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November 26, 2003

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board - Case Control Unit
1925 K Street, N.W.
Washington, D. C. 20423

ENTERED
Office of Proceedings

NOV 26 2003

Part of
Public Record

Re: Docket No. 42058, Arizona Electric Power Cooperative, Inc. v.
The Burlington Northern and Santa Fe Ry. and Union Pacific R.R.

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten copies of the Response of Complainant Arizona Electric Power Cooperative, Inc. to the Board's November 19, 2003 Order. We have also enclosed electronic copies of this filing in WordPerfect 9.0 format on three diskettes.

Kindly acknowledge receipt and filing of these materials by date-stamping the extra copy of this letter and returning it to our messenger.

Sincerely,

Robert D. Rosenberg

Enclosures

cc: Counsel for Defendants

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ARIZONA ELECTRIC POWER
COOPERATIVE, INC.,

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY and
UNION PACIFIC RAILROAD COMPANY,

Defendants.

Docket No. 42058



**RESPONSE OF COMPLAINANT ARIZONA ELECTRIC POWER
COOPERATIVE, INC. TO THE BOARD'S NOVEMBER 19, 2003 ORDER**

ARIZONA ELECTRIC POWER
COOPERATIVE, INC.

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Dated: November 26, 2003

Attorneys for Complainant

I. AEPCO'S TRAFFIC GROUP

The premise of the first part of the November 2003 Decision is that AEPCO changed its traffic group between Opening and Rebuttal. While AEPCO did eliminate the revenue adjustment, AEPCO demonstrated that its traffic group (the issue traffic, crossover coal traffic, and non-coal overhead traffic) handled by its SARR actually remained the same, and that the underlying problem was that the train movement and traffic tape (revenue) data produced by Defendants The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") (jointly, "BNSF/UP" or "Railroads") could not be reconciled.

AEPCO addressed the data inconsistencies at length in its replies to both motions of the Railroads and its Rebuttal Evidence. AEPCO is thus disappointed that the data inconsistencies, which AEPCO demonstrated were substantial, were ignored altogether in the November 2003 Decision. Indeed, in directing AEPCO to declare whether it wishes to stay with its July revenue evidence without definitive indication from the Railroads as to the accuracy of those revenue calculations, the Board is effectively asking AEPCO to commit to the equivalent of the proverbial "pig in a poke."¹

¹AEPCO believes both that its revenue derivation is conservative, and that the Railroads have superior capabilities to determine the correct figure. AEPCO further believes that the Railroads had indicated in the UP Motion to Dismiss and in their separate SAC Reply filings that eliminating the revenue adjustment would eliminate any overstatement, but the Railroads' Motion to Strike appeared to suggest otherwise. It is thus fully appropriate for the Railroads to be required to state what they believe the correct figure to be and the basis for it.

Accordingly, AEPCO requests that the Railroads state what they believe to be the appropriate 2000 revenues for the traffic group described by AEPCO. AEPCO believes that the Railroads should already have this information -- which likely shows revenues greater than those AEPCO calculated without the revenue adjustment -- in their possession (for otherwise they could not have opposed AEPCO's evidence in good faith), and that they should be required to provide this information to AEPCO by December 8, 2003 (which date takes into account the Thanksgiving holiday). To the extent the Railroads submit revenue figures (and the associated basis) different than those calculated by AEPCO on Rebuttal without the revenue adjustment, AEPCO reserves the right to promptly (within seven days) advise the Board and the Railroads if the information alters AEPCO's choice of how to proceed. If data anomalies still persist, AEPCO reserves the further right to seek to depose appropriate Railroad personnel fully knowledgeable of the Railroads' processes for storing and manipulating revenue and train data. The Coal Rate Guidelines make clear that a shipper is entitled to accurate, reliable, and usable information from which to determine its traffic group and associated revenues, and the revenue adjustment arose from the Railroads' failure to provide that information in a manner that allowed AEPCO to reconcile the revenue data to the train movement records.

