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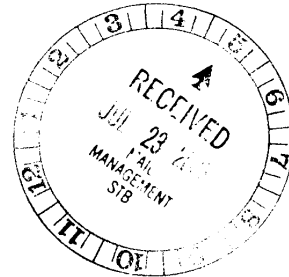
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July 23, 2003



via Hand Delivery

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

PUBLIC VERSION

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 on behalf of The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") is a public version of Defendants' Motion to Strike. This filing consists of the original and 10 copies of the pleading. In addition, BNSF and UP are filing three copies of the public version of the Motion on compact disc. A Highly Confidential version of this pleading is being filed under a separate cover letter.

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

Sincerely,

Anthony J. LaRocca

Enclosures

cc: Counsel for Complainant

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PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

ARIZONA ELECTRIC POWER
COOPERATIVE, INC.,

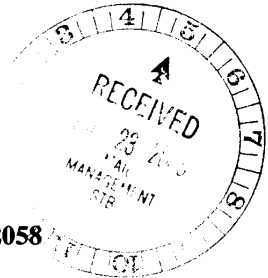
Complainant.

v.

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

Defendants.

Docket No. 42058



DEFENDANTS' MOTION TO STRIKE

Pursuant to 49 C.F.R. §1117.1, defendants The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") (collectively referred to as the "Railroads") hereby move to strike from the record in this proceeding new evidence submitted by complainant Arizona Electric Power Cooperative, Inc. ("AEPCO") in its Rebuttal Evidence filed with the Board on July 3, 2003 in the above-referenced matter. As described in detail below, AEPCO has improperly submitted evidence on rebuttal that substantially changes the SAC traffic and revenue assumptions that are critical elements of its case-in-chief. This action is particularly egregious because AEPCO earlier represented that it would not make any significant change to its opening evidence in this area. In addition, AEPCO has belatedly submitted evidence purporting to support its allocation of revenues on cross-over traffic. AEPCO had no valid reason for holding back its evidence on this critical issue until rebuttal.

In both areas, AEPCO has exceeded the well-established bounds of proper rebuttal and has deprived the Railroads of an opportunity to present an effective reply to AEPCO's case-in-chief. The proper remedy is for the Board to strike the offending evidence from the record.¹

I. PROPER SCOPE OF REBUTTAL

With the recent proliferation of stand-alone cost ("SAC") cases, the Board has strictly enforced the established limits on a complainant's rebuttal evidence. The Board has repeatedly stated that "[r]ebuttal may not be used in SAC cases as an opportunity to introduce new evidence that could and should have been submitted in the party's case-in-chief."² As the Board explained in the recent *TMPA* decision, "we have continually reiterated [that] it is inappropriate to introduce new evidence and arguments on rebuttal and we will not consider the material in such circumstances."³ In that case, the Board refused to consider evidence that was presented by a party for the first time on rebuttal. *See, e.g. TMPA* at 56 n.94, 84, 107, 125, 132, 138, 139, 142, 145, 147, 150, 155.

Two specific rules governing the proper scope of rebuttal have emerged from the Board's recent decisions. First, the complainant may not on rebuttal significantly change the SAC assumptions that are the basis for its opening evidence even if those changes are presented in the guise of correcting an error in the complainant's opening evidence. Thus, in the pending *Duke Energy* matter, the Board granted CSX's motion to strike new evidence submitted by Duke

¹ This pleading is limited to AEPCO's improper rebuttal evidence. It should not be considered as a substitute for briefs, which will address the full range of issues in dispute in this proceeding and will aid the Board in putting the issues into proper perspective.

² *Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070, at 4 (served Mar. 25, 2003) (hereafter "*Duke Energy*").

³ *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 42056, at 56 n.94 (served Mar. 24, 2003) (hereafter "*TMPA*").

Energy on rebuttal that modified the design of the SARR that was the basis for Duke's opening SAC presentation. The Board explained that

[w]hile the changes Duke offers address infirmities in its opening evidence that were pointed out in CSX's reply, they go beyond the proper scope of rebuttal. In choosing to redesign the stand-alone railroad ("SARR") on rebuttal, Duke has gone beyond simply seeking to support what it presented in its opening evidence or adopting evidence submitted by CSX. Fairness dictates that CSX would need an opportunity to address the feasibility and cost of a new SARR design and how that change might alter other evidence in the record. Therefore, in the interest of fairness and orderly handling of the case, we will not accept this evidence on rebuttal.

Duke Energy at 4.

