

209643

SLOVER & LOFTUS

ATTORNEYS AT LAW

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

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
KAREN HASSELL HERREN
KENDRA A. ERICSON

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:
fjp@sloverandloftus.com

December 16, 2003

RECEIVED
DEC 16 2003

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423

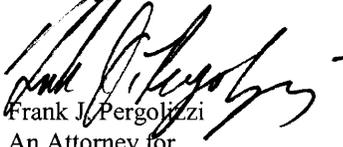
Re: Docket No. 41185, Arizona Public Service Co. & PacifiCorp v.
The Burlington Northern and Santa Fe Railway Company

Dear Secretary Williams:

Please find enclosed for filing in the above-referenced proceeding an original and ten copies of Complainant Arizona Public Service Company and PacifiCorp's Petition for Subpoena Duces Tecum. A diskette containing an electronic copy of the submission (in WordPerfect) is enclosed. Given that discovery is scheduled to close on January 20, 2004, APS/PacifiCorp requests that the Board give this filing **EXPEDITED CONSIDERATION**.

An additional copy of the filing also is enclosed. Kindly indicate receipt and filing by time-stamping this extra copy and returning it to the bearer of this letter.

Sincerely,



Frank J. Pergolizzi
An Attorney for
Arizona Public Service Company
and PacifiCorp

Enclosures

cc: Samuel M. Sipe, Jr.
Linda S. Stein
Paul H. Lamboley

ENTERED
Office of Proceedings

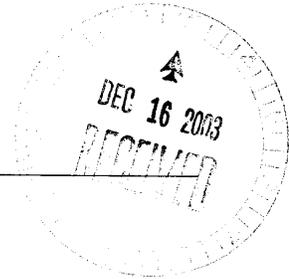
DEC 16 2003

Part of
Public Record

209643

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



)	
)	
ARIZONA PUBLIC SERVICE COMPANY,)	
and PACIFICORP,)	
)	
Complainants)	
)	
v.)	Docket No. 41185
)	
THE BURLINGTON, NORTHERN AND)	
SANTA FE RAILWAY COMPANY,)	
)	
Defendant.)	
)	
)	

COMPLAINANT'S PETITION FOR SUBPOENA DUCES TECUM

ARIZONA PUBLIC SERVICE COMPANY
400 North 5th Street
Phoenix, AZ 85004

PACIFICORP
825 N.E. Multnomah Street
Portland, OR 97232

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
Dated: December 16, 2003

By: C. Michael Loftus
Christopher A. Mills
Frank J. Pergolizzi
Peter A. Pfohl
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170
Attorneys for Complainant

ENTERED
Office of Proceedings
DEC 16 2003
Part of
Public Record



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

)	
)	
ARIZONA PUBLIC SERVICE COMPANY,)	
and PACIFICORP,)	
)	
Complainants)	
)	
v.)	Docket No. 41185
)	
THE BURLINGTON, NORTHERN AND)	
SANTA FE RAILWAY COMPANY,)	
)	
Defendant.)	
)	
)	

COMPLAINANT’S PETITION FOR SUBPOENA DUCES TECUM

Pursuant to 1113.2(b)(2) and 1117.1, Complainants Arizona Public Service Company and PacifiCorp (collectively “APS/PacifiCorp”) hereby respectively petition the Surface Transportation Board to issue a subpoena duces tecum directed to Salt River Project Agricultural Improvement & Power District (“Salt River”) for production of documents. The specific schedule of documents sought, contained in Exhibit A hereto, relate to the sourcing and re-sourcing of coal moved and projected to be moved by Salt River to its Coronado Generating Station between 1994 and 2013, the 20-year Stand Alone Cost (“SAC”) analysis period being considered in this docket. These requests are directly related to an integral issue involved in this reopened decision, and are plainly

“relevant to the subject matter involved in [this] proceeding” and discoverable under 49 C.F.R. Part 1114.21(a).

I.

