

PUBLIC

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



WESTERN FUELS ASSOCIATION, INC
and BASIN ELECTRIC POWER
COOPERATIVE, INC.

Complainants,

v.

BNSF RAILWAY COMPANY

Defendant

Docket No. 42088

223292

**THIRD SUPPLEMENTAL REBUTTAL
EVIDENCE OF COMPLAINANTS
WESTERN FUELS ASSOCIATION, INC. AND
BASIN ELECTRIC POWER COOPERATIVE, INC.**

ENTERED
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Public Record

EXHIBITS

**WESTERN FUELS ASSOCIATION, INC.
and BASIN ELECTRIC POWER
COOPERATIVE, INC**

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Dated August 15, 2008

Attorneys for Complainants

Exhibit I-1

**ICC/STB Authorities Addressing BNSF's
49 U.S.C. §10701(c) Limitations Arguments**

EX PARTE NO 421

COMPLAINTS FILED PURSUANT TO THE SAVINGS PROVISIONS OF THE STAGGERS RAIL ACT OF 1980 (SECTION 229, PUBLIC LAW 94-448)

Decided May 17, 1983

The Commission finds that the 3-year period of limitations imposed by 49 U S C 11701(c) on "formal investigative proceedings begun by the Commission" does not apply to complaint proceedings under section 229 of the Staggers Rail Act of 1980

DECISION

BY THE COMMISSION

By decision served January 4, 1983, Chief Administrative Law Judge Allard issued his Seventh Continuing Report on Docket Management in this proceeding. As pertinent, the Chief Administrative Law Judge found that under 49 U S C 11701(c), complaints filed pursuant to section 229 of the Staggers Rail Act of 1980 are dismissed automatically unless they are concluded by the Commission with administrative finality by the end of the third year after the date on which they were begun. Twelve appeals challenging this finding were filed jointly or individually by complainants.¹ Moreover, complainants Western Co-Operative Fertilizers Limited, Central Louisiana Electric Company, Inc., Potomac Electric Power Company, Arkansas Power & Light Company and System Fuels, Inc., Central Illinois Light Company, and South Carolina Public Service Authority jointly filed comments concerning the status of their respective proceedings relative to the Chief Administrative Law Judge's findings.

Defendant Consolidated Rail Corporation filed a reply to the appeals of Westinghouse Electric Corporation, General Electric Corporation, McGraw-Edison Corporation and the Coal Exporters Association.

These appeals shall be considered since they fall within the exceptions for interlocutory appeals found in the Commission's Rules of Practice.

¹ Appeals were filed by Aluminum Association, Inc., Amstar Corporation, Coal Exporters Association, General Electric Company, McGraw Edison Company, Mobay Chemical Corporation, Montana Department of Agriculture et al., Nevada Power Company, Siemens-Allis, Inc., South Carolina Electric Power Association, Western Co-Operative Fertilizers Limited et al., and Westinghouse Electric Corporation.

because the Chief Administrative Law Judge specifically found that his ruling may result in irreparable harm to complainants. See 49 CFR 1113.15(d). On February 7, 1983, complainants in No. 38301S filed a motion requesting expedited handling of their appeal. We have attempted to comply with this request to the extent practicable and consistent with due process for all parties.

Upon review, we find that the 3-year limitation imposed by section 11701(c) does not apply to section 229 complaint proceedings and the Chief Administrative Law Judge's finding to the contrary must be reversed. Section 11701 provides

(a) The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier or broker is violating this subtitle, the Commission shall take appropriate action to compel compliance with this subtitle. The Commission may take that action only after giving the carrier or broker notice of the investigation and an opportunity for a proceeding.

(b) A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath. The Commission may dismiss a complaint if it determines there are not reasonable grounds for investigation and action. However, the Commission may not dismiss a complaint made against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title because of the absence of direct damage to the complainant.

(c) A formal investigative proceeding begun by the Commission under subsection (a) of this section is dismissed automatically unless it is concluded by the Commission with administrative finality by the end of the 3d year after the date on which it was begun.

[Emphasis added.] Simply stated, the issue is whether or not section 229 complaints fall within the class of proceedings described in section 11701(c) as "formal investigative proceedings begun by the Commission."

Opposing parties argue that the plain meaning of section 11701(c) establishes their respective positions. As these conflicting contentions indicate, however, the plain meaning approach to statutory construction is inapposite because the operative phrase "formal investigative proceeding begun by the Commission" is subject to more than a single, unequivocal interpretation. The term "formal investigative proceeding" on its face could include all proceedings which inquire into the operations of rail carriers including ordinary complaint proceedings or it may be confined to a smaller class of proceedings, namely investigative proceedings in which the Commission is the prime mover prompted by its own investigative resources.

The Chief Administrative Law Judge found that section 229 complaint proceedings are subject to the section 11701(c) 3-year limitation because section 229 complaints are served on defendants by the Commission (see the Revised Rules of Practice, 49 CFR 1111.3) and thus section 229 proceedings are "begun by the Commission" within the meaning of section 11701(c). Moreover, he found that section 229 itself provided no period of limitation on actions and that the "over-all statutory scheme clearly suggests the procedural deadlines in 49 U.S.C. 10327 and the 3-year limitation on Commission action under 49 U.S.C. 11701(c) are applicable." Op. at p. 2.

This analysis, however, is inconsistent with the legislative history of section 11701 as well as the distinction made by the Commission, the courts, and other sections of the Interstate Commerce Act between ordinary complaint proceedings and formal Commission investigation proceedings.

Section 11701(c) has its origin in section 303 of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210) (4R Act) which amended former section 17 of the Interstate Commerce Act by adding subsection 14 which provides

(a) Any formal investigative proceeding with respect to a common carrier by railroad which is instituted by the Commission after the date of enactment of this subdivision shall be concluded by the Commission with administrative finality within 3 years after the date on which such proceeding is instituted. Any such proceeding which is not so concluded by such date shall automatically be dismissed.

(b) Within 1 year after the date of enactment of this subdivision, the Commission shall conclude or terminate, with administrative finality, any formal investigative proceeding with respect to a common carrier by railroad which was instituted by the Commission on its own initiative and which has been pending before the Commission for a period of 3 or more years following the date of the order which instituted such proceeding.

The Senate bill, which is the antecedent of the final language of former section 17(14) and present section 11701(c),² states that—

(12) Except as otherwise provided by this Act, whenever a proceeding which requires affirmative authorization or approval has been pending before the Commission for more

²The Conference Committee Report on the 4R Act states that section 303—

... follows the House bill except that it incorporates the Senate provision that

(2) all proceedings instituted by the Commission shall be concluded with administrative finality within 3 years after such proceeding was initiated.

See H.R. Rept. 94-781, 94th Cong., 2d sess., 159-162 (1976)

than 2 years following the date on which such proceeding was initially instituted or commenced, it shall be presumed, as of such date, that such authorization or approval is warranted and is otherwise lawful in all respects. Such a presumption may be rebutted only by clear and convincing evidence on the record to the contrary. Such a presumption shall be conclusive as to the Commission on the third anniversary of the date on which such proceeding was initially instituted or commenced, and the Commission shall issue an order granting such authorization or approval as soon after such anniversary as is practicable.

There are several factors in the evolution of section 11701(c) which demonstrate Congress' intent not to include ordinary complaint proceedings among "formal investigative proceedings" subject to the 3-year period of limitation. First, the Senate provision applies the limitation only to a proceeding "which requires affirmative authorization or approval" by the Commission. Thus, the Senate bill applies in instances when the Commission is withholding approval of an action that a rail carrier desires to take, such as in proceedings to determine the lawfulness of a proposed rate. In contrast, section 229 complaints challenge the lawfulness of rates already in effect, and thus apply to rail actions which do not require Commission approval. The purpose of section 229 "is to give affected parties a final opportunity to review the reasonableness of existing rates before their opportunity to challenge those rates is curtailed" [Emphasis added] H R Rept 1430, 96th Cong 2d sess, at p 121 (1980).

Moreover, under the Senate bill, upon expiration of 2 years, a presumption is raised that Commission approval of rail action is warranted. Upon expiration of 3 years, "such a presumption shall be conclusive as to the Commission * * * and the Commission shall issue an order granting such approval" [emphasis added]. Thus the time constraints in the Senate bill, and consequently those in section 11701(c) are directed specifically at the Commission. In this sense section 11701(c) is consistent with the procedural deadlines in section 10327 which place time constraints on the Commission's record completion and decision issuance functions in rail proceedings. The aim of both section 11701(c) and section 10327 is to circumscribe Commission actions and not the actions of private parties. The Chief Administrative Law Judge's finding that these sections must be interpreted in terms of an overall statutory scheme placing time constraints on complaint actions initiated by private parties is in error.

Finally, neither the Senate bill, nor section 303 of the 4R Act nor the final language of former section 17(14) refer specifically to complaint actions brought by private parties. It was only after the recodification of the Interstate Commerce Act in 1978 (Public Law 95-473) that specific reference is made to complaint actions along with the 3-year period of

limitations of former section 17(14) in what became section 11701. However, the 1978 recodification was promulgated "to revise, codify, and enact *without substantive change* the Interstate Commerce Act" [Emphasis added] See H R Rept 95-1395, 95th Cong, 2d sess, at p 3 (1978). In any event the reference to complaints is found in section 11701(b). The section 11701(c) period of limitations applies only to section 11701(a) investigations.

Thus, the legislative history of section 11701(c) and the relationship of this provision to other portions of the Interstate Commerce Act demonstrate that ordinary complaint proceedings are not included in the class of proceedings designated as "formal investigative proceedings begun by the Commission" subject to the 3-year period of limitations in section 11701(c). This conclusion is underscored by the longstanding distinction made by the Commission and the courts between complaint and investigation proceedings, a distinction which predates section 303 of the 4R Act, the basis of section 11701(c). While section 11701(a) refers to investigations begun by the Commission on its own initiative or on complaint, this is not inconsistent with the notion that complaint proceedings differ procedurally from investigations and are not subject to the 3-year limitation. Traditionally, investigations were not only instituted as a result of Commission initiative, but often were brought by the Commission after receiving informal complaints. This, however, did not transform the investigation into a complaint proceeding, which is initiated by a formal complaint filed by a party and where the complainant has the burden of proof.

In Ex Parte No 347 (Sub-No 1), *Coal Rate Guidelines, Nationwide* (not printed), served February 24, 1983, we recently highlighted the distinctions between complaint and investigation proceedings. At pages 18-19 we noted that—

[n]ormally, the rail carrier proponent bears the burden of showing, upon investigation, that a proposed rate . . . is reasonable. 49 U S C 10701a and 10707 . . .

After a rate has gone into effect, the rate can be challenged by filing a complaint under 49 U S C 11701.

