

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

MICHAEL L. ROSENTHAL
TEL 202.662.5448
FAX 202.778.5448
MROSENTHAL@COV.COM

May 9, 2003

BY HAND

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

ENTERED
Office of Proceedings

MAY 9 2003

Part of
Public Record



207784

Re: Docket No. 42058, Arizona Electric Power Cooperative, Inc. v. The
Burlington Northern & Santa Fe Ry. and Union Pacific R.R.

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the original and fourteen copies of the parties' Joint Filing Concerning Modification of Protective Order in Docket No. 42058. This filing is being submitted in response to the Board's directive in its Decision served April 25, 2003, in Ex Parte 638 and embraced rail rate proceedings.

One additional copy is enclosed. Please indicate receipt and filing by date-stamping the enclosed extra copy and returning it to our messenger.

Thank you for your assistance.

Sincerely,

Michael L. Rosenthal

Enclosures

cc: Christopher A. Mills (via messenger)
Cynthia L. Quartermann (via messenger)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. 42058

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

v.

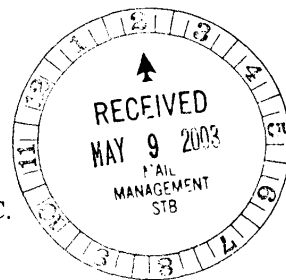
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

**JOINT FILING CONCERNING MODIFICATION
OF PROTECTIVE ORDER IN DOCKET NO. 42058**

The parties to the above proceeding, Arizona Electric Power Cooperative, Inc. ("AEPCO"), The Burlington Northern and Santa Fe Railway Company ("BNSF"), and Union Pacific Railroad Company ("UP"), through their undersigned counsel, hereby provide their views on modifications to the protective order in this proceeding that are appropriate to comply with the Board's Decision served April 3, 2003, in Ex Parte No. 638, Procedures to Expedite Resolution of Rate Challenges to Be Considered Under the Stand-Alone Cost Methodology ("April 3 Decision"). As suggested in the Board's Decision in Ex Parte No. 638 and embraced rate proceedings served April 25, 2003, the parties have attempted to develop a joint proposal for such modifications. Because the parties have been unable to agree on all aspects of such a proposal, they are providing instead a statement of their respective positions.

AEPCO/BNSF Views

AEPCO and BNSF believe the protective order in this proceeding should be modified to include the following additional paragraphs:



ENTERED
Office of Proceedings

MAY 9 2003

Part of
Public Record

1. If a party files with the Board a pleading or evidence containing Confidential and/or Highly Confidential material in accordance with this Protective Order, that party shall, within three (3) business days after the filing of such pleading or evidence, file with the Board a public version of such pleading or evidence from which all Confidential and Highly Confidential material has been redacted. On the first day of that three-day period, the parties shall exchange draft public versions of their filings. On the second day, the parties shall provide comments on the other party's draft. Workpapers accompanying such pleading or evidence need not be included in the public version.

2. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as Highly Confidential by a producing party, without securing prior permission from the producing party.¹ If a party (the "filing party") files and serves upon the other party (the "reviewing party") a pleading or evidence containing the filing party's Highly Confidential material, the filing party shall also prepare and serve upon the reviewing party a Confidential Version of the pleading or evidence from which the filing party's Highly Confidential material has been redacted within one business day of the filing. The Confidential Version may be provided in hardcopy or electronic format at the option of the filing party, and may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material ("In-house Personnel"). Alternatively, in lieu of preparing and serving a Confidential Version of any such pleading or evidence, the filing party may provide to outside counsel for the reviewing party a list of the filing party's own Highly Confidential information that must be redacted from its Highly Confidential Version prior to review by the reviewing party's In-house Personnel. If the filing party chooses this latter option, it shall provide the list to outside counsel for the reviewing party within one business day of the filing of the Highly Confidential version, and such outside counsel shall redact the designated material prior to review of the pleading or evidence by the reviewing party's In-house Personnel.

3. Workpapers accompanying a pleading or evidence and containing the filing party's Highly Confidential material need not be included in a Confidential Version (or substitute list) of the pleading or evidence provided to the reviewing party. To ensure that each party can respond with appropriate input from In-house Personnel to evidence or other material or information filed by another party, the parties shall cooperate to redact or otherwise identify, within five (5) business days of the filing of such evidence or material, portions of such workpapers filed as Highly Confidential so that redacted versions thereof can be disclosed to a party's In-House Personnel. If the parties are unable to reach agreement on appropriate redactions of Highly Confidential information of materials within five (5) business days of filing such workpapers, either party may seek appropriate relief from the Surface Transportation Board.

¹ This sentence is already included in paragraph 16 of the protective order. The new paragraph, including this sentence, would replace paragraph 16 of the protective order.

