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May 26, 2005

via Hand Delivery

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings

MAY 26 2005

Part of
Public Record

Re: AEP Texas North Company v. BNSF Railway Company,
Docket No. 41191

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are an original and ten copies of BNSF's Reply to AEP Texas' Petition on Remand. Also enclosed are three CDs containing electronic copies of BNSF's Reply.

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

Sincerely,



Anthony J. LaRocca

Enclosure
cc: Complainant's Counsel

BEFORE THE
SURFACE TRANSPORTATION BOARD



AEP TEXAS NORTH COMPANY,)

Complainant,)

v.)

BNSF RAILWAY COMPANY,)

Defendant.)

Docket No. 41191

ENTERED
Office of Proceedings

MAY 26 2005

BNSF'S REPLY TO AEP TEXAS' PETITION ON REMAND Part of
Public Record

BNSF Railway Company ("BNSF") hereby replies in opposition to AEP Texas North Company's ("AEP Texas") May 6, 2005 Petition on Remand, in which AEP Texas renewed the request it made on September 2, 2003 that the Board vacate the rate prescription in this proceeding. AEP Texas further requests that the Board give retroactive effect to any vacatur of the rate prescription back to the effective date of the Board's previous March 19, 2004 vacatur of the rate prescription ("*March 2004 Decision*"), which was struck down on appeal by the United States Court of Appeals for the D.C. Circuit on April 8, 2005. *BNSF v. STB*, 403 F.3d 771 (D.C. Cir. 2005). For reasons described in detail below, AEP Texas' Petition should be denied.

The background to this dispute is addressed in BNSF's May 18, 2005 Motion to Dismiss in Docket No. 41191 (Sub-No.1) and is not repeated here. Three issues are raised by AEP Texas' Petition on Remand.

The first issue involves the effect of the D.C. Circuit's vacatur of the Board's *March 2004 Decision*. The law is clear that the vacatur of the *March 2004 Decision* restores the situation that existed prior to the unlawful vacatur. As AEP Texas itself advised the Board, when an order is vacated, it is as though the order never existed. The Board's *March 2004 Decision*

must be treated as having had no effect. Thus, the prior rate prescription has remained in effect and continues to be in effect. Moreover, since *Arizona Grocery*¹ does not permit retroactive adjustment of rates subject to a rate prescription, any action that the Board takes in response to AEP Texas' Petition on Remand must be prospective only.

Second, AEP Texas asks the Board once again to vacate the rate prescription based simply on its unadorned request for vacatur. However, the D.C. Circuit made it clear that it did not believe it was rational to allow a shipper to vacate a rate prescription on demand while imposing a higher standard on railroads seeking vacatur.

Third, AEP Texas asks the Board to consider evidence it submitted in September 2003 in support of its original request to vacate the rate prescription and to find, based on that evidence, that "material intervening changes in factual circumstances and the Board's own regulatory standards combined to render the 1996 prescription invalid." Petition on Remand at 11. As BNSF described in its September 22, 2003 response to AEP Texas' September 2, 2003 petition to vacate, and as further explained below, AEP Texas' evidence shows only that different SAC results occur when different SAC assumptions are used. AEP Texas has not identified any material assumptions in the original SAC analysis that have proven to be incorrect, such as the assumption about the long-term viability of the McKinley Mine in the *APS* case.²

AEP Texas has clearly failed to show that changed circumstances justify vacatur of the rate prescription. Whether the facts AEP Texas has alleged would justify a reopening of the rate prescription is a different question, but it is not one that AEP Texas has raised. The only issue

¹ *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932).

² *Arizona Pub. Serv. Co. & PacifiCorp v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 42077 at 4 (served May 12, 2003) ("*APS May 2003 Decision*") and (served Dec. 13, 2004) ("*APS December 2004 Decision*").

before the Board now is AEP Texas' petition to vacate the rate prescription, and AEP Texas has not produced any evidence that would justify that action. The Board should deny AEP Texas's Petition on Remand.

These matters are discussed further below.

ARGUMENT

I. The Court's Vacatur Of The Board's *March 19 Decision* Had The Effect Of Reinstating The Existing Rate Prescription Until Further Action Is Taken By The Board

AEP Texas asks that the Board "re-affirm that the former Rawhide rate prescription was no longer valid as of the effective date set in the [*March 2004 Decision*]." Petition at 14. That course of action is not available to the Board because the D.C. Circuit vacated the *March 2004 Decision*. The Court's order reversed the effect of the *March 2004 Decision* altogether, thereby reinstituting the rate prescription. *Arizona Grocery* prohibits the Board from taking any action now that retroactively repudiates the rate prescription that was in effect at the time of the Board's March 2004 order.