Moreover, the distinction between complaint and investigation proceedings has long been judicially recognized. For example, in *North Carolina Natural Gas Corp v United States*, 200 F Supp 745 (D Del 1961) at page 748 the court noted

[t]he Interstate Commerce Act provides two methods of challenging the lawfulness of carrier-made rates. Said carrier rates may be attacked by filing a formal complaint with

the ICC * * *, or 2 the Commission on its own motion, with or without a complaint, may investigate carrier-made rates * * *

The distinction between Commission investigations and ordinary complaint proceedings is made in various sections of the Interstate Commerce Act. For example, section 10707a states in pertinent part

(e)(1) Notwithstanding the provision of section 10707 of this title, in the case of any rate increase by a rail carrier that is authorized under subsection (c) or (d) of this section—

(A)(i) the Commission may not suspend such rate increase pending final Commission action, and

(ii) except as provided in paragraph (2) of this subsection, the Commission may not begin an investigation proceeding under section 10707 of this title with respect to the reasonableness of such rate increase, but

(B) an interested party may file a complaint under section 11701(b) of this title alleging that such rate increase violates the provisions of this subtitle

Thus, section 11707a(e)(1) expressly prohibits Commission investigations of rail rates under certain circumstances but permits complaint proceedings and states that shippers may bring a section 11701(b) complaint challenging rates even when the Commission lacks the power to investigate

Statutes are to be construed to effectuate congressional intent and not in a manner that would lead to absurd or obviously unintended, irrational results. See *Hecht v Pro-Football, Inc.*, 444 F 2d 931, 945 (D C Cir 1971), cert denied, 404 U S 1047 (1972). Here, construction of the section 11701(c) period of limitations to apply to complaint proceedings would discourage settlements and encourage defendants to engage in dilatory tactics by rewarding them if they are successful in drawing out the proceeding beyond 3 years. This would be particularly objectionable in section 229 proceedings where complainants are permanently barred from seeking further relief from the Commission if their initial complaints under section 229 are denied or dismissed. See No. 39020, *Petition for Review of a Decision of the Public Service Commission of Indiana* (not printed), served January 21, 1983. The purpose of section 229 is to give affected parties a final opportunity for review of the reasonableness of existing rates before their opportunity to challenge those rates is curtailed. See H R Rept 1430, *supra*, at p 21. Automatic dismissal of section 229 proceedings under section 11701(c) would deny them that opportunity and would be contrary to the purpose of the statute. Such a construction would violate basic notions of due process and fairness since the party affected by dismissal of the case would have no direct control over the imposition of the sanction. We are convinced that Congress did not intend these results.

In view of the legislative history of section 11701(c), and the long-standing distinction between investigation and complaint proceedings made by the Commission, by the courts, and other sections of the Interstate Commerce Act, we find that the Chief Administrative Law Judge's interpretation of section 11701(c) which includes section 229 complaint proceedings within the term "formal investigative proceeding begun by the Commission" is in error. Thus, we find that section 229 complaints are not subject to the 3-year period of limitations of section 11701(c).

This decision will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1 The interlocutory appeals filed by the complainants named in footnote 1 of this decision are granted to the extent set forth in this decision.

2 The Seventh Continuing Report of Docket Management served on January 4, 1983, is reversed to the extent that it finds the complaints filed under section 229 of the Staggers Rail Act of 1980 are subject to the 3-year period of limitations imposed by 49 U.S.C. 11701(c).

3 This decision is effective on the date served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

37520
EB

SERVICE DATE – NOVEMBER 13, 2006

This decision will be printed in the bound volumes of
the STB printed reports at a later date

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No 41191 (Sub-No 1)

AEP TEXAS NORTH COMPANY

v.

BNSF RAILWAY COMPANY

Decided November 9, 2006

The Board concludes that the 3-year limitation provision of 49 U S C 11701(c) does not require the termination of this stand-alone cost rate proceeding

BY THE BOARD:

On August 11, 2003, AEP Texas North Company (AEP Texas) challenged the reasonableness of rates charged by BNSF Railway Company (BNSF) for movements of coal from mines in the Powder River Basin of Wyoming to the Oklaunion power plant near Vernon, TX. AEP Texas seeks to show that the rates are unreasonable based on the stand-alone cost (SAC) test set forth in Coal Rate Guidelines, Nationwide, 1 I C C 2d 520 (1985), aff'd sub nom. Consolidated Rail Corp v United States, 812 F 2d 1444 (3d Cir 1987)

Following the filing of the complaint, the parties engaged in STB-sponsored mediation. When that proved unsuccessful, they filed their opening evidence on March 1, 2004, followed by numerous rounds of evidence and a variety of other pleadings, concluding with final briefs on June 9, 2005.

Before a final decision could be issued in this proceeding, the Board instituted a separate rulemaking proceeding to address major recurring issues presented in SAC cases Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No 1), et al. (STB served Feb 27, 2006) (Major Issues)¹. Because several of the issues noticed in Major Issues were raised or implicated in this case, the Board held this proceeding in abeyance pending completion of the rulemaking and any further evidentiary submissions in this proceeding that may be necessary as a result.

¹ Four pending SAC cases, including this case, were affected by the rulemaking

In its reply to requests for reconsideration of Major Issues, BNSF voiced support for the Board's action instituting the rulemaking and specifically disclaimed any prejudice to AEP Texas as a result of any "delay in the resolution of [its] case[]" caused by the rulemaking.² In addition, while BNSF was aware that various changes proposed in the rulemaking could result in additional evidence being needed in this case, BNSF did not assert that such events could cause AEP Texas' complaint to run afoul of the provision of 49 U.S.C. 10701(c) requiring dismissal of certain proceedings not concluded within 3 years.

Nevertheless, on July 25, 2006, BNSF filed a pleading styled "Notice Regarding Automatic Dismissal of Complaint" in which it suggested that, if this proceeding were not concluded within 16 days (by August 10, 2006), it would be automatically dismissed by operation of section 11701(c). As relevant, section 11701 states:

(a) Except as otherwise provided in this part, the Board may begin an investigation under this part only on complaint

* * * * *

(c) A formal investigative proceeding begun by the Board under subsection (a) of this section is dismissed automatically unless it is concluded by the Board with administrative finality by the end of the third year after the date on which it was begun.

As we discuss, BNSF misinterprets the statute, ignores contrary precedent, and fails to acknowledge that by its own actions it has waived any argument that the case should be terminated at this point.

DISCUSSION

BNSF asserts that this entire proceeding should be terminated under the 3-year dismissal provision of section 11701(c). However, BNSF's interpretation of that section would produce an absurd, unfair, and seemingly unconstitutional result, by depriving AEP Texas of a decision on the merits of its rate complaint where the delay was not AEP Texas' fault. Congress cannot have intended such a result.

The genesis of the 3-year dismissal provision is former 49 U.S.C. 17(14)(a) (1976), which was enacted in section 303 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act).³ That provision applied only to formal investigations into railroad activities instituted by the Board's predecessor, the Interstate Commerce Commission (ICC), on its own initiative, it provided that any such proceeding still

² BNSF Reply to Petition for Reconsideration at 3, filed Apr. 10, 2006, in Major Issues.

³ Pub. L. No. 94-210, 90 Stat. 31 (1976).

pending after 3 years “shall automatically be dismissed ” Congress’ intent was to prevent ICC-launched investigations into rail rates and practices from languishing, and thereby preventing proposed rates (which the ICC could suspend and investigate) from taking effect in a timely fashion See Complaints Filed Pursuant to the Savings Provisions of the Staggers Rail Act of 1980, 367 I C C 406, 409 (1983) (1983 Interpretation)

The statutory language was revised without substantive change 2 years later, when Congress recodified the entire statute administered by the ICC⁴ As recodified, section 11701(a) (1978) stated that the ICC “may begin an investigation on its own initiative or on complaint,” while section 11701(c) (1978) stated that a “formal investigative proceeding begun by the Commission under subsection (a) of this section is dismissed automatically unless it is concluded by the Commission with administrative finality by the end of the 3d year after the date on which it was begun ” In the Staggers Rail Act of 1980 (Staggers Act),⁵ Congress removed language that had limited this provision to railroad-related cases, but made no other substantive changes

In addressing how it would process the hundreds of rate complaints that poured into the agency immediately following the Staggers Act, the ICC concluded that the 3-year dismissal provision was not intended to apply to shipper-initiated, complaint-based investigations Examining the legislative history and the relationship of the provision to other portions of the Act, the agency interpreted the term “formal investigative proceeding” as referring only to investigations begun by the agency on its own initiative – as originally intended by the 4-R Act – and not those begun on complaint 1983 Interpretation, 367 I C C at 407-12 The ICC observed that a contrary interpretation would “lead to absurd or obviously unintended, irrational results ” Id at 411 It explained that applying this dismissal provision to complaint proceedings would discourage settlements and encourage defendants to engage in dilatory tactics by rewarding them for drawing out a proceeding Id Moreover, automatic dismissal would “violate basic notions of due process and fairness since the party affected by dismissal of the case would have no direct control over the imposition of the sanction ” Id

Any other interpretation would have flouted the Supreme Court’s then-recently issued decision in Logan v Zimmerman Brush Co, 455 U S 422 (1982) In Logan, the Supreme Court struck down an analogous state law provision requiring a state agency to convene a fact-finding conference within a statutorily specified period The Illinois courts had held that compliance with the time limit was mandatory and that noncompliance stripped the state agency of jurisdiction The Supreme Court reversed, holding that the right to use the state’s adjudicatory procedures was a “protected interest” and that the state deprived Logan of that interest in violation of the Due Process Clause The Supreme Court explained that “Logan is entitled to have the Commission consider

⁴ Congress expressly disavowed any intent to make any substantive changes through the 1978 recodification H R Rep No 1395, 95th Cong , 2d Sess 1, 9 (1978). reprinted in 1978 U S C C A N 3009, 3018

⁵ Pub L No 96-448, 94 Stat 1895 (1980)

the merits of his charge . before deciding whether to terminate his claim ” Logan, 455 U S at 434 The Logan due process principle plainly applied to the 3-year dismissal provision in section 11701(c) Moreover, dismissal of any of the hundreds of complaints that were outstanding at that time for failure to process it within a 3-year window might have also violated the Equal Protection Clause, by giving otherwise identical complaints radically different treatment based on how long it took the ICC to conclude its investigation Cf Logan, 455 U S at 438-39 (concurring opinion)

Against this backdrop, Congress enacted the ICC Termination Act of 1995 (ICCTA)⁶ In ICCTA, Congress directed the Board to establish procedures to ensure expeditious handling of rail rate challenges, 49 U S C 10704(d), and Congress itself set a 9-month deadline from the close of the administrative record in a SAC case to determine whether the challenged rate is reasonable, 49 U S C 10704(c)(1) Congress also changed section 11701(a) to state that “[e]xcept as otherwise provided in this part, the Board may begin an investigation under this part only on complaint,” but it made no substantive changes in the language of the 3-year dismissal provision See 49 U S C. 11701(a), (c)

By 1995, it was well-established that the term “formal investigative proceeding” meant Board-initiated proceedings, and when enacting ICCTA Congress is presumed to have been aware of that meaning See Lorillard v Pons, 434 U S 575, 580 (1978), Helvering v Wilshire Oil Co, 308 U S. 90, 100 (1939) Preserving the meaning that section 11701(c) applies only to proceedings instituted by the agency on its own initiative does not deprive that section of effect as the Board has authority under Part A of Subtitle IV of Title 49 to institute certain types of rail proceedings on its own initiative For example, section 11123 gives the Board broad authority to investigate emergency service crises on its own initiative If the Board were to launch an investigation of a service crisis, such an investigation would need to be completed within 3 years Likewise, an agreement between rail carriers regarding the pooling or division of traffic must be approved by the Board, and section 11322 authorizes the agency to “begin a proceeding under this section on its own initiative ” Again, any such Board-initiated investigation would need to be concluded within 3 years

Immediately following ICCTA’s enactment, the Board instituted a rulemaking proceeding to fashion procedures for SAC proceedings In the Advance Notice of Proposed Rulemaking, the Board observed that “the decisional time limits in rate reasonableness cases run from the date on which the administrative record is closed,” in contrast to cases involving an exemption from regulation, where the time limits “run from the date on which the proceeding is instituted ”⁷ BNSF concurred in this contrasting

