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***Sandy Creek Energy Station***

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December 12, 2022

**BY E-FILING**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E. Street, S.W.  
Washington, D.C. 20423

Re: EP 772, *Oversight Hearing Pertaining to*  
*Union Pacific Railroad Company's Embargoes*

Dear Ms. Brown,

Sandy Creek Energy Associates L.P. ("SCEA"), Lower Colorado River Authority ("LCRA"), and Janet S. Northrup, solely as Chapter 7 Trustee of the estate of Brazos Sandy Creek Electric Cooperative, Inc. ("Brazos") (collectively, the "Sandy Creek Owners"), the co-owners of the 932-megawatt Sandy Creek Energy Station located near Riesel, Texas ("Sandy Creek"), respectfully submit this letter in response to the Notice that the Surface Transportation Board ("Board" or "STB") served in the above-captioned proceeding on November 22, 2022.

The Sandy Creek Owners applaud the efforts of the Board (and its staff) to address the significant economic injuries that result from poor train service, especially that provided by the Union Pacific Railroad Company ("UP"). Sandy Creek depends on UP

for essential deliveries of Powder River Basin (“PRB”) coal.<sup>1</sup> UP’s removal of train sets from service without notice and without clarity of return have substantially undermined Sandy Creek’s ability to operate as a baseload coal-fired generation station. The resulting substantial reduction in the coal stockpile will hinder operations going into the winter, to the detriment not only of the Sandy Creek Owners and their customers, but also to the reliability of the electric grid in Texas and the ability of Texas wholesale and retail customers to obtain the least cost and most reliable supply of electricity that would otherwise be available. UP has subjected Sandy Creek to not only poor and inadequate service, but has also prevented Sandy Creek from using the private railcar trainsets that Sandy Creek already possesses to offset UP’s poor service. UP’s actions amount to a *de facto* embargo that is worse than an actual embargo in that UP acts with no notice, transparency, or other safeguards that accompany actual embargoes. Sandy Creek respectfully requests that the Board address *de facto* as well as actual embargoes in any actions that it takes at or as a result of its hearing. The last section of this letter presents remedial measures for the Board’s consideration.

### **Background on Sandy Creek**

Sandy Creek is a highly-efficient, super-critical coal-fired generation station that utilizes PRB coal to generate electricity. Its location and fuel source make the station captive to UP. Sandy Creek ships coal under a confidential coal transportation agreement with UP and has not been the subject of any published embargo from UP. Nonetheless, Sandy Creek has suffered all the same harms and injuries as if it had been.

Specifically, in order to receive efficient adequate unit train coal deliveries, the Sandy Creek Owners made material and significant investments, including leasing over 600 railcars to supply UP with four 150-car trainsets. While UP has not imposed any formal or published embargoes on Sandy Creek service through the AAR embargo system, UP effectively embargoed the Sandy Creek for much of 2022 by generally failing to provide adequate service, and periodically reducing, sometimes by as much as (75%, the

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<sup>1</sup> Coal-fired power plants cannot operate without a continuing, adequate inventory of coal. Plants normally build up their stockpile during the Spring and Fall “shoulder” seasons in order to support full operation during the Summer and Winter Peaks. But even during the Spring and Fall, the plant typically continues to operate, requiring both replenishment of stocks used in day to day operation, and additional amounts to build inventories in a timely way. UP’s service restrictions hindered both Sandy Creek’s ordinary operations and its ability to prepare for the peak seasons.

number of trainsets that Sandy Creek could utilize. All of these trainsets are essential for Sandy Creek's reliable operation, and even more critical given UP's otherwise poor service. In particular, Sandy Creek has experienced inconsistent and extended cycle times and associated bunching and other delays throughout 2022 and before. UP has also recurrently removed varying numbers of Sandy Creek's trainsets from service without any consultation and kept them out of service for extended periods despite numerous urgent requests for their restoration by Sandy Creek. These removals or "lay downs" generally occurred without any notice to Sandy Creek of their removal from service and without providing Sandy Creek with any specific explanations or expected duration for these delays other than vague references to crew availability issues. UP's restrictions amount to a *de facto* embargo that has caused Sandy Creek to suffer substantial curtailments in deliveries, forced significant reduction in the plant's output, threatened the reliability of the plant to meet its share of electric demand in the area of Texas covered by the Electric Reliability Council of Texas ("ERCOT"), and inflicted substantial harm on the Sandy Creek co-owners, their customers and ERCOT electric energy consumers.

