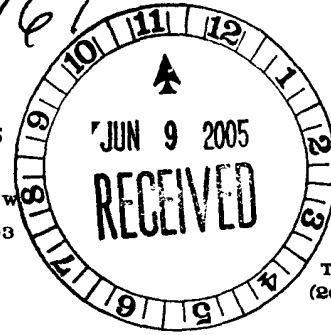


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June 9, 2005

VIA HAND DELIVERY

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

ENTERED
Office of Proceedings

JUN 9 - 2005

Part of
Public Record

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 the Brief of Complainant AEP Texas North Company, together with a computer disk containing the filing.

An additional copy of the Brief 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

KJD:jml
Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AEP TEXAS NORTH COMPANY,	)	
	)	
	)	
v.	)	Docket No. 41191 (Sub-No. 1)
	)	
BNSF RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

**BRIEF OF COMPLAINANT
AEP TEXAS NORTH COMPANY**

ENTERED
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JUN 9 - 2005
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Public Record

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
GLOSSARY OF TERMS	vi
I. AEP TEXAS IS ENTITLED TO A RULING BASED ON THE EVIDENTIARY RECORD IN THIS CASE	1
II. AEP TEXAS' CALCULATION OF VARIABLE COSTS IS WELL-SUPPORTED AND CONSISTENT WITH BOARD PRECEDENT	3
III. AEP TEXAS' EVIDENCE OF TNR COAL TRAFFIC AND REVENUES IS THE MOST RELIABLE	6
IV. THE TNR OPERATING PLAN IS FEASIBLE AND ITS EXPENSE CALCULATIONS ARE VALID	10
V. AEP TEXAS' ROAD PROPERTY INVESTMENT COSTS ARE THE BEST EVIDENCE	14
VI. AEP TEXAS PROPERLY DETERMINED THE TNR'S COST OF CAPITAL	16
VII. AEP TEXAS' PROPOSED PROCEDURE TO INDEX OPERATING EXPENSES IS RATIONAL AND WELL-SUPPORTED	17
VIII. THE GPRM IS CONSISTENT WITH RAMSEY PRINCIPLES AND CURES THE FLAWS IN THE EQUAL PERCENTAGE REDUCTION RULE	19
IX. REPARATIONS ARE DUE ON ALL SHIPMENTS SUBSEQUENT TO JUNE 16, 2000	23
X. CONCLUSION	24

TABLE OF AUTHORITIES

Court Cases:

Page

Arizona Electric Power Cooperative v. United States, 806 F. 2d 1366, 1372-1373 (9th Cir. 1987) 2

Union Pacific Railroad Company v. Nevada Power Company, 950 F. 2d 1429, 1432 (9th Cir. 1991) 24

Agency Cases:

Arizona Public Service Company and PacifiCorp v. The Atchison, Topeka and Santa Fe Railway Company, 2 S.T.B. 367 (1997) 15

Bituminous Coal – Hiawatha, Utah, to Moapa, Nevada, 10 I.C.C. 2d 259 (1994) 6

Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), *aff'd sub nom. Consolidated Rail Corporation v. United States*, 812 F. 2d 1444 (3d Cir. 1987) 6, 21, 23

Coal Trading Corporation v. The Baltimore and Ohio Railroad Company, 6 I.C.C. 2d 361 (1990) 20

Docket No. 40581, *Georgia Power Company v. Southern Railway Company*, Memorandum of Office of Economics, Dated August 19, 1993 4

Docket No. 41191, *West Texas Utilities Company v. Burlington Northern Railroad Company*, STB Served November 7, 2000 1, 2, 23, 24

Docket No. 41191, *West Texas Utilities Company v. Burlington Northern Railroad Company*, STB Served March 23, 2001 23

Docket No. 41191, <i>West Texas Utilities Company v. Burlington Northern Railroad Company</i> , STB Served July 23, 2003	2, 23
Docket No. 42051, <i>Wisconsin Power and Light Company v. Union Pacific Railroad Company</i> , STB Served September 13, 2001	16, 18
Docket No. 42056, <i>Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company</i> , STB Served March 24, 2003	<i>Passim</i>
Docket No. 42057, <i>Public Service Company of Colorado D/B/A XCEL Energy v. The Burlington Northern and Santa Fe Railway Company</i> , STB Served June 8, 2004	<i>Passim</i>
Docket No. 42069, <i>Duke Energy Corporation v. Norfolk Southern Railway Company</i> , STB Served November 6, 2003	6, 7, 8, 16
Docket No. 42070, <i>Duke Energy Corporation v. CSX Transportation, Inc.</i> , STB Served February 4, 2004	7, 8, 9
Docket No. 42072, <i>Carolina Power & Light Company v. Norfolk Southern Railway Company</i> , STB Served December 23, 2003	8, 18, 19
<i>FMC Wyoming Corporation v. Union Pacific Railroad Company</i> , 4 S.T.B. 699 (2000)	16
<i>McCarty Farms, Inc. v. Burlington Northern, Inc.</i> , 2 S.T.B. 460 (1997)	16

<i>West Texas Utilities Company v. Burlington Northern Railroad Company</i> , 1 S.T.B. 638 (1996), <i>aff'd sub nom. Burlington Northern Railroad Company v. STB</i> , 114 F. 3d 206 (D.C. Cir. 1997)	<i>Passim</i>
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Statutes:

49 U.S.C. § 10704(a)	24
49 U.S.C. § 11701(a)	24
49 U.S.C. § 11705(c)	23, 24

Miscellaneous:

“Consulting the Consultants,” <i>Railway Track and Structures</i> , August 2000	14
Ex Parte No. 657, <i>Rail Rate Challenges Under the Stand-Alone Cost Methodology</i> , Statement of the Western Coal Traffic League, April 20, 2005	20

GLOSSARY OF TERMS

SHORT FORM

DEFINITION

<i>1989 Adoption of URCS</i>	Ex Parte No. 431 (Sub-No. 1), <i>Adoption of the Uniform Railroad Costing System as a General Purpose Costing System for All Regulatory Costing Purposes</i>
AEO	Annual Energy Outlook
AEP Texas	AEP Texas North Company
APS	<i>Arizona Public Service Company and PacifiCorp v. The Atchison, Topeka and Santa Fe Railway Company</i> , 2 S.T.B. 367 (1997)
BNSF	BNSF Railway Company
Board	Surface Transportation Board
<i>Coal Trading</i>	<i>Coal Trading Corporation v. The Baltimore and Ohio Railroad Company</i> , 6 I.C.C. 2d 361 (1990)
CP&L	Docket No. 42072, <i>Carolina Power & Light Company v. Norfolk Southern Railway Company</i> , STB Served December 23, 2003
DARA	Density Adjusted Revenue Allocation Methodology
DCF	Discounted Cash Flow
<i>Docket No. 41191</i>	Docket No. 41191, <i>West Texas Utilities Company v. Burlington Northern Railroad Company</i>
<i>Duke/CSXT</i>	Docket No. 42070, <i>Duke Energy Corporation v. CSX Transportation, Inc.</i> , STB Served February 4, 2004