Second, the complainant is not permitted to present evidence for the first time on rebuttal that purports to justify or support assumptions made in its opening evidence if that evidence could have been submitted on opening. In a 2001 order that established a format for SAC presentations, the Board set out clearly and concisely this basic rule relating to the scope of rebuttal evidence:

Rebuttal presentations are limited to responding to the reply presentation of the opposing party. Rebuttal may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions. New evidence improperly presented on rebuttal will not be considered.⁴

These limitations on the scope of rebuttal evidence flow from three important legal and policy considerations. First, the complainant challenging the reasonableness of a rate has the burden of proof on SAC issues.⁵ Because the complainant has the burden of proof, it must

⁴ *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, Ex Parte No. 347 (Sub-No. 3), at 5 (served Mar. 12, 2001) ("*General Procedures*").

⁵ See *Coal Rate Guidelines, Nationwide*, Ex Parte No. 347 (Sub-No. 1), 1 I.C.C.2d 520, 547 (1985).

present evidence on opening demonstrating that it is entitled to relief under the SAC test. That evidence cannot be supplied in a rebuttal filing. As the Board stated in its *General Procedures* order, "the party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence."⁶ If the burden of proof in SAC cases is to have any meaning, the complainant's rebuttal must be limited to demonstrating why its *opening* evidence entitles it to relief and to critiquing any evidence submitted by the defendant on reply. A complainant cannot use rebuttal evidence to change important assumptions in its opening evidence in order to "fix" deficiencies in its case-in-chief.

Second, strict limits on the scope of a complainant's rebuttal filing result from the need for finality and administrative efficiency.⁷ One could imagine procedural rules that would permit a complainant to submit new evidence on rebuttal to repair or support its opening evidence, but a defendant then would have to be provided an opportunity to reply with a full analysis of the new evidence. This approach would provide for a complete and reliable record, but it would also extend and further complicate SAC procedures. Both the Board and the ICC before it have chosen a different procedural balance: The complainant must carry its burden of proof through its opening evidence and must limit its rebuttal evidence to a response to the defendant's evidence and arguments on reply.

The final consideration is procedural fairness. The defendant should have an opportunity to present a meaningful reply to the complainant's evidence. If a complainant is permitted to fix

⁶ *General Procedures*, at 5.

⁷ "Numerous Commission decisions have also articulated the benefits of and the need for administrative finality." *Omaha Pub. Power Dist. v. Burlington Northern R.R. Co.*, 3 I.C.C.2d 853, 862 (1987); see also *Bituminous Coal – Hiawatha, UT to Moapa, NV*, Docket No. 37409, at 1 (I.C.C. served Aug. 16, 1988) (denying motion to file a supplemental reply, noting that "the evidentiary phase of the proceeding must come to an end sometime").

or support its case-in-chief with new evidence presented for the first time on rebuttal, a defendant's reply would be a meaningless exercise. Under such an approach, a complainant would have the incentive to present a bare minimum opening case (or even, as in this case, to hide its case entirely from the defendant), leaving its real evidence for rebuttal, thereby depriving the defendant of a meaningful opportunity to reply. To avoid this prejudice, the complainant is required to submit on opening its full case-in-chief, as well as all necessary evidence to support the assumptions underlying its evidence. As the Board stated in a recent decision, "[w]e are increasingly troubled by the submission of incomplete or erroneous evidence on opening in a SAC case and a complainant's reliance upon an opportunity to address deficiencies through later evidentiary submissions, to which defendant has no opportunity to respond. The interests of fairness and orderly handling of a case dictate that parties submit their best evidence on opening, so that each party has a fair opportunity to reply to the other's evidence."⁸ See also *TMPA* at 138 ("We will not consider new cost evidence submitted for the first time on rebuttal, as BNSF has not had an opportunity to respond to that evidence."); *TMPA* at 150 ("Again, *TMPA* may not present new evidence on rebuttal (to which BNSF has had no opportunity to respond).").

Under these rules, the Board should strike from the record of this case the AEPCO rebuttal evidence described below.

⁸ *Public Serv. Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 42057, at 2 (STB served Apr. 4, 2003) ("*Xcel Energy*") (citing to *General Procedures* and *Duke Energy* decisions).

