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August 12, 2003

BY HAND DELIVERY

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



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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and sixteen copies of Complainant Arizona Electric Power Cooperative, Inc.'s Reply in Opposition to Defendants' Motion to Strike. We have also enclosed electronic copies of this filing in WordPerfect 9.0 format on three diskettes.

Kindly acknowledge receipt and filing of these materials by date-stamping the extra copy of this letter and returning it to our messenger.

Sincerely,

Robert D. Rosenberg

Enclosures

cc: Counsel for Defendants

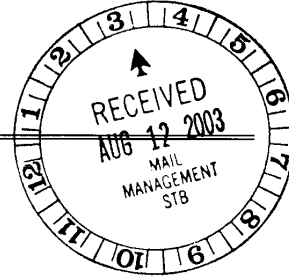
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BEFORE THE
SURFACE TRANSPORTATION BOARD



ARIZONA ELECTRIC POWER
COOPERATIVE, INC.

Complainant,

v.

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

Defendants.

Docket No. 42058

REPLY IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE

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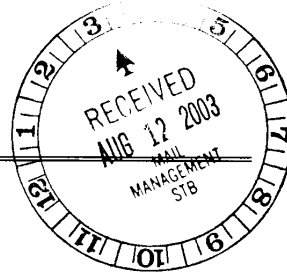
Attorneys for Complainant

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REPLY IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE

Pursuant to 49 C.F.R. § 1104.13, Complainant Arizona Electric Power Cooperative, Inc. ("AEPCO"), hereby replies in opposition to the Motion to Strike that Defendants The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") (jointly, the "Railroads") filed in the above-captioned proceeding on July 23, 2003 (the "Motion").

As explained infra, AEPCO did not submit improper rebuttal evidence, and the Defendants' Motion should be denied. Indeed, Defendants' Motion reflects an improper attempt by Defendants to overcome the flaws in their stand-alone cost ("SAC") Reply filings.

I. INTRODUCTION AND SUMMARY

In their separate Reply Evidence filings on stand-alone costs (“SAC”), Defendants avoided presenting any criticism of most aspects of AEPCO’s stand-alone railroad (“SARR”), the Apache Cochise & Eastern Railroad (“ACE”). Instead, they claimed that such analysis was impossible because of AEPCO’s flawed “revenue adjustment” to its stand-alone traffic group. Nonetheless, they did challenge specific aspects of AEPCO’s traffic group, particularly AEPCO’s reliance on “marginal” intermodal cross-over traffic and utilization of the modified mileage block prorate (“MMP”) method for allocating revenue divisions on that traffic.

On Rebuttal, AEPCO abandoned the disputed revenue adjustment, which, as explained in AEPCO’s Rebuttal at III-A-16 to 18, had no impact on the ultimate results (the SAC rate level was far below the jurisdictional threshold in any event) or on the Railroads’ ability to criticize other aspects of the ACE’s traffic group, design, and construction and operating costs. AEPCO’s Rebuttal also responded to the limited criticisms that the Railroads did present. AEPCO showed that the intermodal and other cross-over traffic were not marginal and that the MMP method yielded reasonable revenue divisions, as compared to both BNSF’s and UP’s real-world divisions and their variable costs of handling the cross-over traffic as residual incumbents. Toward that end, AEPCO presented an expanded version of the very limited R/VC analysis of the cross-over traffic (that is, three hand-picked movements) that BNSF offered on Reply.

Having reviewed AEPCO's Rebuttal filing, Defendants now realize that they have not submitted the best -- or, for that matter, any -- evidence of record on a number of stand-alone issues. In an effort to avoid certain defeat on those issues, Defendants have moved to strike AEPCO's evidence on the revenue adjustment and MMP method as constituting impermissible rebuttal.