AEP Texas fails to acknowledge the significance of the D.C. Circuit's decision to *vacate* the *March 2004 Decision*. When an appellate court remands an agency action for further consideration or explanation, the agency may be able to justify reaching the same result by providing a new or more persuasive rationale. But this option is not available where, as here, the court expressly *vacates* the agency's decision. Vacatur of an agency decision by an appellate court has different consequences from a remand for further consideration. Vacatur means that the appellate court has decided that the effect of the agency's action is nullified. New action, with prospective effect, might be available to the agency. But when the court vacates an agency action, that action cannot be revived.

The consequence of an appellate decision vacating an administrative order is to render the vacated order without force or effect. *See Action on Smoking and Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (“To ‘vacate,’ as the parties should well know, means to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.”); *see also Alabama Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994) (same); *Mobil Oil Corp. v. EPA*, 35 F.3d 579, 584 (D.C. Cir. 1994). AEP Texas has already conceded this basic rule: “When an order is set aside or vacated, the result is the destruction of the order in its entirety. Its effectiveness is ended, the previously existing status is restored, *and the effect is the same as though the order never existed.*” AEP Rebuttal Narrative, at I-6 (filed July 27, 2004) (emphasis in original) (citation omitted).

The D.C. Circuit has explained on several occasions the differences between a vacatur and a remand-only disposition – indeed, “[d]octrinally the difference is enormous.” *Checkosky v. Securities & Exchange Comm’n*, 23 F.3d 452, 464 (D.C. Cir. 1994) (opinion of Silberman, J.). When an agency action is vacated, it has been determined to be unlawful. *Id.* at 463-64. In contrast, when an agency action has been remanded without vacatur, the court has concluded that it is not able to determine whether the agency action is lawful, most often because of a poor or inadequate explanation by the agency. Under those circumstances, the court adopts a “wait and see” approach whereby the agency gets a second opportunity to explain adequately its actions to the reviewing court. *Id.* This distinction is critical, as explained by the D.C. Circuit:

There is a fine line between agency reasoning that is “so crippled as to be unlawful” and action that is potentially lawful but insufficiently or inappropriately explained. (*Checkosky v. SEC*, 23 F.3d 452, 464 (D.C. Cir. 1994) (opinion of Silberman, J.)). In the former circumstance, the court’s practice is to vacate the agency’s order, while in the latter the court frequently remands for further explanation (including discussion of the relevant factors and

precedents) while withholding judgment on the lawfulness of the agency's proposed action.

Radio-Television News Directors Ass'n v. FCC, 184 F.3d 872, 888 (D.C. Cir. 1999). The present case falls within the “former” circumstance – the panel did not withhold judgment on the lawfulness of the Board’s decision, but expressly vacated the *March 2004 Decision* after finding it to be arbitrary and capricious. *BNSF v. STB*, 403 F.3d at 777-78.

Thus, the first, and most important consequence of an appellate court’s vacatur of an agency decision is that the decision has been declared unlawful, is cancelled and cannot be revived. New action may be taken going forward, but the action that was originally challenged and was the subject of the appellate court’s vacatur is nullified. For this reason, most of the cases cited by AEP Texas in support of its request that the Board revive or re-affirm the *March 2004 Decision* are inapposite -- they do not involve appellate court decisions that *vacated* the original agency order. Thus, the decision in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), is irrelevant because the Court had previously remanded the case for a better explanation *without vacating* the decision. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). Similarly, in the first appeal in *City of Charlottesville v. FERC*, 774 F.2d 1205 (D.C. Cir. 1985), the D.C. Circuit found that the record “was insufficient to support the Commission’s order, and ‘remanded the case for proceedings not inconsistent with this Opinion.’” *Id.* at 1212, quoting *City of Charlottesville, Va. v. FERC*, 661 F.2d 945 (D.C. Cir. 1981). The court never vacated the agency decision. *Id.* In contrast, when the appellate court finds the agency action unlawful and vacates the order under review, as was done in this case, the order is removed altogether and it is as though it never existed.

