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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

INTERMOUNTAIN POWER AGENCY)	
)	
Complainant,)	
)	
v.)	Docket No. 42127
)	
UNION PACIFIC RAILROAD COMPANY)	
)	
Defendant.)	
)	

COMPLAINANT'S PETITION TO SUPPLEMENT THE RECORD

- EXPEDITED CONSIDERATION REQUESTED -

Complainant Intermountain Power Agency ("IPA") hereby files this petition seeking leave to supplement the record in order to substantially simplify IPA's stand-alone railroad system. IPA further requests that the Board modify the procedural schedule to accommodate the filing of supplemental evidence by both parties. Board precedent supports the relief that IPA seeks insofar as it will ensure that this proceeding is resolved on the basis of an "adequate record" and in the most "fair and informed" manner possible.¹ IPA respectfully requests that the Board grant expedited consideration to this petition in light of the fact that the current procedural schedule contemplates the filing of rebuttal evidence on January 3, 2012. Although the changes that IPA intends to

¹ *Ariz. Elec. Power Coop., Inc. v. The Burlington N. & Santa Fe Ry. & Union Pac. R.R.*, STB Docket No. 42058, at 2 (STB served Nov. 19, 2003).

make will reduce the scope and complexity of IPA's stand-alone railroad, IPA will not be in a position, even if the Board were to grant leave in a highly expedited manner, to file evidence on the modified SARR system by January 3, 2012.

As the result of certain developments associated with the instant case and with the Board's recent decision in the *AEPCO* case,² IPA seeks leave to reduce the scope of its stand-alone railroad ("SARR") by eliminating the Provo to Price, Utah rail line (and the associated Pleasant Valley Branch), representing more than a third of the SARR system that IPA had included in its August 10, 2011 opening evidence. This change will eliminate a number of issues in dispute between the parties, and will more accurately tailor the scope of the stand-alone system to the Union Pacific Railroad Company ("UP") rate for service from Provo to the IPA plant that will apply to IPA's existing and contemplated coal supply arrangements. IPA may make further adjustments to its stand-alone system as well.

In the absence of the relief IPA seeks through this petition, IPA may need to file a new complaint (and to serve new discovery) in order to maintain its challenge to UP's bottleneck rate – an alternative that would entail avoidable expenditures of each party's resources and would unnecessarily delay the resolution of this case. Accordingly, the approach that IPA recommends represents the most efficient manner of completing the evidentiary record and obtaining a Board determination on the merits of the subject rate challenge.

² *Ariz. Elec. Power Coop., Inc. v. BNSF Ry. & Union Pac. R.R.*, STB Docket No. 42113 (STB served Nov. 22, 2011) ("*AEPCO*").

BACKGROUND

IPA filed its Complaint on December 22, 2010, seeking the prescription of maximum reasonable rates for the transportation of coal in unit train service from one Utah coal loadout (the Savage Coal Terminal), one Utah mine (the Skyline Mine), and one point of interchange with the Utah Railway Company (“URC”) (Provo, Utah) to IPA’s electric generating facility, the Intermountain Generating Station (“IGS”) near Lynndyl, Utah. URC provides upstream service on the interline movements with UP pursuant to a long-term rail transportation contract with IPA.

IPA filed opening evidence on August 10, 2011. UP filed reply evidence on November 10, 2011. The current schedule for this proceeding contemplates that IPA will file rebuttal evidence on January 3, 2012. *See Intermountain Power Agency v. Union Pac. R.R.*, STB Docket No. 42127, at 1 (STB served July 6, 2011) (“*July 6 Decision*”).

ARGUMENT

Several different factors prompt IPA to file this petition and warrant a decision granting the relief that IPA seeks. They include: (i) UP’s unanticipated claim that IPA is precluded from challenging UP’s single-line rates and instead only should be permitted to challenge UP’s rate from Provo to IGS; (ii) IPA’s conclusion that its future electric generating interests will be best served by limiting its challenge to the Provo to IGS rate rather than also seeking the prescription of a single-line rate UP rate from

Savage and from Skyline;³ (iii) certain DCF-related aspects of the Board's November 22, 2011 decision in the *AEPCO* case; and (iv) the impact of a linking error in IPA's opening evidence regarding the calculation of ATC divisions on cross-over traffic.⁴ In the aggregate, these factors strongly counsel in favor of a modification in IPA's approach to limit its challenge to the one UP bottleneck rate under which IPA will move its coal traffic in the foreseeable future and thus that is principally in dispute.