But there is nothing improper in AEPCO's having accepted (albeit with substantial misgivings) the Railroads' objections and thus abandoned the revenue adjustment. See, e.g., PEPCO (refusing to strike shipper's rebuttal evidence that included "adjustments to waybill revenues which were intended to correct the deficiencies pointed out" in carrier's reply).¹ AEPCO certainly did "not alter the basic configuration of the stand-alone system developed in its opening evidence," id. at 3, and the situation thus stands in sharp contrast to that in Duke v. CSXT.² The ACE's design, configuration, and operations were based on the Railroads' train movement data, and not the traffic tape data (where the carload records did not match the train data). Accordingly, AEPCO's abandonment of the revenue adjustment resulted in no alteration of other aspects of the ACE, i.e., the ACE still handles the same trains with the same gross weights and cars (albeit with less revenue-bearing weight and fewer revenue-bearing cars/containers), over

¹Docket No. 41989, Potomac Electric Power Company v. CSX Transportation, Inc. (STB served Nov. 24, 1997) at 5.

²Docket No. 42070, Duke Energy Corp. v. CSX Transportation, Inc. (STB served March 25, 2003) (striking shipper's attempt to relocate a terminal yard and a tunnel on rebuttal).

the same infrastructure, utilizing the same operations, and incurs the same capital and operating costs, all of which the Railroads could have challenged on Reply, had they been so inclined.

As for the use of the MMP method, AEPCO was under no obligation to present on Opening a prima facie defense of the Board-approved methodology, but AEPCO more than fulfilled any such burden through the testimony from John P. Toren. Indeed, if any party failed to meet its burden, it was the Railroads, which ignored their market-based division data in their SAC Replies. Assuming arguendo that the Railroads met their threshold burden, AEPCO was entitled to rebut their claims using an R/VC analysis of various sample movements as well as the market-based divisions, even if AEPCO did not do so on Opening, since “on rebuttal, the proponent may respond to the defenses and criticisms raised by introducing evidence to bolster its initial assumptions.” PEPCO at 3. AEPCO’s presentation was directly responsive (albeit vastly superior) to the analysis that the Railroads presented on Reply.

There is thus no basis for striking any of AEPCO’s Rebuttal evidence. In eliminating the revenue adjustment, AEPCO has not altered any aspect of the ACE’s design or operation, except for the revenue adjustment itself, where AEPCO has adopted the Railroads’ criticism, which is entirely permissible under PEPCO. Consequently, whatever critique the Railroads might offer now could have just as easily been offered on Reply. Likewise, AEPCO has not deviated from MMP method it utilized on Opening,

although AEPCO has responded to the Railroads' criticisms, utilizing the types of evidence that the Railroads either did or should have utilized. Such a response constitutes permissible rebuttal.

The Railroads appear to be claiming that a shipper must present on Opening whatever supporting assertions it might wish to advance on Rebuttal. But there is no obligation for "the proponent to anticipate in its opening evidence every possible defense or criticism of the SAC model" or otherwise engage in anticipatory rebuttal, PEPCO at 3, and any requirement to do so would be fundamentally inconsistent with the very concept of rebuttal.

Furthermore, the principle that "[a] party that does not put forward its best case as to all elements of its case assumes the risk of that strategic choice"³ should apply to defendants as well as shippers, and it is here that the Railroads, not AEPCO, fell far short. Regardless of whether the Railroads disputed the revenue adjustment that AEPCO presented on Opening, they were still in a position to determine if the ACE's facilities and operations were sufficient to handle the movements identified in the traffic group and if AEPCO had properly calculated the costs of constructing and operating those facilities. For whatever reason, the Defendants elected not to do so. Having made that choice, they

³Docket No. 42054, PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Company (STB served June 30, 2003) ("PPL Montana"), at 2.

are not entitled to a second bite at the apple, and they certainly are not entitled to have AEPCO's evidence struck.

Accordingly, the Railroads' Motion should be denied, and the case should proceed to any briefing that the Board may order and the decision on the merits.

