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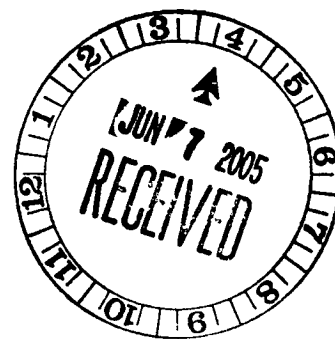
June 7, 2005

VIA HAND DELIVERY

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, DC 20423

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Re: Docket No. 41191 (Sub-No. 1). AEP Texas North
Company v. BNSF Railway Company

Dear Secretary Williams:

Enclosed for filing in the referenced docket, please find an original and 10 copies of Complainant's Reply to Defendant's Second Motion To Dismiss, together with a computer disk containing the filing.

An additional copy of the Reply also is enclosed. Kindly indicate receipt and filing by time-stamping this extra copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

Kelvin J. Dowd
An Attorney for
AEP Texas North Company

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Defendant.

Docket No. 41191 (Sub-No. 1)

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BNSF first claims that the Complaint should be dismissed insofar as it covers coal shipments from the Rawhide Mine, because the D.C. Circuit's April 8, 2005 decision in *Burlington Northern and Santa Fe Railway Company v. Surface Transportation Board*, No. 04-1162 ("*BNSF v. STB*") allegedly reinstated a rate prescription which previously had applied to Rawhide shipments,² and thereby immunized that rate from challenge. However, dispositive precedent from the U.S. Supreme Court makes clear that the D.C. Circuit's ruling did *not* reinstate or "revive" the former prescription, and the evidence presented in this case – when viewed in a light most favorable to AEP Texas (as it must be for present purposes) – independently establishes that the former prescription no longer is valid as a reasonable ceiling on BNSF's pricing. Moreover, nothing in *Arizona Grocery*³ or its progeny holds that a hearing to consider the modification of a prescribed rate cannot take place in response to a complaint. BNSF's first argument therefore must be rejected.

BNSF next claims that the Board should dismiss the Complaint as it relates to movements from origins other than Rawhide, which have never been the subject of a prior rate ruling. The ground asserted here is that a September, 2004 Board decision in *TMPA*⁴

² The prescription was imposed in *West Texas Utilities Company v. Burlington Northern Railroad Company*, 1 S.T.B. 638 (1996) ("*WTU*"). It was subsequently modified in a decision served May 29, 2003, and was vacated upon petition by AEP Texas on March 19, 2004. This latter ruling was the subject of *BNSF v. STB*.

³ *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Company*, 284 U.S. 370 (1932).

⁴ Docket No. 42056, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company*, Decision on reconsideration served September 24, 2004.

compels the automatic application of the “revived” Rawhide rate prescription to non-Rawhide movements as well. This claim is equally wrong-headed. The law is clear that a policy change such as that announced in *TMPA* can have prospective effect only, and cannot override prior Board rulings in this case on which AEP Texas specifically and reasonably relied. Additionally, BNSF’s repetitive and circular⁵ claim that AEP Texas has presented no facts tending to show that the 1996 findings in *WTU* should not be applied to non-Rawhide movements in 2005 is belied by the extensive and detailed record in this very proceeding.

The evidentiary record in this case is closed, and save only for the filing of summary briefs and – in the Board’s discretion – oral argument, the matter is ripe for decision. BNSF’s Motion is simply the latest in a line of thus far unsuccessful sidebar efforts by the carrier to deny AEP Texas the fair hearing to which it is entitled.

BACKGROUND

The history of the dispute between AEP Texas and its predecessor and BNSF over the reasonableness of BNSF’s coal rates to Oklaunion is well known to the Board, and will not be retold here. However, AEP Texas will take this opportunity to address some of the factual misstatements and mischaracterizations contained in the “Background” section of BNSF’s Motion, which are relevant to a fair consideration of the issues raised in the carrier’s pleading.

⁵ BNSF hinges its argument on the falsehood that the Board made rate reasonableness findings with respect to non-Rawhide shipments in 1996, which is precisely the *opposite* of what actually occurred.

First, BNSF erroneously states that the 1996 *WTU* decision included a Board determination of maximum rates under the stand-alone cost (SAC) constraint of the *Coal Rate Guidelines*. Motion at 5, 7. In fact, the Board made *no* specific SAC findings in 1996, and so stated in its Decision. *See* 1 S.T.B. at 677, 716. BNSF asserts that the Board staff “developed a discounted cash flow (DCF) model projecting the SAC maximum rate levels through the year 2014,”⁶ but that is not true either. A simple look at Table E-1 in the 1996 Decision’s Appendix E confirms that there are no SAC rates shown there at all. *See* 1 S.T.B. at 711.

