

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**ARIZONA ELECTRIC POWER
COOPERATIVE, INC.,**

Complainant,

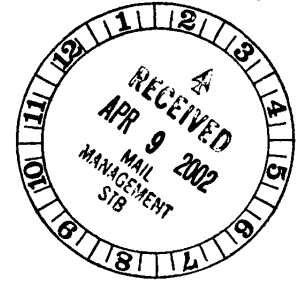
v.

**THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY
COMPANY and**

**UNION PACIFIC RAILROAD
COMPANY,**

Defendants.

Docket No. 42058



**ENTERED
Office of the Secretary**

APR 10 2002

**Part of
Public Record**

UP'S REPLY IN OPPOSITION TO AEPCO'S SECOND MOTION TO COMPEL

On March 20, 2002, Arizona Electric Power Cooperative, Inc. ("AEPCO") filed a Second Motion to Compel directed at The Burlington Northern and Santa Fe Railway Company ("BNSF"). Union Pacific Railroad Company ("UP") submits this short reply because AEPCO's filing affects UP's interests in two respects.

First, AEPCO seeks BNSF revenues and related information on BNSF's traffic through Colorado in an impermissible effort to combine UP and BNSF revenues in its challenge to UP's single-line rates for Colorado coal. For the reasons discussed in Part I below, the Board should not require BNSF to produce such "Colorado Information" for use in regulating UP's rates.

Second, AEPCO seeks to alter established discovery procedures by requiring railroads automatically to produce confidential customer contracts in future rate cases. For the reasons discussed in Part II below, the Board should not adopt a discovery scheme that would preclude UP's and its non-party customers' legitimate objections to discovery.

I. A Stand-Alone Railroad Is Limited To The Defendant's Rights Under Joint Facility Agreements And Cannot Claim Other Railroads' Revenues

AEPCO incorrectly contends that it needs BNSF's Colorado Information because UP has trackage rights over BNSF and vice versa in Colorado. AEPCO claims that it needs BNSF revenue and other information so it can obtain the same benefits that UP receives from facilities UP shares with BNSF.¹ AEPCO does not need BNSF's Colorado Information for its stand-alone railroad ("SARR") to replicate the benefits that UP receives; it needs a different type of information from UP. The benefits UP receives from shared facilities are determined by UP's agreements with BNSF; they have nothing to do with BNSF's traffic revenues and related information. AEPCO can obtain information regarding UP's joint facility agreements from UP, and UP is willing to provide the additional discovery that AEPCO needs to replicate UP's benefits from these joint facilities.

¹ UP is not addressing AEPCO's right to discover BNSF revenue and related data and to use them to regulate BNSF/UP joint-line rates for PRB coal, if they are at issue in this case. UP is instead addressing AEPCO's right to discover BNSF revenues and related data and to use them to regulate a single-line UP rate. If there is no PRB movement in this case, AEPCO has no need for BNSF's Colorado Information for any purpose. Even if the Board rules that PRB rates can be challenged in this case, BNSF's revenues and other information cannot be used to regulate UP's single-line rate. UP has explained in a separate filing why, even if the PRB rates are at issue, the Board must require a separate stand-alone presentation for UP's single-line rate. See Defendants' Petition for an Order Requiring Separate Evidentiary Submissions for Each Rate Challenged by AEPCO, filed Feb. 15, 2002, pp. 7-10.

AEPCO's SARR is not entitled to any share of BNSF's revenues simply because the UP complaint traffic moves over joint facilities with BNSF. In a stand-alone cost case, the SARR "step[s] into the shoes" of the defendant railroad with respect to traffic that the complainant includes in its stand-alone network. See West Texas Utilities Co. v. Burlington Northern R.R., 1 S.T.B. 638, 657 (1996). This basic principle applies in a straightforward manner whenever the issue traffic shares facilities with the non-issue traffic of another carrier:

