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May 10, 2012

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May 10, 2012  
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**VIA ELECTRONIC FILING**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423-0001

Re: ***Texas Municipal Power Agency v. BNSF Railway Company,***  
**STB Docket No. 42056**

Dear Ms. Brown:

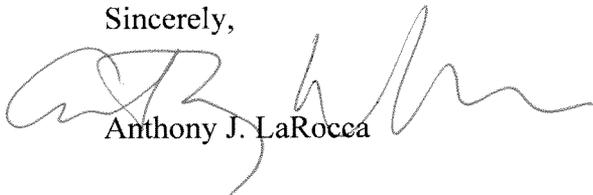
Enclosed for electronic filing in the above-captioned matter is BNSF Railway Company's Reply in Opposition to Texas Municipal Power Agency's Petition to Reopen and Modify Rate Prescription.

We are filing separately a Motion for Leave to Exceed Page Limit, as this Reply exceeds the 20-page limit set forth in 49 C.F.R. §§ 1115.3(d) and 1115.4.

In addition, we are hand delivering four copies of a CD containing workpapers underlying the Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher, which is attached to BNSF's Reply.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Anthony J. LaRocca

Enclosures  
cc: Counsel of Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

ENTERED  
Office of Proceedings  
May 10, 2012  
Part of  
Public Record

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TEXAS MUNICIPAL POWER AGENCY )  
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Complainant, )  
 )  
v. )  
 )  
BNSF RAILWAY COMPANY )  
 )  
Defendant. )  
\_\_\_\_\_)

Docket No. 42056

**REPLY OF BNSF RAILWAY COMPANY IN OPPOSITION TO  
TMPA’S PETITION TO REOPEN AND MODIFY RATE PRESCRIPTION**

BNSF Railway Company (“BNSF”) hereby replies in opposition to the Petition to Reopen and Modify Rate Prescription (“TMPA Petition to Reopen”) filed by Texas Municipal Power Agency (“TMPA”) on April 20, 2012.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

The rate prescription in this docket established by the Board in its 2003 and 2004 decisions expired at the end of 2010. When the rate prescription expired, BNSF exercised its statutory right to establish a new common carrier rate. Any challenge to the lawful rates that BNSF established after the rate prescription expired must be carried out through a new complaint that meets the requirements of the governing statute. TMPA cannot circumvent the statutory provisions governing rate reasonableness challenges by asking the Board to reopen and extend a rate prescription that ended over a year ago.

Moreover, any challenge to the rates that BNSF established after the rate prescription expired – whether through a supposed reopening or through a proper rate reasonableness complaint – would fail because those rates are significantly below the Board’s jurisdictional

threshold. TMPA is wrong that the Board is required to assess its jurisdiction today using the complex and discredited movement-specific variable cost methodology that was used in the Board's 2003 decision in this case. The Board decided in 2006 that the use of movement-specific adjustments to Uniform Rail Costing System ("URCS") variable costs produced unreliable variable cost calculations and determined that it would assess its jurisdiction in the future using only system-average URCS variable costs. Under the Board's current variable cost methodology, BNSF's rates are not subject to the Board's jurisdiction.

TMPA previously sought to extend the rate prescription beyond 2010 through an implausible and erroneous reading of the Board's prior decisions. In response to TMPA's request, the Board on its own initiative considered whether it would be appropriate to reopen its prior decisions in this docket and consider making changes to the rate prescription. The Board concluded that a reopening was not justified and TMPA has provided no basis for reversing that decision.

TMPA's Petition to Reopen is an abuse of the Board's process. TMPA seeks reopening even though TMPA has already acknowledged that a reopening of the 2003/2004 Decisions would not be possible if, as the Board has definitively ruled, the rate prescription expired at the end of 2010. TMPA and its counsel and consultants also know full well that the rates BNSF has charged since the rate prescription expired are below the Board's jurisdictional threshold and therefore are beyond the Board's jurisdiction. TMPA's Petition to Reopen is nothing more than an effort to prolong litigation over the Board's 2003/2004 Decisions as an excuse to continue underpaying BNSF's common carrier rates, which TMPA has been doing since BNSF

established a new common carrier rate on January 1, 2011. The Board should not countenance such a misuse of Board process, and it should promptly deny TMPA's Petition to Reopen.<sup>1</sup>

## **BACKGROUND**

In 2001, TMPA challenged the reasonableness of BNSF's common carrier rate for providing transportation from the Wyoming Powder River Basin to TMPA's Gibbons Creek Station in Iola, TX. In 2003, the STB determined that the challenged rates were unreasonable and prescribed maximum reasonable rates for the transportation service through 2011.<sup>2</sup> In 2004, the STB modified the rate prescription to extend only through the end of 2010.<sup>3</sup> When the rate prescription expired at the end of 2010, BNSF established a new common carrier rate effective January 1, 2011, as it is entitled to do by statute. 49 U.S.C. § 10701(c).

In late 2010, TMPA filed a Petition for Enforcement at the Board seeking a declaration that BNSF could not charge any rates for transportation to the Gibbons Creek Station in the years 2011 through first quarter 2021 that are higher than those identified as "SAC Rates" in the 2004 Decision. TMPA argued that the Board prescribed those "SAC Rates" for the Gibbons Creek movement through the entire 20-year DCF period used in the Board's SAC analysis – 2001 through 2021.<sup>4</sup>

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<sup>1</sup> TMPA's Petition to Reopen also violates the Board's rules limiting petitions to reopen to 20 pages. 49 C.F.R. §§1115.3(d), 1115.4. To address all of the arguments in TMPA's 80-plus page Petition, BNSF is filing along with this Reply a request for leave to exceed the page limit in 49 CFR §§1115.3(d), 1115.4.

<sup>2</sup> *Texas Municipal Power Agency v. The Burlington Northern & Santa Fe Ry. Co.*, 6 S.T.B. 573 (2003) ("2003 Decision").

<sup>3</sup> *Texas Municipal Power Agency v. The Burlington Northern & Santa Fe Ry. Co.*, 7 S.T.B. 803 (2004) ("2004 Decision").

<sup>4</sup> TMPA Petition for Enforcement (filed Dec. 17, 2010) at 7-10.

BNSF opposed TMPA's Petition for Enforcement, explaining that under the plain language of the 2003 and 2004 Decisions the rate prescription had expired at the end of 2010.<sup>5</sup> BNSF also explained that if TMPA's Petition were construed as a petition to reopen for purposes of modifying the rate prescription, there would be no factual basis for extending the rate prescription through first quarter 2021. *Id.* at 11-16. BNSF further showed that its new common carrier rate was below the STB's jurisdictional threshold level and, thus, could not be superseded by a prescribed rate. TMPA submitted a letter replying to BNSF's opposition in which TMPA emphasized that it was not seeking to reopen the 2003 and 2004 Decisions. TMPA stated "this case is not reopened and neither TMPA nor BNSF has sought reopening."<sup>6</sup>

In July 2011, the Board denied TMPA's Petition for Enforcement, finding that the clear language of the 2003 and 2004 Decisions provided that the rate prescription for transportation to TMPA's Gibbons Creek Station expired at the end of 2010.<sup>7</sup> In that 2011 decision, the STB indicated that it could reopen its 2003 and 2004 Decisions on its own initiative but concluded that there was no reason to do so. *Id.* at 5.

In August 2011, despite the clear language of the 2003/2004 Decisions and the Board's affirmation of that language in the 2011 Decision, TMPA filed a petition to reconsider the 2011 Decision, arguing that the STB erred in ruling that the 2003 and 2004 Decisions limited TMPA's rate relief to 10 years of the 20-year DCF period.<sup>8</sup> TMPA did not challenge the Board's 2011 decision not to reopen the 2003 and 2004 Decisions, stating that "[o]f course, there would be

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<sup>5</sup> BNSF's Reply to TMPA's Petition for Enforcement (filed Jan. 6, 2011) at 7-11 ("BNSF 2011 Reply").

<sup>6</sup> January 18, 2011 Letter from Sandra Brown, counsel for TMPA, to Cynthia Brown, STB, in above-referenced docket at 1.

<sup>7</sup> *Texas Municipal Power Agency v. The Burlington Northern & Santa Fe Ry. Co.*, STB NOR Docket No. 42056 at 4 (served July 27, 2011) ("2011 STB Decision").

<sup>8</sup> TMPA Petition for Reconsideration (filed Aug. 16, 2011) at 3.

nothing to reopen, if, as the Board declares, the prior decisions were clear that TMPA's relief ended after 10 years notwithstanding the fact that the rate during those 10 years was established based on a 20-year DCF period." *Id.* at 17-18.

In January 2012, the STB denied TMPA's petition for reconsideration, reiterating that under the plain language of the 2003 and 2004 Decisions, the rate prescription expired at the end of 2010.<sup>9</sup> In February 2012, TMPA filed a Petition for Review of the STB's 2011 decision with the United States Court of Appeals for the District of Columbia Circuit.<sup>10</sup>

Since January 2011, TMPA has refused to pay the full common carrier rate that BNSF established when the rate prescription expired and has instead paid a lower rate identified as the "SAC Rate" for 2011 set out in the 2004 Decision. In January 2011, TMPA told BNSF it would continue to pay this lower rate "until this matter is resolved by the STB."<sup>11</sup> However, after the STB resolved the matter in its July 2011 decision by explaining that the rate prescription had expired at the end of 2010, TMPA continued to pay the lower "SAC rate" while its petition for reconsideration was pending. After the STB denied TMPA's petition for reconsideration and reconfirmed that the rate prescription had expired at the end of 2010, TMPA still refused to pay the full amount of BNSF's common carrier rate, now asserting that it will withhold full payment

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<sup>9</sup> *Texas Municipal Power Agency v. The Burlington Northern & Santa Fe Ry. Co.*, STB NOR Docket No. 42056 at 2 (served Jan. 20, 2012) ("2012 STB Decision").

<sup>10</sup> The Board has filed a motion to dismiss TMPA's petition for review under the Supreme Court decision in *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270 (1982).

<sup>11</sup> January 26, 2011 Letter from Steve Witkowski, TMPA, to Bob Brautovich, BNSF (Exhibit 1); *accord* March 7, 2011 Letter from Steve Witkowski, TMPA, to Bob Brautovich, BNSF ("For all post-2010 shipments *TMPA will pay all amounts that it is lawfully required to pay by the STB's determination . . .*" (emphasis added) (Exhibit 2).

pending the outcome of the D.C. Circuit appeal.<sup>12</sup> TMPA currently owes BNSF almost \$10,000,000 in underpayments, not including interest.

