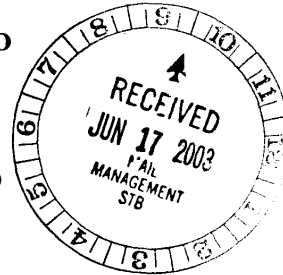


PUBLIC VERSION
HIGHLY CONFIDENTIAL AND CONFIDENTIAL MATERIAL REDACTED

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD



DOCKET NO. 42077

208086

ARIZONA PUBLIC SERVICE COMPANY AND PACIFICORP

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

PETITION TO INTERVENE

ENTERED
Office of Proceedings

JUN 17 2003

Part of
Public Record

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Attorneys for Intervenor,
Peabody Energy Corporation

June 16, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

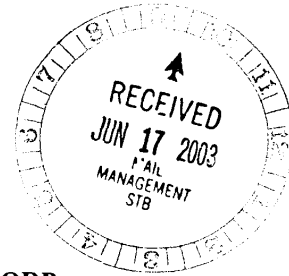
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Pursuant to 49 C.F.R. § 1112.4 and 1117.1, Peabody Energy Corporation (“Peabody”) hereby petitions the Surface Transportation Board (“STB” or “Board”) for leave to intervene in the above-captioned proceeding for the limited purpose of requesting interim rate relief while this case is pending before the Board. Peabody’s intervention will not unduly disrupt this proceeding, and will not unduly broaden the issues raised. See 49 C.F.R. § 112.4(a).

If the Board grants Peabody’s “Petition to Intervene,” Peabody asks the Board to accept and consider the accompanying “Petition for Injunctive Relief.” Peabody also has filed a “Motion for Expedited Consideration” of this “Petition to Intervene” and the “Petition for Injunctive Relief,” due to the imminent threat of irreparable harm. All three pleadings are supported by the Verified Statement of Colin Kelly (“Kelly V.S.”), which is attached to the “Petition for Injunctive Relief” as Exhibit 1.

In support of this Petition to Intervene, Peabody states as follows:

**I. Statement of Peabody's Interest in the Proceeding
(49 C.F.R. § 1112.4(b)(1))**

In this proceeding, Complainants, Arizona Public Service Co. and PacifiCorp (collectively, "APS"), have challenged the reasonableness of rail rates established by The Burlington Northern and Santa Fe Railway Company ("BNSF") in BNSF Common Carrier Pricing Authority BNSF 90040-A, Supplement No. 4 ("BNSF 90040-A") for the transportation of coal in unit trains from the Lee Ranch Mine, in New Mexico, to the Cholla Electric Generating Station ("Cholla") near Joseph City, Arizona. Peabody, through its wholly-owned subsidiary, Lee Ranch Coal Company, owns and operates the Lee Ranch Mine. (Kelly V.S. at 1) A fair and reasonable rail transportation rate is vital to the competitiveness of Lee Ranch coal. (Id. at 2)

The principal competitor to the Lee Ranch Mine in the southwest, and the Cholla Station in particular, is the McKinley Mine, owned by the Pittsburgh and Midway Coal Mining Company. (Id.) Effective January 1, 2003, the BNSF attempted to raise its rail rates from both mines to the Cholla Station. In Docket No. 41185, Arizona Public Service Co. and PacifiCorp v. The Atchison, Topeka and Santa Fe Ry. Co., APS also has challenged the reasonableness of BNSF's rates to Cholla from the McKinley Mine. However, in a decision served in that case on May 12, 2003 (May 12 Decision), the STB instructed BNSF not to collect its rate increase from the McKinley Mine until the conclusion of that proceeding, subject to an accounting order that would make either APS or BNSF whole based upon the Board's final determination of a maximum reasonable rate. In contrast, BNSF has been allowed to implement its rate increase

from the Lee Ranch Mine immediately. This has resulted in a [REDACTED]¹ difference between the rail rates from the McKinley and Lee Ranch Mines to Cholla. (Kelly V.S. at 7)

As a major supplier of coal to the Cholla Station, Peabody is extremely concerned that the gross disparity in rail rates to Cholla from the Lee Ranch and McKinley Mines will inflict severe economic dislocations upon the market for San Juan Basin coal, and particularly upon the sale of coal to the Cholla Station. (Id. at 7-9) This gross disparity has occurred because the STB has enjoined BNSF from raising the McKinley Mine rail rate, while BNSF is allowed to increase the Lee Ranch rail rate immediately, subject only to the ability of APS to obtain reparations. Although reparations may protect APS, they do not protect Peabody. Therefore, Peabody believes that it will suffer substantial and irreparable harm, without immediate relief from BNSF's rate increase.

**II. Statement as to Whether Peabody Supports or Opposes
The Relief Sought or the Action Proposed or is Otherwise Concerned
With the Issues Presented in the Proceeding
(49 C.F.R. § 1112.4(b)(2))**

Although Peabody supports APS's request for a reasonable rail rate from the Lee Ranch Mine to the Cholla Station, Peabody seeks to intervene in this proceeding solely to protect its own interests while APS prosecutes its Complaint. Peabody has no intention to present Stand-Alone Cost evidence or otherwise participate in that phase of this proceeding. Rather, Peabody seeks to preserve the competitive market conditions for the sale of coal that existed between the Lee Ranch and McKinley Mines prior to January 1, 2003, but which have been distorted by the May 12 Decision. Peabody's interest is represented entirely in the "Petition for Injunctive Relief" that has been filed contemporaneous with this "Petition to Intervene."

¹ The shaded text is highly confidential and confidential material that has been redacted from the public version of this filing.

III. Statement Regarding Peabody's Request for Relief
(49 C.F.R. § 1112.4(b)(3))

As set forth in greater detail in the accompanying "Petition for Injunctive Relief," Peabody seeks an immediate order under 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 BNSF from collecting the rates established in BNSF 90040-A. Specifically, Peabody requests that the Board enter an order (1) instructing BNSF not to collect a rate higher than the last effective contract rate from the Lee Ranch Mine to the 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.

* * *

The Board routinely grants petitions to intervene in circumstances where the petitioner demonstrates that it has an interest in the proceeding and intervention will not unduly broaden the issues. E.g., STB Docket No. 42071, Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, Decision served November 15, 2002; Finance Docket No. 34003, The Burlington Northern and Santa Fe Ry. Co. – Construction and Operation Exemption – Seadrift and Kamey, TX, Decision served February 14, 2001; Entergy Arkansas and Entergy Rail – Construction and Operation Exemption – White Bluff to Pine Bluff, AR, Decision served June 30, 2000.

WHEREFORE, Peabody respectfully requests that the Board grant this Petition to Intervene and consider Peabody's accompanying "Petition for Injunctive Relief."

Respectfully submitted,



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June 16, 2003

CERTIFICATE OF SERVICE

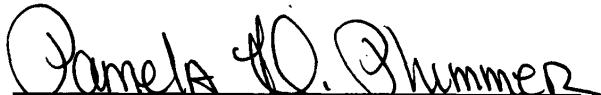
I, Pamela D. Plummer, a secretary at the law firm of Thompson Hine LLP, do
hereby certify that on this 16th day of June, 2003, a copy of the Petition to Intervene, was
hand delivered to the following:

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Pamela D. Plummer