### **UP's *De Facto* Embargo on Sandy Creek**

During most of its operation, Sandy Creek's cycle time has historically averaged 7.5 days. The cycle times during 2022 have been substantially longer, and Sandy Creek has consistently stressed with UP the importance of maintaining all four trainsets in service to maintain appropriate coal inventory. This need has become increasing more critical in light of the slow service. Notwithstanding these requests, UP has refused to do this for much of the year and cycle times have continued to deteriorate. Table No. 1 illustrates the problems by identifying the relevant month starting May 2022, when the Texas summer peak in load began, the number of Sandy Creek trainsets in service, and the average cycle time (in days) that Sandy Creek experienced for the month, and providing an explanation for the number of trainsets in service:

| <b>Table 1</b>                                                                   |                      |                           |                                                                                                                                                                                                                                                                        |
|----------------------------------------------------------------------------------|----------------------|---------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Sandy Creek Trainsets in Service and Average Cycle Times by Month in 2022</b> |                      |                           |                                                                                                                                                                                                                                                                        |
| Month (2022)                                                                     | Trainsets in Service | Average Cycle Time (days) | Comment                                                                                                                                                                                                                                                                |
| May                                                                              | 1                    | 15.5                      | UP removed 1 set from service in March. Sandy Creek requested the short term removal of 2 sets for two weeks in May then a return to 4 sets in service. UP removed 3 sets from service for an extended time leaving Sandy Creek with 1 set in service for most of May. |
| June                                                                             | 1                    | 10.0                      | Sandy Creek requested all 4 sets in-service. UP refused.                                                                                                                                                                                                               |
| July                                                                             | 1-2                  | 9.0                       | UP put 1 set back into service, and Sandy Creek requested all 4 sets in service.                                                                                                                                                                                       |
| August                                                                           | 2-3                  | 8.75                      | Sandy Creek requested all sets in-service. UP added 1 mid-month.                                                                                                                                                                                                       |
| September                                                                        | 3-4                  | 10.8                      | Sandy Creek requested all sets in-service. UP added 1 at end of month.                                                                                                                                                                                                 |
| October                                                                          | 4                    | 12                        | All sets in service                                                                                                                                                                                                                                                    |
| November                                                                         | 2-3                  | 13                        | Sandy Creek requested all sets in-service. UP removed two mid-month - added 1 back end of month.                                                                                                                                                                       |

As shown in Table 1, UP's actual cycle times exceeded the historical average of 7.5 days in each month and were even double the average in May. During most of May, all of June, and part of July, UP allowed only a single trainset in service. In each instance where it removed one or more Sandy Creek trainset from service, UP provided no notice of the removal, no specific information regarding why the removal occurred, and no schedule for returning the set(s) to service. Despite Sandy Creek's repeated requests, UP offered no specific explanation for the removal of the sets from service or the deterioration of cycle times nor any indication of what steps it was taking to correct these issues, much less when they will be corrected. For the most recent removal, UP has further advised that the fourth trainset will not be returned to service in 2022 but refused provide any further details.