- Where the defendant's route includes trackage rights over another carrier – as in the case of UP's trackage rights over BNSF's line between NA Jct., CO, and Stratford, TX – the complainant may utilize those trackage rights under the same terms and conditions that apply to the defendant. See Bituminous Coal - Hiawatha, Utah to Moapa, Nevada, 6 I.C.C.2d 1, 54 (1989); Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 543 n.60 (1985).
- Under the same principle, where another carrier has trackage rights over the defendant's route – as in the case of BNSF's trackage rights over UP's line between Bond, CO, and Denver, CO – the complainant is entitled to the trackage rights fees earned by the defendant, as long as the complainant also assumes the defendant's obligations to the tenant.
- Where the defendant and another carrier jointly own facilities – as in the case of UP's and BNSF's lines between Denver, CO, and Pueblo, CO² – the complainant is

² Between Denver and Pueblo, some of the tracks are jointly owned; other tracks are owned separately, but the non-owning carrier has trackage rights.

similarly entitled to the same benefits of joint ownership as the defendant, as long as it also assumes the defendant's obligations.

UP agrees with AEPCO that AEPCO's SARR is entitled to the same benefits UP enjoys from its joint facilities. By standing in UP's shoes, AEPCO's SARR will benefit from BNSF traffic moving over shared facilities to the same extent that UP benefits.

AEPCO cannot be allowed any portion of BNSF's revenues from traffic over joint facilities that UP uses to serve AEPCO, because UP cannot obtain those revenues. Because of competitive concerns, UP and BNSF would not be allowed to merge and share that traffic. UP's rates should not be reduced because of revenues UP cannot earn. UP does earn the trackage rights fees that BNSF pays as a tenant, and AEPCO could properly inquire about those fees.

The Board will encourage unreasonable and inequitable SARRs if it allows complainants to obtain revenues for traffic of railroads that do not participate in the challenged rate merely because they share joint facilities with a defendant. For example, in a challenge to a BNSF single-line rate for movement of coal from New Mexico to Los Angeles, the complaining shipper might claim for its SARR a share of UP's revenues for UP's transcontinental traffic between Chicago and Los Angeles simply because UP has trackage rights on the BNSF line for 100.4 miles over Cajon Pass. Under AEPCO's theory, the complainant would be entitled to group the UP traffic in its SARR because UP shares a joint facility with BNSF.³ The shipper would claim revenues for these shipments, even though BNSF cannot obtain them, and even

³ Indeed, under AEPCO's theory, the SARR could include part or all of the UP system in its SARR because UP traffic uses the joint-facility portion of the issue route. Second Motion to Compel at 22.

though BNSF has no voice in UP's rates. BNSF receives only the trackage rights fees UP pays to BNSF.

Similarly, in a rate challenge to a single-line KCS rate for grain from Kansas City to Arkansas, under AEPCO's reasoning, the complainant could claim an allocation of revenues for BNSF's transcontinental traffic, UP's St. Louis gateway traffic, IMRL's Chicago-Kansas City traffic, and NS's Kansas City gateway traffic. Why? Because BNSF, UP, IMRL, and NS all share joint trackage with KCS in Kansas City. Under AEPCO's theory, the complainant would be entitled to group all of the traffic of every railroad using the joint facility. The complainant would claim revenues for this traffic, even though KCS gains no revenues or quantifiable benefits from the traffic of other carriers using the joint facility in Kansas City.

The Board must draw reasonable limits on SARRs and on the associated discovery in rate cases. It should not allow SARRs to enjoy revenues that defendants cannot obtain in the real world. Nor should it expose a defendant to liability on the basis of another railroad's pricing decisions.⁴ It must limit SARRs to the defendant's rights under joint facility agreements and require the SARR to step into the defendant's shoes.

