

Statement of Chairman Roger Nober
APS v. BNSF Oral Argument
September 29, 2004

Good morning. Thank you all for being here.

As you know, today we will hear argument in a rail rate reasonableness case— Arizona Public Service Company and Pacificorp v. Burlington Northern and Santa Fe Railway Company.

This case is different from the other rate cases in which we have held an oral argument. This case has been around for some time as the Board first ruled on it in 1997. That case evaluated the reasonableness of the rates to transport coal from the McKinley mine to the Cholla power plant. The Board applied the stand-alone cost test and used a 20 year analysis that spanned from 1994 to 2013 to determine that the challenged rate was unreasonably high and to set a maximum reasonable rate.

In 2003, BNSF provided undisputed evidence that the McKinley mine would run out of coal in 2008, five years before the end of that 20 year period. BNSF asked the Board to vacate the prescribed rate and restore rate making authority to it.

In light of the new evidence regarding the shut down of the mine, the Board lifted the prescriptive effect of the prior rate prescription, ordered the parties to keep account of payments, and asked for evidence before determining whether to vacate the prescription or determining what the SAC rate would be under an analysis that was five years shorter than originally used. The parties have now provided the Board with evidence.

The case can really be considered in two parts. The first part regards several technical issues that bear on what the base rate

should be for the remaining years. That base rate is the rate that the SAC test would say is the maximum reasonable rate for the period from today through 2008. Using a variety of assumptions that the Board posed to the parties, the parties could be as close as pennies apart on the base rate.

The second part is more complicated and is where the parties are far apart. It is frankly where I think we will spend most of our time this morning. When a shorter analysis period is used, the way the capital recovery for the hypothetical railroad are distributed in each year from 1994 to 2008 is different than the way the capital recovery would be distributed across each year from 1994 to 2013.

The question then is what the Board can legally do now that some of the years are in the history books.

Now both sides have submitted ideas about how to handle this problem. Frankly, I have questions about whether APS's approach is the right thing to do and whether BNSF's approach is legally viable under our statutes, Supreme Court law, or both. I also wonder whether the fairer thing to do here is just to vacate the rate.

That said, I have an open mind on the issues in this case. I look forward to the parties' presentations today.