully submitted,

AEP TEXAS NORTH COMPANY
1 Riverside Plaza
Columbus, OH 43215

By: Timothy P. Stanley, Director of
Transportation and Marketing
David M. Cohen, Senior Counsel
155 West Nationwide Boulevard
Suite 500
Columbus, OH 43215

OF COUNSEL:

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

William L. Slover
Kelvin J. Dowd
Christopher A. Mills
Frank J. Pergolizzi
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036



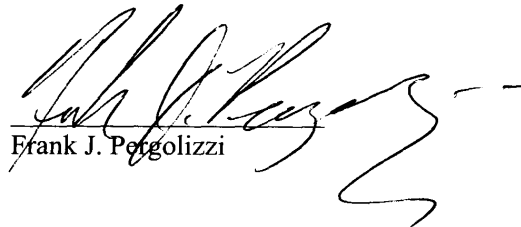
Dated: June 18, 2003

Attorneys & Practitioners

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2003, I caused a copy of the foregoing
Petition to Stay Pending Petition for Reconsideration or to Reopen to be served by hand
upon:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036


Frank J. Potgolizzi