The first time that the Board entered a finding of maximum rates to Oklahoma based on a SAC analysis was on May 29, 2003, when it granted BNSF’s April 17, 2003 *Petition for a Declaration Regarding the Rate Prescription*. Therein, BNSF acknowledged that the SAC rates it advocated were found in an “electronic workpaper developed by the Board’s staff” (*id.* at 3-4), not the 1996 Decision itself. This fact is material to the parties’ current dispute, as it explains why BNSF suddenly changed positions and advocated application of the Rawhide prescription to non-Rawhide movements,⁷ and why AEP Texas

⁶ Motion at 5 n.4.

⁷ Prior to the Board’s May 29, 2003 ruling, BNSF steadfastly had opposed extension of the Rawhide prescription. *See Docket No. 41191*, Decisions served November 7, 2000 and March 23, 2001.

ultimately accepted the Board's invitation to address the reasonableness of BNSF's non-Rawhide rates through a new SAC analysis in a new complaint proceeding.⁸

Next, BNSF misleadingly implies that the Board's 1996 rate prescription was limited to Rawhide movements only because "there was insufficient evidence of the variable costs for movements from other mines" Motion at 5. The true facts are that the Board made a *threshold* determination that its ruling only would apply to Rawhide,⁹ and later noted that its variable cost calculations were so limited because "this decision only addresses the reasonableness of the rate from Rawhide" ¹⁰ BNSF, of course, strenuously supported and defended that holding, until the Board's May 29, 2003 Decision authorized a 32% increase in AEP Texas' Rawhide rate, which suddenly made the Rawhide prescription much more attractive to the railroad.

BNSF similarly miscasts the basis for the Board's November 7, 2000 Decision allowing BNSF to set the rate of its choice for shipments from mines other than Rawhide. In its Motion, BNSF suggests that the ruling was grounded on a 1996 SAC finding, which as shown above never was made. Motion at 6. However, the Board's Decision clearly says otherwise:

⁸ *Docket No. 41191*, Decision served July 23, 2003 at 3.

⁹ 1 S.T.B. at 644.

¹⁰ 1 S.T.B. at 678.

We find ... that the rate prescription in *West Texas* only applied to the Rawhide mine, and thus, under 49 U.S.C. 11101(c), BNSF may raise its rates from non-Rawhide PRB origins to \$15.78 per ton, effective July 8, 2000. BNSF does not need a Board order to modify the rate.

Decision served November 7, 2000 at 4 (footnote omitted). The Board did reopen *Docket No. 41191* to consider a challenge to the reasonableness of BNSF's non-Rawhide rates, and it is true that AEP Texas did not request the establishment of a procedural schedule for the reopening until May, 2003. Motion at 7. As the Board recognized, however, the reason for this "delay" was that AEP Texas had entered into negotiations with BNSF in an effort to resolve the rate dispute without further litigation.¹¹

Finally, BNSF mischaracterizes the basis of the D.C. Circuit's decision in *BNSF v. STB*. Motion at 8-9. While BNSF *argued* to the Court its view of the standard for modification or vacation of a rate prescription, the Court specifically declined to address those points. *BNSF v. STB*, Slip Op. at 13. The Court grounded its holding solely on the finding that the Board had failed to adequately explain the basis for treating complainant shippers and defendant railroads differently when it came to requests to modify rate prescriptions. *Id.* at 9-12¹²

BNSF's attempts at historical revisionism plainly are geared toward trying to set a factual predicate for its legal arguments, which are addressed below. However, the true

¹¹ *Docket No. 41191*, Decision served July 23, 2003 at 2.

¹² AEP Texas' May 6, 2005 *Petition On Remand* addresses this issue in detail. *Id.* at 6-10.

record of this dispute speaks for itself, and as we now show, offers no factual foundation for dismissal of this case.