The second consequence of vacatur by an appellate court of an agency decision is that the vacatur restores the pre-existing status quo. “A judgment setting aside the ICC’s decision

restores the status quo ante” *Busboom Grain Co., Inc. v. ICC*, 830 F.2d 74, 76 (7th Cir. 1987). This principle is well established. *See Milk Train, Inc. v. Veneman*, 310 F.3d 747, 756 (D.C. Cir. 2002) (noting that vacating a regulation restores the circumstances to the *status quo ante*); *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847, 855 (D.C. Cir. 1987) (same). In the context of administrative agencies, the status quo ante is that established by the last valid administrative decision, which is restored by an appellate court vacatur of a subsequent administrative decision. Thus, the vacatur of an agency action “reinstate[s] the last valid administrative determination.” *Greene v. United States*, 376 U.S. 149 (1964). *See also Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925) (noting that if lack of notice to the carrier rendered the second ICC order void, “the original order remained in full force”). In *Action on Smoking and Health v. Civil Aeronautics Bd.*, 713 F.2d 795 (D.C. Cir. 1983), the agency had issued two sets of rules through separate rulemaking proceedings and the reviewing court vacated the second set of rules. The Court found that “the judgment of this court had the effect of reinstating the rules previously in force[.]” *Id.* at 797.³

Here, a return to the status quo ante means that the 1996 rate prescription as modified by the Board’s May 29, 2003 correction of that rate prescription -- the last valid agency determination -- is automatically restored. The three cases cited by AEP Texas that involve an appellate court’s vacatur of an agency action (as opposed to remands for additional explanation) are fully consistent with this result. *Consolidated Rail Corp v. National Assoc. of Recycling Industries, Inc.*, 449 U.S. 609 (1981) (“Conrail”), *Atchison, T. & S.F.R. Co. v. Wichita Board of*

³ *See also Fleet Aerospace Corp. v. Holderman*, 848 F.2d 720, 721 n.1 (6th Cir. 1988) (where a decision of the Court of Appeals had been vacated and remanded by the Supreme Court, that prior decision “is no longer of any import but the district court’s decision was, in effect, reinstated”); *Menorah Medical Center v. Heckler*, 768 F.2d 292, 297 (8th Cir. 1985) (adopting D.C. Circuit’s holding in *Action on Smoking and Health*); *Abington Memorial Hosp. v. Heckler*, 750 F.2d 242, 244 (3d Cir. 1984).

Trade, 412 U.S. 800 (1973) (“*ATSF*”), and *Burlington N., Inc. v. United States*, 459 U.S. 131 (1982) (“*Burlington Northern*”), all involved an agency action establishing maximum reasonable rates, not vacating an existing rate prescription. This distinction is important in understanding these cases, because in the absence of a valid agency finding as to the maximum reasonable rate, the governing statute expressly declares that the railroad has the right to establish the rates to be charged. Accordingly, when the agency’s maximum reasonable rate determination is vacated, the effect is normally to restore the rate setting freedom conferred by the statute, and not to reinstate a prior valid administrative order.

The *Conrail* and *ATSF* Supreme Court decisions both involved appellate court decisions striking down agency orders that established maximum reasonable rates. However, the appellate court, in both cases, also took further action that limited the railroads’ ability to increase rates while the agency redid its flawed rate reasonableness analysis. The Supreme Court in both cases struck down this separate action by the appellate courts to impose limitations on the railroads’ rate setting. In both cases, the vacatur by the appellate courts of the agency’s maximum rate determinations should have restored the status quo ante, which was that the railroads had rate setting freedom unless or until the agency acted to limit that freedom. The problem with the appellate courts’ actions in both cases was that they did not, in fact, allow the status quo ante to be restored but rather imposed conditions on the railroads’ rate setting freedom that were inconsistent with the status quo ante.⁴

Although *Burlington Northern* had a convoluted and peculiar procedural history, the decision in that case is no different from the decisions in *Conrail* and *ATSF* -- the Court there

⁴ Accordingly, the Ninth Circuit, in *Union Pacific Railroad Co. v. Nevada Power Co.*, 950 F.2d 1429 (9th Cir. 1991), made it clear that there was nothing wrong with reviving a prior valid rate if that was the natural effect of the vacatur of an unlawful agency action. *See id.* at 1434.

found that the railroad's rate setting freedom should be restored when a flawed rate reasonableness determination by the ICC was vacated. The origin of that controversy was a 1976 decision by the ICC that established a temporary, interim rate for transportation of coal to new coal-fired electric generating units that would "permit the coal movement to begin." *San Antonio v. United States*, 631 F.2d 831, 835 (D.C. Cir. 1980). The rate prescription (referred to as *San Antonio I*) was not intended to remain in effect over the long term and the ICC "invited petitions for modification of the rate when actual experience in operating the trains was gained." *Id.* Such petitions were filed, *San Antonio I* was reopened, *id.* at 835 n.11, and the ICC subsequently issued new maximum reasonable rate determinations (referred to as *San Antonio II and III*). *Id.* at 835.

