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September 22, 2003

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



208550

Re: **STB Docket No. 41191, West Texas Utilities Company 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 Reply of The Burlington Northern and Santa Fe Railway Company to Petition to Vacate Rate Prescription. Also enclosed is a disk containing an electronic version of the above referenced pleading in WordPerfect format.

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

Sincerely,

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

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



WEST TEXAS UTILITIES COMPANY,

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 41191

**REPLY OF THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY TO PETITION TO VACATE RATE PRESCRIPTION**

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies in opposition to AEP Texas North's ("AEP") September 2, 2003 Petition to Vacate Rate Prescription ("Petition to Vacate"). AEP Texas states that "the purpose of [its] Petition is to restore BNSF's rate making initiative so that AEP Texas can seek a new maximum reasonable rate based on current cost data and SAC principles." Petition to Vacate at 16. As this statement indicates, the notion of restoring BNSF's ratemaking initiative is a sham. What AEP really wants is to substitute a new rate prescription more to its liking for the modified rate prescription that the Board adopted in May of this year.

AEP's suggestion that a shipper can shed a Board-imposed rate prescription and pursue a new one any time it chooses is contrary to the congressional policy "to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required." 49 U.S.C.

§10101(2). Under AEP's proposed approach, regulatory intervention would be ongoing and Board proceedings would never be completed. Litigants before the Board are entitled to expect that Board decisions will have some measure of finality.

There is no support for AEP's position that a shipper that has succeeded in obtaining a rate prescription can simply have it vacated on request so that the shipper can pursue additional relief under a new SAC theory. The logic of AEP's approach would permit a party that has recovered damages in a court action to return to court at any time and seek to recover additional damages under a new theory of injury. This, of course, is not the law. Such a renewed claim would be barred on the grounds of res judicata. AEP has suggested no reason why a Board determination in a rate reasonableness case should be fundamentally different.

The Board has recently made clear that a party seeking to reopen a rate reasonableness determination must make a substantial showing to warrant reopening. As a matter of logic, the standard for vacation should be at least as stringent as that for reopening. *See Arizona Pub. Serv. Co. v. Burlington N. & S. F. Ry.*, Docket No. 41185 (STB served May 12, 2003) at 7-8 ("2003 APS Decision"). Yet AEP has not even met the reopening standard here. Its evidence purporting to show that the results of the Board's 1996 DCF analysis have fundamentally changed due to changed circumstances is essentially meaningless. AEP has only been able to achieve a different outcome in its revised DCF analysis by significantly expanding its shipper group, adding movements to be handled as cross-over traffic that were never part of the stand-alone railroad as originally configured. This suggests nothing more than that different SAC models can produce different outcomes. And even with these manipulations of its prior SAC model,

the results AEP produces with its revised model do not differ materially from those in the Board's original DCF analysis.

AEP has not made a showing sufficient to justify reopening the Board's rate reasonableness determination, much less one that would justify vacating the rate prescription. Its Petition to Vacate should be denied.

BACKGROUND

The origins of the current dispute reach back to 1996. *See West Texas Utils. Co. v. Burlington N. R.R. Co.*, 1 S.T.B. 638 (1996) ("1996 WTU Decision"). The Board reached its maximum reasonable rate determination in the *1996 WTU Decision* based on a SAC analysis. The Board determined the costs and revenues of AEP's hypothetical West Texas Railroad ("WTRR"), a stand-alone railroad ("SARR") that would commence service in 1995 and operate through 2014. As configured by AEP's predecessor, the WTRR was designed to serve 11 coal shippers, all of whom were local to the SARR. *See 1996 WTU Decision*, 1 S.T.B. at 657.

Because the SAC analysis produced a rate that was below the jurisdictional threshold level, the Board set the prescribed rate at 180% of variable costs. As the Board explained,

Because we have no rate reasonableness jurisdiction over rail rates below the 180% revenue-to-variable cost (r/vc) level, the 180% r/vc level constitutes a floor below which we may not set a maximum reasonable rate. Therefore, we set the maximum reasonable rate level for the WTU traffic at 180% of BN's variable cost of providing service to WTU.