ARGUMENT

The legal criteria for evaluating a motion to dismiss a complaint before the Board are well-established. Such a motion can only be granted if there are no material facts to be resolved in the proceeding,¹³ and the Board can conclude without equivocation that there is no basis on which the non-moving party can prevail.¹⁴ In considering BNSF's Motion, all factors and disputed claims must be construed in the light most favorable to AEP Texas. *See* Docket No. 42012, *Sierra Pacific Power Company v. Union Pacific Railroad Company*, Decision served January 26, 1998; Docket No. 40169, *National Grain and Feed Ass'n v. Burlington Northern Railroad*, Decision served June 1, 1990. Under this standard, which BNSF completely ignores, it is clear that the Motion must be denied.

I. There Is No Basis For Dismissal Of The Complaint As It Relates To Rawhide

With no citation to applicable case law or other controlling authority, BNSF first argues that the effect of the Court's ruling in *BNSF v. STB* was to reinstate the former Rawhide rate prescription, and that as a consequence of this "revival" AEP Texas' Complaint

¹³ Docket No. WCC-100, *Carribean Shippers Ass'n v. NPR, Inc., et al.*, Decision served March 25, 1997.

¹⁴ Docket No. 42060 (Sub-No. 1), *North American Freight Car Association v. The Burlington Northern and Santa Fe Railway Company*, Decision served August 13, 2004 at 9.

should be dismissed insofar as it relates to rates from the Rawhide Mine. Motion at 9-10. BNSF is wrong on both counts.¹⁵

The Court's vacation and remand order in *BNSF v. STB* pointedly did not include any directive regarding revival of the Rawhide prescription on remand. *See* Slip Op. at 13. This is significant, because BNSF specifically requested such a directive in its prayer to the Court.¹⁶ However, the Court's deference to the Board was squarely in line with the law governing the unique jurisdictional issues attending the vacation of rail rate prescriptions.

In *Burlington Northern, Inc. v. United States*, 459 U.S. 131 (1982), the U.S. Supreme Court considered a D.C. Circuit ruling which held that when that court vacated two ICC decisions which themselves had modified an earlier rate prescription, the effect of the court's action was to reinstate the initial prescription as the status quo prior to the invalid ICC orders.¹⁷ Upon petition by BNSF, the Supreme Court *reversed* the D.C. Circuit, and held

¹⁵ BNSF states that the D.C. Circuit found that the Board "did not lawfully vacate the rate prescription" originally entered in 1996. Motion at 2. This is incorrect. What the Court found was that the Board's explanation for holding complainant shippers and defendant railroads to different demonstrative standards in the case of requests to vacate rate prescriptions was arbitrary and capricious. *BNSF v. STB*, Slip Op. at 1. On remand, the Board can reaffirm the result of its original ruling vacating the former Rawhide rate prescription based upon alternate grounds, and/or by providing a reasoned explanation for treating shippers and carriers differently that comports with the Court's ruling. *See SEC v. Chenery Corp.*, 332 U.S. 194, 199-200 (1946); *Chicago and North Western Transp. Co. v. U.S.*, 575 F.2d 926, 929-930 (7th Cir. 1978). *See also Bowen v. Hood*, 202 F.3d 1211, 1219-1220 (9th Cir. 2000).

¹⁶ *BNSF v. STB*, Brief of Petitioner at 51.

¹⁷ *San Antonio Texas v. United States*, 655 F.2d 1341, 1344 (D.C. Cir. 1981).

that the initial prescription¹⁸ was not reinstated when the agency decisions that lifted it were vacated. 459 U.S. at 141-142. Confirming that the jurisdiction of the courts of appeals to review Board rate orders “extends to the orders alone, and not to the rates themselves” (*id.*), the Supreme Court grounded its holding on prior precedent¹⁹ and a balancing of the equities in the case presented. *Id.*

Burlington Northern squarely controls here, and compels rejection of BNSF’s prescription “revival” theory. Here, as in *San Antonio*, the Court of Appeals vacated a Board decision which itself had “terminated the vitality” of a prior rate prescription. 459 U.S. at 143. While the courts’ rulings deprived the agency decisions of any precedential value, at

¹⁸ The initial prescription was imposed in *San Antonio, Texas v. Burlington Northern, Inc.*, 355 I.C.C. 405 (1976) (“*San Antonio I*”), and by its terms was to “continue in full force and effect until the further order of the Commission.” *Id.* at 417-418. This is analogous to Board prescriptions in the current era, which often include language confirming that they will be revisited and/or revised periodically should new evidence or changed circumstances warrant. *See, e.g.*, Docket No. 42051, *Wisconsin Power & Light Company v. Union Pacific Railroad Company*, Decision served September 13, 2001 at 33. The *San Antonio I* prescription was set aside and a new rate was prescribed in *San Antonio, Texas v. Burlington Northern, Inc.*, 359 I.C.C. 1 (1978) (“*San Antonio II*”). That prescription, in turn, was further revised in *San Antonio, Texas v. Burlington Northern, Inc.*, 361 I.C.C. 482 (1979) (“*San Antonio III*”). *San Antonio II* and *San Antonio III* subsequently were vacated by the D.C. Circuit. *San Antonio, Texas v. United States*, 631 F.2d 831, 851 (D.C. Cir. 1980).