BACKGROUND

This reopened Docket Number 41185 arises from a complaint filed by APS/PacifiCorp before the Interstate Commerce Commission on January 3, 1994, challenging rates for rail transportation between the McKinley Mine, located near Gallup, New Mexico, and the Cholla Electric Steam Generation Station, located near Joseph City, Arizona, which is jointly owned by APS and PacifiCorp. In July, 1997, APS/PacifiCorp obtained a decision from the STB which declared the challenged rates to be unreasonable, awarded reparations for past movements and prescribed maximum reasonable rates for the future. See Arizona Public Service Co. v. Atchison Topeka & Santa Fe Ry., 2 S.T.B. 367 (1997) (“1997 Decision”).

Based on circumstances existing in 1993 and 1994, APS/PacifiCorp designed a stand-alone railroad (“SARR”), the Arizona & Gallup Railroad, serving the McKinley Mine, the Cholla Station, and the Coronado Generating Station of the Salt River Project. See 1997 Decision at 398, Appendix A. With regard to the long-range future output of the McKinley Mine, APS/PacifiCorp relied upon testimony from an officer of P&M Coal Company (which owns the mine) that P&M had sufficient reserves to meet the coal requirements of the two SARR customers over the life of the SARR. The

Board found this evidence to be probative, concluding that “it is quite likely that coal would continue to be available from P&M at the McKinley Mine site through 2013 (the extent of our SAC analysis here)” 1997 Decision at 384, which decision was upheld on reopening. See Arizona Public Service Company and PacifiCorp v. The Atchison, Topeka and Santa Fe Railway Company, 3 S.T.B. 70, 79 (1998) (“1998 Decision”).

In both the 1997 Decision and the 1998 Decision, the Board acknowledged uncertainty concerning the ultimate availability of coal from the McKinley Mine after existing reserves were depleted, but concluded that if it turned out coal was not available from McKinley, the SAC analysis could be revised based on the new circumstances. 1997 Decision at 385, 395; 1998 Decision at 79-80, 86. In January 2003, Santa Fe’s successor, The Burlington Northern and Santa Fe Railway Company (“BNSF”), requested the Board to vacate its rate prescription on the grounds of substantially changed circumstances and new evidence relating to the volume of coal available to be shipped from the McKinley Mine. APS/PacifiCorp responded in opposition, while acknowledging changed circumstances with regard to coal volumes available to be shipped from McKinley Mine in the final few years (2010-13) of the original DCF analysis.

On May 12, 2003, the Board served its decision (“May 12 Decision”) granting BNSF’s request for reopening, defining the scope of reopening as limited to the original 1994 SARR configuration and traffic group, and lifting its rate prescription. APS/PacifiCorp sought reconsideration of that decision, and in a decision served October

14, 2003 (“October 14 Decision”), the Board denied the petition for reconsideration, and requested the parties to submit a proposed procedural schedule to govern the reopened proceeding, which they did.¹

APS/PacifiCorp have consulted with both in-house and outside counsel for Salt River concerning the requests contained in Exhibit A to the Subpoena.

APS/PacifiCorp have provided Salt River with copies of the Board’s May 12 and October 14 decisions, and have explained that under these decisions, the parties will need to address the current and future sourcing and re-sourcing of coal by APS/PacifiCorp and Salt River. APS/PacifiCorp have further advised Salt River that in order to meet their evidentiary obligations in the reopened proceeding, they will need to obtain the same discovery information from Salt River that is in the schedule contained in Appendix A.

APS/PacifiCorp have also provided Salt River with a copy of the protective order governing this proceeding, and have stipulated that the order will govern any confidential materials produced by Salt River.²

¹ In a decision served December 8, 2003, the Board revised the proposed procedural schedule entered previously on October 30, 2003. Under the revised procedural schedule, discovery is to be completed by January 20, 2004.

² Additionally, APS/PacifiCorp have advised Salt River that the discovery requests contained in the schedule to Exhibit A, hereto, have been discussed with BNSF. BNSF has authorized APS/PacifiCorp to represent that it will not be seeking discovery separately from Salt River. Rather, the parties have agreed that any responses received by APS/PacifiCorp to the Subpoena will be shared with BNSF, subject to the confidentiality requirements of the protective order governing this proceeding.