Id. at 677-678. The Board therefore "direct[ed] 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 set here.” *Id.* at 679. The Board “decline[d] to prescribe a rate for the future at a set dollar amount.” *Id.*¹

In 1997, the Rawhide mine closed, and WTU began to take its base-load coal from other Powder River Basin mines. BNSF voluntarily extended the rate it was charging for unit train movements from the Rawhide mine to unit train movements from non-Rawhide origins.² The Rawhide mine reopened in 2002 and AEP resumed shipments from Rawhide at that time.

In April 2003, BNSF petitioned the Board to modify the rate prescription that it had imposed in its *1996 WTU Decision*. Specifically, BNSF requested that the Board declare that BNSF is entitled to charge for the Rawhide to Oklaunion movement the higher of the SAC maximum rate as calculated in the Board’s 1996 DCF analysis or the rate set at the jurisdictional threshold of 180 percent of variable costs. AEP vigorously opposed BNSF’s petition, arguing that “a new hearing and a new rate order by the Board are necessary prerequisites to any departure by BNSF from the terms of the 1996 rate prescription.”³

¹ WTU is thus incorrect when it states in its Petition to Vacate that “the Board prescribed a rate of \$13.68 per ton for coal movements between the Rawhide mine and Oklaunion Station.” Petition to Vacate at 3.

² In 2000, BNSF notified that Board that it intended to increase its rate to WTU for movements from non-Rawhide mine origins. BNSF asked the Board to confirm that the rate prescription in the *1996 WTU Decision* applied only to coal movements from the Rawhide mine or, in the alternative, to modify the prescription to allow BNSF to charge the higher of 180 percent of variable costs or the SAC maximum for non-Rawhide movements. The Board ruled that BNSF did not need a Board order to modify the rate from non-Rawhide origins because the rate prescription applied only to movements from the Rawhide mine. *See West Texas Utils. Co. v. Burlington N. R.R. Co.*, Docket No. 41191 (STB served Nov. 7, 1996), *recon. denied* (Mar. 21, 2001).

³ AEP’s Reply in Opposition to Petition for a Declaration Regarding the rate Prescription on Coal Movements from Rawhide, Wyoming to Oklaunion, Texas (May 7, 2003) at 5.

In a decision served May 29, 2003, the Board reopened its *1996 WTU Decision*

“to correct a material error in [that] prior decision.”⁴ The Board stated:

The SAC constraint is designed to determine the maximum reasonable rate a carrier may charge annually over the 20-year period of the SAC analysis. If the SAC rate rises above the jurisdictional threshold in any year, the railroad should have the right to charge a rate up to that maximum reasonable rate. . . . While the analysis in *West Texas* showed that the SAC rate initially fell below the jurisdictional threshold . . . , it should also have been clear that the SAC rate might in some future years exceed the jurisdictional threshold. It was therefore error not to prescribe a maximum reasonable rate at the higher of the SAC rate or the statutory jurisdictional rate threshold, as the Board has done in subsequent proceedings. With this decision, we correct that error.⁵

BNSF subsequently established the current SAC maximum rate of \$18.04 per ton as the lawful rate on movements from the Rawhide mine, effective June 28, 2003. As of this date, AEP has not shipped any coal from Rawhide under the new rate that BNSF established in accordance with the modified rate prescription. Instead, AEP is obtaining coal for Oklaunion from non-Rawhide mines served by BNSF.⁶

⁴ *West Texas Util. Co. v. Burlington N. & S. F. Ry.*, Docket No. 41191 (STB served May 29, 2003) (“*May 2003 Decision*”) at 3.

⁵ *Id.* (citations and footnotes omitted).

⁶ AEP has avoided paying the \$18.04 SAC maximum rate on Rawhide movements by refraining from shipping coal from Rawhide since the \$18.04 rate went into effect. BNSF has also established a common carrier rate of \$18.04 per ton for movements from non-Rawhide mines to Oklaunion. AEP has filed a complaint challenging the reasonableness of that rate in STB Docket No. 41191 (Sub-No. 1). However, as BNSF explained in its September 2, 2003 motion to dismiss AEP’s complaint, AEP has refused to pay the rate it purports to challenge. It is short paying BNSF, tendering payment of \$13.68 for each ton of coal shipped instead of paying the lawfully established rate of \$18.04 per ton. AEP has pursued this course notwithstanding its recognition in its