<i>Duke/NS</i>	Docket No. 42069, <i>Duke Energy Corporation v. Norfolk Southern Railway Company</i> , STB Served November 6, 2003
EIA	Energy Information Administration, U.S. Department of Energy
FADB	BNSF's Fixed Assets Data Base
<i>FMC</i>	<i>FMC Wyoming Corporation v. Union Pacific Railroad Company</i> , 4 S.T.B. 699 (2000)
G&A	General and Administrative Expenses
<i>Georgia Power</i>	Docket No. 40581, <i>Georgia Power Company v. Southern Railway Company</i> , Memorandum of Office of Economics, Dated August 19, 1993
GPRM	Generalized Percentage Reduction Methodology
GTM	Gross Ton-Miles
<i>Guidelines</i>	<i>Coal Rate Guidelines, Nationwide</i> , 1 I.C.C. 2d 520 (1985)
<i>Means</i>	<i>R.S. Means</i> (engineering unit cost reference guide)
<i>McCarty</i>	<i>McCarty Farms, Inc. v. Burlington Northern, Inc.</i> , 2 S.T.B. 460 (1997)
MOW	Maintenance-of-Way Expenses
MSP	Modified Straight-Mileage Prorate Methodology
<i>Nevada Power II</i>	<i>Bituminous Coal – Hiawatha, Utah, to Moapa, Nevada</i> , 10 I.C.C. 2d 259 (1994)
PRB	Powder River Basin

<i>PSCo/Xcel</i>	Docket No. 42057, <i>Public Service Company of Colorado D/B/A XCEL Energy v. The Burlington Northern and Santa Fe Railway Company</i> , STB Served June 8, 2004
RCAFA	Rail Cost Adjustment Factor Adjusted for Productivity
RCAFU	Rail Cost Adjustment Factor Unadjusted for Productivity
ROI	Return on Investment
RTC Model	Rail Traffic Controller Model
SAC	Stand-Alone Cost
SARR	Stand-Alone Railroad
STB	Surface Transportation Board
<i>TMPA</i>	Docket No. 42056, <i>Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company</i> , STB Served March 24, 2003
TNR	Texas & Northern Railroad
Union Pacific	Union Pacific Railroad Company
UP	Union Pacific Railroad Company
URCS	Uniform Rail Costing System
<i>WPL</i>	Docket No. 42051, <i>Wisconsin Power and Light Company v. Union Pacific Railroad Company</i> , STB Served September 13, 2001
<i>WTU</i>	<i>West Texas Utilities Company v. Burlington Northern Railroad Company</i> , 1 S.T.B. 638 (1996)

		)	
AEP TEXAS NORTH COMPANY,		)	
		)	
	Complainant,	)	
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		)	
BNSF RAILWAY COMPANY,		)	
		)	
	Defendant.	)	
		)	

Complainant AEP Texas submits this Brief in support of its Complaint against Defendant BNSF¹ for prescriptive rate relief and its prayer for reparations.

Throughout this proceeding,² BNSF has argued that its outcome should be pre-ordained by *WTU*, which at BNSF's insistence was limited in application solely to movements from the Rawhide Mine,³ and was based on facts, circumstances and Board precedents very different from

³ See *WTU*, 1 S.T.B. at 644; *Docket No. 41191*, Decision served November 7, 2000. In a Decision served March 19, 2004, the Board vacated the Rawhide rate prescription. That Decision itself was vacated and remanded by the D.C. Circuit on April 8, 2005. Proceedings on remand remain pending. Nevertheless, the evidence presented by AEP Texas in this proceeding clearly

those now prevailing, nine years later. In its prior decisions, the Board unequivocally has held that the reasonableness of BNSF's rates on movements from non-Rawhide origins were *not* covered by *WTU*, and has confirmed AEP Texas' right to have those rates⁴ evaluated against a comprehensive SAC analysis performed under current standards and contemporaneous evidentiary facts.⁵

AEP Texas' June 7, 2005 Reply to BNSF's second Motion To Dismiss explains why the Board should reject BNSF's claim that *WTU* dictates the results of this case, and those reasons need not be repeated here. AEP Texas has proceeded in reliance on the Board's clear, prior pronouncements concerning the restricted scope of *WTU*, and AEP Texas' right to a separate adjudication as to the reasonableness of the challenged rates under current SAC procedures and based on a modern evidentiary record. The Board must remain true to those representations. *See Arizona Electric Power Cooperative v. United States*, 816 F. 2d 1366, 1372-1373 (9TH Cir. 1987).

shows that the rates prescribed in *WTU*, as modified by the Board's May 29, 2003 ruling in *Docket No. 41191*, no longer are valid as reasonable limits on BNSF's pricing to Oklaunion.

⁴ The challenged rates also apply to shipments from the Rawhide Mine (*see* AEP Op. Exhibit I-4), and AEP Texas' Opening Evidence provided independent justification for vacation of the former Rawhide rate prescription. AEP Op. at I-38-39. BNSF did not object to AEP Texas' April 19, 2004 Second Supplement to the Complaint, which clarified that the rates at issue in this proceeding specifically included the rate applicable to Rawhide shipments. AEP Reply at I-3. AEP Texas' pending *Petition On Remand* addresses the question of when the former prescription should be deemed vacated. However, the evidence of record clearly establishes that the rate being charged by BNSF today exceeds a reasonable maximum.

⁵ *See* Decision served March 19, 2004 at 1-2 (denying BNSF's first Motion To Dismiss); *Docket No. 41191*, Decisions served July 23, 2003 at 3 and November 7, 2000 at 4.

II.
AEP TEXAS' CALCULATION OF VARIABLE
COSTS IS WELL-SUPPORTED AND CONSISTENT
WITH BOARD PRECEDENT

In its Reply Evidence, AEP Texas described in detail how BNSF's near-exclusive reliance on system average variable costs was at odds with Board precedent – including prior decisions that costed movements virtually identical to AEP Texas' – and was undermined by the carrier's own data produced in discovery.⁶ These points are not reargued in this Brief. However, two variable cost issues that remain in dispute do merit further attention here: BNSF's inflated locomotive spare margin, and the proper calculation of variable road property costs.