The lack of trainsets and other service problems have substantially reduced the volume of coal delivered to Sandy Creek. As of the end of November, Sandy Creek had received only 55% of the volumes originally nominated for 2022. UP's removal of Sandy Creek's railcar sets and deterioration in cycle times forced Sandy Creek to reduce its coal burn for those eleven months to only 72% of the level it could have achieved based on ERCOT demand. An additional consequence is that Sandy Creek's stockpile as of the end of November was only 27% of the level at the end of April, before UP restricted Sandy Creek to a single trainset. This dramatic reduction in the stockpile has caused the Sandy Creek owners to make progressively drastic reductions in production in an effort to try and

maintain sufficient inventory to be able to meet expected and emergency ERCOT demand for the winter months. Sandy Creek's ability to meet this goal requires immediate and substantial improvement in UP's performance.

**The Substantial Harm UP's Service  
Curtailments Inflict on Sandy Creek and its Customers**

In order to conserve coal and maintain its coal stockpile, Sandy Creek has been forced to curtail its output. Sandy Creek is dispatched through the Electric Reliability Council of Texas ("ERCOT"), which utilizes locational marginal pricing ("LMP") calculated every 15 minutes in order to minimize the economic cost of serving electric load within Texas while maintaining reliability in accordance with standards established by the North American Electric Reliability Corporation ("NERC"). Sandy Creek estimates that the station was economical to dispatch (meaning its operation would save customers money) in all but 22.75 hours in June, 1 hour in July, zero hours in August, 0.75 hours in September, 72.75 hours in October, and 171.75 hours in November. Furthermore, if output was not constrained by the lack of UP coal deliveries, the station would have operated at full load, meaning 932 megawatts, during the June-September period, for all but 3 days during October, and for all but 7 days during November. Overall, Sandy Creek was forced to decrease its output by 1.3 million MWh or 33% during June-November because UP did not deliver sufficient volumes of coal nominated by Sandy Creek for the period.

This inability to dispatch Sandy Creek economically results in immediate and substantial adverse economic consequences. First, the Sandy Creek owners are deprived of the revenues they would have obtained by serving available load in an economic manner. The absence of those revenues is especially significant because ERCOT operates on an energy-only basis and does not compensate generators for capacity, as is the case in other centralized markets such as MISO (Midcontinent Independent System Operator) and PJM (Pennsylvania, New Jersey, and Maryland) Interconnection. Accordingly, the inability to dispatch the station due to UP's non-deliveries of coal impairs Sandy Creek's ability to recoup its substantial fixed costs, particularly the more than \$1.5 billion that was required to construct the station. The inability to receive coal has thus significantly impaired the economic value of the unit.

LCRA is a public power entity created by the Texas state legislature. LCRA is a load-serving entity that is directly responsible for serving native wholesale load. In addition to its direct ownership share in Sandy Creek, LCRA also acquires some of the station's output under a power purchase agreement with SCEA. Sandy Creek's inability

to dispatch due to UP's delivery deficiencies requires LCRA to acquire substitute power or generation in the market, generally at higher cost. These higher costs are passed down to LCRA's wholesale power customers, which consist mainly of small municipally-owned electric utilities and electric cooperatives located in rural areas of Texas.

Brazos is a non-profit electric cooperative and was a wholly-owned subsidiary of Brazos Electric Power Cooperative, Inc., a nonprofit rural electric generation and transmission cooperative. Brazos's former parent is a load-serving entity directly responsible for serve native electric load. In March, 2022, Brazos filed for relief under Chapter 7 of the United States Bankruptcy Code. Janet S. Northrup was appointed as Chapter 7 Trustee and has been serving in that capacity since then. During the bankruptcy case, Ms. Northrup sought and obtained Bankruptcy Court approval to sell Brazos's interest in Sandy Creek to a newly-formed entity established by Brazos' secured noteholders. Closing of that sale is pending. Brazos's share of the power from the unit was originally committed for sale to its parent under a long-term power purchase agreement. That agreement was rejected in the Chapter 11 case of its parent. Since the rejection, all of Brazos's share is used to serve the ERCOT market. UP's deficient deliveries to the unit deprive the market of a significant source of competitively priced power and materially reduced Brazos's revenues in conflict with a core baseload incentive principle of ERCOT market design.

