MR. LOFTUS: Thank you, Chairman Nober.

Good morning, Vice-chairman Mulvey. Good morning, assembled staff.
I am appearing this morning on behalf of Complainants Arizona Public Service Company and Pacificorp.

I want to advise the Board that representatives of both of those companies are here this morning to observe these proceedings.

With me at counsel table is Peter Pfohl of our firm who has assisted in the development of this case.

I have advised that we would like to reserve five minutes of our time for rebuttal.

In this reopened proceeding, each of the parties, the Complainants and BNSF went back to the Board's 1998 DCF analysis and they made revisions to that analysis in the limited areas that the Board allowed the parties to address in this reopened proceeding. The most consequential issue by far in the case is the question of BNSF's proposed revenue adjustment to the DCF analysis.

BNSF claims that there is a conceptual flaw in the analysis submitted by Complainants. They identify that flaw as a failure to take account of the
prescribed rate levels during the elapsed portion of the DCF period. Now when I refer to the elapsed portion or the historical period, I'm referring to the period January 1, 1994 until the date of reopening, which was in May of 2003.

The supposed flaw, I want to point out, is not in the revenues that the Complainants used in the DCF analysis. In fact, both Complainants and BNSF assumed the same revenues in the analysis for purposes of determining whether stand alone revenues exceed stand alone costs. For the traffic moving from McKinley to Cholia and to the Coronado station.

The supposed flaw doesn't relate then to the revenues, nor does it relate to the costs i.e., not to the inputs of the DCF analysis. Rather, it relates to the application of the percentage reduction methodology through which the Board in its prescription in 1998 and since has determined how the excess revenues for the stand alone system are spread over the stand alone traffic group to generate the maximum rates. That is where the supposed flaw occurs.
BN says that because the new maximum rate levels under the Board's percent reduction methodology for the elapsed period are higher than the maximum rates prescribed by the Board in 1998, an adjustment must be made. That adjustment is made by first calculating the present value difference between the new maximum rate levels and the old maximum rate levels for the tons that move during the elapsed period. In other words, the first step is to calculate the value of the additional monies BNSF would have earned from the traffic moving during the elapsed period if the Board had prescribed the rates that are generated by the DCF analyses now in evidence.

In short, it is a calculation of reparations. The next step in BNSF's adjustment is to calculate the additional amount that should be added to prescribed rate levels for traffic moving from May 2003 through the future period ending with closure of the McKinley mine.

This adjustment, we believe, must be rejected by the Board for multiple reasons. But
before I address those, I want to make one point at
the outset and that is that we believe the only reason
that the new maximum rates are higher than the
original maximum rates is because the Board improperly
limited the evidence with regard to the impacts of
changed circumstances on the stand alone cost
analysis. We've made that point before. I just make
it for the record now. We believe if all relevant
change circumstances had been considered, the new
maximum rates would be below the old maximum rates.

Turning to the reasons why this adjustment
must be rejected, we first start with the fact that it
is well established law this agency may not order
payment of amounts beyond the original prescribed
rates for traffic that moved before May 2003. In the
Arizona Grocery case, the Supreme Court ruled that the
ICC could not retroactively change a prescribed rate.
As you know, the fact pattern there was the ICC had
prescribed a rate level, a few years later, it
prescribed a lower maximum rate level and it awarded
reparations on the difference between the higher
original prescription and the subsequent lower
prescription. And the Supreme Court ruled, and I quote, that the ICC did not have the power to "retroactively repeal its own enactment as to the reasonableness of the rate it prescribed."

Now, in the Arizona Grocery decision, the Supreme Court actually addressed specifically the claim that BNSF presents here. It said, "If that body," then the ICC, "sets too low a rate, the carrier has no redress saving new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was too low."

That is precisely what BN is attempting to do here.

We believe that not only does Arizona Grocery directly preclude the adjustment that BN seeks to make, the Board's own decision reopening the case also does so. In that decision, the Board said that the lawfulness of the rates approved and prescribed in our 1998 reopening cannot be challenged with respect to traffic that moved from 1997 until now. There is no question that that is what the BN's adjustment is focused on. I quote from BN's brief. "APS
Pacificorp's payment of the originally prescribed rates in the elapsed years of the DCF period resulted in a revenue shortfall for those elapsed years." That is what they're seeking to recover through this adjustment.