On Rebuttal, AEP Texas demonstrated that the extraordinarily high locomotive spare margin advocated by BNSF which was accepted in *PSCo/Xcel* is not appropriate in this case.⁷ In particular, AEP Texas showed that the locomotive maintenance agreements on which AEP Texas relied, and which the Board generally uses as the backbone of its spare margin determinations, actually were in effect during the study period and supported AEP Texas' spare margin calculation. *See* AEP Reb. at II-A-61 to 65. This is in contrast to *PSCo/Xcel*, where the Board adopted BNSF's higher figure after finding that the locomotive availability guarantees cited by the complainant were not in effect during the relevant period. *Id.* at 142. AEP Texas also demonstrated that BNSF's spare margin study was deeply flawed,⁸ and that BNSF's proposed redefinition of "spare margin" to include more than "the number of diesel units a railroad keeps in reserve to cover diesel units that

⁶ *See, e.g.*, AEP Reply at III-A-4-13. *See also* AEP Reb. at II-A-13-19.

⁷ *See* AEP Reb. at II-A-58-70.

⁸ *See* AEP Reb. at II-A-65-69.

have power failures or require maintenance”⁹ was inconsistent with a long line of Board decisions. *See* AEP Reb. at II-A-70-84.

With respect to road property, AEP Texas showed that the Board repeatedly has used line-specific adjustments for the very route utilized by AEP Texas’ trains.¹⁰ AEP Texas followed the Board’s established approach, and presented line-specific investment data sufficient to make such an adjustment. It was shown that the vast majority of investment was assigned to specific line segments along the relevant route by BNSF’s own data. Yet, BNSF insists that the Board should abandon its prior precedents, and adopt BNSF’s system-average version of road property costs. *See* BNSF Reb. at I. 3-33.

BNSF’s claims all hinge on arguments that it has urged unsuccessfully before: (i) that its own FADB data allegedly is unreliable; (ii) that depreciation is overstated; and (iii) that the variability percentage should be higher than 50 percent. AEP Texas thoroughly refuted these claims in its Reply and Rebuttal evidence – particularly in Reb. Exhibit II-A-91. The vast majority of investment is recorded on a line-specific basis, and the remaining unallocated investment is allocated across the appropriate cost center (*i.e.*, state or system) and then added to the line specific figures. Allocations using this method are demonstrably superior to system-average figures.

BNSF offered no support for its claims regarding “overstated” depreciation other than hypothetical calculations in its Rebuttal argument. Tellingly, BNSF never provided the data AEP Texas or the Board would need to test those claims against BNSF’s actual investments. Moreover, even if it were true that the FADB calculator overstates depreciation and understates net investment

⁹ *See, e.g., Georgia Power* at 29 n.11.

¹⁰ *TMPA* at 56-67; *WTU*, 1 S.T.B. at 724.

and associated ROI costs, the corresponding depreciation costs would be *overstated* and would offset the allegedly understated ROI costs. And as AEP Texas demonstrated in its Reb. Exhibit II-A-91, the group life accounting methodology that BNSF advocates is simply another acceptable depreciation accounting methodology, and should not produce a different answer than any other legitimate depreciation accounting methodology.

The road property variability percentage of 50 percent has been in use by the Board since the 1940s, and was affirmed again after extensive analysis in the 1989 *Adoption of URCS* proceeding. Nevertheless, BNSF insists that the Board should use a higher variability percentage. *See* BNSF Reb. at I.19-33. As “proof,” BNSF proffers what it describes as a regression analysis by its new witness, Dr. Mercurio. *See* BNSF Reb. Exhibit II.A-4. Notwithstanding that BNSF had ample opportunity to present this new regression earlier in the proceeding, and that such tardiness should be as fatal here as it was in *TMPA*,¹¹ the carrier’s belated regression is scant and only lightly documented. Its incompleteness and lack of detail pales in comparison to the extensive work performed by Dr. M. Daniel Westbrook in the *Adoption of URCS* proceeding, and it is no way related to the specifics of this case. It would be arbitrary and capricious to revise the longstanding road property variability percentage solely on the basis of BNSF’s proffer.

¹¹ *TMPA* at 56 n. 94.

III.
AEP TEXAS' EVIDENCE OF TNR COAL
TRAFFIC AND REVENUES IS THE MOST RELIABLE

The principal areas of dispute remaining regarding coal traffic and revenues¹² for the TNR are: (1) the inclusion of cross-over traffic; (2) the internal rerouting of approximately 28 million base year tons that originate at the southernmost PRB mines; (3) the use of the 2004 PRB regional EIA Annual Energy Outlook to forecast 2009-2020 annual coal volumes; (4) the division of revenues from cross-over traffic; (5) the projection of future revenues from certain common carrier movements; and (6) the projection of revenues following the expiration of current contracts. As to each of these, AEP Texas has presented the better evidence.

1. The Inclusion of Cross-Over Traffic Is An Established Principle

BNSF's persistent objection to the inclusion of cross-over traffic in the TNR system conflicts with key principles of traffic grouping that are at the heart of the *Guidelines'* SAC constraint,¹³ and established Board precedents.¹⁴ Most recently, the same arguments made by BNSF here were rejected by the Board in *PSCo/Xcel*. BNSF's effort to relitigate this settled issue in this case deserves the same treatment.

¹² Minor differences persist regarding approximately 1,000,000 tons of 2003 base year volumes, the post-2006 volumes attributable to the TEP Springerville plant, and post-2008 volumes to a new unit at the Holcomb Station. For the reasons explained in AEP Texas' October 20, 2004 *Reply To Motion To Strike* (at 13-15) and its Rebuttal (AEP Reb. at III-A-37-40, 45-48), BNSF's objections to AEP Texas' evidence are meritless, and should be overruled.

¹³ AEP Reb. at III-A-10-11.

¹⁴ *Duke/NS* at 29; *Nevada Power II*, 10 I.C.C. 2d at 265-67 and n.12.

