

82434K

SLOVER & LOFTUS

ATTORNEYS AT LAW

1034 SEVENTEENTH STREET, N.W.
WASHINGTON, D. C. 20036-3003

WILLIAM L SLOVER
C MICHAEL LOFTUS
JOHN H LE NEUR
KEVIN J DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A MILLS
FRANK J PERGOIL/71
ANDREW B KOLENAR III
PETER A PFOHL
DANIEL M JAFFE
STEPHANIE P LYONS
JOSHUA M HOFFMAN

OF COUNSEL
DONALD G AVERY

TELEPHONE
(202) 347-7170

FAX
(202) 347-3019

WRITER'S E-MAIL:

cam@sloverandloftus.com

January 13, 2009

BY E-FILING

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

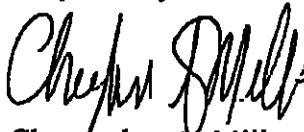
Re: Docket No. 42113. Arizona Electric Power Cooperative, Inc. v.
BNSF Railway Company and Union Pacific Railroad Company

Dear Secretary Quinlan:

Enclosed for filing are the original and ten copies of the parties' joint Report on Conference Pursuant to 49 C.F.R. § 1111.10(b) in the above-referenced proceeding. The Report contains a proposed procedural schedule (Appendix A) and a stipulated Protective Order (Appendix B) which the parties jointly request the Board to enter in this case.

Also enclosed for the Board's convenience is an electronic copy of the proposed protective order in Word format..

Respectfully submitted,


Christopher A. Mills

CAM.lad
Enclosures

cc (w/enclosure): Anthony J. LaRocca, Esq.
Michael I. Rosenthal, Esq

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

) **ARIZONA ELECTRIC POWER**
) **COOPERATIVE, INC.**

) Complainant,
)

) v.)

) Docket No 42113
)

) **BNSF RAILWAY COMPANY and**
) **UNION PACIFIC RAILROAD COMPANY**

) Defendants
)

**REPORT ON THE PARTIES' CONFERENCE
PURSUANT TO 49 C.F.R. § 1111.10(b)**

Counsel for the parties have conducted a conference to discuss procedural and discovery matters in this case pursuant to 49 C.F.R. § 1111.10(b)

The results of their conference are summarized below

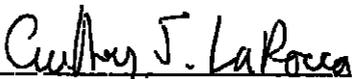
1. The parties have agreed on a procedural schedule for this case. The proposed schedule is attached hereto as Appendix A. The proposed schedule is significantly longer than the "standard" schedule adopted by the Board for use in stand-alone cost rate cases, as set forth in 49 C.F.R. § 1111.8. However, the Board recently recognized that the § 1111.8 schedule has not been adhered to in recent SAC cases as these cases have become far more complex and time consuming since it was adopted in 1998. *See Seminole Electric Cooperative, Inc. v CSX Transportation, Inc.*, STB Docket No. 42110, slip. op. at 2-3 (STB served December 11, 2008). This

is particularly true given that three other recently-filed maximum rate reasonableness cases are pending at the Board (Docket Nos. 42110, 42111 and 42112). Several of the same consultants are involved in all of these cases, and the parties to this proceeding are also mindful that the Board has limited staff resources to review the evidence and assist it in deciding all of these cases. The schedule set forth in Appendix A was crafted with these issues in mind, and gives particular consideration to the need to space the evidentiary due dates out in a reasonable manner.

2. The parties have agreed on a form of protective order to govern the production and use of confidential information. The proposed protective order, which is attached hereto as Appendix B, is similar to the protective order adopted by the Board in *Oklahoma Gas & Electric Company v. Union Pacific Railroad Company*, STB Docket No. 42111 (STB served Dec. 3, 2008), with minor changes (in paragraphs 1 c, 2 and 10 and in the Undertakings) to reflect the fact that two defendants will produce and use confidential and highly confidential information and to allow in-house counsel and consultants to retain file copies of pleadings. The parties request that the protective order set forth in Appendix B be adopted and entered by the Board in this proceeding.

3. Counsel for the parties also agreed that the parties will serve all papers on their Washington counsel by hand-delivery, on in-house counsel by overnight delivery, and, to the extent practicable, on all counsel by email.