The permissible scope of SAC rebuttal evidence is an issue that the Board has addressed in a number of different cases on the basis of a variety of different circumstances. The current state of the Board's jurisprudence on the matter is that substantial modification of a stand-alone system is permitted only where the complaining shipper first requests permission from the Board to supplement the record. The Board's precedent further supports the notion that when a shipper is permitted to modify the scope of its SARR after the filing of reply evidence, the Board likewise will permit the defendant carrier to file new responsive evidence and will permit the shipper to file rebuttal to that response, as well.

When filing rebuttal evidence as to issues that the defendant carrier has challenged, the shipper has three basic options. The shipper may "demonstrate that its

³ The Board will recall that ongoing developments regarding IPA's specific plans for future coal purchases led to the extension of the original due date for opening evidence in this case. *See July 6 Decision* at 1.

⁴ In its reply evidence regarding cross-over traffic divisions, UP correctly observed that when IPA attempted to calculate the ratio of the IRR's variable and fixed costs to the total variable and fixed costs for each movement, "IPA inadvertently excluded IRR's variable costs from the denominator." *See UP Reply* at III.A-24. The effect of IPA's error was to overstate the share of cross-over movement revenues available to the SARR.

opening evidence was feasible and supported, it may adopt the railroad's evidence, or in certain circumstances it may offer to refine its evidence to address issues raised by the railroad regarding its opening evidence." *Duke Energy Corp. v. Norfolk S. Ry.*, STB Docket No. 42069, at 14 (STB served Nov. 6, 2003). Significantly, however, "[w]here the railroad has identified flaws in the shipper's evidence *but has not provided evidence that can be used in the Board's SAC analysis*, or where the shipper shows that the railroad's reply evidence is itself unsupported, infeasible or unrealistic,[] the shipper may supply corrective evidence." *Id.* at 14-15 (emphasis added). The Board has cautioned in this regard that "a shipper is not free on rebuttal to significantly redesign its SARR or alter the core assumptions upon which its case-in-chief is based *without filing a separate petition to supplement the evidentiary record.*" *Id.* at 15 (emphasis added).⁵

Elsewhere, the Board has explained that it will consider three factors in evaluating a shipper's petition to supplement the record, including whether "the material sought to be introduced is central to its case, could not reasonably have been introduced earlier, and would materially influence the outcome of the case." *Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070, at 4 (STB served March 25, 2003). The facts of the instant matter warrant relief under this standard. The changes that IPA seeks to implement are central to the evaluation of UP's rates, and UP's position that the scope of

⁵ See also *Western Fuels Ass'n, Inc. & Basin Elec. Power Coop., Inc. v. BNSF Ry.*, STB Docket No. 42088, at 1 (STB served March 17, 2006) (instructing both parties to file supplemental evidence "so that the Board will have a full record upon which to analyze the traffic group and operating plan issues that have been raised in this case."); *AEP Tex. N. Co. v. The Burlington N. & Santa Fe Ry.*, STB Docket No. 41191 (Sub-No. 1), at 1-2 (STB served March 17, 2006) (same).

the Board's analysis should be limited to the UP bottleneck rate from Provo was not evident prior to the filing of opening evidence. In addition, the contemplated change in the stand-alone system would materially influence the outcome of the case.⁶

Historically, rail carriers have been disinclined to provide bottleneck rates where they also have the ability to provide origin-to-destination service. In this case, UP provided in response to IPA's requests both a common carrier bottleneck rate to IPA and also single line rates from Utah coal origins (Skyline and Savage). In its reply evidence, UP opposes IPA's effort to obtain the prescription of single-line UP rates, arguing that IPA's forecasts indicated that such rates would not be used during the lifetime of the stand-alone railroad and insisting that the Board limit its analysis to the reasonableness of the UP bottleneck rate. *See* UP Reply at I-12-18.

Significantly, UP's reply evidence did not include an analysis of the disputed rates based on the assumption that single-line rate relief would be unavailable (*i.e.*, evidence limiting the SARR to the western portion of the IRR system). Instead, UP filed reply evidence based on the assumption that IPA's system would continue to incur the costs necessary to serve coal origins from which UP argued that rate relief should not be permitted.⁷

⁶ As discussed below, the outcome of the *AEPCO* case likewise was not evident at the time IPA filed its opening evidence.