2. The Internal Reroutes are Proper

Consistent with the capabilities of the TNR¹⁵ and Board precedent,¹⁶ AEP Texas rerouted approximately 28 million tons of coal in 2001 and an additional 5 million tons in 2005 from the current BNSF route via Guernsey, WY to an alternate TNR route via Edgemont, SD. The rerouted traffic still would be turned over to BNSF at an interchange along its typical route of movement, and the TNR would handle the traffic over the entire rerouted segment.¹⁷ Thus, the only issue is whether “increased densities and other operational efficiencies” offset additional distance-related costs.¹⁸

UP’s single-route operations in the PRB negate BNSF’s criticism that the TNR would be less efficient with only one route out of the region,¹⁹ and BNSF did not even attempt to refute AEP Texas’ showing that length of haul is not as important to coal shippers as the secure delivery of all scheduled tons, and that the TNR would accord a higher priority to coal traffic than BNSF does.²⁰ BNSF’s only challenge was to AEP Texas’ demonstration that despite the longer distance that some shipments would travel, overall TNR transit times to destination or point of interchange would be lower than BNSF’s.²¹ However, BNSF’s criticism of the feasibility of AEP Texas’

¹⁵ See, e.g., AEP Reb. at III-A-22.

¹⁶ See, e.g., PSCo/Xcel at 22-24.

¹⁷ AEP Reb. at III-A-20.

¹⁸ Duke/NS at 26. Compare Duke/CSXT at 16-17.

¹⁹ AEP Reb. at III-A-22.

²⁰ *Id.*

²¹ See AEP Reb. at III-A-20-21; Duke/NS at 26-29.

operating plan was thoroughly refuted by AEP Texas on Rebuttal,²² and in its Supplemental submission on November 8, 2004. *See also* Part D, *infra*.

3. The 2004 EIA Regional AEO Is The Best Evidence

On Rebuttal, AEP Texas updated the projection of future TNR coal volumes through use of EIA's 2004 AEO growth rate for PRB coal. BNSF subsequently argued that because AEP Texas used the 2003 AEO on Opening²³ and BNSF offered only the 2004 *national* forecast on Reply, AEP Texas was limited to these two options.²⁴ However, in previous cases the Board has taken "official notice" of an updated regional EIA projection, and has relied upon it even if *neither party* offered it in evidence. *See PSCo/Xcel* at 53; *Duke/CSXT* at 48; *Duke/NS* at 61, 65. Plainly, it was proper for AEP Texas to incorporate the most recent regional projection on Rebuttal.²⁵

4. The Proper Division of Cross-Over Revenue

AEP Texas relied upon the MSP formula for allocating revenues on cross-over traffic, consistent with *Duke/NS*, *Duke/CSXT*, *CP&L* and *PSCo/Xcel*. AEP Texas also demonstrated²⁶ that in this case MSP provides a fair reflection of the relative costs of service over the various on-SARR and off-SARR line segments, and leaves the residual BNSF with sufficient revenues to support its handling of the traffic.

²² AEP Reb. at III-B-5-22.

²³ As AEP Texas explained, the 2004 forecast was not available at the time that AEP Texas had to finalize traffic levels for its Opening Evidence. *See* AEP Reb. at III-A-51.

²⁴ *Motion To Strike*, September 9, 2004 at 8, *citing Duke/NS* at 14.

²⁵ The *Duke/NS* restrictions on rebuttal submissions have no application to updated public data, government indices or forecasts. *See PSCo/Xcel* at 55.

²⁶ *See* AEP Reb. Exhibit III-A-21.

BNSF continued to promote its DARA methodology, which the Board rejected in each of the four cases in which MSP was used. *See, e.g., PSCo/Xcel* at 17-18. On Rebuttal, AEP Texas again demonstrated that DARA is empirically flawed, and obviously biased toward minimizing the cross-over revenue allocation to the TNR. *See* AEP Reb. at III-A-61-69. AEP Texas' allocation of cross-over revenues is the better evidence of record.

5. BNSF's Common Carrier Revenue Projections Are Biased

In projecting future TNR revenues from three common carrier movements (including AEP Texas') whose governing pricing authorities do not include rate adjustment provisions, AEP Texas followed the approach taken by the Board in similar circumstances²⁷ and based the forecasts on BNSF's Long Range Plan and the 2004 EIA forecasts. AEP Reb. at III-A-72. BNSF argued that future revenues from these movements should be based on BNSF's stated intent regarding future rate adjustments. *Id.* at III-A-71, 73.

In light of the Board's current equal percentage reduction rule, the flaw in BNSF's position is self-evident. If the carrier is permitted to dictate the rate levels for future Oklahoma shipments throughout the DCF period, the Board would be ceding its authority to determine maximum reasonable rates to the very party whose pricing practices are in issue. The *Guidelines* do not contemplate that defendant railroads will control the outcome of the regulatory process.

6. Post-Contract Revenues Should Be Based On The 2004 EIA AEO

Consistent with *PSCo/Xcel* and *Duke/CSXT*, AEP Texas used the growth rates reflected in the regional transportation rate forecasts in EIA's 2004 AEO to project future TNR coal

²⁷ *See, e.g., PSCo/Xcel* at 55.

revenues following the expiration of existing contracts.²⁸ Projections keyed to the supply-demand regions that are specific to the members of the TNR traffic group are superior to the national rate forecast which BNSF used (and applied incorrectly).²⁹

BNSF's proposal to "rebase" TNR shippers' rates by lowering them at the conclusion of their contract terms³⁰ also should be rejected. The notion that BNSF would reduce expiring contract rates in order to secure new long-term contracts is contradicted by the carrier's own stated policy to *increase* coal rates whenever possible, and to avoid future contract commitments through reliance on "public pricing." See AEP Reb. at III-A-77-80. Likewise, the made-for-litigation study³¹ that BNSF offered in support of its theory was rife with methodological flaws which would preclude reliance on it even if its conclusions weren't contrary to the carrier's own public statements.³²

IV. **THE TNR OPERATING PLAN IS FEASIBLE AND ITS EXPENSE CALCULATIONS ARE VALID**

The feasibility of TNR's operating plan was confirmed by a computerized simulation using the RTC Model. As this is the first SAC case in which both parties have used the same computer model and the first case in which such a large, complex SARR has been modeled, it is not

²⁸ AEP Reb. at III-A-74, 75 and Reb. Exhibit III-A-23.

²⁹ AEP Reb. at III-A-75 n.79.

³⁰ See BNSF Reply at III.A 97-101.

³¹ The Board repeatedly has rejected such studies. See, e.g., *TMPA* at 28; *WTU*, 1 S.T.B. at 662-663.

³² AEP Reb. at III-A-80-84.

surprising that some problems were encountered. As AEP Texas explained,³³ these problems principally arose from AEP Texas' use of BNSF's Reply RTC train file as the basis for its Rebuttal RTC simulation, to minimize differences between the parties. The result was an understatement in the number of peak-period trains that should have been modeled. AEP Texas corrected the errors, conducted a revised RTC simulation, and presented the results to the Board with its November 8, 2004 Petition to Supplement the Record.