II. AEPCO'S REBUTTAL EVIDENCE EXCEEDS THE SCOPE OF PERMISSIBLE REBUTTAL IN SEVERAL AREAS

A. SAC Traffic Issues

In its opening evidence, AEPCO developed a traffic group for its stand-alone railroad consisting of both coal and a large amount of non-coal traffic. After analyzing AEPCO's traffic group, the Railroads concluded that they could not present a meaningful reply. Among other things, the Railroads discovered that AEPCO had derived its base year non-coal volumes by applying enormous "adjustments" to the non-coal traffic volumes and revenues that AEPCO identified in the traffic tapes produced by BNSF and UP.⁹ These adjustments increased BNSF and UP's 2001 non-coal volumes by 56 percent and 32 percent, respectively, and increased BNSF and UP's 2001 non-coal revenues by 54 percent and 29 percent, respectively. *Id.* Based upon these adjustments, AEPCO's 2001 traffic base included { } million tons of non-coal traffic and { } million in non-coal revenues. Notwithstanding the size of these adjustments, the only reference to them in AEPCO's opening evidence was contained in a cryptic footnote.¹⁰ AEPCO's evidence contained no explanation whatsoever of how the adjustments were developed or applied.

On April 18, 2003, six weeks before the deadline for submitting reply evidence, UP filed a petition to require AEPCO to submit new opening evidence or, alternatively, to dismiss AEPCO's claims (hereafter "UP Petition"). In that petition, UP argued that AEPCO's opening SAC evidence did not permit a meaningful reply for several reasons, including the fact that AEPCO had not adequately identified the non-coal traffic that it selected for its stand-alone

⁹ See Reply Evidence of The Burlington Northern and Santa Fe Railway Company dated May 27, 2003 (hereafter "BNSF SAC Reply") at III-A-2.

¹⁰ *Id.* at I-9.

railroad. *See* UP Petition at 9-13. UP showed that, while the methodology and rationale for AEPCO's volume and revenue adjustments to the non-coal traffic were unclear, those adjustments must have been flawed because they clearly overstated the amount of traffic moved by the incumbent on those line segments. *Id.* at 5, 12.

On May 7, 2003, almost three weeks prior to the deadline for defendants to submit reply evidence, AEPCO filed its opposition to UP's Petition.¹¹ In that brief, AEPCO affirmatively stated that it "believes its SARR traffic group and configuration, as presented on Opening and in its subsequent Errata filings, to be fully correct and feasible and *has no intention of altering them significantly at a later stage of this proceeding.*" AEPCO Opposition at 3 (emphasis added).

As a result of AEPCO's failure to present a meaningful traffic group, the Railroads did not present traditional SAC reply evidence in this proceeding. The predicate for any SAC analysis must be an accurate identification of the traffic handled by the SARR. It is impossible to evaluate the complainant's SAC assumptions relating to revenues, construction costs or SARR operations without a clear understanding of the SARR traffic group. As UP explained in its reply evidence, "AEPCO's opening evidence was so flawed that defendants are not in a position to develop alternative SAC evidence."¹² Citing its earlier petition, UP explained that defendants were unable to decode or replicate AEPCO's traffic selection and that AEPCO's reply to UP's petition had failed to shed any significant light on its selection.¹³ In its reply evidence, BNSF

¹¹ *See* Reply in Opposition to Union Pacific Railroad Company's Petition to Require Submission of New Opening Evidence or, Alternatively, to Dismiss, dated May 7, 2003 (hereafter "AEPCO Opposition").

¹² *See* Reply Evidence of Union Pacific Railroad Company Concerning Stand-Alone Costs dated May 27, 2003 (hereafter "UP SAC Reply"), at I-1 n.1; *see also id.* at I-1 to 9.

¹³ *See id.* at III-A-1 to 2.

explained that "AEPCO's traffic selection is not reliable or probative. The 'adjustments' made to 2001 non-coal volumes and revenues are obviously incorrect This fundamental flaw in AEPCO's traffic selection is particularly significant. Because of it, the Railroads are unable to submit traditional SAC reply evidence in this case." BNSF SAC Reply at III-A-3.

Now, despite its representation in its Opposition to UP's Petition that it would not alter its opening traffic evidence, AEPCO has significantly altered its traffic group. Specifically, on rebuttal AEPCO presents new SAC analyses based upon two new, alternate traffic groups -- it (1) "modif[ies] the traffic group analysis it presented on opening to remove the revenue adjustments"¹⁴ and (2) presents "an alternate revenue adjustment limited to just those trains for which there were no matching revenue records." *Id.* at III-A-1, n. 1. These alternate traffic groups substantially reduce the amount of non-coal traffic transported by AEPCO's stand-alone railroad in base-year 2001. Under the unadjusted traffic group, AEPCO's 2001 traffic base includes { } million tons of non-coal traffic,¹⁵ which is 31 percent less non-coal traffic than the SARR carried in AEPCO's opening evidence.¹⁶ Under the alternate revenue adjustment methodology presented in AEPCO's rebuttal evidence, the 2001 traffic base includes { }

¹⁴ Complainant Arizona Electric Power Cooperative, Inc.'s Rebuttal Evidence dated July 3, 2003 (hereafter "AEPCO Rebuttal") at III-A-1.

