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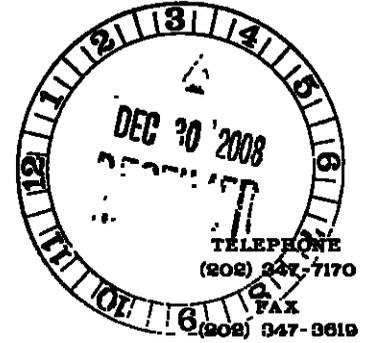
**SLOVER & LOFTUS**

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N W  
WASHINGTON, D C 20036-3003

WILLIAM L SLOVER  
C MICHAEL LOFTUS  
JOHN H LE SEUR  
KELVIN J DOWD  
ROBERT D ROSENBERG  
CHRISTOPHER A MILLS  
FRANK J PERGOI  
ANDREW B KOLESAR III  
PETER A POHL  
DANIEL M JAFFE  
STEPHANIE M PISANELLI  
JOSHUA M HOFFMAN

OF COUNSEL  
DONALD G AVERY



WRITER'S E-MAIL

December 30, 2008

BY HAND DELIVERY

The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, D.C. 20423-0001

ENTERED  
Office of Proceedings

DEC 30 2008

Part of  
Public Record

Re. Docket No 42113, Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company

Dear Acting Secretary Quinlan

Enclosed for filing in the referenced docket please find an original and 10 copies of the Verified Complaint of Arizona Electric Power Cooperative, Inc Also enclosed are a check with the requisite filing and a diskette containing the Verified Complaint.

In addition, enclosed is an additional copy of the Complaint to be time-stamped and returned to the bearer of this letter.

Thank you for your attention to this matter

**FEE RECEIVED**

DEC 30 2008

**SURFACE  
TRANSPORTATION BOARD**

Respectfully submitted,

Robert D Rosenberg  
An Attorney for Arizona Electric Power  
Cooperative, Inc

RDR.rlh

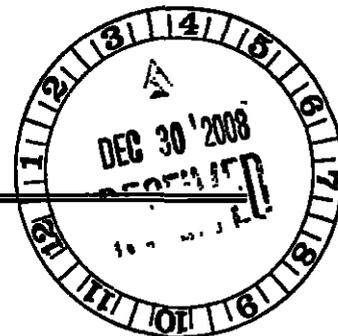
cc: Richard E Weicher, Esq.  
Louise Anne Rinn, Esq.

**FILED**

DEC 30 2008

**SURFACE  
TRANSPORTATION BOARD**

BEFORE THE  
SURFACE TRANSPORTATION BOARD



ARIZONA ELECTRIC POWER  
COOPERATIVE, INC.

Complainant,

v.

BNSF RAILWAY COMPANY and  
UNION PACIFIC RAILROAD COMPANY

Defendants.

Docket No. 42113

VERIFIED COMPLAINT

ARIZONA ELECTRIC POWER  
COOPERATIVE INC

By: Patrick F. Ledger  
Corporate Counsel  
1000 S Highway 80  
Benson, AZ. 85602

OF COUNSEL.

Slover & Loftus  
1224 Seventeenth Street, N.W  
Washington, D C 20036  
(202) 347-7170

William L. Slover  
Robert D Rosenberg  
Christopher A Mills  
Daniel M Jaffe  
1224 Seventeenth Street, N.W  
Washington, D C 20036  
(202) 347-7170  
Attorneys for Complainant

Dated: December 30, 2008



other service terms for such transportation. In support hereof, AEPCO states the following

1 AEPCO is a customer-owned electric generating company which supplies electricity to six (6) distribution cooperatives which serve over 100,000 homes and businesses in portions of Arizona, California and New Mexico.

2. At Cochise, Arizona, AEPCO owns and operates the Apache Generating Station which includes two (2) coal-fired units. These units consume approximately 1,500,000 tons of coal each year

3 BNSF and UP are each common and contract carriers by railroad and each engages in the transportation of property in interstate and intrastate commerce. Both are subject to the provisions of the ICC Termination Act of 1995 (49 U.S.C. §§ 10101 *et seq.*), and to the jurisdiction of this Board with respect to their interstate rail transportation services.

4 Over the past twenty years, AEPCO has purchased coal from various mines served by either or both BNSF and UP. However, regardless of where AEPCO purchases its coal requirements for its Apache generating units, it must deliver its coal via the lines of UP which is the only carrier serving Cochise, Arizona. AEPCO is a so-called Bottleneck Shipper.

5 Currently, AEPCO transports a portion of its annual coal purchases to Cochise pursuant to Common Carrier Pricing Authority BNSF 90044, Amendment No

11, which is set to expire on December 31, 2008. Other coal purchases move to Cochise pursuant to the terms of a confidential coal transportation agreement between AEPCO and UP which also expires on December 31, 2008.

6. AEPCO and the rail carriers have been unable to reach a mutually satisfactory agreement governing the terms and conditions for AEPCO's coal shipments from New Mexico to Cochise after December 31, 2008

7. Beginning on January 1, 2009, AEPCO intends to transport its coal purchases from mines located in New Mexico pursuant to a Common Carrier Pricing Authority BNSF 57966 (Attachment A).