Very few differences remain between AEP Texas' and BNSF's operating plans, as almost all of AEP Texas' final operating inputs and network parameters were accepted by BNSF.³⁴ BNSF's criticism of AEP Texas' operating plan essentially boils down to two items: AEP Texas' decision not to accept all 137 random outages that BNSF included in its RTC simulation; and AEP Texas' alleged failure to account for the presence of Union Pacific trains at certain PRB mines.³⁵

AEP Texas included only 13 out of the 137 random outages claimed by BNSF because BNSF's witnesses provided virtually no documentation to support most of these outages.³⁶

While BNSF claimed that its witnesses selected "*only* those events which, by their nature, would have resulted in the track signal system producing a red or 'stop' signal, meaning that trains would

³³ See *Reply To Motion To Strike* at 24-28.

³⁴ See AEP Reb. at III-C-34-35.

³⁵ In its *Motion To Strike*, BNSF also criticized 19 manual interventions in the running of the RTC Model that AEP Texas' experts made on Rebuttal. AEP Texas explained why these manual interventions were consistent with what occurs in the real world. See *Reply To Motion To Strike*, Reistrup V.S. at 13-16. However, this issue essentially was mooted by the fact that only one manual intervention was made in the revised RTC simulation presented in AEP Texas' Supplemental Evidence, and it was made prior to the final model run. See Supplemental Evidence at 5-6.

³⁶ See AEP Reb. at III-C-38-55; *Reply To Motion To Strike*, Reistrup V.S. at 6-13.

be forced to stop at the signal and either wait there or proceed, with permission from the dispatcher, at restricted speed,”³⁷ there is nothing about the “nature” of most of these events that automatically produces a red signal or requires a train to stop. The fact that a train might have to move at “restricted” speed does not mean that the train cannot exceed the 10 mph speed decreed by BNSF, or that the train had to reduce speed at all given the particular operating conditions in the area. See AEP Reb. at III-C-52-54. And as Mr. Reistrup verified, the nature of many of the outage events was such that they easily could have indicated a maintenance issue that could be handled on a scheduled basis (e.g., outages for “Switch Points”). BNSF failed or refused to provide information specific enough to justify inclusion of more than the 13 outages that AEP Texas accounted for in its Rebuttal and Supplemental simulations.

In response to AEP Texas’ Supplemental Evidence, BNSF claimed that AEP Texas’ RTC simulation ignored the presence of UP coal trains at certain PRB mines, and thus the need for staging capacity at or near the mines. However, AEP Texas demonstrated in its Opening and Rebuttal Evidence that the UP trains were accounted for in the 5.5 hours of mine dwell time assumed for all TNR trains, which BNSF accepted. See AEP Op. at III-C-28-29; AEP Reb. at III-B-8-11 and III-C-49. See also *TMPA* at 75. AEP Texas provided staging capacity for empty coal trains at its Alliance Yard,³⁸ and two extra hours of dwell time at Alliance over and above the time needed to

³⁷ *Defendant’s Response to Complainant’s Post-Rebuttal RTC Analysis*, February 14, 2005 at 6.

³⁸ AEP Reb. at III-B-28.

perform locomotive fueling, train inspections and bad order/spare car switching. AEP Op. at III-C-35. This is more time than it takes to load a train at the mines in issue. AEP Reb. at III-B-9.³⁹

BNSF argued that a jointly-served mine's ability to accommodate an empty train's arrival due to the presence of a UP train is different from the ability of the loaded train to depart from the mine without interference from a UP train. However, BNSF's own data showed that the average elapsed time between the arrival of empty trains at the mine and the spotting of the train at the loading chute in 2002 was 1.1 hours.⁴⁰ Given that it takes no more than two hours to load a train at these mines, the allowance of 5.5 hours of dwell time is ample to accommodate both the time between arrival and spotting, and the time between loading and subsequent release.

When it comes to the TNR's annual operating expenses, the two largest areas of difference between the parties are G&A and MOW. AEP Texas' proposed G&A staff of 56 employees is between the 63 G&A employees accepted in *TMPA* (at 94) and the 51 G&A employees accepted in *PSCo/Xcel* (at 65). AEP Texas' G&A staff also is much larger than the 38-person G&A staff that was proposed by BNSF and accepted by the Board in *WTU*. See AEP Reb. at III-D-68-72.

With respect to MOW, in *PSCo/Xcel* the complainant's plan was rejected because the complainant "failed to explain how its staffing levels were derived and did not show that any

³⁹ At page 17 of its Response to AEP Texas' Supplemental Evidence, BNSF quotes a passage from the *PSCo/Xcel* decision on reconsideration to the effect that the complainant there failed to provide staging facilities for SARR trains at the mines. However, the quoted passage related to the complainant's modeling of the SARR's operations using a procedure under which the cycle of each empty train was stopped when it arrived at the mine and then started again when the corresponding real-world train actually departed from the mine, which caused trains to sit at the mine for between 22.2 and 118.8 hours. See Decision served June 8, 2004 at 25-26. In this case, AEP Texas' simulation cycles trains continuously through the mine loading facilities.

⁴⁰ See AEP Reb. electronic workpaper file "AEP Tex L-UL Times.xls." This is considerably less than the 1.5 hours of comparable time cited by the Board in *TMPA* (at 75).

existing railroad actually functions with such a limited workforce.” *Id.* at 79. In contrast, AEP Texas’ detailed MOW plan uses field track maintenance crew sizes that are used by real-world railroads on heavy-tonnage lines. Consistent with the practice of real-world railroads, the MOW plan also reflects the use of contractors for appropriate functions, including those performed by large seasonal employee gangs at BNSF. *See* AEP Texas Reb. at III-D-166-206. *See also* “Consulting the Consultants,” *Railway Track and Structures*, August 2000 at 53-56.⁴¹

V.
**AEP TEXAS’ ROAD PROPERTY INVESTMENT
COSTS ARE THE BEST EVIDENCE**

AEP Texas has conservatively estimated the cost to build the TNR. From using *Means* for grading costs to utilizing BNSF’s own designs for bridges, AEP Texas has ensured that the TNR’s infrastructure is more than capable of handling its traffic during the peak period, and has ample excess capacity in earlier years. BNSF therefore has turned its sights to the last place where costs can be increased with a stroke of the pen; *i.e.*, additives such as engineering and contingencies.