⁶ Pub L No 104-88, 109 Stat 803 (1995)

⁷ Expedited Procedures For Processing Rail Rate Reasonableness, Exemption & Revocation Proceedings, STB Ex Parte No 527 (STB served Mar 8, 1996)

characterization⁸ Shippers also agreed, noting that the 9-month deadline “does little to solve the real problem faced by rate complaints – unnecessary delays that effectively prevent the record from being closed in the first place”⁹ Thus, the Board’s contemporaneous reading of ICCTA, as well as that of the rail and shipper communities, was that the only post-ICCTA statutory deadline applicable to SAC proceedings is the 9-month deadline in section 10704(c)(1)

Now, a decade after ICCTA’s enactment, BNSF suggests that ICCTA’s change to section 11701(a) rendered untenable the agency’s long-standing interpretation of the 3-year dismissal provision in section 11701(c)¹⁰ Acceptance of BNSF’s new reading of the dismissal provision, however, “would produce an absurd and unjust result which Congress could not have intended” Clinton v City of N.Y., 524 U.S. 417, 429 (1998) Railroads would have every incentive to drag out a rate investigation by delaying discovery or filing frivolous motions, complainants would be at the mercy of the agency, with no protection from bureaucratic delay, and the Board might not be able to develop a complete record upon which to base its SAC decision, or be left without time to perform an adequate analysis

Indeed, this case provides a clear illustration of the absurd outcome that would result from application of the dismissal provision The agency here sought to improve the rate review process by issuing a rulemaking that resulted in this case being held in abeyance—a process which BNSF supported and claimed would result in no prejudice to AEP Texas Depriving AEP Texas of a decision on the merits of its complaint, because the agency endeavored to improve the very complaint process AEP Texas was availing itself of, would clearly be an irrational result, one that would be contrary to due process and fairness

Furthermore, Logan remains good law and, thus, BNSF’s interpretation raises Constitutional concerns See BNSF Ry v STB, 453 F.3d 473, 479 (D.C. Cir. 2006) (Board’s concern that dismissal would raise a due process issue is well founded) The

⁸ See Comments of the Association of American Railroads and its Member Railroads at 1-2, STB Ex Parte No 527 (filed May 20, 1996) (BNSF is a member of the AAR)

⁹ Comments of the Western Coal Traffic League & Edison Electric Institute, STB Ex Parte No 527 (filed May 20, 1996), at 5

¹⁰ In CF Indus v Koch Pipeline Co., 2 S.T.B. 257, 262 (1997), without any examination of the statutory history or potential Constitutional implications, the Board summarily stated that an analogous 3-year dismissal provision in section 15901(c) applied to a rate complaint brought by a pipeline shipper That statement conflicts, however, with the robust statutory analysis in the 1983 Interpretation, and with the due process parameters set forth in Logan Those analyses are more persuasive and, therefore, we will adhere to the longstanding interpretation that the 3-year automatic dismissal provision does not apply to a rate investigations begun on complaint

agency's longstanding narrow interpretation of the term "formal investigation proceeding" in section 11701(c) avoids any constitutional conflict and is consistent with the intent of Congress when it originally enacted the provision. Such an interpretation, which avoids serious constitutional conflict, is preferred so long as the construction is not "plainly contrary to the intent of Congress." DeBartolo Corp v Florida Gulf Coast Bldg & Constr Trades Council, 485 U S 568, 575 (1988)

Finally, even if section 11701(c) could be interpreted as requiring this proceeding to be terminated, BNSF has waived the issue through its course of conduct in this case. As noted above, BNSF asserted in Major Issues that any delay resulting from the rulemaking would not prejudice AEP Texas' case. Having represented to both this agency and AEP Texas that the extended schedule was acceptable, basic equitable considerations preclude BNSF from claiming that AEP Texas' complaint must now be terminated. Cf. Irwin v Department of Veterans Affairs, 498 U S 89, 96 (1990) (tolling appropriate where complainant was induced or tricked by his adversary into allowing a filing deadline to pass), Baldwin County Welcome Ctr v Brown, 466 U S 147, 151 (1984) (per curiam) (tolling may be appropriate where a plaintiff is lulled into inaction by defendant)

CONCLUSION

For all of the above reasons, we conclude that section 11701(c) does not require termination of AEP Texas' rate complaint.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

This decision is effective on the date of service.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey

Vernon A. Williams
Secretary

No. 05-1030

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BNSF RAILWAY COMPANY,

Petitioner

SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA

Respondents

PUBLIC SERVICE COMPANY OF COLORADO
d/b/a XCEL ENERGY

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF
THE SURFACE TRANSPORTATION BOARD

MEMORIAL OF RESPONDENTS
SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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TYPEWRITTEN COPY

July 21, 2005

The Board has not “turned its back” (Pet. Br. 27) on its responsibility to assist the railroads in achieving revenue adequacy, as BNSF charges. The statute directs the Board to balance the needs of captive shippers (to pay only reasonable rates) and the needs of the railroads (to be able to earn adequate returns). The agency cannot ignore evidence of unreasonable rates just because the defendant railroad is not revenue adequate on a system-wide basis. Xcel uses only a tiny fraction of BNSF’s 30,000-mile rail network. Under *Guidelines*, a captive shipper is not responsible for paying for facilities it does not use. Therefore, there was no purpose served by a separate discussion of the railroad’s submissions regarding its system-wide revenue needs.

This was an ordinary rate case that, due in part to procedural delays requested by the parties, took slightly longer than three years for the Board to complete its initial investigation. But BNSF’s untimely argument that this case must therefore be dismissed is contrary to the agency’s long-standing interpretation of the three-year deadline in § 11701(c). More importantly, it would raise serious constitutional concerns, because dismissal without reaching the merits of Xcel’s complaint would deprive Xcel of a protected interest without due process, in violation of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

ARGUMENT

I. THE STANDARD OF REVIEW IS NARROW AND DEFERENTIAL

This Court will not set aside an agency's decision unless it is "arbitrary, capricious, an abuse of discretion, . . . otherwise [unlawful], . . . or unsupported by substantial evidence."³⁴ Where the agency's findings rest "on such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and it has articulated a "rational connection between the facts found and the decision made," this Court will leave the Board's judgments undisturbed.³⁵

In rate matters, the Board operates at the zenith of its powers.³⁶ As the Supreme Court has explained, the "process of rate making is essentially empiric. The stuff of the process is fluid and changing – the resultant of factors that must be valued as well as weighed."³⁷ Indeed, "[a]lthough ringing of mathematical precision, the calculation of a just and reasonable rate is less a science than an art."³⁸ Accordingly, Congress delegated the complex and policy-infused task of determining what is a reasonable rate to a permanent expert body with technical expertise in the rail industry, by committing that determination to the agency's

³⁴ 5 U.S.C. § 706(2)(A),(E); *see, e.g., CF Indus , Inc. v STB*, 255 F.3d 816, 826 (D.C. Cir. 2001).

³⁵ *Burlington N. R.R.*, 114 F.3d at 210.

³⁶ *CF Indus.*, 255 F.3d at 826; *Burlington N.R.R.*, 114 F.3d at 210.

³⁷ *Board of Trade v. United States*, 314 U.S. 534, 546 (1942).

³⁸ *Public Serv. v. FERC*, 832 F.2d 1201, 1206 (10th Cir. 1987).

broad discretion.³⁹ The Board's decision is therefore entitled to "more than mere deference or weight," and BNSF may not ask this Court "to substitute its judgment for that of the agency."⁴⁰

Finally, the procedures used are "basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments."⁴¹ And review of an agency's interpretation of the statute it administers falls under the familiar framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

II. THE COMPLAINT SHOULD NOT BE DISMISSED BASED ON THE LENGTH OF THE BOARD'S INVESTIGATION

A. Section 11701(c) Has Not Been – And Should Not Be – Interpreted As Applying To A Rail Rate Investigation Begun On Complaint

BNSF asserts that this entire proceeding should have been dismissed under the three-year dismissal provision of § 11701(c). However, its interpretation of that section would produce an absurd, unfair, and seemingly unconstitutional result, by depriving Xcel of a decision on the merits of its rate complaint where the

³⁹ *Atchison, T.&S.F.Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 806 (1973).

⁴⁰ *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁴¹ *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).

delay was not Xcel's fault. Congress cannot have intended to punish a complainant for agency inaction.

The genesis of this provision is former 49 U.S.C. § 17(14)(a) (1976), which was enacted in § 303 of the Rail Revitalization and Regulatory Reform Act of 1976 (4-R Act).⁴² That provision applied only to formal investigations into railroad activities instituted by the agency *on its own initiative*, and declared that any such proceeding still pending after three years “shall automatically be dismissed.” Congress sought to prevent ICC-launched investigations into rail rates and practices from languishing, and to allow proposed rates (which the ICC could suspend and investigate) to take effect in a timely fashion. *See 1983 Interpretation*, 367 I.C.C. at 409.

The language was revised without substantive change two years later, when Congress recodified the entire statute administered by the ICC.⁴³ As recodified, § 11701(a) (1978) stated that the Commission “may begin an investigation . . . on its own initiative or on complaint,” while § 11701(c) (1978) stated that a “*formal investigative proceeding* begun by the Commission under subsection (a) of this section . . . is dismissed automatically unless it is concluded by the Commission

⁴² Pub. L. No. 94-210, 90 Stat. 31 (1976).

⁴³ Congress expressly disavowed any intent to make any substantive changes through the 1978 recodification. H.R. Rep. No. 1395, 95th Cong., 2d Sess. 1, 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3018.

with administrative finality by the end of the 3d year after the date on which it was begun” (emphasis added). In the Staggers Rail Act of 1980,⁴⁴ Congress removed language that had limited this provision to railroad-related cases, but made no other substantive changes.

In addressing how it would process the 800 rate complaints that poured into the agency immediately following the Staggers Act, the ICC concluded that the three-year deadline was not intended to apply to complaint-based investigations. — Examining the legislative history and the relationship of the provision to other portions of the Act, the agency properly interpreted the term “formal investigative proceeding” as referring only to rate investigations begun by the agency on its own initiative – as originally intended by the 4-R Act – and not those begun on complaint. *1983 Interpretation*, 367 I.C.C. at 407-12. The Commission observed that a contrary interpretation would “lead to absurd or obviously unintended, irrational results.” *Id.* at 411. It explained that applying this dismissal provision to complaint proceedings would discourage settlements and encourage defendants to engage in dilatory tactics by rewarding them for drawing out a proceeding. *Id.* Moreover, automatic dismissal would “violate basic notions of due process and fairness since the party affected by dismissal of the case would have no direct control over the imposition of the sanction.” *Id.* at 411.

⁴⁴ Pub. L. No. 96-448, 94 Stat. 1895 (1980).

While BNSF suggests that the *1983 Interpretation* “defied the clear language of the statute” (Pet. Br. 26), any other interpretation would have flouted the Supreme Court’s 1982 *Logan* decision. In that case, the Supreme Court struck down an analogous state law provision requiring a state agency to convene a fact-finding conference within a statutorily specified period. The Illinois Supreme Court had held that compliance with the time limit was mandatory and that noncompliance stripped the state agency of jurisdiction. The Supreme Court reversed, holding that the right to use the state’s adjudicatory procedures was a “protected interest” and that the state deprived Logan of that interest in violation of the Due Process Clause. The Supreme Court explained that “Logan is entitled to have the Commission consider the merits of his charge . . . before deciding whether to terminate his claim.” *Logan*, 455 U.S. at 434. The *Logan* due process principle plainly applied to the three-year dismissal provision in § 11701(c). Moreover, dismissal of any of the 800 complaints for failure to process it within a three-year window might have also violated the Equal Protection Clause, by giving otherwise identical complaints radically different treatment based on how long it took the ICC to conclude its investigation. See *Logan*, 455 U.S. at 438-39 (concurring opinion).