On April 20, 2012, TMPA filed its Petition to Reopen and Modify Rate Prescription with the Board. TMPA seeks to reopen the 2003 and 2004 Decisions, and have the Board extend the rate prescription for the Gibbons Creek movement from 2011 through first quarter 2021 based on “changed circumstances.” In its Petition to Reopen, TMPA seeks to introduce what it characterizes as “limited additional evidence concerning stand-alone costs (“SAC”) and updated variable costs for the traffic at issue. . . .”<sup>13</sup> Based on that new evidence, TMPA asks the Board to “revise its schedule of the maximum reasonable rates that Defendant, BNSF . . . can charge for the transportation of coal to TMPA’s Gibbons Creek Generating Station established in [the 2004 Decision], and extend the prescription from 2011 through 2012.” *Id.* at 1-2. For the reasons set out below, TMPA’s Petition to Reopen should be denied.

## **ARGUMENT**

### **I. TMPA Cannot Reopen a Case that Is Over and Done.**

#### **A. Because the TMPA Rate Prescription Has Expired, There Is Nothing for the Board to Reopen**

TMPA’s Petition to Reopen is based on the indefensible premise that there is an existing rate prescription established by the 2003 and 2004 Decisions that could be reopened and modified. The continued existence of a rate prescription was the same proposition that TMPA had urged the Board to endorse in TMPA’s 2010 Petition for Enforcement. But the Board refused to endorse TMPA’s view that the 2003/2004 rate prescription was still in existence, stating that “[t]he Board will not clarify or ‘enforce,’ its *TMPA 2003* and *TMPA 2004* decisions

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<sup>12</sup> April 9, 2012 Letter from Craig York, TMPA, to Stevan Bobb, BNSF (Exhibit 3).

<sup>13</sup> TMPA Petition to Reopen at 1.

in the manner TMPA seeks, because those decisions clearly provide that TMPA is entitled to a rate prescription only through 2010.” 2011 STB Decision, at 4.

In its current Petition to Reopen, TMPA acknowledges, as it must, that the Board has rejected TMPA’s view that the 2003/2004 rate prescription was ongoing. TMPA stated:

In a decision served July 27, 2011, the Board denied the relief sought by TMPA in its *Enforcement Petition*. Relying on what it deemed the ‘plain language’ of the *TMPA 2003* and *TMPA 2004* decisions, the Board ruled that the rate prescription was limited to the years 2001 through 2010, and that BNSF was free to establish any rate it chose after 2010. . . .

TMPA Petition to Reopen at 8. Thus, despite the implication to the contrary arising from TMPA’s current request to modify a rate prescription, there is actually no dispute that the rate prescription that TMPA now seeks to reopen no longer exists.<sup>14</sup> The parties’ current commercial relationship is not defined by an ongoing rate prescription. Their relationship is defined by a common carrier rate that, in TMPA’s words, “BNSF was free to establish. . . .”

TMPA’s Petition to Reopen must be denied because there is no rate prescription that the Board could reopen or modify.<sup>15</sup> Nor is there any ongoing TMPA rate case that could be reopened. The TMPA rate case that culminated in the 2003/2004 Board decisions became a prior rate case when the relief ordered in those decisions expired at the end of 2010. At that point, “BNSF was free to establish any rate it chose,” which is exactly what BNSF did. While there has been no Board decision dismissing TMPA’s complaint as to the period after 2010, there is no

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<sup>14</sup> TMPA has sought review of the Board’s 2011 Decision in the D.C. Circuit. However, that decision was a final order and TMPA has not sought to stay its effectiveness. Thus, notwithstanding TMPA’s appeal, the current legal status is that no rate prescription exists.

<sup>15</sup> The cases that TMPA relies upon for reopening, *Arizona Pub. Serv. Co. & Pacifcorp v. The Burlington Northern & Santa Fe Ry. Co.*, 6 S.T.B. 851 (2003) (“APS”), *FMC Wyoming Corp., et al. v. Union Pac. R.R.*, 4 S.T.B. 699 (2000), and *Wisconsin Power & Light Co. v. Union Pac. R.R.*, 5 S.T.B. 955 (2001), are not relevant because none of those cases involved a request to reopen after the rate prescription had expired.

need for an order of dismissal to mark the end of the prior rate case. The prior prescription has expired under its own terms, and any challenge to BNSF's new, lawfully established common carrier rate would have to be brought in the form of a new rate case.<sup>16</sup>

Significantly, TMPA itself, in its August 16, 2011 Petition for Reconsideration, acknowledged that reopening would not be appropriate in the circumstances this case currently presents. Addressing the subject of possible reopening, TMPA stated: "Of course, there would be nothing to reopen if, as the Board declares, the prior decisions were clear that TMPA's relief ended after 10 years notwithstanding the fact that the rate during those 10 years was established based on the 20-year DCF analysis period." TMPA Petition for Reconsideration at 17-18. The Board has confirmed that the 2003 and 2004 Decisions were clear that "TMPA's relief ended after 10 years." Accordingly, by TMPA's own admission there is now "nothing to reopen."

TMPA has manifested its dissatisfaction with BNSF's current common carrier rate by refusing to pay the rate in full. TMPA's refusal to pay the full amount of BNSF's rate is in direct defiance of the rule that "[a] shipper may seek a Board determination of the reasonableness of [challenged] rates, but it may not withhold payment of a legally established rate."<sup>17</sup> Neither this unlawful exercise of self-help nor the filing of a petition to reopen the prior rate reasonableness proceeding is a legally valid means of challenging the current rate. The only option available to

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<sup>16</sup> <sup>16</sup> *See DuPont De Nemours & Co. v. CSX Transp., Inc.* STB Docket No. 42099, at 20 (served June 30, 2008) (footnote omitted) ("Once the rate relief is exhausted, CSXT's rate-making freedom will be restored, with a regulatory safe harbor at the level of the challenged rate for the remainder of the 5-year period, with appropriate adjustments for inflation using the rail cost adjustment factor that is adjusted for productivity (RCAF-A). If, however, CSXT establishes a new common carrier rate once the rate prescription expires, and the new rate exceeds the inflation-adjusted challenged rate, DuPont may bring a new complaint against the higher rate.")

<sup>17</sup> *AEP Texas North Company v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 41191 (Sub-No. 1), at 2 (served March 19, 2004).

TMPA under the statutory framework is to file a new rate complaint and demonstrate that the Board has jurisdiction to review the reasonableness of BNSF's common carrier rate.

TMPA and its counsel and consultants know that BNSF's common carrier rates are below the Board's jurisdictional threshold. TMPA cannot use its Petition to Reopen to try to circumvent the statutory framework that gives BNSF a safe harbor from regulatory review when it sets rates below the Board's jurisdictional threshold. In the end, TMPA's Petition to Reopen is nothing more than a pretext for TMPA's continuing to underpay BNSF's lawful rates while the Board addresses the reopening petition. The Board should make clear that TMPA may not circumvent the statutory scheme for challenging the reasonableness of rail rates through its reopening gambit.

**B. TMPA Should Be Foreclosed from Making a Second Attempt to Extend the Rate Prescription Established in the Board's 2003/2004 Decisions**

Even if there were an ongoing proceeding that the Board could reopen, which there is not, the Board should not condone TMPA's second effort to extend the expired rate prescription. TMPA's Petition to Reopen is TMPA's second attempt since December 2010 to establish a rate prescription extending through 1Q2021 based on the STB's 2003/2004 SAC analysis. In 2010, TMPA sought to "enforce" the rate prescription in the 2003/2004 Decisions, claiming that the prescription went through 1Q2021 and that BNSF was deviating from that rate prescription by assessing its 2011 common carrier rate. The Board denied TMPA's petition on the basis that the plain language of the 2003/2004 Decisions established a rate prescription only through 2010.

Now in 2012, TMPA, in its Petition to Reopen, again seeks to extend the rate prescription established in the 2003/2004 Decisions through 1Q2021. This time TMPA seeks to extend the rate prescription by "reopening" the 2003/2004 Decisions based upon "changed circumstances." TMPA's new petition should be rejected as a collateral challenge to the Board's 2011 decision

confirming what was obvious from the 2003/2004 Decisions -- that the rate prescription ended in 2010. TMPA lost its earlier attempt to extend the rate prescription, and it should not be permitted to assert a second argument, albeit one based on a different theory, that seeks the same result. Longstanding principles of administrative efficiency and repose prohibit a petitioner from submitting multiple petitions intended to achieve the same end result.<sup>18</sup>

It would be particularly inappropriate for the Board to grant TMPA's Petition to Reopen in this case given that TMPA expressly declined to seek reopening when it brought its Petition for Enforcement in 2010. As the Board noted in its 2011 decision, TMPA could have sought reopening at that time, but it chose for its own strategic reasons to advise the Board that it did not want to reopen the 2003/2004 Decisions. TMPA presents no changed circumstance now in its Petition to Reopen that it could not have brought to the Board's attention in late 2010 in its Petition for Enforcement. After failing to prevail on its original strategy for extending the rate prescription, it is too late now for TMPA to embrace an approach that it expressly rejected only sixteen months ago.

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<sup>18</sup> See, e.g., *Tongue River R.R. Co., Inc. – Construction and Operation – Western Alignment*, STB Finance Docket No. 30186 (Sub-No. 3), at 5 (served June 15, 2011) (in denying petition to reopen, STB explains importance of considering “equitable concerns regarding administrative finality and repose . . .” and quotes from a June 2010 STB decision in which it stated “[t]he administrative process might never come to an end if parties could come back to the Board years after a final decision to try out a new theory.”); *B. Willis, C.P.A. Inc. – Petition for Declaratory Order*, 6 S.T.B. 280, 283 (2002) (STB denied a petition to reopen, noting “[t]he limitations in our rules against the introduction of new evidence reflect the need for finality in the administrative process. A party should not withhold evidence it considers to be relevant until after it has obtained a result not to its liking, and then seek to have the proceeding reopened so that it may introduce that evidence.”); *Big Stone-Grant Indus. Dev. & Transp., LLC – Construction Exemption – Ortonville, MN and Big Stone City, SD*, STB Docket No. 32645 at 4 (served May 30, 2000) (STB denied petition to reopen filed one month after the petitioner's petition for reconsideration of an STB decision was denied, explaining “[i]t is not the purpose of reopening under 49 CFR 1115.4 to afford the petitioner a second bite at the apple.”)