Salt River has indicated that it prefers to respond to requests through the subpoena process. To accommodate Salt River's preference in this regard, and to avoid further unnecessary delay in obtaining this information, the issuance of a subpoena duces tecum ordering Salt River to produce responses is required at this time.

II.

ARGUMENT

A. A Subpoena Should Be Granted

The standards for issuance of a subpoena duces tecum under the Board's discovery rules have been met. The documents requested are clearly "relevant to the subject matter involved in [this] proceeding," which makes them discoverable under 49 C.F.R. §1114.21(a).

The Board and its predecessor repeatedly have held that in cases brought under the CMP model, complainant shippers are entitled to broad discovery. See, e.g., Coal Rate Guidelines, Nationwide, 5 I.C.C.2d 520, 548 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987) ("[w]e recognize that shippers may require substantial discovery to litigate a case under CMP, and we are prepared to make that discovery available to them"). The Board's Rules of Practice reinforce this policy, permitting "discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." See 49 C.F.R. Part 1114.21(a). It is also well-settled that the Board's discovery rules are to be liberally

construed. See, e.g., Finance Docket No. 32821, Bar Ale, Inc. v. California Northern Railroad Co. (STB served March 15, 1996), at 2.

The Board also has granted petitions for subpoenas in rate reasonableness cases directed to third parties where the discovery is reasonably necessary and addressed to relevant issues involved in the proceeding. See, e.g., Docket No. 42057, Public Service Company of Colorado D/B/A Excel Energy v. The Burlington Northern and Santa Fe Railway Company (STB served Feb. 1, 2002) at 3 (“Public Service Company of Colorado”).

In this reopened proceeding the Board has specifically requested “a more developed record on how Arizona and Salt River will re-source their coal needs once McKinley shuts down, what portion of that traffic could flow over the SARR, and what revenues the SARR could reasonably expect to earn from that coal traffic.” May 12 Decision at 5. Complainants’ discovery requests are discretely addressed to the issue of the sourcing of coal by Salt River over the life of the original 20-year SAC analysis period of 1994 - 2004. This includes the re-sourcing of coal by Salt River once the McKinley mine is closed, or after current coal purchase agreements expire, if it is anticipated that additional coal would not be purchased from McKinley.

Included in the schedule contained in Exhibit A are requests for coal transportation agreements, which pertain to coal rates and volumes, and requests for pertinent provisions from coal supply agreements pertaining to coal volumes. This contract information, as well as the other information requested on coal traffic and coal

supply is reasonably calculated to lead to the discovery of admissible evidence, and therefore easily satisfies the Board's standard under Coal Rate Guidelines and the Rules of Practice. In that regard, the Board has consistently held that contracts and other information related to the determination of an appropriate SARR traffic group's associated volumes and revenues are highly relevant. See, e.g., Docket No. 41191(Sub-No.1), AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company (STB served Dec. 4, 2003); Docket No. 42072, Carolina Power & Light Company v. Norfolk Southern Railway Company (STB served May 1, 2002); Docket No. 42069, Duke Energy Corporation v. Norfolk Southern Railway Co. (STB served March 4, 2002); Docket No. 42054, PPL Montana, LLC v. Burlington Northern and Santa Fe Ry. Co. (STB served Nov. 9, 2000). The Board has also consistently found in the above authorities that the existence of a protective order will satisfy all confidentiality concerns.³

APS/PacifiCorp require the discovery information in the schedule contained in Appendix A to allow them to meet their evidentiary obligations. The scope of the

³ The volume, rate, and traffic information sought is no different in principle than confidential transportation contracts with involved third-party utility customers and other third-party agreements, which the Board has ordered to be produced, subject to the governing protective order, in the above SAC proceedings. Thus, any confidentiality concerns Salt River may have concerning the discovery will be addressed by designation and treatment of the appropriate documents as "Confidential" or "Highly Confidential" under the terms of the governing Protective Order. In that regard, APS/PacifiCorp have agreed to treat the materials produced by Salt River pursuant to the subpoena according to the manner in which they are appropriately designated. To further ensure the protection of confidential information, APS/PacifiCorp request the Board to specify that the terms of the protective order served by the Board in this proceeding will govern the documents produced by Salt River.