**BNSF'S POSITION IN RESPONSE TO
THE PETITION TO VACATE**

At first glance, the Board might find it counterintuitive that BNSF should oppose an action whereby AEP purports to reestablish BNSF's ratemaking initiative. As a general matter, BNSF seeks to exercise its ratemaking initiative as the statutory scheme contemplates and it has sought to restore its ratemaking initiative in circumstances where it believes a rate prescription is no longer valid. But in this case, the proposed restoration of BNSF's ratemaking initiative would be merely a stepping stone along a path to further regulatory scrutiny of whatever rate BNSF might establish. AEP has made it clear that its entire purpose in seeking to have the existing rate prescription vacated is to institute new litigation and to seek to obtain a rate prescription more to its liking than the modified rate prescription imposed in the Board's *May 2003 Decision*.

Operating within the constraints of the modified rate prescription is not an optimal commercial arrangement, but BNSF has concluded that in the current situation it is preferable to continued rate litigation, with all the uncertainty and expense that that continued litigation would entail. BNSF has been subject to and has abided by the Rawhide rate prescription when it was very bitter medicine indeed. The Board has belatedly modified the rate prescription and the prescribed rate is no longer so onerous. BNSF prefers to operate within the constraint of the existing rate prescription as opposed to embarking on another cycle of litigation.

Petition to Vacate that the "shipper must pay" any rate the carrier sets unless a different rate has been prescribed by the Board. *See* Petition to Vacate at 11.

ARGUMENT

In its Petition to Vacate, AEP advances two inconsistent arguments. The first argument, asserted without much conviction, is that AEP as the complaining shipper and beneficiary of the Board's prior rate prescription is entitled to have the rate prescription vacated on its request, without any evidentiary showing. The second argument is that changed circumstances have rendered the Board's prior rate prescription invalid, a claim that AEP purports to support with a new DCF analysis. As shown below, both arguments fail.

I. AEP MAY NOT HAVE THE RATE PRESCRIPTION VACATED AT ITS REQUEST WITHOUT DEMONSTRATING THAT THE PRESCRIPTION IS NO LONGER VALID

AEP asserts that there is a double standard for vacating rate prescriptions. "The law is clear that if a *railroad* seeks to modify a rate prescription because it believes the rate is *too low*, 'the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future.'" Petition to Vacate at 9 (emphasis in original) (quoting *Arizona Grocery Co. v. Atchison T. & S. F. Ry. Co.*, 284 U.S. 370, 387 (1932)). However, according to AEP, "if the shipper determines that it no longer needs or desires the protection of the rate prescription it secured, or if that prescription no longer is serving its intended purpose, the shipper should be able to request and receive an order vacating that prescription without further evidentiary showings." Petition to Vacate at 11.⁷

⁷ AEP Texas erroneously suggests that the exclusive function of the Board's ratemaking powers is "to benefit and protect shippers who otherwise would be harmed by unreasonable rates." Petition at 11. The Board also has a responsibility to assist carriers in attaining adequate revenues, and has been directed to exercise its rate jurisdiction with

AEP cites no authority for the proposition that a shipper can have a rate prescription vacated at will without any evidentiary showing and, to the best of BNSF's knowledge, there is no such authority. In the absence of such authority, AEP relies on the following statement from the Board's July 23 decision addressing AEP's request to establish a procedural schedule for a rate reasonableness proceeding on rates on non-Rawhide movements: "If a shipper wishes to establish a current maximum reasonable rate using a SAC analysis that is based on different assumptions than originally used, its recourse is to have the rate prescription vacated, allow the railroad to establish a new common carrier rate, and then file a complaint challenging the railroad's new rate."⁸ AEP characterizes this statement as an "invitation to AEP Texas to request vacation of the current prescription in order to obtain a full hearing on a new maximum reasonable rate." Petition to Vacate at 5 n.3.

The Board's statement that a shipper's "recourse is to have the rate prescription vacated" says nothing about the standards that the shipper must meet to achieve its objective of vacation. There are several reasons why it would be entirely illogical – and, indeed, unlawful – for the Board to adopt a rule permitting shippers to vacate rate prescriptions simply by requesting vacation.