Now, they claim that this is not a recovery of reparations, and the reason why, which they explain at page 8 of their brief, is that if this were a reparations award, it would be an amount certain, including interest, that would be paid to them. But what they propose is different. The amount, which depends on the actual amount of traffic that moves from the date of reopening forward, may be different from the amount of reparations. And this they say is a sufficient distinction to make Arizona Grocery inapplicable.

We have three responses to that argument. First, this adjustment is a prohibited recovery of reparations for past shipments. It is precluded regardless of its precision. There cannot again be any question about the fact that these monies are for the historic shipments.
Second, this reopening is designed to achieve the most accurate calculation of future tonnage possible within the confines of the limited areas the Board has allowed to be addressed in evidence.

Third, the payment of reparations by check now would be less expensive, in all likelihood, to Complainants than recovery over future time periods as proposed by BNSF, and that is because of the interest rates that would apply to the reparations amount when contrasted to the impact of the cost of capital discount rates that are utilized in the DCF formula in determining how much needs to be recovered in future years to make up for the shortfall they posit in the elapsed period. In other words, we think BN's reparations recovery will be greater under this adjustment than they would be if you just forced us to write a check today.

BN's adjustment also violates contractual arrangements between the parties. In January of 1999, Complainants and BNSF entered into a memorandum of understanding concerning rail transportation to
Cholla. Pursuant to that MOU, they subsequently entered into a rail transportation contract. Each of those documents has been submitted into evidence and we have provided each Board member a copy of those two documents for convenient reference at this time.

And if I could ask you to look under tab A where we have -- I should add for the Chairman Nober and Vice-chairman Mulvey, the BN was aware that we were presenting these in this fashion and we're dealing with highly confidential documents. I can't read them, so what we've done is to box the language we're referring to in connection with a specific point and direct your attention to it.

At page 4 of the MOU with the red tab designated with an "A" and at page 5 of the contract at the red tab where we have designated with an "A," we believe it is very clear these documents resolve all issues relating to the rates that would be paid for the transportation rendered under the contract from January 1, 1999 through December 31st, 2002, a four-year period. And we believe those pieces of these documents make that very clear.
As contract rates, the Board has no jurisdiction over those rates that were paid on that traffic that moved during that period. And yet, having agreed to accept those monies for that traffic, the BN is here today asking for more money for that very same traffic in the form of its adjustment that it proposes be added to the prescribed rates for the future.

A separate point: BN waived its right to seek any reopening of this case before 2003. In the first place, after the Board's decision on reopening, BN chose not to file a judicial appeal. They then agreed to enter into this contract that we have directed your attention to. We have marked with the blue tab at page 4 of the MOU the language box where we put the letter "B", and we believe that language confirms that the BN waived any right to seek reopening prior to 2003.

And here is a very important point. BN made that waiver despite the fact that it very clearly understood two things. First, the effect of errors in the traffic volumes and the out years of the DCF would
cause lower prescribed rates in the early years of the DCF. They understood that perfectly well. They explained that in their petition to reopen in 1997. And they further explained that if the Board subsequently discovered this error, that they wouldn't be able to remedy it, and I quote from their petition to reopen: "Even if the Board at some future time sought to reopen this proceeding to correct an actual shortfall in the SARS predicted traffic volumes, it likely would have no ability to remedy its error." Arizona Grocery.

Now, BN has actually received in the real word revenues greater than the new higher maximum reasonable rates under Complainant's percent reduction methodology. They say on their brief, "You must disregard that fact." They say, "You must disregard it because that's real world." The reason they receive greater revenues is that the traffic moving to Coronado did not actually pay the rates that were set by the Board. Instead, they paid higher contract rates. They were not issue traffic in the case. But if you look at the stand alone traffic group as a
whole, they earned revenues greater than the revenues that result from these new maximum rates for the stand alone traffic group. They say, "Can't consider that. That's real world." And yet, they entire premise for their adjustment is in the real world they earn less than the maximum rates that are generated by the percent reduction methodology. They meet themselves coming around the corner on that argument.

In summary on this issue, Arizona Grocery and the Board's May 2003 decision directly preclude BN's proposed adjustment. Second, the adjustment would violate the parties' contract. Third, BN knew before entering the contracts that it could not recover in a subsequent reopening if it turned out that the prescribed rates were set too low. Notwithstanding that knowledge, it waived the right to seek reopening prior to January of 2003. In the real world, BN's revenues from the stand alone railroad traffic have exceeded the new maximum rates for the historic period.

