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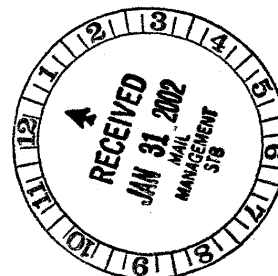
January 31, 2002

via Hand Delivery

ENTERED
Office of the Secretary

FEB 01 2002

Part of
Public Record



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

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and ten (10) copies of the Motion of BNSF for a Protective Order to Extend the Time to Respond to AEPCO's Third Supplemental Discovery Requests. A copy of the filing is also included on the attached diskette in WordPerfect.

Please date stamp the extra copy of this cover letter and return it to the messenger who delivered this filing.

Sincerely,

Brooke L. Gaede

Enclosure

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ARIZONA ELECTRIC POWER
COOPERATIVE, INC.

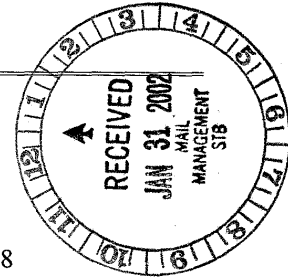
Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY and
UNION PACIFIC RAILROAD COMPANY,

Defendants.

Docket No. 42058



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**BNSF'S MOTION FOR A PROTECTIVE ORDER TO EXTEND THE TIME TO
RESPOND TO AEPCO'S THIRD SUPPLEMENTAL DISCOVERY REQUESTS**

Pursuant to 49 C.F.R. § 1114.21(c)(2), defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby moves for a protective order extending the time to provide written responses and objections to Arizona Electric Power Cooperative, Inc.'s ("AEPCO") Third Supplemental Interrogatories and Requests for Production of Documents ("Third Supplemental Discovery Requests") until February 11, 2002.

AEPCO's Third Supplemental Discovery Requests were served on BNSF on January 7, 2002. AEPCO requested a response by January 31, 2002. For several reasons set out below, BNSF and defendant Union Pacific Railroad Company ("UP") contacted AEPCO's counsel and requested a brief extension of the response date. AEPCO's counsel refused to grant any extension, necessitating this Motion. BNSF believes that good cause exists for the Board to grant a brief extension of time. The grounds for this Motion are described in detail below.¹

¹ To avoid unnecessary procedural delays, BNSF intends to produce its responses and objections no later than February 11, 2002, even if the Board has not had a chance to issue an order in response to this Motion by that date.

Background

On December 31, 2001, the Board served a decision denying the motion of Defendants BNSF and UP for partial dismissal of AEPCO's amended complaint. Defendants had requested the Board to dismiss AEPCO's amended complaint to the extent that it challenged the reasonableness of unit train coal rates from mines in the Powder River Basin ("PRB") to AEPCO's Apache Generating Station in Cochise, Arizona.

In the same decision, the Board addressed AEPCO's pending Motion to Compel Defendants to Respond to its Amended Interrogatories and Requests for Production of Documents ("Amended Discovery Requests"), which accompanied AEPCO's March 9, 2001 amended complaint. The Amended Discovery Requests had sought information regarding a broad 10-state area that AEPCO claimed was relevant to its stand-alone cost ("SAC") presentation. The defendants had objected to AEPCO's Amended Discovery Requests on grounds that they were overly broad, unduly burdensome and sought information that was neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Among other things, defendants objected to the production of information relating to defendants' PRB coal traffic because virtually none of that traffic shares facilities with the issue traffic originating in New Mexico.

The Board agreed that the scope of AEPCO's discovery was too broad:

We agree that the discovery request appears to be overly broad in light of the limited portion of that ten-state territory through which the complainant's traffic moves and the defendants' expressed concern that a SAC analysis not be allowed to be structured in such a way as to give rise to an impermissible cross-subsidy of the complainant's traffic. Moreover, we continue to be concerned that discovery in SAC cases not become overreaching.