¹⁵ AEPCO Rebuttal, Exhibit III-A-15 at 1, column 3, line 13.

¹⁶ { } See AEPCO Opening at III-A-5 for AEPCO's non-coal volume assumptions on opening.

million tons of non-coal traffic,¹⁷ which represents a 23 percent decline in the volume of non-coal traffic transported by the SARR in AEPCO's opening evidence.¹⁸

Obviously concerned that its adoption of new traffic groups would be perceived as improper rebuttal -- as it clearly is -- AEPCO attempts to justify its use of the unadjusted revenue traffic group as merely the "adoption of the Railroads' criticism" of its revenue adjustment.¹⁹ AEPCO Rebuttal at I-3. However, AEPCO did not "adopt the Railroads' criticism." The Railroads never argued that the unadjusted non-coal volume and revenue numbers were the correct or proper basis for carrying out the SAC analysis. To the contrary, BNSF expressly stated in its reply that those unadjusted traffic and volume numbers *could not be used* "as a starting point since they are obviously not the basis for AEPCO's opening evidence." BNSF SAC Reply at III-A-20. Whatever traffic assumptions AEPCO intended to use for its SAC analysis, it was clear that it did not intend to use the unadjusted numbers because it believed those numbers understated the traffic and revenues that would be handled by the SARR.²⁰

¹⁷ AEPCO Rebuttal electronic workpapers at ACE Non-Coal Traffic and Revenue Forecast -- Rebuttal worksheet titled "Exhibit III-A-15."

¹⁸ { } On rebuttal, AEPCO -- apparently attempting to justify its earlier use of volume and revenue adjustments to non-coal traffic -- presents a five-page explanation of its decision to make those adjustments. See AEPCO Rebuttal at III-A-4 to III-A-9. Any such explanation of a key assumption in AEPCO's traffic volume and revenue calculations could have been -- and should have been -- presented on opening. As the Board recognized in the *FMC* case, the complainant must support or justify its case-in-chief in the opening presentation; it cannot hold back important evidence that purportedly justifies its opening assumptions until rebuttal, when the defendant has no opportunity to respond. See *FMC Wyoming Corp. and FMC Corp. v. Union Pac. R.R. Co.*, STB Docket No. 42022, at 129, 136, 137, 167, 172 (served May 12, 2000) ("*FMC*").

¹⁹ AEPCO never even attempts to justify its use of the alternate limited revenue adjustment traffic group on rebuttal.

²⁰ AEPCO's presentation of alternative traffic figures on rebuttal shows that it continues to believe the unadjusted numbers understate the traffic that the SARR would handle.

BNSF's position was not that the unadjusted numbers were "correct" or that those figures should be used in the SAC analysis, but rather that the traffic figures AEPCO did use in its SAC presentation -- the adjusted traffic and revenues -- were obviously and fundamentally wrong. UP further pointed out in its reply that, in addition to the unexplained and plainly erroneous adjustment, AEPCO had failed to address other questions UP had raised about its initial selection of traffic. For example, AEPCO never explained its intention regarding traffic that originates or terminates in the Pacific Northwest and Utah. See UP SAC Reply at III-A-1 to 2; UP Petition, Verified Statement of John C. Klick and Julie A. Murphy, at 7.

AEPCO claims that its presentation of new traffic groups on rebuttal is supported by Board decisions in *Duke Energy* and *PEPCO*.²¹ However, far from supporting its position, those cases instead confirm that AEPCO's modification of its traffic group on rebuttal is improper. In *Duke Energy*, the Board emphasized that there are strict limits on the complainant's ability on rebuttal to address infirmities in its opening evidence that a railroad identifies in its reply. As the Board explained, "[i]n choosing to redesign the SARR on rebuttal, Duke has gone beyond simply seeking to support what it presented in its opening evidence or adopting evidence submitted by CSX." *Duke Energy* at 3-4. Similarly, AEPCO has clearly gone beyond the scope of proper rebuttal. The new traffic groups AEPCO has adopted on rebuttal do not support what AEPCO presented on opening, nor do they adopt evidence submitted by the Railroads on reply. In the *PEPCO*²² case, the Board stated that new evidence would be improper rebuttal if it

²¹ *AEPCO Rebuttal* at I-3, III-A-1 to 2.