Accordingly, AEPCO's discovery requests asked the wrong questions of the wrong party. AEPCO should not demand revenue and other information from BNSF for the

⁴ See Defendants' Petition for an Order Requiring Separate Evidentiary Submissions for Each Rate Challenged by AEPCO, filed Feb. 15, 2002, pp. 8-9. To the extent that AEPCO seeks information about traffic that does not even share facilities with traffic moving over UP's single-line route for Colorado coal, UP has previously explained that statutory revenue adequacy requirements preclude AEPCO from combining competing railroads' traffic. See Union Pacific's Reply in Opposition to AEPCO's Motion to Compel, filed May 7, 2001, pp. 8-10. UP has also previously explained that the Board's Constrained Market Pricing principles preclude the cross-subsidization that would occur if AEPCO sought to add traffic to its SARR that does not use the complaint route. See *id.* at 10-12.

Colorado traffic. It should ask UP for information about the joint-facility traffic moving over UP lines and the fees UP receives or pays for use of joint facilities. But AEPCO's requests to UP did not seek the necessary information to allow its SARR to stand in UP's shoes with respect to joint facility agreements. For example, AEPCO has not asked UP about BNSF's trackage rights payments to UP.

UP is willing to remedy AEPCO's oversight. Although AEPCO has already served extensive discovery requests on UP, UP is willing to provide the additional discovery necessary for AEPCO's SARR to stand in UP's shoes with respect to joint facilities on the lines traversed by the UP complaint traffic.

II. AEPCO's Discovery Of Confidential Customer Contracts

AEPCO suggests that the Board "make it part of the standard procedure that an order requiring production of contracts be issued at the same time as the protective order." Second Motion to Compel at 27. An automatic blanket order compelling production of all commercially sensitive third-party contracts requested by complainants, denying defendant railroads and their customers an opportunity to interpose legitimate objections, would be inappropriate.

The Board should not foreclose railroads from raising appropriate objections about the nature and scope of customer contract discovery. Nor should the Board deprive shippers that are not party to the rate dispute – and that may even compete directly with the complainant – of the opportunity to raise the sensitive commercial concerns that underlie the confidentiality clauses in these contracts. In UP's experience, when an objection has been asserted, the customers and the parties have been able to fashion mutually acceptable solutions. AEPCO's proposal for a blanket order compelling automatic production in every future case

would foreclose either approach and trample upon the legitimate concerns of defendant railroads and their customers.

UP's actions in this case demonstrate that no new rule is needed. When UP responded to AEPCO's overbroad request for contracts and common carrier pricing authorities for all shipments moving over specified lines, UP raised several objections. At a meet-and-confer session, UP agreed as an initial matter to produce contracts for trainload movements of Colorado coal after notifying its customers as the contracts required.⁵ (For this subset of contracts alone, UP sent customers 37 notice letters regarding disclosure of 80 contracts.) UP reserved its burden objection for all other contracts, quotes, tariffs, and other price instruments that applied to any traffic moving over the AEPCO route. UP has since determined that it has 6,300 responsive price instruments in 2000 and 5,300 in 2001. AEPCO and UP are negotiating over the remaining scope of customer contract discovery in order to address UP's burden concerns.⁶ If an agreement is reached as anticipated, UP will follow a similar notification process to the extent required for a reasonable subset of the additional contracts.⁷ If AEPCO's

⁵ UP is not privy to the confidentiality provisions of BNSF contracts (with very few exceptions where it is also a party). UP's practice of notifying customers and allowing them to raise objections prior to UP actually producing their contracts satisfies UP's obligations under its agreements. That does not mean that UP's practice would satisfy BNSF's contractual commitments.

⁶ See Letter from Eric C. Bosset, Esq., to Christopher A. Mills, Esq., dated Apr. 8, 2002 (attachment A).

⁷ In its motion, AEPCO applauds UP for not requiring or requesting a Board order before seeking to obtain consents to produce confidential documents. Second Motion to Compel at 27. Ironically, AEPCO is refusing to seek consents to produce confidential documents regarding its dealings with coal suppliers, and it is insisting that UP and BNSF move to compel production of such documents. See Letter from Andrew B. Kolesar III, Esq., to Cynthia L. Quarterman, Esq., and Eric C. Bosset, Esq., dated Mar. 28, 2002, p. 5 (attachment B).

proposed practice were adopted, however, UP would be required to produce all of the price instruments AEPCO demanded without a meaningful opportunity to discuss compromise or to minimize or share the burden of production.