II. TRACKAGE RIGHTS

The November 2003 Decision at 6 provides that "if AEPCO chooses to reply on its rebuttal SAC evidence [as it intends to do, subject to the concerns expressed

herein], the defendants will be entitled to demonstrate the inadequacy (for purposes of the SAC analysis) of the usage fee reflected in the existing BNSF-UP trackage rights agreement and to show the level at which a usage fee would need to be set to satisfy the objectives of the SAC test. AEPCO would then have an opportunity to present rebuttal evidence on that issue.” AEPCO thus concludes that the November 2003 Decision holds that the trackage rights fee AEPCO utilized in its Opening and Rebuttal is too low, but that AEPCO will be allowed to rely on a trackage rights approach consistent with that addressed in Union Pacific/Southern Pacific Merger, 1 S.T.B. 223, 415 & n.128 (1996) (“UP/SP”).

AEPCO anticipates no difficulties complying with the approach described in the November 2003 Decision. Indeed, AEPCO’s preliminary analysis show that substitution of the 8.32 or 9.05 mills per gross ton-mile figures for the figure utilized in AEPCO’s Opening and Rebuttal Evidence would result in a negligible reduction in the stand-alone cost (“SAC”) relief, and that the results of the SAC analysis would remain far below the jurisdictional threshold. In other words, under the approach described by the Board in the November 2003 Decision, the trackage rights issue is not pivotal to the outcome of the case.

At the same time, AEPCO admits to being somewhat puzzled, if not perplexed, by the rejection of its effort to use the existing trackage rights fee for its stand-alone railroad (“SARR”). The Board’s key distinction between when the use of the

existing trackage rights fee is and is not permissible appears to be whether the trackage rights arrangement is between a defendant and a third-party (non-defendant) carrier, or between the defendants in a case involving a joint rate (which AEPCO takes to be a joint through rate).

However, such a distinction cannot be reconciled with the Board's earlier treatment of the issue in its decision in the proceeding served August 20, 2002 (the "August 2002 Decision"). In that decision, the Board accepted AEPCO's proposed use of UP's trackage rights, including the specified fee, over the BNSF-owned segment between Pueblo, CO and Stratford, TX for not only the then-issue traffic moving to AEPCO from Colorado in UP single-line service, but also for the BNSF/UP joint-rate movements from the PRB. August 2002 Decision at 7 ("These guiding principles ... apply with equal force to SARRs designed to test the BNSF-UP joint rates from the PRB and New Mexico origins."). While the Board's distinction purports to be fact-specific, the situations are factually indistinguishable. Nor does the language in the August 2002 Decision, quoted in the November 2003 Decision, stating that "[a]ny SAC presentation must necessarily be grounded in, and bounded by, what is reasonable and appropriate to serve the purpose of the SAC test," provide a plausible basis for the two different outcomes because, in both cases, the trackage rights were to be used for the issue traffic in a SAC analysis.

It may be that the Board now believes that its decision rendered a little over a year ago is in error. Ample administrative law cases make clear that agencies are

entitled to change their minds, and that may well be what happened here. But if that is the case, agencies are required to justify their change, and any such justification would logically begin with the agency's acknowledgment that its position has, in fact, changed. The Board's recognition that AEPCO relied on "expectations that may have been created" by the August 2002 Decision does not constitute such an acknowledgment, and the result is bound to be confusion on the part of the general public (at least shippers) as well as AEPCO.

AEPCO also feels obliged to note that the single rate/joint rate distinction now apparently relied on by the Board is less than compelling. In particular, it is the carriers, not the shippers, that decide whether to provide service through a joint rate or separate proportional rates (or, for that matter, a bottleneck rate) in the first place, and it is inherently illogical and inequitable for the carriers to be able to dictate whether the rate to be charged by a least-cost, most-efficient competitor can be determined in part by reliance on a preexisting trackage rights agreement. The Board's approach also provides a ripe context for gaming in that a single defendant facing the prospect of an existing trackage rights agreement being used against it could seek instead to provide the service through a joint through rate involving another carrier, thus defeating application of the trackage rights. Moreover, the notion that the SARR should be unable to take advantage of arrangements available to real-world competitors would appear to constitute a major entry barrier, particularly as the shipper is otherwise precluded from combining the traffic of

the owner and tenant railroad over the segment with trackage rights or joint ownership (even though those two carriers may compete for traffic in the real world).