I'd now like to turn to another issue, which is the minimum volume obligation that BN
purports to establish in its common carrier or pricing
authority 90069. That is a minimum volume commitment
of 3.5 million tons per year from the McKinley mine to
Cholia, and that's important. It's not all deliveries
to Cholia. It's from the McKinley mine to Cholia.
They say "must be 3.5 million tons a year." If it is
not, they purport to impose a penalty equal to 100
percent of the rate for every shortfall ton. This
volume obligation we submit is clearly improper.

In the first place, in the original case
the rates challenged by the Complainants were subject
to an annual volume of 1.5 million tons. That was the
common carrier tariff that was challenged, 1.5 million
ton annual volume. The Board did not in its '97 or
'98 decisions direct any change in that volume. For
that reason, this 3.5 million that BN purports to have
imposed today is in violation of the Board's
decisions. In addition, the change to the annual
volume is beyond the limited scope of this reopening.
It has not been justified by any evidence that has
been submitted by BN in this case. Even though 2003
volumes were less than 3.5 million tons, if you look
at BN's DCF analysis, you won't see any revenue in there for shortfall tons. So apparently they did not even consider it sufficiently realistic that they even took that into account.

Even if a change in the minimum volume were not improper, the tonnage level they set, 3.5 million tons from McKinley is clearly unreasonable given the facts relating to this traffic movement to Cholia. That's particularly true as it applies to 2003 volumes. We've explained in length in the evidence the circumstances affecting 2003.

Finally, it has to be improper to charge 100 percent of the rate if there is to be any sort of penalty for not meeting a reasonable annual volume commitment. Charging 100 percent of the rate is clearly unreasonable and penal, and should not be permitted.

I'd like to turn finally to two relatively minor issues in the scheme of things, and they relate first to non-McKinley tons delivered to the Cholla facility prior to 2007. We have included such tons because we believe they are proper under the Board's
October decision and May decision on reopening. BN has taken the position that the only tons moving from other origins are tons that are moved after closure of the McKinley mine.

Now the Board in its October 2003 decision said that the decline in traffic moving over the SAR from the McKinley mine can be made up for by including in the SAR replacement coal from the Lee Ranch mine or even other origins. So a decline to us means a gradual reduction and that it does not require that you put off consideration of other tons until the mine actually closes.

The October decision also says that both parties may update the record regarding any forecasts used in the original SAC analysis that have since proved to be inaccurate. We have explained in the evidence that one of the reasons additional coal was used is that there were increases in electricity demand beyond that forecast in 1997 and 1998 by the parties or the Board. In short, we think it’s proper to include these non-McKinley tons that moved prior to 1997 in the stand alone cost analysis as crossover
traffic and to consider the revenues associated with those tons.

On non-McKinley tons after 2007, BN raises two arguments. First, it challenges APS Pacificorp's projected coal burns on the grounds that they would exceed an 85 percent capacity factor. We have explained to you in evidence that their calculations are incorrect. When you use the correct heat rates, the capacity factors do not exceed 85 percent at the tonnage levels we have posited. But even if they did, achieving those capacity factors would not be unprecedented or even unusual for Cholia or for other plants. The Complainant's projections in this regard are numbers developed in the ordinary course of business for purposes not related to this case and should clearly be accepted.

BN also challenges certain of Salt River's coal volume projections. Salt River is not a party. They provided information pursuant to requests for discovery subpoenas served upon them and BN took issue with some of their projections as being speculative. There is no evidence to support BN's position in that
regard. In fact, Salt River's fuels department manager testified that the projections were not speculative, but are its best attempt to model its future needs.

I'd like to make another comment with regard to the idea of lifting the rate prescription. BN is the moving party in this case. It seeks the relief. As such, it has the burden of proving that that is appropriate. Now, the Board in its decision on reopening said that because the Complainants were likely to have better access to information about how the Complainants might resource their coal requirements in the face of dwindling supplies from McKinley, that we should go first and close, and so we did. But, 49 C.F.R. 1153 and 1154 clearly impose the burden of proof on BN and that does not change because of the manner in which the Board directed the parties to proceed with their evidence.

I will stop with my prepared remarks at this point and be happy to respond to any questions from the Board.