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December 17, 2004

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, DC 20423-0001

212799

Re: Docket No. 42091, Arizona Public Service Company and
PacifiCorp v. The Burlington Northern and Santa Fe Railway Company

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten (10) copies of Arizona Public Service Company and PacifiCorp's Petition to Hold in Abeyance Pending Judicial Review.

Please date stamp the extra copy of this Petition and return it to our messenger.

Respectfully submitted,

C. Michael Loftus
An Attorney for Arizona Public Service
Company and PacifiCorp

Enclosures

cc: Samuel M. Sipe, Jr., Esq.
Jeffrey R. Moreland, Esq.

212799

BEFORE THE
SURFACE TRANSPORTATION BOARD

ARIZONA PUBLIC SERVICE COMPANY
and PACIFICORP

Complainants,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

Defendant.

Docket No. 42091

**PETITION TO HOLD IN ABEYANCE
PENDING JUDICIAL REVIEW**

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

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

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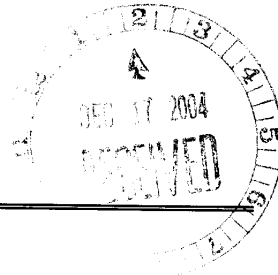
OF COUNSEL:

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Dated: December 17, 2004

Attorneys for Complainants

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



ARIZONA PUBLIC SERVICE COMPANY,
and PACIFICORP

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Docket No. 42091

**PETITION TO HOLD IN ABEYANCE
PENDING JUDICIAL REVIEW**

By this Petition to Hold in Abeyance Pending Judicial Review ("Petition"), Arizona Public Service Company ("APS") and PacifiCorp respectfully request that the Board hold proceedings in abeyance in the instant docket. This docket seeks relief from the common carrier rates imposed by The Burlington Northern and Santa Fe Railway Company ("BNSF") upon coal traffic moving from the McKinley and Lee Ranch Mines in New Mexico to APS/PacifiCorp's Cholla Electric Steam Generation Station ("Cholla"), located near Joseph City, Arizona. See Docket No. 42091, Arizona Public Service Company and PacifiCorp v. The Burlington Northern and Santa Fe Railway Company (Complaint filed December 17, 2004).

Contemporaneous with the filing of their Verified Complaint and this Petition, APS and PacifiCorp also are seeking judicial review in the United States Court of Appeals for the District of Columbia Circuit of the Board's May 12, 2003, October 14, 2003, and December 13, 2004 decisions in Docket No. 41185, Arizona Public Service Company and PacifiCorp v.

The Burlington Northern and Santa Fe Railway Company. As the Board is aware, the referenced decisions in Docket No. 41185 pertain to the common carrier rates charged by BNSF for coal transportation service between the McKinley Mine and the Cholla Station.

The purpose of the instant Petition is to request that the Board hold the proceedings in Docket No. 42091 in abeyance pending resolution of APS and PacifiCorp's petition for judicial review of the Docket No. 41185 decisions.

ARGUMENT

1. The Board Routinely Holds Cases in Abeyance to Avoid the Waste of Resources or to Avoid Unnecessary Complexities

The Board routinely holds cases in abeyance in situations in which the time and resources of the parties and the Board would be wasted through ongoing proceedings. See, e.g., Docket No. AB-167 (Sub-No. 1094)A, Chelsea Property Owners – Abandonment – Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY (STB served Oct. 7, 2003); Docket No. AB-384 (Sub-No. 1X), Delta Southern R.R. – Abandonment Exemption – Between Lake Village, AR and Shelburn, LA (STB served June 17, 2004).

