MR. SIPE: Thank you, Chairman Nober, Vice-chairman Mulvey. My name is Sam Sipe. I'm outside counsel for BNSF in this case.

It's a really interesting set of issues I think we've already gotten into and I will try to speak to what I understand to be the concerns of both of you as reflected in the questions.

I think this case does raise the key issue of first impressions. And that is, how does the Board implement the DCF analysis when on reopening a substantial portion of the DCF period has elapsed and the Board is Board is determining a maximum reasonable rate for the future. And that's what the Board is doing here. The Board said in its May 2003 decision, "We're vacating the prescriptive effect, the legislative effect of our rate prescription going forward." And that's what BNSF is focusing on, the rate for the future. Do we have to take account of what's happened up to this point?

We think we do because the Board said, "Go back and resubmit the evidence changing only a few things," and both parties understood that to be, "Do the DCF from 1994 through 2013." So, from the beginning of your reopening we had to deal with a 20-year DCF period, a portion of which has elapsed. And that's what gives rise to the important issue here.

Now, with all due respect, I don't think it should be that hard to decide if you adhere to the logic of your own DCF analysis and principles, which were not around when the Supreme Court decided Arizona Grocery.

Could I have slide 1?

I'm not going to be wedded to a PowerPoint presentation, but I've got a few that I think will help focus on what we're talking about here.

On reopening in this case, both parties submitted evidence that showed that the overage, that is the amount by which the present value of revenues exceeded costs, is lower on reopening in light of the impending shutdown of McKinley than it was back when the Board decided the case in '97-'98. You'll see the original STB decision had a present value overage of 69.96 million. On reopening, APS calculated that that amount was reduced by about 38 percent to 42.9

million. BNSF saw the overage reduced by 27.3 million and the difference between those numbers reflects our difference on the calculation technical issues. The point though is both parties said there's less of a present value overage, so to bring the revenues in line with SAC over the 20-year DCF you'd expect the rates would come down. Well, what does APS propose in this case?

Slide 2.

This not a very exciting slide, but it's simple and it makes the point, I think, that on reopening APS, which sponsors that blue line, is saying, "Hey, the rates should be lower going forward than they were under the Board's original prescription." That's the testimony they've sponsored in this case. "Lower rates, guys." How could that be given that they themselves concluded that the overage is now smaller than it was back in '98?

Well, the answer is that they ignore what happened in the elapsed portion of the DCF period for purposes of their calculations.

Next slide.

Here, we see what you get if you take into account the numbers that APS doesn't show in its evidence. You show that under the revised reopening evidence the rate would be hire than what the Board prescribed. And in effect, what they're saying is, "For purposes of this case, we can't take any account of the difference between those two lines," the black line being the Board's original rate prescription and the blue line being what APS is now sponsoring. We just have to ignore that. For us to try to take account of it at all means we are claiming reparations, means we're asking for a payment for traffic that moved in the past. But that's not what we're doing. We're solving for an outcome under a 20-year analysis that has to take account of how the total dollars available cover the costs over the life of the stand alone railroad.

Next slide.

And what you see is under APS's approach, they don't cover the full costs. They leave a shortfall between stand alone costs and stand alone revenue, whereas both the Board's original decision and our decision on reopening achieve the equilibrium point after a rate prescription is imposed that has revenues that cover costs over the 20-year DCF period.

Now, the Arizona Grocery issue is one I think where they are not relying on an announced and applied application of Arizona Grocery to this set of facts. You read the case and you don't need to be a lawyer to understand it was not this set of facts. The court was not trying to figure out what's the right rate for the future in Arizona Gross Rate. In fact, the Court in Arizona Gross Rate said, "You can take account of the future. You can set rates for the future. What you can't do is order reparations." Well, we're not asking for reparations. And what you can't do is set a different rate for the past. We're not asking to set a different rate for the past. APS paid and BNSF received the rate that was prescribed in the past.

And as for the contract, we adhered to all the terms of the contract and the notion that we somehow waived our right to pursue reopening because we entered into the contract is frankly, I just, I really don't get it. I mean, consider our situation. We went back to the Board in 1998 to reopen the 1997 decision. And if you read that '98 decision, you get a sense that the Board was none to happy that BNSF came back and raised the same issue only a year within which the case had been decided.

Now Mr. Loftus is suggesting, "Well, maybe you guys should have, you know, just kept going back, going back, going back." No. No, we realized that there was no point in going back until we could adduce the kind of evidence the Board would find probative that McKinley was going to shut down. And we entered into the contract and we lived under the contract and adhered to its terms. Frankly, I don't think the jurisdictional issue is all that important for the Board as to whether you have jurisdiction to consider it or not, because I think it's simply not relevant to what we're talking about here. It's another version of the Arizona Grocery argument. They're saying we're trying to change the contract rates. Well, we're not. We're trying to set rates for a period going forward.

What we're talking about in this case is a regime of rate making that is guided by the Board's stand alone cost DCF methodology which was introduced in 1995, years after Arizona Grocery. And the core principle of that SAC methodology, which I didn't hear Mr. Loftus say word one about, is the concept of netting over years, and we'll have the next slide please, which is directly applicable to this case. Netting is essential, the Board said, in this case because without it, the railroad would have no means to recover the revenue shortfalls that would be incurred in certain periods. The netting procedure balances out overpayments and shortfalls so that the sum of the present value of all overpayments and shortfalls for the 20-year DCF period equals zero.