AEPCO v. BNSF and UP, STB Docket No. 42058 at 5 (Dec. 26, 2001) (footnote omitted) (“December 2001 Decision”). Therefore, the Board denied AEPCO’s Motion to Compel and instructed AEPCO to refine and narrow its Amended Discovery Requests following the guidelines set forth in its decision. *Id.* at 6, 8. Those guidelines clarified that “revenues from PRB traffic may not be used to cover the costs of a portion of a SAC system over which the traffic would not move.” *Id.* at 6 n.13. The Board concluded:

we are not persuaded that AEPCO would need information on traffic encompassing a broad 10-state area for a SAC presentation that is properly structured to avoid cross-subsidies. Thus, we will afford AEPCO an opportunity to narrow its discovery requests.

Id. at 6.

On January 7, 2002, AEPCO served its Third Supplemental Discovery Requests. AEPCO claimed that the Amended Discovery Requests responded to the Board’s order requiring that its requests be modified “so as to narrow their scope and ‘avoid obvious cross-subsidies.’” *See* Complainant’s Third Supplemental Interrogatories and Requests for Production of Documents at 1 (Jan. 7, 2002), attached hereto as Exhibit A.

The Third Supplemental Discovery Requests revised the definitions in AEPCO’s Amended Discovery Requests and added new instructions. First, AEPCO specified the line segments in nine states as to which the Amended Discovery Requests applied. Second, the revised definitions purported to cover rates for common carrier service that had not been challenged in AEPCO’s amended complaint. AEPCO’s Amended Complaint challenged Common Carrier Authority 90044, but the Third Supplemental Discovery Requests defined the challenged rates to include “Common Carrier Pricing Authority BNSF 90052 as amended or supplemented,” and “any reinstated, replacement or new common carrier pricing authority

covering service from Powder River Basin origins in Wyoming and/or Montana to Apache established in compliance with the December 31 Decision.” See Attachment A at 2. Third, contrary to the Board's instruction that AEPCO "narrow [the] scope" of the discovery, AEPCO expanded the scope of its Amended Discovery Requests to include non-coal traffic. AEPCO requested responses to its Amended Discovery Requests by January 31, 2002.

On January 28, 2002, defendants contacted AEPCO's counsel to request additional time in which to respond to the Third Supplemental Discovery Requests. In addition to pointing out the difficulty of responding to the numerous discovery requests that were the subject of AEPCO's Third Supplemental Discovery Requests, defendants pointed out that the revised discovery requests appeared to be based on an assumption that AEPCO was challenging certain rates that did not exist and were not covered by AEPCO's amended complaint. Defendants assumed that AEPCO was planning to amend the complaint to incorporate the rates referenced in AEPCO's new discovery and they proposed a schedule that would allow AEPCO to amend its complaint and then permit defendants to file responses to AEPCO's discovery based on the specific claims that AEPCO intends to pursue. To avoid additional delay, defendants proposed to provide written responses and objections to the discovery requests no later than 10 days after AEPCO filed its amended complaint.

In response to defendants' proposal, AEPCO advised defendants on January 29, 2002 that it did not intend to file an amended complaint and that it would not agree to any extension of the date for responding to the pending discovery requests.

Argument

BNSF's request for a brief extension in the time to respond to AEPCO's Third Supplemental Discovery Requests is justified for several reasons.

First, a brief extension of time is necessary because the Third Supplemental Discovery Requests involve numerous, complex requests for data and information. The Third Supplemental Discovery Requests specifically incorporate several previous discovery requests, which themselves were complex and extremely broad. The background of discovery in this case was set forth in detail in BNSF's Reply in Opposition to Complainant's First Motion to Compel filed on May 7, 2001 and is not repeated in detail here. However, a brief summary of the discovery history in this case illustrates the breadth of discovery that AEPCO is pursuing in this matter and the unusual complexity involved in responding to AEPCO's Third Supplemental Discovery Requests.