## **II. The Board Does Not Have Jurisdiction over BNSF's Existing Common Carrier Rate for Purposes of Reopening or Otherwise**

### **A. The Current Rate Is Below the Board's Jurisdictional Threshold**

The rate BNSF is charging for transportation to TMPA's Gibbons Creek Station is a common carrier rate established by BNSF pursuant to the statutory authority granted to railroads in 49 U.S.C. § 10701(c) to "establish any rate." BNSF became free to establish this rate, and did so, when the rate prescription terminated at the end of 2010. The governing statute provides that a carrier's rate-setting prerogative can be overridden by a rate prescription only as the outcome of a rate reasonableness proceeding initiated by the filing of a complaint. 49 U.S.C. § 10704(b).

By its reopening petition, TMPA seeks to supplant BNSF's lawfully established rate with a Board prescribed rate. The lawfully established rate could be supplanted only if the Board has jurisdiction to determine that it is unreasonably high. The Board only has jurisdiction to evaluate the reasonableness of a rate where it makes a determination under 49 U.S.C. § 10707 that a railroad has market dominance over the transportation to which the rate applies, and it may not find market dominance where the revenue-to-variable cost ("R/VC") ratio for the transportation is less than 180%. 49 U.S.C. §§ 10701(d), 10707(d)(1)(A).<sup>19</sup> Here, the challenged rate produces an R/VC of less than 180% and the Board therefore has no jurisdiction to review it.

*Major Issues* specifies that for purposes of calculating the jurisdictional threshold, variable costs

will be the system-average variable cost generated by URCS, using the nine movement-specific factors inputted into Phase III of URCS. The only adjustments allowed to the URCS Phase III program would be those adopted in Ex Parte No. 431 (Sub-No. 2).

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<sup>19</sup> See also *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) at 47 (served Oct. 30, 2006) ("*Major Issues*").

The inputs will not be refined further by using the URCS “detailed parameters.”<sup>20</sup>

BNSF’s expert witnesses, Messrs. Baranowski and Fisher, have calculated R/VCs for the current rate in compliance with the Board’s instructions in *Major Issues*. See the Joint Verified Statement of Messrs. Baranowski and Fisher at 1-2 (“2012 Joint Baranowski/Fisher VS”) attached as Exhibit 4. As Table 1 from the 2012 Joint Baranowski/Fisher VS shows, the current TMPA rate is well below the jurisdictional threshold level (“JTL”), regardless of mine origin.

**Table 1**  
**Current R/VC and JTL Rate Calculations for TMPA Movements**  
**2011 Originations**

<b>Mine Origin</b>	<b>1Q 2012 Rate</b>	<b>URCS Variable Cost (indexed to 1Q 2012)</b>	<b>R/VC Ratio</b>	<b>JTL Rate (180% of Variable Costs)</b>
Buckskin	\$31.21	\$20.19	155%	\$36.35
Coal Creek	\$31.21	\$19.67	159%	\$35.40
Dry Fork	\$31.21	\$20.00	156%	\$36.01
Eagle Butte	\$31.21	\$20.18	155%	\$36.32
Rawhide	\$31.21	\$20.10	155%	\$36.19

**B. There Is No “Law of the Case” that Requires the Board to Assess Its Jurisdiction over BNSF’s Current Rates Using the Approach Adopted in the 2003 Decision**

TMPA contends that “the law of the case in this proceeding” requires that variable costs be calculated for purposes of determining the Board’s jurisdictional threshold using the movement-specific adjustments approved by the Board in 2003.<sup>21</sup> According to TMPA, calculating the jurisdictional threshold as required by *Major Issues* “would be erroneous as a

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<sup>20</sup> *Major Issues* at 60 (notes omitted).

<sup>21</sup> TMPA Petition to Reopen at 3, 28-34.

matter of law, and cannot properly be followed here,”<sup>22</sup> given the Board’s conclusion in 2003 that variable costs were to be calculated using movement-specific adjustments.

TMPA’s argument is based on the flawed premise that the Board’s 2003 Decision has any relevance at all in assessing jurisdiction today over BNSF’s common carrier rates. As explained above, the rate case that culminated in the Board’s 2003/2004 Decisions is now over and there is no ongoing case that has any impact on the Board’s assessment of BNSF’s current rates. The fact that a prior decision by the Board in a rate reasonableness case involving TMPA’s transportation calculated variable costs using movement-specific adjustments to URCS does not require that the same methodology must govern subsequent challenges to BNSF’s common carrier rates.

Moreover, on the face of it, the Board’s 2003 and 2004 Decisions do not purport to require that the Board use any particular variable cost methodology to assess the jurisdictional threshold of any rate set by BNSF after the rate prescription expired. The Board’s 2003/2004 Decisions made it clear that the parties were to use the specified adjustments to URCS to determine the jurisdictional threshold for the specific purpose of determining whether the SAC maximum rate or the jurisdictional threshold rate should be applied during the rate prescription period. Once the rate prescription ended, the calculation of the jurisdictional threshold was no longer relevant because BNSF became free to charge a rate of its choice. The Board’s instructions relating to the calculation of variable costs applied only so long as the rate prescription existed.

Even if the Board were to view the case as ongoing despite the expiration of the prescription – a view which would make no sense – the Board would not be required in a

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<sup>22</sup> *Id.* at 31.

reopening of the 2003/2004 Decisions to continue using the variable cost methodology used in 2003. The express purpose of a reopening is to revisit the results of the original decision. If, as TMPA suggests, the “law of the case” doctrine precluded any revisiting of the Board’s original determinations, there would be nothing to reopen. Indeed, if TMPA were correct, the “law of the case” would preclude reconsideration of the conclusion that the rate prescription ended in 2010 just as it would preclude a reconsideration of the methodology for calculating variable costs. As a matter of simple logic and fairness, the Board would be permitted to consider whether to revisit in a reopening its original conclusion that variable costs should be calculated using movement-specific adjustments to URCS.

In such a reopening, application of the movement-specific approach used in 2003 could not be justified in light of the Board’s conclusion in *Major Issues*, discussed below, that the use of movement-specific adjustments in the calculation of variable costs was a “flawed approach” to determining the Board’s jurisdictional threshold. *Major Issues*, at 76. The Board is not required slavishly to adhere on reopening to methodologies that it has concluded are flawed. It would be unsound policy to continue applying a variable cost methodology that the Board has concluded does not produce reliable results.

The cases cited by TMPA are irrelevant to the question whether the Board would be required in a reopening to apply the approach used in 2003 to calculate variable costs. Indeed, all of the cases cited by TMPA involve a denial by the Board or ICC of a petition for reconsideration or reopening, not the limitations on the scope of reopening when the Board decides to reopen a prior decision. *See Productivity Adjustment-Implementation*, 2 S.T.B. 158 (1996) (denying petition for reconsideration and reopening because proponent failed to demonstrate material error in prior decision); *AEP Texas North Co. v. BNSF Ry. Co.*, STB

Docket No. 41191 (Sub-No. 1) (served May 15, 2009) (denying petition for reconsideration); *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 9 I.C.C. 2d 989 (1993) (holding that the final decision would not be vacated or dismissed years after the fact and that changed circumstances did not justify reopening). None of these cases address the situation here, where the proponent of reopening argues for the reopening of some issues but claims that the Board is prohibited from considering other issues in the reopened proceeding. If the Board were to reopen the 2003/2004 Decisions, it would not be precluded from applying the current approach to determining the jurisdictional threshold, which the Board has concluded is superior to the approach used in the 2003 and 2004 Decisions.

**C. It Would Be Contrary to Current Board Policy to Use Its Prior Movement-Specific Approach to Determine the Jurisdictional Threshold**

In *Major Issues*, the Board set out the strong justifications for abandoning the use of movement-specific adjustments to URCS variable costs for determining the jurisdictional threshold. First, the Board correctly concluded that there were serious conceptual flaws with the movement-specific approach to calculating variable costs that made the results unreliable. As the Board explained:

[P]iecemeal or incomplete adjustments to URCS are suspect. There are hundreds of individual expense categories that URCS uses to estimate the variable cost of a movement and the parties do not seek to adjust all of them. Indeed, many of the expense categories could not be changed, because movement-specific information is unavailable. Yet selective replacement of system-average costs with movement-specific costs may bias the entire analysis, rendering the modified URCS output unreliable.<sup>23</sup>

Similarly, the Board concluded that the use of movement-specific adjustments to URCS with the system-average variability parameters in URCS was flawed:

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<sup>23</sup> *Major Issues* at 51-52.

Such an approach seems improper, as the variability parameter will increase when traffic increases on a network. In other words, for movements over high-density segments, the variability percentage should be higher than for the “system-average” movement. But such adjustments to the variability percentage are not made when parties submit proposed movement-specific adjustments.<sup>24</sup>

In addition to the substantive flaws in the prior use of movement-specific adjustments to URCS, the Board correctly concluded that the complexity and burdens associated with discovery relating to movement-specific adjustments and with the resolution of disputes regarding the specific calculations needed to make movement-specific adjustments conflicted with Congress’ intent to establish a measure for the jurisdictional threshold that could be quickly and easily determined. As the Board explained, the R/VC–based jurisdictional threshold was intended by Congress to ““simplify rate regulation by setting forth a clear threshold test . . . .””<sup>25</sup> “Congressional intent was that, if a railroad chooses to price its traffic within this safe harbor, it should not need to worry about regulatory intervention.”<sup>26</sup> It would undermine Congress’ intent to subject a railroad that chose to avail itself of the regulatory safe harbor, as BNSF did here, to the “exhaustive discovery, volumes of evidence, significant consulting fees, and months of effort” required for the battle over movement-specific adjustments.<sup>27</sup>

TMPA disingenuously suggests that the efforts required to replicate the movement-specific adjustments made nearly a decade ago would be modest. TMPA’s witnesses Messrs. Crowley and Fapp present the exercise as a simple question of collecting readily available data and plugging it in to existing formulae to make calculations that have already been agreed upon or specified by the Board. This rosy picture is a distortion of reality. As the accompanying

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<sup>24</sup> *Id.* at 53.

<sup>25</sup> *Id.* at 51, *quoting* S. Rep. No. 96-470.

<sup>26</sup> *Id.* at 51.

<sup>27</sup> *Id.*

verified statement of Messrs. Baranowski and Fisher explains in detail, the present-day calculation of movement-specific adjustments using the 2003 methodology would, in fact, be enormously complicated for the parties and for the Board itself. Extensive discovery would be needed, new data sources would need to be identified and new studies would have to be carried out. Experience in rate reasonableness cases prior to *Major Issues* makes clear that numerous disputes would have to be resolved. There is no valid reason for turning back the clock to a time period when rate cases were unduly complicated by the practice of making movement-specific adjustments to URCS in assessing the jurisdictional threshold.