BNSF proposes that the Board should include a 20 percent additive for contingencies,⁴² even though the Board repeatedly has adopted the 10 percent figure utilized by AEP Texas,⁴³ and BNSF itself has supported a 10 percent contingency additive. *See, e.g., TMPA* at 158;

⁴¹ In contrast, BNSF’s proposed MOW operating expense is nearly 23% higher than the MOW expense adopted in *PSCo/Xcel*.

⁴² *See* BNSF Reply, Part III-F-11.

⁴³ *See, e.g., PSCo/Xcel* at 118; *TMPA* at 158; *WTU*, 1 S.T.B. at 710; *APS*, 2 S.T.B. at 402.

PSCo/Xcel at 118. AEP Texas also demonstrated that BNSF's own comparable projects typically assume less than a 10 percent contingency. *See* AEP Reb. at III-F-210.

Before AEP Texas filed its Rebuttal, the Board ruled in *PSCo/Xcel* that it was adopting a 10 percent engineering additive as its new standard. *Id.* at 118. AEP Texas accepted the Board's directive and used 10 percent on Rebuttal. BNSF responded with a frivolous motion to strike the 10 percent additive on the grounds that it was unsupported.⁴⁴ AEP Texas noted the myriad deficiencies in BNSF's arguments in its reply to the carrier's motion.⁴⁵ As with contingencies, AEP Texas' engineering additive is consistent with the Board's now-settled standard, and clearly preferable to BNSF's artificially inflated figures.

Finally, AEP Texas demonstrated that its land costs were appropriate and well supported, and showed that BNSF's objections to AEP Texas' Rebuttal presentation were unfounded.⁴⁶ BNSF's spurious claims cannot hide the inadequacies of its own land evidence, which consisted of little more than its witness' review of AEP Texas' materials and unsupported argument for a higher cost to acquire the necessary land.

⁴⁴ *See Motion To Strike* at 36.

⁴⁵ *Reply To Motion To Strike* at 49-51.

⁴⁶ *Compare Motion To Strike* at 28 and *Reply To Motion To Strike* at 40-43.

VI.
AEP TEXAS PROPERLY DETERMINED
THE TNR'S COST OF CAPITAL

On Rebuttal, AEP Texas justified its reliance on the Board-determined industry cost of capital over the 2002-2003 time period, and explained why BNSF's proposal to saddle the TNR with higher capital costs from an earlier period was without merit.⁴⁷ AEP Texas also provided evidentiary support for TNR's refinancing of debt in 2002, to take advantage of the lower interest rates that were available that year,⁴⁸ and showed that there was no support for BNSF's proposed 4% add-on for equity flotation costs, a premium which the Board repeatedly has rejected in the past.⁴⁹

AEP Texas likewise demonstrated that there was no merit to BNSF's charge that AEP Texas had improperly modified the Board's economic depreciation methodology.⁵⁰ The division of the DCF period into segments to reflect debt refinancing and amortization of debt over the life of the assets that were purchased or constructed with the proceeds are entirely consistent with the Board's procedures and the practices of Class I railroads generally.⁵¹ Similarly, AEP Texas' treatment of hiring and training costs as a component of start-up investment is consistent with the fact that these

⁴⁷ AEP Reb. at III-G-2. On Rebuttal, AEP Texas updated its cost of capital calculation to incorporate the Board's then-recent determination for 2003. *See FMC*, 4 S.T.B. at 845.

⁴⁸ AEP Reb. at III-G-2-3. As a least-cost, efficient replacement for BNSF, the TNR would be free to choose a financing method that would minimize cost, including refinancing debt when interest rates declined. *WTU*, 1 S.T.B. at 712; *McCarty*, 2 S.T.B. at 523 n.126.

⁴⁹ *See, e.g., Duke/NS* at 38; *TMPA* at 162; *WPL* at 107; AEP Reb. at III-G-3-4.

⁵⁰ AEP Reb. at III-G-31-32.

⁵¹ *Id.* at III-G-32.

costs will be incurred by the TNR *before* it commences operation, and complies with the requirements of American Institute of Certified Public Accountants Statement of Position 98-5.⁵²

VII.
AEP TEXAS' PROPOSED PROCEDURE TO INDEX OPERATING
EXPENSES IS RATIONAL AND WELL-SUPPORTED

It is indisputable that there is an inherent contradiction in forecasting future TNR revenues using an EIA projection that assumes a pass-through of productivity gains, while forecasting future TNR operating expenses using an index that assumes there are no productivity gains. BNSF does not even attempt to defend the inherent bias in this approach, as this dichotomy pointedly is ignored in the carrier's otherwise prolix submission on the issue.

On Opening, AEP Texas introduced a solution to the fatal circularity implicit in the approach to indexing operating expenses accepted by the Board in previous cases. AEP Texas benchmarked the historical, coal-related productivity values included in the EIA transportation rate forecast against the historical RCAFA values, then applied that relationship to the projection of future changes in the RCAFU otherwise relied upon by the Board. *See* AEP Op. Exhibit III-G-1 at 19-22, and Exhibit III-G-5.⁵³ The result was an imputed annual rate of productivity growth for the TNR of approximately 1.3%,⁵⁴ a rate significantly lower than that observed by EIA for coal-hauling railroads generally. AEP Reb. at III-G-12.

⁵² AEP Reb. at III-G-33. This procedure also is consistent with Internal Revenue Service guidelines for the treatment of start-up training costs. *Id.* at III-G-34 n.35.

⁵³ This approach differs significantly from that addressed by the Board in *PSCo/Xcel* (at 33-34).

⁵⁴ AEP Op. Exhibit III-G-1.

On Rebuttal, in response to previous statements by the Board concerning the likelihood that an optimally efficient SARR would begin experiencing productivity gains in its first year of operation⁵⁵ and arguments made by BNSF on Reply, AEP Texas pointed to specific sources of productivity gains commencing in Year 1 which more than justified the 1.3% rate implicit in AEP Texas' methodology. These included annual employee-related productivity growth of 0.94% attributable to increased density,⁵⁶ and locomotive efficiency improvements captured annually as the TNR added 3.2 new road units each year and leased an additional 13-17 units to handle peak traffic.⁵⁷ AEP Texas also identified information technology improvements that were acknowledged by the Board in *WPL*, and were credited there with productivity gains of 1.5% per year.⁵⁸

A fallacy promoted by BNSF was that because the TNR allegedly would start out 19% more efficient than BNSF on a operating cost basis, and it would take BNSF 18 years to catch up, no accounting for intervening productivity gains was necessary.⁵⁹ Assuming *arguendo* that a firm's initial cost advantage is relevant to its prospects for future productivity gains,⁶⁰ AEP Texas showed that when corrected for obvious errors and inconsistencies, BNSF's analysis showed that the

⁵⁵ See, e.g., *CP&L* at 27-28.