Against this backdrop, Congress enacted the ICC Termination Act of 1995 (ICCTA).⁴⁵ In ICCTA, Congress directed the Board to establish procedures to ensure expeditious handling of rail rate challenges, 49 U.S.C. § 10704(d), and Congress itself set a nine-month deadline from the close of the administrative record in a SAC case for the Board to determine whether the challenged rate is reasonable, 49 U.S.C. § 10704(c)(1). Congress also changed § 11701(a) to state that “[e]xcept as otherwise provided in this part, the Board may begin an investigation under this part only on complaint,” but it made no substantive changes in the language of the three-year dismissal provision. See 49 U.S.C. § 11701(a), (c).

By 1995, the term “formal investigative proceeding” had an established meaning that Congress is presumed to have been aware of when it retained that term. See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100 (1939). Preserving that meaning does not deprive § 11701(c) of any effect. Section 11701(a) allows Board-initiated investigations where Congress has “otherwise provided.” Congress has specifically provided for the Board to broaden an investigation beyond the contours of a complaint. 49 U.S.C. § 10704(b). And Congress has specifically authorized the Board to reopen

⁴⁵ Pub. L. No. 101-88, 109 Stat. 803 (1995).

a proceeding and conduct a new investigation “on its own initiative.” 49 U.S.C. § 722(c). Thus, § 11701(c) would apply to those Board-initiated proceedings.

Immediately following ICCTA’s enactment, the agency instituted a rulemaking proceeding to fashion procedures for SAC proceedings. In the advanced NPRM, the Board observed that “the decisional time limits in rate reasonableness cases run from the date on which the administrative record is closed,” in contrast to cases involving a exemption from regulation, where the time limits “run from the date on which the proceeding is instituted.”⁴⁶ BNSF concurred in this contrasting characterization.⁴⁷ Shippers also agreed, noting that the nine-month deadline “does little to solve the real problem faced by rate complaints – unnecessary delays that effectively prevent the record from being closed in the first place.”⁴⁸ Thus, the contemporaneous reading of ICCTA by the Board, as well as the rail and shipper community, was that the only post-ICCTA

⁴⁶ *Expedited Procedures For Processing Rail Rate Reasonableness, Exemption & Revocation Proceedings*, STB Ex Parte No. 527, 1996 WL 125562 (STB served Mar. 8, 1996).

⁴⁷ See Comments of the American Association of Railroads and its Member Railroads at 1-2, STB Ex Parte No. 527 (filed May 20, 1996) (Addendum B) (BNSF is a prominent member of the AAR).

⁴⁸ Comments of the Western Coal Traffic League & Edison Electric Institute at 5, STB Ex Parte No. 527 (filed May 20, 1996) (Addendum C).

statutory deadline applicable to SAC proceedings was the nine-month deadline in § 10704(c)(1).⁴⁹

Now nearly a decade after ICCTA's enactment, however, BNSF argues that ICCTA's change to § 11701(a) rendered untenable the agency's long-standing interpretation of the three-year dismissal provision in § 11701(c). Pet. Br. 26. Acceptance of BNSF's new reading of the dismissal provision "would produce an absurd and unjust result which Congress could not have intended." *Clinton v. City of N.Y.*, 524 U.S. 417, 429 (1998). Railroads would have every incentive to drag out a rate investigation by delaying discovery or filing frivolous motions; complainants would be at the mercy of the agency, with no protection from bureaucratic delay; and the Board might not be able to develop a complete record upon which to base its SAC decision, or be left without time to perform an adequate analysis. Contrary to BNSF's suggestion that a lengthy investigation "severely inhibits" its ability to respond to changing market forces (Pet. Br. 27

⁴⁹ *But cf. CF Indus. v. Koch Pipeline Co.*, 2 S.T.B. 257, 262 (1997) (assuming without explanation that the deadline in 49 U.S.C. § 15901(c) applied in a pipeline rate complaint case). Pipeline provisions contain no specific deadline comparable to the nine-month deadline in 49 U.S.C. § 10704(c)(1), which the agency has consistently regarded as the only deadline applicable to rail rate investigations. *See General Procedures* at 2 n.3; *FMC*, 4 S.T.B. at 724 n.57.

n.4), the railroad retains its rate setting initiative while the investigation is pending and may change its rate as necessary, as BNSF did several times here.⁵⁰

Most importantly, *Logan* remains good law and is on point, and an interpretation that avoids serious constitutional conflict is preferred if the construction is not “plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The agency’s long-standing definition of the term “formal investigation proceeding” in § 11701(c) avoids any constitutional conflict, is not plainly contrary to the intent of Congress, and is entitled to *Chevron* deference.

B. BNSF Waived This Defense Or Tolloed Any Three-Year Clock

In the alternative, an issue not raised before an agency in a timely fashion may not be pressed on appeal. *See Canady v SEC*, 230 F.3d 362 (D.C. Cir. 2000) (statute of limitations waived). BNSF had every opportunity to present this defense in its numerous pleadings before the agency, but failed to raise this issue until its petition for reconsideration. The Board generally “does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding.” *TMPA Recon.* at 3; 49 C.F.R. § 1115.3.

⁵⁰ *See Xcel Open. Narr.* at I-5, II.A3-6 (J.A. __, __-__).

Alternatively, BNSF tolled any such deadline through its course of conduct in this case (outlined *supra* at 11-14), which included stipulating to extending the procedural schedule by 20 months and continuing to present evidence and argument after the case reached the three-year mark. Having lulled the Board and Xcel into believing that the extended schedule was acceptable, basic equitable considerations should preclude BNSF from claiming that Xcel's complaint must now be dismissed. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96_ (1990) (tolling appropriate where complainant was induced or tricked by his adversary into allowing a filing deadline to pass); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (*per curium*) (tolling may be appropriate where a plaintiff is lulled into inaction by defendant).

III. THE BOARD'S DECISION AFFORDED BNSF THE OPPORTUNITY TO EARN ADEQUATE REVENUES

A. The Agency Must Balance The Goals Of Protecting Captive Shippers And Providing Adequate Revenues To Railroads

BNSF's brief (Pet. Br. 3-9, 27-31) belabors the uncontroversial point that, in a rate reasonableness examination, the Board must recognize the congressional policy that rail carriers earn revenues that are adequate under "honest, economical, and efficient management." 49 U.S.C. §§ 10701(d)(2), 10704(a)(2). But the statute also embodies a countervailing policy to maintain reasonable rates where there is an absence of competition. *See* 49 U.S.C. §§ 10101(6), 10702. And

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1167

WESTERN FUELS ASSOCIATION, INC. and
BASIN ELECTRIC POWER COOPERATIVE, INC.,
Petitioners

v.

SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA,
Respondents

and

BNSF RAILWAY COMPANY,
Intervenor

REPLY OF RESPONDENT SURFACE TRANSPORTATION BOARD
TO BNSF RAILWAY COMPANY'S RESPONSE
TO MOTION TO DISMISS

Intervenor BNSF Railway Company (BNSF) opposes the Board's motion to dismiss, arguing that under the two-pronged test of *Bennett v. Spear*, 520 U.S. 154 (1997), the Board's *Western Fuels* decisions are indeed "final orders," even though they afforded complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively,

WFA) the opportunity to substantially revise their case. As explained below, BNSF is mistaken in its contentions.

I. THE WESTERN FUELS DECISIONS ARE NOT FINAL ORDERS.

Contrary to BNSF's claim, the challenged *Western Fuels* decisions are not final orders. The fundamental issue before the Board—whether the rates BNSF charged WFA for rail transportation are reasonable under 49 U.S.C 10701(d)(1) and 10702—has not been conclusively resolved. In *Western Fuels I*, the Board determined that WFA had failed to demonstrate that the challenged rates were unlawful “on this record.” *Western Fuels I*, slip op. at 3. But because the Board adopted a new revenue allocation methodology during the proceeding that “clearly could have prejudiced WFA,” the Board afforded WFA the opportunity to revise its presentation under the stand-alone cost (SAC) test. *Id.* WFA has elected to do so. And in *Western Fuels II*, after denying requests to change various aspects of its prior decision, the Board set a procedural schedule for the submission of revised SAC evidence. Only after the Board has received and considered the parties' revised evidentiary submissions will it be in a position to resolve *conclusively* WFA's rate challenge.

BNSF argues that the decisions met the first prong of the test for finality because the Board “conclusively resolved all contested issues of fact

and law raised by WFA” in its first SAC presentation. BNSF Response at 9. But, while the Board treated certain *subsidiary* issues as conclusively resolved, the Board did *not* conclusively resolve the *ultimate* question, the lawfulness of the challenged rates. Thus, neither decision challenged here marks the “consummation,”¹ or end, of the agency’s decisionmaking process. Rather, the proceeding is ongoing before the Board.

BNSF argues that the second prong of the test for finality is met because “legal consequences clearly flowed from the challenged decisions.” BNSF Response at 11. BNSF contends that the decisions “found that WFA had failed to demonstrate that the challenged rates exceed reasonable maximum rates,” *id.*, and that this finding precludes any order directing the railroad to roll back rates charged prior to the effective date of those decisions, *id.* at 12

Again, BNSF is mistaken. Far from specifying the reasonable maximum rate, the Board merely determined that WFA had not yet shown the challenged rates to be unreasonable. Indeed, because the Board expressed concern that WFA may not have had a fair chance to make the required showing, and given that WFA did not waive its right to revise its case, it would have been inappropriate for the Board to have ruled

¹ *Spear*, 520 U.S. at 158.

conclusively on the lawfulness of the challenged rates. In short, not until the Board rules on the parties' revised SAC presentations will the parties' rights and obligations finally be resolved.

II. THE STATUTORY SCHEME HERE DOES NOT ALTER THE TEST OF FINALITY.

BNSF contends that the Interstate Commerce Act (IC Act) requires the Board to complete a rate reasonableness determination within 3 years of the filing of a complaint, and that construing the *Western Fuels* decisions as non-final would run afoul of this time limit. BNSF Response at 2, 12-15. But BNSF misconstrues the 3-year time limit, which applies only to Board-initiated investigations and not to investigations initiated upon complaint

To see this, it helps to understand the history of the Board's investigative powers and the 3-year time limit. Historically, parties could file complaints with the Board's predecessor, the Interstate Commerce Commission (ICC), and in response, the ICC was "to investigate the matters complained of."² The statute also gave the ICC the right to institute investigations on its own initiative.³

² 49 U.S.C. 13(1) (1976).

³ *See, e.g.*, 49 U.S.C. 15(1) (1976).

But agency-initiated investigations sometimes dragged on for many years.⁴ In 1976, Congress added a new provision to the IC Act requiring that any “formal investigative proceeding” instituted by the ICC be concluded “with administrative finality within 3 years,” or else the proceeding “shall automatically be dismissed.”⁵ Nothing in the language or legislative history of this provision linked it to complaint cases brought by outside parties.