²² *Potomac Elec. Power Co. v. CSX Transp., Inc.*, STB Docket No. 41989, at 3 (served Nov. 24, 1997) ("*PEPCO*").

“impermissibly alter[ed] basic assumptions of the SAC model introduced in the opening evidence.” *PEPCO* at 3. This is plainly the case with AEPCO’s new traffic groups.

AEPCO also attempts to justify its modification of the traffic group on rebuttal by asserting that it was “careful to avoid changing the configuration or operating plan of its SARR.” AEPCO Rebuttal at I-3. But the fact that AEPCO did not change other aspects of its SAC case does not justify its switch to a different traffic base on rebuttal. The case law does not support the notion that some parts of a complainant’s opening SAC evidence may be changed on rebuttal so long as other parts remain the same. As the *PEPCO* decision makes clear, a complainant may not alter on rebuttal the basic assumptions underlying its SAC presentation, and the SARR traffic group is the most basic assumption in a SAC analysis.

AEPCO boldly asserts that the changes it has made in traffic assumptions are actually conservative because AEPCO has not modified the costs it calculated on opening for a SARR that handled a larger traffic volume. In effect, AEPCO asks the Board to assume that the costs AEPCO presented on opening were reasonable in regard to the higher volume SARR and therefore should be reasonable in regard to the lower volume SARR it presents on rebuttal. But such an assumption is clearly unjustified. AEPCO’s own failure to present a meaningful traffic group on opening made it impossible for defendants to assess *any* cost assumptions for the SARR.

AEPCO’s introduction of new traffic evidence on rebuttal is particularly egregious in the circumstances of this case. In its response to UP’s Petition, AEPCO declared that it had no intention of changing its traffic group in any significant way. The Railroads filed limited reply evidence because their lack of knowledge about AEPCO’s traffic base (and other features of its

case) curtailed their ability to prepare a meaningful response. AEPCO now substitutes two different traffic groups and revenue assumptions on rebuttal.

This conduct amounts to a form of “sandbagging” that the Board should not condone. The new SAC cases AEPCO presents based upon the two alternate new traffic groups it has identified for the first time on rebuttal should be stricken as improper rebuttal.²³

B. Improper Reliance on New Evidence Relating to Coverage of Off-Line Costs for Cross-Over Traffic

As AEPCO has acknowledged, the traffic group it selected for its SARR consists almost entirely of cross-over traffic. On opening, AEPCO had the burden of showing that its methodology for allocating revenues for this traffic would leave the railroads connecting to the SARR (the residual incumbents) with sufficient revenue to cover the directly attributable costs of the off-line portions of the cross-over movements.²⁴ As UP explained in its April 18 Petition and the Railroads reiterated on reply,²⁵ AEPCO failed to satisfy that burden. Indeed, in its earlier reply to UP’s Petition, AEPCO had specifically disclaimed any such burden, asserting that “AEPCO strongly objects to any claim that a shipper on opening should be required to undertake a detailed cost analysis of all off-SARR cross-over traffic.”²⁶

²³ The Board should strike Section III-A-1-a of AEPCO’s rebuttal narrative, Exhibits III-A-7 and III-A-15, as well as other related references to the revised traffic and revenue assumptions in AEPCO’s rebuttal argument, narrative and exhibits.

²⁴ *TMPA*, at 31 n.73; *PPL Montana, LLC v. The Burlington Northern & Santa Fe Ry. Co.*, STB Docket No. 42054, at 10 n.20 (STB served Aug. 20, 2002). *See also Arkansas Power & Light Co. v. Burlington Northern R.R.*, 3 I.C.C.2d 757, 774 (1987).

²⁵ *See* UP Petition at 13-16; BNSF SAC Reply at III-A-46 to 49; UP SAC Reply at I-9 to 16.

²⁶ *See* AEPCO Opposition at 26.

On rebuttal, however, AEPCO introduced new evidence purporting to demonstrate that it had met its burden regarding coverage of off-line costs by presenting a study prepared by William Whitehurst of an allegedly random sample of BNSF and UP intermodal, automotive and other non-coal cross-over traffic.²⁷ In this study Mr. Whitehurst purports to show that “if the total Railroad revenues for the move produced a contribution to unattributable costs, then there will still be a contribution for unattributable costs for the residual incumbent railroad.”²⁸ In its rebuttal narrative, AEPCO claims that the Whitehurst study “indicates that the intermodal traffic is not marginal at all, and is fully capable of sustaining a SARR, *while providing the residual incumbents with revenues that exceeds their directly variable (attributable) costs.*” AEPCO Rebuttal at III-A-44 (emphasis added). AEPCO similarly contends that the Whitehurst study shows that “average returns still exceed 100% of variable costs, and DVC by a much larger margin. *The traffic thus covers its ‘attributable’ costs, however, defined, . . .*” *Id.* at II-A-69 (emphasis added).