II. DISCUSSION

In their Motion, Defendants do not identify or seek leave to present any evidentiary rejoinder to the supposedly impermissible SAC evidence that AEPCO submitted in its Rebuttal filing submitted July 3, 2003.⁴ Rather than engage on the ACE's merits, Defendants instead seek to strike portions of AEPCO's Rebuttal Evidence -- those addressing the abandonment of the revenue adjustment and supporting the use of the MMP method for allocating revenues on cross-over traffic -- as constituting impermissible rebuttal evidence.

As discussed infra, AEPCO strongly disagrees with the Railroads' claims as to (a) the revenue adjustment, (b) the MMP method, and (c) the governing standards for what is required for opening evidence and permitted for rebuttal evidence.

⁴The absence of any such attempt is hardly surprising given the inherent conservatism of AEPCO's SAC presentation. In particular, the ACE (a) replicates and/or improves upon the incumbents' existing rail infrastructure and transportation operations, while it both (b) eliminates traffic (e.g., local and Amtrak trains) that BNSF and UP handled over the route in the 2001 base year and (c) assumes that future traffic volumes will not exceed the 2001 base year level, notwithstanding both Railroads' projections of substantial growth in the traffic handled by their high-density lines that the ACE replaces.

A. The Revenue Adjustment

For reasons explained in AEPCO's Rebuttal at III-A-11 to 14, AEPCO continues to believe that some revenue adjustment is appropriate in view of the mismatch between the Railroads' train movement and traffic data, particularly since the absence of such an adjustment effectively rewards the Defendants for having hid the ball on their revenues and the relationship between their traffic tape and train event data during discovery. Nonetheless, AEPCO abandoned the revenue adjustment on Rebuttal because of the difficulty of calculating the proper adjustment with precision.⁵

However, the revenue adjustment issue ultimately amounts to nothing more than a red herring. Even without the revenue adjustment, the resulting SAC rate level is still substantially below the jurisdictional threshold as calculated by AEPCO (and even further below the jurisdictional threshold claimed by the Railroads). AEPCO Rebuttal at III-A-17. The revenue adjustment thus has no bearing on the ultimate outcome of the rate case, at least for a number of years.⁶

⁵AEPCO did present an alternate case with a revenue adjustment limited to just those revenue-bearing trains for which AEPCO could find no matching revenue records in the traffic tape data. AEPCO Rebuttal at III-A-15 to 16. While the alternate case was directly responsive to assertions that the Railroads made in their Reply SAC filings that no revenue adjustment was warranted, AEPCO is content to have the alternate case apply only for illustrative purposes and to have the reasonableness of Defendants' rates adjudged on the present record only under the base case analysis, without any recourse to the alternate case. Id. at III-A-15.

⁶Decisions issued by the Board since AEPCO submitted its Opening Evidence appear to limit the long-term value of any rate prescription.

Furthermore, it is important to understand that the revenue adjustment has no impact on the ACE's operational aspects. The revenue adjustment serves only to reconcile the traffic tape (revenue) data with the train event data, i.e., to identify freight and associated revenues for those cars identified in the train event data for which no matching records could be found in the traffic data. The revenue adjustment thus goes only to the revenues and content of those trains handled by the ACE, nothing else. AEPCO Rebuttal at III-A-18 to 19.

In contrast, the ACE's operations are based entirely on the Defendants' train event data and not at all on the revenue data. With or without the revenue adjustments, the ACE seeks to handle the same overhead trains, with the same locomotives and car consists, as did the incumbents in 2001.⁷ The revenue adjustment affects only the number of "loaded" or revenue-bearing cars or containers deemed to be included in a particular train, their contents, and their associated revenues. However, with or without the revenue adjustment, the ACE still handles exactly the same overhead trains -- both in number and identity -- that Defendants handled over the ACE's route in the 2001 base year. With or without the revenue adjustment, those trains have the same number of cars (more of which are deemed to be revenue-bearing with the revenue

⁷The relevant train files were included in AEPCO's Opening electronic workpapers as "bngfsactrn01.dbf" (BNSF) and "sactraf01.dbf" (UP). The databases were summarized in "ACE Non-Coal Traffic and Revenue Forecast.xls" (Opening) and "ACE Non-Coal Traffic and Revenue Forecast-Rebuttal.xls" (Rebuttal). The ACE excludes the incumbents' local, yard, helper, work and Amtrak trains.

adjustment) and the same gross weight (more of which is revenue-bearing with the revenue adjustment), and enter the ACE's system at the same time.