In 1978, Congress recodified the IC Act. In the recodification, subsection (a) of § 11701 stated that the ICC “may begin an investigation . . . on its own initiative or on complaint,” while subsection (c) provided that a “formal investigative proceeding begun by the Commission under subsection (a) . . . is dismissed automatically unless it is concluded by the Commission with administrative finality by the end of the 3d year after the date on which it was begun.” But the recodification did not subject

⁴ See, e.g., *Investigation of Railroad Freight Rate Structure*, 345 I.C.C. 2042 (1976) (reporting on status of investigation begun in 1971)

⁵ Railroad Revitalization and Regulatory Reform Act of 1976, § 303, Pub. L. No. 94-210, 90 Stat. 31, 50.

complaint cases to the 3-year deadline, because the recodification intended no substantive change.⁶

That is what the ICC found in the early 1980s when it was called upon to address the meaning of this provision after Congress shortened the time for shippers to file complaints against pre-existing rates.⁷ Anticipating a bulge of rate complaints, the ICC concluded that it would not need to issue final decisions in every case within 3 years, because Congress did not intend the 3-year deadline to apply to complaint-based investigations. Based on legislative history, the relationship to other parts of the IC Act, and the due process implications of a contrary interpretation, the agency construed the phrase “formal investigative proceeding” to refer only to investigations begun by the agency on its own initiative and not those begun on complaint.⁸

In the ICC Termination Act of 1995 (ICCTA),⁹ Congress curtailed—but did not entirely eliminate—the agency’s power to initiate an

⁶ Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1446; *see also* H.R. 95-1395, 95th Cong., 2d Sess. 1, 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3013.

⁷ Staggers Rail Act of 1980, Pub. L. No. 96-448, §229(b), 94 Stat. 1895, 1934.

⁸ *Complaints Filed Pursuant to the Savings Provisions of the Staggers Rail Act of 1980*, 367 I.C.C. 406, 408-12 (1983). A copy of this decision is attached as an Addendum.

⁹ Pub. L. No. 101-88, 109 Stat. 803 (1995).

investigation.¹⁰ Congress made no substantive change to the provision in § 11701(c) that a “formal investigative proceeding” not completed within 3 years is dismissed automatically.

Congress is presumed to have been aware of and to have adopted the ICC’s long-standing interpretation of the phrase “formal investigative proceeding” when it reenacted § 11701(c) without substantive change in ICCTA.¹¹ Preserving the long-established meaning of the phrase “formal investigative proceeding” does not deprive the 3-year time limit of all effect. That time limit still applies to Board-initiated investigations that Congress has “otherwise provided” for.¹² The 3-year time limit applies to such Board-initiated investigations, but not to complaints.

This interpretation is confirmed by the time limits that Congress added in ICCTA for rail rate decisions. In a SAC case, “the Board shall make a determination as to the reasonableness of a challenged rate . . .

¹⁰ Section 11701(a) now states that “except as otherwise provided in this part, the Board may begin an investigation . . . only on complaint.”

¹¹ *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

¹² For example, the Board may (1) broaden an investigation beyond the contours of a complaint, *see* 49 U.S.C. 10704(b); (2) launch an investigation into payments made by rail carriers for services supplied by shippers, 49 U.S.C. 10745; and (3) reopen a proceeding and conduct a new investigation “on its own initiative,” 49 U.S.C. 722(c).

within 9 months after the close of the administrative record.”¹³ This specific deadline for the type of proceeding involved here—a deadline tied not to the date on which a complaint is filed, or an investigation begun, but rather to the time the record closes (whenever that may be)—governs this proceeding.¹⁴

The railroad’s reading of the 3-year time limit would produce seemingly unconstitutional results, as the government may not deprive a person of a property interest without due process of law. The automatic dismissal of a cause of action due to agency delay violates due process.¹⁵ A shipper has a protected property interest in a cause of action before the Board for rate relief.¹⁶ An interpretation that avoids serious constitutional conflict is preferred so long as the construction is not ‘plainly contrary to the intent of Congress.’¹⁷

Here, the agency’s long-standing interpretation of the term “formal investigative proceeding” in § 11701(c) is reasonable, as it carries out the

¹³ 49 U.S.C. 10704(c).

¹⁴ *See Morales v Trans World Airlines*, 504 U.S. 374, 384 (1992) (in statutory construction, the specific governs over the general).

¹⁵ *Logan v Zimmerman Brush Co*, 455 U.S. 422, 431 (1982)

¹⁶ *See id.*

¹⁷ *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

intent that agency-initiated investigations proceed expeditiously while avoiding constitutional conflicts and removing any incentive for the railroad to drag out a rate proceeding past the 3-year mark by delaying discovery or filing unwarranted motions. Thus, the agency's statutory interpretation is entitled to deference.¹⁸

III. THE BOARD MAY AWARD RETROACTIVE RELIEF

Relying on *Arizona Grocery Co v Atchison, Topeka & Santa Fe Ry. Co*, 284 U.S. 370 (1932) (*Arizona Grocery*), BNSF contends that a decision on the parties' revised SAC presentations could have only prospective effect. But *Arizona Grocery* only "bars reparations that retroactively change a final Commission-approved rate."¹⁹ Here, the Board did not *approve* the challenged rates; it simply found that they had not yet been shown to be unreasonable. Indeed, it would have made no sense for the Board to approve the rates while *simultaneously* acknowledging that the adoption of a new revenue allocation methodology "clearly could have prejudiced WFA" and affording WFA the opportunity to revise its SAC presentation. Because the Board has not approved the challenged rates, it may award full relief should

¹⁸ *Chevron, U.S.A., Inc v Natural Res Def. Council, Inc*, 467 U.S. 837, 842-44 (1984).

¹⁹ *BP West Coast Prods, LLC v. FERC*, 374 F.3d 1263, 1304 (D.C. Cir. 2004) (per curiam) (emphasis added).

it find the rates to be unlawful after considering the parties' revised SAC evidence.

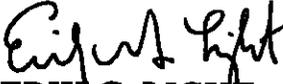
CONCLUSION

Accordingly, the Court should dismiss WFA's petition for review.²⁰

Respectfully submitted,

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Dated: June 6, 2008

²⁰ Because the Court lacks jurisdiction over non-final decisions, holding the petition in abeyance (as BNSF proposes) is not an option. *See New Mexico Navajo Ranchers Ass'n v. ICC*, 850 F.2d 729, 731-32 (D.C. Cir. 1988) ("Our decision to place [the action] in abeyance seems necessarily to have rested on the assumption that this court secured jurisdiction").

SUMMARY OF BNSF TREATMENT OF MOBA TRAINS BASED ON BNSF 3RD SUPPLEMENTAL REPLY

Peak Period Train ID (1)	Time (Hours)			BNSF Treatment According To TSR Text (7)		BNSF Treatment In Base RTC (8)	BNSF Treatment In Operating Coals (8)		
	Train (2)	Highway (3)	Total Mine-Orn (4)	BNSF Resolution (6)					
				BNSF Category (6)	BNSF Resolution (7)				
<u>WFA/Hasin - Laramie River</u>									
1	CODFMMOL10AF-09	7 17	3 57	11 14	13 42	Campbell Train	Rescue Crew	No Change	Rescue Crew
2	CODFMMOL11AF-11	7 21	3 57	11 18	13 33	Campbell Train	Rescue Crew	No Change	Rescue Crew
3	CODFMMOL12AF-12	7 55	3 57	11 52	14 27	Campbell Train	Rescue Crew	No Change	Rescue Crew
4	CODFMMOL13AF-14	7 45	3 57	11 42	13 58	Campbell Train	Rescue Crew	No Change	Rescue Crew
5	CODFMMOL14AF-16	8 00	3 57	11 57	14 13	Campbell Train	Rescue Crew	No Change	Rescue Crew
6	CODFMMOL15AF-19	8 16	3 57	12 13	14 34	Campbell Train	Rescue Crew	No Change	Rescue Crew
7	CODFMMOL16AF-20	7 38	3 57	11 35	16 50	Campbell Train	Rescue Crew	No Change	Rescue Crew
8	CODFMMOL09AF-18	10 19	3 57	14 16	xxx	Campbell Train	Rescue Crew	No Change	Rescue Crew
9	CODFMMOL10AF-20	8 10	3 57	12 07	xxx	Campbell Train	Rescue Crew	No Change	Rescue Crew
10	COCRRMMOL05AF-09	7 48	3 17	xxx	11 05	MOBA Train	Orn Crew Change	No Change	Rescue Crew
11	COCRRMMOL06AF-10	8 44	3 17	xxx	12 01	MOBA Train	Orn Crew Change	No Change	Rescue Crew
12	COCRRMMOL07AF-12	11 35	3 17	xxx	16 52	MOBA Train	Orn Crew Change	No Change	Rescue Crew
13	COCRRMMOL07AF-13	9 12	3 17	xxx	12 29	MOBA Train	Orn Crew Change	No Change	Rescue Crew
14	COCRRMMOL08AF-13	8 10	3 17	xxx	11 27	MOBA Train	Orn Crew Change	No Change	Rescue Crew
15	COCRRMMOL09AF-15	9 06	3 17	xxx	12 23	MOBA Train	Orn Crew Change	No Change	Rescue Crew
16	COCRRMMOL10AF-15	10 03	3 17	xxx	13 20	MOBA Train	Orn Crew Change	No Change	Rescue Crew
17	COCRRMMOL11AF-17	9 02	3 17	xxx	12 19	MOBA Train	Orn Crew Change	No Change	Rescue Crew
18	COCRRMMOL12AF-20	10 30	3 17	xxx	13 47	MOBA Train	Orn Crew Change	No Change	Rescue Crew
19	COCRRMMOL13AF-22	7 53	3 17	xxx	11 10	MOBA Train	Orn Crew Change	No Change	Rescue Crew
20	COCRRMMOL02AF-17	6 21	2 35	8 56	11 00	n/a	n/a	No Change	No Change
<u>Platte River - Rawhide</u>									
1	COATMPRRR08AF-08	5 21	3 17	xxx	8 38	n/a	n/a	Add 30 Min Dwell	Orn
2	COATMPRRR09AF-10	5 43	3 17	xxx	9 00	n/a	n/a	Add 30 Min Dwell	Orn
3	COATMPRRR10AF-11	4 28	3 17	xxx	7 45	n/a	n/a	Add 10 Min Dwell	Orn
4	COATMPRRR11AF-13	5 00	3 17	xxx	8 17	n/a	n/a	Add 30 Min Dwell	Orn
5	COATMPRRR12AF-15	5 01	3 17	xxx	8 18	n/a	n/a	Add 30 Min Dwell	Orn
6	COATMPRRR13AF-17	6 03	3 17	xxx	9 20	n/a	n/a	Add 30 Min Dwell	Orn
7	COATMPRRR14AF-18	6 00	3 17	xxx	9 17	n/a	n/a	Add 30 Min Dwell	Orn
8	COATMPRRR15AF-21	5 16	3 17	xxx	8 33	n/a	n/a	Add 30 Min Dwell	Orn

VERIFIED STATEMENT

OF

JAMES E. HODDER

My name is James E. Hodder. I am the Charles and Laura Albright Professor of Finance at the University of Wisconsin-Madison. I have served on the faculty of the Wisconsin School of Business since 1992. From 1978 to 1992, I served on the faculty of Stanford University, where I received my Ph.D. in Economics in 1979. At Wisconsin, I have taught a masters-level Corporate Finance course as well as corporate-oriented courses on Financial Policy and on Multinational Business Finance. In addition, I have taught several courses on options and other derivative securities, at both introductory and advanced levels. At Stanford, most of my teaching was in corporate finance with a particular focus on valuing manufacturing and technology investments. Hence, I have been teaching corporate finance courses over a period of 30 years.

