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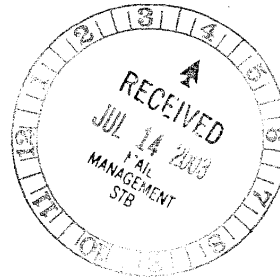
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July 14, 2003

Via HAND DELIVERY

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



Re: **Docket No. 41185, Arizona Public Service Company and PacifiCorp v.
The Burlington Northern and Santa Fe Railway Company**

Dear Secretary Williams:

Enclosed for filing in the captioned docket, please find the original and ten copies of the Response of The Burlington Northern and Santa Fe Railway Company to the American Public Power Association and the National Rural Electric Cooperative Association's Reply Comments as Amici Curiae.

Please date stamp the extra copy provided and return it to our messenger. If you have any questions regarding this matter, please contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Samuel M. Sipe, Jr." with a stylized flourish at the end.

Samuel M. Sipe, Jr.

Counsel for The Burlington Northern and
Santa Fe Railway Company

cc: John H. LeSeur
C. Michael Loftus
William L. Slover

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ARIZONA PUBLIC SERVICE
COMPANY and PACIFICORP,

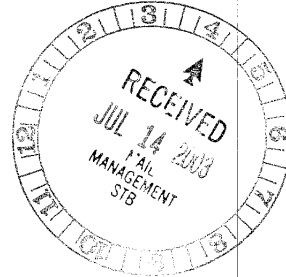
Complainants,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 41185



**RESPONSE OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY TO APPA AND NRECA'S REPLY COMMENTS AS AMICI CURIAE**

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby submits this response to the Motion for Leave to File Reply Comments as Amici Curiae ("Amici Motion") and the Reply Comments as Amici Curiae ("Amici Comments") filed by the American Public Power Association ("APPA") and the National Rural Electric Cooperative Association ("NRECA") on June 23, 2003. The Amici Comments were submitted in support of petitions previously filed by Arizona Public Service and PacifiCorp ("APS") and by intervenor the Western Coal Traffic League ("WCTL"), asking the Board to reconsider its May 12, 2003 decision in the above referenced docket ("*May 2003 Decision*"). BNSF does not object to the request for leave to file, but, as explained below, amici's comments should be given no weight.

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SUMMARY OF ARGUMENT

Amici's "reply" comments advance no argument of law or fact that has not already been submitted in the petitions for reconsideration filed by APS and WCTL. Amici's arguments therefore fail for the same reasons stated in BNSF's response to those petitions, and amici have pointed to no error—let alone any material error—in the Board's *May 2003 Decision*.

Contrary to amici's assertion, no additional hearing was required in this case because the Board did not "vacate" or "overturn" the prescribed rate. Rather, it suspended the prescriptive effect of the rate as interim relief only, with the intent of preventing irreparable harm while reopening was pending. This is explicitly within the Board's authority granted by 49 U.S.C. § 721(b)(4).

Amici also fail to identify any error in the Board's decision to limit the issues to be litigated on reopening. The Board properly limited the scope of the reopening to the changed circumstances that justified reopening—the imminent exhaustion of the coal reserves at the McKinley Mine. Limiting the reopening in this manner is legally sound, fair to the parties, and recognizes the value of finality in administrative litigation. Indeed, the Board's own rulings do not support the broad, unlimited reopening urged by amici.

I. THE BOARD PROPERLY GRANTED INTERIM RELIEF BASED ON UNDISPUTED EVIDENCE OF CHANGED CIRCUMSTANCES

Amici first argue that the Board erred when it "summarily granted BNSF's vacation request without first holding the hearing requested by APS." Amici Comments at 3. This argument is without merit as it seriously distorts the nature and plain language of the Board's *May 2003 Decision*.

In the Board's *May 2003 Decision*, the Board found "undisputed evidence" of changed circumstances regarding assumptions about the McKinley Mine coal reserves, which were used in the Board's prior decisions in this rate proceeding. *See May 2003 Decision* at 3-4. In light of this finding, the Board suspended the effect of the prescribed rate and fixed the rate BNSF may charge pending resolution of the reopened issues, with a "keep account" order imposed to prevent either side from suffering irreparable harm. *See May 2003 Decision* at 7. The Board did not "vacate" the rate prescription. BNSF is not now free to charge shippers whatever it chooses for the Cholla coal movement, and therefore BNSF's ratemaking initiative has not been restored. Rather, the Board adopted the interim measure of suspending the legislative force of the rate, with the intent of preventing irreparable harm. *See May 2003 Decision* at 7-8. Had the Board not done so, BNSF would not have been in a position to be made whole if the Board ultimately decides to vacate the rate prescription or set the prescribed rate at a higher level. This ruling is not a "vacation" as amici contend.

