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SERVICE DATE - LATE RELEASE MARCH 15, 2005

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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42058

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY¹
AND UNION PACIFIC RAILROAD COMPANY

Decided: March 15, 2005

The Board finds that the complainant has failed to show that the
challenged rates are unreasonably high. Accordingly, the
complaint is dismissed.

BY THE BOARD:

By complaint filed on December 29, 2000, Arizona Electric Power Cooperative, Inc. (AEPCO) challenges the reasonableness of the joint rates charged by The Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UP) (collectively, defendants) for transporting unit-train movements of coal from mines at North Tipple and Lee Ranch, NM (the New Mexico mines), to AEPCO's Apache power plant in Cochise, AZ. We have the authority to examine the reasonableness of the challenged rates.² However, as discussed below, we cannot complete a rate reasonableness analysis in this case because AEPCO, which chose to contest the reasonableness of the challenged rates using the Board's stand-alone cost (SAC) test, presented an incomplete SAC case and, even when afforded the opportunity to provide a more complete case, failed to do so. Thus, we are left with no

¹ Effective January 20, 2005, the name of this rail carrier was changed to "BNSF Railway Company." We will continue to use the current title for this proceeding despite the name change.

² See 49 U.S.C. 10701(d)(1), 10707 (Board rate review limited to situations where there is no effective transportation alternative and the rates produce revenues greater than 180% of the carrier's variable costs); AEPCO Reb. Narr. at I-20, n.14 (defendants concede that there is no effective transportation alternative); Def. Reb. Narr. at II-2, II-3 (defendants agree that at least some of the issue movements produce revenue-to-variable cost percentages greater than 180).

choice but to dismiss the complaint on the merits for failure to set forth necessary elements of the SAC case.

THE SAC TEST

The Board's general standards for judging the reasonableness of rail rates are set forth in Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985) (Guidelines), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987). Those guidelines adopt a set of pricing principles known as "constrained market pricing" (CMP). The main principles of CMP can be simply stated. A captive shipper should not be required to pay more than is necessary for the carrier involved to earn adequate revenues. Nor should it pay more than is necessary for efficient service. And a captive shipper should not bear the cost of any facilities or services from which it derives no benefit. Guidelines, 1 I.C.C.2d at 523-24.

These principles can be applied to test the reasonableness of a carrier's rates by one of two means. The complainant may use a "top-down" approach, which examines the existing operations of a defendant carrier to determine what that carrier needs to charge to earn adequate revenues (i.e., sufficient funds to cover its costs and provide a fair return on its investment) after eliminating any unnecessary costs that the complainant identifies in the defendant's existing operations. Or the complainant may use a "bottom-up" approach—the SAC test—which calculates what a different, entirely new and efficient hypothetical carrier would need to charge if it could freely enter the market. Under either approach the objective is the same: to identify those costs that should reasonably be borne by captive shippers and to determine what portion of those costs should be charged to the traffic at issue. Guidelines at 547-48.

Here, AEPCO chose to apply the SAC test, which is based on contestable market theory and seeks to determine the least cost at which a hypothetical, optimally efficient carrier could provide service to the complaining shipper's traffic and other traffic designated by that shipper to share in the use of the hypothetical carrier's facilities and services. To apply this test, the complainant hypothesizes a "stand-alone railroad" (SARR) that could serve the selected traffic group. Under the SAC constraint, the rates at issue cannot be higher than what the SARR would need to charge that traffic group to fully cover all of the costs (including a reasonable return on investment) that the SARR would need to incur to assemble and operate the hypothetical railroad.

By identifying the costs that would need to be incurred by an efficient replacement carrier, the SAC test ensures that the defendant carrier's rates will be disallowed only if the revenues that the defendant is earning from the selected traffic group exceed the amount needed to cover all of the forward-looking costs that an efficient provider of rail service would face. At the same time, it ensures that the complainant shipper is not required to pay for cross-subsidies or inefficiencies built into the defendant's existing operations.