AEPCO and BNSF note that proposed additional paragraph 1 provides for the deferral of public versions of pleadings or evidence containing confidential or highly confidential material for three business days. They believe this procedure will likely reduce disputes between the parties and the inadvertent disclosure of confidential and highly confidential materials. Additional paragraph 2 provides for the deferral of service of Confidential versions of pleadings or evidence containing a party's own Highly Confidential material (or an alternative list) for one business day.

AEPCO and BNSF urge the Board to accept these provisions, notwithstanding their facial inconsistency with the Board's April 3 Decision which requires contemporaneous filing and service of Highly Confidential, Confidential and public versions of submissions in SAC rate cases. Id. at 9, 10. Preparation of the Highly Confidential version of an evidentiary filing in a SAC rate case already requires extended effort by outside counsel during the days and hours before filing is accomplished, and that version must be completed before counsel can undertake the preparation of either a Confidential or a public version. AEPCO and BNSF intend to request the Board to reconsider this aspect of the April 3 Decision in their comments, which are due June 9, 2003. The public interest would not be harmed by delaying the filing of public versions of Board submissions by three days, and AEPCO and BNSF have voluntarily agreed to defer the service upon each other of Confidential versions of pleadings and evidence by one day.

UP Views

Paragraph 1. UP believes proposed additional paragraph 1 should not be included in the protective order. As a general matter, UP believes that the timing of public filings is not an appropriate matter for negotiation in the protective order by the parties. Rather, it should be prescribed on a uniform basis by a Board order.

UP reads the April 3 Decision as requiring that a public version be filed simultaneously with a Confidential or Highly Confidential version of a submission. To the extent there are concerns about practical problems that might result from a requirement of simultaneous filing, UP believes the better approach is to address those concerns when the procedural schedule is established. On a going forward basis, the parties should be able to plan ahead and manage any such concerns by, *e.g.*, building extra time into the schedule to ensure that the redaction process can be completed by the due date of the submission.

UP recognizes that in this case a procedural schedule has already been established and that, in negotiating the filing dates, the parties did not anticipate the April 3 Decision. In these circumstances, UP would have no objection if the Board were to conclude that it is appropriate to make an exception for this case and to order the three-day delay procedure proposed by AEPCO and BNSF here.

UP is uncertain whether the Board's reference to "submission" in the April 3 Decision was intended to cover workpapers, as well as argument, narrative, and exhibits. UP believes that in most cases only a small percentage of workpapers would be nonconfidential and thus eligible for inclusion in a public version. In these circumstances, UP agrees that a public version of workpapers should not be required.

Paragraph 2. For this case, UP does not object to the addition of proposed paragraph 2. The April 3 Decision states that Confidential versions of submissions should be provided simultaneously with filing of Highly Confidential versions, and UP believes that this should be the rule on a going forward basis. As UP explained in its testimony in Ex Parte No. 638, it is important that its in-house personnel obtain access to filings as soon as possible. However, in the circumstances of this case, where the procedural schedule was set without

knowledge that the Board would impose this requirement, UP does not object to the one-day delay in provision of a Confidential version.

Paragraph 3. For this case, UP does not object to the addition of proposed paragraph 3. In the testimony it submitted in Ex Parte No. 638, UP urged the Board to require that a party provide a Confidential version of workpapers simultaneously with the filing of Highly Confidential workpapers, and it continues to believe this is the proper approach. Again, on a going forward basis, the parties should be able to plan ahead and manage any concerns by building extra time into the procedural schedule. However, in the circumstances of this case, where the procedural schedule has already been set, UP does not object to the approach outlined in proposed paragraph 3.

Respectfully submitted,

Patricia E. Cooper
Chief Legal Officer
Arizona Electric Power Cooperative, Inc.
100 S. Highway 80
Benson, AZ 85602

Richard E. Weicher
Michael E. Roper
The Burlington Northern and Santa Fe
Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

Christopher A. Mills/cfe
William L. Slover
Robert D. Rosenberg
Christopher A. Mills
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036
(202) 347-7170

Cynthia L. Quarterman/cfe
Samuel M. Sipe, Jr.
Anthony J. LaRocca
Cynthia L. Quarterman
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

*Attorneys for Arizona Electric Power
Cooperative, Inc.*

*Attorneys for The Burlington Northern and
Santa Fe Railway Company*

J. Michael Hemmer
Louise A. Rinn
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179
(402) 271-3309

Carolyn F. Corwin
Carolyn F. Corwin
David L. Meyer
Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 662-6000

*Attorneys for Union Pacific
Railroad Company*

May 9, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2003, I caused a copy of the foregoing Joint Filing Concerning Modification of Protective Order in Docket No. 42058 to be served by first-class mail on the parties of record in Ex Parte No. 638 and in the rail rate proceedings listed in the Board's Decision served April 25, 2003, in Ex Parte No. 638, et al.



Michael L. Rosenthal