

NOV 14 2006

**SURFACE
TRANSPORTATION BOARD**

Public Version

218086



NOV 14 2006
RECEIVED.

V.

Docket No. 41191 (Sub-No. 1)

Defendant.

ENTERED
Office of Proceedings

~~NOV 15 2006~~

**Part of
Public Record**

PETITION FOR RECONSIDERATION

AEP Texas North Company ("AEP Texas"), pursuant to 49 C.F.R. Part 115.3(b)(2), petitions for reconsideration of the Decision served in the captioned proceeding on November 8, 2006 ("Decision"), on grounds of material error. In light of the clarity of the error and the fact that this proceeding has been awaiting decision for over 16 months, expedited action on this Petition is requested.

In support hereof, AEP Texas shows as follows:

1. In the Decision, the Board set a procedural schedule for the submission of supplemental evidence in this proceeding, in response to three methodological changes in the Board's application of the *Coal Rate Guidelines*¹ which were adopted in Ex Parte No. 657 (Sub No. 1), *Major Issues in Rail Rate Cases*, Decision served February 27, 2006. The schedule calls for opening, reply and rebuttal

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

submissions. Decision at 6. However, despite the fact that AEP Texas has the burden of proof in this case, the Decision allows *BNSF* to open and close this final evidentiary round.

2. The law is clear that as the party with the burden of proof in this case, AEP Texas has the right to open and close the record. *Duke Energy Corp v. Norfolk Southern Railway Co.*, 2005 WL 23887 (STB); *Canadian National Railway Co., et. al. – Control – Duluth, Missabe, & Iron Range Railway Co.*, 2004 WL 761305 *9 (STB); *Union Pacific Corp., et. al. – Control – Chicago & North Western Transp. Co., et. al.*, 1994 WL 670136 *8 (ICC). As the Board's predecessor squarely held:

In any proceeding before us, the party with the burden of proof opens, and closes if rebuttal evidence is allowed.

Bituminous Coal – Hiawatha, Utah to Moapa, Nevada, 1991 WL 47120 *3 (ICC).

Fundamental fairness and adherence to principles of administrative due process require that this rule continue to be respected in all phases of this proceeding.²

3. The Decision purports to justify its prejudicial reversal of the established order of proof with the observation that “the information being requested is in the possession of the railroad.” Decision at 4. However, it has *always* been the case that most of the data and other information needed to develop evidence and render a determination of rate reasonableness under the *Coal Rate Guidelines* is in the possession of the railroad. *See, e.g.*, 1 I.C.C. 2d at 548 (“We recognize that shippers may require substantial discovery to litigate a case under CMP, and we are prepared to make that discovery available to them.”). The fact that BNSF possesses and would have to produce data needed to support the submissions called for in the Decision offers no legitimate basis

² The Board's previous call for supplemental evidence in this case adhered to the proper order of proof. *See* Decision served March 17, 2006 at 3.

for depriving AEP Texas of its inherent right to open and close the record on stand-alone cost issues.³

4. Exhibit A to this Petition sets forth the information that AEP Texas requires in order to supplement the record on stand-alone costs in this case in the manner directed by the Decision. Production of the required SAC data should neither be burdensome nor time-consuming.⁴ Particularly when compared to the breadth and volume of data that railroads routinely produce during the main evidentiary stages of a rate case – where complainants’ rights to open and close the record are not questioned – the cache of information needed from BNSF at this point cannot justify a failure to respect these rights.

5. Unlike the burden of proof on SAC issues, which unquestionably lies with the complainant, the burden of proof on variable costs (which are needed to determine the jurisdictional threshold rate level) is shared. Thus, SAC rate cases usually involve simultaneous opening, reply and rebuttal filings by both parties on variable cost issues. AEP Texas submits that a similar procedure should be followed for the supplemental evidence on Phase III URCS variable costs requested in the Decision.⁵

³ See also Docket No. 42058, *Arizona Electric Power Cooperative, Inc. v. BNSF Railway Co., Et Al.*, Decision served November 19, 2003 at 7, wherein the Board applied the governing rule and enabled the Complainant to open and close a supplemental evidentiary round.

⁴ As the Board noted, BNSF previously has stated that the burden associated with applying the ATC formula – the most factually-intensive of the three changes addressed in the Decision – would not be significant. See Decision at 4, n. 9. Producing the underlying source data needed to apply the formula should not impose an undue burden, either.