A substantial portion of my research and publications has addressed the subjects of investment evaluation and discounting. A key aspect of those subjects is the firm or project cost of capital, including appropriate risk and inflation adjustments. Another substantial portion of my research has addressed corporate capital structure. I have previously submitted testimony to the Surface Transportation Board (Board) in two coal rate cases: on behalf of Wisconsin Power & Light in its case against Union Pacific Railroad Company and on behalf of PPL Montana in its case against the Burlington Northern and Santa Fe Railway Company. I also provided testimony on several occasions to the Board on behalf of the Western Coal Traffic League (WCTL) in connection with Ex Parte No. 664, Methodology to be Employed in Determining the Railroad

Industry's Cost of Capital, as well as with Ex Parte No. 664 (Sub-No 1). Use of a Multi-Stage Discounted Cash Flow Methodology In Determining the Railroad Industry's Cost of Capital Those occasions include a Verified Statement (December 2006), a Public Hearing (February 2007), a Verified Statement (September 2007), a Reply Verified Statement (October 2007), a Public Hearing (December 2007), and a Verified Statement (April 2008). A copy of my detailed curriculum vitae is included herewith as Appendix A

In the current instance, I have been asked by Counsel for the Western Fuels Association and the Basin Electric Power Cooperative (collectively, WFA) to provide comments in response to the Verified Statement (VS) of Professor Robert S Hamada and Mr Rajiv B Gokhale that was submitted on behalf of the Burlington Northern and Santa Fe Railway Company (BNSF) in the connection with STB Docket No 42088, Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc v BNSF Railway Co

I view the analysis and comments contained in the Hamada and Gokhale VS as largely tangential to the issue of whether the Board should utilize its approved CAPM-based procedure for estimating a railroad cost of equity to be used for years 2002-2005 in the current proceeding. It seems to me that the basic issue is whether to utilize the best currently available technology to examine pricing behavior during an earlier period, before that technology had been approved for use by the Board. An appropriate analogy might be the use of DNA techniques to reexamine evidence in cases from the past. In that situation, the general approach has been to use the best currently available technology to help understand what occurred at times before that technology had been developed and/or approved for use in legal proceedings.

In my view, the Board should definitely use its approved CAPM-based technology in the current proceeding to estimate the 2002-2005 capital costs for the stand-alone railroad utilized to examine the appropriateness of BNSF's pricing of its service to WFA. The Single-Stage Discounted Cash Flow (DCF) procedure used by the Board in prior determinations of the cost of equity for the 2002-2005 rested on five-year growth projections that were (implicitly) assumed to continue in perpetuity. For the 2002-2005 period, those projections ranged from 11.00% to 13.66%.¹ During that period actual GDP growth for the U.S. economy ranged between 3.4% and 6.6% according to the U.S. Bureau of Economic Analysis (BEA).² I suggested in my Verified Statement regarding the Board's 2005 estimate for the Railroad Cost of Capital that a reasonable estimate for a long-run growth rate of the U.S. economy would have been 6% or a bit less in 2005.³ The same statement could be made about the years 2002-2004.

As the Board recognized in its decision in Ex Parte No. 664, Methodology to be Employed in Determining the Railroad Industry's Cost of Capital, served January 17, 2008, using a Single-Stage DCF procedure with growth rates that substantially exceed the long-run growth rate for the economy generates cost of equity estimates which are implausibly high. Indeed, this was the key problem with the Single-Stage DCF procedure that led the Board to opt for the CAPM approach. Given the large gaps between the 5-year growth projections and reasonable long-run growth rates for the U.S. economy, it seems clear that Single-Stage DCF procedure was yielding badly biased estimates during the 2002-2005 period. Failure to use the best available

¹ See the Board's Railroad Cost of Capital decisions for 2002-2005.

² See data from the BEA website at <http://www.bea.gov/national/index.htm#gdp>

³ Hodder VS, December, 2006, at page 9.

technique to generate information under these circumstances seems a bit like burying one's head in the sand.

Hamada and Gokhale propose three arguments for not using the CAPM-based technology. Their first argument essentially boils down to an assertion that railroad shareholders and potential shareholders may react adversely to a Board decision to use a superior methodology to determine the stand-alone railroad's cost of equity in the current proceeding. It seems unlikely to me that such a Board decision would result in a substantial adverse reaction from railroad shareholders of the type hypothesized by Hamada and Gokhale (e.g., decreased investment in the railroad industry). In any case, Hamada and Gokhale's recommendation to continue using the clearly inaccurate Single-Stage DCF methodology would sacrifice accuracy, fairness, and economic efficiency in order to (hypothetically) make some group of investors better off. Moreover, to the extent that investors hold broadly diversified share portfolios, actions which benefit railroads at the expense of utility companies will tend to have offsetting effects within the overall portfolios. Alternatively, to the extent that utility companies pass such costs through to their customers, those customers will have fewer resources to spend on other goods and services or to invest. This takes us back to the issue of economic efficiency and an overall benefit for the economy as a whole. If we are going to estimate railroad costs, we should attempt to do so accurately, and we should certainly avoid what are readily apparent inaccuracies.

Their second argument seems to suggest that the Board might (maybe) have implemented the CAPM-based approach in a different way, utilizing different inputs, if the Board had adopted

the model before January 2008. One can certainly conjecture such a possibility, however, the Board conducted rather thorough proceedings over the course of roughly two years prior to its January 2008 adoption decision. Those proceedings included both an advance notice and notice of proposed rulemaking plus two public hearings. I do not see any clear basis for concluding that the Board would have selected a different approach if it had decided the matter in, for example, 2004 as opposed to 2008. Moreover, the most significant potential change mentioned by Hamada and Gokhale (calculation of the equity risk premium using a different procedure relying on a recent time period or using a prospective approach) would likely result in a substantially lower cost of equity.⁴ Other than creating a distraction, this argument does not seem to have been thought through very carefully.

The third argument Hamada and Gokhale put forward is that allowing the use of a CAPM-based cost of equity estimation in this case for 2002-2005 would introduce an asymmetry into the regulatory process because it "would favor a select category of litigants"⁵. I am not aware that the Board has precluded other parties arguing for the use of CAPM-based estimates for years prior to 2006 on a case-by-case basis. Hence, the alleged asymmetry is not obvious to me. Indeed, the Board's brief in *Western Coal Traffic League v. Surface Transportation Board* (D.C. Circuit No. 07-1064) argued that it could consider CAPM-based cost of equity estimates on a case-by-case basis, exactly along the lines in the current proceedings. Moreover, the Board argued that this approach was preferable (at least from its perspective) to reopening Railroad Cost of Capital proceedings for years prior to 2006. Seemingly, Hamada and Gokhale want to

⁴ The risk-free rate input (where there was ultimately broad agreement) and the beta estimate would tend to have much smaller impacts on the cost of equity estimate.

preclude exactly the sort of case-by-case flexibility that the Board advocated. Hamada and Gokhale go on to suggest that allowing “all concerned parties” to request use of a CAPM-based estimation procedure for years prior to 2006 would “Risk Chaos in the Regulatory System” (see their heading IV on page 9). That suggestion seems rather extreme. Given the costs and uncertainties of litigation, plus my understanding that most rate cases utilize a construction period of no more than three years, a flood of rate cases based on using the CAPM (for years prior to 2006) seems unlikely. Moreover, one would think that the Board considered that issue in the process of preparing its brief to the DC Circuit Court that argued in favor of the case-by-case approach.

In summary, the WFA proposed CAPM-based estimation for costs of equity in 2002-2005 is appropriate for generating information using the best currently available technology. Moreover, it is perfectly consistent with the Board’s case-by-case approach to considering the use of that technology for years prior to 2006. Indeed, this seems like a very reasonable approach for generating information as part of the Board’s attempts to enhance economic efficiency.

⁵ Hamada and Gokhale VS, paragraph 25

Executed on August 2, 2008


James E. Hodder

Appendix A

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Areas of Specialization Corporate Finance, Derivative Securities, International Finance, and Risk Management

Education

1967	B S	Industrial Engineering, Stanford University
1968	M B A	Business Administration, University of Michigan
1976	M A	Economics, University of California (Berkeley)
1979	Ph D	Economics, Stanford University

Dissertation The Hedging of Exposure to Exchange-Rate Movements

Employment

1968-69	Sylvania Electronic Systems. Project Administrative Engineer
1969-73	U.S Navy Engineering Duty Officer
1974-76	Department of Economics, University of California (Berkeley). Research and Teaching Assistant
1976-78	Department of Economics, Stanford University: Teaching Assistant and Instructor
1978-92	Department of Industrial Engineering and Engineering Management, Stanford University. Assistant Professor and Associate Professor, Associate Chairman 1987-1988, Ph D Program Director 1987-1992
1992-	School of Business, University of Wisconsin - Madison. Professor of Finance, Director of Quantitative Masters in Finance (QMF) Program 1995-2004, Department Chairman 2004-2008

Visiting Appointments

1986	Visiting Scholar, Department of Economics, Osaka University -- funded by a fellowship from the Japan Society for the Promotion of Science
1990-91	Visiting Associate Professor, School of Business, University of Wisconsin - Madison

Teaching Advanced Derivatives
 Corporate Finance
 Fixed Income and Derivative Securities
 Options and Financial Futures
 Ph D Seminar Interest Rate and Credit Risk Models
 Ph D Seminar Risk Management in Financial Institutions
 Multinational Business Finance
 Financial Policy
 Doctoral Seminar in Financial Decisions
 Engineering Economy
 International Economics

Awards Outstanding Teacher, Department of Industrial Engineering and Engineering Management, Stanford University, 1981-82 and 1986-87

 Lawrence J Larson Award for Excellence in Teaching, School of Business, University of Wisconsin-Madison, 1999

 Wisconsin Idea Fellow, In recognition of extraordinary public service on behalf of the University of Wisconsin, 2004-2005

Publications

- 1 "Foreign Investment from the Firm's Perspective," in D Bonham-Yeamon, ed , Developing Global Corporate Strategies, Academy of International Business and European International Business Association Joint Conference, Barcelona, Spain, December, 1981
- 2 "Exposure to Exchange Rate Movements." Journal of International Economics, November, 1982
- 3 "Plant Location Modeling for the Multinational Firm," with J V Jucker, Proceedings of the Academy of International Business Conference on the Asia-Pacific Dimension of International Business, Honolulu, Hawaii, December, 1982
- 4 "Financial Market Approaches to Facility Location Under Uncertainty," Operations Research, November-December, 1984
- 5 "Pitfalls in Evaluating Risky Projects," with H E Riggs, Harvard Business Review, January-February, 1985 This article has also been reprinted in Managing Projects and Programs, Harvard Business School Press, 1989 and as Chapter 3 in Kim B Clark and Steven C Wheelwright, eds , The Product Development Challenge, Harvard Business School Press, 1995
- 6 "Pricing to Reduce Investment When Costs Follow an Experience Curve Constrained Dynamic Programming as well as Heuristic Rules," with Y A Ilan, Proceedings of the American Institute for Decision Sciences Fourteenth Annual Meeting, Western Regional Conference, Monterey, California, March, 1985
- 7 "International Plant Location Under Price and Exchange Rate Uncertainty," with J V Jucker, Engineering Costs and Production Economics, April, 1985

