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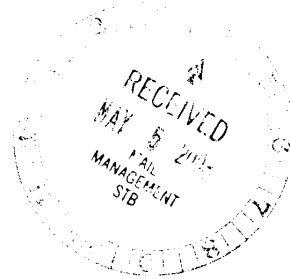
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207734

May 5, 2003



*via Hand Delivery*

Hon. Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423

ENTERED  
Office of Proceedings

MAY 5 2003

Part of  
Public Record

Re: *PPL Montana, LLC v. The Burlington Northern and Santa  
Fe Railway Company*, Docket No. NOR 42054

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and 10  
copies of BNSF's Reply to PPL Montana's Second Petition for Reconsideration.

Please date stamp the extra copy of this cover letter and return it to the  
messenger who delivered this filing.

Sincerely,

Cynthia L. Quarterman

Enclosures

cc: Counsel for Complainant

- 1 -

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

BRUSSELS

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**PPL MONTANA, LLC**

**Complainant,**

**v.**

**THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY,**

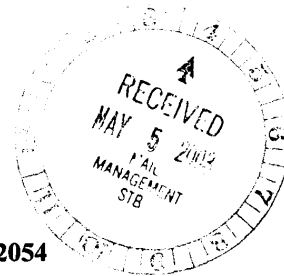
**Defendant.**

**Docket No. 42054**

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Office of Proceedings

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**BNSF'S REPLY TO PPL MONTANA'S SECOND PETITION FOR  
RECONSIDERATION**

Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies in opposition to the Petition of PPL Montana, LLC ("PPL") for Reconsideration of Decision Served March 24, 2003 ("Second Petition").

PPL's Second Petition is an inappropriate expansion of this litigation and a burden that should never have been imposed on the Board or BNSF. PPL claims that it is protecting its appellate options by filing the Second Petition, and it cites two FERC cases as the source of its professed concern that failure to file a petition for reconsideration may result in waiving its appellate rights. Second Petition at 4. But the statute governing appeals from FERC decisions *specifically* requires that petitions for reconsideration be filed before appeals are taken.<sup>1</sup> In addition to participating in electricity markets regulated by FERC, PPL has been a frequent litigant before the Board, so it certainly must be aware that the statute governing appeals from

<sup>1</sup> 16 U.S.C. § 825l(b). The two FERC cases cited by PPL make this abundantly clear. *Kelley ex rel. Michigan Dept. of Natural Resources v. FERC*, 96 F.3d 1482, 1487 (D.C. Cir. 1996); *Town of Norwood, Mass. v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990).

Board decisions does not contain the FERC's petition-for-rehearing requirement. There is no excuse for PPL's confusion regarding the procedures for seeking appellate review of FERC and STB decisions. PPL's Second Petition should not have been brought.

PPL's Second Petition is also premised on a gross mischaracterization of the Board's March 24, 2003 decision in this case. PPL claims that the Board, in its March 24, 2003 decision, abandoned its original rationale for dismissing PPL's complaint and "supports its result with new contentions that have their own defects." Second Petition at 5. According to PPL, the Board was forced to come up with a new rationale for its decision after it realized, in light of PPL's first petition for reconsideration, that the August 20, 2002 decision was improperly based on two Board decisions issued after the record closed in this case. Second Petition at 2.<sup>2</sup> This fanciful characterization of the Board's reasoning ignores clear language in both of the Board decisions at issue.

In its original August 20, 2002 decision, the Board found that PPL's SAC evidence was flawed because PPL relied on a cross-subsidy from non-issue traffic to cover the cost of facilities needed by the issue traffic. August 20 Decision, slip op. at 9. The prohibition on cross-subsidy, which was the foundation for the Board's decision, was not based on the Board decisions issued after the close of the record in this proceeding but rather on the principles of Constrained Market Pricing ("CMP") set out in the *Guidelines*, issued in 1985.<sup>3</sup> As the Board stated, "PPL's contention that non-issue traffic may be used to cross-subsidize the complaining shipper's rate is

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<sup>2</sup> The two decisions that the Board was supposed to have relied improperly upon were a decision in this docket issued on November 27, 2001 and a decision in STB Docket No. 42058, *Arizona Elec. Power Coop., Inc. v. The Burlington Northern and Santa Fe Ry. Co. and Union Pac. R.R. Co.*, served December 31, 2001.

<sup>3</sup> *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985), *aff'd*, *Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987) ("*Guidelines*").

inconsistent with CMP principles.” August 20 Decision, slip op. at 8. The Board specifically stated that “both cross-subsidization by and cross-subsidization of the captive issue traffic are proscribed by *Guidelines*.” *Id.* at 9.