These decisions were appealed to the D.C. Circuit. The issue on appeal was not whether *San Antonio I* should remain in effect, but whether the new rate levels established by the ICC in *San Antonio II and III* were reasonable. *See id.* at 836. The D.C. Circuit found that the ICC's rate reasonableness analysis was flawed and it set aside *San Antonio II and III* and instructed the ICC to carry out a new analysis. *Id.* at 836, 853. The parties later returned to the D.C. Circuit and asked the court to advise them on whether the rates in *San Antonio I* continued to apply to the issue traffic movements. The D.C. Circuit ruled that *San Antonio I* applied until there was further action by the ICC. *See San Antonio v. United States*, 655 F.2d 1341, 1344-45 (D.C. Cir. 1981).

The Supreme Court disagreed with the D.C. Circuit that *San Antonio I* continued to have any effect. *Burlington Northern*, 491 U.S. at 142-44. But the Court did not announce a new principle of law governing the effect of appellate court vacatur of agency orders. It clearly accepted the principles that have been described above -- when an agency order is vacated, the

effect of the order is eliminated, the status quo ante is reinstated, and if there is a valid prior administrative order, that prior administrative order is restored. It simply found that *San Antonio I* was not a valid administrative order that could be reinstated or restored. *Id.* at 143-44. *San Antonio I* was a temporary, stop-gap rate prescription that was never intended to have long term effect: “More important, the [D.C. Circuit’s] determination requires the railroads to accept a return that was considered temporary when it was approved in 1976 and ‘below a minimum reasonable rate’ when it was modified in 1978.” *Id.* at 142. The D.C. Circuit overstepped its bounds when it ordered reinstatement of a rate prescription that was expressly intended when it was promulgated to be a temporary measure designed to allow the traffic to move, not a long-term rate prescription.

The contrast with the present case is obvious. The issue on appeal here was the Board’s vacatur of the existing rate prescription, not the vacatur of a determination of maximum reasonable rates. When the D.C. Circuit ruled that the Board’s vacatur was improper, the only possible effect of that decision was to reinstate the rate prescription that had improperly been removed. Moreover, the rate prescription at issue here, unlike *San Antonio I*, was a 20-year rate prescription expressly intended to cover the movements occurring through 2013. Thus, unlike the situation in *Burlington Northern*, there was a valid administrative decision in place when the D.C. Circuit vacated the Board’s *March 2004 Decision*, and that decision automatically was restored and remains in effect until further action is taken by the Board.

The D.C. Circuit’s decision in this case is silent on what further actions the Board can take. The limits that exist on the scope of the Board’s actions going forward are imposed not by the D.C. Circuit, but by the Board’s own governing statute and the case law interpreting it. Thus, the Board is prohibited from retroactively vacating or modifying the rate prescription not

because of any action the D.C. Circuit has taken but because *Arizona Grocery* expressly prohibits retroactive modifications to an existing rate prescription. *Arizona Grocery*, 284 U.S. at 387-90. The D.C. Circuit clearly had the authority to vacate the *March 2004 Decision*, thus declaring it to be unlawful and beyond repair. The vacatur eliminated the effect of the *March 2004 Decision*, and thereby reinstated the rate prescription that had unlawfully been removed. Under *Arizona Grocery*, any new action taken to modify or vacate the rate prescription would have only prospective effect. *Id.* at 387-89.

The D.C. Circuit agreed with BNSF that the 1996 rate prescription protected BNSF from exposure to reparations claims for as long as that prescription was in effect. *BNSF v. STB*, 403 F.3d at 776. The D.C. Circuit also found that the Board had acted unlawfully in removing that protection in March 2004. *Id.* at 777-78. The Board cannot defy the D.C. Circuit by removing that protection retroactively. BNSF explains below why the Board does not have grounds for changing, suspending or vacating the rate prescription at this time. But if the Board were to conclude otherwise, such vacatur would only have prospective effect.