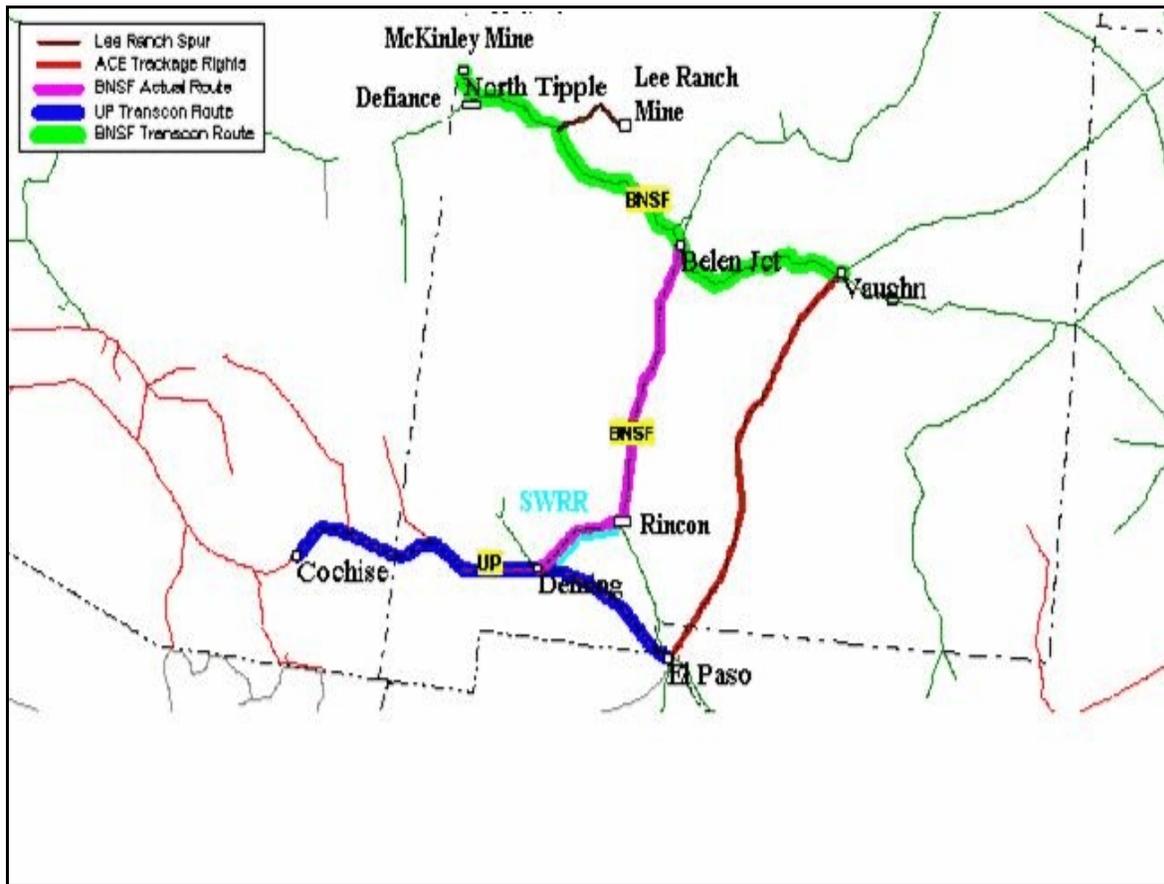
OVERVIEW

A SAC analysis examines all of the costs that the hypothetical carrier would need to incur to provide service now and into the future and compares those costs to the revenues generated by the selected traffic group. Here, however, as discussed more fully below, AEPCO has failed to identify and quantify the costs to assemble and operate an essential portion of the facilities needed to provide the transportation. Rather than develop the costs for these facilities, AEPCO assumed that the SARR could use the existing facilities of one of the two defendants, and for those facilities AEPCO included only a trackage rights fee to be paid to that defendant. But AEPCO has failed to show that the level of the fee it assumed the SARR would pay for the use of the facilities would be sufficient, in combination with other traffic sharing in the use of that line, to cover the full costs to supply those facilities. AEPCO thus has not satisfied the objective of the SAC test: to measure whether the defendant railroads are earning sufficient revenues to reproduce the facilities needed to provide the service at issue.

BACKGROUND

A. Proposed SARR

As shown on the following map, the AEPCO traffic to which the challenged rates apply is transported in joint-line service (1) from the New Mexico mines (near Defiance) over BNSF's main east-west line to Belen Junction, NM, then (2) from Belen Junction south to Rincon and Deming, NM, over lighter-density lines of BNSF (and, since 2001, of Southwestern Railroad Company, Inc. (SWRR) for the Rincon-to-Deming segment), and finally (3) from Deming to Cochise over UP's main east-west line.



The hypothetical railroad designed by AEPCO for this case, the Apache, Cochise and Eastern Railroad (ACE), would use a different routing, also shown on the preceding map. As designed by AEPCO, the ACE would construct longer east-west line segments—replicating BNSF’s line segment from Defiance to Vaughn, NM, and UP’s line segment from El Paso, TX, to Cochise—and would serve most (but not all) of the existing traffic on those line segments. But AEPCO would not have the ACE construct a connecting north-south line. Rather, AEPCO assumes that the ACE would use UP’s Vaughn-to-El Paso line under a trackage rights arrangement comparable to the one under which BNSF has the right to operate over that line. AEPCO’s presentation did not address what other traffic should be included in the SAC analysis for that line segment.