First, a rule of permissive vacation would impose a lesser standard for a shipper to vacate a rate prescription than to reopen a rate prescription. The Board has recently stated that "a reopening [of a rate case] for substantially changed circumstances is

that consideration in mind. See 49 U.S.C. §§ 10701(d)(2); 10704(a)(2); *Coal Rate Guidelines*, 1 I.C.C. 2d 520, 521 & n.3 (1985).

⁸ *West Texas Util. Co. v. Burlington N. & S. F. Ry.*, Docket No. 41191 (STB served July 23, 2003) ("*July 2003 Decision*") at 3.

intended to address projections in the original decision that have proven to have been seriously inaccurate.” *July 2003 Decision* at 3 (citing 2003 APS Decision). It is clear from the context of the Board’s statement that to justify reopening either a shipper or a rail carrier would have to make the evidentiary showing of projections in the original decision that have been proven to be seriously inaccurate. It would make no sense for the Board to impose a demanding evidentiary standard for reopening but to permit vacation of a rate prescription at a shipper’s request without any evidentiary showing whatever.

Second, the rule of permissive vacation that AEP advocates conflicts with the deregulatory policy of ICCTA. The imposition of a rate prescription is admittedly an act of regulatory intervention that is contemplated by and permitted under the statute. But once a rate prescription is imposed, it is normally self-executing. The rule advocated by AEP would provide for a far more interventionist regulatory role than that contemplated by the Board’s rate prescriptions. Under AEP’s rule, a rate prescription could be vacated any time the complaining shipper believed that it could improve its position bringing a new complaint based on a new SAC model. Although no one can say with certainty whether the specter of continuous rate regulation would in fact become a reality, the adoption of a rule giving rise to this possibility would itself be contrary to congressional policy.

A third important consideration that militates against AEP’s proposed rule is the desirability of administrative finality and repose. *See July 2003 Decision* at 3.⁹ In the

⁹ In its *July 2003 Decision* the Board spoke of “achiev[ing] a proper balance between the interests of fairness to all parties and of administrative finality and repose.” The tension between these two goals that the Board alluded to does not exist here. Considerations of fairness as well as administrative finality weigh in favor of maintaining the existing rate prescription. BNSF has been significantly disadvantaged by the Board’s error in failing

context of this case, the Board has stated that “[t]he SAC constraint is designed to determine the maximum reasonable rate a carrier may charge annually over the 20-year period of the SAC analysis.” *May 2003 Decision* at 3. Certainly there are circumstances when a prescription will not remain valid for 20 years. The Board’s reopening test speaks to this reality. But to allow a shipper to vacate a rate prescription without any evidentiary showing whatever would be to undermine any semblance of administrative finality and repose that a Board rate prescription entails.

II. AEP HAS NOT SHOWN THAT THE EXISTING RATE PRESCRIPTION IS INVALID

As an alternative to its novel contention that a shipper can vacate a rate prescription merely by requesting it, AEP asserts that the prescription should be vacated because it is no longer valid. The standard that AEP appears to have in mind in arguing for vacation based on invalidity is drawn from the following statement in *San Antonio v. Burlington Northern*, 364 I.C.C. 887, 896 (1981):

[T]he question here is whether to vacate a previously established prescription and thus to restore ratemaking initiative to the carriers subject to normal Commission review, and that issue turns on an assessment of the likelihood that the factual and legal underpinnings of the original prescription continue to have current validity.

See Petition to Vacate at 8-9.

to impose until May of this year a rate prescription on the Rawhide movement that allowed BNSF to charge the higher of the SAC rate or 180 percent of variable costs. AEP’s attempt to vacate the rate prescription is clearly in response to the Board’s recent modification of the prescription. Having erroneously deprived BNSF of the right to charge the SAC rate until recently – and as noted above, AEP is not moving traffic under that rate – it would hardly be equitable for the Board to deprive BNSF of any prospective benefit that it perceives under the modified prescription.

AEP addresses this standard by attempting to show that “the factual bases for the *West Texas I* prescription (as modified by *West Texas II*) have been undermined by changed circumstances.” Petition to Vacate at 12. In fact, AEP’s discussion of changed circumstances sounds more like an attempt to justify reopening than an attempt to justify vacation.¹⁰ Whatever AEP’s intent, its showing of changed circumstances is insufficient to justify either vacation or reopening.