⁵⁶ This growth was measured in gross ton-miles per employee, a primary indicator of productivity improvements employed by BNSF and other railroads. AEP Reb. at III-G-22. Based upon a 29% increase in coal volumes over the DCF period, the TNR's GTMs per employee are forecasted to grow at an annual rate of 0.94%. *Id.*

⁵⁷ AEP Reb. at III-G-23 and Exhibit III-C-3.

⁵⁸ *WPL* at 106.

⁵⁹ See BNSF Reply at III. G-9-10.

⁶⁰ The performance of discount retailers such as Wal-Mart, Costco and Home Depot routinely disprove this notion.

TNR's initial operating cost advantage would be only 2.5%,⁶¹ and that once BNSF erased that advantage in fewer than three years, the TNR would be entitled to the benefits of the same RCAFA productivity growth projected for the railroad industry generally. AEP Reb. at III-G-14-20.⁶²

AEP Texas' solution to the revenue/operating expense indexing dichotomy answers both problems identified by the Board⁶³ in response to past calls for use of the RCAFA: the implicit productivity factor is coal-specific, and it reflects productivity gains for the TNR that are significantly more modest than those forecast for "real world" railroads. This sound and empiric approach represents the best evidence of record, and should be adopted in this case.

VIII.
THE GPRM IS CONSISTENT WITH RAMSEY
PRINCIPLES AND CURES THE FLAWS IN THE
EQUAL PERCENTAGE REDUCTION RULE

AEP Texas has proposed the GPRM as a substitute for the equal percentage reduction approach to the allocation of surplus stand-alone revenues over SAC that the Board has relied on in previous decisions. AEP Texas demonstrated that the equal percentage reduction rule's focus on absolute price levels rather than the relative mark-ups of revenue contributions over marginal cost

⁶¹ The comparison is to actual, movement-specific costs, not the inflated system average variable costs advanced by BNSF elsewhere in this case.

⁶² In further response to concerns expressed by the Board in prior cases, AEP Texas also demonstrated that its presumptively new assets in fact were not all that much "newer" than BNSF's coal-related transportation assets. AEP Op. at III-G-14-16; AEP Op. Exhibit III-G-6; AEP Reb. at III-G-27-29.

⁶³ See, e.g., *CP&L* at 27; *TMPA* at 161.

was inconsistent with Ramsey pricing principles,⁶⁴ and allowed improper manipulation of the outcome of a SAC analysis.⁶⁵

In contrast, the GPRM adheres to Ramsey principles by allocating rate relief according to relative demand elasticities, awarding proportionately higher relief to those group members with higher contribution mark-ups; *i.e.*, the same shippers who would bear a proportionately greater burden if revenues were inadequate.⁶⁶ *See* AEP Op. at III-G-30-31 and Exhibit III-G-11. On Rebuttal, AEP Texas showed that BNSF's criticisms of GPRM and its own "alternative" were without merit, and further exposed the carrier's incessant drive to nullify the benefits of cross-over traffic. AEP Reb. at III-G-38-48.

As initially proposed by AEP Texas, the GPRM allocated revenue reductions in an iterative fashion, starting with the traffic with the highest mark-up and gradually expanding the scope of the reductions to cover additional traffic until the excess of revenues over SAC was exhausted. *See* AEP Op. Exhibit III-H-1. This raised the possibility that in a given quarter, traffic that began with a very low mark-up (*i.e.*, traffic with highly elastic demand)⁶⁷ might not experience a reduction, and that traffic which began with different mark-up factors could end up with the same factors once the excess revenues were fully distributed. In *PSCo/Xcel*, the Board evaluated what appeared to be

⁶⁴ AEP Op. at III-G-25-30; AEP Reb. at III-G-35-28. *See also* Ex Parte No. 657, *Rail Rate Challenges Under the Stand-Alone Cost Methodology*, Statement of the Western Coal Traffic League, April 20, 2005 at 23-25 and n.33.

⁶⁵ *See, e.g.*, *PSCo/Xcel* at 37.

⁶⁶ The GPRM also is immune from "gaming." AEP Op. at III-G-31-32.

⁶⁷ The Board endorses the assumption that the rate structure inherited by a stand-alone railroad sets prices in accordance with Ramsey principles. *See Coal Trading*, 6 I.C.C. 2d at 380.

a similar approach⁶⁸ and opined that these effects raised a question of consistency with Ramsey principles. *Id.* at 38. AEP Texas respectfully disagrees, for the reasons explained in detail in AEP Op. Exhibit III-G-11, AEP Reb. at III-G-43-48 and AEP Reb. Exhibit III-G-18. In any event, the effects described above can be avoided and the Board's *PSCo/Xcel* concerns met through a straightforward adjustment to the GPRM, which is described immediately below.

To allocate excess revenues over SAC in a manner which simultaneously provides reductions to all shippers in a group whose contributions exceed marginal costs,⁶⁹ and closely maintains the relative relationship of each shipper's respective demand elasticity to every other shipper's, the adjustment starts with the measure of each movement's revenue contribution in excess of marginal cost:

$$(1) \quad M_i = (P_i - MC_i) Q_i, \text{ where}$$

M_i = aggregate contribution over marginal cost

P_i = original rate per ton

MC_i = marginal cost

Q_i = movement volume

Once these contributions over marginal cost are totaled ($M = \sum M_i$), each movement's decimal share of the total (S_i) can be calculated:

⁶⁸ The approach considered in *PSCo/Xcel* was raised for the first time at the Board's request in post-argument briefs. *PSCo/Xcel* at 37. It is not clear from the public versions of the briefs just how similar or different that approach was to the GPRM as designed by AEP Texas.

