



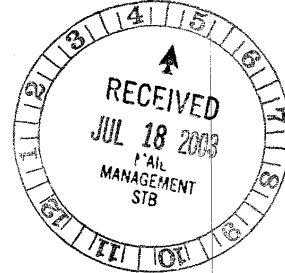
BRUSSELS CINCINNATI CLEVELAND COLUMBUS DAYTON NEW YORK WASHINGTON, D.C.

July 18, 2003

By Messenger

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

208443



RE: Docket No. 42077, *Arizona Public Service Company and PacifiCorp v. The Burlington Northern and Santa Fe Railway Company*

Dear Secretary Williams:

Please find enclosed an original and ten (10) copies of the (1) Motion for Leave To File a Rebuttal in Support of Peabody Energy Corporation's Petition to Intervene and Petition for Injunctive Relief, and (2) Rebuttal in Support of Peabody Energy Corporation's Petition to Intervene to be filed in the above referenced case.

Also enclosed is an extra copy to be date stamped and returned.

Sincerely,

Jeffrey O. Moreno

Enclosures

cc: (with enclosures)
Samuel M. Sipe, Esq.
Michael H. Loftus, Esq.

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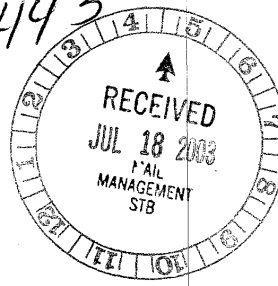
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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 42077

ARIZONA PUBLIC SERVICE COMPANY AND PACIFICORP

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

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MOTION FOR LEAVE TO FILE A
REBUTTAL IN SUPPORT OF
PEABODY ENERGY CORPORATION'S

PETITION TO INTERVENE
AND
PETITION FOR INJUNCTIVE RELIEF

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*Attorneys for Intervenor,
Peabody Energy Corporation*

July 18, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 42077

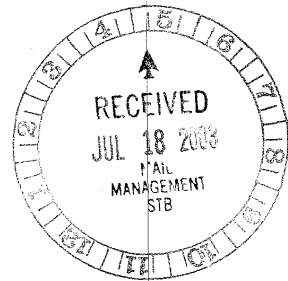
ARIZONA PUBLIC SERVICE COMPANY AND PACIFICORP

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MOTION FOR LEAVE TO FILE A
REBUTTAL IN SUPPORT OF
PEABODY ENERGY CORPORATION'S

PETITION TO INTERVENE
AND
PETITION FOR INJUNCTIVE RELIEF



On June 16, 2003, Peabody Energy Corporation ("Peabody") petitioned the Surface Transportation Board ("STB" or "Board") for leave to intervene in this proceeding and for an order under both 49 U.S.C. § 721(b)(4) and the "Phasing Constraint" in Coal Rate Guidelines Nationwide, 1 I.C.C. 2d 520, 547-48 (1985), to enjoin The Burlington Northern and Santa Fe Railway Company ("BNSF") from collecting the rates established in BNSF Common Carrier Pricing Authority 90040-A, Supplement No. 4 ("BNSF 90040-A"). Specifically, Peabody requested that the Board immediately (1) enter an order instructing BNSF not to collect a rate

higher than the last effective contract rate from the Lee Ranch Mine to the Cholla Electric Generating Station (“Cholla” or “Cholla Station”) during the pendency of this proceeding; and (2) order BNSF and APS to keep account of the amounts paid during the pendency of this proceeding and to make the other party whole, at the conclusion of this proceeding, with respect to the amounts paid during the interim, based on what the Board ultimately finds to be the maximum reasonable rate. BNSF filed a reply in opposition to Peabody’s Petitions on July 7, 2003.

Pursuant to 49 C.F.R. 1104.13(c), a reply to a reply is not permitted. Peabody hereby petitions the Board to waive this restriction and accept for filing the attached “Rebuttal in Support of Peabody Energy Corporation’s Petition to Intervene and Petition for Injunctive Relief.” In support of this Motion, Peabody states as follows:

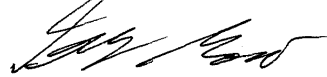
1. First and foremost, the phasing constraint is a standard of rate reasonableness on a par with the stand-alone cost (“SAC”) constraint. In SAC proceedings, the party with the burden of proof on an issue has the last word on the issue. Thus, for example, the complainant has a right of rebuttal on SAC issues and the defendant has a right of rebuttal on variable cost issues. The Board also employed the same pleading cycle in STB Docket No. 41685, CF Industries, Inc. v. Koch Pipeline Company, LP, decision served May 14, 1997, a case that involved the “revenue adequacy” constraint. There is no reason to treat the phasing constraint any differently procedurally than the Board has treated the SAC and revenue adequacy constraints. This procedural treatment would permit Peabody to file a rebuttal as a matter of ordinary Board procedure.

2. Second, Peabody's Petitions to intervene and for injunctive relief present novel issues and significant questions of first impression. This is the first time anyone ever has invoked the "phasing constraint" of the Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520, 546-47 (1985) as a basis for rail rate relief. The phasing constraint, unlike the other three constraints in the Coal Rate Guidelines, may constrain "otherwise justified rate increases [that] could cause significant economic dislocations which must be mitigated for the greater public good." Id. at 546. It focuses on a very different set of factors than the other constraints, by looking beyond railroad costs, revenues, and management efficiencies to "the magnitude of the proposed increase..., the economic conditions in the coal supply area (and the impact of the rate increase on that region), and any supply contracts involved." Id. at 547. The Board has a strong interest in fostering a complete discussion of the issues in this matter.

3. Third, the absence of any precedent interpreting the phasing constraint means that there is little guidance available to parties, such as Peabody, to prepare a petition for relief under the phasing constraint or to anticipate the arguments in opposition to such a petition. In its Reply, BNSF has challenged the Board's authority to grant any of Peabody's requested relief; challenged the scope and nature of the phasing constraint; accused Peabody of asking the Board to regulate coal supply markets; and asserted that it would be bad public policy to grant Peabody relief. In making these arguments, BNSF has utterly misrepresented the facts and the law and grossly distorted the scope and effect of Peabody's Petitions. Because this is a case of first impression that poses significant questions, it is critical that the Board have a full, accurate, and complete record upon which to reach a decision.

For the foregoing reasons, the Board should accept Peabody's Rebuttal.

Respectfully submitted,



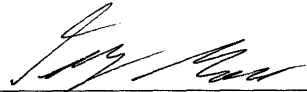
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*Counsel for Intervenor,
Peabody Energy Corporation*

July 18, 2003

Certificate of Service

I hereby certify that I have on this 18th day of July 2003 served a copy of the foregoing
“Motion for Leave to File a Rebuttal in Support of Peabody Energy Corporation’s Petition to
Intervene and Petition for Injunctive Relief,” by hand delivery, on all parties of record in this
proceeding.



Jeffrey O. Moreno