A demonstration of changed circumstances sufficient to show that a rate prescription is no longer valid logically requires that the moving party rerun the same SAC model used by the Board in its prior rate reasonableness analysis, maintaining the configuration of the stand-alone railroad but changing the inputs to reflect the changed circumstances. This is the approach that BNSF took in Docket No. 41185, *Arizona Public Service v. The Burlington Northern and Santa Fe Railway Co.*, where BNSF showed that new information regarding coal volumes that could be expected to produced at the McKinley Mine over the 20-year DCF period fundamentally changed the outcome of the Board’s analysis. For purposes of its showing, BNSF kept the same SARR configuration and the same shipper group that had been used in the Board’s original analysis. In its May 12, 2003 decision ruling on BNSF’s petition to vacate the rate prescription, the Board stated that “reopening is appropriate because the changed circumstance relates to a specifically identified and contested assumption in our prior decisions.” 2003 APS Decision at 4. The Board ruled that, except for evidence about how the two preexisting shippers in the shipper group would resource their coal, “the

¹⁰ In *San Antonio*, the ICC vacated the prior rate prescription based in part on “significant changes in the governing legal standards” since the prior rate prescription was established. 364 I.C.C. at 894. AEP points to no changes in governing legal standards here.

reopening must be limited to the basic assumptions upon which Arizona based its SAC case in 1994.” *Id.* at 5.

In its Petition to Vacate, AEP sounds like it is trying to adhere to this logic of maintaining the same SAC model as used in the Board’s original analysis, changing only the inputs to reflect changed circumstances:

Relying solely on publically [sic] available information and addressing only the few examples of changed circumstances described above, which can be observed without the benefit of discovery, *Witness Crowley re-ran the Board’s 1996 SAC model* after adjusting the assumptions for traffic volumes and revenues, inflation and capital costs to conform to actual experience.

Petition to Vacate at 15 (emphasis added). If AEP had adhered to the stand-alone shipper group that it originally chose and to the SARR configuration it originally designed, then it would be correct to say that AEP “reran the Board’s 1996 SAC model.” But AEP expanded its stand-alone shipper group by adding six new shippers that were not part of the SARR configuration it selected and that was used in the Board’s 1996 SAC analysis. *See Crowley V.S. in Support of Petition to Vacate*, at 6. Moreover, the inclusion of five of these six shippers entails a fundamental change in the configuration of the stand-alone railroad, because, unlike the original 11 shippers in the group, these shippers are not served directly by the stand alone railroad; instead, they are cross-over shippers who are served through a fictional interline movement between the SARR and the residual incumbent. Although it nowhere directly acknowledges the fact, AEP assumes the creation of a fictional interchange at Fort Worth where traffic is handed from the SARR to BNSF. *See Verified Statement of Michael R. Baranowski* at ¶ 5.

Thus, AEP has not rerun the Board's 1996 SAC model at all. It has modeled a different stand-alone railroad from that used in the Board's 1996 analysis. AEP's calculations say nothing whatever about the continuing validity of the Board's rate prescription. All AEP shows is that different outcomes can be produced by using different SAC models. This is hardly the basis on which the Board could justify vacation of its prior rate prescription.

It is also worth noting that, notwithstanding the changes AEP made to its original SAC model, the results of its new DCF analysis do not differ materially from the results of the Board's 1996 DCF analysis. AEP asserts that "the restated SAC rates are significantly lower than those" in the Board's DCF analysis. Petition to Vacate at 15. In fact, while the SAC rates that AEP chooses to display for 2003 forward are lower than those calculated under the Board's DCF analysis, the SAC rates calculated by AEP for the first few years of the DCF period under its revised analysis are higher than those calculated by the Board. For example, AEP's SAC rate for 1995 under its revised analysis is \$16.03, versus the \$13.06 that the Board calculated. Baranowski V.S. at ¶ 7.

The difference in SAC rates under the two analyses is primarily a function of a different capital recovery pattern in the two analyses. The Board's 1996 DCF analysis provided for relatively lower capital recovery in the early years of the DCF period and relatively greater capital recovery in the later years than AEP's revised analysis. Baranowski V.S. at ¶ 6. Accepting AEP's inputs to its new SAC analysis at face value, the actual difference between the two analyses in terms of the present value of overpayments is relatively modest -- \$1.132 billion as calculated under the Board's 1996 DCF analysis versus \$1.215 billion as calculated under the AEP's restated analysis. *Id.* at

¶ 8. Even if the two analyses had been calculated on a comparable basis, and they were not, the Board could not conclude that a difference of 7.3 percent in the outcomes shows its prior assumptions to have been seriously inaccurate.

