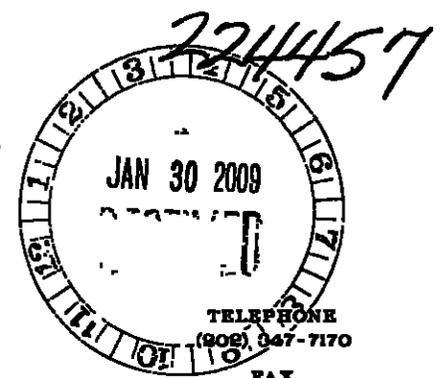


WILLIAM L SLOVER
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WRITER'S E-MAIL

January 30, 2009

BY HAND DELIVERY

ENTERED
Office of Proceedings

JAN 30 2009

Part of
Public Record

The Honorable Anne K Quinlan
Acting Secretary
Surface Transportation Board
395 I 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 Acting Secretary Quinlan:

Enclosed for filing in the referenced docket please find an original and 10
copies of the Amended Verified Complaint of Arizona Electric Power Cooperative, Inc
Also enclosed is 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

Respectfully submitted,

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

RDR rlh

cc Anthony J LaRocca, Esq
Michael I Rosenthal, Esq

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ARIZONA ELECTRIC POWER)	
COOPERATIVE, INC.)	
1000 S. Highway 80)	
Benson, AZ 85602)	
Complainant,)	
)	
v.)	
)	
BNSF RAILWAY COMPANY)	Docket No. 42113
2650 Lou Menk Drive)	
Fort Worth, TX 76131-2830)	
)	
and)	
)	
UNION PACIFIC RAILROAD COMPANY)	
1400 Douglas Street)	
Omaha, NE 68179)	
Defendants)	
)	

AMENDED VERIFIED COMPLAINT

COMES NOW the Complainant, Arizona Electric Power Cooperative, Inc. ("AEPCO"), and files this Amended Verified Complaint against Defendants, BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UP"), pursuant to 49 U.S.C §§ 10701 and 11701, requesting that the Board (1) require UP to establish common carrier rates for the transportation of coal from UP-served origins in Colorado and the Power River Basin ("PRB") to AEPCO's Apache Generating Station located in Cochise, Arizona; (2) determine that the rates established or to be established by

Defendants for unit train coal transportation service from coal mine origins in New Mexico, Colorado, and the PRB to AEPCO's Apache Generating Station located in Cochise, Arizona, are unreasonably high; (3) prescribe reasonable rates along with reasonable practices and other service terms for such transportation, and (4) award AEPCO reparations and grant AEPCO such other and further relief as the Board deems proper. In support hereof, AEPCO states the following

1. AEPCO is a customer-owned electric generating company that supplies electricity to six (6) distribution cooperatives that 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 that 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, including mines in New Mexico, Colorado, Wyoming, and Montana However, regardless of where AEPCO purchases its coal

requirements for its Apache generating units, its coal must be delivered via the lines of UP as UP is the only carrier serving Cochise, Arizona. AEPCO is a so-called Bottleneck Shipper.

5. Until December 31, 2008, AEPCO transported a portion of its annual coal purchases to Cochise from coal origins in New Mexico pursuant to Common Carrier Pricing Authority BNSF 90044, Amendment No 11, which expired on December 31, 2008. Other coal purchases moved to Cochise from origins in Colorado and the Powder River Basin ("PRB") pursuant to the terms of a confidential coal transportation agreement between AEPCO and UP, which also expired 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 to Cochise after December 31, 2008

7. Starting January 1, 2009, AEPCO began transporting coal it purchases from mines located in New Mexico pursuant to a Common Carrier Pricing Authority BNSF 57966 (Attachment A). In addition, AEPCO intends to transport coal it purchases from mines located in Wyoming and Montana served exclusively by BNSF (the "Northern PRB") pursuant to the common carrier rates established in Attachment B. Attachment B was provided to AEPCO in response to a formal request for common carrier rates pursuant to 49 U.S.C. § 11101

8. The rates set forth in Attachments A and B for railroad transportation services from the New Mexico and the Northern PRB origins 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 and Northern PRB origins to Cochise as defined in 49 U.S.C. § 10707.

10. The rates which the carriers hold out for coal transportation services from the New Mexico and Northern PRB origins to Cochise are unreasonably high in violation of 49 U.S.C. §§ 10701(d)(1) and 10702.

11. AEPCO has been unable to reach a mutually satisfactory arrangement governing the terms and conditions for AEPCO's coal shipments to Cochise after December 31, 2008, from UP-served origins in Colorado and the PRB. Moreover, UP has refused to establish common carrier rates from such origins, despite AEPCO's request pursuant to 49 C F R Part 1300.