AEPCO filed an initial set of discovery requests (including 6 interrogatories and 100 requests with multiple subparts for production of documents) on January 12, 2001, to which BNSF responded and objected on February 28, 2001. Less than two weeks later, on March 9, 2001, AEPCO amended its complaint and filed Amended Discovery Requests (including 15 interrogatories and 102 requests with multiple subparts for production of documents). Before responses were due on those Amended Discovery Requests, AEPCO filed its First Supplemental Discovery Requests on March 30, 2001 (including 9 additional interrogatories and 3 additional requests for production of documents). BNSF responded and objected to AEPCO's Amended Discovery Requests on April 9, 2001. BNSF's general responses and objections to AEPCO's Amended Discovery Requests were the focus of AEPCO's Motion to Compel, which was denied

in the Board's December 31, 2001 decision. On April 16, 2001, BNSF responded and objected to AEPCO's First Supplemental Discovery Requests. AEPCO served its Second Supplemental Discovery Requests (including 4 additional interrogatories and 8 additional requests for production of documents) on December 3, 2001. BNSF responded and objected to AEPCO's Second Supplemental Discovery Requests on January 4, 2002. As noted above, AEPCO's Third Supplemental Discovery Requests reiterate, with substantial revisions, all prior 28 interrogatories and the requests for production of documents, which number in the hundreds including the detailed subparts. The extent and complexity of these requests alone justifies a brief extension in the time to respond.

Second, BNSF needs additional time to provide written responses and objections to AEPCO's Third Supplemental Discovery Requests because those discovery requests substantially expanded the scope of information AEPCO is seeking. As the Board recognized in its decision denying AEPCO's Motion to Compel, AEPCO's Amended Discovery Requests, which were already overly broad and unduly burdensome, were limited to coal movements only. *See* Decision denying Motion to Compel at 5, n.10. However, in response to the Board's order to narrow its discovery requests, AEPCO substantially expanded those requests to include non-coal movements. BNSF's previous discovery efforts in the pending stand-alone costs cases has focused on coal traffic, therefore BNSF needs additional time to assess the impact of this significant expansion in the scope of discovery.

Third, BNSF needs additional time to respond to AEPCO's Third Supplemental Discovery Requests because those discovery requests implicate difficult and important threshold issues in this case. BNSF has been analyzing the legal consequences of the Board's December

31, 2001 order denying defendants' motion to dismiss AEPCO's PRB claims and ordering defendants to establish rates for transportation from PRB origins. While BNSF continues to believe that defendants should not be required to establish rates solely for the purpose of allowing AEPCO to create jurisdiction to maintain a rate reasonableness challenge, BNSF, jointly with UP, provided AEPCO with rates for PRB transportation in compliance with the Board's order on January 30, 2002. BNSF has also needed time to assess whether AEPCO's revisions to its previous discovery requests address the concerns identified by the Board in its December 2001 order relating to AEPCO's apparent intention to rely on impermissible cross-subsidies in presenting stand-alone cost evidence in this case.

Fourth, AEPCO's Third Supplemental Discovery Requests do not correspond in scope to AEPCO's pending complaint. AEPCO's amended complaint does not challenge any PRB rates that are currently in effect or that have ever been used to provide transportation. AEPCO's Amended Complaint challenges the PRB rates set forth in BNSF Common Carrier Pricing Authority BNSF 90044. *See* AEPCO's Amended Verified Complaint at 3-4 (Mar. 9, 2001). BNSF and UP withdrew those rates on March 22, 2001. Pursuant to the Board's May 8, 2001 order in STB Docket No. 34041, BNSF established a common carrier rate for trainload movements of coal from PRB Wyoming origins to AEPCO's Apache Station in Common Carrier Pricing Authority BNSF 90052, which expired on June 30, 2001. Pursuant to the Board's December 2001 order, BNSF and UP have established a new Common Carrier Pricing Authority for movements to PRB locations in Wyoming and Montana.