8. The rates set forth in Attachment A for railroad transportation services from the McKinley Mine, Lee Ranch Mine and El Segundo Mine exceed 180 percent of the variable service costs of the participating carriers and therefore the Board has jurisdiction over the named rates pursuant to 49 U.S.C. § 10707(d)(1)(A) and the rules and regulations promulgated thereunder.

9. BNSF and UP enjoy market dominance over the movements of coal from the New Mexico origins of McKinley Mine, Lee Ranch Mine and El Segundo Mine to Cochise as defined in 49 U.S.C. § 10707.

10. The rates which the carriers hold out for coal transportation services between McKinley Mine, Lee Ranch Mine and El Segundo Mine on the one hand and

Cochise on the other are unreasonably high in violation of 49 U.S.C. § 10701(d)(1) and § 10702

11 AEPCO's complaint implicates issues common to coal rate cases generally and, accordingly, the issues raised in its Verified Complaint are appropriate for application of Constrained Market Pricing as adopted in Ex Parte No. 347 (Sub-No 1), *Coal Rate Guidelines—Nationwide*, 1 I.C.C. 2d 520 (1985), as further refined and applied in subsequent decisions issued by the Interstate Commerce Commission and the Board

12 Neither this proceeding nor the granting of the relief requested will constitute a major federal action significantly affecting the quality of the human environment or the conservation of energy resources.

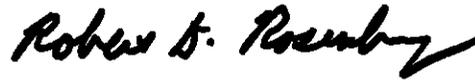
WHEREFORE, AEPCO prays that Defendants be required to answer the charges herein, that, after hearing and investigation, the Board find that the common carrier rates applicable to the transportation of AEPCO's coal purchases from the named origins in New Mexico to the Apache Generating Station at Cochise, Arizona are unreasonably high, that the Board issue an order or orders pursuant to 49 U.S.C §§ 10704(a)(1) and 11701(a) prescribing the maximum reasonable rates that Defendants may assess and collect from AEPCO for the described transportation; that the Board award AEPCO reparations for unlawful charges assessed by Defendants on and from January 1, 2009; and that the Board grant to AEPCO such other and further relief as the Board may deem proper

Respectfully submitted,

ARIZONA ELECTRIC POWER COOPERATIVE INC  
1000 S. Highway 80  
Benson, Arizona 85606

By. Patrick F Ledger  
Corporate Counsel  
1000 S. Highway 80  
Benson, Arizona 85602

William L Slover  
Robert D Rosenberg  
Christopher A Mills  
Daniel M Jaffe  
1224 Seventeenth Street, N W  
Washington, D C 20036  
(202) 347-7170  
Attorneys for Complainant



OF COUNSEL:

Slover & Loftus  
1224 Seventeenth Street, N W.  
Washington, D C 20036  
(202) 347-7170

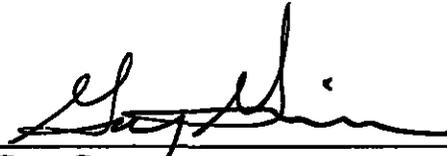
Dated December 30, 2008

VERIFICATION

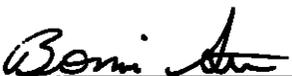
STATE OF ARIZONA    )  
                                  ) ss  
COUNTY OF COCHISE )

Gary Grim, being duly sworn, deposes and says that he is the Senior Vice President and Chief Operating Officer of Arizona Electric Power Cooperative, Inc ; that he has read the foregoing Verified Complaint, knows the contents thereof, and that the same are true as stated, except as to those statements made on information and belief, and as to those, he believes them to be true

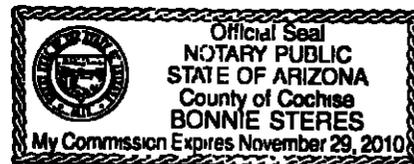
Dated this 18<sup>th</sup> day of December, 2008

  
\_\_\_\_\_  
Gary Grim  
Senior Vice President and  
Chief Operating Officer

Subscribed and sworn to  
before me this 18<sup>th</sup> day  
of December, 2008

  
\_\_\_\_\_  
Notary Public in and for  
the State of Arizona

My Commission expires 11-29-2010



## **ATTACHMENT A**

**The Burlington Northern and Santa Fe Railway Company ("BNSF")  
Common Carrier Pricing Authority BNSF 57966**

**Effective Date:** January 1, 2009

**Commodity:** Raw Subbituminous Coal, STCC 11-21-series Not applicable for transportation of beneficiated, enhanced or synthetic coal, provided however, Coal treated with additives used exclusively for dust control or to reduce freezing shall not be considered "enhanced" or "beneficiated"

**Origins:** Lee Ranch Mine (Lee Ranch), NM – "LRM"  
El Segundo Mine (El Segundo), NM – "ESM"  
McKinley Mine (North Tipple), NM – "MCM"

