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BEFORE THE
SURFACE TRANSPORTATION BOARDARIZONA ELECTRIC POWER
COOPERATIVE, INC.,

Complainant,

v.

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

Defendants.

Docket No. 42058

**DEFENDANTS' PETITION FOR SUBPOENA
DUCES TECUM TO THE PITTSBURG
AND MIDWAY COAL MINING COMPANY**

Pursuant to 49 C.F.R. §§ 1113.2 (b)(2) and 1117.1, Defendants The Burlington Northern & Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") hereby petition the Board to issue a subpoena duces tecum directed to the Pittsburg and Midway Coal Mining Company ("P&M"), for production of documents described in Exhibit A. P&M operates the McKinley (a/k/a North Tipple) mine located near Gallup, New Mexico. The mine is an origin point for the complaint traffic.

BACKGROUND

This proceeding began as a challenge by Arizona Electric Power Cooperative, Inc. ("AEPCO") to a joint BNSF-UP rate for the transportation of coal from the McKinley and Lee Ranch mines in northwestern New Mexico to AEPCO's Apache Electric Generating Station near Cochise, Arizona. See AEPCO's original complaint, dated December 29, 2000. Shortly after AEPCO filed its original complaint, defendants petitioned the Board to issue a subpoena to the

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McKinley mine, among other parties. Defendants' Petition for Subpoenas Duces Tecum (Feb. 23, 2001). The main purpose of the requested subpoena to P&M was to determine when the mine can be expected to cease coal production. Public reports indicate that the McKinley mine does not have adequate resources to supply the Apache Station with coal for 20 years, which is the period the Board has typically employed in past SAC analyses. As defendants pointed out in their request for issuance of the subpoena, media accounts suggest that the McKinley mine could cease operations as early as 2006. *Id.*, Exhibit F.

Shortly after defendants filed their request for subpoenas, AEPCO amended its complaint and expanded its rate reasonableness challenge to include rates for movements of coal originating in Colorado and the Powder River Basin ("PRB"). AEPCO's Amended Verified Complaint (Mar. 9, 2001). It then responded to defendants' subpoena request on March 15, 2002, arguing that the request for information about the life of the McKinley mine was moot because the scope of AEPCO's rate reasonableness case had been expanded to include rates for movements of coal from other coal origins. Complainant's Reply to Defendants' Petition for Subpoena Duces Tecum at 8 (Mar. 15, 2001). According to AEPCO, "[t]he reason for amending the complaint is that if the New Mexico coal origins prove to be insufficient for AEPCO's future needs, AEPCO's SARR will provide the flexibility to permit coal to be shipped from other origins." *Id.* AEPCO asserted that the "flexibility" provided by its amended complaint to assume coal movements to AEPCO's facility from multiple origins obviated the need for discovery relating to the life of the McKinley mine.

AEPCO did not rely entirely on this mootness argument in opposing defendants' subpoena request, and in a footnote AEPCO noted that "[m]ost of the information sought from the third parties has also been sought from AEPCO itself" and that defendants had not explained

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why its need for information on the McKinley mine could not "be adequately met through production from AEPCO's files." *Id.* at 9 n. 7. In a subsequent April 2, 2001 pleading, defendants pointed out that while they had in fact requested materials from AEPCO relating to the life of the McKinley mine, AEPCO had objected to producing that information. Defendants' Reply Brief in Support of Petition for Subpoenas Duces Tecum at 4 (Apr. 2, 2001). AEPCO replied to this pleading on April 6, 2001 and suggested a "willingness to negotiate the scope of production" of materials relating to the McKinley mine. Complainant's Reply to Defendants' Motion for Leave to File a Reply Brief in Support of Petition for Subpoena Duces Tecum at 6 (Apr. 6, 2001).