Moreover, amici's assertion that the Board has acted "arbitrarily" or "without a sound evidentiary basis" completely misses the point of the Board's ruling. *See Amici Comments* at 3, 4. The Board found "undisputed evidence" of a changed circumstance relating to assumptions about the McKinley Mine coal reserves. *See May 2003 Decision* at 3. Amici and the parties seeking reconsideration do not challenge the validity of this finding. Nor do they dispute that changes in the McKinley Mine reserve assumptions are material to the ultimate rate determination. Amici offer no reason why an evidentiary hearing is needed to establish facts or issues that are uncontested. *See San Antonio, Tex. v. Burlington N., Inc.*, 364 I.C.C. 887, 896 (1981) ("the type of hearing that is required

and appropriate in particular circumstances depends on the issues involved”). While BNSF maintains that the undisputed evidence regarding future volumes from the McKinley Mine was sufficient basis for the Board to vacate its rate prescription, at a minimum there is no doubt that sufficient evidence supported the interim relief granted in the *May 2003 Decision*.

The Board’s decision to suspend on an interim basis the prescriptive effect of the prior rate prescription was therefore fully grounded in undisputed facts. There was no need for the Board to prolong these proceedings—and prolong the effectiveness of a rate prescription which is likely to be found invalid—to entertain evidence on matters that were not in dispute.

II. THE BOARD PROPERLY LIMITED THE REOPENING TO THE CHANGED CIRCUMSTANCES THAT FORMED THE BASIS FOR REOPENING

Amici further contend that the Board “must permit APS to introduce all evidence pertinent *today* under the Board’s governing SAC standards.” Amici Comments at 7. This contention cannot be supported by the Board’s prior rulings or by sound administrative policy.

Amici assert that the “governing law” in this case was set forth in *Consolidated Rail Corp.—Petition to Eliminate Docket No. 28300 Class Rate Prescription*, 364 I.C.C. 615 (1981) (“*Conrail*”). See Amici Comments at 7. In *Conrail*, the Board vacated an existing rate prescription which was held to be inconsistent with fundamental changes in transportation law, including the enactment of the Staggers Act and the 4R Act. See *id.* at 618-19. *Conrail* is distinguishable here, of course, because the rate in this case has not been vacated. Moreover, under the broad reopening urged by amici’s interpretation of

this case, *every* time the Board decided to reopen a proceeding, it would be required to permit the parties to relitigate *every* issue. Rate litigation would be without end. This has never been the Board's position, and it finds no favor in reason or in law. Prudential notions of fairness and the need for administrative finality would be dramatically undermined by the rule amici would impose upon the Board. As the Board has said, "[t]he purpose of reopening the record [is] to resolve unanswered questions concerning the previous configuration . . . not to embark upon a new study of a fundamentally different hypothetical railroad." *Bituminous Coal—Hiawatha, Utah to Moapa, Nev.*, No. 37038, 1990 WL 300663 at *3 (I.C.C. Dec. 19, 1990) ("*Nevada Power*").

Amici fail to distinguish *Nevada Power* in a meaningful way. The principle protected by the Board in that case—the need to achieve finality by preventing a fundamental redesign of the hypothetical stand-alone railroad—is precisely the issue presented in this proceeding. To permit shippers to submit all evidence of “current transportation facts and circumstances,” *see* Amici Comments at 8, would “alter the fundamental character of the configuration previously analyzed.” *Nevada Power*, 1990 WL 300663 at *3. Again, the Board has spoken on this point: “If parties in proceedings of this type could change their fundamental network designation every time they received additional data, there might be no end to the analytical process and it would be difficult to bring a proceeding of this nature to a conclusion.” *Id.*; *see also PPL Montana, LLC v. Burlington N. Santa Fe Ry. Co.*, Docket No. 42054, 2003 WL 1474407 (S.T.B. Mar. 24, 2003), at *7 (“Were we to allow a disappointed party to revise its case in response to our rulings, there could be no end to an administrative proceeding.”).

The Board's limitation of the issues to be litigated on reopening reflects a logical policy that the issues to be considered on reopening ought to be connected to the changed circumstances that form the basis for the reopening. Permitting the broader "anything goes" approach advanced by amici would unnecessarily consume resources of the Board (and the parties), and would undermine the goal of achieving a measure of finality in administrative litigation. APS should not be permitted to relitigate issues not relevant to the changed circumstance addressed in BNSF's petition.

CONCLUSION

For the foregoing reasons, the Board should deny the request of amici curiae to grant reconsideration of the *May 2003 Decision*.

Respectfully submitted,



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July 14, 2003

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2003, a copy of the foregoing Response of the Burlington Northern and Santa Fe Railway Company to APPA and NRECA's Reply Comments as Amici Curiae was served by hand on the following:

Counsel for APPA and NRECA

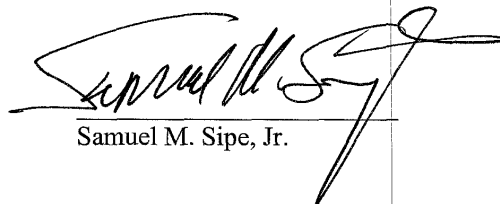
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