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May 20, 2009

**BY E-FILING**

The Honorable Anne K. Quinlan  
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 in the referenced proceeding is Complainant Arizona Electric Power Cooperative, Inc's Unopposed Motion to Extend Procedural Schedule. As stated in the Motion, the Defendants concur in the relief requested therein.

Please provide electronic receipt of this filing. Thank you for your attention to this matter.

Respectfully submitted,



Christopher A. Mills

CAM:lad  
Enclosure

cc (w/enclosure): Counsel for Defendants per Certificate of Service



As discussed below, this case has unique features, unlikely to be repeated in future SAC cases, that provide good cause for the proposed schedule. It involves two defendants, with different line segments and traffic flows (including substantial volumes of non-coal traffic that move over each defendant's lines used for issue traffic); two distinct coal-producing regions (New Mexico and the northern Powder River Basin); and disputes over the geographic scope of the SARR that are not presented in typical coal rate cases and that were not resolved until relatively late in the discovery period. In addition, the recently established schedule in *Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.*, Docket No. 42110, creates a serious conflict for the consultants working on both cases.

The revised schedule proposed herein has been agreed to by AEPCO and the defendants, BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UP"). AEPCO has been authorized to represent to the Board that both BNSF and UP concur in the relief requested herein.

The parties initially (and jointly) proposed an extended procedural schedule for this case, under which opening evidence would not have been due until December 11, 2009.<sup>1</sup> The proposed schedule reflected the parties' mutual perception of the breadth of the case and the volume of information involved, including the presence of two defendants serving multiple origins, the need to discover information from two carriers and the carriers' need to process that information, the need to assess possible low-density segments and potential reroutings, and the need to coordinate the schedule in this case

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<sup>1</sup> See the parties' Joint Report on Conference filed January 13, 2009.

with the schedules in other pending rate cases. However, in a Decision served February 3, 2009 (“February 3 Decision”), the Board deemed the schedule proposed by the parties to be “unnecessarily long” and adjusted it to the current schedule which reflected what the Board deemed “a more appropriate timeframe.” February 3 Decision at 1.

As described more fully below, intervening events unique to this case have contributed to additional complexity and delay. Good cause thus exists to extend the remaining due dates provided in the procedural schedule adopted in the February 3 Decision.

In particular, on February 24, 2009, UP filed a motion with the Board seeking to hold in abeyance the portion of AEPCO’s complaint challenging UP single-line rates for coal movements from origins in Colorado and the Southern Powder River Basin of Wyoming (“SPRB”) because of a dispute as to the existence of a rail transportation contract covering these movements. Subsequently, UP objected to AEPCO’s first discovery requests related to the single-line movements and the UP lines north of Pueblo, CO used for those movements, and on April 2, 2009, AEPCO filed a motion to compel responses to the relevant discovery requests by UP. On April 23, 2009, the Board served a decision granting UP’s motion to hold the portion of the proceeding related to its single-line movements in abeyance, denying AEPCO’s motion to compel, ordering UP to establish conditional common carrier rates from the SPRB origins, and establishing a separate sub-docket for that portion of the case.

Both BNSF and UP also objected to other aspects of AEPCO’s first discovery requests, in particular requests involving the potential geographic scope of

AEPCO's stand-alone railroad ("SARR") related to the joint BNSF/UP movements in issue in the main docket. In late April the parties were able to work out a compromise on most of these objections, after receiving assistance from Board staff at a staff-supervised discovery conference held on April 24, 2009.

Although discovery in the main docket is proceeding, production of the traffic, revenue, train or car movement data that are the essential building blocks for determination of the SARR route and traffic group and thus for the calculation of stand-alone costs (SAC) relevant to the rail movements at issue has barely begun.<sup>2</sup> Because of the disputes on the SARR's geographic scope which were not resolved until recently, the parties do not expect the production of this data to be completed until mid-June 2009, and based on experience in other rate cases, it is likely that there subsequently will be several weeks of follow-up questions and responses as AEPCO's consultants integrate and convert the data to a format that is suitable for a rate case. The remaining period of time is not nearly sufficient for AEPCO to complete the iterative process (described below) used to develop and configure its SARR and prepare and present its opening evidence. An extension of the discovery completion date by six weeks, and of the due date for opening evidence by at least two and a half months, is essential to enable AEPCO to prepare its case. Extensions of the due dates for reply and rebuttal evidence and closing briefs are also required to maintain the current intervals between the due dates for all of these pleadings as well as allow for the intervening end-of-year holidays.

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<sup>2</sup> AEPCO understands that the defendants, with reason, did not want to go through the complicated process of assembling and producing these materials until the scope of the case and thus their discovery obligations were resolved.

The Board itself has recognized that a procedural schedule considerably longer than the default schedule for SAC cases set out in 49 CFR Part 1111.8(a) may be appropriate in view of the fact that “SAC cases have become far more complex and time consuming since 1996” when the default procedural schedule was promulgated.

*Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.* (STB Docket No. 42010) (STB served December 11, 2008, at 2).

In particular, the complexity of SAC evidentiary presentations has increased because of the Board’s adoption of the new ATC procedure for developing revenue divisions for cross-over traffic, which requires an analysis of revenues and variable costs for each potential movement that is considered for inclusion in the SARR traffic group not just over the SARR itself, but also over the off-SARR portion of the movement. *See Major Issues In Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (STB served Oct. 30, 2006). The ATC analysis must be completed before the traffic group can be finalized, and the traffic group must be finalized before the peak-period train volumes can be determined. The peak train volumes are a necessary input for the simulation of the SARR’s operations using the Board-approved Rail Traffic Controller Model – which itself is a very demanding and data-intensive modeling exercise. It is only at that point that the complainant can complete the system design and operating plan for the SARR, which in turn are necessary predicates for the development of operating expenses and road property investment cost for input into the DCF model.

The complexity of assembling the SARR/SAC building blocks is heightened in this case because two defendants are involved. The SARR will replicate portions of both the BNSF and UP systems in nine states, involving different lines extending from mine origins in Montana, Wyoming and New Mexico to AEPCO's Apache generating Station at Cochise, AZ. In addition, the SARR likely will handle several distinct flows of non-coal traffic in addition to the issue and other coal traffic. Accordingly, AEPCO sought traffic, revenue and train/car movement records from both defendants in discovery covering a variety of commodities (including intermodal traffic). The task of producing and then assembling the documents and data in a format that is compatible with the Board's protocols is time-consuming, and is likely to lead to a substantial number of follow-up questions and exchanges between the parties. The process is complicated further by the understandable fact that BNSF and UP traffic and other data are not maintained in a form designed for STB rate litigation.

Because of the procedural issues and delays involving the scope of the case (and thus the SARR) described earlier, the production of traffic, revenue and train/car movement data has just begun<sup>3</sup> and complete production of this data is not expected to occur until mid-June, 2009. Only when complete data has been received, and follow-up issues resolved, will AEPCO be in a position to assemble the SARR traffic group (including analysis of cross-over traffic using the ATC procedure) and then the peak volume/train list. When these tasks are completed, AEPCO can then proceed with

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<sup>3</sup> BNSF produced some traffic, revenue and train event data late on May 15, 2009, but the production is incomplete. UP has not produced any such data to date.

development of its opening evidence regarding the SARR system, operating plan, operating expenses and road property investment costs. The time required for completion of discovery and for these subsequent tasks necessitates an extension of the due date for opening evidence by approximately two and a half months, from August 27 to November 13, 2009. This is the minimum extension AEPCO believes is necessary in order to complete discovery and develop a complete, well-documented presentation of its opening evidence, consistent with the Board's requirements for SAC cases.

AEPCO further notes that the Board recently granted the complainant's request to extend the evidentiary due dates in the *Seminole* rate case (Docket No. 42110). The due date for the complainant's opening evidence in that case is now July 31, 2009, which is only four weeks before the current due date for opening evidence in this case. Two of the complainant's consultants involved in assembling the essential building blocks for the SARR in the *Seminole* case (the traffic/revenue/cost consultant and the RTC Modeling consultant) are also being used by AEPCO in this case. These building blocks need to be in place considerably in advance of the submission of opening evidence, and it would be extremely difficult if not impossible for AEPCO's consultants to finalize them for purposes of this case at the same time they are preparing and documenting their initial expert testimony in the *Seminole* case.

It should also be noted that the due date for the defendant's reply evidence in the *Seminole* case, November 18, 2009, is only a week prior to the current due date for reply evidence in this case. The defendants here are using the same cost consultant used by the defendant in *Seminole*, and it would be impossible for their consultant to prepare

reply evidence almost simultaneously in both cases. A similar problem for AEPCO's experts exists with respect to the current due dates for rebuttal evidence in the *Seminole* case and this case, which are only three days apart.

The proposed new due dates for the defendants' reply evidence, AEPCO's rebuttal evidence and final briefs were set to maintain approximately the same time intervals after the filing of opening evidence as those set forth in the February 3 Decision, with some allowance for the 2009 Thanksgiving, Christmas and New Year's holidays which occur during the proposed interval between opening and reply evidence. All parties agree that the extended due dates are necessary and appropriate.

### CONCLUSION

For the foregoing reasons, good cause exists to modify the procedural schedule in this case. Accordingly, the Board should grant AEPCO's Motion and extend the schedule as proposed herein.

Respectfully submitted,

ARIZONA ELECTRIC POWER  
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Dated: May 20, 2009

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of May, 2009, I caused copies of the foregoing Motion to be served by email upon counsel for Defendants, as follows:

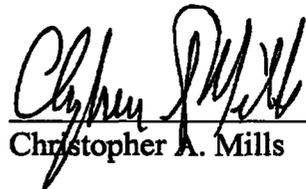
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