Nothing in the Board’s March 24, 2003 decision even remotely suggests that it intended to abandon its reliance on a cross-subsidy rationale for rejecting PPL’s claims. To the contrary, the Board expressly reiterated that the “cross-subsidy analysis we applied in our 2002 *Decision* is not only consistent with, but also compelled by, *Guidelines*.” March 24 Decision, slip op. at 5. The Board reaffirmed its August 20, 2002 conclusion that “[i]t would turn the CMP principle against cross-subsidization on its head to protect a captive shipper from subsidizing other traffic, while at the same time allowing that shipper’s rates to be subsidized by other traffic.” *Id.* at 6. There is no basis whatsoever for PPL’s claim that the Board in its March 24, 2003 decision retreated from its original rationale for dismissing PPL’s complaint.

PPL also mischaracterizes the Board’s discussion in the March 24, 2003 decision of a complainant’s incentives to maximize revenues and minimize costs in presenting SAC evidence. PPL claims that the Board erroneously relied on these incentives as a “fallback” rationale for applying a cross-subsidy test in this case. Second Petition at 6. But the Board’s discussion of a complainant’s incentives had nothing to do with its conclusion that PPL had improperly relied on a cross-subsidy in its SAC evidence. Instead, the Board referred to these incentives to explain why it declined to give PPL another opportunity to present SAC evidence. PPL argued in its first petition for reconsideration that it should be given a second chance to present SAC evidence because it had accepted certain BNSF evidence on traffic flows over the stand-alone railroad

that, in retrospect, PPL wished that it had rejected.<sup>4</sup> The Board rejected PPL's request for yet another opportunity to present SAC evidence, noting correctly that PPL had every incentive to examine BNSF's traffic evidence closely the first time it was presented, and in fact, PPL did examine the evidence and knowingly accepted some of that evidence while rejecting other portions of it. March 24 Decision, slip op. at 8-9.

It is difficult to take issue with the Board's assertion that a complainant has the incentive to maximize revenues and minimize costs in presenting SAC evidence, since a SAC complainant can prevail only if it shows that SAC revenues exceed SAC costs. But PPL asserts that the Board is wrong and that the complainant in a SAC case does not have an incentive to maximize SAC revenues or minimize SAC costs but instead "not to engage in rate case overkill." Second Petition at 8.<sup>5</sup> According to PPL, complainants "frequently accept railroad evidence that is questionable or wrong" out of convenience or out of a desire to minimize litigation costs. *Id.* And when choices made out of convenience produce unfavorable results, PPL asserts that the complainant should have an opportunity to refile its SAC evidence. Otherwise, rate litigation would "become more onerous because captive shippers must try to guess what obstacles to relief they may face." *Id.* at 9.

It is unnecessary to consider PPL's implausible characterization of a complainant's incentives in a SAC case. Even if the Board accepted PPL's assertions, the relief PPL seeks -- open-ended opportunities to present SAC evidence -- is patently unreasonable and would produce an administrative nightmare. The Board has made it clear that the complainant in a

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<sup>4</sup> Petition of PPL Montana, LLC for Reconsideration, *PPL Montana, LLC v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 42054, at ii (filed Sept. 30, 2002).

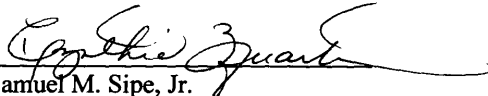
<sup>5</sup> For PPL to claim that its incentive in this case was to avoid "rate case overkill" is, if nothing else, bold. The SAC evidence presented by PPL in this proceeding was perhaps the most extreme and aggressive SAC presentation that the Board has ever seen.

SAC case must present its entire case-in-chief in its opening evidence and it may not change its SAC evidence on rebuttal.<sup>6</sup> This requirement is driven, in part, by the need for administrative finality. PPL asks to go even farther than submitting new evidence on rebuttal and seeks the opportunity to change its SAC assumptions *after a decision in the case*. As the Board noted in its March 24, 2003 decision, if complainants were allowed to modify their SAC assumptions after the record closed and the Board issued a decision, there would be no end to the litigation of a SAC case. March 24 Decision, slip op. at 11.

The Board should summarily deny PPL's Second Petition.

Respectfully submitted,

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May 5, 2003

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<sup>6</sup> *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, STB Ex Parte No. 347 (Sub-No. 3), slip op. at 5 (served Mar. 12, 2001) ("We remind parties that, in presenting evidence, the party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence."); *Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070, slip op. at 4 (served Mar. 25, 2003) ("Rebuttal may not be used in SAC cases as an opportunity to introduce new evidence that could and should have been submitted in the party's case-in-chief.").

**CERTIFICATE OF SERVICE**

I hereby certify that on May 5, 2003, a true and correct copy of the foregoing document  
was served by hand on:

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