The assumption by AEPCO that the SARR would be able to avail itself of trackage rights that one defendant has over a co-defendant’s line is an issue of first impression in a SAC case. Because AEPCO takes the position that the Board has expressly invited and allowed such an approach in this case, we review the pertinent case history here.

B. Pertinent History

1. Expansion of Complaint

AEPCO's initial complaint in this case challenged only the defendants' joint rates from the New Mexico mines to its Apache power plant. In March 2001, AEPCO amended the complaint to include joint rates for movements from BNSF-served mines in the Powder River Basin (PRB) of Wyoming and Montana, as well as single-line rates for movements from UP-served mines in Colorado. This expansion of the complaint both delayed and significantly complicated this case. Because the three sets of challenged rates were for service from separate coal-producing areas hundreds of miles apart, moving over lines with different physical characteristics and traffic patterns and moving in different types of service (two in joint-line service and the other in single-line service), defendants filed a petition in February 2002 asking the Board to require AEPCO to make a separate SAC presentation for each of the three sets of challenged rates.

2. 2002 Decision

In response to that petition, the Board issued a decision, served August 20, 2002 (2002 Decision), to provide guidance on the permissible contours of a SAC presentation in the expanded case. The Board first explained that AEPCO's SAC presentation would need to include a separate sub-SARR for each of the three parts of the amended complaint. It then addressed the extent to which various types of cost- and revenue-sharing arrangements could be included in the SAC analysis.

With respect to the sub-SARR that the Board expected AEPCO might use to test the UP single-line rates for shipments from Colorado mines, the Board rejected AEPCO's suggestion that the traffic group for that sub-SARR need not be restricted to UP traffic. The Board explained that revenues from rates paid to BNSF could not be included in the SAC analysis for the Colorado sub-SARR because UP (the carrier whose single-line rate was challenged) did not enjoy those revenues. But the Board noted that, where UP had cost-sharing arrangements in place with another carrier, it would be entirely appropriate to assume that the SARR would have the benefit of the same opportunities under the same terms as UP enjoyed. Thus, the Colorado sub-SARR could reflect trackage rights receipts that UP enjoyed from trackage rights fees paid by BNSF to operate over UP lines replicated by that sub-SARR. Similarly, if a segment of line owned jointly by UP and BNSF were replicated by that sub-SARR, the sub-SARR could be assumed to enjoy the same benefits of sharing costs with BNSF as UP enjoyed. Finally, consistent with SAC precedent addressing trackage rights over the line of a non-defendant third-

party railroad,³ the Board explained that, for the portion of the Colorado single-line move where UP used trackage rights over a line of BNSF—a non-defendant carrier there—the sub-SARR could be assumed to step into UP’s shoes and operate over the BNSF line under the same trackage rights terms as UP used for that traffic. See 2002 Decision at 4, 6-7.

Turning to the other portions of the amended complaint, the Board stated that “[t]hese guiding principles—that a SARR may replicate the existing cost-sharing arrangements but may not hypothesize non-existent revenue or cost-sharing arrangements—apply with equal force to SARRs designed to test BNSF-UP joint rates from the PRB and New Mexico origins.” 2002 Decision at 7. Accordingly, the Board stated, the relevant sub-SARR “may be assumed to have the same cost-sharing arrangements as the defendant carriers have on each segment” Id.

3. Contraction of Complaint and Submission of SAC Evidence

After issuance of the 2002 Decision, but before any SAC evidence was filed, AEPCO reached a settlement with UP regarding both the single-line rates for shipments from the Colorado mines and the joint-line rates for shipments from the PRB mines, and AEPCO withdrew those portions of its amended complaint. The complaint was thus once again confined to the joint rates for shipments from the New Mexico mines.

In February 2003, AEPCO filed its opening evidence containing its case-in-chief, which, as explained above, included evidence on the costs of constructing and operating the two parallel east-west lines, but not the costs of constructing a connecting north-south line. Rather, AEPCO assumed that the ACE would operate over UP’s Vaughn-to-El Paso line under the same terms as contained in a trackage rights arrangement that BNSF has with UP. AEPCO further assumed that the ACE would pay a trackage rights fee of 3.2 mills per gross ton-mile (GTM), a figure derived from a trackage rights agreement negotiated between the predecessors of UP and BNSF. See Burlington Northern Inc. – Control and Merger – Santa Fe Pacific Corp., 10 I.C.C.2d 661, 761-75 (1995) (BN/SF Merger); AEPCO Open. Narr. at III-D-71.