As UP's response to AEPCO's discovery demonstrates, the existing discovery procedures allow complainants to obtain the information they need while respecting the legitimate concerns of carriers' non-party customers regarding disclosure of commercially sensitive information. They also promote privately negotiated solutions to discovery issues without Board intervention. AEPCO's proposed procedure is unnecessary and unfair to other parties.

Respectfully submitted,



JAMES V. DOLAN
LOUISE A. RINN
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179

J. MICHAEL HEMMER
ERIC C. BOSSET
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
Tel: (202) 662-6000
Fax: (202) 662-6291

*Counsel for Defendant Union Pacific
Railroad Company*

April 9, 2002

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, hereby certify that on this 9th day of April, 2002, I caused copies of "UP's Reply in Opposition to AEPCO's Second Motion to Compel" to be served on the following individuals:

Christopher A. Mills, Esq. (by hand)
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036

Patricia E. Cooper, Esq. (by overnight mail)
Arizona Electric Power Cooperative, Inc.
1000 S. Highway 80
Benson, AZ 85602

Cynthia Quarterman, Esq. (by hand)
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, DC 20036

Michael E. Roper, Esq. (by overnight mail)
The Burlington Northern and Santa Fe Railway Company
3017 Lou Menk Drive
Fort Worth, TX 76131



Michael L. Rosenthal

ATTACHMENT A

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW WASHINGTON, DC
WASHINGTON, DC 20004-2401 NEW YORK
TEL 202.662.6000 LONDON
FAX 202.662.6291 BRUSSELS
WWW.COV.COM SAN FRANCISCO

April 8, 2002

BY HAND

Christopher A. Mills, Esq.
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036

Re: STB Docket No. 42058, Arizona Electric Power Cooperative, Inc.
v. The Burlington Northern and Santa Fe Railway Company
and Union Pacific Railroad Company

Dear Chris:

This letter addresses UP's efforts in response to AEPCO's Request for Production No. 43, regarding UP price instruments for coal and non-coal traffic included on the traffic tapes UP produced to AEPCO.

Colorado Coal Price Instruments

UP has initiated the process of producing all transportation contracts involving coal from Colorado mines, some 80 contracts in all. UP already notified, as it is contractually required to do, the 37 affected customers about UP's intention to produce the contracts unless objection is made by April 30, 2002. Absent objection, UP anticipates producing the responsive contracts soon thereafter. We will encourage any objecting parties to explore with you ways in which their concerns can be addressed, if possible, without Board involvement.

Other Coal and Non-Coal Price Instruments

Enclosed with this letter is a compact disc that contains a comprehensive list of all price instruments (e.g., contracts, tariffs, quotes) for UP traffic on the traffic tapes for years 2000 and 2001. The disc bears the bates label U-A-HC 015379 and is designated "Highly Confidential." For your further convenience, we also enclose paper summaries of this data by instrument type and business group. These documents are bates labeled U-A-HC 015380 through U-A-HC 015382, and are also designated "Highly Confidential."

Christopher A. Mills, Esq.
April 8, 2002
Page 2

These documents show that there are approximately 6300 responsive price instruments for year 2000, and approximately 5300 responsive price instruments for year 2001. In addition to the 80 Colorado contracts already in process, UP will agree to produce an additional one percent of these price instruments, to be selected by AEPCO, for each year (i.e., 63 instruments for 2000 and 53 instruments for 2001). AEPCO's selection of a contract in effect for both years will count only against one year. As with the Colorado coal contracts, UP will provide all third parties to the contracts or quotes that AEPCO selects with prior notice and an opportunity to object. Any selected tariff/circulars will be produced directly because they are public documents.

UP's proposal permits AEPCO to select instruments for a substantial majority of UP's traffic volume on the tapes produced in this case. Indeed, the top 63 price instruments for year 2000 represent over 79% of the traffic volume for that year. Similarly, the top 53 price instruments for year 2001 represent over 78% of the traffic volume for that year. The coverage under UP's proposal would be much higher since many coal contracts are included among the top price instruments, yet will not count against AEPCO's selection for either year.