12. Accordingly, UP must be required to establish common carrier rates for shipment from Colorado and UP-served origins in the PRB to Cochise. Such rates, when established, are likely to exceed 180 percent of the railroad(s)' variable costs of service for the transportation, UP is likely to enjoy market dominance over such movements; the

Board is likely to have jurisdiction over such rates pursuant to 49 U.S.C. § 10707(d)(1)(A) and the rules and regulations promulgated thereunder; and the rates are likely to be unreasonably high in violation of 49 U.S.C. § 10701(d)(1) and § 10702.

13. 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

14. 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 UP be required to establish common carrier rates for transportation of coal from UP-served origins in Colorado and the PRB to the Apache Generating Station at Cochise, Arizona, that, after hearing and investigation, the Board find that the common carrier rates applicable to the transportation of AEPCO's coal purchases from origins in New Mexico, Colorado, Wyoming, and Montana 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 LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated. January 30, 2009

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 less than the Minimum Tender

Claims for damage to or destruction of Shipper-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 workmanship of Shipper-provided

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

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

Attachment B

**A Confidential Rail Transportation Offer
From
The BNSF Railway Company (“BNSF”) and Union Pacific Railroad Company (“UPRR”),
 (“Railroads”)
To
Arizona Electric Power Cooperative, Inc. (“Shipper”)**

Offer Date: December 1, 2008
Offer Expiration: December 31, 2008

Authority: Common carrier pricing authority

Effective Date: Upon publication

Commodity: Raw Subbituminous Coal, STCC 11-21-series This Offer is 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, NM
El Segundo Mine, NM
McKinley Mine, North Tipton, NM
BNSF Gillette area mines located on BNSF Campbell subdivision, WY
Decker Mine & Spring Creek Mine (Nerco Junction), MT

Destination: Shipper’s Apache Generating Station at Cochise, Arizona

Route: NM origins = BNSF – Deming, NM – UPRR
BNSF MT/WY origins = BNSF-Pueblo, CO – UPRR

Base Rates: Effective January 1, 2009

<u>Origins</u>	<u>\$ Per Net Ton</u>
Lee Ranch Mine	\$13 94
El Segundo Mine	\$13 94
McKinley Mine	\$15 98
Gillette Mines	\$40 58
Decker/Spring Creek Mines	\$41 58

BNSF Fuel Surcharge: Transportation charges otherwise payable shall be subject to application of BNSF Mileage-based Coal Fuel Surcharge, if any, as specified by BNSF Rules 6100 Item 3381 or successors thereto in effect on the waybill date of the shipment

Minimum Annual Volume: 1,100,000 Net Tons of Coal per Calendar Year

Minimum Train Size:

El Segundo and Lee Ranch NM origins One-hundred fifteen (115) Carloads
McKinley Mine minimum and maximum train size One-hundred four (104) Carloads
WY/MT origins One-hundred twenty (120) Carloads

A Confidential Rail Transportation Offer
From
The BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UPRR"),
("Railroads")
To
Arizona Electric Power Cooperative, Inc. ("Shipper")

Offer Date: December 12, 2008
Offer Expiration: December 31, 2008

Authority: Common carrier pricing authority

Effective Date: Upon publication

Commodity: Raw Subbituminous Coal, STCC 11-21-series This Offer is 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, NM
El Segundo Mine, NM
McKinley Mine, North T'ipple, NM
BNSF Gillette area mines located on BNSF Campbell subdivision, WY
Decker Mine & Spring Creek Mine (Nerco Junction), MT

Destination: Shipper's Apache Generating Station at Cochise, Arizona

Route: NM origins = BNSF - Deming, NM - UPRR
BNSF MT/WY origins = BNSF-Pueblo, CO - UPRR

Base Rates: Effective January 1, 2009

<u>Origins</u>	<u>\$ Per Net Ton</u>
Lee Ranch Mine	\$13.94
El Segundo Mine	\$13.94
McKinley Mine	\$15.98
Gillette Mines	\$40.58
Decker/Spring Creek Mines	\$41.58

BNSF Fuel Surcharge: Transportation charges otherwise payable shall be subject to application of BNSF Mileage-based Coal Fuel Surcharge, if any, as specified by BNSF Rules 6100 Item 3381 or successors thereto in effect on the waybill date of the shipment

Minimum Train Size:

El Segundo and Lee Ranch NM origins One-hundred fifteen (115) Carloads
McKinley Mine minimum and maximum train size One-hundred four (104) Carloads
WY/MT origins One-hundred twenty (120) Carloads