SCEA, the majority owner of Sandy Creek, delivers a portion of its power from the unit to LCRA under a long term power purchase agreement ("PPA"). The remainder is used to serve the ERCOT market as a whole. The non-deliveries due to UP's poor performance noted herein require the ERCOT market to pay to procure generation from other generators or resellers with higher costs and threaten its ability to provide power under its PPA. It has also significantly reduced SCEA's revenues and undermined a core incentive for baseload power units embedded in ERCOT's market design. Under economic dispatch principles, units generally run only when it is economic to do so, and the inability to discharge an economic unit requires a less economic unit to make up the generation deficit.

Beyond the immediate economic harms, the far greater risk economic and societal harm is that UP's non-deliveries imperil the reliability of the power grid. The ability of Sandy Creek to stockpile coal at the plant gives it reliability and resiliency benefits that other types of generation do not have, *e.g.*, gas units cannot run if there is a pipeline interruption, windmills cannot rotate without wind, and solar cells do not function without sunshine. The Uri adverse weather event of February 2021 revealed just how vital

coal units can be during adverse conditions. Sandy Creek provided energy during the URI event for all but a 25-hour period during which it was required to restart after being tripped by grid instability caused by the loss of multiple other generators. The ability to generate output and make up for other lost generation occasioned by various weather or other unplanned events is lost if the station lacks an adequate stockpile, and it cannot maintain or restore that stockpile if its trainsets are continually being laid down by UP and UP's cycle times for its coal deliveries remain at current levels.

As noted above, UP has not imposed any formal embargo for Sandy Creek or the plant's coal origins. Nonetheless, the impact of UP's poor service, increasing, inconsistent, and unpredictable cycle times, and continuing removal of multiple Sandy Creek railcar sets for sustained periods amount to an actual embargo and have the same effect, albeit without the procedural and related substantive safeguards that apply to actual embargoes.

### **The Underlying Cause of UP's Service Curtailments and Legal Ramifications**

The service problems experienced by Sandy Creek and those experienced by shippers and receivers subject to formal embargoes are manifestations of, and descend from, the same core problem: UP has fixated on reducing its operating ratios using Precision Scheduled Railroading ("PSR") and other means to meet management and shareholder objectives and in the process sacrificed its ability to operate soundly and meet customer needs. UP has elevated lower operating ratios over volumes and even profits (measured in dollars as opposed to mark-ups). The result is that UP is unable to fulfill its common carrier obligation to provide service on reasonable request as well as its contractual requirements. Indeed, in its most recent earnings release (October 20, 2022), UP touted that its operating ratio remained under 60% (59.9%, to be exact) even after the charge for the then-tentative labor agreement was taken into account, and quoted its CEO as stating, "we will maintain strong price discipline while improving efficiency and service to capitalize on the available demand." Furthermore, UP affirmed its guidance for "Pricing gains in excess of inflation dollars" and "Long term dividend payout target of 45% of earnings," while updating to "Full year share repurchases of \$6.5 billion."<sup>2</sup>

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<sup>2</sup> See <https://www.up.com/media/releases/3q22-earnings-results-nr-221020.htm#:~:text=Third%20Quarter%202022%20Compared%20to,carloads%2C%20were%20up%203%25>.

Judging from the recent statement of UP's Chief Financial Officer at a very recent Credit Suisse conference (November 30, 2022)<sup>3</sup> and other pronouncements, UP utilizes embargoes as a recurrent and ongoing congestion management tool to achieve its larger objectives. In other words, UP is unable to handle available traffic and has resorted to embargoes in combination with "permits" to select the traffic that it chooses to serve. This conduct constitutes a violation of the AAR's embargo rules at its Revised Circular TD-1, <https://public.railinc.com/sites/default/files/documents/TD-1.pdf>. Those rules specify that "[a]n embargo is a method of controlling movements when ... an actual or threatened Physical or Operational impairment, *of a temporary nature*, warrants restrictions against such movements." *Id.*, I (Definitions) (original emphasis). Furthermore, those rules specifically prohibit embargoes "[l]imiting the amount of Traffic to be accepted daily or periodically" or to "[r]estrict business growth." UP has abused the embargo system by imposing embargoes and functional embargoes (as is the case for Sandy Creek) to limit traffic on a sustained basis precisely for the reasons prohibited by the AAR's own rules.