AEPCO presents this new evidence on off-line costs ostensibly as a response to Mr. Klick’s intermodal costing examples presented in the BNSF SAC Reply at III-A-49 to 50.²⁹ But Mr. Klick’s testimony did not address whether AEPCO’s proposed revenue division methodology allowed coverage of the directly attributable costs for the off-line portion of cross-over movements. Indeed, the Railroads have consistently argued that AEPCO, not the Railroads,

²⁷ See AEPCO Rebuttal Exhibit III-A-10.

²⁸ AEPCO Rebuttal Exhibit III-A-10 at 15, Conclusion 2.

²⁹ Mr. Whitehurst claims that he is commenting on Mr. Klick’s analysis in the introduction to his rebuttal statement. See AEPCO Rebuttal Exhibit III-A-10 at 1.

has the burden of proof on this topic.³⁰ Mr. Klick's sample intermodal costing calculations addressed an entirely different issue -- whether "AEPCO's modified mileage prorate distorts the revenue allocation on intermodal shipments by allocating to the ACE a disproportionately large percentage of contribution that can be used to defray unattributable costs." BNSF SAC Reply at III-A-49. Mr. Klick thus addressed the proper allocation of revenue to cover *unattributable* costs, an issue that Mr. Whitehurst ignores.³¹ In any event, Mr. Klick's critique of AEPCO's allocation methodology does not somehow open the door for submission of evidence on coverage of the directly attributable off-line costs for cross-over traffic that AEPCO should have presented on opening.

Moreover, because the Whitehurst study was presented for the first time on rebuttal, the Railroads have not had the opportunity to address the complex URCS costing issues on which AEPCO bases its purported showing relating to directly attributable off-line costs. An adequate record on this important issue could have been created only if AEPCO had presented its analysis on opening, thus giving the Railroads an opportunity to reply. The Board cannot allow AEPCO to avoid scrutiny of its evidence on this issue by submitting its evidence on rebuttal, when the Railroads can no longer respond to it.

AEPCO's new evidence supposedly demonstrating that the residual incumbents will have sufficient revenues to cover the directly attributable costs of the off-line portions of cross-over

³⁰ See BNSF SAC Reply at III-A-46 to 49; UP SAC Reply at I-9 to 16.

³¹ It is also obvious that Mr. Whitehurst's study did not respond to Mr. Klick's testimony since Mr. Klick's critique only addressed intermodal movements whereas Mr. Whitehurst's study addressed not only intermodal movements but all types of non-coal traffic in AEPCO's traffic group. The wider scope of Mr. Whitehurst's testimony establishes that AEPCO seeks not to rebut reply evidence, but to fill a gap in its opening evidence.

movements should be stricken.³² Under existing Board precedent, it is improper rebuttal.

AEPCO could have – and should have – presented this evidence on opening. *See Duke Energy* at 4.

C. Improper Reliance on New Evidence Supporting Modified Mileage Prorate Methodology (“MMP”)

In an effort to show that its reliance on the MMP method to develop a revenue allocation to the SARR was proper, AEPCO presents for the first time on rebuttal new analyses regarding actual divisions data for certain UP and BNSF movements that included an overhead carrier.³³ The new evidence consists of an analysis of divisions for a small group of UP manifest traffic movements that included an overhead segment and Mr. Crowley’s linear regression of divisions percentages for overhead movements for { } BNSF intermodal moves that included an overhead segment. *See* AEPCO Rebuttal at III-A-62 to 65, Exhs. III-A-12, III-A-13, III-A-14. According to AEPCO, these new analyses of actual market divisions data show that the MMP method actually understates the revenue the SARR might reasonably expect to receive. *See id.* at III-A-65, Exh. III-A-14, at 3.

However, if AEPCO wished to introduce evidence of the Railroads’ “actual divisions” to support its use of the MMP methodology to determine cross-over revenue divisions, it should have done so on opening. In *TMPA*, the Board stated expressly that it has “not adopted a single, preferred procedure for developing revenue divisions on cross-over traffic.” *TMPA* at 36 n.74. Thus, if AEPCO was to justify its use of the MMP method for this purpose, it should have done

³² The Board should strike the analysis set out in AEPCO’s rebuttal Exhibit III-A-10, the descriptions of that analysis contained in Section III-A-3-c of AEPCO’s rebuttal narrative, as well as other references to the study and its results in AEPCO’s rebuttal argument, narrative and exhibits.