requested subpoena is reasonable, and compliance would not be unduly burdensome for Salt River. The subpoena has been narrowly tailored to seek only the relevant coal volume, rate, and traffic information necessary for APS/PacifiCorp to pursue their evidentiary obligations in this case. As set forth herein, the Board has granted petitions for a subpoena ordering a non-party to a railroad rate case to produce relevant information that may be used by a party in its evidentiary presentation with respect to the challenged rate. See Public Service Company of Colorado at 3; Docket No. 42051, Wisconsin Power & Light Co. v. Union Pacific Railroad Co. (STB served June 21, 2000) at 2-4.

APS/PacifiCorp submit that the same considerations warrant the issuance of a subpoena duces tecum in this case.

Finally, while APS/PacifiCorp have tailored their requests to be as unobtrusive as possible, and do not expect that compliance with the subpoena will present any significant burdens for Salt River, they agree to work with Salt River to address any concerns as to burden that may be raised.

CONCLUSION

For the foregoing reasons, APS/PacifiCorp move that the Board issue a subpoena duces tecum directed to Salt River for production of documents that are responsive to the requests specified in the schedule contained in Appendix A hereto, and stipulate that the protective order in this case governs the production of all documents in response to those requests. Given the shortened procedural schedule in this proceeding

and the importance of obtaining this information in a timely manner so that it may be utilized in preparing the parties' evidentiary submissions, APS/PacifiCorp respectfully request that the Board expedite its consideration of this Petition.

Respectfully submitted,

ARIZONA PUBLIC SERVICE COMPANY
400 North 5th Street
Phoenix, AZ 85004

PACIFICORP
825 N.E. Multnomah Street
Portland, OR 97232

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: December 16, 2003

By: C. Michael Loftus
Christopher A. Mills
Frank J. Pergolizzi
Peter A. Pfohl
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170



Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2003, I served a copy of the foregoing Petition by hand upon counsel for Defendant, as follows:

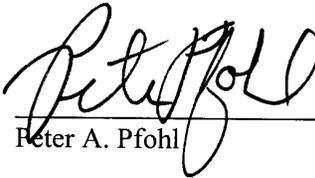
Samuel M. Sipe, Jr., Esq.
Linda S. Stein, Esq.
Steptoe & Johnson, L.L.P.
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

and by hand upon counsel for Salt River, as follows:

Paul H. Lamboley, Esq.
1701 Pennsylvania Ave., N.W., Suite #300
Washington, D.C. 20006

and by overnight mail on in-house counsel for Salt River, as follows:

Jane D. Alfano, Esq.
Fritz Beeson, Esq.
Salt River Project Agricultural
Improvement & Power District
1521 N. Project Drive
MS PAB207
Tempe, AZ 85281


Peter A. Pfohl

APPENDIX A

SCHEDULE OF DOCUMENT REQUESTS

I.

DEFINITIONS

The following defined terms are used herein:

1. “And,” “or,” and/or “each” shall be construed in the disjunctive or conjunctive as necessary in order to bring within the scope of each Request all responsive information or documents which otherwise might be construed as outside the scope of the Request.
2. “BNSF” means The Burlington Northern and Sante Fe Railway Company, its present or former employees, agents, counsel, officers, directors, advisors, consultants, divisions, departments, predecessors (including but not limited to the Burlington Northern Railroad Company (“BN”) and The Atchison, Topeka and Sante Fe Railway Company (“ATSF”)), parent and/or holding companies, subsidiaries, or any of them, and all other persons acting (or who have acted) on its behalf.
3. “Coronado” or “Coronado Generating Station” means the electrical generating plant of Salt River, located at Coronado, Arizona, including its rail car unloading facilities.
4. “Document(s)” means all writings or visual displays of any kind, whether generated by hand or mechanical means, including, without limitation, photographs, lists,

memoranda, reports, notes, letters, phone logs, contracts, drafts, workpapers, computer printouts, computer tapes, telecopies, telegrams, newsletters, notations, books, affidavits, statements (whether or not verified), speeches, summaries, opinions, studies, analyses, evaluations, statistical records, proposals, treatments, outlines, any electronic or mechanical records or representations (including physical things such as, but not limited to, computer disks), and all other materials of any tangible medium or expression, in Salt River's current or prior possession, custody or control. A draft or non-identical copy is a separate document within the meaning of this term. The term "document" also includes, without limitation, any and all documents constituting, referring, or relating to electronic mail ("E-mail") and/or voice-mail.