¹⁹ *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609 (1981) and *Atchison, T.&S.F. Ry Co. v. Wichita Board of Trade*, 412 U.S. 800 (1973). In this regard, BNSF’s reference to AEP Texas’ statement on Rebuttal concerning the effect of the Board’s March 29, 2004 vacation order is misplaced. Motion at 9. Read in context, AEP Texas plainly was referring to the effect of that order on any precedential value that the 1996 Decision in *WTU* otherwise might have. The statement was in response to claims made by BNSF on Reply to the effect that those nine year-old findings should be binding in this case. *See also* pp. 16-17 *infra*.

least pending proceedings on remand.²⁰ those rulings could not reinstate that which was “terminated.” *Id.* at 144.

The balance of equities also supports the rejection of BNSF’s revival theory. In *Burlington Northern*, the Supreme Court juxtaposed the right of the shipper in that case to recover reparations if the rate it paid was found to be too high against the carrier’s inability to secure similar relief if its rate artificially was held below what eventually was determined to be a reasonable maximum. *Id.* 459 U.S. at 521-522. Here, the equitable roles are reversed. If BNSF’s revival theory is upheld and AEP Texas prevails in its evidentiary showing that the rates charged by BNSF are and have been unlawfully high under the *Coal Rate Guidelines*, AEP Texas would be without recourse to recover overcharges on Rawhide shipments prior to the date of the Board’s rate determination.²¹ BNSF, on the other hand, is fully protected: if the challenged rates are found reasonable, the railroad simply retains the higher charges that it already has collected.

Finally, even if it is assumed – contrary to law – that the Rawhide prescription was revived by the D.C. Circuit’s ruling, dismissal of AEP Texas’ Complaint would not be proper. *Arizona Grocery* holds only that there must be a “new hearing” before a rate

²⁰ In its May 26, 2005 Reply to AEP Texas’ May 6, 2005 Petition On Remand in *Docket No. 41191*, BNSF purports to contrast this case with *San Antonio* by suggesting that “[t]he issue on appeal here was the Board’s vacatur of the existing rate prescription, not the vacatur of a determination of maximum reasonable rates.” BNSF Reply at 10. But this description completely mischaracterizes what was before the Court of Appeals in *San Antonio*. The rulings that were under review specifically modified the initial *San Antonio I* prescription. *See, e.g.*, 361 I.C.C. at 497; 359 I.C.C. at 20. In *Burlington Northern*, the Supreme Court held that there was no distinction between a “modification” and a “vacation” when it comes to rate prescriptions. 459 U.S. at 143 n.8.

²¹ *Arizona Grocery*, 284 U.S. at 387-388.

prescription can be lifted or changed. 284 U.S. at 387. Nowhere is it specified that such a hearing cannot be held in response to a complaint, rather than a petition to vacate or some other pleading. In this case, prior to the Board's March 19, 2004 vacation order AEP Texas asserted that the evidence it had presented showed that the prior Rawhide prescription no longer was valid. AEP Op. at I-38-39. If the Board ultimately agrees, the *Arizona Grocery* hearing requirement would be fully satisfied.²²

II. **No Valid Rate Prescription Precludes A Challenge To The Reasonableness of Non-Rawhide Rates**

A. The *TMPA* Policy Change Cannot Be Applied Retroactively

Springing onward from its "revival" theory, BNSF argues that AEP Texas' August, 2003 Complaint also should be dismissed with respect to movements from mines other than Rawhide, on the ground that the revived Rawhide prescription now automatically applies to the non-Rawhide movements. *See* Motion at 10-14. The sole authority cited for this proposition is the Board's September, 2004 ruling in *TMPA*, in which the agency appeared to announce a change in policy and found in that case that a rate prescription would

²² The Board previously has described a scenario in which a petition to vacate a prescription would be followed by the establishment of a new common carrier rate and then, potentially, a complaint. *Docket No. 41191*, Decision served July 23, 2003 at 3. However, that scenario presupposes uncertainty concerning both the level of the common carrier rate that the railroad might set, and whether the shipper would find the rate acceptable. Here, there is no doubt on either score. The common carrier pricing document that sets out the rates challenged in AEP Texas' August, 2003 Complaint included the Rawhide origin in its coverage, and BNSF independently confirmed that in the absence of a prescription it would (and did) charge the same rate. *See* AEP Op. Exhibit I-4; AEP Reply at I-3.

apply to movements from all mines to which the challenged rate applied. *Id.* at 29.