What we are saying here is that there is a shortfall in cost recovery for that early portion of the DCF period that we saw in the third slide. And the reason there's a shortfall in cost recovery is that BNSF received the prescribed rates which we don't quarrel about the fact that we received them in the past; that's all we were entitled to, but the reality is under the DCF analysis the shortfall has to be made up somewhere and we can't make up the shortfall in the past. We have to make it up in the future. And the Board's staff regularly performs this kind of netting analysis when it executes its DCF runs and if you don't take account of this shortfall in cost recovery from the elapsed period of the DCF, then you're going to end up back on slide 4 with this -- could you go back to 4 -- with the middle column, the discrepancy I was talking about.

Let me speak briefly about some of the other technical issues and I'm sure I'll come back to the subject I've just been addressing in response to your questions. So I've left anything out or been less than clear, I hope I'll have an opportunity to rectify it.

If you go to the next slide, you'll see that this slide assumes that the Board recognizes the appropriateness of the capital allocation method, as the Board has called it, and is left to decide between the parties two sets of calculations. And Chairman Nober, I think I heard you say at the beginning that the parties were just pennies apart on the individual calculation issues, but in fact, if you are in the universe of having made this capital allocation adjustment, what this slide shows you is that we're more than just pennies apart on the technical issues, because the technical issues drive the full difference between the $5.40 and the $7.15.

All these numbers that I'm going to be talking about here are derived from a document we've referred to as modified TDC6, which we submitted into the record following the submission of final briefs. APS objected to the submission of TD6 into the record saying that it constituted new evidence. We don't think it does constitute new evidence. It shows calculations derived from numbers that were in the record. But anyhow, that's what I'm talking about now. I'm talking about the range of difference between the parties on the technical calculation issues and the factors that drive them.

There are actually a total of about 12 or 13 individual technical disputes, but the majority of them are attributable to three major differences, which I'll just speak to very briefly.

Add the next column.

One of those disputes is how you allocate revenues on the crossover non-McKinley traffic that comes onto the stand alone railroad in the later years. We agreed with APS for purposes of this case to use the MPS revenue allocation procedure, however, we adjusted the credits for originating and terminating that crossover traffic consistent with the Board's Ex Parte 270 sub (4) adjustments. And if you do that and if you made this change alone, accepting the APS calculations in the world with the capital allocation adjustment and changed only the crossover traffic, this is the result you get, $5.71.

Add the next column, please.

Now another issue which you heard Mr. Loftus speak to is the issue of whether the Board should take account of McKinley tons pre-2007. We think you shouldn't because the Board's 2003 decision reopening this case talked about tonnage that would replace McKinley tonnage once McKinley shuts down and nobody has said that they're going to stop taking McKinley tonnage until 2007 at the earliest. If you only made that adjustment and no other to APS evidence on reopening in the capital allocation world, this shows what the resulting rate would be.

Add the next column, please.

A third issue, technical issue on which we have differences with APS is the use of the proper inflation index which Vice-chairman Mulvey asked Mr. Loftus about. And what this bar shows you here is if you changed only the inflation index from that advocated by APS to that advocated by BNSF, in the capital allocation world you'd be at $6.18. The difference in the inflation indices is that APS sponsors an index calculated over a 13-year period. We used a six-year period because that's more consistent with the time period the Board has used to calculate inflation in other SAC cases. Moreover, and this is the important thing, the 13-year period includes a one-time very significant spike in inflation in the early 1990s and we don't believe that the results in this case should now be driven by something anomalous that occurred over 10 years ago. So we advocate the six-year inflation period.

Now, if you took into account all three of BNSF's adjustments on these disputed technical issues in the world of the capital allocation adjustment, there's where we would be. And what this slide in its current form is really intended to show you is that there is a substantial range of potential outcomes with the capital allocation adjustment taken into account. The remainder of the difference between $6.86 and $7.15 is attributable to the other disputed technical issues which are reflected in the record and I'm not going to take the Board's time by talking about those here because they are relatively modest.

Let me just say before I conclude, I'm not sure how much of my time I've used, a couple of words about this minimum annual volume provision.

UNIDENTIFIED SPEAKER: I think you have six minutes.

MR. SIPE: I have six minutes? Well, you won't mind if I don't take it all. And I don't even talk as fast as Mr. Weicher so we've probably said about the same number of words.

Mr. Loftus said the minimum annual volume provision is beyond the scope of this reopening provision. And this may be a rare instance for purposes of this case I agree with him. We didn't raise this issue. There's no evidence in the record of this reopening case regarding the minimum annual volume provision. I don't think the Board can fairly decide the issue based on the evidence of record in this case. We would respectfully ask you to ignore it here and if APS has a concern about it, they can bring it to the Board's attention in a context where we have an appropriate opportunity to address it on the record.

And with that, I will stop and try to respond along with Mr. Weicher to any questions you might have.