II. The D.C. Circuit Has Made It Clear That Any Vacatur Of An Existing Rate Prescription Must Be Based On An Examination Of Changed Circumstances

AEP Texas asks the Board to “re-affirm” its March 19, 2004 conclusion that a rate prescription can be vacated merely upon the shipper’s request. It is hard to believe that AEP Texas is serious about this request in light of the D.C. Circuit’s clear rejection of the Board’s *March 2004 Decision* and the underlying rationale. Nevertheless, AEP Texas urges the Board to consider two new rationales that it claims would justify disparate treatment of railroads and shippers seeking vacatur. The new rationales, however, are little more than a restatement of the rationales already presented to the court and rejected by it.

First, AEP Texas asserts that disparate treatment is warranted because of an “asymmetry of risk of violating the” National Rail Transportation Policy after a vacatur by a railroad and a vacatur by a shipper. Petition on Remand at 7. The asymmetry occurs, apparently, because a railroad, freed from a rate prescription, has the ability to charge an unreasonable rate, while a shipper, freed from a rate prescription, must either accept the new rate established by the railroad or challenge it before the Board. This is just another version of the argument that the court already considered and rejected:

The Board also observed that while the carrier is restored to rate setting freedom, the shipper has relinquished the benefits of a prior rate prescription, must take service under the new rate established by the carrier, and bears the risk that a new rate complaint may be unsuccessful.

403 F.3d at 775 and 777 (citing *March 2004 Decision* at 3). The court did not accept this purported rationale for distinguishing between shippers and railroads. As the court found, both parties are bound by and protected by a rate prescription while it exists, and both parties should therefore be required to show changed circumstances to remove the prescription.

AEP Texas suggests a second, related rationale for disparate treatment, namely that vacatur of a rate prescription by a railroad will invariably lead to new litigation while vacatur by the shipper does not necessarily lead to new litigation. Petition on Remand at 8. This argument is not persuasive in light of the fact that the shipper here sought to vacate the rate prescription for the express purpose of bringing a new case. But even if there was an “asymmetric” risk of litigation, that would still beg the question why either party should be relieved of the obligation to show changed circumstances before obtaining vacatur of an existing rate prescription. If changed circumstances justified vacatur because the changed circumstances showed that the prescribed rate was too low (and could not be adjusted upward through a reopening), there is no reason to believe that litigation will invariably result from an increase in the rate after the

prescription is vacated. The shipper might conclude that the rate increase is reasonable.

Similarly, if the rate prescription is vacated after the shipper shows that changed circumstances did not justify a rate as high as the prescribed rate, a new rate might be established at a lower level that avoided litigation. If a showing of changed circumstances is required from any party seeking a vacatur, the risk of subsequent litigation should be the same regardless of which party makes the showing.

Finally, AEP Texas quibbles with the D.C. Circuit's decision and suggests that the Board should essentially disregard the court's conclusion that the relative procedural posture of the parties before the Board did not justify disparate treatment. Petition on Remand at 9. While the Board could have sought reconsideration of the Court's decision, the Board is not free to ignore it now. The D.C. Circuit's mandate "establishes the law binding further action," and the Board on remand is bound to follow in "letter and spirit" the Court's decision. *City of Cleveland, Ohio v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977). The Board has "no power to reconsider issues laid to rest" in the original appeal. *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 584-85 (D.C. Cir. 1980); *see also Sanford Fork & Tool Co.*, 160 U.S. 247, 255-65 (1895) (when acting under an appellate court's mandate, the lower court "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon a matter decided on appeal; or intermeddle with it[.]"). Indeed, in *Northern States Power Co. v. Department of Energy*, 128 F.3d 754, 758-59 (D.C. Cir. 1997), *cert. denied*, 525 U.S. 1016 (1998), the D.C. Circuit granted a petition to enforce the mandate where the agency merely "recycle[d]" the same argument in a slightly different form. In *International Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922-23 (D.C. Cir. 1984), the Court found that the Secretary of Labor's attempt to "reimplement[] precisely the same rule that this court vacated as

‘arbitrary and capricious’” conflicted with the Court's “unambiguous mandate.”