It bears emphasis that UP's proposal will require a substantial amount of additional work by UP to comply with the contractual notice provisions, and to locate up to 116 instruments and amendments in addition to the 80 Colorado contracts already underway.

I look forward to hearing from you.

Sincerely,

Eric C. Bosset/psr

Eric C. Bosset

Enclosures

cc: Louise A. Rinn, Esq.

ATTACHMENT B

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. PENGOZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
KAREN HASSELL HERREN

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:

abk@sloverandloftus.com

March 28, 2002

VIA TELECOPIER

Cynthia L. Quarterman, Esq.
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Eric C. Bossett, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Docket No. 42058, Arizona Electric Power
Cooperative, Inc. v. The Burlington Northern
and Santa Fe Railway Company and Union Pacific
Railroad Company

Dear Cynthia and Eric:

We are writing to follow-up on our March 22, 2002 meet-
and-confer session regarding BNSF and UP's First and Second Sets
of Discovery Requests ("First Requests" and "Second Requests").

1. Document Requests Subject to
AEPCO's "Ex Parte No. 627" Objection

The discussion at our meeting focused principally upon
what we refer to as BNSF and UP's "Ex Parte No. 627" requests.¹
As we indicated, AEPCO objects on grounds of relevance and burden
to producing documents that have been sought solely to develop
evidence regarding any potential "indirect" influences on coal
consumption during the twenty year life of AEPCO's stand-alone
railroad. It is AEPCO's position that the production of such
documents is not appropriate, particularly where, as here, AEPCO
has agreed to produce its formal coal consumption forecasts.

¹ See, e.g., First Request Nos. 5, 6, 14-16, 23-25, 31-37,
40-46, 49 and First Interrogatory Nos. 8, 9, and 11.

Cynthia L. Quarterman, Esq.
Eric C. Bosset, Esq.
March 28, 2002
Page 2

Those forecasts, of course, implicitly reflect AEPCO's assessment of "indirect" influences.

In particular, AEPCO will produce three years' worth of the formal unit-specific forecasts of coal consumption that it prepares for its annual budgeting purposes, and will provide its most recent update to the current annual forecast.² This information sufficiently addresses your discovery requests as to future coal consumption, and under Board precedent, obviates any suggestion that the railroads have a need for documents that have only an "indirect" bearing on future coal use.

At our March 22 meet-and-confer, we also discussed the burden associated with BNSF and UP's numerous "Ex Parte No. 627" requests. These requests seek an exceptionally wide range of material that encompasses the full breadth of AEPCO's operations. In addition, rather than being restricted to official and/or formal summaries of these diverse topics, your requests frequently seek all documents "discussing, describing or relating to" each of the Ex Parte No. 627 topics.

For example, your First Request Nos. 40-42 seek "all documents describing, discussing or relating to current, proposed, or possible laws and regulations," including but not limited to "environmental laws and regulations," that "affect[] or [are] applicable to:"

Request No. 40: "the sale of electric power by utilities"

Request No. 41: "the burning of coal by utilities"

² AEPCO also will provide any: (i) origin-specific coal consumption forecasts; (ii) short-term coal consumption forecasts; (iii) forecasts of coal demand and/or production generally; (iv) forecasts of coal demand and/or production for a given region; (v) forecasts of railroad rates and/or costs; (vi) forecasts of the capacity factor of AEPCO's coal-fired units; and (vii) forecasts generated by the expert(s) AEPCO retains to sponsor evidence in this case regarding future stand-alone volumes (to the extent such forecasts are not subject to confidentiality restrictions).

