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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ARIZONA PUBLIC SERVICE COMPANY
and PACIFICORP

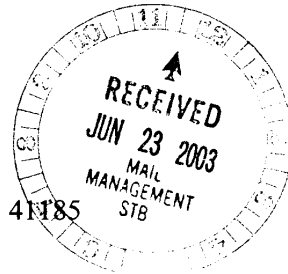
Complainants,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 41185



**REPLY COMMENTS OF APPA
AND NRECA AS AMICI CURIAE**

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AMERICAN PUBLIC POWER ASSOCIATION
NATIONAL RURAL ELECTRIC COOPERATIVE
ASSOCIATION

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Dated: June 23, 2003

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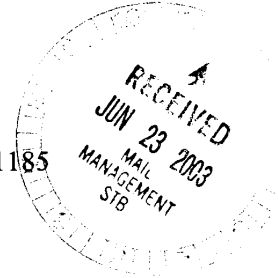
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**REPLY COMMENTS OF APPA
AND NRECA AS AMICI CURIAE**

American Public Power Association ("APPA") and National Rural Electric Cooperative Association ("NRECA") respectfully submit these joint reply comments as amici curiae. Herein, we file comments in support of the separate petitions for rehearing filed on June 2, 2003 by complainant Arizona Public Service et al. ("APS") and intervenor-applicant Western Coal Traffic League ("WCTL").¹ We take this action because of the substantial adverse impact the decision is likely to have on captive coal shippers throughout the nation.

¹ WCTL's petition to intervene is pending before the Board. APS's rehearing petition shall be referred to herein as the "APS Petition" and WCTL's rehearing petition shall be referred to herein as the "WCTL Petition."

STATEMENT OF CONCERN

The Board is undoubtably aware of the substantial time captive coal shippers must expend, and the costs they must bear, in order to obtain a maximum rate prescription. The APS case provides a graphic illustration.

The APS case took three and one-half years to litigate (APS Petition at 3). The record in this case was “voluminous” (id.) including thousands of pages of hard copy evidence and extensive additional evidence submitted in hard copy format. Id. at 4.

APS’s extensive litigation efforts were successful. In the Board’s 1997 APS I² decision, as subsequently modified in the Board’s 1998 APS II³ decision, the Board issued a rate prescription order setting forth prescribed rates substantially lower than the common carrier tariff rates unilaterally imposed on APS by the Burlington Northern and Santa Fe Railway Company (“BNSF”).⁴

In January of 2003, BNSF filed a petition with the STB asking the STB to vacate the APS I/II rate prescription order. APS responded and requested that the STB take no action to vacate the APS I/II prescription order until APS was granted a full hearing. The STB, however, in its May 12, 2003 decision (“Decision” or “APS III”)

² Arizona Pub. Serv. Co. v. Atchison T.& S.F. Ry., 2 S.T.B. 367 (1997) (“APS I”).

³ Arizona Pub. Serv. Co. v. Atchison T. & S.F. Ry., 3 S.T.B. 70 (1998) (“APS II”).

⁴ References to BNSF include BNSF’s corporate predecessors.

summarily granted BNSF's vacation request without first holding the hearing requested by APS. APS III at 6-8.

APPA/NRECA are concerned with the Board's summary vacation order and its potential chilling impact on future cases. The APS III ruling suggests the Board can and will take summary actions, at the behest of defendant carriers, to overturn rate prescription orders that took the complainant shippers years to obtain, without a sound evidentiary basis. Shippers contemplating the filing of new maximum rate cases will be discouraged by the prospect of short-lived, and easily reversed, rate prescriptions. Accord WCTL Petition at 9.

APPA/NRECA are also very concerned about the Board's evidentiary rulings. In the Decision, the Board placed strict limits on the evidence that APS can present in the hearing on reopening. APS III at 4-6. As APS explains, the Board-imposed limits will unfairly constrain its ability to defend the prior prescription. See APS Petition at 6-9. The Board's evidentiary rulings will further discourage shippers from bringing STB rate cases.

Both APS and WCTL have filed petitions asking the STB to reverse its rulings vacating the APS prescription order and limiting the scope of APS's post-vacation evidentiary filings. As discussed below, APPA/NRECA agree with APS and WCTL that governing law requires the Board to conduct a full evidentiary hearing – without any

arbitrary evidentiary limits placed on the complainant shipper – before vacating or affirming the APS I/II prescription order.

We jointly urge the Board to set aside its decision in the manner requested by APS and WCTL. This action will signal to captive rail shippers throughout the nation that the STB will honor its rate prescription orders, and not arbitrarily set them aside at the behest of defendant carriers.

ARGUMENT

A. The STB Erred In Vacating The APS Rate Prescription

The STB prescribed a maximum rate on APS's Cholla coal movement in APS I. That prescription was slightly modified in APS II. In APS III, the Board vacated its APS I/II prescription order.

The STB clearly misapplied its own precedents in its APS III vacation order. The governing STB precedents hold that the STB can vacate a prescription order only if that order is no longer valid. See Arizona Grocery Co. v. Atchison T. & S.F. Ry., 284 U.S. 370 (1932); San Antonio, Tex. v. Burlington N. Ry., 364 I.C.C. 887 (1981) ("San Antonio IV"); Consolidated Rail Corp. – Petition to Eliminate Docket No. 28300 Rate Prescription, 364 I.C.C. 615 (1981) ("Conrail").