On December 31, 2001, the Board denied defendants' subpoena request. It rejected AEPCO's argument that the discovery was moot as a result of AEPCO's expansion of the scope of its complaint. Since AEPCO continued to challenge rates for movements of New Mexico coal, information relating to the life of the New Mexico coal mines was clearly discoverable. December 31, 2001 Decision at 4-5. However, because "AEPCO has offered to supply this information itself," the Board concluded that third party discovery was not appropriate. *Id.* at 4.

Defendants responded to the Board's December 31, 2001 order by propounding revised discovery on issues relating to AEPCO's coal source plans, including information relating to the life of the McKinley mine. AEPCO served responses and objections to those requests on February 28, 2002. Documents responsive to those requests were produced by AEPCO between March 18 and July 5, 2002. **[Highly Confidential Material Expunged]**. Defendants do not question the thoroughness of AEPCO's production of materials in its possession, but they believe that the paucity of information available from AEPCO justifies the limited third-party discovery that is the subject of the present subpoena request.

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Argument

The Board permits third-party discovery when two conditions are met: (1) the materials sought are relevant to an important, contested issue; and (2) the materials are not available from other sources. The application of this standard is illustrated by the Board's recent decision in STB Docket No. 42057, *Public Service Company of Colorado d/b/a/ Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*, (Jan. 31, 2002) (hereinafter *Xcel v. BNSF*). In that case, Xcel requested that the Board issue a subpoena to the manufacturer of locomotive fuel gauges for information on the use of fuel gauges to measure fuel consumption. The Board had previously found that the issue on which third-party discovery was sought — fuel consumption on locomotives used to power trains carrying issue traffic — is potentially important in the calculation of variable costs. STB Docket No. 42056, *Texas Municipal Power Company v. BNSF*, slip opin. at 8 (Feb. 9, 2001). Because the Board concluded that the fuel gauge information sought by Xcel was relevant to this issue and was not available from other sources, the Board issued the requested subpoena.¹

The third-party subpoena requested by defendants here should be issued for the same reasons. First, the expected life of the McKinley mine will be a critical element in AEPCO's stand-alone cost evidence relating to its challenge to defendants' New Mexico rates. AEPCO will be required to present and defend in its opening SAC evidence specific assumptions about the volume of issue traffic that its stand-alone railroad ("SARR") will originate at the McKinley mine for each year of the SARR's life. If, as defendants believe, the McKinley mine is likely to cease commercial operations well before the end of this decade, AEPCO will be required to take

¹ The Board subsequently ruled that BNSF could not be compelled to assist Xcel in a fuel consumption study that involved fuel gauges, since fuel consumption data was available from locomotive event recorder data. *Xcel v. BNSF*, slip opin. at 3 (July 2, 2002).

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those real-world expectations into account. A SAC presentation that involves only a few years of issue traffic will obviously be very different from the SAC presentations that the Board has seen in past cases, where the issue traffic has been assumed to move into perpetuity. Defendants will need the requested discovery in order to assess the reasonableness of AEPCO's assumptions on this important issue.

Second, the information sought by defendants is not otherwise available. Defendants sought voluntary production of the requested information from P&M, the operators of the McKinley mine, before filing this subpoena request, but P&M advised defendants that it is not willing to produce the requested information without a subpoena. Defendants also sought the information from AEPCO, but AEPCO's files contain very little information indicating when the McKinley mine is expected to cease operations. **[Highly Confidential Material Expunged.]**

Finally, defendants have tailored their discovery requests to be as unobtrusive as possible. The requested subpoena is limited to documents showing the useful life, production capabilities and future sales commitments of the McKinley mine. **[Highly Confidential Material Expunged.]** Defendants do not expect that compliance with the subpoena will present any significant burdens for P&M but will agree to work with P&M to address any concerns regarding burden that they might have. Further, defendants will agree to treat the materials produced pursuant to the subpoena as "Confidential" or "Highly Confidential" documents under the Protective Order in this proceeding according to the preference of P&M.