Cynthia L. Quarterman, Esq.
Eric C. Bosset, Esq.
March 28, 2002
Page 3

Request No. 42: "building coal-fired electric generating facilities"

In order to comply with these requests, AEPCO would be required to identify each of the "current, proposed, or possible laws and regulations" that might affect or might be applicable to each of the individual topics. Of course, given the extraordinary breadth of these topics (e.g., the "burning of coal"), AEPCO would be required to spend an inordinate amount of time attempting to develop its list of such current, proposed, or possible laws or regulations. After developing this list, AEPCO would be required to identify the departments and individuals within its organization that potentially might have some awareness of, or involvement with, such "current, proposed or possible" laws or regulations. Then, of course, AEPCO would be required to collect each and every document that describes, discusses or (with the greatest burden) relates to such laws or regulations from these different company sources.³

Similar burdens would be associated with your other Ex Parte No. 627 requests. In particular, your requests seeking information regarding AEPCO's power sales (e.g., First Request Nos. 5, 6, and 15) are extremely burdensome and lack any corresponding evidentiary value to this case. Essentially, these requests ask AEPCO to produce every document in its possession that describes, discusses, or relates to AEPCO's core business, namely, the past, present, or future sale of electric power. We understand from your comments at our meeting that you wish to explore the burden associated with production based upon some subset of the information that you requested. However, even if the railroads were willing to make some commitment that the production of such a subset would obviate the need to pursue the balance of the requested documents -- and we note that you have not offered to make such a commitment -- AEPCO nevertheless would be required to sift through all of its office, seeking all documents that "relate" to its power sales arrangements.

³ We understand that the railroads do not intend to pursue a response to Request No. 43 (seeking documents regarding laws or regulations affecting or applicable to the operations of AEPCO's customers). Even with this limitation, the burden associated with your requests is still inordinate.

Cynthia L. Quarterman, Esq.
Eric C. Bosset, Esq.
March 28, 2002
Page 4

Notably, there is also a considerable burden that would be associated with producing all documents (regardless of date) that "relate" to the boilers used at the Apache Station, and with producing all documents (regardless of date) that are "related" to constraints on AEPCO's consumption of differing types of coal, including documents describing, discussing or relating to the issues of "HGI, ash fusion, BTU per pound, ash percentage, sulfur percentage, and [any unspecified] other restraints." See First Request No. 33 (emphasis added).

In addition to these specific examples, the other "Ex Parte No. 627" requests that BNSF and UP have made also would impose considerable discovery burdens on AEPCO.⁴ As such, AEPCO's refusal to produce the Ex Parte No. 627 documents that you have requested is based on grounds of both relevance and burden.

2. Updates to Prior Responses and Production

As we indicated at our meeting, AEPCO is willing to update its prior responses and document production. In instances in which AEPCO previously agreed to produce documents (or information) to the railroads, AEPCO will update its production. In instances in which AEPCO previously stated that no responsive documents exist, AEPCO will confirm that its response is still correct.

This commitment is based upon our expectation that the railroads will produce current information in response to AEPCO's discovery requests.

3. Coal Supply Materials

AEPCO has complied fully with the Board's December 31, 2001 decision regarding AEPCO's current North Tipple and Lee Ranch agreements. Moreover, in response to your Second Set of Requests, AEPCO has produced each of its current coal supply agreements with Colorado and PRB mines. In other words, AEPCO has fulfilled its commitment as to each agreement that is responsive to Second Request No. 1.

⁴ Moreover, as we suggested at our meeting, these requests all involve lines of inquiry that the Board has determined to be too burdensome for it to analyze.

Cynthia L. Quarterman, Esq.
Eric C. Bosset, Esq.
March 28, 2002
Page 5

With respect to additional documents sought in your First and Second Sets of Requests,⁵ we have concluded that rather than seeking consent from each necessary party, it would be more efficient for BNSF and UP to file a motion to compel the production of such documents. Although specifically preserving its relevance objection with respect to the merits of this case, AEPCO hereby confirms that it would not object to the entry of an STB order compelling the production of: (i) all of AEPCO's coal supply agreements in effect from January 1, 1998 to the present; and (ii) any documents generated on or after January 1, 1998 that are responsive to your First Request Nos. 4 and 7.⁶ AEPCO's response to a motion to compel seeking documents solely of this nature would be to state that confidentiality restrictions prevent the disclosure of these materials in the absence of a Board order.