If anything, UP's treatment of coal shippers such as Sandy Creek has been even worse. Regular embargoes at least come with a measure of transparency in that the AAR posts embargoes <https://embargo.railinc.com/#/embargo/searchEmbargo>, as does UP to a lesser extent, <https://www.up.com/customers/embargo/list/index.htm>. In contrast, UP's provides no or little transparency as to which coal and other shippers are having their cars parked experiencing substantial increases in their historic cycle times substantially increased, and suffering other degradations in service, etc., even though the effect is the same as if UP imposed an embargo. While UP has made some statements that these measures are being applied to other coal shippers and to other types of freight, no data or other documentation to that effect has been posted or otherwise made available. The lack of transparency also invites "moral hazard," *e.g.*, some coal shippers may not curtail their generation, only to receive favored service later on the grounds that they are at risk of running out of coal. While UP, like other railroads, often asks about the level of coal stockpiles, presumably to determine if the plant is actually about to run out of coal, they do not provide equivalent information, much less commitments, regarding how they are

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<sup>3</sup> See [https://seekingalpha.com/article/4561410-union-pacific-corporation-unp-presents-credit-suisse-10th-annual-global-industrials?mailingid=29846307&messageid=2800&serial=29846307.3912&utm\\_campaign=rta-stock-article&utm\\_medium=email&utm\\_source=seeking\\_alpha&utm\\_term=29846307.3912](https://seekingalpha.com/article/4561410-union-pacific-corporation-unp-presents-credit-suisse-10th-annual-global-industrials?mailingid=29846307&messageid=2800&serial=29846307.3912&utm_campaign=rta-stock-article&utm_medium=email&utm_source=seeking_alpha&utm_term=29846307.3912).

allocating service reductions, when cycle times will improve, or when trainsets will be restored to service.

The concern with transparency is made even more acute because under PSR and otherwise, UP and other railroads are incented to move traffic with higher mark-ups, and not to move traffic with lower mark-ups, even though the lower marked-up traffic may be more vital for basic societal functions, such as keeping the lights on. Furthermore, intermodal shippers, precisely because they have other transportation options, may be able to obtain superior service protections in their contracts, which coal shippers typically cannot obtain. Faced with triage conditions of their own making, the railroads may decide to favor non-coal traffic with the superior contractual provisions in order to avoid liquidated damages or other consequences. Embargoes thus represent just the tip of the iceberg in terms of the measures (parking trainsets, slowing cycle times, doubling trains) that railroads undertake when they are unable to provide adequate service.

### **Addressing UP's Service Curtailments**

Sandy Creek strongly believes, and respectfully submits, that the Board should focus on both transparency and accountability in reviewing UP's purported embargoes and other restrictions on service. First, UP should be required to demonstrate and document, to the Board and to its customers, all of the measures, not just embargoes, it has taken to allocate and restrict service, for common carrier, contract, and exempt traffic, and show how those measures have been fair and reasonable under the circumstances, and not undertaken to increase profits, lower operating ratios, or retaliate. While the railroads may prefer to avoid such accountability, they are common carriers at their core, and common carriers have a duty to provide service upon reasonable request and upon reasonable terms and conditions.

Second, the Board should flesh out the minimum standards for fulfilling the common carrier obligation. A fleshed-out common carrier standard would provide a meaningful baseline for both tariff and contract performance. What constitutes reasonable service for one shipper may not be adequate, or may be excessive, for another, but there should still be a discernable standard that can be ascertained in advance, not one that might emerge only after sustained litigation.