In April 2003, UP filed a petition asking that the Board either dismiss the complaint or require AEPCO to submit new opening evidence. UP argued that AEPCO’s assumed use by ACE of BNSF’s trackage rights over UP’s Vaughn-to-El Paso line, without measuring the costs of reproducing that line, violated SAC principles. UP further argued that AEPCO’s opening

³ See, e.g., Bituminous Coal – Hiawatha, UT to Moapa, NV, 6 I.C.C.2d 1, 54 (1989) (Nevada Power); Wisconsin Power & Light Co. v. Union Pac. R.R., STB Docket No. 42051 (STB served Sept. 13, 2001) (WPL) at 60; Texas Mun. Power Agency v. Burlington N.&S.F. Ry., STB Docket No. 42056 (STB served Mar. 24, 2003) (TMPA) at 67 n.106; Duke Energy Corp. v. CSX Transp., Inc., STB Docket No. 42070 (STB served Feb. 4, 2004) (Duke/CSXT) at 15.

SAC evidence was so poorly defined as not to permit a meaningful reply. Accordingly, the defendants did not include any responsive SAC evidence in their reply submissions.

AEPCO's rebuttal evidence sought to address some of the deficiencies in its opening evidence. As pertinent here, AEPCO offered testimony directed at supporting its argument that the proposed 3.2-mills/GTM trackage rights fee would cover all costs needed to provide service pursuant to trackage rights.⁴

4. 2003 Decision

The Board addressed UP's April 2003 petition in a decision served on November 19, 2003 (2003 Decision). The Board clarified that the 2002 Decision had intended to address only the use of trackage rights or other cost-sharing arrangements with a non-defendant, third-party carrier, and not the use by a SARR of trackage rights arrangements between co-defendants where joint-line rates are challenged. 2003 Decision at 5-6. The Board further explained that "when applied to a joint rate, the SAC test could not serve its purpose if the SAC analysis failed to take into account the full costs of providing and maintaining the physical plant needed to serve the traffic—costs which the joint-rate defendants collectively must bear." Id. at 6. Thus, "using [a trackage rights arrangement] between joint-rate defendants to avoid a significant portion of the capital costs of providing service would defeat the SAC test." Id.

The Board further warned that in this case "there is good cause to believe that the existing [trackage rights] fee would not be adequate to reflect the full [stand-alone] costs of providing service over the Vaughn-to-El Paso line segment." Id. The Board pointed to UP testimony received in a prior Board case as to whether a similar trackage rights fee was low enough to maintain pre-merger competition over the 3,900 miles of track over which BNSF obtained trackage rights in the UP/SP Merger. Id., citing Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996) (UP/SP Merger). In that case UP had submitted testimony comparing a fee calculated using a capitalized earnings method (3.84 mills/GTM), a fee calculated using an annuity method (8.32 mills/GTM), and a fee using a replacement-cost-new-less-depreciation (RCNLD) method (9.05 mills/GTM). See UP/SP Merger, 1 S.T.B. at 415 & n.168.

Notwithstanding its concerns in this case, the Board was reluctant to dismiss AEPCO's complaint, because it recognized that AEPCO could have misinterpreted the 2002 Decision. Therefore, AEPCO was given the opportunity to submit new SAC evidence calculating the costs of building and operating the Vaughn-to-El Paso line. 2003 Decision at 6. Alternatively, AEPCO could continue to rely on its rebuttal evidence, but AEPCO was put on notice that it would need to defend the adequacy of whatever trackage rights fee it might choose to use as a surrogate measure of the stand-alone costs of the Vaughn-to-El Paso line. Id.

⁴ AEPCO Reb. Narr. at III-B-20; AEPCO Reb. Exh. III-B-3.

5. Supplemental Filings

In response to the 2003 Decision, AEPCO notified the Board and the defendants that it elected to rely on its prior trackage rights evidence, rather than present evidence on the costs of constructing and maintaining the Vaughn-to-El Paso line.

In their supplemental evidentiary filings, the defendants challenged AEPCO's reliance on the 3.2-mills/GTM usage fee, on the ground that it does not represent a reasonable measure of the stand-alone costs of the Vaughn-to-El Paso line. Defendants explained that AEPCO's attempt to support the trackage rights fee by comparing it to UP's system-average costs is inappropriate because those system averages reflect historical costs, rather than forward-looking stand-alone costs. Defendants compared the revenues that would be generated by the trackage rights fee from the coal traffic rerouted from the Belen Junction-to-Deming line with AEPCO's cost evidence for building the east/west portions of the ACE and observed that the proposed usage fee would generate only enough revenue from that traffic to build 12 miles of main line, whereas the existing Vaughn-to-El Paso segment is 226 miles in length.⁵

Defendants explained that they could not themselves develop full stand-alone costs for the Vaughn-to-El Paso line segment, because in SAC cases, the initial selection of the traffic group is within the sole purview of the complainant,⁶ and here AEPCO had not specified what additional traffic should share in the use (and hence costs) of the Vaughn-to-El Paso line. Thus, the defendants did not feel free to determine what other traffic to include in the SAC analysis or the extent of facilities needed to serve the selected traffic group.⁷

Defendants continued to assert that to assume the use of trackage rights over a defendant's own line to avoid computing the costs of reproducing that line is inconsistent with SAC theory. Nevertheless, to comply with the Board's directive in the 2003 Decision to provide responsive SAC evidence, defendants submitted, under protest, evidence which they stated assumed a trackage rights fee of 9.05 mills/GTM—the highest of the three figures mentioned in the evidence in the UP/SP Merger proceeding referenced by the Board in the 2003 Decision.⁸ In

⁵ Def. Supp. Reply Narr. at III-B-6.

