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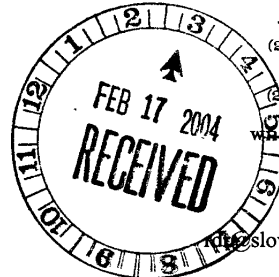
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February 17, 2004

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

FEB 17 2004

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 sixteen (16) copies of Complainant Arizona Electric Power Cooperative, Inc.'s Reply to Defendants' Motion to Dismiss on Reopening. In addition, we have enclosed three computer diskettes containing electronic versions of this Reply in WordPerfect 9.0 format.

We have enclosed an additional hard-copy of this Reply to be date-stamped and returned to the bearer of this letter. Thank you for your attention to this matter.

Respectfully submitted,

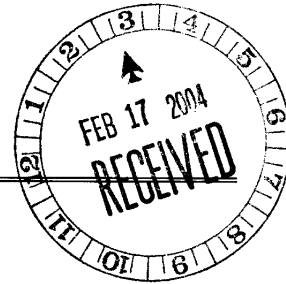
Robert D. Rosenberg
An Attorney for Arizona Electric Power
Cooperative, Inc.

Enclosures

cc: Counsel for Defendants

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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

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COMPLAINANT ARIZONA ELECTRIC POWER COOPERATIVE, INC.'S
REPLY TO MOTION TO DISMISS ON REOPENING

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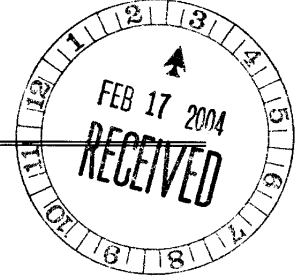
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Dated: February 17, 2004

Attorneys for Complainant

**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

**COMPLAINANT ARIZONA ELECTRIC POWER COOPERATIVE, INC.'S
REPLY TO MOTION TO DISMISS ON REOPENING**

Pursuant to 49 C.F.R. § 1104.13, Complainant Arizona Electric Power Cooperative, Inc. ("AEPCO"), hereby replies to the Motion to Dismiss on Reopening ("Motion") that Defendants The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") (jointly, "BNSF/UP" or "Railroads") filed in the above-captioned proceeding on January 26, 2004.

Defendants premise their Motion on AEPCO's election, in response to the Board's decision in the proceeding served November 19, 2003 (the "November 2003 Decision"), to rely on its previously-filed evidence, rather than submit additional evidence, particularly on the issue of trackage rights for operating over the Vaughn, NM-El Paso, TX, segment of its stand-alone railroad ("SARR"), the Apache, Cochise &

Eastern Railroad (“ACE”). Ironically, the November 2003 Decision denied an earlier motion to dismiss regarding AEPCO’s use of Vaughn-El Paso trackage rights, and instead gave AEPCO the explicit option of either (1) relying on its previously-filed rebuttal evidence, or (2) preparing a new case-in-chief:

Nor will the Board require AEPCO to prepare an entirely new case-in-chief at this late date. Rather ... AEPCO will be allowed to rely on its rebuttal SAC presentation as its case-in-chief, if it does not wish to prepare a new case-in-chief. However, if AEPCO chooses to rely on its rebuttal SAC evidence, 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.

Id. at 6.

A complainant’s election of an option squarely presented in the Board’s decision denying a motion to dismiss plainly cannot constitute grounds for subsequent dismissal, and it is absurd for the Railroads to contend otherwise. “As a general rule, a motion to dismiss is a disfavored request and rarely granted in judicial and administrative proceedings.” Docket No. 31593, Garden Spot & Northern Limited Partnership and Indiana Hi-Rail Corp. – Purchase and Operate – Indiana Rail Road Co. Line Between Newton and Browns, IL (ICC served Dec. 23, 1992), at 2. Indeed, a successful movant seeking dismissal must show that there are no material issues of fact and, in so doing, all evidence must be viewed in a light most favorable to the complainant. Docket No.

42012, Sierra Pacific Power Co. & Idaho Power Co. v. Union Pacific R.R. (STB served Jan. 26, 1998). In short, a party must show that it is entitled to judgment as a matter of law. See, e.g., Docket No. 40169, National Grain and Feed Association v. Burlington Northern R.R. (ICC served June 1, 1990), at 4 & n.4; Docket No. 40913, Department of Public Service Regulation and Public Service Commission of the State of Montana v. Union Pacific R.R. (ICC served March 15, 1993). Defendants have not presented, or even attempted to present, any facts that could support dismissal, and their legal arguments fly directly in the face of the November 2003 Decision itself.