Third, fulfillment of the common carrier obligation should be assessed not only on an individualized basis, but also in the aggregate. When, as with UP, there is a broad and sustained failure to move traffic, and that failure inflicts broad harm on shippers,

receivers, and society as a whole, then some form of sanction should follow so that the carrier shares in the adverse economic consequences it has created. The Board has an available mechanism, *i.e.*, civil penalties under 49 U.S.C. § 11901(a), that it can and should utilize. While the individual penalty is modest, it is to be applied per violation per day. If scaled according to the number of railcars and carloads not moved on any particular day, such penalties should help incent more appropriate conduct on the part of UP and other carriers.

Sandy Creek does not suggest such penalties lightly. In theory, they should not be necessary, as the loss of revenue from not moving traffic should serve as an adequate deterrent, but that opportunity cost is plainly insufficient within the context of the current environment. Since the market is not providing a sufficient incentive to produce reasonable behavior, as the railroads are most concerned with lowering their operating ratios, it is incumbent upon the Board to provide those incentives and consequences.

Additionally, the Board should also act to facilitate application of the revenue adequacy constraint and take other measures so that the service problems created by UP and the other carriers do not translate into rate increases. UP has manifestly achieved revenue adequacy on a long-term basis, yet remains committed to taking rate increases in excess of inflation, as made clear by its CFO at a recent conference and its CEO on earnings calls.<sup>4</sup> Early in 2022, its CEO stated on its earnings calls for the fourth quarter of 2021: “Item number two is, if we see volume overwhelming our ability to satisfy it, we’ve always got price as a lever that we can use that discourages some amount of that volume and helps it find a different home.” See <https://news.alphastreet.com/union-pacific-corporation-unp-q4-2021-earnings-calltranscript>. The matter is not one that should continue to be neglected.

Sandy Creek commends the Board for initiating this proceeding and seeking to address this matter that is of vital consequences for shippers, receivers, and the public as a whole.

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<sup>4</sup> See n.2, *supra*, and UP CEO Lance Fritz at the Cowen 2022 Global Transportation & Sustainable Mobility Conference, September 7, 2022. *E.g.*, [https://seekingalpha.com/article/4539425-unionpacific-corporation-unp-ceo-lance-fritz-presents-cowen-2022-global-transportationand?mailingid=28975161&messageid=2800&serial=28975161.4912&source=email\\_2800&utm\\_campaign=rta-stockarticle&utm\\_medium=email&utm\\_source=seeking\\_alpha&utm\\_term=28975161.4912](https://seekingalpha.com/article/4539425-unionpacific-corporation-unp-ceo-lance-fritz-presents-cowen-2022-global-transportationand?mailingid=28975161&messageid=2800&serial=28975161.4912&source=email_2800&utm_campaign=rta-stockarticle&utm_medium=email&utm_source=seeking_alpha&utm_term=28975161.4912)

Ms. Cynthia T. Brown  
December 12, 2022  
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Respectfully submitted,

*Brant Yung*

Brant Yung

Vice President

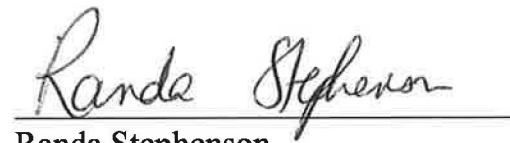
Sandy Creek Energy Associates L.P.

200 W. Madison, Ste. 3810

Chicago, IL 60606

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Respectfully submitted,

A handwritten signature in cursive script that reads "Randa Stephenson". The signature is written in dark ink and is positioned above a horizontal line.

Randa Stephenson  
Chief Commercial Officer  
Lower Colorado River Authority  
3700 Lake Austin Blvd.  
Austin, TX 78703

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Respectfully submitted,

  
Janet S. Northrup, solely as Chapter 7  
Trustee of the estate of Brazos Sandy  
Creek Electric Cooperative, Inc.  
TotalEnergies Tower  
1201 Louisiana St., 28<sup>th</sup> Floor  
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*by permission*  