As the court concluded, there is no rational basis for treating shippers and railroads differently when a shipper or railroad seeks to vacate a rate prescription because it believes that the rate prescription is no longer valid. In both cases, the proper course is for the party to identify circumstances that have changed and to show that those changed circumstances have fundamentally altered the grounds on which the original rate prescription was based, thereby rendering it invalid. There is no reason to allow shippers to relitigate settled rate reasonableness disputes whenever they want by granting them vacatur on demand so they can pursue new rate litigation involving the same transportation that is the subject of the existing rate prescription.

III. AEP Texas Has Not Alleged Changed Circumstances Of The Type Or Magnitude That Would Justify Vacating The Rate Prescription

As AEP Texas acknowledges, “the party seeking to vacate a rate prescription [must] demonstrate a change in legal or factual circumstances which would render the prior rate analysis invalid.” Petition on Remand at 11 (citing *San Antonio v. Burlington Northern, et al.*, 364 I.C.C. 887 (1981)). AEP Texas claims that its September 2003 Petition demonstrated “that material changes in factual circumstances and the Board’s own regulatory standards combined to render the 1996 prescription invalid.” *Id.* However, the September 2003 Petition did little more than point out that the coal market and the economy have not followed exactly the same course that was predicted by the Board in 1996. AEP Texas has not identified changed circumstances of the type or magnitude that would support vacatur of the rate prescription.

AEP Texas does not identify any material assumption underlying the original SAC analysis, such as the assumption regarding the life of the McKinley Mine at issue in the *APS* case, that has proven to be incorrect.⁵ AEP Texas’ Petition identifies two types of factual

⁵ See *APS May 2003 Decision* at 4.

changes that have occurred since 1996. First, it asserts that there have been “unanticipated changes in inflation rates and the cost of capital.” September 2003 Petition at 3. It is not surprising that inflation and railroad cost of capital did not turn out exactly as predicted in 1996. But the existence of a mere difference over several years between predicted economic results and actual results cannot provide grounds for vacating a rate prescription. If vacatur of an existing rate prescription could be obtained whenever the real world economic results diverge somewhat from the Board’s economic forecasts, a rate prescription could never be maintained for any significant period of time. Forecasts rarely turn out to be precise predictors of the future. The question here is whether the Board’s 1996 economic forecasts were so far off the mark -- and so central to the rate prescription -- that the Board’s prior rate reasonableness analysis is invalid. AEP Texas’ September 2003 Petition does not make such a showing.

The second type of factual change that AEP Texas alleges in its September 2003 Petition involves changes in traffic patterns that have occurred since 1996. Once again, AEP Texas merely points out the obvious -- that traffic patterns have changed and that some of the Board’s predictions in 1996 have not come to pass. What AEP Texas fails to address is whether these changes are so wide-ranging or significant that they undermine the validity of the Board’s 1996 SAC analysis. In fact, the purported changes in traffic patterns do not support vacatur of the 1996 rate prescription.

AEP Texas’ basic claim is that the SARR traffic group could now be expanded to include the traffic of six additional shippers. Five of these six shippers would have to be handled as cross-over traffic. But the Board in *APS* made it clear that it would not vacate an existing order based on evidence relating to a different traffic group from that used in the original SAC

presentation or based on fundamentally different SAC assumptions.⁶ It is obvious that a change in basic SAC assumptions will produce different SAC results, but that says nothing about the continued validity of the original SAC determination. In this case, the SARR posited by AEP Texas' predecessor did not carry any cross-over traffic.⁷ The use of cross-over traffic would represent a fundamental change in the nature of the SARR posited originally by AEP Texas' predecessor. AEP Texas' evidence relating to the six potential new shippers thus says nothing about the continued validity of the Board's rate prescription. All AEP Texas demonstrates is that different SAC outcomes can be produced using different SAC models and different SAC traffic groups.

As BNSF explained in its September 22, 2003 reply to AEP Texas' original petition, BNSF did not address the underlying validity of AEP Texas' new traffic and revenue assumptions or its modified economic assumptions. However, BNSF showed that even if those assumptions were valid, they do not produce results that materially affect the Board's 1996 SAC results. As BNSF explained, the actual difference between the 1996 SAC analysis and the revised analysis proffered by AEP Texas in September 2003 is modest -- the \$1.132 billion over-recovery calculated under the Board's 1996 DCF analysis increases slightly to \$1.215 billion as calculated under AEP's restated analysis. *See* BNSF's Reply to Petition to Vacate Rate Prescription, Verified Statement of Michael R. Baranowski, at 22-23. Even if AEP Texas'

⁶ *APS May 2003 Decision* at 5.