³³ AEPCO Rebuttal at III-A-62 to 65.

so on opening. As the Board has explained, “[r]ebuttal may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions.” *See General Procedures* at 5.

In an apparent effort to excuse its failure to present the “actual divisions” evidence on opening, AEPCO complains that the Railroads’ production of divisions data came too late to allow it to use the data on opening. *See AEPCO Rebuttal* at III-A-46 to 47. This excuse is not credible. In its earlier reply to UP’s Petition, AEPCO asserted that its use of MMP was justified on the ground that the Railroads had produced *no* divisions data. *See AEPCO Opposition* at 31-32 & n.33. Now it concedes that the Railroads did produce divisions data and instead offers alleged delay as its justification. These shifting excuses make it evident that AEPCO never had any real intent to use divisions data to support the use of MMP on opening.

In any event, the claim of delay is spurious. AEPCO admittedly received the UP divisions data more than a month and a half before it filed its opening evidence. *See AEPCO Rebuttal* at III-A-46. Thus, it certainly could have submitted its analysis of the UP data on opening.³⁴

As to data from BNSF, the information Mr. Crowley analyzed did not even consist of traffic data setting out revenue divisions. Instead, Mr. Crowley looked at BNSF “pricing authorities” from which he purported to derive revenue divisions. AEPCO did not even identify

³⁴ AEPCO complains that the overhead movements contained in the UP data related only to manifest movements and thus the data are of little value to testing application of the MMP method to intermodal traffic. *AEPCO Rebuttal* at III-A-46. However, AEPCO itself acknowledged in its opening evidence that, because most long-haul intermodal traffic moves under separate shipper arrangements with each line haul carrier, divisions data for intermodal traffic is generally lacking. *See AEPCO Opening* at III-A-31. In any event, the Railroads’ arguments regarding revenue divisions on cross-over traffic were not confined to one category of traffic.

which pricing authorities it wanted BNSF to produce until January 16, 2003, well after the December 16, 2002 close of discovery.³⁵ Given the lateness of its designation of contracts to be produced, AEPCO cannot complain about the timing of BNSF's production.

If AEPCO had presented its "actual divisions" evidence on opening, BNSF and UP would have had an opportunity to demonstrate the flaws in AEPCO's analysis and conclusions. Because AEPCO waited to submit this evidence until the rebuttal stage, the Railroads lost that opportunity. This evidence should therefore be rejected as improper rebuttal.³⁶

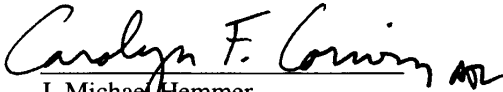
III. CONCLUSION

In the areas described above, AEPCO has exceeded the scope of permissible rebuttal. The Board should therefore strike the evidence from the record.

³⁵ See January 16, 2003 letter from Daniel M. Jaffe, counsel for AEPCO, to Brooke L. Gaede, counsel for BNSF, requesting BNSF to produce 50 non-coal contracts, attached hereto as Exhibit 1. In its March 20, 2002 Motion to Compel, AEPCO noted that it was only seeking the production of coal contracts at that time and that it would subsequently identify any non-coal contracts it wished to examine. See AEPCO's Second Motion to Compel at 12 (filed March 20, 2002). When BNSF received AEPCO's list of requested non-coal contracts in January 2003, BNSF complained about the timing of the request, since AEPCO "waited until one month after the close of discovery and just three weeks before the opening evidence is due to request the contracts." See January 24, 2003 letter from Brooke L. Gaede, counsel for BNSF, to Daniel M. Jaffe, counsel for AEPCO, attached hereto as Exhibit 2. Nevertheless, BNSF produced the requested pricing authorities on January 30, 2003, just two weeks after AEPCO made the request and one week before opening evidence was due. See January 30, 2003 letter from Brooke L. Gaede, counsel for BNSF, to Christopher A. Mills, counsel for AEPCO, attached hereto as Exhibit 3.

³⁶ The Board should strike the divisions analyses referred to in AEPCO's rebuttal narrative Section III-A-3-c-ii-(e) and Exhibits III-A-12, 13, 14, as well as related references in AEPCO's rebuttal argument, narrative and exhibits.

