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The Honorable Vernon A. Williams
Secretary
Surface Transportation Board - Case Control Unit
1925 K Street, N.W.
Washington, D.C. 20423

Re: Docket No. 41185, Arizona Public Service Company & PacifiCorp v. The Burlington Northern and Santa Fe Railway Company

Dear Secretary Williams:

On October 4, 2004, the Burlington Northern and Santa Fe Railway Company ("BNSF") filed supplemental written argument in the above-referenced proceeding with regard to certain issues addressed at oral argument. Arizona Public Service Company and PacifiCorp ("APS/PacifiCorp") object to Defendant's submission of improper post-record argument without prior request or permission, and request that the Board disregard BNSF's submission. See Docket No. 41185, Arizona Pub. Serv. Co. and PacifiCorp v. The Burlington Northern and Santa Fe Ry. (STB served Sept. 9, 2004), at 1 ("No additional written statements may be filed in connection with the oral argument . . .").¹ Against the possibility that the Board does consider it, however, APS/PacifiCorp submit the following response.

¹ As the Board is aware, the parties have filed responses to specific requests made by Vice Chairman Mulvey at oral argument pertaining to (1) requests for historical information as to generating station capacity factor levels (see Oct. 5, 2004 APS/PacifiCorp letter) and (2) requests for unredacted versions of contractual information (see Sept. 30, 2004 BNSF letter). In contrast, BNSF's supplemental argument contained in its October 4th letter was, to the best of APS/PacifiCorp's knowledge, unsolicited.

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BNSF's October 4th letter is directed principally to the question raised by Chairman Nober at oral argument about the Board's authority in SAC cases to prescribe maximum reasonable rates at levels above the challenged common carrier rates.² BNSF contends that there are no limits on the level of a prescribed rate that may be established by the Board above the rates "charged or collected" by a market dominant rail carrier, and that the "Board regularly prescribes rates . . . that exceed the rates 'charged or collected' during the pendency of the litigation."

BNSF's arguments are premised on the contention that the challenged rates being "charged or collected" in SAC cases are only those rates in place during the pendency of the litigation. Using this restrictive understanding of the rates "charged or collected," BNSF makes the unremarkable point that maximum SAC levels for future time periods may exceed historic tariff rates in effect during the pendency of litigation. This was not the question raised at oral argument, which instead pertained to the Board's authority to prescribe maximum reasonable rates in SAC cases at levels above the applicable challenged rate for the period in question.

Contrary to BNSF's assertions, the rates under challenge in SAC cases are not restricted only to those rates in effect "during the pendency of [SAC] litigation." Under the Board's SAC methodology, the challenged rates are projected out for the life of the 20-year DCF analysis. See, e.g., Docket No. 42057, Public Serv. Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Ry. (STB served June 8, 2004), at 11 ("Xcel"); Docket No. 42072, Carolina Power & Light Co. v. Norfolk Southern Ry. (STB served Dec. 23, 2003), at 11 ("Carolina"). When the revenues for the SARR exceed the SARR's costs on a present value basis, the Board finds that the challenged rates exceed a maximum reasonable level. See Xcel at 12, 36; Carolina at 13, 29. Under the percentage reduction methodology, a determination is made as to the amount by which the projected rates applicable during each year of the DCF period should be reduced. See Xcel at 36-39; Carolina at 30-34. The Board does not set prescribed rates for any time period at levels in excess of the challenged rate for that period. See Xcel at 41; Carolina at 34-35; Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. (STB served March 24, 2003), at 34-35. If a calculated future SAC level is higher than a projected rate for the same year,

² BNSF's letter also briefly addresses updated variable cost information. APS/PacifiCorp agree that variable costs are not an issue on reopening.

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the only implication is that all else remaining equal, the projected rate would not be considered unreasonable.

This is not only consistent with – but is compelled by – the Board’s statutory authority to prescribe maximum reasonable rates. Section 10704(a)(1) of Title 49 requires that before the Board may prescribe a rate, it first must find that the challenged rate violates the statutory requirement that it be reasonable. Although BNSF suggests that this can only apply to rates in place during the pendency of the litigation, this suggestion is belied by the explicit wording of the statute regarding a rate that “does or will violate this part.” 49 U.S.C. § 10704(a)(1) (emphasis added).

The Board clearly does not “regularly prescribe” rates above the applicable tariff rates. We have reviewed all SAC decisions where the Board or ICC has employed a 20-year DCF analysis, and have been unable to find any case where the Board has set the SAC rate for any time period above the challenged rate for that period. Instead, in every case where the challenged rate was determined to be unreasonably high, rate reductions from the projected challenged rates have been ordered consistent with DCF analysis principles, except in those years where the SARR generates revenues below costs, in which circumstance no reduction in the projected rate is shown.

BNSF contends that significant rate increases above historic rates were prescribed by the ICC in the Coal Trading case in the years 1987-1998 in order to ensure “a full recovery of the SAC revenue requirement in each of the remaining years of the DCF analysis.” But this analysis sheds no light on the issue of whether the Board may prescribe rates at levels above challenged tariff rates. The fact that the Board allowed the SAC rates to be escalated over time in Coal Trading (which rates were calculated using a completely different DCF analysis than is employed today by the Board), is irrelevant. A similar result occurred in TMPA, where the Board found that the SAC would escalate by 78% over the 20-year DCF period (the SAC level in TMPA was initially found to be \$18.61 in the Second Quarter of 2001, and would escalate to \$33.05 over the 20-year period) – but, again, in no year of the SAC analysis period would there be a prescribed SAC rate that exceeded the projected challenged rate. Where the SAC level was higher, the decision simply shows no mandated rate reduction.

The statute does not permit the Board to prescribe a rate in excess of a challenged rate for the simple reason that the challenged rate can not be changed unless it

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exceeds a maximum reasonable level. Since the statute authorizes the Board to prescribe the "maximum rate," it must, by definition, be less than the challenged rate.

Respectfully submitted,

A handwritten signature in black ink that reads "C. Michael Loftus". The signature is written in a cursive style with a long horizontal flourish extending to the right.

C. Michael Loftus

CML/jwp

cc: Chairman Nober
Vice-Chairman Mulvey
Commissioner Buttrey
Samuel M. Sipe, Jr., Esq. (by hand delivery)