Minimum Weight:

El Segundo and Lee Ranch NM origins One-hundred sixteen (116) Net Tons Coal Per Carload
McKinley Mine minimum and maximum lading One-hundred ten (110) Net Tons Per Carload
WY/MT origins One-hundred sixteen (116) Net Tons Per Carload

**A Confidential Rail Transportation Offer
From
The BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UPRR"),
("Railroads")
To
Arizona Electric Power Cooperative, Inc. ("Shipper")**

Railcar Equipment: Shipper owned or leased Railcars will be provided at no cost to Railroads. Handling and operation of such Railcars will be subject to the rules set out in the Field Manual and Office Manual of the Interchange Rules adopted by the AAR, as may be amended from time to time ("AAR Rules"). The application of AAR Rules shall govern such Railcar damage, destruction and maintenance as may be incurred by the parties. Railcars also shall be inspected and approved in accordance with regulations promulgated by the Federal Railroad Administration ("FRA"), or a successor federal agency, as may be amended from time to time.

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.

Other Ancillary 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: Transportation charges, including fuel surcharge if applicable, shall be invoiced to Shipper by BNSF subject to the provisions of BNSF Rules Book 6100 Item 3400-series in effect on the waybill date of shipment. Ancillary service charges shall be invoiced to Shipper by the railroad providing such services.

Other Provisions: Shipments made under the provisions of the Agreement will be subject to the Uniform Freight Classification 6000-Series or its successor, applicable federal regulatory rules and regulations, AAR Rules, BNSF Rules 6100-series, UPRR Circular 6605 and other accepted practices within the industry as the same may be amended from time to time. Services and other matters not specifically addressed in the Agreement shall continue to be governed by and paid for under rules, regulations, tariffs and statutes which would apply if the transportation service were provided under tariffs or other common carrier terms otherwise applicable to these shipments. Shipments tendered pursuant to the Agreement shall be covered by Standard Common Carrier liability pursuant to 49 U.S.C. Section 11706. In the event of conflict between the above referenced rules, regulations, etc., and the Agreement, the Agreement shall govern.

A Confidential Rail Transportation Offer
From
The BNSF Railway Company (“BNSF”) and Union Pacific Railroad Company (“UPRR”),
(“Railroads”)
To
Arizona Electric Power Cooperative, Inc. (“Shipper”)

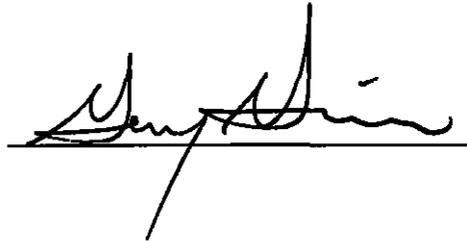
Confidentiality: This is a confidential and non-transferable Offer of service from Railroads to Shipper. This Offer shall not be disclosed to anyone not directly employed by Railroads or Shipper without the expressed written consent of the non-disclosing party. In the event of unauthorized disclosure by Shipper, this Offer shall be considered null and void in addition to any other remedies which may be available to Railroads at law or in equity.

VERIFICATION

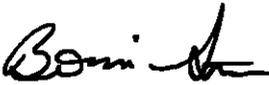
STATE OF ARIZONA)
) ss
COUNTY OF COCHISE)

Gary Grim, being duly sworn, deposes and says that he is Senior Vice President and Chief Operating Officer of Arizona Electric Power Cooperative, Inc : that he has read the foregoing Amended 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.

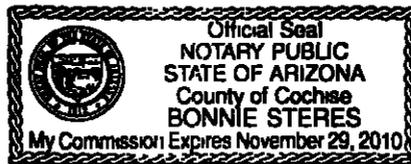
Dated this 29th day of January, 2009



Subscribed and sworn to before me this 29th day of January, 2009



Notary Public in and for the State of Arizona



My Commission expires: 11-29-2010

CERTIFICATE OF SERVICE OF COMPLAINT

I, Robert D. Rosenberg, certify that copies of the Amended Verified Complaint that Complainant Arizona Electric Power Cooperative, Inc., filed in STB Docket No 42113 on January 30, 2009, against Defendants BNSF Railway Company and Union Pacific Railroad Company were sent by overnight courier on the following Chief Legal Officers of the Defendants on January 30, 2009, in accordance with 49 C.F.R. § 1111.3:

Roger Nober, Esq
Executive Vice President Law
BNSF Railway Company
2650 Lou Menk Drive
Fort Worth, TX 76131

J. Michael Hemmer, Esq
Senior Vice President, Law and
General Counsel
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179


Robert D. Rosenberg

Dated January 30, 2009