Board decisions to hold cases in abeyance historically have pertained to matters ranging from settlement discussions between the parties to situations in which developments in one case would impact issues in dispute in another. For example, in Finance Docket No. 34415, Ohio Dept. of Transp. – Petition for Declaratory Order – Status of Track at Findlay, Hancock County, OH (STB served Feb. 17, 2004) at 1, the Board held that "[t]he declaratory order proceeding in STB Finance Docket No. 34376 is held in abeyance pending the disposition of the City's petition to reopen STB Docket No. AB-33 (Sub-No. 132X).". Similarly, in Finance

Docket No. 34342, Kansas City Southern – Control – The Kansas City Southern Ry., Gateway Eastern Ry., and The Texas Mexican Ry. (STB served Oct. 8, 2003) at 3, the Board held that “[t]he procedural schedule adopted in Decision No. 2 is suspended, pending a resolution of the uncertainties that now surround KCS’s efforts to acquire control of Tex Mex.” See also Ex Parte No. 575, Review of Rail Access and Competition Issues (STB served March 2, 1999) at 1 (holding WCTL’s request for rulemaking in abeyance “pending our review of experience under the Rail Industry Agreement (RIA) recently entered into by AAR and ASLRRRA.”); Finance Docket No. 32530, Kansas City Southern Ry. – Construction and Operation Exemption – Geismar Industrial Area near Gonzales and Sorrento, LA (STB served Aug. 27, 1998) at 1-2 (“We have decided to hold further proceedings in this construction case in abeyance at this time because of several other recent developments that directly affect this case. . . . This proceeding is held in abeyance until the issuance of a final written decision in the pending CN-IC merger.”).

In addition, the Board’s precedent includes instances in which the Board has held complaint proceedings in abeyance where the otherwise applicable schedule would be improper. For example, in Docket No. 42023, DeBruce Grain, Inc. v. Union Pacific R.R. (STB served Dec. 22, 1997) at 4, the Board requested that the Complainant indicate whether it wished to hold its procedural schedule in abeyance pending changes in Union Pacific service patterns:

We will, of course, hear DeBruce’s individual complaint, through which it is seeking damages. In that regard, however, it is not clear to us whether, inasmuch as we are denying its request for injunctive relief, DeBruce wants to proceed with its complaint now, or whether it wants to wait until more normal levels of service are restored. We request that, by January 12, 1997, DeBruce propose a procedural schedule for handling its complaint, or that it request that its complaint be held in abeyance.

Likewise, in Docket No. 41191, West Texas Utilities Co. v. The Burlington Northern and Santa Fe Ry. (STB served July 23, 2003) at 2, the Board allowed the Complainant to indicate how it wished to proceed in light of related Board decisions:

As a general proposition, if a carrier did not object to a shipper's request to extend a rate prescription to embrace nearby mines, the Board would likely grant a request for such relief. In this case, however, WTU may no longer desire that relief, given the intervening change in the Rawhide prescription. Accordingly, WTU should advise the Board on whether and how it wishes to proceed. Its petition for a procedural schedule will be held in abeyance pending such notification.

See also Docket No. 42038, Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry. (STB served March 6, 2000) at 8 (holding "this proceeding in abeyance and require DMIR to conform its records to USOA for a 12-month period, beginning May 1, 2000, and to report appropriate cost data for that 12-month period.").

Finally, the Board has agreed to hold proceedings in abeyance pending the outcome of court actions. See, e.g., Docket No. WCC-102, Ocean Logistics Management, Inc. – Petition for Declaratory Order – Certain Rates and Practices of NPR, Inc., and Holt Cargo Systems, Inc. (STB served April 9, 1999) at 1 ("[A]s requested, the Board held the processing of the proceeding in abeyance pending the District Court's disposition of the related action."); Finance Docket No. 32896, Kansas City Terminal Ry. and The Atchison, Topeka and Santa Fe Ry. – Contract to Operate Exemption – In Kansas City, MO (STB served Nov. 20, 1996) at 1, 4 ("On June 10, 1996, Kansas City Southern Railway Company (KCS) filed a motion to hold the petition for exemption in abeyance pending resolution of a contract dispute between it and petitioners in the Circuit Court of Clay County, MO. . . . Under the circumstances it appears that

the best course of action is to hold up action on the matter before the Board for now, pending action by the court.”).