The Board need not reach this claim, as it is entirely derivative of BNSF's revival theory which, as shown *supra*, is contrary to governing law. Even standing on its own, however, BNSF's gambit to apply *TMPA* retroactively to nullify prior rulings in *this* case on which AEP Texas reasonably relied is wholly lacking in merit, and must fail.

In the first place, it is well-settled that regardless of its independent validity, a later change in policy or practice cannot retroactively invalidate a prior decision that was sound when made. *Altamont Gas Transmission Company v. F.E.R.C.*, 965 F.2d 1098, 1102 (D.C. Cir. 1992); *Showtime Networks, Inc. v. F.C.C.*, 932 F.2d 1, 6 n.8 (D.C. Cir. 1991). On at least three separate occasions prior to the filing of AEP Texas' Complaint, the Board specifically held (usually at BNSF's behest) that the former Rawhide rate prescription did not extend to non-Rawhide movements.²³ These rulings ultimately were accepted and respected by both parties, and while BNSF generally denied liability in response to AEP Texas' August, 2003 Complaint, it never disputed AEP Texas' right to proceed in compliance with the Board's orders and maintain a separate action to challenge the rates on non-Rawhide coal traffic.

Second, by the Board's own description the *TMPA* ruling in question was a statement of policy, and a statement of *changed* policy at that. One of the defining

²³ See 1 S.T.B. at 644; *Docket No. 41191*, Decisions served November 7, 2000 and March 23, 2001.

characteristics and consequences of a policy change is that it is given prospective effect only, that is, it only applies to matters arising after its announcement. *Assure Competitive Transportation, Inc. v. United States*, 635 F. 2d 1301, 1307, n.6 (7th Cir. 1980); *Texaco v. Federal Power Commission*, 412 F. 2d 740 (3rd Cir. 1969). Indeed, it has been held that such statements are not even binding for the future, as they amount to an announcement of an agency's intent which may not be followed in all cases. *See Panhandle Eastern Pipeline Company v. F.E.R.C.*, 198 F.3d 266, 269 (D.C. Cir. 1999). As a matter of fundamental fairness and due process, a new policy announced in September, 2004 in *TMPA* cannot provide grounds to dismiss a proceeding commenced over a year earlier.

Third, even in circumstances where an agency is announcing a new rule as opposed to a policy change, the law forbids application to prior or even pending matters where to do so would work a manifest injustice. *Cassell v. F.C.C.*, 154 F. 3d 478, 486-87 (D.C. Cir. 1998); *Clark-Cowlitz Joint Operating Agency v. F.E.R.C.*, 826 F. 2d 1074, 1081 (D.C. Cir. 1987). In this regard, "the issue boils down to the question of whether the ... party reasonably and detrimentally relied on a previously established rule." *Garvey v. National Transportation Safety Board*, 190 F. 3d 571, 584-85 (D.C. Cir. 1999). There can be no dispute that the "previously established rule" in this case is that the 1996 prescription applied only to Rawhide, and that the non-Rawhide rates could be challenged anew in a separate proceeding.²⁴ Likewise, there can be no doubt that AEP Texas has reasonably relied on that

²⁴ *See, e.g., Docket No. 41191*, Decision served July 23, 2003 at 3.

rule, as the entire conduct of the case since August, 2003 has been in accordance with the Board's prior rulings.²⁵