⁶ See McCarty Farms, Inc. v. Burlington N. R.R., 4 I.C.C.2d 262, 271 (1988); Rate Guidelines—Non-Coal Proceedings, 1 S.T.B. 1004, 1054 (1996).

⁷ Def. Supp. Reply Narr. at I-5 to I-6.

⁸ Although the defendants stated that their evidence used a 9.05-mills/GTM figure (Def. Supp. Reply Narr. at I-6), their underlying spreadsheets reflect the 3.2-mills/GTM figure

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addition, defendants jointly filed a motion⁹ seeking dismissal of AEPCO's complaint on various grounds.¹⁰

In its supplemental submissions, AEPCO argued that the Board's 2003 Decision had ratified its use of trackage rights for the Vaughn-to-El Paso line. AEPCO defended its use of the 3.2-mills/GTM figure as the appropriate trackage rights fee, on the ground that the former Southern Pacific Transportation Company (SP) had voluntarily agreed to that figure and that the figure had been defended by UP in the UP/SP Merger proceeding. AEPCO argued that defendants' analysis of how much track could be built with the fee receipts ignored AEPCO's assumption that other traffic—which AEPCO still failed to specify—would use the line. But responding to the criticisms of the 3.2-mills/GTM figure, AEPCO also provided calculations using trackage rights fees of 8.32 mills/GTM and 9.05 mills/GTM.

On November 2, 2004, we held an oral argument in this proceeding. At that time, the parties further addressed the adequacy of the various trackage rights fee figures mentioned and the burden of proof of each of the parties on this issue.

DISCUSSION

Under 49 U.S.C. 11323(a)(6), the Board approves and authorizes trackage rights arrangements between rail carriers. But because such arrangements are usually voluntary in nature, the Board is generally not involved in the level of compensation, which is a usage-based fee that is ordinarily set by agreement between the railroads involved and generally is not intended to reflect the full costs of ownership. See, e.g., Brotherhood of Locomotive Engineers v. United States, 101 F.3d 718, 720 (D.C. Cir. 1996). (“In a trackage-rights agreement, one railroad allows another railroad to operate over a portion of its track. The railroad that owns the track—the landlord carrier—continues to use the track, but the railroad acquiring the rights—the tenant carrier—gains access to additional track without the expense of construction or outright purchase.”)

The possible use of trackage rights in a SAC case was first addressed in Potomac Electric Power Co. v. Conrail, 367 I.C.C. 532 (1983) (PEPCO), before the Guidelines had been finalized.

⁸(...continued)
originally used by AEPCO.

⁹ Def. Motion to Dismiss on Reopening, filed Jan. 27, 2004.

¹⁰ We need not rule on the motion to dismiss because we are deciding this case on the merits. Indeed, at oral argument, defendants' counsel agreed that it would be appropriate to rule on the merits at this point. Oral Arg. Trans. at 84-85.

In PEPCO, our predecessor, the Interstate Commerce Commission (ICC), rejected a complainant's SAC presentation that had hypothesized trackage rights over the defendant carrier. The ICC stated that "[u]sing a trackage rental fee, rather than the cost of constructing or purchasing the necessary rail line, is not proscribed as a means of determining stand-alone cost. Much depends, of course, on how the trackage rights have been valued."¹¹ The ICC found that the rental fee proposed for use in that case bore no relation to the stand-alone cost of serving the facilities, and the ICC thus rejected its use.

In Guidelines, 1 I.C.C.2d at 543 n.60, the potential use of trackage rights was addressed again, in response to railroad arguments that trackage rights fees do not reflect the true economic cost to a railroad of leasing its facilities. The ICC declined to rule out a SAC analysis using trackage rights over another carrier's lines where the proponent can demonstrate what constitutes a reasonable charge for the trackage rights. The ICC explained that "the return the carrier should make on its existing facilities, and the portion the various users can and should pay, should not turn on whether the charge is in the form of a rate to a shipper or a fee to a trackage rights holder." Id. But the ICC observed that "a SAC presentation based on trackage rights over the very facilities to which the rate at issue applies is not useful," since the level assumed for the trackage rights fee would prejudice the ultimate issue in the case, i.e., the costs of providing the facilities. Id.