**2. The Facts of the Instant Case Warrant
a Decision Holding this Case in Abeyance**

The facts of the instant case warrant a result similar to that obtained in the cases cited supra. The Complaint in Docket No. 42091 pertains, in part, to the rates charged by BNSF for service from McKinley to Cholla during the time period from May 22, 2003 through the present. Those same rates are the subject of APS/PacifiCorp’s petition for review regarding the Board’s decisions in Docket No. 41185. Those decisions present what the Board has characterized as novel questions regarding the application of the Board’s stand-alone cost methodology in the context of the reopening of an existing prescription.

In the absence of a decision to hold the instant docket in abeyance, APS/PacifiCorp would be in the position of simultaneously: (i) seeking reversal of the Board’s decision regarding these May 2003-to-present rates before the court; and (ii) seeking a finding from the Board that BNSF’s May 2003-to-present rates exceed a reasonable maximum. In such a scenario, significant complexities would arise with respect to the development of a DCF model for this time period, the prescription of rates, and the calculation and payment of reparations. A decision to grant the instant Petition would obviate those difficulties.

As the Board is aware, parties to SAC cases are required to expend considerable resources to complete the discovery process and to develop and submit the multiple rounds of evidence that a SAC case requires. In preparing their case-in-chief, APS/PacifiCorp will be required to make a number of consequential decisions regarding the nature of their stand-alone

railroad model (e.g., SARR revenues, the starting date of SARR operations, etc.). If APS/PacifiCorp were required to present their SAC evidence to the Board prior to the completion of the judicial review proceedings involving Docket No. 41185, then the parties could be forced, upon the completion of that review proceeding, to submit supplemental or revised evidence in the instant docket. Having borne the considerable expense associated with their STB litigation to date, APS/PacifiCorp respectfully submit that it will be in the interest of all parties to avoid embarking on a procedural schedule that bears the risk of such redundancy and increased costs.

APS/PacifiCorp note that they will seek expedited handling of the judicial review proceeding, thus minimizing – to the greatest extent possible – the period in which the instant case would be held in abeyance. In particular, APS/PacifiCorp will seek to avail themselves of the processes developed by the United States Court of Appeals for the District of Columbia Circuit to allow cases to be briefed and/or argued on a more expedited basis. The success of that effort, however, will depend upon the cooperation of the Board and any other parties to the proceeding to the extent that the Court limits participation in its program for expedited cases to those appeals in which all parties support expedited treatment.

Moreover, in the event that APS/PacifiCorp are successful in their judicial challenge to the Board's decisions in Docket No. 41185, much of the instant dispute may be rendered moot. In fact, it is entirely possible in such a scenario that APS/PacifiCorp may elect at that time to withdraw their Complaint in the instant docket. Should that occur, Complainants also would seek a refund of their \$66,600.00 filing fee. Accordingly, to minimize the expenditure of effort made by the Board in terms of processing this case, APS/PacifiCorp request

that after docketing the Complaint in this case, and after granting this petition, the Board avoid further action in this case to the extent possible.

WHEREFORE, for the foregoing reasons, APS and PacifiCorp respectfully request that the Board grant this Petition to Hold in Abeyance Pending Judicial Review.

Respectfully submitted,

ARIZONA PUBLIC SERVICE COMPANY and
PACIFICORP

By: C. Michael Loftus
Frank J. Pergolizzi
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OF COUNSEL:

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Dated: December 17, 2004

Attorneys for Complainants

CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. § 1111.3, I hereby certify, that I have this 17th day of December, 2004 caused to be served copies of this Petition by overnight express courier on the senior legal officers of Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") as follows:

Jeffrey R. Moreland, Esq.
Richard E. Weicher, Esq.
2500 Lou Menk Drive
Fort Worth, TX 76131-0039

and by hand delivery on outside counsel for BNSF, as follows:

Samuel M. Sipe, Jr., Esq.
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, DC 20036



Andrew B. Kolesar III
An Attorney for Complainants