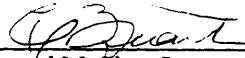
CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Board grant their Petition for subpoenas duces tecum directed to P&M, the operators of the McKinley mine.

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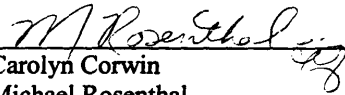
Respectfully submitted,

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Attorneys for Defendant Union Pacific
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October 15, 2002

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CERTIFICATE OF SERVICE

I hereby certify that this 15th day of October 2002, I served a copy of the Public Version of Defendants' Petition for Subpoenas Duces Tecum to the Pittsburg and Midway Coal Mining Company by overnight mail to:

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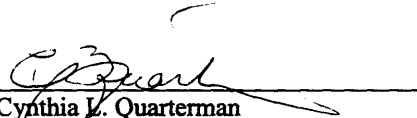

Cynthia L. Quarterman

EXHIBIT A

DEFINITIONS AND INSTRUCTIONS

A. "AEPCO" means Arizona Electric Power Cooperative, Inc., including any of its member-owner cooperatives, officers, directors, agents, employees and representatives, and any predecessor corporation, past or present subsidiary or affiliated corporation, and the officers, directors, agents, employees and representatives of any such predecessor, subsidiary, or affiliate.

B. "BNSF" means The Burlington Northern and Santa Fe Railway Company, including its officers, directors, agents, employees and representatives, and any predecessor corporation, past or present subsidiary or affiliated corporation, and the officers, directors, agents, employees and representatives of any such predecessor, subsidiary, or affiliate.

C. "UP" means Union Pacific Railroad Company, including its officers, directors, agents, employees and representatives, and any predecessor corporation, past or present subsidiary or affiliated corporation, and the officers, directors, agents, employees and representatives of any such predecessor, subsidiary, or affiliate.

D. "You" and "yours" means the Pittsburg and Midway Coal Mining Company, including the parent of Pittsburg and Midway Coal Mining Company, Chevron Corporation, any affiliate or subsidiary, whether wholly or partially owned, and any predecessor in interest, and any representative or agent acting on your behalf.

E. "McKinley" means the mine operated by the Pittsburg and Midway Coal Mining Company located at North Tipple, New Mexico.

F. "Affiliate" means any person who, directly or indirectly, in whole or in part, owns or controls, is owned or controlled by, or is under common ownership or control with you.

G. "Document" includes without limitation all writings of every kind. letters, telegrams, telexes, memoranda, reports, studies, calendar or diary entries, maps, pamphlets, drafts, notes, graphs, charts, tabulations, analyses, statistical or informational accumulations, accounting records of any kind, audio recordings, photographs, film impressions, videotapes, microfilm, microfiche, vu-graphs, emails, computer disks, computer programs, software, magnetic tapes, or any medium containing computer programs, software, or data, and sound or mechanical reproductions, and all compilations of the foregoing.

H. "Identify" when used with respect to a natural person means to state the person's full name, job title, and home or business address.

I. If you for any reason (including the assertion of privilege), withholds documents or information responsive to any of these requests, it should state the specific factual and legal basis for doing so and produce documents or information for any part of the request or interrogatory which is not alleged to be objectionable or protected.

J. In these requests, the conjunctive shall include the disjunctive and vice versa, the singular shall include the plural and vice versa, "all" shall include "any" and vice versa, and "each" shall include "every" and vice versa, all to the end that each requests shall be construed to cover the broadest scope of information.

Document Requests

Document Req. No. 1: All documents that discuss or refer to the procurement or sale of coal produced at the McKinley mine for use at AEPCO's Apache Generating Station at Cochise, Arizona, on or after December 31, 2002.

Document Req. No. 2: All documents that constitute forecasts, projections or estimates (whether or not prepared by you) of the production and/or sale of coal from your McKinley mine after December 31, 2002.

Document Req. No. 3: All documents that discuss the anticipated date that mining operations (as distinct from reclamation) at your McKinley mine will cease.