Accordingly, whatever Defendants' Motion may be, it is not a motion to dismiss that may be granted. At best, Defendants' Motion might be construed as a petition for reconsideration of the November 2003 Decision, although the Motion is too late for that purpose and is now time-barred under 49 C.F.R. § 1115.3.¹ Indeed, it is difficult to discern if the Railroads' arguments are directed more against AEPCO's

¹AEPCO acknowledges that, under 49 C.F.R. § 1111.5, motions to dismiss can be filed at any time. Indeed, Defendants have previously filed several motions to dismiss or the functional equivalent at various times in the proceeding, including April 4, 2001, and April 18, 2003. But it is especially disruptive and burdensome to AEPCO for Defendants to have filed their latest Motion to Dismiss at the same time as their Supplemental Reply Evidence.

AEPCO notes, as discussed infra, that it has its own concerns with error in the November 2003 Decision, and that if Defendants wanted to pursue their concerns in a constructive manner, they could have sought to engage on the issue by joining in AEPCO's request for technical conference on the trackage rights issue.

evidence or more against the Board in order to preserve points for later appeal (although an additional motion to dismiss is hardly necessary for that purpose).

In particular, Defendants' Supplemental Reply at III.B-6 to 7 addresses the supposed inadequacy of the 3.2 mills figure than AEPCO used in its prior evidence. Moreover, BNSF/UP's Supplemental Reply Evidence at III.B-11 purports to (but does not actually) utilize the 9.05 mills per gross-ton mile trackage rights fee from the UP/SP merger referenced in the November 2003 Decision (and also referenced in AEPCO's November 26, 2003 response to the November 2003 Decision).² Defendants thus availed themselves of the opportunity conferred by the November 2003 Decision to attempt 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." Accordingly, the Motion is thus another example of Defendants' trying to have their cake (claim that they need not and cannot be forced to submit evidence on the issue) and eat it too (submit their evidence anyway).

²Specifically, Defendants' Supplemental Reply states they "have applied a 9.05 mills-per-GTM usage fee to SARR traffic moving over the Vaughn-El Paso line, and included the total fee thus generated in AEPCO's total operating expenses." BNSF/UP Supp. Reply at III.B-11 and at III.D-153 (similar effect). Notwithstanding such claims, BNSF/UP's actual calculations (e.g., BNSF/UP Supplemental Reply Exhibit III-H-1, Table K, line 11) appear to utilize the same 3.2 mills figure that AEPCO used on Opening and in its original Rebuttal.

While Defendants chose to ignore it, the derivation of the 9.05 mills figure suffices to overcome the substantive SAC concerns noted in Defendants' Motion and in the November 2003 Decision (which is presumably the reason that the Board referenced the figures in its decision). The figure was developed, presented, and defended by Richard F. Kauders, UP's then-Manager of Economics Research, in his Rebuttal Verified Statement in the UP/SP merger,³ for purposes of defending the reasonableness of a BNSF/UP trackage rights fee that was "nearly identical" to the 3.2 mills fee that AEPCO sought to utilize.⁴ In footnote 34 at p. 59 of his testimony, Mr. Kauders stated that "[t]he annuity method [which yields the lower 8.32 mills figure noted in the November 2003 Decision] is very similar to the discounted cash flow ('DCF') technique used in stand-alone rate cases." His testimony at pp. 59-60 further explained that "an engineering study

³UP/SP Applicants' Rebuttal, Public Version (UP-SP231), filed April 29, 1996, in Fin. Docket No. 32760, Union Pacific Corporation, et al., Vol. 2, Part A, at Tab 12.

⁴In its merger rebuttal narrative, UP/SP explained that "[t]he compensation levels provided for in the BN/Santa Fe settlement agreement are entirely reasonable" and "were arrived at in arm's-length negotiations between two highly sophisticated parties." UP/SP Applicants' Rebuttal (UP-SP231), Vol. 1, at 118. UP/SP further noted that "[i]n past merger cases, the ICC has repeatedly made clear its preference for privately negotiated terms and conditions for trackage rights" and "has also repeatedly set forth the compensation principles that it expects railroads to bring to bear in their negotiations, including the necessity for the tenant to contribute to fixed costs and asset replacement in order to avoid a cross-subsidy from the landlord." Id. at 125-26.