⁶⁹ If a shipper's rate is below marginal cost, any further reduction would be improper as it would push that shipper's price farther away from optimum efficiency. Since the *Guidelines* do not contemplate increasing rates on non-issue traffic, such a movement's rate would be unchanged under GPRM.

$$(2) \quad S_i = M_i/M$$

The next step is to allocate the excess revenue over SAC; *i.e.*, determine the measure of relief (d_i) assigned to each member of the group:

(3) $d_i = S_i D$, where “D” is the total excess revenue over SAC. This allows each member’s adjusted contribution over marginal cost (such that total revenues equal SAC) to be determined ($M_i - d_i$), which then is converted to a per ton basis:

$$(4) \quad (M_i - d_i) / Q_i$$

Adding back the original marginal cost yields the new rate for each movement:

$$(5) \quad [(M_i - d_i) / Q_i] + MC_i$$

Attached to this Brief as Counsel’s Exhibit No. 1 is a straightforward example of the functioning of the steps summarized above. *Inter alia*, the example confirms that the relative relationships between the movements’ demand elasticities as reflected in their aggregate contributions above marginal cost are the same both before and after the revenue allocation. The only circumstance in which the equal percentage reduction formula would pass this critical test of consistency with Ramsey principles is in the unique case of a traffic group wherein every member’s demand elasticity is exactly the same as every other member’s, a case which is not presented here.

As augmented by the steps described above, the GPRM allocates surplus revenue over SAC in a manner that is squarely consistent with Ramsey principles, and avoids the “gaming” risk that afflicts the equal percentage reduction rule. It is a proven, superior alternative to the Board’s current methodology, and should be adopted for use in this case.

IX.
REPARATIONS ARE DUE ON ALL
SHIPMENTS SUBSEQUENT TO JUNE 16, 2000

AEP Texas filed its Complaint in this proceeding on August 11, 2003, only 19 days after being advised by the Board *for the first time* that AEP Texas would not be permitted to present a complete evidentiary case against the reasonableness of BNSF's non-Rawhide rates in the context of a reopened *Docket No. 41191*.⁷⁰ Prior to that, AEP Texas reasonably had been led to believe that the Board's earlier call in *Docket No. 41191* for evidence of "other significant changed circumstances that would affect the rate analysis"⁷¹ was broad enough to encompass a SAC-based analysis of rates which had not yet been scrutinized by the agency that took into account the myriad changes in coal traffic patterns, operating characteristics, costs, and the further evolution of Board policies under the *Guidelines* since *WTU*.

As AEP Texas showed on Opening and Rebuttal, the foregoing circumstances support application of the equitable tolling doctrine to allow AEP Texas to claim reparations on all shipments made under the challenged rates since June 16, 2000, rather than only two years prior to the date of the new Complaint (*i.e.*, August 11, 2001).⁷² Because the statute of limitations urged by BNSF (49 U.S.C. § 11705(c)) is not jurisdictional⁷³ and AEP Texas' failure to file a new Complaint before August, 2003 was a direct consequence of statements by the Board in 2000 that the rates from

⁷⁰ *Docket No. 41191*, Decision served July 23, 2003 at 2-3.

⁷¹ *Docket No. 41191*, Decision served March 23, 2001 at 3.

⁷² AEP Reb. at I-38-46.

⁷³ *See* AEP Reb. at I-39-42.

non-Rawhide origins already were under challenge,⁷⁴ equitable tolling of Section 11705(c) is appropriate.

The claims asserted by AEP Texas in this proceeding arise out of the same general conduct and practices of BNSF as those that were the subject of the Complaint in *Docket No. 41191*. While the Board effectively compelled AEP Texas to file a new, separate Complaint in order to be assured a fair opportunity to challenge the subject rates based on a full evidentiary record and current rate reasonableness standards, that challenge clearly relates back to the dispute giving rise to the Board's November 7, 2000 reopening order in that earlier proceeding. This condition provides independent ground for the Board to find that 49 U.S.C. § 11705(c) does not limit AEP Texas' reparations relief in this case. See *Union Pacific Railroad Company v. Nevada Power Company*, 950 F. 2d 1429, 1432 (9th Cir. 1991).

X. CONCLUSION

For the reasons summarized in this Brief and detailed in AEP Texas' Evidence, the Board should find the rates at issue to be unreasonably high and unlawful, and pursuant to 49 U.S.C. §§ 10704(a) and 11701(a), grant the prescriptive relief and award the reparations and interest described in Part III-H of AEP Texas' Rebuttal Narrative. The Board also should affirm that the newly prescribed rates apply to shipments from all of the origins described in Exhibit A to AEP Texas' Original Complaint, including the Rawhide Mine.

⁷⁴ See, e.g., *Docket No. 41191*, Decision served November 7, 2000.

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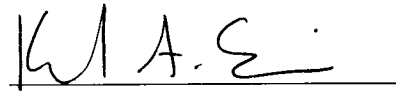
GPRM Example Utilizing Aggregate Contribution

	<u>Movement</u> (1)	<u>Price per Ton ("P")</u> (2)	<u>Marginal Cost Per Ton ("MC")</u> (3)	<u>P-MC 1/</u> (4)	<u>Volume (tons)</u> (5)	<u>Aggregate Revenues 2/</u> (6)	<u>Aggregate P-MC 3/</u> (7)	<u>Dist. Of Aggreg. P-MC 4/</u> (8)	<u>Relief 5/</u> (9)	<u>Revised Aggregate P-MC 6/</u> (10)	<u>Dist. Of Revised P-MC 7/</u> (11)	<u>SAC Rate 8/</u> (12)
1.	1	\$30.00	\$12.00	\$18.00	10,000	\$300,000	\$180,000	0.340	\$84,906	\$95,094	0.340	\$21.51
2.	2	\$40.00	\$15.00	\$25.00	5,000	\$200,000	\$125,000	0.236	\$58,962	\$66,038	0.236	\$28.21
3.	3	\$20.00	\$8.00	\$12.00	10,000	\$200,000	\$120,000	0.226	\$56,604	\$63,396	0.226	\$14.34
4.	4	\$7.00	\$5.00	\$2.00	30,000	\$210,000	\$60,000	0.113	\$28,302	\$31,698	0.113	\$6.06
5.	5	\$10.00	\$5.00	\$5.00	9,000	\$90,000	\$45,000	0.085	\$21,226	\$23,774	0.085	\$7.64
6.	Totals	xxx	xxx	xxx	xxx	\$1,000,000	\$530,000	1.000	\$250,000	\$280,000	1.000	xxx
1/	Column (2) - Column (3)											
2/	Column (2) x Column (5)											
3/	Column (4) x Column (5)											
4/	Column (7) ÷ Line 6, Column (7)											
5/	Assume revenue exceeds SAC by \$250,000 and distribute based on Column (8) factors.											
6/	Column (7) - Column (9)											
7/	Column (10) ÷ Line 6, Column (10)											
8/	[Column (10) ÷ Column (5)] - Column (3)											

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2005, I caused a copy of the foregoing Brief of Complainant AEP Texas North Company to be served by hand delivery on counsel for BNSF, as follows:

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