**III. TMPA Has Offered No Valid Reason for the Board to Reverse Its Conclusion that the 2003/2004 Decisions Should Not Be Reopened**

In its 2011 Decision, the Board decided on its own initiative that the 2003/2004 Decisions should not be reopened to consider whether to extend the rate prescription through 1Q2021. In reaching that conclusion, the STB recognized that significant “changed circumstances” had occurred since the 2003/2004 Decisions were rendered, but it concluded that those changed circumstances did not justify a reopening. 2011 STB Decision at 5. In its Petition to Reopen, TMPA has not provided any legitimate reason to revisit the STB’s conclusion.

**A. TMPA Has Presented No “Changed Circumstances” that the Board Did Not Already Consider when It Decided Not to Reopen the 2003/2004 Decisions**

TMPA claims that two changed circumstances justify a reopening. First, TMPA argues that the fact that BNSF is charging a common carrier rate other than the “SAC Rate” identified for the years 2011 to 2021 in the 2004 Decision is a “changed circumstance” that justifies reopening. *See, e.g.*, TMPA Petition to Reopen at 17. TMPA cannot rely on the fact that BNSF began charging a common carrier rate after the rate prescription ended for seeking a reopening of the 2003 and 2004 Decisions. When a rate prescription expires, as it did in this case, the railroad obtains the right by statute to set a common carrier rate of its choosing. 49 U.S.C. § 10701(c).

The 2003/2004 Decisions expressly recognized that the rate prescription would end in 2010, which meant that by operation of the statute, BNSF would have the right to set a new common carrier rate after 2010. The fact that BNSF exercised that statutory right is not a changed circumstance justifying reopening of the expired rate prescription.

Second, TMPA argues that significant differences between projected and actual inflation, traffic volumes and revenues constitute changed circumstances that would produce different SAC results from those reached in the 2003 and 2004 Decisions and therefore justify reopening. *See, e.g.*, TMPA Petition to Reopen at 17. But BNSF already submitted evidence in response to TMPA's Petition for Enforcement showing that fundamental changes in economic conditions since 2003/2004 would produce different SAC results from those obtained in the 2003 and 2004 Decisions.<sup>28</sup> The Board in its 2011 Decision acknowledged that economic conditions had changed, but it concluded that the fact that economic conditions had changed did not warrant a reopening of the rate prescription. 2011 STB Decision at 5.<sup>29</sup>

**B. The Board Properly Concluded That The Adoption Of New Methodologies In Major Issues Supported Its Decision Not To Reopen The 2003/2004 Decisions.**

One reason the Board gave in its 2011 Decision for not reopening the 2003/2004 Decisions to extend the rate prescription was that any reopening “would look at revisions to [its]

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<sup>28</sup> BNSF 2011 Reply at 2-3, 11-12 and accompanying 2011 Joint Verified Statement of Michael Baranowski and Benton Fisher at 2-6.

<sup>29</sup> TMPA appears to suggest at pages 18-22 of its Petition to Reopen that there is a third changed circumstance justifying reopening, namely the fact that the expiration of the rate prescription in 2010 somehow results in TMPA's loss of rate relief that TMPA would have obtained if the rate prescription had extended for 20 years. TMPA is merely repackaging its disagreement with the Board over the scope of the 2003/2004 rate prescription as a supposed “changed circumstance.” TMPA's argument is a collateral attack on the Board's decision that the rate prescription ended at the end of 2010 and it should be ignored. TMPA's related attempt on page 15 of its Petition to Reopen to rely on the supposed unfairness to TMPA that would result from a failure to consider the 20-year netting process is also an improper collateral attack on the Board's 2011 decision.

SAC policies in the past 8 years, such as [its] shortening [its] analysis period to 10 years, changing the method by which [it] calculate[s] maximum lawful rates for a complainant shipper, and using [its] unadjusted Uniform Rail Costing System to determine if rail rate levels are below the jurisdictional floor.” 2011 STB Decision at 5. As shown by BNSF’s experts Messrs. Baranowski and Fisher, and as explained above, consideration of these changed methodologies on reopening would lead inevitably to the conclusion that BNSF’s challenged common carrier rate is below the jurisdictional threshold level and, thus, “the legal underpinnings of the rate prescription no longer have validity.”<sup>30</sup>

TMPA now relies on the Board’s *APS* decision to argue that it would be “legally improper and unfairly prejudicial” to consider the new methodologies adopted in *Major Issues* in any reopening of the 2003 and 2004 Decisions. TMPA Petition to Reopen at 25. TMPA’s reliance on *APS* to argue that it would be “legally improper” to apply new methodologies from *Major Issues* in this case is misplaced. See TMPA Petition to Reopen at 26. There is no discussion whatever of the issue in the Board’s *APS* decision. Moreover, two years later the Board expressly rejected claims by shippers in *Major Issues* that the Board should not apply the newly adopted methodologies in any reopening of existing rate prescriptions, noting that the Board would address the issue on a case-by-case basis. *Major Issues* at 75.

As to TMPA’s claim that it would be prejudiced by application of the new methodologies adopted in *Major Issues* in any reopening of the 2003/2004 Decisions, TMPA ignores the Board’s rationale for adopting the new methodologies, which was to address perceived flaws in

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<sup>30</sup> *Major Issues* at 70.

the existing methodologies.<sup>31</sup> In this case, contrary to TMPA's claim of prejudice to TMPA, it would be arbitrary and unfair to BNSF to ignore the new methodologies and to propagate SAC results based on methodologies that the Board has acknowledged to be flawed.

The Board decided in *Major Issues* to change its methodologies for allocating revenue on cross-over traffic, determining variable costs for jurisdictional threshold purposes, the number of years that would be included in its discounted cash flow analysis, the indexing of operating expenses and the methodology for determining maximum reasonable rates. *Major Issues* at 9-23, 39-44, 50-53, 61-64. The Board discussed in detail the flaws in prior methodologies that led to the adoption of new methodologies. Since *Major Issues*, the Board has acknowledged that it would not make sense to continue to apply approaches that the Board now considers to have been flawed or inaccurate. For example, in a 2008 decision involving BNSF's common carrier rate for transportation of coal to the Laramie River Station in Moba, Wyoming, the Board acknowledged that the continued use of a discredited revenue allocation approach on cross-over traffic would be inappropriate in light of the Board's adoption of the Average Total Cost ("ATC") methodology: "[O]nce we had adopted a more accurate, cost-based revenue allocation methodology, it would not have been appropriate to apply a flawed or discredited approach."<sup>32</sup>

Finally, TMPA argues that consideration of new methodologies would violate the principle supposedly established in *APS* and *West Texas Utilities* ("WTU") that the scope of any reopening should be limited. TMPA Petition to Reopen at 22-23. Neither decision supports TMPA's claim. In *APS*, the Board stated that a reopening would be limited in the sense that "the

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<sup>31</sup> TMPA's prejudice and unfairness claims are yet another collateral challenge to the Board's decision in 2003 and 2004, reiterated in the 2011 Decision, that the rate prescription expired at the end of 2010, and that TMPA was not entitled to rate relief after 2010.

<sup>32</sup> *Western Fuels Ass'n. Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088 at 5 (served Feb. 29, 2008).

scope of future reopening would be defined by the nature of the changed circumstances that arise to justify reopening, . . .” *Arizona Pub. Serv. Co. & PacifiCorp v. The Burlington Northern & Santa Fe Ry. Co.*, 7 S.T.B. 69, 73 (2003). Similarly, in *WTU* the scope of the reopening was defined by the circumstance that justified the reopening. *See West Texas Utilities v. The Burlington Northern & Santa Fe Ry. Co.*, 6 S.T.B. 919, 922 (2003). Here, if a reopening were considered to be appropriate at all, it would be, at least in part, due to the significant changes in methodology that have occurred since the 2003 and 2004 Decisions. The impact of those changes on the continued validity of the rate prescription would be a valid subject of the reopening.<sup>33</sup>

**C. In Any Reopening, a New Rate Prescription Could Only Be Prospective from the Date of Reopening**

In its Petition to Reopen, TMPA seeks to have the STB “extend” a rate prescription from January 1, 2011 through March 31, 2021. *See, e.g.*, TMPA Petition to Reopen at 2, 3. The Board has made it clear, however, that any reopening of a rate prescription would only have prospective effect from the date of the reopening. *See Major Issues* at 70.

In *Major Issues*, the Board explained that the basis for giving only prospective effect to a reopening is the rule established in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*,

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<sup>33</sup> Any reopening would also have to consider numerous other complex issues such as the impact on the SAC analysis of the fundamental changes that are taking place in coal and coal transportation markets as a result of the declining prices of natural gas, as well as the reasonableness of the factual assumptions and methodologies presented by TMPA’s consultants. The complexity of the required analyses is another reason why it was appropriate for the Board to decline to reopen the 2003/2004 Decisions. Indeed, given the wide range of changed factual circumstances and methodological changes in SAC analyses that would have to be considered in a reopening, the inevitable result of a reopening would, ironically, be a decision to vacate the rate prescription. As the Board recognized in *Major Issues*, “at some point, attempting to interweave the old and new SAC presentations would be so complicated and convoluted that it would be preferable to vacate the old decision and permit the complainant to design a new SARR in a new SAC proceeding. In that circumstance, a new SAC analysis would be less complex and would yield a more reliable result.” *Major Issues* at 70.

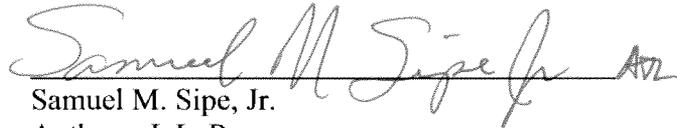
284 U.S. 370 (1932), that the rates charged under a rate prescription cannot retroactively be changed. *Major Issues* at 73. While the rates that BNSF has charged since January 1, 2011 have not been prescribed, the rule that a reopening can only have prospective effect nevertheless applies here.

In this case, BNSF exercised its statutory right under 49 U.S.C. § 10701(c) to establish new common carrier rates when the rate prescription expired. The rates that BNSF has been charging since January 1, 2011 have been lawful rates. Under the statute, a railroad's lawful rates can be challenged and retroactively adjusted (through an award of damages) only in a proceeding begun on complaint, where the statutory requirements, including the establishment of rail carrier market dominance are met. 49 U.S.C. § 10704(b). TMPA would not have any statutory right to obtain a retroactive reduction in BNSF's lawfully established rates back to January 2011 through a reopening of the expired rate prescription initially sought in April 2012. TMPA could obtain retroactive relief only by filing a new complaint, but as shown above, the Board would lack jurisdiction over such a complaint because the rates charged by BNSF since January 1, 2011 have been below the Board's jurisdictional threshold.