8. "Some Aspects of Japanese Corporate Finance," with A E Tschoegl, Journal of Financial and Quantitative Analysis, June, 1985 This article is also reprinted as Chapter 3 in Edwin J Elton and Martin J Gruber, eds , Japanese Capital Markets, Harper-Row, 1990
9. "A Simple Plant Location Model for Quantity-Setting Firms Subject to Price Uncertainty," with J V Jucker, European Journal of Operational Research, July, 1985
10. "Evaluation of Manufacturing Investments. A Comparison of U S and Japanese Practices." Financial Management, Spring, 1986 This article has also been reprinted in Stephen H Archer and Halbert S Kerr, eds , Readings and Cases in Corporate Finance, McGraw-Hill, 1988
11. "Capital Cost Difference Between U S and Japan Shrinks" (in Japanese), Nihon Keizai Shimbun, August 30, 1986
12. "A Multifactor Model for International Facility Location and Financing Under Uncertainty," with M C Dincer, Computers and Operations Research, 1986.
13. "Declining Prices and Optimality When Costs Follow an Experience Curve," with Y. A Ilan, Managerial and Decision Economics, December, 1986
14. "Technology Transfer and Second Sourcing when Production Costs Follow an Experience Curve," with Y A Ilan, IEEE Transactions on Engineering Management, February, 1987
15. "Simple Solution Procedures for Nonlinear Programming Problems that are Derivative Decomposable," with R C Carlson and J V Jucker, European Journal of Operational Research, July, 1987.
16. "Corporate capital structure in the United States and Japan: financial intermediation and implications of financial deregulation," in John B Shoven, ed , Government Policy Towards Industry in the USA and Japan, Cambridge University Press, 1988
17. "On Dumping at Less than Marginal Cost," in Developments in Pacific-Asian Business Education and Research, Volume 2, Pacific Asian Management Institute, 1989
18. "A Commentary on 'Japanese Capital Exports through Portfolio Investment in Foreign Securities.'" in Charles A E. Goodhart and George Sutija, eds , Japanese Financial Growth, Macmillan (London), 1990.
19. "Agency Problems and International Capital Structure," with L W Senbet, in S Ghon Rhee and Rosita P Chang, eds , Pacific Basin Capital Markets Research. Elsevier, 1990
20. "Valuing Flexibility as a Complex Option," with A J Triantis, Journal of Finance, June, 1990.
21. "International Capital Structure Equilibrium," with L W Senbet, Journal of Finance, December, 1990
22. "Is the Cost of Capital Lower in Japan?", Journal of the Japanese and International Economics, March. 1991
23. "The Cost of Capital for Industrial Firms in the U S and Japan," in William T Ziemba, Warren Bailey, and Yasushi Hamao, eds , Japanese Financial Market Research, Elsevier, 1991

- 24 "Corporate Finance in Japan," with A. E. Tschoegl, in Shinji Takagi, ed , Handbook of Japanese Capital Markets, Basil Blackwell, 1993
- 25 "Valuing Flexibility An Impulse Control Framework," with A. J. Triantis, Annals of Operations Research, vol 45, 1993
- 26 "Cross-holdings Estimation Issues, Biases and Distortions," with M Fedenia and A J Triantis. Review of Financial Studies, Spring, 1994
- 27 "Risk Management and Assessment," in Richard C Dorf, ed., Handbook of Technology Management, CRC Press, 1998.
- 28 "Pricing Models with Transaction Fees," with T Zariphopoulou, in W. M. McEncaney, G Yin, and Q Zhang, eds , Stochastic Analysis, Control, Optimization and Applications: A Volume in Honor of W H Fleming, Birkhauser Boston, 1999
- 29 "Multinational Capital Structure and Financial Flexibility," with K Singh, Journal of International Money and Finance, vol 19, 2000
- 30 "Numerical Schemes for Variational Inequalities Arising in International Asset Pricing," with A Tourin and T Zariphopoulou, Computational Economics, February, 2001
31. "Valuing Real Options Can Risk Adjusted Discounting Be Made To Work?", with A S Mello and G S Sick, Journal of Applied Corporate Finance, Summer, 2001.
- 32 "Corporate Finance," in Allan Bird, ed , Encyclopedia of Japanese Business and Management, Routledge, 2002
- 33 "Debt/Equity Ratios." in Allan Bird, ed., Encyclopedia of Japanese Business and Management, Routledge, 2002
- 34 "Incentive Contracts and Hedge Fund Management," with J C Jackwerth, Journal of Financial and Quantitative Analysis, December, 2007 (Lead Article)

Published Book Reviews

"Review of The Economic Analysis of Industrial Projects by Lynn E Bussey," James E. Hodder and James V Jucker in The Engineering Economist, Winter, 1980

"Review of Investment Analysis and Management by Anthony J Curley and Robert M Bear," in The Engineering Economist, Spring, 1980

Research in Progress

"Default Risk with Managerial Control," with T. Zariphopoulou

"Managerial Responses to Incentives: Control of Firm Risk, Derivative Pricing Implications, and Outside Wealth Management," with J. C. Jackwerth

"Optimal Compensation Structure for Hedge Fund Managers." with J C Jackwerth

"Hedge Fund Performance. Attribution, Time Variation, and Persistence," with J C Jackwerth and O Kolokolova

"Credit Default Risk with Optimal Management Control," with J C Jackwerth

"Recovering Delisting Returns of Hedge Funds," with J. C. Jackwerth and O Kolokolova

Presentations at Conferences and Public Lectures

"A Plant-Location Model for the Multi-National Firm," with J. V. Jucker, TIMS/ORSA Joint National Meeting, Washington, D C , May, 1980

"Exposure to Exchange Rate Movements," Annual Meeting of Western Finance Association, San Diego, California, June, 1980

"International Plant Location Under Price and Exchange Rate Uncertainty," with J V. Jucker, CORS/TIMS/ORSA Joint National Meeting, Toronto, Canada, May, 1981.

"Hedging International Exposure A Model with Flexible Exchange Rates and Expropriation Risk," Academy of International Business Annual Meeting, Montreal, Canada, October, 1981

"Foreign Investment from the Firm's Perspective," Academy of International Business and European International Business Association Joint Meeting, Barcelona, Spain, December, 1981

"A Simple Approach to Solving a Family of Nonlinear Programming Problems," with R C Carlson and J V Jucker, TIMS/ORSA Joint National Meeting, Detroit, Michigan, April, 1982

"Evaluating Risky R&D Projects." with H E Riggs, TIMS/ORSA Joint National Meeting, San Diego, California, October, 1982

"A Multifactor Model for International Facility Location Under Uncertainty," with M. C. Dincer, Academy of International Business Annual Meeting, Washington, D.C , October, 1982

"Hedging International Exposure Capital Structure Under Flexible Exchange Rates and Expropriation Risk," American Finance Association Annual Meeting, New York, December, 1982

"Technology Transfer When Production Costs Follow an Experience Curve," with Y A Ilan, TIMS/ORSA Joint National Meeting, San Francisco, California, May, 1984.

"Investment and Financial Decision Making in Japanese Firms A Comparison with U S Practices," Academy of International Business Annual Meeting, Cleveland, Ohio, October, 1984

"Pricing to Reduce Investment When Costs Follow an Experience Curve Constrained Dynamic Programming as well as Heuristic Rules," with Y A Ilan, Fourteenth Annual Meeting of the American Institute for Decision Sciences, Western Regional Conference, Monterey, California, March, 1985

"Corporate Capital Structure in the U S and Japan. Financial Intermediation and Implications of Financial Deregulation," Conference on Government Policy Towards Industry in the United States and Japan, Koret Conference Series, Center for Economic

Policy Research, Stanford, California, May, 1985 This paper was also presented at the Academy of International Business Annual Meeting, New York, October, 1985

"International Capital Structure Equilibrium," with I. W. Senbet, Allied Social Sciences Association Annual Meeting, New York, December, 1985

"Security Market and Capital Structure Issues in U S -Japanese Economic Relations," Public Lecture at Osaka University, June, 1986.

"International Capital Structure Equilibrium," with L W Senbet, presented at the 1987 Annual Meetings of the Western Finance Association (San Diego, June), the European Finance Association (Madrid, September), the Academy of International Business (Chicago, November), and the American Finance Association (Chicago, December).

"A Commentary on 'Japanese Capital Exports through Portfolio Investment in Foreign Securities,'" International Conference on Japanese Financial Growth, London, England, October, 1988

"Capital Structure and Cost of Capital in the U S and Japan." presented at the 1988 Annual Meeting of the Academy of International Business (San Diego, November) and the 1989 Annual Meeting of the Association of Japanese Business Studies (San Francisco, January) This paper was also presented at a symposium on Japanese Finance at the University of Michigan, January, 1989.

"On Dumping at Less than Marginal Cost," Second Annual International Symposium on Pacific-Asian Business, Honolulu, January, 1989

"Agency Problems and International Capital Structure," with L W Senbet, First Annual Pacific-Basin Finance Conference, Taipei, Taiwan, March, 1989

"Japanese Corporate Financing Patterns," Applied Securities Analysis Conference, University of Wisconsin-Madison, September, 1989.

"Is the Cost of Capital Lower in Japan?" Presented at the 1990 Annual Meeting of the Academy of International Business (Toronto, October) and the 1990 TIMS/ORSA Joint National Meeting (Philadelphia, October)

"Global Manufacturing Planning Models and Practices," TIMS/ORSA Joint National Meeting, Philadelphia, October, 1990

"International Financial Structure and Competitiveness," 1991 International Conference on Economics and Management, Tokyo, Japan, March, 1991

"Cross-holding and Market Return Measures," with M Fedenia and A J Triantis, presented at the 1991 Western Finance Association Annual Meeting (Jackson Lake Lodge, Wyoming, June), the 1991 TIMS/ORSA Joint National Meeting (Anaheim, November), and the Osaka University - Wharton Conference on Corporate Financial Policy and International Competition (Osaka, Japan, January, 1992)

"Multinationality and Capital Structure," with K Singh, presented at TIMS/ORSA Joint National Meeting, Boston, April, 1994

"The Bubble Burst, Then Things Got Worse Perspectives on the Japanese Financial Crisis," with N Buchan and K Ito, presentation at the World Affairs and Global Economy (WAGE) workshop, University of Wisconsin-Madison, April, 1998

"The Japanese Banking Crisis," presented at the U S -Asian Pacific Relations in the 21st Century Conference, St Norbert College, De Pere, Wisconsin, October, 1998

"Default Risk with Managerial Control," with T. Zariphopoulou, presented at the Bachelier Finance Society Congress, Crete, June, 2002.

"Incentive Contracts and Hedge Fund Management," with J Jackwerth, presented at the Conference on Delegated Portfolio Management jointly sponsored by the University of Oregon and the Journal of Financial Economics (Eugene, Oregon, September 2004) and at the 2005 Frontiers of Finance conference (Bonaire, Netherlands Antilles, January 2005).