Since the trains are the same operationally with or without the revenue adjustment, the revenue adjustment has no bearing on such matters as whether the ACE's infrastructure is sufficient to handle the trains in the manner identified, whether the ACE has enough track and operational capacity, whether the ACE has sufficient staffing, and whether AEPCO has accurately calculated the costs of constructing and operating the ACE and otherwise engaged in an appropriate DCF analysis, i.e., any of the matters that the Railroads might have addressed in their SAC Replies. The presence or absence, or soundness or unsoundness, of the revenue adjustment in no way impairs the Railroads' ability to critique the ACE's traffic selection, design, operation, and capital and operating costs. Moreover, their ability to challenge those aspects of the ACE was no less than that in any prior SAC case.

Defendants' claims that they could not criticize the ACE's configuration or operations because they could not understand the traffic group (i.e., the revenues or, more specifically, the revenue adjustment) represent an effort, almost literally, to put the cart before the horse. As AEPCO explained in its Opening Evidence, Reply to UP's Petition, and Rebuttal Evidence, the ACE's traffic group, as well as its configuration, and operations, began with the overhead trains identified in the train event data and only then did AEPCO look to the traffic tapes to determine the revenues associated with those

trains. Since the ACE's basic conception is that of an overhead or bridge carrier, it was necessary to begin with the train data (the horse) before determining the revenues (the carts). AEPCO Rebuttal at III-A-5 to 6 and 10 to 11.

The Railroads' claims that they could not discern the nature of the ACE's operations as a replacement for the incumbents' own overhead train operations are belied by their own statements:

As described above in Section III.A-1 of this Narrative, the starting point for AEPCO's selection of traffic for the SARR was the identification of trains that traversed BNSF's lines between Vaughn and Defiance from BNSF's train event data produced in discovery. This step in AEPCO's traffic selection was relatively straightforward, since BNSF's train event data identifies the movement of individual trains over particular line segments.

BNSF SAC Reply at III.C-7 (emphasis added; footnote referencing issues of matching revenue records to train event data omitted). UP directly noted that "the SARR will operate as a bridge carrier that will interchange with UP and BNSF the same number and size of cross-over trains that UP and BNSF handle today in through service." UP SAC Reply at III-A-15 (emphasis added). The ACE's operations thus posed no mystery to the Railroads.

Moreover, the limited criticisms that the Railroads did offer in their SAC Replies -- primarily BNSF's criticisms of AEPCO's inclusion of traffic that is supposedly

switched at Belen and/or originated or terminated at Phoenix,⁸ their claim that AEPCO should absorb alleged cost increases (which are actually cost decreases) in the residual incumbents' off-SARR costs resulting from the ACE's insertion as an overhead carrier, the supposed manipulation of revenue divisions for cross-over traffic, and their criticism of the revenue adjustment itself -- further confirm that (a) the Railroads fully understood the details of AEPCO's operations, and (b) they could have critiqued other aspects of the ACE's design, operations, and/or costs, if they had been so inclined. The Railroads' decision not to critique those other aspects of the ACE was thus a matter of their choice, not a consequence of any deceit, deception, or confusion by AEPCO. Having made their choice, the Railroads are not entitled to have AEPCO's evidence struck or extract a second bite at the apple of Reply.⁹

Most certainly, AEPCO was entitled, as in PEPCO, to modify or abandon the revenue adjustment on Rebuttal in response to the criticisms that the Railroads presented in their Reply Evidence. Again, the revenue adjustment goes only to the stand-

⁸The criticism is unfounded, and even if the Railroads were correct, the impact is de minimis, as AEPCO explained in its Rebuttal at III-A-19 to 25. The Railroads' contentions regarding the Pacific Northwest and Utah traffic (Motion at 11) are meritless in that all of the carloads that AEPCO included reflected a matching of train and carload records, as noted in AEPCO's Rebuttal at III-A-6.