## CONCLUSION

For the reasons set forth above, the Board should deny TMPA's Petition to Reopen and Modify Rate Prescription.

Respectfully submitted,



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Jill K. Mulligan  
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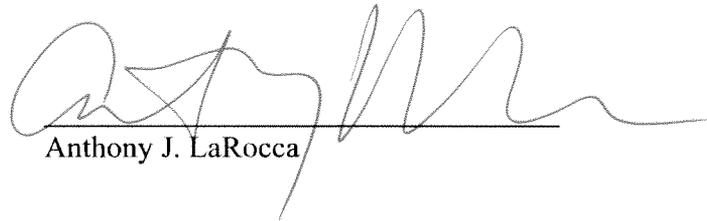
**Attorneys for BNSF Railway Company**

May 10, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that this 10<sup>th</sup> day of May, 2012, I served a copy of the Reply of BNSF Railway Company in Opposition to TMPA's Petition to Reopen and Modify Rate Prescription to the following by hand delivery:

William L. Slover  
Kelvin J. Dowd  
Daniel M. Jaffe  
Slover & Loftus LLP  
1224 Seventeenth Street, N.W.  
Washington, DC 20036

  
Anthony J. LaRocca

# **Exhibit 1**



Serving the Cities of Bryan, Denton, Garland & Greenville

January 26, 2011

BNSF Railway  
Attn: Bob Brautovich  
Assistant Vice President  
Coal Marketing  
2650 Lou Menk Drive  
Ft. Worth, TX 76131-2830

Subject: Invoices for Trains Shipped After 12/31/10

Dear Bob,

TMPA is in receipt of the following four BNSF invoices all dated 1/12/11 with a payment due date of 1/27/11:

1. No. 81078338 for Train CBKMIOG001
2. No. 81078347 for Train CDFMIOG001
3. No. 81078374 for Train CDFMIOG002
4. No. 81078395 for Train CDFMIOG003

These documents concern transportation of coal by BNSF from the Powder River Basin to TMPA's Gibbons Creek steam electric generating station. These are the first invoices BNSF based on a transportation rate of \$29.70 per ton per BNSF tariff 90115. TMPA disputes and is not paying the invoices to the extent they exceed \$25.33 per ton.

As you know, TMPA has filed a petition at the Surface Transportation Board (STB) in Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, Docket No. 42056, to enforce the rate for 2011 at the \$25.33 per ton stated in the decision. See page 2 of the STB decision served October 29, 2004.

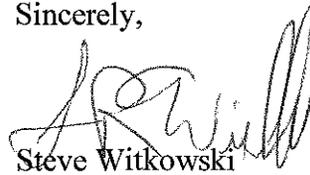
Based on the filing made by BNSF at the STB on January 6, 2011, TMPA is aware that BNSF believes that the stand-alone cost rate from Docket No. 42056 is now exceeded by the jurisdictional threshold of 180% of BNSF's variable costs. However, BNSF has not provided formal sufficient notice and support for its view regarding BNSF's variable costs, calculated using the movement specific adjustments from STB Docket No. 42056.

All rail transportation invoices for 2011 will be paid at the \$25.33 per ton rate until this matter is resolved by the STB. Additionally, Invoice no. 81078338 for Train CBKMIOG001 is affected by a minimum tonnage provision of 120 tons per car in BNSF tariff 90115. As this limit is not provided

in STB Docket No. 42056, and is greater than the 118 ton minimum in our previous BNSF tariff (90042), we will only pay for the tons shipped.

Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Witkowski", written over a printed name.

Steve Witkowski

Fuels Manager

TEXAS MUNICIPAL POWER AGENCY

# **Exhibit 2**



Serving the Cities of Bryan, Denton, Garland & Greenville

March 7, 2011

BNSF Railway  
Attn: Bob Brautovich  
Assistant Vice President  
Coal Marketing  
2650 Lou Menk Drive  
Ft. Worth, TX 76131-2830

Dear Bob,

TMPA is in receipt of your letter dated February 11, 2011 wherein BNSF states that it interprets statements from TMPA to mean that "TMPA will promptly pay BNSF the shortfall amount on all post-2010 shipments, plus interest...if the STB resolves the current dispute in BNSF's favor." We believe additional clarification is warranted.

While TMPA acknowledges that shippers must pay lawfully established common carrier rates, TMPA does not concede at this time that BNSF's Pricing Authority 90115 is a lawfully established common carrier rate. TMPA has outlined in its STB submissions its reasons why BNSF's Pricing Authority 90115 is not a lawfully established common carrier rate, including the fact that the STB's rate prescription covered 20 years not 10 years and the fact that the TMPA rate case utilized movement specific adjustments to determine variable costs, which BNSF has not done in establishing the referenced rate.

For all post-2010 shipments TMPA will pay all amounts that it is lawfully required to pay by the STB's determination for the applicable time period.

Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Witkowski". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Steve Witkowski

Fuels Manager

TEXAS MUNICIPAL POWER AGENCY

# **Exhibit 3**



SERVING THE CITIES OF BRYAN, DENTON, GARLAND & GREENVILLE

April 9, 2012

Mr. Stevan B. Bobb  
Group Vice President  
Coal Marketing  
BNSF Railway Company  
2650 Lou Menk Drive  
Fort Worth, TX 76131-2830

Re: Texas Municipal Power Agency

Dear Mr. Bobb:

This responds to your letter dated March 12, 2012, requesting the payment by TMPA of nearly \$10,000,000 relating to BNSF's transportation of coal from PRB origins to Gibbons Creek generating station during 2011. In your letter, you refer to these amounts as "underpayments" in connection with that transportation. Your request is premature, and TMPA is not agreeable to making any additional payments to BNSF at this time.

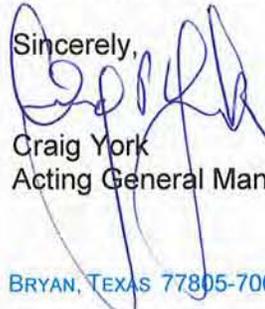
Contrary to your characterization, TMPA has not "deliberately failed to pay the common carrier rate lawfully established by BNSF." The legality of the rates that BNSF billed in 2011 remain in dispute, through TMPA's petition to the United States Court of Appeals for the District of Columbia Circuit. TMPA has a firm responsibility to its Member Cities to ensure that Gibbons Creek's coal transportation costs are reasonable, and continues to believe that BNSF's unilateral decision to raise TMPA's rates through BNSF Pricing Authority 90115 was not consistent with the applicable law. That issue remains pending.

It also appears that BNSF misunderstood the March 7, 2011 letter from TMPA's Steve Witkowski to Bob Brautovich. While Mr. Witkowski stated that "[f]or all post-2010 shipments TMPA will pay all amounts that it is lawfully required to pay by the STB's determination for the applicable time period," that statement is not inconsistent with TMPA's current position that the issue whether TMPA is lawfully required to pay the rates that BNSF charged has not been finally resolved.

Finally, your letter includes calculations of the amount that BNSF contends would be due if its 2011 rates are found lawful in all respects. While we have not performed a comprehensive audit of BNSF's calculations, TMPA has identified a number of discrepancies in the tonnages and rates used by BNSF. TMPA reserves all rights to make whatever corrections may be appropriate, once the legal issues respecting BNSF's rates are finally resolved.

As always, TMPA remains available to discuss these issues with BNSF should you wish to confer.

Sincerely,

  
Craig York  
Acting General Manger

# **Exhibit 4**

**JOINT VERIFIED STATEMENT OF  
MICHAEL R. BARANOWSKI AND  
BENTON V. FISHER**

**I. Introduction**

We are Michael R. Baranowski and Benton V. Fisher. We are Senior Managing Directors in FTI Consulting's Network Industry Strategies practice with offices at 1101 K Street, N.W., Washington, DC 20005. Statements of our qualifications are set forth in Exhibits 1 and 2, respectively, to this Joint Verified Statement. We have previously provided testimony in this proceeding on behalf of BNSF Railway Company ("BNSF"). We have been asked by BNSF to (1) calculate the Revenue-to-Variable Cost ("R/VC") ratios on BNSF's current rates for the transportation of coal to Texas Municipal Power Agency's ("TMPA's") Gibbons Creek Generating Station and (2) respond to claims made by TMPA in its Petition to Reopen and Modify Rate Prescription ("Reopen Petition"), filed April 20, 2012, regarding the data necessary to make movement-specific adjustments to the URCS variable costs for the Gibbons Creek movement.

**II. The Current R/VC Ratio for the TMPA Movement is Below the STB's Jurisdictional Threshold of 180%**

BNSF asked us to calculate the Revenue-to-Variable Cost ("R/VC") ratio on the current common carrier rate that BNSF is charging for movements of coal from the Powder River Basin ("PRB") to Gibbons Creek using the STB's current methodology for determining variable costs. In order to perform those calculations, we determined the nine movement inputs for developing URCS system-average variable costs, calculated the variable costs based on the 2010 BNSF URCS published by the STB, and indexed the results to the first quarter 2012. Table 1 below shows that the resulting R/VC ratios range from 155% to 159% and that BNSF's rate is \$4-5 per ton below the level that would yield a rate at 180% of variable costs.

**Table 1**  
**Current R/VC and JTL Rate Calculations for TMPA Movements**  
**2011 Originations**

<b>Mine Origin</b>	<b>1Q 2012 Rate</b>	<b>URCS Variable Cost (indexed to 1Q 2012)</b>	<b>R/VC Ratio</b>	<b>JTL Rate (180% of Variable Costs)</b>
Buckskin	\$31.21	\$20.19	155%	\$36.35
Coal Creek	\$31.21	\$19.67	159%	\$35.40
Dry Fork	\$31.21	\$20.00	156%	\$36.01
Eagle Butte	\$31.21	\$20.18	155%	\$36.32
Rawhide	\$31.21	\$20.10	155%	\$36.19

BNSF began charging \$31.21 per ton in October 2011. From January 1, 2011 until October 2011, BNSF charged a rate of \$29.70. In our previous verified statement filed on January 6, 2011 in this proceeding, we calculated the R/VC ratios for coal movements to Gibbons Creek under the \$29.70 per-ton rate. As set out in Table 3 of our prior verified statement, the R/VC ratios ranged from 166% to 174%, depending on mine origin. Therefore, since January 1, 2011, when the Board’s rate prescription in this case expired, BNSF has continuously been charging rates for coal movements to Gibbons Creek that are below the Board’s jurisdictional threshold.