Complainants in rail rate cases have long been permitted to hypothesize a SARR that would utilize trackage rights over another railroad's line for a portion of the route where those trackage rights have replicated how the defendant railroad was actually moving the issue traffic, and where the line has belonged to a third-party, i.e., a railroad that was not a defendant in that rate case.¹² In those cases, use of trackage rights was allowed in the SAC analysis because the third-party carrier was not responsible for providing the service and the revenue requirements of the third-party carrier were not at issue in the rate case.¹³ Moreover, as the Board and ICC have explained, in those circumstances, allowing the SARR to have the benefit of the same trackage rights arrangement as the defendant railroad uses to move the traffic involved, at the same trackage rights fee, is necessary for the SARR to "stand in the shoes" of the defendant. Otherwise, the SAC analysis would be based on categories of costs the defendant railroad does

¹¹ 367 I.C.C. at 552. The complainant in that case relied on a trackage rights fee paid by the Consolidated Rail Corporation (Conrail) to the National Railroad Passenger Corporation (Amtrak) for use of a 71-mile segment of the Northeast Corridor.

¹² See Nevada Power, 6 I.C.C.2d at 54; WPL at 60; TMPA at 67 n.106; Duke/CSXT at 15.

¹³ Nevada Power, 6 I.C.C.2d at 54.

not incur. It is well-settled that costs not incurred by the defendant carrier are to be excluded from a SAC analysis.¹⁴

The situation here is quite different; we are presented here with novel issues of reliance in a SAC presentation on trackage rights over a co-defendant carrier. In challenging BNSF/UP joint rates, AEPCO hypothesizes a SARR that would utilize trackage rights over a UP line for a portion of the move, paying only a trackage rights fee. But, the usual trackage rights fee arrangement, in which the tenant carrier's fee does not reflect the full cost of ownership, would not be appropriate. Because it is the collective revenue requirements of UP and BNSF that are being tested, all necessary costs of providing facilities for the Vaughn-to-El Paso portion of the joint line movement must be taken into account.

We will not completely close the door on using trackage rights as part of a SARR, but the fee must reflect the full costs of assembling and operating the essential facilities required to provide the service.¹⁵ Defendants argue that a complainant must use a traditional SAC analysis that assumes the SARR would construct the needed facilities itself. We are not prepared to rule out entirely any other method. It may be possible, although perhaps unlikely, for a complainant to hypothesize a SARR that would operate a portion of the movement using trackage rights over a defendant carrier's line; but it may do so only where the complainant can demonstrate convincingly that the trackage rights charges paid by the SARR would reflect the full stand-alone costs of providing and maintaining the line.

AEPCO incorrectly suggests¹⁶ that we would not require a showing of the adequacy of the trackage rights fee if UP and BNSF had each charged separate proportional rates, rather than a joint rate for this through movement.¹⁷ But we could not apply different or lesser evidentiary

¹⁴ Id.; WPL at 60; McCarty Farms, Inc. v. Burlington N. Inc., 2 S.T.B. 460, 504 (1997).

¹⁵ 2003 Decision at 6 (. . . when applied to a joint rate, the SAC test could not serve its purpose if the SAC analysis failed to take into account the full costs of providing and maintaining the physical plant needed to serve the traffic — costs which the joint rate defendants collectively must bear.)

¹⁶ AEPCO Response to 2003 Decision at 6.

¹⁷ A “through movement” is a movement that originates on one carrier's line and terminates on another carrier's line. A “joint rate” is a unitary rate set by mutual agreement between the participating carriers that is applied to a through movement. A “proportional rate” is set by a single carrier for applicability only to its portion of a through movement. Joint and proportional rates are through rates, as opposed to a “local rate,” which is a rate for transportation
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standards in that situation. Both Supreme Court and agency precedent require that, whether examining joint rates or proportional rates, we must address the reasonableness of the through rate as a whole, rather than the reasonableness of the component parts of the through rate.¹⁸ The purpose of the SAC analysis is to take into account all necessary costs to the co-defendants of collectively providing and maintaining the physical plant needed to serve the traffic from origin to destination. Thus, we must be assured that, where trackage rights of one defendant over another defendant's line are hypothesized, all of the combined necessary costs to the co-defendants of providing and maintaining the physical plant needed to serve the traffic are reflected in the SAC analysis.