In short, AEP has not succeeded in showing that the rate prescription should be vacated, or even that it should be reopened.

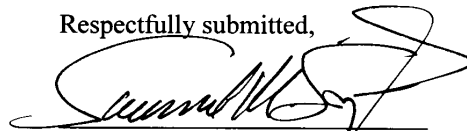
CONCLUSION

For the foregoing reasons, AEP's Petition to Vacate should be denied.

OF COUNSEL:

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Respectfully submitted,



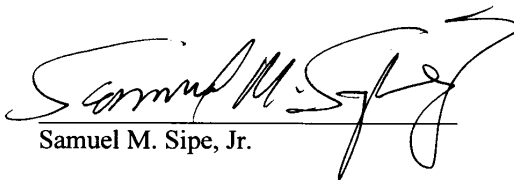
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September 22, 2003

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by
messenger on this 22nd day of September, 2003, on:

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



Samuel M. Sipe, Jr.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

WEST TEXAS UTILITIES COMPANY,

Complainant,

vi.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 41191

VERIFIED STATEMENT OF MICHAEL R. BARANOWSKI

1. My name is Michael R. Baranowski. I am a Senior Managing Director of FTI's Financial Consulting Division, with offices at 1201 Eye Street, N.W., Suite 400, Washington, D.C. 20005.

2. I have been involved in virtually every major rate reasonableness proceeding conducted by the Surface Transportation Board ("STB" or "Board") and its predecessor the Interstate Commerce Commission ("ICC") since the Coal Trading proceeding in the late 1980's. In each of those proceedings I have, on behalf of defendant railroads, personally run the Board's discounted cash flow ("DCF") model summarizing stand-alone capital recovery costs, operating costs and revenues over the life of the stand-alone system and am, thus, intimately familiar with all aspects of that model.

3. In June 2000 I submitted a verified statement in this proceeding in support of The Burlington Northern Santa Fe Railway Company's ("BNSF") Notice and Justification for Increased Rates on Coal Movements From Non-Rawhide Origins, or, in

the Alternative, Petition for Modification of Rate Prescription. In that verified statement, I demonstrated that the maximum reasonable stand-alone cost ("SAC") rate as calculated by the Board's staff for its May 3, 1996 decision in the above-referenced docket had increased to a level well above 180 percent of variable costs, the Board's jurisdictional threshold level, as of June 2000. I also submitted a verified statement on April 17, 2003 demonstrating that the 2003 SAC maximum rate computed by the Board in its WTU discounted cash flow model is above the jurisdictional threshold rate level for the Rawhide movement. A statement of my qualification is included as Exhibit 1 to that verified statement.

4. I have been asked by BNSF to respond to the September 2, 2003 verified statement by Thomas D. Crowley filed on behalf of AEP Texas North Company ("AEP Texas"), successor to WTU, quantifying the impact of what are described as fundamental changes in the operating, economic and regulatory environment that have occurred since the Board issued its WTU decision in 1996. In his statement, Mr. Crowley concludes that updating the Board's 1996 SAC analysis with publicly available information to capture these fundamental changes would produce a 2003 SAC maximum rate of \$16.44 in place of the \$18.04 rate computed by the Board. In this verified statement I will demonstrate that Mr. Crowley's analysis is misleading in three critical respects.

- Mr. Crowley fundamentally changed the structure of the Board's WTU SAC analysis by adding six new shippers to the original WTU shipper group, five of which are handled as cross-over movements.
- Mr. Crowley masks the true effects of his changes by showing only the prospective prescribed rates and failing to disclose that the SAC rates he calculates for the early years of the DCF analysis are higher than those found by the Board.

- Although Mr. Crowley made a number of seemingly material “updates” to the Board’s WTU DCF, when looked at over the 20-year DCF period, Mr. Crowley’s new DCF results are very close to those produced by the Board.