**III. The Movement-Specific Adjustments Adopted by the STB in the 2003 Decision Would Require Extensive Data Collection, Review, and Analysis**

The STB currently applies system-average URCS variable costs to calculate R/VC ratios for purposes of determining whether a challenged rate exceeds its jurisdictional threshold. The STB adopted this approach in the 2006 *Major Issues* rulemaking decision.<sup>1</sup> In the STB’s 2003 decision in this case, prior to *Major Issues*, the STB applied several movement-specific URCS

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<sup>1</sup> *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (served October 30, 2006) (“*Major Issues*”).

adjustments to calculate R/VC ratios.<sup>2</sup> TMPA claims in its Reopening Petition that the STB should apply these same movement-specific adjustments to calculate R/VC ratios today. In a Verified Statement that accompanied TMPA's Reopening Petition, Messrs. Thomas D. Crowley and Daniel L. Fapp asserted that the data required to perform movement-specific adjustments were readily available and that none of the adjustments would require a special study.<sup>3</sup>

We explain below why Messrs. Crowley's and Fapp's claim is flatly wrong, and considerably misrepresents the effort, complexity, and uncertainty associated with the various methodologies used to implement the movement-specific adjustments. We note that our January 6, 2011 verified statement in this proceeding set out a detailed explanation (at pages 7-14) of the problems that would be associated with calculating R/VC ratios applying the movement-specific adjustments from the 2003 Decision. TMPA and Messrs. Crowley and Fapp completely ignored the testimony we submitted on this issue.

As brief background, when the STB decided in *Major Issues* to calculate variable costs for purposes of determining the jurisdictional threshold level ("JTL") rate using only system-average URCS, it recognized the cost and complexity of movement-specific adjustments.

The analysis of proposals for movement-specific adjustments is complex, expensive, and time consuming. Massive discovery is required. Detailed adjustments to the URCS program are needed and exhaustive analysis of the reliability of the evidence is performed.<sup>4</sup>

The same sort of data collection efforts that led the STB to abandon the use of movement-specific adjustments in JTL determinations would be required here to develop current values for movement-specific adjustments used in the 2003 Decision. In addition, the STB concluded in

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<sup>2</sup> *Texas Municipal Power Agency v. The Burlington Northern & Santa Fe Ry. Co.*, STB Docket No. 42056 (served March 24, 2003) ("2003 Decision").

<sup>3</sup> Crowley/Fapp VS at 9.

<sup>4</sup> *Major Issues* at 50.

*Major Issues* that the use of movement-specific adjustments to URCS was a “flawed approach” to determining the STB’s jurisdictional threshold.<sup>5</sup> As the STB explained, the selective use of movement-specific adjustments “may bias the entire analysis.”<sup>6</sup>

The STB determined the variable costs in the 2003 Decision by evaluating more than two dozen detailed analyses, special studies, and other adjustments to URCS that were proposed by TMPA and BNSF. The list of adjustments to system-average URCS costs adopted in the 2003 Decision is set out at page 8 to our January 6, 2011 verified statement. For many cost items, the STB modified calculations made by the parties and incorporated other corrections or adjustments. For example, the STB observed that the variable costs that it adopted differed from both parties’ estimates for most of the 20 different cost components.<sup>7</sup> The STB specifically observed that “[w]e have noticed that the spreadsheets used to develop movement-specific adjustments have become more complex and detailed.”<sup>8</sup> The STB’s discussion of variable costs was set out in a technical appendix to the 2003 Decision that ran to a length of nearly 30 pages.

Messrs. Crowley and Fapp acknowledge that data would need to be obtained from BNSF in order to implement the movement-specific adjustments, but they ignore the evidence we previously submitted in our January 6, 2011 verified statement as to the vast range of data that would need to be gathered and analyzed. In Table 2 to our January 6, 2011 verified statement, we listed the more than 30 sources of data and other information that would need to be queried in order to determine whether adjustments to system-average URCS could be calculated today consistent with the movement-specific adjustments used in the 2003 Decision.

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<sup>5</sup> *Id.* at 76.

<sup>6</sup> *Id.* at 52.

<sup>7</sup> 2003 Decision at 46-47, Table A-4.

<sup>8</sup> *Id.* at 41.

Messrs. Crowley and Fapp identify 16 movement-specific adjustments made by the STB in the 2003 Decision using confidential data that were provided by BNSF that would have to be implemented here if TMPA's proposal were adopted.<sup>9</sup> To illustrate the extensive data collection and analysis that would be needed to carry out these movement-specific adjustments, we explain in more detail the data and analysis that would be associated with three of the adjustments that Mr. Crowley identified.

First, it is particularly misleading for Messrs. Crowley and Fapp to suggest that the "Train crew wage adjustment" does not require significant data and effort. The full-year, system-wide database of payroll records for all train and engine crewpeople would have to be queried four times. The payroll records for the TMPA trains would be collected, the crewpeople working those trains would be identified, and then the system-wide payroll records would be queried again to collect all of the wage records for each of the crewpeople throughout an entire year, including time working on other trains and pay for time not working on trains, *e.g.*, medical leave and vacations. This same multiple-step approach would have to be repeated again, to collect all the payroll records for any crewperson that worked in a helper district traversed by the TMPA trains (which is covered by a separate item on Mr. Crowley's list, "Helper service for locomotives and crews"). Once these data were collected, the payroll records for specific TMPA train crews or helper crews would have to be aligned by crew district, direction, and crewmember (*e.g.*, separately for conductors and engineers) for the loaded and empty TMPA trains, including any relief crews that are used. Then, in a separate effort, the entire year's worth of payroll records would need to be compiled to calculate the mark-up ratios, also by specific craft, to account properly for other wage payments that are included in the movement-specific adjustment.

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<sup>9</sup> Crowley/Fapp VS at 8.

Second, Mr. Crowley identified “return on and of road property investment.” Before getting into the specific data sources required to make the movement-specific adjustment, we note that the STB adopted in its 2003 Decision two separate adjustments to system-average URCS return on road property investment costs. First, the STB accepted the findings of a special study that BNSF conducted of the duration that specific investments were reported to Construction Work in Progress (STB Property Account 90), concluded that the projects were not long-lived, and accepted a BNSF URCS dataset that adjusted the STB’s dataset to include Account 90 and exclude investments in Account 76 (Interest During Construction).<sup>10</sup> Second, the STB adopted an analysis of line-specific estimates of investment and depreciation that required no fewer than four detailed datasets: 1) gross investments by individual line segment and property account; 2) depreciation by individual line segment and property account; 3) gross investments and depreciation of unassigned investments by property account; and 4) density information by individual line segment. In addition to the data for the specific line segments at issue, separate analyses would have to be performed to reconcile the investments and the depreciation amounts with the corresponding totals reported in the R-1. While the STB previously found a “close correspondence” between certain road property totals, this question would need to be revisited given the passage of several years since the data were last collected.<sup>11</sup>

A third example of an item on TMPA’s list that requires substantial effort is the calculation of the “Locomotive capital” adjustment. In addition to incorporating the Account 90

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<sup>10</sup> 2003 Decision at 40.

<sup>11</sup> In fact, confirmation that such a “correspondence” exists is a critical underpinning of any movement-specific adjustment. In addition to extracting and analyzing the data applicable to the specific movement, a separate step is required to verify that the source information is comparable to the URCS cost components for which the adjustment is being substituted. Without this confirmation, there could be either a “double-count” of certain variable costs, or a failure to assign and recover in full the carrier’s overall variable costs.

adjustment to capital costs discussed above, calculating these costs on a movement-specific basis involves using detailed train movement records to identify 1) the specific units used to power the TMPA loaded and empty trains; 2) each individual unit's usage in the TMPA service (*e.g.*, loco hours or miles); and 3) the overall average cycle time of the TMPA movement, for the entire round trip, including loading and unloading time. Once this information was assembled, BNSF's accounting records would have to be queried to determine the specific method of acquisition for each unit, *e.g.*, purchase, capital lease or operating lease, and the particular terms of each acquisition, including any additions and betterments that have been made throughout the life of the unit. And then the economic life, salvage values, and depreciation rates would be incorporated into the calculation of the movement-specific adjustment.<sup>12</sup>

Finally, although Messrs. Crowley and Fapp included "Yard switching and bad order car switching" on their list of studies, they omitted a critical third component of switching that the STB addressed in the 2003 Decision. The STB adopted TMPA's calculation of each of 1) the duration and 2) the frequency of switching of locomotives in Distributed Power configuration and reattaching to the train at the plant. These estimates were developed from TMPA's Unloading Reports, which were manually reviewed and compiled to produce the figures that the STB adopted.<sup>13</sup>

In sum, the calculation of variable costs using the movement-specific adjustments employed in the STB's 2003 decision would entail a complex and highly burdensome effort to collect and analyze a large quantity of data.

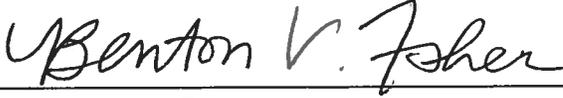
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<sup>12</sup> Mr. Crowley also lists "Car capital" costs, for which the process follows a similar series of steps as for locomotives, requiring separate inquiries to determine the mix of equipment by individual car from waybill or operating data, and the acquisition method and specific financial terms from accounting data, as well as the appropriate life, salvage, and depreciation inputs.

<sup>13</sup> 2003 Decision at 46.

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on May 10, 2012

  
Benton V. Fisher

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on May 10, 2012

A handwritten signature in cursive script that reads "Michael Baranowski". The signature is written in black ink and is positioned above a horizontal line.

Michael Baranowski



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**Mike Baranowski** provides financial and economic consulting services to the telecommunications and transportation industries. He has special expertise in analyzing and developing complex computer costing models, operations analysis, and transportation engineering. Much of his work involves providing oral and written expert testimony before courts and regulatory bodies.

Some of Mr. Baranowski’s representative accomplishments include:

- Overseeing the development of computer cost modeling tools designed to simulate the cost of competitive entry into local telecommunications markets and directing the efforts of a nationwide team of testifying experts presenting the cost model results in multiple proceedings across the country.
- Directing the analysis, critique and restatement of a variety of complex cost models developed by major telecommunications companies designed to simulate the forward-looking cost of competitive entry into local telecommunications markets.
- Designing multiple PC-based spreadsheet models for use in calculating the stand-alone cost of competitive entry into the railroad and pipeline markets. These models have been used to assist clients in all three network industries in making internal pricing decisions that are in compliance with governing regulatory standards.
- Conducting detailed analyses of railroad operations and developing the associated capital requirements and operating expenses attributable to specific movements and the incremental capital and operating expense requirements attributable to major changes in anticipated traffic levels.
- Calculating marginal and incremental costs for a major petroleum products pipeline company, an approach that is now used regularly by the company in making internal day-to-day pricing decisions.