⁹AEPCO suspects that the Railroads know that they cannot prevail on the merits and have resorted to procedural diversions instead. Such tactics are fully consistent with the numerous procedural obstacles that the Railroads have previously sought to impose in AEPCO's rate case, e.g., the cancellation of the PRB rates and refusal to move AEPCO's PRB train, insistence that AEPCO file an entirely separate SAC analysis for each set of rates it sought to challenge, claim that the ACE could not rely on trackage rights, etc.

alone revenues, and not to other aspects of the SARR's traffic group, design, operation, and associated costs. Thus, AEPCO, unlike the shipper in Duke v. CSXT, is not seeking on rebuttal to alter or improve upon any aspect of the SARR's configuration or operation.¹⁰ Instead, as in PEPCO, AEPCO is simply accepting a discrete criticism and thereby eliminating a particularly contentious (albeit ultimately insignificant) area of dispute.¹¹ This is the sort of practice that should be encouraged, not discouraged, and to hold that it is impermissible is to prevent a shipper from ever acquiescing as to a disputed SAC matter. As explained infra, rebuttal is an opportunity to respond to the assertions made by the defendant(s) on reply, and cannot be confined to a vehicle for simply repeating what was said on opening. Consequently, acceptance of a defendants' criticism, either in whole or in part, must necessarily be a permissible action for rebuttal.

B. AEPCO's Use of the MMP Method

Defendants' efforts to strike aspects of AEPCO's Rebuttal discussion of the reasonableness of the MMP method for allocating revenue divisions on cross-over traffic are even more deficient than their contentions regarding the revenue adjustment. Here,

¹⁰Nonetheless, some design modifications are permissible on rebuttal. See, e.g., Docket No. 42057, Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company (STB served April 4, 2003) ("Xcel") (denying defendant's motion for summary disposition based on shipper's alleged failure to present a prima facie case on opening for what shipper acknowledged were flaws regarding track sidings, crew starts, and train speeds because "those deficiencies appear to be readily correctable without a significant redesign of the SARR").

¹¹The revenue adjustment was plainly the central attack in the UP Motion and in the Railroads' SAC Reply filings.

AEPCO on Rebuttal did apply the exact same MMP method it presented on Opening. Accordingly, the Railroads predicate their motion not on AEPCO's use of the MMP method itself, but instead on the additional analysis of the variable costs for the cross-over traffic and the Defendants' real-world divisions for overhead traffic that AEPCO presented on Rebuttal in support of the MMP method. The Railroads' claim that AEPCO should have presented its evidence as part of its required prima facie showing on Opening and that AEPCO is apparently otherwise precluded from presenting on Rebuttal that which could have been presented on Opening.

AEPCO objects to the Railroads' claims in their entirety: (1) it was the Railroads, not AEPCO, that failed to make any required prima facie or threshold showing; (2) AEPCO's analysis of the late-produced market division data did not constitute impermissible rebuttal; and (3) AEPCO's R/VC analysis was directly responsive to the Railroads' testimony and thus appropriate rebuttal as well. These matters are discussed below.

1. The Railroads, not AEPCO, Failed to Meet Their Threshold Burden

AEPCO was under no obligation to offer any cost-based justification for the use of the MMP method as part of its prima facie Opening Evidence, notwithstanding the Board's statement in TMPA that it has "not adopted a single, preferred procedure for developing revenue divisions on cross-over traffic," especially as TMPA (which postdated AEPCO's Opening Evidence) itself utilized the MMP method without any

indication that the shipper had made the cost-based prima facie showing that the Defendants claim is required.¹²