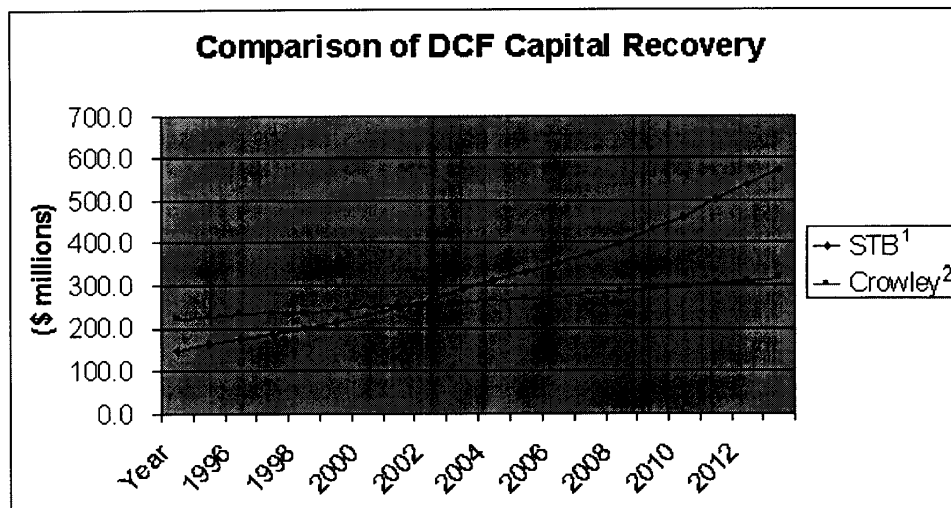
It is important to note that for purposes of this analysis I do not address the validity of the many new opinions proffered by Mr. Crowley relating to alleged shifts in coal traffic patterns, impacts of railroad mergers, changes in inflation and costs of capital or changes in the SAC procedures. Rather, my analysis demonstrates that even adopting these assertions as Mr. Crowley suggests would not invalidate the Board’s WTU rate prescription.

5. Mr. Crowley fundamentally changes the WTU SAC analysis conducted by the STB by adding six new shippers to the to the WTRR traffic base, five of which are served by cross-over traffic movements. In configuring the original WTRR, WTU limited its traffic to coal delivered to 11 selected power plants served by BN.¹¹ To serve this traffic, WTU assumed the WTRR, as a replacement for BN, would be built to the origin, destination or historical interchange point. In his changes to the WTU SAC, Mr. Crowley adds traffic for six new shippers to the WTRR traffic base. Rather than build to the actual destination for five of these six new shippers,¹² Mr. Crowley establishes hypothetical interchanges between the WTRR and the residual BNSF at the southern terminus of the WTRR in Fort Worth for continued movement on the residual BNSF. Expansion of the shipper group and treatment of most of this new traffic as cross-over traffic constitute fundamental changes to the WTRR SAC analysis.

¹¹ STB WTU April 25, 1996 Decision at 16.

¹² The sixth shipper, Public Service of Colorado’s Arapahoe station near Denver is on the WTRR route.

6. Mr. Crowley states that his new analysis shows that the current Rawhide prescription is invalid and that the SAC rates set forth in the Board's revised rate prescription are "dramatically overstated." Crowley V.S. at 20. What Mr. Crowley does not explain to the Board is that his new analysis results in higher SAC rates for the early years of the DCF period than those calculated by the Board. WTU would not have benefitted from rates set at the jurisdictional threshold under Mr. Crowley's analysis as it did under the Board's analysis. The explanation for this is in the different patterns of capital recovery in the two analyses. One of the changes made by Mr. Crowley was to replace the relatively high forecasts of road property investment inflation reflected in the Board's WTU DCF model with the more modest increases that occurred between 1995 and the present. Mr. Crowley's analysis also reflects a changed pattern of capital recovery, with capital recovery spread evenly over the 20 years of the DCF period instead of being based on projected tonnages. These changes to the Board's DCF model reduce the amount of the capital recover that is assumed to occur in the later years of the DCF model. This, in turn, increases the amount of recovery in the early years of the DCF. The chart below compares the capital recovery pattern for the Board's WTU DCF model with the new analysis presented by Mr. Crowley.