While AEPCO thus questions the soundness of the Board's treatment of the trackage rights issue in the November 2003 Decision, AEPCO is, as stated above, prepared to comply with it for present purposes.

III. RELATION OF NEW EVIDENCE TO OLD EVIDENCE

The Board's November 2003 Decision provides the Railroads with "an opportunity to submit responsive SAC evidence, and for AEPCO to address the defendants' evidence."

Nothing in the November 2003 Decision gives the Railroads any opportunities to submit further evidence on variable cost/jurisdictional threshold matters. These issues were fully addressed in the earlier evidence, and they are in no way implicated by the SAC issues. The submission of additional SAC evidence thus should not provide any sort of predicate for the submission of further evidence on non-SAC issues. Indeed, the parties negotiated a general discovery cutoff date for movements occurring through June 30, 2002 (which was itself eighteen months into the pendency of the rate case), and allowing data as to even later movements beyond those already addressed in the prior variable cost evidence would place AEPCO at a significant disadvantage because of the disparity in access to information. There is no basis to

conclude that the record on jurisdictional threshold matters is incomplete, and there is thus no need for the Commission to receive additional evidence on these matters.

The same treatment should apply to BNSF's arguments concerning the effects of AEPCO's settlement with UP on the single-line rates from the Colorado origins and the joint rates from the Powder River Basin origins. BNSF's arguments have nothing to do with SAC matters (indeed, BNSF premised its quantitative contentions in this area on its variable cost calculations), and the Board's receipt of additional SAC evidence provides no predicate for additional evidentiary treatment of what is ultimately a legal matter and certainly not a SAC issue.

AEPCO's position is also that the Railroads should be precluded from submitting additional evidence on those SAC matters that Defendants have already addressed at length, as well as those which Defendants could have logically addressed in full notwithstanding any claimed confusion over AEPCO's revenue adjustment. In particular, Defendants attacked AEPCO's use of the modified mileage block prorate ("MMP") method for calculating divisions on crossover traffic at length in (a) UP's original motion to require AEPCO to refile its Opening Evidence, (b) BNSF's and UP's separate SAC reply evidence, and (c) the BNSF/UP joint Motion to Strike. For whatever reason, the November 2003 Decision is silent about the matter. It may be that the Board believes the matter to have been resolved by its recent Duke/NS decision, where the Board adopted its modified straight-mileage prorate ("MSP") methodology. In any event,

any further discussion of crossover divisions should be tied directly to the MSP methodology and not become a vehicle for treating further matters that were already addressed.

AEPCO submits that the same principles should also apply to any claims by the Railroads that the intermodal and other crossover traffic handled by AEPCO's SARR is too "marginal" to support any SAC relief. The Railroads, particularly UP, addressed this matter at length in their Reply filings. Allowing the Railroads to address this matter further would undermine the Board's prior directives that parties are to put their "best foot forward."

The same logic also applies to the SAC operational issues that the defendants did raise in their SAC replies. In particular, the Railroads should not be allowed to present further evidence regarding the SARR's impact on the residual incumbents' operations. Having addressed the matter in the SAC replies that they did submit, Defendants are not entitled to a second bite at this apple.

IV. TIMING CONSIDERATIONS

AEPCO is naturally mindful of all the delay that it has already experienced in its rate case and is eager to avoid any further delay.

Accordingly, AEPCO believes that the procedural dates specified in the third ordering paragraph of the November 2003 Decision (Railroads' reply due January 26, 2004, and AEPCO's rebuttal due February 24, 2004) should apply. To the extent that

a modest extension is needed to accommodate the Railroads' validation of the AEPCO's revenue figures for the traffic group, the slippage should not extend beyond that specified in the fourth ordering paragraph of the decision (Railroads' evidence and argument due no later March 25, 2004, and AEPCO's due no later than April 26, 2004).

V. CONCLUSION

As explained above, AEPCO intends will rely on its previously-filed evidence.

Respectfully submitted,

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Dated: November 26, 2003

Attorneys for Complainant

Certificate of Service

I hereby certify that this 26th day of November 2003, I have caused a copy of the foregoing Response to be served upon counsel for Defendants as follows:

By Hand:

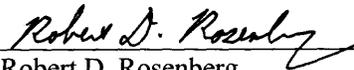
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