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June 8, 2004

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Via HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

Re: **STB 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 above-captioned matter are the original and ten copies of the Motion of The Burlington Northern and Santa Fe Railway Company ("BNSF") for Establishment of a Briefing Schedule.

Please date stamp the extra copy of this cover letter and Motion and return it to the messenger who delivered this filing.

Sincerely,

Samuel M. Sipe, Jr.

Enclosures

cc: Counsel for Complainant

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

BRUSSELS

**BEFORE THE SURFACE
TRANSPORTATION BOARD**

ARIZONA PUBLIC SERVICE COMPANY
And PACIFICORP,

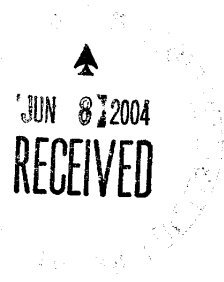
Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY*,

Defendants.

Docket No. 41185



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**MOTION OF THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY
FOR ESTABLISHMENT OF BRIEFING SCHEDULE**

Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") respectfully requests that the Board establish a due date for the simultaneous filing of final briefs in this reopened proceeding.¹ Briefing will permit the parties to identify and address the critical legal and factual issues that arise from the evidentiary submissions on reopening and will assist the Board in reaching a timely decision in this proceeding.

BACKGROUND

In January 2003, BNSF petitioned the Board to reopen this proceeding and to vacate the rate prescription entered by the Board in its 1998 decisions based upon fundamentally changed

* As successor in interest to The Atchison, Topeka and Santa Fe Railway Company

¹ On June 7, 2004, counsel for the Complainants informed counsel for BNSF that complainants do not believe briefs are necessary and, consequently, would not join in BNSF's request to establish a briefing schedule.

circumstances and new evidence.² Complainants, Arizona Public Service Company and PacifiCorp (hereafter jointly referred to as “APS/PacifiCorp”) responded to BNSF’s petition, acknowledging changed circumstances but contending that the rate prescription could not be vacated or modified absent a full evidentiary hearing that included evidence of a reconfigured SARR and a changed traffic group.³

In a decision served on May 12, 2003, the Board removed the prescriptive effect of the prior rate prescription and reopened the proceeding for the submission of limited evidence related to the changed circumstances identified in BNSF’s petition.⁴ Although BNSF was the moving party with respect to the reopening, the Board granted APS/PacifiCorp the right to open and close the evidentiary record. “Because Arizona may have better access to information on how it may re-source its coal needs once McKinley shuts down, what portion of that traffic could flow over the SARR, and the revenues available from that coal traffic, the procedural schedule should provide for opening evidence by Arizona, then reply evidence by BNSF, followed by an opportunity for rebuttal evidence by Arizona.”⁵

Following the denial of APS/PacifiCorp’s petition for reconsideration of the *May 12th Decision*, the Board established a procedural schedule for the submission of evidence on reopening.⁶ APS/PacifiCorp filed its Opening Evidence on Reopening on February 27, 2004,

² Petition of The Burlington Northern and Santa Fe Ry. Co. to Reopen and Vacate Rate Prescription, STB Docket No. 41185 (filed Jan. 10, 2003).

³ APS/PacifiCorp Reply to Petition to Reopen and Vacate Rate Prescription, STB Docket No. 41185 (filed Jan. 30, 2003).

⁴ *Arizona Public Service Co. & PacifiCorp v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket Nos. 41185 and 42077, slip op. at 4-6 (served May 12, 2003) (“*May 12th Decision*”).

⁵ *May 12th Decision* at 6.

⁶ *APS/PacifiCorp v. BNSF*, STB Docket No. 41185 (served Dec. 8, 2003)

BNSF filed its Reply Evidence on Reopening on April 9, 2004, and APS filed Rebuttal Evidence and Argument on Reopening on April 27, 2004.⁷

ARGUMENT

The Board has regularly found that the filing of post-evidentiary briefs has been of assistance in deciding rate cases brought under its Constrained Market Pricing standards.⁸ While the scope of this reopened proceeding is considerably narrower than the scope of the typical SAC case, the issues raised here are nonetheless complex and, in some instances, novel. BNSF believes that the Board would benefit from a focused consideration of the issues. In particular, the parties' evidentiary submissions raise the issue of conflicting interpretations of the proper pattern of cost recovery over the 20-year DCF period and the requirement that stand-alone costs be recovered over the 20-year DCF period. These are critical issues that have not arisen in prior SAC cases, and the Board would benefit from briefing on this subject.

In addition, briefing is necessary here so that the Board may have a fair and balanced overview of the record. In that regard, it should be noted that BNSF was the moving party that sought relief in the form of vacation of the rate prescription. In its *May 12th Decision*, the Board found that BNSF made a threshold showing of changed circumstances sufficient to justify reopening of the record. However, it gave APS/PacifiCorp the opportunity both to open and to close the evidentiary record on reopening, while BNSF was given only the right of a reply.

Under these circumstances, basic fairness requires that BNSF be given the opportunity, in the

⁷ APS/PacifiCorp filed an Errata to its Opening Evidence on March 31, 2004. BNSF filed an Errata to its Reply Evidence on May 28, 2004.

⁸ See *Wisconsin Power and Light v. Union Pacific R.R. Co.*, STB Docket No. 42051, slip op. at 1 (served Nov. 15, 2000); *PPL Montana, LLC v. BNSF*, STB Docket No. 42054, slip op. at 2 (served Dec. 12, 2001); *Texas Municipal Power Agency v. BNSF*, STB Docket No. 42056, slip op. at 1 (served May 28, 2002); *Carolina Power and Light Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42072, slip op. at 1 (served May 12, 2003); *Public Service Co. of Colorado d/b/a Xcel Energy v. BNSF*, STB Docket No. 42057, slip op. at 1 (served Aug. 8, 2003).

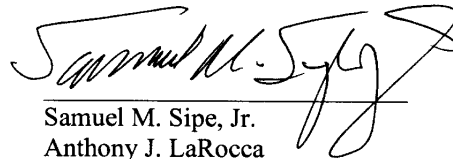
form of a final brief, to address the record on reopening as a whole. APS/PacifiCorp will not be prejudiced if the Board grants BNSF's request, as it will have the opportunity to file a final brief itself.

BNSF suggests that a 25-page limit is appropriate for final briefs in this reopened proceeding. BNSF proposes a due date of July 23, 2004 for the simultaneous filing of final briefs.

Respectfully submitted,

OF COUNSEL

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A handwritten signature in dark ink, appearing to read "Samuel M. Sipe, Jr.", written over a horizontal line.

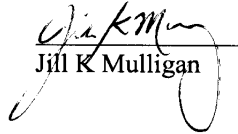
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June 8, 2004

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2004, I caused a copy of the foregoing Defendants' Reply to Complainant's Motion to Strike Defendants' Clarification to be served by hand upon the following counsel for Arizona Public Service Company and PacifiCorp.:

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