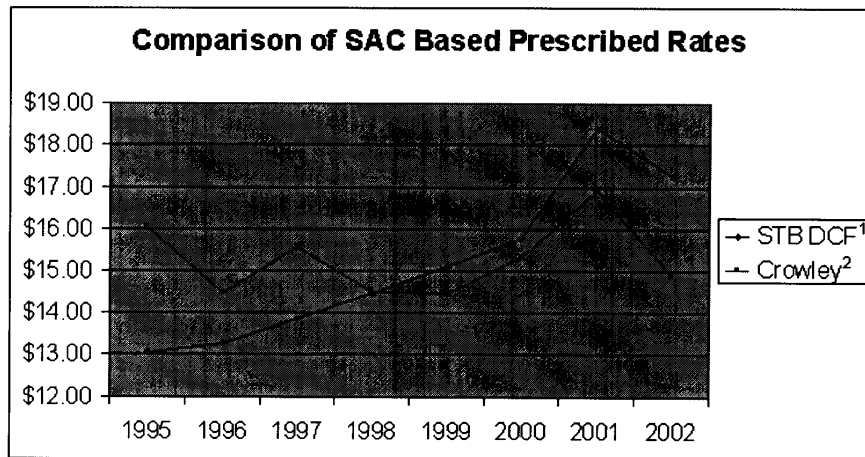
¹ Source: STB - STB Lotus 123 spreadsheet DCF-TONS, Table L, Column 3.

² Source: Crowley - Crowley Lotus 123 spreadsheet DCF-TONS_Updated, Table L, Column 3.

A higher capital recovery in the early years of the DCF would, all other things equal, produce a higher prescribed rate level in those early years under the Board's procedures than a lower capital recovery. This is because the Board's rate prescription procedures compare the stand-alone cost (which includes both capital recovery cost and operating expenses) for each year to the stand-alone revenues for each year and, for those years in which stand-alone revenues exceed stand-alone costs, computes the ratio by which revenues would need to be reduced to equal costs.

7. Based on the capital recovery pattern represented in Mr. Crowley's new analysis, the 1995 stand-alone rate prescription for the WTU movement would have been \$16.03 per ton. This is 23 percent higher than the \$13.06 stand-alone based maximum rate for 1995 calculated by the Board in its 1996 decision and 17 percent higher than the \$13.68 jurisdictional rate level actually prescribed by the Board. The chart below compares the stand-alone based rate prescription computed by the Board in its DCF for

the period 1995 through 2002 with the calculated rate prescription in Mr. Crowley's new analysis.



¹ Source: STB - STB Lotus 123 spreadsheet DCF-TONS, Table L, Column S, Maximum SAC Rate Levels.

² Source: Crowley - Crowley Lotus 123 Spreadsheet DCF-TONS_Updates, Table L, Column S, Corrected Max. SAC Rate Levels.

As the above chart demonstrates, had the Board in its April 25, 1996 decision used assumptions consistent with those now proffered by Mr. Crowley, it would have found that SAC based rates exceeded the jurisdictional rate level and would have set its rate prescription based on SAC.

8. Lastly, it is important to point out that even taking into account all of the changes proposed by Mr. Crowley, the overall results of WTU SAC analysis do not change materially from those derived by the Board in its 1996 decision. The Board's stand-alone cost test compares the present value of the stand-alone capital and operating costs over the 20-year DCF period with the present value of the actual and forecasted revenues over that same time frame. In its 1996 DCF, the Board found that over the 20-year DCF period, the present value of stand-alone revenues exceeded the present value of

stand-alone cost by \$1.132 billion.¹³ In his new, updated DCF analysis Mr. Crowley computes stand-alone revenues that exceed stand-alone costs on a present value basis by \$1.215 billion or only 7.3 percent above that computed by the Board.¹⁴ Thus, although Mr. Crowley has added new traffic to the original shipper group and has altered the capital recovery pattern within the WTU DCF model, among other changes, his changes have not produced a material difference in the overall outcome of the SAC analysis.

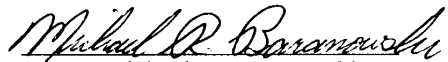
¹³ STB WTU April 25, 1996 Decision at 69.

¹⁴ Crowley Lotus 123 spreadsheet DCF-TONS_Updated, Table L, Column 10. The percentage difference between the Board's SAC overage and that calculated by Mr. Crowley is calculated by dividing \$1.215 billion by \$1.132 billion.

VERIFICATION

I, Michael R. Baranowski, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on September 22, 2003.


Michael R. Baranowski