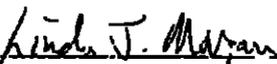
Respectfully submitted,



Samuel M. Sipe, Jr. *am*
Anthony J. LaRocca
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Richard E. Weicher
Jill K. Mulligan
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

Attorneys for Defendant BNSF
Railway Company



Linda J. Morgan *am*
Michael L. Rosenthal
Charles H. P. Vance
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

J. Michael Hemmer
Louise A. Rinn
Tonya W. Conley
UNION PACIFIC RAILROAD COMPANY
1400 Douglas Street
Omaha, NE 68179
(402) 544-3309

Attorneys for Defendant
Union Pacific Railroad Company

Dated: January 13, 2009



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

Attorneys for Complainant
Arizona Electric Power
Cooperative, Inc.

APPENDIX A

STB Docket No. 42113

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

v.

**BNSF RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

Proposed Procedural Schedule

<u>DATE</u>	<u>DAY</u>	<u>EVENT</u>
December 30, 2008	0	Complaint filed; discovery period begins
January 21, 2009	0 + 22	Defendant's answer to complaint due
June 25, 2009	0 - 177	Staff-supervised discovery conference, if necessary
August 12, 2009	0 - 225	Discovery completed
October 21, 2009	0 295	Joint submission of operating characteristics
December 11, 2009	0 + 346	Complainant files opening evidence
March 19, 2010	0 + 444	Defendants file reply evidence
May 14, 2010	0 + 500	Complainant files rebuttal evidence
June 11, 2010	0 + 528	Parties file closing briefs

PROTECTIVE ORDER

STB Docket No 42113

- 1 Any party producing information, data, documents, or other material (hereinafter collectively referred to as "material") in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as "CONFIDENTIAL," and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom
 - (a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.
 - (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising herefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials
 - (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings which they were authorized to review under this Protective Order, including Paragraph 10
 - (d) If contained in any pleading filed with the Board shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside "Confidential Materials Subject to Protective Order" Sec 49 CFR 1104.14

- 2 Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as "HIGHLY CONFIDENTIAL." If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board. Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising herefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, and execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as "HIGHLY CONFIDENTIAL" and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1. Nothing in this Protective Order shall prevent the defendants from agreeing to provide each other with access to railroad data, information, and documents designated "HIGHLY CONFIDENTIAL" in order to provide for and facilitate their joint defense in this proceeding

- 3 In the event that a party produces material which should have been designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and inadvertently fails to designate the material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.

- 4 In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

- 5 If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material to the Board, or the court, as appropriate, with a written request that the Board or the court: (a) restrict attendance at the hearings during discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material, and (b) restrict access to the portion of the record or briefs reflecting discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.
- 6 If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material shall be kept under seal and treated as "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.
- 7 Each party is ordered to produce to the other party rail transportation contracts or other documents or information which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the contracts be produced in discovery, and (2) the parties agree that the requested contracts would be properly discoverable in this proceeding but for the confidentiality provision(s). Such documents shall be required to be produced only after the other party(ies) to a contract (or other document subject to a confidentiality provision) who are entitled to prior notice have been provided written notice and a reasonable opportunity to object to that production and obtain a ruling from the Board on that objection. Any documents or contracts produced pursuant to this Section 7 shall be treated as "HIGHLY CONFIDENTIAL," and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904.

8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the "CONFIDENTIAL" material, "HIGHLY CONFIDENTIAL" material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release
9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding
10. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as "HIGHLY CONFIDENTIAL" by a producing party, without securing prior permission from the producing party. If a party or parties (the "filing party or parties") file and serve upon another party or parties (the "reviewing party or parties") a pleading or evidence containing the "HIGHLY CONFIDENTIAL" material of the filing party or parties, the filing party or parties shall also contemporaneously provide to outside counsel for the reviewing party or parties a list of the "HIGHLY CONFIDENTIAL" information of the filing party or parties contained in the pleading that must be redacted from the "HIGHLY CONFIDENTIAL" version prior to review by the In-house Personnel of the reviewing party or parties.
11. Any party filing with the Board a "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" pleading in this proceeding should simultaneously file a public version of the pleading

UNDERTAKING
CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on _____ [date], governing the production of confidential documents in STB Docket No. 42113, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. 42113 or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel may retain copies of pleadings which they were authorized to review under the Protective Order.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated, _____

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on _____ [date], governing the production of confidential documents in STB Docket No 42113, understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated "HIGHLY CONFIDENTIAL" to any person or entity who (1) is not eligible for access to "HIGHLY CONFIDENTIAL" material under the terms of the Protective Order, or (11) has not executed a "HIGHLY CONFIDENTIAL" undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Dated _____