Mr. Baranowski holds a B.S. in Accounting from Fairfield University in Fairfield, Connecticut and has pursued supplemental finance studies at Kean College in Union, New Jersey.

## TELECOMMUNICATIONS TESTIMONY

### *Federal Communications Commission*

February 1998	File No. E-98-05. AT&T Corp. v. Bell Atlantic Corp. Affidavit of Michael R. Baranowski.
March 13, 1998	File No. E-98-05. AT&T Corp. v. Bell Atlantic Corp. Supplemental Affidavit of Michael R. Baranowski.
June 10, 1999	CC Docket No. 96-98. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996. Reply Affidavit of Michael R. Baranowski, John C. Klick and Brian F. Pitkin.

- July 25, 2001 CC Docket No. 00-251, 00-218. In the Matter of Petition of AT&T Communications of Virginia, Inc. and WorldCom, Inc., Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. Panel
- June 13, 2005 WC Docket No. 05-25;RM-10593. In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, Joint Declaration on Behalf of SBC Communications, Inc.
- July 29, 2005 WC Docket No. 05-25;RM-10593. In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, Joint Reply Declaration on Behalf of SBC Communications, Inc.

*Public Service Commission of Delaware*

- February 4, 1997 PSC Docket No. 96-324. In the Matter of Bell Atlantic - Delaware Statement of Terms and Conditions Under Section 252(F) of the Telecommunications Act of 1996. Testimony of Michael R. Baranowski.

*Public Service Commission of the District of Columbia*

- March 24, 1997 Formal Case No. 962. In the Matter of the Implementation of the District of Columbia Telecommunications Competition Act of 1996. Testimony of Michael R. Baranowski.
- May 2, 1997 Formal Case No. 962. In the Matter of the Implementation of the District of Columbia Telecommunications Competition Act of 1996. Rebuttal Testimony of Michael R. Baranowski.

*Public Service Commission of the State of Maryland*

- March 7, 1997 Docket No. 8731, Phase II. In the Matter of the Petitions for Approval of Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996. Direct Testimony of Michael R. Baranowski.
- April 4, 1997 Docket No. 8731, Phase II. In the Matter of the Petitions for Approval of Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996. Rebuttal Testimony of Michael R. Baranowski.
- May 25, 2001 Case No. 8879. In the Matter of the Investigation into Rates for Unbundled Network Elements Pursuant to the Telecommunications Act of 1996. Panel Testimony on Recurring Cost Issues

*Public Service Commission of the State of Michigan*

January 20, 2004 Case No. U-13531. In the Matter, on the Commission's Own Motion to Review the Costs of Telecommunication Service Provided By SBC Michigan. Initial Testimony of Michael R. Baranowski and Julie A. Murphy.

May 10, 2004 Case No. U-13531. In the Matter, on the Commission's Own Motion to Review the Costs of Telecommunication Service Provided By SBC Michigan. Final Reply Testimony of Michael R. Baranowski and Julie A. Murphy.

*New Jersey Board of Public Utilities*

December 20, 1996 Docket No. TX 95120631. Notice of Investigation Local Exchange Competition for Telecommunications Services. Rebuttal Testimony of John C. Klick and Michael R. Baranowski.

*North Carolina Utilities Commission*

March 9, 1998 Docket No. P-100, Sub 133d. In the Matter of Establishment of Universal Support Mechanisms Pursuant to Section 254 of the Telecommunications Act of 1996. Rebuttal Testimony of Michael R. Baranowski.

*Pennsylvania Public Utility Commission*

January 13, 1997 Docket Nos. A-310203F0002 et al. MFS-III. Application of MFS Intelenet of Pennsylvania, Inc. et. Al. (Phase III). Rebuttal Testimony of Michael R. Baranowski.

February 21, 1997 Docket Nos. A-310203F0002 et al. MFS-III. Application of MFS Intelenet of Pennsylvania, Inc. et. Al. (Phase III). Surrebuttal Testimony of Michael R. Baranowski.

April 22, 1999 Docket Nos. P-00991648, P-00991649. Petition of Senators and CLECs for Adoption of Partial Settlement and Joint Petition for Global Resolution of Telecommunications Proceedings. Direct Testimony of Michael R. Baranowski.

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*State Corporation Commission Commonwealth of Virginia*

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June 10, 1997 Case No. PUC970005. Ex Parte to Determine Prices Bell Atlantic - Virginia, Inc. Is Authorized To Charge Competing Local Exchange Carriers In Accordance With The Telecommunications Act of 1996 And Applicable State Law. Rebuttal Testimony of Michael R. Baranowski.

*Washington State Utilities and Transportation Commission*

December 22, 2003 Docket No. UT-033044. In the Matter of the Petition of Qwest Corporation To Initiate a Mass-Market Switching and Dedicated Transport Case Pursuant to the Triennial Review Order. Direct Testimony of Michael R. Baranowski.

February 2, 2004 Docket No. UT-033044. In the Matter of the Petition of Qwest Corporation To Initiate a Mass-Market Switching and Dedicated Transport Case Pursuant to the Triennial Review Order. Response Testimony of Michael R. Baranowski.

*Public Service Commission of West Virginia*

February 13, 1997 Case Nos. 96-1516-T-PC, 96-1561-T-PC, 96-1009-T-PC, 96-1533-T-T. Petition to establish a proceeding to review the Statement of Generally Available Terms and Conditions offered by Bell Atlantic in accordance with Sections 251, 252, and 271 of the Telecommunications Act of 1996. Testimony of Michael R. Baranowski.

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June 3, 2002 Case No. 01-1696-T-PC, Verizon West Virginia, Inc. Petition For Declaratory Ruling That Pricing of Certain Additional Unbundled Network Elements (UNEs) Complies With Total Element Long-Run Incremental Cost (TELRIC) Principles. Direct Testimony of Michael R. Baranowski

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**RAILROAD TESTIMONY**

*Interstate Commerce Commission*

March 9, 1995 Finance Docket No. 32467. National Railroad Passenger Corporation and Consolidated Rail Corporation -- Application Under Section 402(a) of the Rail Passenger Service Act for an Order Fixing Just Compensation.

October 30, 1995 Docket No. 41185. Arizona Public Service Company and PacifiCorp v. The Atchison, Topeka and Santa Fe Railway Company.

*Surface Transportation Board*

- July 11, 1997 Docket No. 41989. Potomac Electric Power Company v. CSX Transportation, Inc. Reply Statement and Evidence of Defendant CSX Transportation, Inc.
- August 14, 2000 Docket No. 42051. Wisconsin Power and Light Company v. Union Pacific Railroad Company, Reply Verified Statement of Christopher D. Kent and Michael R. Baranowski.
- September 20, 2002 STB Docket No. 42070. Duke Energy Corporation v. CSX Transportation, Inc., Reply Evidence and Argument of CSX Transportation, Inc.
- September 30, 2002 STB Docket No. 42069. Duke Energy Corporation v. Norfolk Southern Railway Company, Reply Evidence and Argument of Norfolk Southern Railway Company.
- October 11, 2002 STB Docket No. 42072. Carolina Power & Light v. Norfolk Southern Railway Company, Reply Evidence and Argument of Norfolk Southern Railway Company.
- November 12, 2002 Docket No. 42070 Duke Energy Corporation v. CSX Transportation, Rebuttal Evidence and Argument of CSX Transportation
- November 19, 2002 Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company, Rebuttal Evidence and Argument of Norfolk Southern Railway Company
- November 27, 2002 Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Rebuttal Evidence and Argument of Norfolk Southern Railway Company
- January 10, 2003 STB Docket No. 41185. Arizona Public Service Co. And Pacificorp v. The Atchison, Topeka and Santa Fe Railway Company, Petition of the Burlington Northern and Santa Fe Railway Company to Reopen and Vacate Rate Prescription.
- February 19, 2003 STB Docket No. 42077, Arizona Public Service Co. And Pacificorp v. The Burlington Northern and Santa Fe Railway Company, and STB Docket No. 41185, Arizona Public Service Co. And Pacificorp v. The Burlington Northern and Santa Fe Railway Company, Reply of the Burlington Northern Santa Fe Railway Company in Opposition to Petition for Consolidation.
- April 4, 2003 Docket No. 42057 Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Railway Company, Reply Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
- October 8, 2003 Docket No. 42071 Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, Reply Evidence of The Burlington Northern and Santa Fe Railway Company
- October 24, 2003 Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company, Supplemental Evidence of Norfolk Southern Railway Company

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November 24, 2003 Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Supplemental Evidence of Norfolk Southern Railway Company

December 2, 2003 Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Reply of Norfolk Southern Railway Company to Carolina Power & Light Company's Supplemental Evidence

December 12, 2003 Docket No. 42069 Reply of Norfolk Southern Railway Company to Duke Energy Corporation's Petition to Correct Technical Error and Affidavit of Michael R. Baranowski

January 5, 2004 Docket No. 42070 Duke Energy Corporation v. CSX Transportation, Inc., Supplemental Evidence of CSX Transportation, Inc.