⁷ While UP assumed that IPA would continue to receive revenues for moving traffic over the eastern portion of its system, this approach does not optimize the SARR's contribution where issue traffic only moves from Provo to IGS.

Without conceding the merits of UP's argument regarding the supposed unavailability of single-line rate prescription, the mismatch between UP's legal claim and its reply evidence presents the type of situation that the Board previously had found to warrant the receipt of supplemental evidence. *See Duke/NS* at 15 (a railroad may not submit reply evidence that "presents a criticism without appropriate evidence that can be used in the Board's SAC analysis"). Stated differently, in order to properly evaluate the reasonableness of UP's bottleneck rate (in the absence of relief on the single-line rates), it would be appropriate to exclude the costly eastern elements of the SARR system that were dedicated principally to the task of providing upstream service that otherwise would be provided by the URC. The evidence of record presently does not permit that type of analysis. In light of IPA's decision to forego single-line rate relief, a modification of the stand-alone system is appropriate to provide the Board with evidence that is directly tailored to a challenge of UP's bottleneck rate.

The Board's recent *AEPCO* decision also impacts the proper resolution of the instant case. Specifically, IPA's stand-alone model relied upon the same cost-of-capital ("COC") arguments that the Board rejected in *AEPCO*. *See AEPCO* at 135-37; IPA Op. at III-G-3-11. Likewise, IPA utilized the same approach to calculating the terminal value of the SARR that the Board rejected in the *AEPCO* decision. *See AEPCO* at 140-42; IPA Op. at III-G-13-14.

The Board will recall that the *AEPCO* decision initially was scheduled to be released prior to the due date for opening evidence in this proceeding. Shortly before the anticipated issuance of that decision, however, the Board extended the *AEPCO* schedule

to consider evidence on the subject of proper variable cost calculations in the MMM calculation. *See Ariz. Elec. Power Coop., Inc. v. BNSF Ry. & Union Pac. R.R.*, STB Docket No. 42113, at 2 (STB served June 27, 2011). Accordingly, IPA lacked any insight into the Board's resolution of these DCF issues at the time it filed its opening evidence. With the benefit of the guidance from the Board in the November 2011 *AEPCO* decision, it is now evident that IPA's assumptions underlying the stand-alone system regarding cost of capital and terminal value also must be modified.

The Board has long recognized that its role in stand-alone cost cases is fundamentally different than that of a court. In particular, the Board has explained that it is "reluctant to deny or dismiss a rail rate challenge on procedural grounds or because the record is inadequate" and that "[t]he Board's role differs from that of a court, because the Board is not simply an adjudicator, as it is also charged with carrying out the national rail transportation policy." *Ariz. Elec. Power Coop., Inc. v. The Burlington N. & Santa Fe Ry. & Union Pac. R.R.*, STB Docket No. 42058, at 2 (STB served Nov. 19, 2003) (reopening the record for the submission of additional evidence and commenting that "[t]he Board strives to achieve an appropriate balance so that the adversarial process works in a manner that provides an *adequate record upon which the Board may make a fair and informed assessment* of the reasonableness of a challenged rate.") (emphasis added).

Under the present circumstances, IPA respectfully submits that the most fair and informed basis on which to evaluate UP's common carrier rates is to permit IPA to modify its stand-alone system in the manner described herein.

CONCLUSION

For the foregoing reasons, IPA respectfully requests that the Board issue an expedited decision: (1) rescinding the current January 3, 2012 due date for rebuttal evidence (and the February 15, 2012 due date for briefs); and (2) establishing the following schedule for the submission of three rounds of supplemental evidence:

Day 0	Date of service of the Board's decision granting this petition
Day 90	IPA's supplemental opening evidence due
Day 180	UP's supplemental reply evidence due
Day 255	IPA's supplemental rebuttal evidence due
Day 300	Simultaneous briefs due

Respectfully submitted,

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Dated: December 8, 2011

CERTIFICATE OF SERVICE

I hereby certify that this 8th day of December, 2011, I caused copies of the foregoing to be served upon counsel for Defendant Union Pacific Railroad Company via email and by first-class mail, postage prepaid at the following addresses:

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