BNSF also addressed the reasonableness of the trackage rights fee, noting, among other things, that "SP ha[d] moved more than three billion gross ton-miles of traffic over trackage rights subject to nearly identical fees in just the first three months of" 1996. BN/Santa Fe's Response to Inconsistent and Responsive Applications, et al. (BN/SF-54), filed April 29, 1996, in Fin. Docket No. 32760, supra, Vol. 1, at 7.

is used to calculate the cost of replacing the lines” and “[a]n annual rental amount is then determined by calculating an annuity that takes into account the return on investment required by investors (the railroads’ cost of capital), depreciation, income taxes, and the value of the lines at the end of the annuity period.” While the annuity calculation excluded operating and maintenance costs on the basis that the track value was new and reflected upgrades (concrete bridges and CTC) that would lower the maintenance and operations costs (Kauders Reb. V.S. at 61, 64), his alternate replacement-cost-new-less-depreciation calculation (the 9.05 mills figure that Defendants claim to have used) included UP/SP system-average operating and maintenance expenses at 0.86 mills per gross ton-mile (*id.* at 70). Accordingly, the 9.05 mills figure identified in the November 2003 Decision, which Defendants themselves purported to utilize in their Supplemental Reply Evidence, does “take into account the full costs of providing and maintaining the physical plant needed to serve the traffic--costs which the joint-rate defendants collectively must bear” and thus enables “the SAC test [to] ... serve its purpose,” thus comporting with the standard set by the November 2003 Decision.

In any event, the Defendants certainly had ample opportunity in their Supplemental Reply Filing to attack the 3.2 mills fee, as well as to show that some other fee was more appropriate. They are not entitled to submit further evidence on the matter.

Nor is there any basis for Defendants to claim that the standard assignment of the burden of proof in rate cases has been impermissibly altered or that submitting

evidence on an appropriate trackage rights fee is somehow beyond their competence, especially under the circumstances presented here. The Defendant whose line is being utilized under trackage rights has already addressed, as an applicant in a prior merger proceeding, the issue of the appropriate level of trackage rights fees, utilizing stand-alone cost principles, in the context of supporting a nearly identical trackage rights fee with the other Defendant in this case, and that other Defendant concurred in the reasonableness of the trackage fee. Defendants are thus not starting from a blank slate, and neither was the Board, as demonstrated by its reference to the relevant portion of the UP/SP merger decision in the November 2003 Decision. Defendants possess, or have access to, all available information regarding the line in issue, including information on construction costs, operating and maintenance costs, and traffic levels. Defendants were plainly in a position to address the level of the trackage rights fee before (when they were merger applicants or seeking merger conditions), and they do not suddenly lose that capability because they are now defendants in a rate case.

Under the circumstances, the Board was entitled to determine that: (1) AEPCO could rely on a trackage rights approach (especially since a trackage rights agreement is already in place); (2) Defendants were in a position to attack the reasonableness of the 3.2 mills figure specified in the existing agreement (which Defendants did); and (3) Defendants were in a position to show that a higher fee was more appropriate (inasmuch as they had previously addressed the issue of trackage rights

compensation utilizing what Defendants' characterized over seven years ago as repeatedly stated compensation principles). In light of the delays that had already ensued in the proceeding, much of which stemmed from discussion of the trackage rights issues, the Board was entitled to depart from the normal allocations of the burdens of going forward and responding in this particular instance. The Board was certainly entitled to find that AEPCO had already met its initial burden of going forward, especially in light of the Board's prior decisions in the case, and the Board is also free to revise the allocation of procedural burdens in a particular instance.

AEPCO adds that its opposition to Defendants' Motion and its explanation of the aspects of the November 2003 Decision addressed by the Motion should not be construed as any sort of concession that AEPCO should not be allowed to utilize the existing trackage rights fee in the existing trackage rights agreement. To the contrary, AEPCO, as it explained in its November 26, 2003 response, strongly believes that the Board's ruling that AEPCO cannot utilize the fee level set in the existing trackage rights agreement violates stand-alone cost theory in general by imposing an entry barrier on the SARR that does not apply to the defendants as they operate in the real world. See, e.g., Bituminous Coal--Hiawatha, Utah, to Moapa, Nevada, 6 I.C.C.2d 1, 54 (1989). The violation is exacerbated here because UP previously characterized a fee nearly identical to that which AEPCO sought to utilize as "eminently reasonable" "arrived at in arm's-length negotiations between two highly sophisticated parties," and comporting with established

“compensation principles .. including the necessity for the tenant to contribute to fixed costs and asset replacement in order to avoid a cross-subsidy from the landlord.”

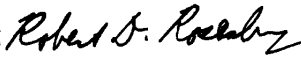
Moreover, the Board’s latest ruling directly contravenes prior decisions in this case, which squarely held that AEPCO could utilize joint-defendant trackage rights to challenge a joint rate. Nor does AEPCO agree that the Defendants should be entitled to submit Supplemental Reply Evidence that could, and should, have been submitted as part of Defendants’ original Reply Evidence.

For the reasons stated, the Defendants’ Motion to Dismiss should be denied.

Respectfully submitted,

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Dated: February 17, 2004

Attorneys for Complainant

Certificate of Service

I hereby certify that this February 17, 2004, I have caused a copy of the foregoing Response to be served upon counsel for Defendants as follows:

By Hand:

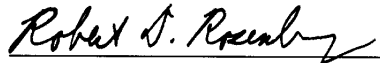
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