5. "McKinley Mine" means the mine owned by the Pittsburgh & Midway Coal Mining Company located approximately 20 rail miles northeast of Gallop, NM.

6. "Pertaining to" means and includes information discussing, describing, referring to, reflecting, explaining, analyzing, or in any way related to, in whole or in part, the subject matter of the Request.

7. "Salt River" means the Salt River Agricultural Improvement and Power District.

II.

INSTRUCTIONS

Salt River is requested to conform to the following instructions in responding to these Requests:

1. All documents that in their original form were stapled, clipped or otherwise attached to other documents should be produced in such form.
2. All documents that respond, in whole or in part, to any portion of the request below, shall be produced in their entirety, including all attachments and enclosures.
3. Where information sought is contained in a computer-readable format, such information should be produced in that format whether or not it also exists in paper or other non-computerized format.
4. Documents should be produced as they are kept in the ordinary course of business or organized and labeled to correspond to the requests.
5. Each page of each document should be produced with a "Bates stamp" or similar number so that each document can be properly identified.
6. Documents should be delivered to the offices of Slover & Loftus, 1224 Seventeenth Street, N.W., Washington, D.C. 20036, by the close of the discovery period in this reopened Docket No. 41185, and sooner to the extent reasonably practicable, unless otherwise agreed by the parties.
7. The time period of these requests is specified in each of the requests.

III.

DOCUMENT REQUESTS

Request No. 1:

Please provide reasonably available documents from January 1, 2002 to present (whether or not prepared by Salt River) sufficient to show:

- (a) the amount of coal produced at the McKinley Mine that Salt River intends to obtain for use at the Coronado Generating Station for each year 2004-2013;
- (b) the amount of coal produced at mine origin(s) other than the McKinley Mine that Salt River intends to obtain for use at the Coronado Generating Station for each year 2004-2013;
- (c) the transportation route(s) that Salt River expects to be utilized for movements of coal from each mine origin specified in subpart (b);
- (d) forecasts, projections, or estimates of the transportation costs for the movement of coal from the McKinley Mine for each year 2004-2013; and
- (e) forecasts, projections, or estimates of the transportation costs for the movement of coal from each mine origin as specified in response to subpart (b) for each year 2004-2013.

Request No. 2:

Please provide all contractual provisions from Salt River's coal supply agreements defining volumes of coal that Salt River is obligated to purchase or has the right to purchase for use at its Coronado Generating Station for each year 2004-2013.

Request No. 3:

Please provide all reasonably available documents from January 1, 2002 to present (whether or not prepared by Salt River) from any contractual negotiations (other

than negotiations resulting in agreements provided in response to Request No. 2) pertaining to the future purchase of coal and the volumes of coal that Salt River would be obligated to purchase or would have the right to purchase for use at its Coronado Generating Station for each year 2004-2013.

Request No. 4:

Please provide all coal transportation agreements involving Salt River pertaining to the coal transportation rights and obligations of Salt River for movements to its Coronado Generating Station during the period 2004-2013.

Request No. 5:

Please provide all reasonably available documents from January 1, 2002 to present (whether or not prepared by Salt River) from any contractual negotiations (other than negotiations resulting in agreements provided in response to Request No. 4) pertaining to the future coal transportation rights and obligations of Salt River for movements to its Coronado Generating Station during the period 2004-2013.

Request No. 6:

Please produce for each year or partial year from January 1, 1994 to the present, by mine origin:

- (a) the coal tonnages delivered by BNSF to Coronado, and
- (b) Salt River's payment obligations associated with all deliveries identified in response to subpart (a).