"Employee Stock Options Much More Valuable Than You Thought," with J C Jackwerth, presented at the 15th Annual Derivative Securities and Risk Management Conference (Arlington, Virginia, April 2005), at the 2005 FMA European Conference (Siena, Italy, June), and at the 2006 Frontiers of Finance conference (Bonaire, Netherlands Antilles, January 2006)

Testimony

Wisconsin Power and Light Company vs Union Pacific Railroad Company, Surface Transportation Board, Verified Rebuttal Statement, September 2000

PPL Montana, LLC vs Burlington Northern and Santa Fe Railway Company, Surface Transportation Board, Verified Rebuttal Statement, April 2001

Xcel Energy vs United States Government, Expert Report (March), Rebuttal Report (May), Deposition (June), 2006

Surface Transportation Board, Methodology to be Employed in Determining the Railroad Industry's Cost of Capital, Verified Statement (December 2006), Public Hearing (February 2007), Verified Statement (September 2007), Reply Verified Statement (October 2007), Public Hearing (December 2007)

Deutsche Finance New Zealand vs New Zealand Commissioner of Inland Revenue, Witness Statement, October 2007

Bank of New Zealand vs New Zealand Commissioner of Inland Revenue, Witness Statement, July 2008

Professional Societies

Academy of International Business
American Finance Association
Financial Management Association
Global Association of Risk Professionals
Professional Risk Managers' International Association
Society for Financial Studies
Western Finance Association

WFA/Basin Maximum Markup Method Rates With III-H-1 DCF Model

Time Period (1)	Caballo Rojo		Dry Fork		Antelope		Caballo		Cordero		Esle Butte		Weighted Average	
	SAC	MMM Rate	SAC	MMM Rate	SAC	MMM Rate	SAC	MMM Rate	SAC	MMM Rate	SAC	MMM Rate	SAC	MMM Rate
	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
1	\$6.54	\$2.87	\$6.73	\$3.24	1/	1/	1/	1/	\$6.54	\$2.78	\$6.73	\$3.27	\$6.61	\$2.99
2	\$6.81	\$2.79	\$7.01	\$3.15	\$6.49	\$2.13	\$6.81	\$2.83	1/	1/	1/	1/	\$6.72	\$2.59
3	\$6.81	\$2.97	\$7.01	\$3.36	\$6.49	\$2.27	\$6.81	\$3.02	1/	1/	1/	1/	\$6.72	\$2.76
4	\$6.81	\$2.96	\$7.01	\$3.35	\$6.49	\$2.26	\$6.81	\$3.01	1/	1/	1/	1/	\$6.72	\$2.75
5	\$6.81	\$3.09	\$7.01	\$3.49	\$6.49	\$2.35	\$6.81	\$3.14	1/	1/	1/	1/	\$6.72	\$2.87
6	\$7.17	\$2.80	\$7.39	\$3.16	\$6.83	\$2.13	\$7.17	\$2.84	1/	1/	1/	1/	\$7.08	\$2.60
7	\$7.17	\$2.82	\$7.39	\$3.19	\$6.83	\$2.15	\$7.17	\$2.87	1/	1/	1/	1/	\$7.08	\$2.62
8	\$7.17	\$2.85	\$7.39	\$3.22	\$6.83	\$2.17	\$7.17	\$2.90	1/	1/	1/	1/	\$7.08	\$2.64
9	\$7.17	\$2.89	\$7.39	\$3.27	\$6.83	\$2.21	\$7.17	\$2.94	1/	1/	1/	1/	\$7.08	\$2.68
10	\$8.15	\$2.90	\$8.39	\$3.28	\$7.77	\$2.21	\$8.15	\$2.94	1/	1/	1/	1/	\$8.04	\$2.69
11	\$8.15	\$2.89	\$8.39	\$3.27	\$7.77	\$2.21	\$8.15	\$2.94	1/	1/	1/	1/	\$8.04	\$2.68
12	\$8.15	\$2.92	\$8.39	\$3.30	\$7.77	\$2.23	\$8.15	\$2.97	1/	1/	1/	1/	\$8.04	\$2.71
13	\$8.15	\$2.95	\$8.39	\$3.34	\$7.77	\$2.25	\$8.15	\$3.00	1/	1/	1/	1/	\$8.04	\$2.74
14	\$8.30	\$2.99	\$8.55	\$3.38	\$7.91	\$2.28	\$8.30	\$3.03	1/	1/	1/	1/	\$8.19	\$2.77
15	\$8.30	\$2.98	\$8.55	\$3.36	\$7.91	\$2.27	\$8.30	\$3.02	1/	1/	1/	1/	\$8.19	\$2.76
16	\$8.30	\$3.00	\$8.55	\$3.39	\$7.91	\$2.28	\$8.30	\$3.04	1/	1/	1/	1/	\$8.19	\$2.78
17	\$8.30	\$3.02	\$8.55	\$3.41	\$7.91	\$2.30	\$8.30	\$3.06	1/	1/	1/	1/	\$8.19	\$2.80
18	\$8.46	\$2.92	\$8.71	\$3.30	\$8.06	\$2.23	\$8.46	\$2.97	1/	1/	1/	1/	\$8.35	\$2.71
19	\$8.58	\$2.99	\$8.84	\$3.37	\$8.17	\$2.28	\$8.58	\$3.03	1/	1/	1/	1/	\$8.47	\$2.77
20	\$8.76	\$3.01	\$9.02	\$3.41	\$8.35	\$2.30	\$8.76	\$3.06	1/	1/	1/	1/	\$8.65	\$2.79
21	\$8.97	\$3.06	\$9.24	\$3.46	\$8.55	\$2.34	\$8.97	\$3.11	1/	1/	1/	1/	\$8.85	\$2.84
22	\$9.21	\$3.13	\$9.49	\$3.53	\$8.78	\$2.38	\$9.21	\$3.18	1/	1/	1/	1/	\$9.09	\$2.90
23	\$9.44	\$3.21	\$9.73	\$3.63	\$9.00	\$2.45	\$9.44	\$3.26	1/	1/	1/	1/	\$9.32	\$2.98
24	\$9.69	\$3.36	\$9.99	\$3.80	\$9.24	\$2.56	\$9.69	\$3.42	1/	1/	1/	1/	\$9.57	\$3.12
25	\$9.94	\$3.44	\$10.24	\$3.88	\$9.47	\$2.62	\$9.94	\$3.49	1/	1/	1/	1/	\$9.81	\$3.19
26	\$10.19	\$3.46	\$10.50	\$3.91	\$9.71	\$2.63	\$10.19	\$3.51	1/	1/	1/	1/	\$10.06	\$3.21
27	\$10.46	\$3.49	\$10.78	\$3.95	\$9.97	\$2.66	\$10.46	\$3.55	1/	1/	1/	1/	\$10.33	\$3.24
28	\$10.73	\$3.55	\$11.05	\$4.02	\$10.22	\$2.71	\$10.73	\$3.61	1/	1/	1/	1/	\$10.59	\$3.30
29	\$11.01	\$3.61	\$11.34	\$4.09	\$10.49	\$2.76	\$11.01	\$3.67	1/	1/	1/	1/	\$10.87	\$3.35
30	\$11.30	\$3.66	\$11.64	\$4.14	\$10.77	\$2.79	\$11.30	\$3.72	1/	1/	1/	1/	\$11.15	\$3.40
31	\$11.58	\$3.74	\$11.93	\$4.22	\$11.04	\$2.85	\$11.58	\$3.79	1/	1/	1/	1/	\$11.43	\$3.46
32	\$11.89	\$3.79	\$12.25	\$4.29	\$11.34	\$2.89	\$11.89	\$3.85	1/	1/	1/	1/	\$11.74	\$3.52
33	\$12.18	\$3.83	\$12.55	\$4.33	\$11.61	\$2.92	\$12.18	\$3.89	1/	1/	1/	1/	\$12.02	\$3.55

1/ No movement in this time period from this origin

Effect of Reallocating Laramie River Volume on MMM Analysis Results -- 102005
LRR Traffic Group Tonnage Distribution

Origin (1)	Destination (2)	Tons 1/ (3)	SARR Revenue 1/ (4)	Actual Rate 1/ (5)	URCS Phase III VC 1/ (6)	Actual R/V C 1/ (7)	SAC Requirement 2/ (8)	Starting Cost-Based Benchmark 1/ (9)	Maximum R/V C After Iterations 1/ (10)	Resulting MMM Maximum Rate 1/ (11)
1 CABJCT	MOBA	82,000	\$558,076	\$6.81	\$113,463	4.92	xxx	1.60	1.92	\$2.66
2 CONJCT	MOBA	1,000,400	\$6,489,195	\$6.49	\$1,039,102	6.25	xxx	1.60	1.92	\$2.00
3 ROJCT	MOBA	311,600	\$2,120,687	\$6.81	\$424,590	4.99	xxx	1.60	1.92	\$2.62
4 DRYFORJCT	MOBA	668,300	\$4,685,451	\$7.01	\$1,029,305	4.55	xxx	1.60	1.92	\$2.96
5 Subtotal	MOBA	2,062,300	\$13,853,409	xxx	2,606,461	xxx	xxx	xxx	xxx	xxx
6 All Other	All Other	13,721,587	\$45,334,287	xxx	\$25,234,930	xxx	xxx	xxx	xxx	xxx
7							Capital Expense			
8							Operating Expense			
9 Total LRR	Total LRR	15,783,887	\$59,187,696	xxx	\$27,841,390	xxx	\$16,184,010	1.60	1.92	xxx
							\$28,260,808			
							\$44,444,818			

1/ From WFA/Basin TSO electronic workbook "MMM Model Linked To III-H-1 With CAPM VC.xls"
2/ From WFA/Basin TSO electronic workbook "Exhibit_III-H-1.xls"

Effect of Reallocating Laramie River Volume on MMM Analysis Results -- 1Q2005
Alternate Tonnage Distribution

Origin (1)	Destination (2)	Tons 1/ (3)	SARR Revenue 2/ (4)	Actual Rate 3/ (5)	URCS Phase III VC 4/ (6)	Actual R/V C 3/ (7)	SAC Requirement (8)	Starting Cost-Based Benchmark 5/ (9)	Maximum R/V C After Iterations 6/ (10)	Resulting MMM Maximum Rate 7/ (11)
1 CABJCT	MOBA	82,000	\$558,076	\$6 81	\$113,463	4 92	xxx	1 59	1 89	\$2 61
2 CONJCT	MOBA	100,040	\$648,919	\$6 49	\$103,910	6 25	xxx	1 59	1 89	\$1 96
3 ROJCT	MOBA	311,600	\$2,120,687	\$6 81	\$424,590	4 99	xxx	1 59	1 89	\$2 57
4 DRYFORJCT	MOBA	1,568,660	\$10,997,875	\$7 01	\$2,416,026	4 55	xxx	1 59	1 89	\$2 91
5 Subtotal	MOBA	2,062,300	\$14,325,558	xxx	\$3,057,989		xxx	xxx	xxx	xxx
6 Difference 8/	MOBA	0	\$-472,149	xxx	\$451,529			xxx	xxx	xxx
7 All Other	All Other	13,721,587	\$45,334,287	xxx	\$25,234,930		xxx			
8						Capital Expense 9/	\$16,184,010			
9						Operating Expense 10/	\$28,712,337			
10 Total LRR	Total LRR				28,292,919		44,896,347	1 59	1 89	xxx

1/ Reallocated as follows 90% of Antelope tons shifted to Dry Fork

2/ Column (3) x Column (5)

3/ From WFA/Basin TSO electronic workpaper "MMM Model Linked To Ill-H-1 With CAPM VC xls"

4/ Column (4) / Column (7)

5/ Line 10, Column (8) / Line 10, Column (6)

6/ From WFA/Basin TS Rebuttal electronic workpaper "1Q 2005 Reallocation Example xls"

7/ Column (10) x (Column (6) / Column (3))

8/ Line 5 - Page 1, Line 5

9/ From WFA/Basin TSO electronic workpaper "Exhibit_III-H-1 xls"

10/ Page 1, Line 8, Column (8) + Line 6, Column (6)