AEPCO, however, maintains its objection on grounds of confidentiality, relevance, and burden insofar as the railroads seek: (i) coal supply contracts that terminated before January 1, 1998; (ii) other documents dated before January 1, 1998 relating to AEPCO's coal supply contracts; and (iii) routine contract administration documents (e.g., invoices, loading notices, etc.). We do not believe that such documents have any bearing on the issues in dispute in this case.

4. Expanding the Scope of Prior Requests
to Include Colorado and PRB Origins

In a number of instances, BNSF and UP have asked AEPCO to expand its production of documents in response to "North Tipple/Lee Ranch" requests and interrogatories to also include Colorado and PRB coal origins. Although AEPCO notes that the

⁵ E.g., coal supply contracts that are not currently in effect and confidential coal supply bids that did not result in contracts.

⁶ We believe that an order of this nature would encompass all of the coal supply-related materials that you seek (with the exception of certain pre-1998 documents), including the materials that would be responsive to those of your Second Requests (e.g., Second Request Nos. 9 and 10) that the railroads asked to expand at our March 22 meeting.

Cynthia L. Quarterman, Esq.
Eric C. Bosset, Esq.
March 28, 2002
Page 6

railroads have failed to similarly expand their own production of documents, AEPCO nevertheless will comply with this request.

5. Alternative Fuel Use

At our March 22 meeting, BNSF and UP raised the subject of First Request No. 32, which seeks the production of all documents, regardless of date, describing, discussing or relating to the Apache Station's current or future ability to generate electricity using "natural gas, oil or other fuels, including but not limited to engineering studies, forecasts, projections or estimates." As we indicated, AEPCO -- for many years -- has had the ability to burn both coal and gas at the Apache Station. As such, your request seeks what would be an extremely large number of documents.

Following this discussion, you asked whether AEPCO would be willing to produce some subset of responsive material to demonstrate the extent of AEPCO's ability to use natural gas. Without some clearer definition of the scope of your narrowed request, we are unable to provide any response other than to reiterate that AEPCO objects to producing documents regarding the use of alternative fuels. We note that it is public knowledge that AEPCO has the physical ability to burn natural gas.

6. Current Coal Blending Capabilities

By way of confirmation, AEPCO committed at our meet-and-confer session to producing documents sufficient to identify the current coal blending capabilities of the Apache Station.

7. Rail Cars

As we indicated during our meeting, AEPCO will inform the railroads if any of the documents sought in First Request No. 38 (regarding railcars owned or leased by AEPCO) are withheld on grounds of confidentiality.

8. Cycle Times

AEPCO will produce documents responsive to the railroads' First Request No. 38 regarding cycle times. This production will include both routine waybill-type documents and summa-

Cynthia L. Quarterman, Esq.
Eric C. Bosset, Esq.
March 28, 2002
Page 7

ries of railroad cycle times, to the extent that such summaries exist.

9. Reports Submitted to State/Local Governments

AEPCO is willing to expand the scope of the documents that it will produce in response to First Request No. 49 to also include responsive reports, if any exist, relating to "the demand for coal."

With regard to the question raised at our meeting regarding to reports submitted to state or local governments pertaining to the construction of new coal-fired facilities, AEPCO hereby stipulates that its stand-alone model in this case will not include traffic moving to any new AEPCO coal-fired plant.

Finally, in response to your March 22 inquiry, we note that AEPCO will produce copies of its Integrated Resource Plan pertaining to the time period from 1998 to the present.

10. First Interrogatory No. 3

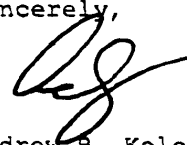
AEPCO will identify any additional contractors engaged in activities at the Apache Station that are related to the transportation of coal.

11. Attachments from e-mail Correspondence

AEPCO will endeavor to locate and produce any missing attachments to the email messages that have been produced in this case.

We believe that this letter responds adequately the various inquiries that the railroads made at our March 22 meeting.

Sincerely,



Andrew B. Kolesar III