Implicitly acknowledging the complete lack of legal authority for its *TMPA* claim, BNSF tries to twist prior statements by AEP Texas and the Board to suggest some sort of agreement that adjudication of the reasonableness of the non-Rawhide rates somehow should be driven by the fate of the 1996 Rawhide prescription. *See* Motion at 13-14. However, the portion of AEP Texas' Reply Evidence to which BNSF refers directly addressed BNSF's own refusal to submit cost data for mines from which coal did not move during the chosen study period,²⁶ and petitioned for a new prescription to cover movements from all the origins named in the August, 2003 Complaint (including Rawhide). Nowhere has AEP Texas suggested that that prescription was pre-ordained by the 1996 Rawhide ruling. Indeed, on Opening AEP Texas specifically argued the contrary.²⁷ Likewise, the Board's July 23, 2003 order specifically addressed the prospect of a new, separate complaint against BNSF's non-Rawhide rates,²⁸ and its conduct of this case under standard rules and procedures applicable to cases brought under the *Coal Rate Guidelines* for almost seven months *before* ruling on AEP Texas' Petition To Vacate belies any belief on the agency's

²⁵ *See Gilbert v. Federal Mine Safety & Health Review Commission*, 866 F. 2d 1433, 1442 (D.C. Cir, 1989) (reasonable reliance found in the filing of a complaint predicated on the rule then in effect).

²⁶ AEP Reply at I-4-6.

²⁷ *See* AEP Op. at I-38-39.

²⁸ *Docket No. 41191*, Decision served July 23, 2003 at 3.

part that “any new complaint would be preceded by the vacatur of the Rawhide rate prescription.” Motion at 14.

The claim that *TMPA* compels dismissal of AEP Texas’ challenged to the reasonableness of BNSF’s non-Rawhide rates is bereft of any legal support, and should be rejected.

B. The 1996 SAC Findings Are No Longer Valid

BNSF closes its Motion with a reprise of the claim in its Reply Evidence²⁹ that the outcome of this case should be dictated by the 1996 *WTU* Decision. Motion at 15-16. The Board’s many prior rulings³⁰ that its 1996 Decision applied *only* to shipments from Rawhide contradict this claim, and again compel its rejection.

In support of its position, BNSF relies on *Traugott Schmidt & Sons v. Michigan Central Railroad Co.*, 23 I.C.C. 684 (1912). However, that decision is wholly inapposite to this case. There, the former ICC addressed a re-asserted claim made only 15 months after the identical claim had been rejected by the agency. 23 I.C.C. at 685. Here, more than 8 years have passed, and the claims made and evidentiary record assembled are very different from those considered by the Board in 1996. As AEP Texas showed on Opening and Rebuttal, based on current facts and cost data evaluated under the current policies underlying

²⁹ BNSF Reply at I-3-13.

³⁰ See 1 S.T.B. at 644; *Docket No. 41191*, Decisions served November 7, 2000 at 4, March 23, 2001 at 3 and July 23, 2003 at 1-2.

the Board's application of the *Coal Rate Guidelines*, the rates being charged by BNSF and reflected in the 1996 staff workpaper relied on by the Board when it revised the Rawhide prescription exceed a lawful, reasonable maximum, and cannot be sustained.³¹ For purposes of a ruling on BNSF's Motion, all evidentiary issues raised by AEP Texas must be considered in the light most favorable to AEP Texas. *See Sierra Pacific Power Company, supra*. On this basis, it must be held that AEP Texas has established that the Board's 1996 analysis no longer is valid.

Finally, it bears mention again that BNSF misleadingly claims that the Board determined SAC-based maximum rates for non-Rawhide movements in 1996. As noted *supra*, the Board made *no* final SAC determinations in 1996. *See* 1 S.T.B. at 677, 716. The Board's first SAC-based rate ruling was made in its May 29, 2003 decision, which specifically was limited to Rawhide movements. *Id.* at 1, 5. Any revisionist, contrary ruling now would be arbitrary and capricious. *See Arizona Electric Power Cooperative, Inc. v. United States*, 816 F.2d 1366, 1373-1375 (9th Cir. 1987).

³¹ BNSF falsely claims that AEP Texas' "only response" to BNSF's argument on Reply that the 1996 *WTU* ruling should govern this case was to rely on the Board's March 19, 2004 order vacating the former Rawhide prescription. Motion at 16. In fact, AEP Texas presented volumes of narrative and supporting evidence which showed that for most key elements of the SAC analysis, current data and regulatory policies compelled conclusions very different from those that were reached in 1996.

CONCLUSION

For all of the foregoing reasons, BNSF's second Motion To Dismiss should be denied.

Respectfully submitted,

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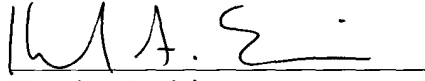
Dated: June 7, 2005

Attorneys & Practitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2005, I caused a copy of the foregoing Complainant's Reply to Defendant's Second Motion To Dismiss, as follows:

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