⁵ AEP Texas notes that BNSF (unlike AEP Texas) did not submit evidence on variable costs for movements from some of the origins for which a maximum rate-reasonableness determination is sought, and did not stipulate to the values of the nine operating characteristics required to calculate URCS Phase III costs for movements from the origins it did not cost. It is therefore particularly appropriate for both parties to make initial URCS Phase III calculations, as called for by the Decision.

6. AEP Texas submits that the time frames reflected in the Decision generally are reasonable, and should form the basis for a revised and properly balanced schedule. Upon reconsideration, therefore, the Board should correct its error and substitute the following:

BNSF's production of Exhibit A data due: December 8, 2006

Complainant's supplemental evidence on all issues and BNSF's supplemental evidence on variable costs due: January 8, 2007

BNSF's reply evidence on all issues and complainant's reply on variable costs due: February 9, 2007

Complainant's rebuttal on all issues and BNSF's rebuttal on variable costs due: February 23, 2007

WHEREFORE, for the reasons set forth above, the Board should reconsider its Decision and revise the supplemental evidentiary schedule in the manner described in this Petition.

Respectfully submitted,

AEP TEXAS NORTH COMPANY

By: David Cohen
Senior Counsel
144 West Nationwide Blvd.
Suite 500
Columbus, Ohio 43215

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Kelvin J. Dowd
Christopher A. Mills
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20005
202-347-7170



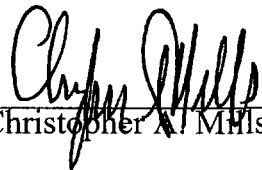
Dated: November 14, 2006

Attorneys & Practitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November 2006, I caused a copy of the foregoing Petition for Reconsideration to be served by hand delivery on counsel for BNSF, as follows:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Linda S. Stein
Steptoe & Johnson, L.L.P.
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795



Christopher A. Mills

**DATA REQUIRED TO IMPLEMENT
EX PARTE 657 (SUB-NO. 1) PROCEDURES FOR AEP TEXAS**

1. Please provide BNSF density information for each route traversed by each movement in the traffic group during base year 2000 in a machine readable database or electronic spreadsheet, including all field descriptions, data definitions and data dictionaries required to utilize the data. The density database or spreadsheet should include, at a minimum, the following data:
 - a. Identification of the unique railroad divisions, subdivisions, and individual line segments for each unique density segment;
 - b. Station name at the beginning of a unique density segment and at the end of a unique density segment;
 - c. Beginning and ending milepost for each unique density segment;
 - d. Rail mileage for each unique density segment;
 - e. Total density (both directions including empty and loaded trains) by segment expressed in net ton-miles; and
 - f. In the alternative, BNSF should provide total density (both directions including empty and loaded trains) by segment expressed in gross ton-miles plus appropriate factors that can be used to convert gross ton-miles to net ton-miles on each unique density segment.
2. Please provide the following BNSF train event data (for coal traffic), car movement data (for non-coal data) and traffic revenue data in a machine readable database or spreadsheet, including all field descriptions, data definitions and data dictionaries:
 - a. For base year 2000, provide BNSF train event data and car movement data from origin to destination for each movement included in the traffic group for base year 2000. BNSF train event data and car movement data should reflect all traffic handled by the SARR;
 - b. For years 2001 through 2005, provide BNSF train event data and car movement data from origin to destination for each new movement included in the SARR group that was not included in the base year 2000 traffic group. BNSF train event data and car movement data should reflect all traffic handled by the SARR; and
 - c. Provide BNSF traffic revenue data for the following coal moves from origin to destination which were first included in the SARR group as shown below:

DATA REQUIRED TO IMPLEMENT
EX PARTE 657 (SUB-NO. 1) PROCEDURES FOR AEP TEXAS

<u>Operator</u> (1)	<u>Plant</u> (2)	<u>Year First Included In SARR Group</u> (3)
1. [redacted]	[redacted]	[redacted]
2. [redacted]	[redacted]	[redacted]
3. [redacted]	[redacted]	[redacted]
4. [redacted]	[redacted]	[redacted]

3. Please provide the proposed routing and estimated train and operating characteristics from the PRB mine origins for the unit train coal movements to the following destinations:
- a. [redacted] Generating Station included in the traffic group in [redacted]; and
 - b. [redacted] Generating Station included in the traffic group in [redacted].