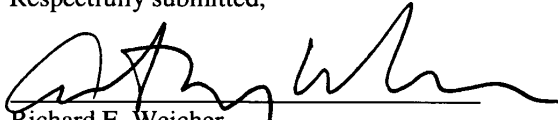
Respectfully submitted,



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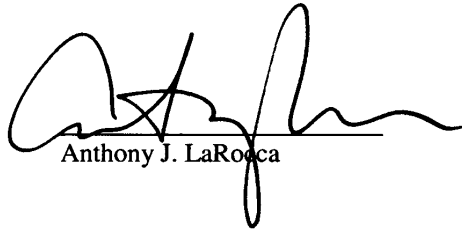
ATTORNEYS FOR
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

Dated: July 23, 2003

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2003, a true and correct copy of the foregoing document
was served by hand on:

William L. Slover
Robert D. Rosenberg
Christopher A. Mills
Andrew B. Kolesar III
Daniel M. Jaffe
Slover & Loftus
1224 Seventeenth Street, N.W.
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Anthony J. LaRocca

EXHIBIT 1

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WRITER'S E-MAIL:
dmj@sloverandloftus.com

January 16, 2003

VIA FACSIMILE AND FIRST CLASS MAIL

Brooke L. Gaede, Esq.
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

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

Dear Brooke:

AEPCO's ongoing review of BNSF's traffic tapes has identified a number of non-coal movements for which AEPCO requires the related transportation contract. The particular contracts are detailed in Attachment No. 1 to this letter. In addition, please provide any forecasts or long-range plans associated with the listed contracts.

In addition, AEPCO's review of BNSF's traffic tapes have identified several BNSF coal transportation contracts that BNSF has not yet produced in discovery. The relevant contracts are listed hereto in Attachment No. 2.

Brooke L. Gaede, Esq.
January 16, 2003
Page 2

Thank you for your prompt attention to this matter. Please contact us if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Jaffe", written in a cursive style.

Daniel M. Jaffe

Enclosures

cc: Michael L. Rosenthal, Esq. (via facsimile)

REDACTED

EXHIBIT 2

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

Brooke L. Gaede
202.429.6467
bgaede@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Telephone 202.429.3000
Facsimile 202.429.3902
www.steptoel.com

BNSF/UP Motion to Strike
Exhibit 2, Page 1 of 1

January 24, 2003

Via Facsimile and U.S. Mail

Daniel M. Jaffe
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

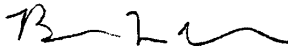
Re: **STB Docket No. 42058, *Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company***

Dear Dan:

I am writing in response to your letter of January 16, 2003 in which you request 50 general freight contracts and 8 additional coal contracts identified from your review of the traffic tapes produced by BNSF in discovery. We believe it is very late in the process for you to be requesting this information. BNSF produced the traffic tapes months ago -- the New Mexico movements on September 10, 2002 and the traffic tapes for PRB movements on October 10, 2002. Despite having the traffic tapes for months, you waited until one month after the close of discovery and just three weeks before the opening evidence is due to request the contracts.

Despite the very late request, BNSF is investigating whether it is possible to produce the requested materials prior to the February 7, 2003 opening evidence filing date.

Sincerely,



Brooke L. Gaede

cc: Michael Rosenthal

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

BRUSSELS

EXHIBIT 3

STEPTOE & JOHNSON LLP

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BNSF/UP Motion to Strike
Exhibit 3, Page 1 of 1

January 30, 2003

Via HAND DELIVERY

Christopher A. Mills, Esq.
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

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

Dear Chris:

Enclosed please additional land records reviewed by AEPCO's consultants in Fort Worth and Topeka (BNSF/AEPCO 41673-42028). Also enclosed are seven coal contracts requested by Mr. Jaffe in a letter dated January 16, 2003 (BNSF/AEPCO 42029-42190). BNSF has no record of one of the coal contracts requested by Mr. Jaffe, BNSF-C-12005.

Notwithstanding the short time we have had since we received Mr. Jaffe's request on January 16, also enclosed is non-coal contract data (BNSF/AEPCO 42191-44095).

We inadvertently used bates numbers BNSF/AEPCO 18175-18436 twice, for documents and for valuation maps. Enclosed please find the documents originally produced under that bates range and relabeled BNSF/AEPCO 44096-44357. Also enclosed is one locomotive lease payment schedule and BNSF depreciation rates inadvertently omitted from a previous production.

Please feel free to contact me if you have any questions.

Sincerely,



Brooke L. Gaede

Enclosures

cc: Michael Rosenthal

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

BRUSSELS