**Destination:** Arizona Electric Power Cooperative, Inc Apache Generating Plant near Cochise, AZ.

**Route:** BNSF – Deming, NM – Union Pacific Railroad Company ("UP")

**Through Rates and Minimum Weights:** Weights stated in Net Tons Coal,  
Rates stated in U S Dollars Per Net Ton Coal

<u>Origin</u>	<u>Minimum Weight Per Carload</u>	<u>Shipper- provided Railcars</u>
Lee Ranch, NM	116	\$ 13.94
El Segundo, NM	116	\$ 13.94
North Tipple, NM	110	\$ 15.98

Freight Charges will be assessed on the basis of the applicable Minimum Weight per Trainload or the actual weight of Coal per Trainload whichever is greater

**Fuel Surcharge Application:** Transportation charges per shipment otherwise calculated by application of the freight rate and weight provisions herein shall also be subject to BNSF Coal Fuel Surcharge provisions specified by **BNSF Rules Book 6100-series Item 3381** or successors thereto

**Railcar Supply and Tender Requirements:** Shipper-provided Railcars shall be aluminum open top rapid discharge hopper cars suitable for loading not less than 116 net tons Coal per carload from LRM/ESM origin and not less than 110 net tons Coal per carload from MCM, not subject to any private car mileage allowance and furnished at no cost to Railroads

The Minimum Tender for a train of Shipper-provided Railcars shall be one-hundred fifteen (115) such Railcars from LRM/ESM origins and one-hundred four (104) such Railcars from MCM origin In the event that Minimum Tender for a train of Shipper-provided Railcars is not met due to Railroads' failure to switch such Railcars into a train at such location where Railroads' have agreed to provide and Shipper has requested such service, the Minimum Weight per Trainload shall be reduced to the appropriate net tons for each Railcar (116 net tons for each Railcar or 110 net tons for each Railcar) depending on the origin, not so switched which results in a train of than Minimum Tender

Claims for damage to or destruction of either Shipper-provided or BNSF-provided Railcars shall be handled in accordance with the procedures set forth in the Field Manual and Office Manual of the Association of American Railroads Interchange Rules, as amended from time to time Notwithstanding the foregoing, Railroads shall not be liable for loss or damage caused by defects in design, materials, or

**The Burlington Northern and Santa Fe Railway Company ("BNSF")  
Common Carrier Pricing Authority BNSF 57966**

workmanship of Shipper-provided Railcars, or events of force majeure, or to improper loading or unloading performed by Shipper, its agent, its contractor, consignor or consignee

**Weights:** Lading Weights shall be ascertained at Origin by Shipper, its agent, or the Coal mine operator, at no charge to BNSF, and will be provided to Railroads via either electronic data interchange or facsimile upon release of a loaded train. BNSF shall have the right to inspect and certify the Origin scales. The Minimum Weight per Trainload shall be the product of the Minimum Weight Per Carload times the Minimum Tender.

**Loading:** Shipper or its agent shall be responsible for the provision of appropriate loading facilities. All cars in each shipment shall be tendered to BNSF for loaded movement subject to the provisions of BNSF Price List 6041-series in effect on the date that service is provided.

**Unloading and Switching:** Shipper shall be responsible for the unloading of trains at Destination, including the operation of UP locomotives to unload the train, dumping of each railcar, switching, train movement and other related train handling required to accomplish the unloading and tender of the empty train to UP. Other related train handling events shall include, but is not limited to, switching of bad order cars, and switching repaired and spare cars into the train. Use of UP locomotives shall be subject to the execution of a locomotive operation agreement which will cover insurance and liability requirements. Shipper shall be allowed ten (10) hours of free time to unload the train and perform switching as described herein.

In the event Shipper elects to have UP operate the locomotives during the unloading process and perform switching as described above, then Shipper agrees to pay UP \$1,500 per train for such work. When UP crews operate the locomotives to unload, free time to unload shall be five (5) hours.

**Accessorial Services:** BNSF-provided services ancillary to the linehaul transportation of Coal shall be provided in accordance with BNSF Price List 6041-series in effect on the date such services are requested. UPRR-provided services ancillary to the linehaul transportation of coal shall be provided in accordance with UPRR Circular 6605-series in effect on the date such services are requested.

**Billing and Payment:** Freight Charges will be billed by BNSF and paid by Shipper within ten working days of receipt of a bill therefor. BNSF will bill each shipment under the terms of the Uniform Straight Bill of Lading. All railcars for each shipment are to be billed on one (1) Bill of Lading. This Common Carrier Authority BNSF 57966, correct address and patron code must be shown on the Bill of Lading to insure accurate billing. In the event Shipper does not make timely payment, or if adverse credit conditions occur, which in the judgment of either Railroad could affect Shipper's ability to meet payment terms, either Railroad may require Shipper to pay cash in advance of service for all amounts for which Shipper is liable under this Common Carrier Authority. Charge for Accessorial Services shall be billed by the Railroad providing such service. Shipper shall pay for such services within ten working days of receipt of a bill therefor.

**Other Provisions:** Shipments made under the provisions of this Common Carrier Authority are subject to the Uniform Freight Classification 6000-series or its successor, applicable tariffs, statutes, federal regulatory rules and regulations, AAR rules, and other accepted practices within the railroad industry as may be amended from time to time.