In the 2003 Decision AEPCO was expressly placed on notice that its trackage rights approach was not what the Board had contemplated and that the Board expressed doubt that the 3.2 mills/GTM fee AEPCO had initially proposed was adequate to reflect stand-alone costs. 2003 Decision at 6. That decision explained that whether a trackage rights assumption is permissible depends upon whether the fee for the trackage rights is sufficient to satisfy the objectives of the SAC test—to measure the full stand-alone costs of reproducing the facilities and operations needed to serve the traffic group. AEPCO has not met this burden, as neither the 3.2-mills/GTM figure nor any of the valuation figures calculated in the UP/SP Merger proceeding have been shown to account for the full stand-alone costs of the Vaughn-to-El Paso segment. Indeed, as we will explain, none of the fee amounts mentioned in this record has been shown to reflect stand-alone costs.

AEPCO's argument that the 3.2-mills/GTM figure should be deemed to be sufficient because it was accepted in a merger proceeding as a satisfactory trackage rights fee for another line is without merit. That fee was negotiated by a predecessor of UP long before the UP/SP merger. AEPCO states that it is nearly identical to a fee that was first examined by this agency in the BN/SF Merger proceeding to assure that it was set low enough to preserve the pre-merger competition that had existed between the merging railroads over a different line (the Pueblo-to-Fort Worth line).¹⁹ The Board's acceptance of the fee level for that purpose provides no basis for finding that the fee is adequate to cover all necessary costs associated either with that line or with

¹⁷(...continued)

that is provided by only one carrier, with the transportation both originating and terminating on that carrier's line.

¹⁸ Great N. Ry. v. Sullivan, 294 U.S. 458, 463 (1925); Central Power & Light Co. v. Southern Pac. Transp. Co., 1 S.T.B. 1059 (1996), aff'd in part sub nom. MidAmerican Energy Co. v. STB, 169 F.2d 1099 (8th Cir.), cert. denied, 528 U.S. 950 (1999); Union Pac. R.R. v. STB, 202 F.3d 337 (D.C. Cir. 2000).

¹⁹ BN/SF Merger, 10 I.C.C.2d at 767-73.

the Vaughn-to-El Paso line for purposes of a SAC analysis. Carriers with ongoing commercial relationships enter into a variety of arrangements at different places, and a low-cost trackage rights fee by one carrier for a particular line segment may be offset by a low-cost trackage rights fee by the other carrier at another location. Thus, the fact that the parties, for whatever reasons, set a rate of 3.2 mills/GTM many years ago has no bearing on the fee level needed to meet stand-alone costs.

AEPCO has offered testimony in this proceeding seeking to demonstrate the sufficiency of the 3.2-mills/GTM figure based upon UP's system-wide average costs of providing service, as computed under our Uniform Railroad Costing System (URCS). However, URCS reflects historical costs, not reproduction costs (which is the objective of the SAC test). Moreover, the URCS data are not specific to any line segment. A SAC analysis should be addressed to the lines to be replicated, not a carrier's entire system. Therefore, AEPCO has not supported the adequacy of the 3.2-mills/GTM figure.

The record also contains three alternative figures calculated in the UP/SP Merger. Two of those figures—one calculated using an annuity method, and another using an RCNLD method—were referenced by the Board in the 2003 Decision to demonstrate the likely inadequacy of the 3.2 mills/GTM figure, but not to endorse either of those figures as presumptively sufficient to cover stand-alone costs. A third figure, which has been referenced in AEPCO's workpapers,²⁰ was developed using a capitalized earnings method. We will address each of those figures.

The 3.84-mills/GTM figure calculated using a capitalized earnings method is not useful here. That approach addresses the market value of a line for purposes of a merger. Such an approach does not necessarily correlate with the costs that a new entrant would incur to replicate the line, and AEPCO has offered no evidence that it would do so here.

Likewise, both the 8.32-mills/GTM figure and the 9.05-mills/GTM figure—developed in the UP/SP Merger proceeding—have not been shown to reflect the costs of the Vaughn-to-El Paso line. To arrive at those two figures, UP's witness developed construction costs for the 3,900 miles of UP and SP track over which the BNSF was afforded trackage rights in the UP/SP Merger proceeding. There is no evidence, however, that the per-mile construction costs for the 226-mile Vaughn-to-El Paso segment would be equal to the average per-mile construction costs for the 3,900 miles of track at issue in the UP/SP Merger case.

²⁰ AEPCO Supp. Reb. WP00219hhh (Kauders' Verified Statement).

Moreover, although the UP witness in the merger case compared some elements of his methodology to the SAC test,²¹ he explicitly disavowed any intent to develop stand-alone costs:²²

My purpose in conducting this study was not to determine the exact cost of replacing the lines at issue and develop a precise fair market value, such as would be done in a maximum rate reasonableness case. Rather, I sought to develop an amount that, while in the ballpark, would be below the costs a railroad would actually incur in replacing the lines. I also made several assumptions in performing the discounted cash flow annuity analysis that lowered the final rental amount. By performing my calculations conservatively, I am confident my results understate the full costs.