January 26, 2004 Docket No. 42058 Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, Joint Supplemental Reply Evidence and Argument of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company

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May 24, 2004 Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company, Reply Evidence of The Burlington Northern and Santa Fe Railway Company

June 23, 2004 Docket No. 42057 Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company, Petition to Correct Technical and Computational Errors

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July 20, 2005 Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Reply Evidence of BNSF Railway Company

May 1, 2006 Docket No. Ex Parte 657 (Sub-No. 1) Major Issues in Rail Rate Cases, Verified Statement Supporting Comments of BNSF Railway Company

May 31, 2006	Ex Parte 657 (Sub-No. 1) Major Issues in Rail Rate Cases; Verified Statement Supporting Reply Comments of BNSF Railway Company
June 15, 2006	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Reply Supplemental Evidence of BNSF Railway Company
June 15, 2006	Docket No. 41191 (Sub 1) AEP Texas North Company v. BNSF Railway Company, Reply Supplemental Evidence of BNSF Railway Company
June 30, 2006	Docket No. Ex Parte 657 (Sub-No. 1) Major Issues in Rail Rate Cases; Verified Statement Supporting Rebuttal Comments of BNSF Railway Company
February 4, 2008	Docket No. 42099 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSX Transportation, Inc.
February 4, 2008	Docket No. 42100 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSX Transportation, Inc.
February 4, 2008	Docket No. 42101 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSX Transportation, Inc.
May 1, 2008	Docket No. Ex Parte 679 Petition of the AAR to Institute a Rulemaking Proceeding to Adopt a Replacement Cost Methodology to Determine Railroad Revenue Adequacy, Verified Statement of Michael R. Baranowski
July 14, 2008	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Third Supplemental Reply Evidence of BNSF Railway Company
July 14, 2008	Docket No. AB-515 (Sub-No. 2) Central Oregon & Pacific Railroad, Inc. -- Abandonment and Discontinuance of Service -- in Coos, Douglas, and Lane Counties, Oregon (Coos Bay Rail Line)
August 8, 2008	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Fourth Supplemental Evidence of BNSF Railway Company
August 11, 2008	Docket No. 42014 Entergy Arkansas, Inc. and Entergy Services, Inc. v Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc.; Finance Docket No. 32187 Missouri & Northern Arkansas Railroad Company, Inc. -- Lease, Acquisition and Operations Exemption -- Missouri Pacific Railroad Company and Burlington Northern Railroad Company, Reply Evidence and Argument of Union Pacific
September 5, 2008	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Fourth Supplemental Reply Evidence of BNSF Railway Company
September 12, 2008	Docket No. AB-515 (Sub-No. 2) Central Oregon & Pacific Railroad, Inc. -- Abandonment and Discontinuance of Service -- in Coos, Douglas, and Lane Counties, Oregon (Coos Bay Rail Line); Rebuttal to Protests
August 24, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Opening Evidence of Union Pacific Railroad Company
October 22, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Rebuttal Evidence of Union Pacific Railroad Company

- January 19, 2010 Docket No. 42110 Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
- May 7, 2010 Docket No. 42113 Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company, Joint Reply Evidence of BNSF Railway Company and Union Pacific Railroad Company
- November 22, 2010 Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, BNSF Comments on Remand, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
- January 6, 2011 Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition for Enforcement of Decision, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
- October 28, 2011 Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Opening Evidence of BNSF Railway Company, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
- November 10, 2011 Docket No. 42127 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company\
- November 28, 2011 Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Reply Evidence of BNSF Railway Company, Joint Reply Verified Statement of Michael R. Baranowski and Benton V. Fisher

*US District Court for Northern District of Oklahoma*

- January 2, 2007 Case No. 06-CV-33 TCK-SAJ, Grand River Dam Authority v. BNSF Railway Company; Report of Michael R. Baranowski
- February 2, 2007 Case No. 06-CV-33 TCK-SAJ, Grand River Dam Authority v. BNSF Railway Company; Reply Report of Michael R. Baranowski

*Circuit Court of Pulaski County, Arkansas*

- August 17, 2007 Case No. CV 2006-2711, Union Pacific Railroad v. Entergy Arkansas, Inc. and Entergy Services, Inc., Expert Witness Report of Michael R. Baranowski
- December 14, 2007 Case No. CV 2006-2711, Union Pacific Railroad v. Entergy Arkansas, Inc. and Entergy Services, Inc., Reply Expert Witness Report of Michael R. Baranowski

*U.S. District Court for the Eastern District of Wisconsin*

- February 15, 2008 Case No. 06-C-0515, Wisconsin Electric Power Company v. Union Pacific Railroad Company, Expert Reply Report of Michael R. Baranowski

*Arbitrations and Mediations*

- March 7, 2005 Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Expert Report on behalf of BNSF Railway Company
- March 28, 2005 Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Rebuttal Expert Report on behalf of BNSF Railway Company
- April 12, 2005 Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Supplemental Expert Report on behalf of BNSF Railway Company

April 19, 2005	Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Supplemental Rebuttal Expert Report on behalf of BNSF Railway Company
April/May 2005	Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Hearings before Arbitration Panel
February 20, 2007	In the Matter of the Arbitration between the Detroit Edison Company, et al, and BNSF Railway Company, Expert Report of Michael R. Baranowski
March 19, 2007	In the Matter of the Arbitration between the Detroit Edison Company, et al, and BNSF Railway Company, Supplemental Expert Report of Michael R. Baranowski
February 12, 2009	In the Matter of the Arbitration between Wisconsin Public Service Corporation and Union Pacific Railroad Company, Rebuttal Expert Report of Michael R. Baranowski
October 16, 2009	In the Matter of Arbitration Between Norfolk Southern Railway Company and Drummond Coal Sales, Inc., Expert Report of Michael R. Baranowski
July 25, 2011	American Arbitration Association Case No. 58 147 Y 0031809, BNSF Railway Company and Kansas City Southern Railway Company, Expert Report of Michael R. Baranowski

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**Benton V. Fisher** is a Senior Managing Director of FTI's Economic Consulting group, located in Washington, D.C. Mr. Fisher has more than 20 years of experience in providing financial, economic and analytical consulting services to corporate clients dealing with transportation, telecommunications, and postal subjects.

North America's largest railroads have retained FTI both to assist them in making strategic and tactical decisions and to provide expert testimony in litigation. FTI's ability to present a thorough understanding of myriad competitive and regulatory factors has given its clients the necessary tools to implement and advance their business. Mr. Fisher has worked extensively to develop these clients' applications for mergers and acquisitions and expert testimony justifying the reasonableness of their rates before the Surface Transportation Board. In addition to analyzing extensive financial and operating data, Mr. Fisher has worked closely with people within many departments at the railroad as well as outside counsel to ensure that the railroads' presentations are accurate and defensible. Additionally, Mr. Fisher reviews the expert testimony of the railroads' opponents in these proceedings, and advises counsel on the necessary course of action to respond.

AT&T and MCI retained FTI to advance its efforts to implement the Telecommunications Act of 1996 in local exchange markets. Mr. Fisher was primarily responsible for reviewing the incumbent local exchange carriers' (ILEC) cost studies, which significantly impacted the ability of FTI's clients to access local markets. Mr. Fisher analyzed the sensitivity of multiple economic components and incorporated this information into various models being relied upon by the parties and regulators to determine the pricing of services. Mr. Fisher was also responsible for preparing testimony that critiqued alternative presentations.

Mr. Fisher assisted in reviewing the U.S. Postal Service's evidence and preparing expert testimony on behalf of interveners in Postal Rate and Fee Changes cases. He has also been retained by a large international consulting firm to provide statistical and econometric support in their preparation of a long-range implementation plan for improving telecommunications infrastructure in a European country.

Mr. Fisher has sponsored expert testimony in rate reasonableness proceedings before the Surface Transportation Board and in contract disputes in Federal Court and arbitration proceedings.

Mr. Fisher holds a B.S. in Engineering and Management Systems from Princeton University.

**TESTIMONY**

Surface Transportation Board

January 15, 1999	Docket No. 42022 FMC Corporation and FMC Wyoming Corporation v. Union Pacific Railroad Company, Opening Verified Statement of Christopher D. Kent and Benton V. Fisher
March 31, 1999	Docket No. 42022 FMC Corporation and FMC Wyoming Corporation v. Union Pacific Railroad Company, Reply Verified Statement of Christopher D. Kent and Benton V. Fisher
April 30, 1999	Docket No. 42022 FMC Corporation and FMC Wyoming Corporation v. Union Pacific Railroad Company, Rebuttal Verified Statement of Christopher D. Kent and Benton V. Fisher
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September 28, 1999	Docket No. 42038 Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Company, Rebuttal Verified Statement of Christopher D. Kent and Benton V. Fisher
June 15, 2000	Docket No. 42051 Wisconsin Power and Light Company v. Union Pacific Railroad Company, Opening Verified Statement of Christopher D. Kent and Benton V. Fisher
August 14, 2000	Docket No. 42051 Wisconsin Power and Light Company v. Union Pacific Railroad Company, Reply Verified Statement of Christopher D. Kent and Benton V. Fisher
September 28, 2000	Docket No. 42051 Wisconsin Power and Light Company v. Union Pacific Railroad Company, Rebuttal Verified Statement of Christopher D. Kent and Benton V. Fisher
December 14, 2000	Docket No. 42054 PPL Montana, LLC v. The Burlington Northern Santa Fe Railway Company, Opening Verified Statement of Christopher D. Kent and Benton V. Fisher
March 13, 2001	Docket No. 42054 PPL Montana, LLC v. The Burlington Northern Santa Fe Railway Company, Reply Verified Statement of Christopher D. Kent and Benton V. Fisher
May 7, 2001	Docket No. 42054 PPL Montana, LLC v. The Burlington Northern Santa Fe Railway Company, Rebuttal Verified Statement of Christopher D. Kent and Benton V. Fisher

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September 30, 2002	Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company, Reply Evidence and Argument of Norfolk Southern Railway Company
October 4, 2002	Northern States Power Company Minnesota v. Union Pacific Railroad Company, Union Pacific's Reply Evidence
October 11, 2002	Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Reply Evidence and Argument of Norfolk Southern Railway Company
November 1, 2002	Northern States Power Company Minnesota v. Union Pacific Railroad Company, Union Pacific's Rebuttal Evidence
November 19, 2002	Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company, Rebuttal Evidence and Argument of Norfolk Southern Railway Company
November 27, 2002	Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Rebuttal Evidence and Argument of Norfolk Southern Railway Company
January 10, 2003	Docket No. 42057 Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Railway Company, Opening Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
February 7, 2003	Docket No. 42058 Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Opening Evidence of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad

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May 19, 2003	Docket No. 42057 Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Railway Company, Rebuttal Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
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- October 1, 2010 Docket No. 42121 Total Petrochemicals USA, Inc. v. CSX Transportation, Inc., Motion for Expedited Determination of Jurisdiction Over Challenged Rates, Verified Statement of Benton V. Fisher
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- November 28, 2011 Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Reply Evidence of BNSF Railway Company, Joint Reply Verified Statement of Michael R. Baranowski and Benton V. Fisher

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- February 13, 2012 Docket No. 42132 Canexus Chemicals Canada L.P. v. BNSF Railway Company, Opening Evidence of BNSF Railway Company, Verified Statement of Benton V. Fisher
- March 13, 2012 Docket No. 42132 Canexus Chemicals Canada L.P. v. BNSF Railway Company, Reply Evidence of BNSF Railway Company
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- March 17, 2006 Civil Action No. 4:05-CV-55-D, PCS Phosphate Company v. Norfolk Southern Corporation and Norfolk Southern Railway Company, Report by Benton V. Fisher

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Arbitrations and Mediations

- July 10, 2009 JAMS Ref. # 1220039135; In the Matter of the Arbitration Between Pacer International, Inc., d/b/a/ Pacer Stacktrain (f/k/a/ APL Land Transport Services, Inc.), American President Lines, Ltd. And APL Co. Pte. Ltd. And Union Pacific Railroad Company; Rebuttal Expert Report of Benton V. Fisher