⁷ AEP Texas' assertion in its May 2005 Petition that the SARR did carry cross-over traffic is based on a distorted and misleading definition of cross-over traffic that would treat as cross-over traffic interline movements that the incumbent hands off to another carrier in the real world. But interline movements are not cross-over traffic. The essential characteristic of cross-over traffic is that it involves a hypothetical interchange with the residual incumbent and a procedure to allocate through revenues. This requires that, among other things, the complainant defend the reasonableness of the hypothetical interchange and the reasonableness of revenues attributed to the cross-over movement. The original SARR had no cross-over traffic.

assumptions are used without any changes or consideration of other developments since 1996, the purported overcharge increases by only 7.3 percent. *Id.*

AEP Texas tries to mask the modest effect of the changes in traffic, revenue and economic assumptions identified in its September 2003 petition by presenting revised SAC calculations based on a capital recovery pattern that is different from that assumed by the Board in 1996. As BNSF explained in response to AEP Texas' September 2003 Petition, AEP Texas assumed that a larger portion of the SARR's capital would be recovered in the historical period than the 1996 SAC calculations assumed. This had the effect of reducing the capital that would need to be recovered in the future periods, and thus reduced the apparent revenue needs for the SARR going forward. Accordingly, AEP Texas' calculations do not reflect changed circumstances; they merely show that different DCF results are produced when different assumptions are made about capital recovery over the 20-year DCF period. That is not a changed circumstance that justifies vacatur.

AEP Texas claims that the new capital recovery pattern it used in its revised SAC calculations is consistent with the capital recovery pattern that the Board uses in new SAC analyses. While that is true, it not relevant to the question here -- whether something has occurred since 1996 that undermines the validity of the 1996 SAC calculations. Even though the Board now uses a different capital allocation pattern in new SAC cases than the pattern used in the 1996 calculations, that does not mean that the Board's original SAC calculations *in this case* are no longer valid. Once the Board establishes a 20-year pattern of capital allocation in a particular case that is designed to ensure full cost recovery, it should assess the effect of supposed changed circumstances using the same capital allocation pattern. In the *APS* case, the Board did not authorize the parties to submit new SAC evidence based on a different pattern of

capital recovery than that used in the original SAC calculations. *APS May 2003 Decision* at 5-6. Thus, in assessing the continued validity of the Board's 1996 SAC calculations, the basic capital recovery assumption used in the 1996 calculations should not be changed.

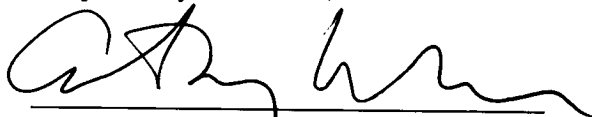
AEP Texas has not shown that any material assumptions underlying the original SAC calculations were incorrect. Therefore, it has not presented evidence that would justify vacatur of the 1996 rate prescription, as modified in May 2003. Whether AEP Texas has presented evidence of factual changes since 1996 that would justify a reopening of the existing rate prescription to make adjustments going forward is a different question. But that question is not before the Board.⁸ AEP Texas has sought a vacatur of the rate prescription, but it has not presented grounds that support that request. The Board should deny AEP Texas' request.

CONCLUSION

For the reasons set forth above, the Board should deny AEP Texas' Petition on Remand.

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Respectfully submitted,



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May 26, 2005

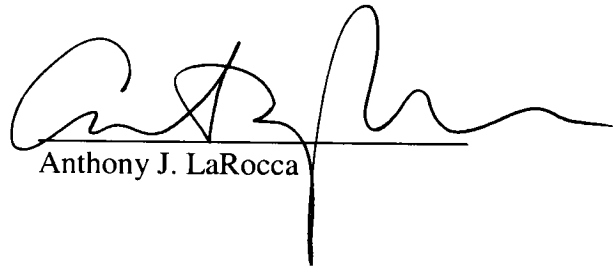
Attorneys for Defendant

⁸ Indeed, BNSF presented evidence on reply in Docket No. 41191 (Sub-No.1) showing that the changes that have occurred in coal market and economic conditions since 1996 would not justify any reduction in the level of the rate prescription. BNSF Reply Narrative at III.A-17 to 21 (filed May 24, 2004).

CERTIFICATE OF SERVICE

I hereby certify that this 26th day of May, 2005, I served a copy of BNSF Railway Company's Reply To AEP Texas' Petition On Remand on the following by hand delivery:

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