The STB, however, does not know whether the APS prescription order remains valid. According to the Board, the order may still be valid, or it may be invalid, due to changed circumstances. APS III at 7. The STB acknowledges it does not – and

will not – know the answer to this basic question until it receives additional evidence from the parties. Id. In the instant case, the only way the STB can determine whether the prescription remains valid under current facts and circumstances is to first accept, and then consider, detailed evidence submitted by both APS and BNSF. This requires a full evidentiary hearing – a hearing the STB has denied APS.

The STB relies on the ICC's San Antonio IV decision as providing a legal basis for denying APS a full hearing. APS III at 6. However, APPA/NRECA respectfully submit that the Board has misread and misapplied San Antonio.

In its 1976 San Antonio I⁵ decision, the Interstate Commerce Commission ("ICC") prescribed a maximum coal rate. Following San Antonio I, the defendant carriers petitioned the ICC to vacate the prescription. They argued changed legal and factual circumstances required vacation. The ICC responded, but not by immediately vacating the San Antonio I prescription. Instead, the ICC held a full evidentiary hearing. In the hearing the ICC received comprehensive evidence from both the complainant shipper and the defendant carriers. At the conclusion of this full hearing, the STB issued

⁵ San Antonio, Tex. v. Burlington N. Ry., 355 I.C.C. 405 (1976) ("San Antonio I").

successive orders, in San Antonio II⁶ and III,⁷ modifying the San Antonio I rate prescription order.

Following the D.C. Circuit vacation of the San Antonio II and III orders,⁸ the ICC ruled in San Antonio IV that the San Antonio I prescription order had no continuing application. However, the San Antonio IV decision was issued only after the ICC had granted the complainant shipper the full evidentiary hearing that preceded the ICC's issuance of the San Antonio II and III decisions. In APS III, the Board denied APS the full hearing the ICC accorded the complainant shipper in San Antonio.⁹

B. The STB Erred In Its Evidentiary Rulings

The STB ruled in APS III that APS cannot respond to BNSF's changed circumstance contentions by reconfiguring its stand-alone traffic group to include new

⁶ San Antonio, Tex. v. Burlington N. Ry., 359 I.C.C. 1 (1978) ("San Antonio II").

⁷ San Antonio, Tex. v. Burlington N. Ry., 361 I.C.C. 482 (1979) ("San Antonio III").

⁸ See San Antonio, Texas v. United States, 631 F.2d 831 (D.C. Cir. 1980).

⁹ Similarly, the Board's citation (APS III at 6) to Burlington Northern, Inc. v. Unites States, 459 U.S. 131 (1982), is misplaced. That case addressed what rates the shipper in the San Antonio litigation was required to pay after the D.C. Circuit vacated the San Antonio II and III decisions in 1981. However, that time period (1981-1982) is not pertinent in this case. The time period in the San Antonio litigation that is pertinent in the instant case is the time period between the date the railroad defendants first requested the ICC to vacate the San Antonio I prescription order (1977) and the date the ICC modified that prescription order in San Antonio II (1978). During this 1977-1978 time period the San Antonio I prescription remained in effect and the shipper paid the prescribed rates.

shippers or new rail lines. APS III at 4-6. This evidentiary ruling conflicts with governing law.

Under governing law, the question the Board must address here is whether “if proposed today [could] this prescription ... be imposed” Conrail, supra, at 364 I.C.C. 619 (emphasis added). To answer this inquiry the STB must permit APS to introduce all evidence pertinent today under the Board’s governing SAC standards.

Of course, if APS was presenting a new case today it could present whatever traffic group and facilities evidence it deemed appropriate under the Board’s stand-alone cost (“SAC”) standards. The Board could then evaluate that evidence, and BNSF’s evidence, under the governing SAC standards. The Board’s APS III evidentiary ruling limits APS from presenting all relevant evidence and demonstrating that the APS II/III prescription remains valid today.

The STB sidesteps governing evidentiary law by citing the Nevada Power litigation as the legal source for its evidentiary rulings in APS III. See APS III at 5. However, the Board’s Nevada Power evidentiary rulings are not applicable in the instant case. In Nevada Power, the parties had submitted SAC evidence but the ICC had not yet made a final merits decision on SAC issues. Following receipt of this SAC evidence, the ICC asked the parties to supplement the submitted evidence to fill in certain ICC-

perceived gaps.¹⁰ The ICC proceeded to reject certain evidence subsequently tendered by the complainant shipper on grounds that it fell outside the scope of the Board's supplementation order. Nevada Power II at 3, Nevada Power III at 263.

The ICC's Nevada Power rulings did not address, much less establish, the governing evidentiary standards in a case involving the vacation of an existing prescription order. Had the STB properly applied existing precedent, (see Conrail, *supra*), it would have permitted APS to present all evidence to support continuation of the APS I/II prescription, under the current transportation facts and circumstances. Also, as discussed above, this evidence should have been considered in a hearing that preceded the final Board action on BNSF's vacation request.

CONCLUSION

APPA and NRECA join with APS and WCTL in asking the STB to reconsider its Decision. On reconsideration, the Board should reinstate its prior APS I/II rate prescription and provide a full evidentiary hearing on reopening. The Board should also vacate its prior rulings limiting the SAC evidence APS can present in the new hearing.

¹⁰ See Bituminous Coal – Hiawatha to Moapa, NV, 6 I.C.C.2d 1 (1989) (“Nevada Power I”); Bituminous Coal – Hiawatha to Moapa, NV (ICC served Jan. 8, 1991) (“Nevada Power II”); Bituminous Coal – Hiawatha to Moapa, NV, 10 I.C.C.2d 259 (1994) (“Nevada Power III”).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2003, I caused copies of the foregoing
Reply Comments of APPA and NRECA as Amici Curiae to be served by hand upon all
parties of record.



John H. LeSeur