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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

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MAIL
MANAGEMENT
STB

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

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

December 4, 2003

VIA HAND DELIVERY

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

Office of Proceedings

DEC - 5 2003

Part of
Public Record

Re: Docket No. 42077, 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 Complainants Arizona Public Service Company and PacifiCorp's Petition for Filing Fee Refund. A diskette containing an electronic copy of the submission (in WordPerfect) is enclosed.

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,



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

Enclosure

cc: Counsel for Defendant

BEFORE THE
SURFACE TRANSPORTATION BOARD

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ARIZONA PUBLIC SERVICE COMPANY,
and PACIFICORP,

Complainants

v.

THE BURLINGTON, NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 42077

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PETITION FOR FILING FEE REFUND

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

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

OF COUNSEL:

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

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

Dated: December 4, 2003

ARIZONA PUBLIC SERVICE COMPANY,
and PACIFICORP,

 $\mathbf{y}_i$

THE BURLINGTON, NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Pursuant to 49 C.F.R. § 1117.1, Complainants Arizona Public Service Company and PacifiCorp (collectively “APS/PacifiCorp”) hereby respectively petition the Surface Transportation Board, upon the issuance of a decision granting their Request for Withdrawal filed in this docket on this date, to refund the filing fee paid upon the filing of their Complaint. In support of their petition, APS/PacifiCorp state as follows:

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2. As set forth in the Request for Withdrawal of Complaint filed separately in this docket on this date, APS/PacifiCorp brought their Complaint and sought to consolidate this docket with Docket No. 41185, with the intention of presenting a single, combined SAC analysis for purposes of both proceedings.

3. Under the Board's decisions served May 12, 2003 jointly in this docket and in Docket No. 41185, and served October 14, 2003 in Docket No. 41185, these proceedings have not been consolidated, development and presentation of a common SAC analysis for this proceeding and Docket No. 41185 is not possible, and APS/PacifiCorp thereby have concluded under these circumstances it is not in their best interest to pursue the Complaint in this proceeding at this time.

4. APS/PacifiCorp understand that the Board's rules (at 49 C.F.R. § 1002.2(c)) and authorities do not normally provide for the refund of filing fees, but believe that the unique circumstance of this case, which is at the very preliminary stages, with little or no substantive actions having occurred, and the equities involved -- especially given the high level of fees involved -- countenance the granting of a refund herein.

5. Board precedent has authorized refunds in instances where filings have been rejected on procedural grounds. See, e.g., Docket No. 32760 (Sub-No. 39), Union Pacific Corp., et al. -- Control and Merger -- Southern Pacific Rail Corp., et al. (STB Served Dec. 8, 2000). The Board's May 12 and October 14 decisions on the issue

of consolidation, were, for all practical effects in application, procedural decisions which inhibited APS/PacifiCorp's planned joint and simultaneous pursuit of the two dockets.

6. The equities involved further countenance the granting of a refund. A justification provided by the Board for its policy of rejecting filing fee refund requests in the context of rate reasonableness cases is the fact that the fee's purpose in such cases is "to reimburse this agency for a small portion (in the case of rail rate complaints) of the average expense incurred in processing such filings." Rate Guidelines -- Non-Coal Proceedings, 1 S.T.B. 1004, 1055 (1996). No procedural schedule has been entered by the Board in this docket, and APS/PacifiCorp do not believe that the Board has devoted significant time or resources on this docket which would require the reimbursement of expenses. Also, in contrast to other Board decisions where the refund requests involved relatively insignificant fee amounts, the fee involved here is significant. If the Board has incurred expenses in this docket, APS/PacifiCorp respectfully request that they be refunded the remaining portion of the filing fee after any involved Board expenses have been covered.

7. Finally, there is no cause to believe that granting a refund, given the unique circumstances of this case, "might encourage the filing of casual complaints designed to test the regulatory waters, rather than serious complaints in which the shipper is prepared to shoulder its burden of proof." Id. at 1055 n.159. In this docket, APS/PacifiCorp were fully prepared and desired to pursue their complaint and their filing was in no way frivolous. For the reasons set forth above and in the Request for

Withdrawal of Complaint filed in this docket on this date, APS/PacifiCorp's complaint is being withdrawn without prejudice because of the unique circumstances of the case, and they respectfully submit that their refund request is appropriate.

WHEREFORE, APS/PacifiCorp hereby respectfully request that their Petition be granted, and that an appropriate refund be made.

Respectfully submitted,

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

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

OF COUNSEL:

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

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

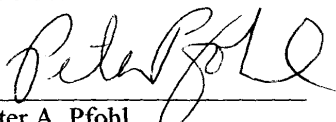
Dated: December 4, 2003

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2003, I served a copy of the foregoing Petition for Filing Fee Refund by hand delivery on designated outside counsel for BNSF, as follows:

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


Peter A. Pfohl