When defendants pointed out to AEPCO this obvious deficiency in AEPCO's Amended Complaint, AEPCO responded that it does not intend to amend its complaint. Instead, AEPCO

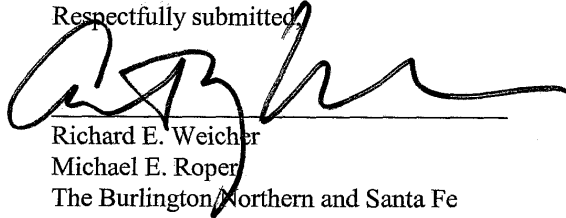
has simply redefined, for purposes of the Third Supplemental Discovery Requests, the “challenged rates” as to which discovery is directed to include not only Common Carrier Pricing Authority BNSF 90044, but also to include any amendments or supplements to it, as well as “Common Carrier Pricing Authority BNSF 90052 as amended or supplemented,” and “any reinstated, replacement or new common carrier pricing authority covering service from Powder River Basin origins in Wyoming and/or Montana to Apache established in compliance with the December 31 Decision.” *See* Attachment A at 2. BNSF is in the process of assessing the impact of AEPCO's decision not to amend its complaint to conform to the definitions set out in its revised discovery and its responses to AEPCO's pending discovery should reflect the result of that assessment.

Given the complexity of the issues underlying AEPCO's discovery requests and the breadth of those requests, BNSF believes that a brief extension of the time in which to respond to AEPCO's requests is reasonable. AEPCO's refusal to agree to BNSF's request for a modest extension has necessitated this Motion and further complicated this proceeding.

Conclusion

For the foregoing reasons, BNSF requests a brief extension of the time to provide written responses and objections to AEPCO's Third Supplemental Discovery Requests until February 11, 2002.

Respectfully submitted,



Richard E. Weicher
Michael E. Roper
The Burlington Northern and Santa Fe
Railway Company
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(202) 429-3000

Attorneys for Defendant

January 31, 2002

CERTIFICATE OF SERVICE

I hereby certify that this 31st day of January 2002, I served a copy of the foregoing
Motion For A Protective Order To Extend The Time To Respond To AEPCO's Third
Supplemental Discovery Requests to the following by overnight mail:

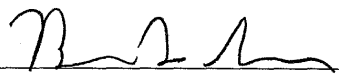
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James V. Dolan
Louise A. Rinn
Union Pacific Railroad Company
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And by hand delivery to the following:

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Christopher A. Mills
Andrew B. Kolesar III
Daniel M. Jaffe
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Brooke L. Gaede

Exhibit A

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January 7, 2002

BY HAND

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Eric C. Bosset, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

Re: Docket No. 42058, Arizona Electric
Power Cooperative v. BNSF and UP

Dear Tony and Eric:

Enclosed herewith are AEPCO's Third Supplemental Interrogatories and Requests for Production of Documents in the above matter. These requests are being served in response to the Board's decision served December 31, 2001.

Please advise if you have any questions.

Sincerely,



Christopher A. Mills

CAM:lma
Enclosure

cc (via Federal Express w/enclosure):

Michael E. Roper, Esq.
Louise A. Rinn, Esq.

Docket No. 42058

¹ The definitions and instructions set forth in AEPCO's Amended Discovery Requests otherwise continue to apply except to the extent modified herein.

Responses to AEPCO's Amended Discovery Requests (as well as outstanding items in its first and second supplemental discovery requests), including copies of responsive documents, that have not heretofore been provided by BNSF and/or UP, and that are in accordance with the amended definitions and additional instruction set forth below, should be delivered to the offices of Slover & Loftus, 1224 Seventeenth Street, N.W., Washington, D.C. 20036, by January 31, 2002, unless otherwise agreed by the parties. AEPCO is prepared to cooperate with Defendants to facilitate the expeditious production of these documents with the minimum practicable burden.

I.

AMENDED DEFINITIONS

5. "AEPCO route(s)" means the railroad line segments over which BNSF and UP, or UP alone, move(s) or has moved loaded and empty coal trains between Origin(s) and Destination.