UP's witness also conceded that, in determining the cost of constructing the lines, his analysis omitted a number of assets (such as a communication system and tunnels), which could have caused the estimate to be tens of millions of dollars less than it otherwise would have been, and that his method of estimating the cost of land and grading may have been understated by half a billion dollars.²³ Given these acknowledged understatements, the figures relied upon by UP's witness to develop construction costs cannot be considered to approximate those costs that would be included in a SAC analysis.

UP's witness relied upon those understated construction costs to form the basis of both the 8.32-mills/GTM and 9.05-mills/GTM valuations. Thus, while those valuations may have been adequate for the purpose of the analysis conducted in the merger proceeding – to show that 3.2 mills/GTM was a low figure – they are not adequate to establish that any of those figures is sufficiently high to reflect the stand-alone costs of reproducing the line at issue. As a result, neither figure can be relied upon here to measure the stand-alone costs of the Vaughn-to-El Paso line.

In SAC cases, the complaining shipper is responsible for designing the SARR, and it has the initial burden of supporting the feasibility of all components of its design and cost estimates.²⁴ Here, notwithstanding the railroads' repeated challenges, the Board's warnings, and ample opportunity to remedy its SAC presentation, AEPCO has failed to link any proposed

²¹ AEPCO Supp. Reb. WP00219mmm n.34.

²² Id. at WP00219nnn (emphasis in original).

²³ AEPCO Supp. Reb. WP 00219ppp.

²⁴ Guidelines, 1 I.C.C.2d at 544.

trackage rights fee to the stand-alone costs of the Vaughn-to-El Paso line. Thus, AEPCO has failed to provide a complete SAC analysis.

AEPCO wrongly suggests that in the Board's 2003 Decision the responsibility of measuring the stand-alone costs of the Vaughn-to-El Paso line was placed on the defendants.²⁵ The 2003 Decision simply noted (at 6) that, if AEPCO continued to rely upon its trackage rights assumption, the defendants would be "entitled to" demonstrate the inadequacy of the usage fee relied upon by AEPCO and to show at what level the fee would need to be set to satisfy the objectives of the SAC test. While defendants did address the inadequacy of the trackage rights fee proposed by AEPCO, they have not shown what fee amount would cover stand-alone costs, explaining that AEPCO's SAC presentation was so deficient as to preclude the development of SAC evidence for the Vaughn-to-El Paso line.

The Board has an interest in ensuring that we have an adequate record upon which to make a fair and informed assessment of the reasonableness of a challenged rate.²⁶ Thus, where a complainant has made a good-faith effort to present reasonable evidence on all of the basic components of the SAC test, we are reluctant to dismiss a case without completing the SAC analysis,²⁷ and we may fill in missing information where possible²⁸ or direct a party to provide missing information.²⁹ In this case, however, AEPCO did not provide either evidence of the costs of constructing and maintaining the Vaughn-to-El Paso line or evidence to link the trackage rights fee to stand-alone costs. AEPCO cannot look to the Board or other parties to remedy its own failure to provide any probative evidence on a basic component of the SAC test.

CONCLUSION

Based on the failure of AEPCO to measure the stand-alone costs of reproducing the north-south Vaughn-to-El Paso line segment—whether expressed as a trackage rights fee that provides a reasonable alternative measure of the full stand-alone cost of building and operating the facilities at issue, or through a more traditional SAC presentation—we find that AEPCO's

²⁵ Oral Arg. Transcript at 31-35.

²⁶ Public Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N.&S.F. Ry., STB Docket No. 42057 (STB served June 8, 2004) (Xcel) at 23.

²⁷ Public Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N.&S.F. Ry., STB Docket No. 42057 (STB served Jan. 19, 2005) at 6.

²⁸ Xcel at 23.

²⁹ Otter Tail Power Co. v. Burlington N.&S.F. Ry., STB Docket No. 42071 (STB served Dec. 13, 2004) at 1-2.

SAC presentation is fatally deficient. AEPCO had several opportunities to rehabilitate its case, but failed to do so. Accordingly, the complaint is dismissed.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The complaint is dismissed.
2. This decision is effective on April 14, 2005.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey. Commissioner Mulvey commented with a separate expression.

Vernon A. Williams
Secretary

COMMISSIONER MULVEY, commenting:

It is unfortunate that the Board is required to dismiss the complaint at this stage in the proceeding, as there is the possibility that the challenged rate in this matter might be unreasonably high. However, where complainant fails to provide sufficient cost evidence—even after explicit warnings in Board decisions as to the importance of such evidence in a SAC analysis—an insufficient record remains, thereby dictating no other result.

It would have been preferable if the complainant had filed either evidence of the costs of constructing and maintaining the Vaughn-to-El Paso line or evidence linking the trackage rights fee to stand-alone costs. If it had, this case would have proceeded on its merits rather than collapse, as it has today.