7. "Challenged Rates" means the rates for common carrier rail transportation service that are the subject of AEPCO's Amended Verified Complaint in this proceeding; in BNSF's Common Carrier Pricing Authority No. BNSF 90044 as amended or supplemented; BNSF's Common Carrier Pricing Authority No. BNSF 90052 as amended or supplemented; any reinstated, replacement or new common carrier pricing authority covering service from Powder River Basin origins in Wyoming and/or Montana to Apache established in compliance with the December 31 Decision; the letter from G.C. Dixon of UP to Mark W. Schwartz of AEPCO dated December 18, 2000; and UP Tariff 4244 as amended or supplemented.

18. "SARR States" means the portions of the states of Montana, Wyoming, South Dakota, Nebraska, Colorado, Oklahoma, Texas, New Mexico and Arizona in which the

following BNSF and UP lines are located (and which are the lines that AEPCO anticipates that its stand-alone railroad is reasonably likely to replace):

BNSF: Dutch, MT to Donkey Creek, WY, including branches to Decker and Spring Creek, MT

All other BNSF lines in Wyoming excluding the line extending west from Orin to and through Casper, Bonneville and Greybull

All BNSF lines in Nebraska from Alliance west, including the lines from Alliance to Edgemont, SD, from Alliance to Guernsey, WY, and from Alliance through Northport to Sterling, CO

All BNSF lines in South Dakota north and west of Alliance, NE

All BNSF lines in Colorado except the lines extending from Brush east toward McCook, NE and from Trinidad east to La Junta

Trinidad, CO to Amarillo, TX

Springfield, CO to Amarillo, TX via Boise City, OK and Stratford, TX

Amarillo to Vaughn, NM

All other BNSF lines in New Mexico (including, for purposes of AEPCO's discovery requests, the line between Rincon and Deming which has recently been leased to The Southwestern Railroad Company) except the line from Clovis, NM to Rustler Springs, TX

Rincon, NM to El Paso, TX;

UP: Bond to Denver, CO

Axiel to Bond, CO including branch serving Energy, CO

Denver to Walsenburg, CO

Walsenburg to Allen Mine, CO via Trinidad, CO (?)

Pueblo, CO to Stratford, TX

Stratford, TX to El Paso, TX via Dalhart, TX and Tucumcari, NM

El Paso, TX to Benson, AZ

II.

ADDITIONAL INSTRUCTIONS

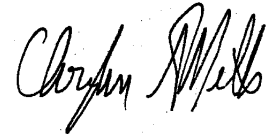
9. In responding to requests for documents or information pertaining to the SARR States, you should provide documents or information pertaining to the portions of the SARR States in which your lines (as identified in the revised definition of the SARR States) are located, except that with respect to Request for Production No. 45, you should produce forecasts or projections involving the movement of coal originated by you in any of the eight SARR States. For example, UP should produce forecasts or projections related to the volume of coal it expects to transport from the Wyoming Powder River Basin even though Wyoming is not a SARR State for UP.

10. Given the narrowed scope of the SARR States as re-defined above, you are requested to provide documents related to non-coal traffic as well as coal traffic moving to, from or through (i.e., moving overhead in) the SARR States, as requested in AEPCO's Amended Discovery Requests.

ARIZONA ELECTRIC POWER
COOPERATIVE, INC.

By: Patricia E. Cooper
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Of Counsel:

Slover & Loftus
1224 Seventeenth St., N.W.
Washington, D.C. 20036

Dated: January 7, 2002

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of January, 2002, served copies of the foregoing Complainant's Third Supplemental Interrogatories and Requests for Production of Documents upon counsel for Defendants, as follows:

By hand:

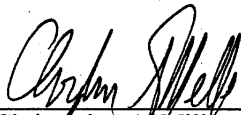
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An Attorney for Complainant Arizona
Electric Power Cooperative, Inc.