Moreover, the MMP method is plainly the accepted method for allocating revenues on cross-over traffic, and has been so in every case, including TMPA, since Nevada Power II (1994) and McCarty Farms (1997).¹³ When a party utilizes the same methodology that the Board has applied in a string of recent cases (and the methodology that BNSF itself suggested in McCarty Farms and UP advocated in Wisconsin), the party should not be required to act as if it is reinventing the wheel, and no basic justification of the methodology's reasonableness, either in general or as applied to the specific traffic, is required. Requiring such a showing would be directly counter to the Board's admonition in Ex Parte No. 347 (Sub-No. 3), General Procedures for Presenting Evidence in Stand-Alone Rate Cases (STB served March 12, 2001), that parties are limited in their ability to challenge matters resolved in prior SAC decisions.¹⁴

¹²Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern And Santa Fe Railway Company, (STB served March 24, 2003) at 31 & n.74.

¹³Bituminous Coal – Hiawatha, UT to Moapa, NV, 10 I.C.C.2d 259, 268 (1994); McCarty Farms, Inc. v. Burlington Northern, Inc., 2 S.T.B. 460, 472 (1997). See also Docket No. 42022, FMC Wyoming Corp. v. Union Pacific R.R., (STB served May 12, 2000) ("FMC") at 27-29 & n.62; Docket No. 42051, Wisconsin Power and Light Co. v. Union Pacific R.R., (STB served Sept. 13, 2001) ("Wisconsin") at 24; TMPA at 31; and Docket No. 42054, PPL Montana (STB served Aug. 20, 2002) ("PPL Montana 2002") at 7-8 & n.14.

¹⁴Under Ex Parte 347 (Sub-No. 3), it is Defendants that face a heavy burden in urging deviation from the long-accepted and approved MMP methodology.

Furthermore, even if AEPCO were somehow under any obligation to defend the reasonableness of the MMP method for allocating revenue divisions on cross-over traffic in its Opening Evidence, AEPCO more than satisfied that burden through the testimony it presented from John P. Toren, the former Vice President-Sales & Marketing for Intermodal and Consumer Products for the former Chicago and North Western Railway (“CNW”), with more than thirty years’ experience in railroad sales and marketing. Mr. Toren explained that the MMP method reasonably approximated results among real-world railroads and provided the connecting carriers with a commercially desirable division relative to the costs of serving intermodal cross-over traffic. While BNSF and UP might dispute his conclusions, there can be no question that his testimony addressed the reasonableness of the MMP method and thus fulfilled any prima facie burden.¹⁵

If any party failed to meet its evidentiary burden on the revenue divisions, it was the Defendants and not AEPCO. While, as noted supra, the Board indicated in

¹⁵Actually, it is not clear that BNSF and UP really dispute Mr. Toren’s conclusions. BNSF Witness Ordovery’s testimony was to the effect that any divisions on cross-over traffic would be inherently arbitrary and cross-over traffic should be greatly limited or eliminated altogether. BNSF Reply at III.A-20 to 46. BNSF Witness Klick’s apparent contentions were that, on three selected movements, the MMP method gave the SARR a disproportionate return relative to the residual BNSF and that the residual BNSF did not cover its attributable costs in one of the three instances. Id. at III.A-50 to 51. However, BNSF and UP did not claim that MMP method fails to provide a reasonable approximation of commercial divisions in the real world, and their failure to advance (and support) such a claim ought to be sufficient reason for finding that AEPCO’s presentation constitutes the best evidence of record.

TPMA that it had not necessarily settled on a single standard, it is clear that the Board used the MMP method in TPMA, as it did in PPL Montana at 7-8 & n.14, Wisconsin at 24, and FMC at 27-29 & n.62, where the Board found that the MMP method “is the best procedure for allocating revenues to carriers where market-based divisions are not available.” Accordingly, as Defendants were seeking to deviate from established precedent, it is they that rightly had at least the burden of going forward on the issue.

In that regard, the Board has made clear in FMC and Wisconsin that if the carriers wished to depart from the MMP method, it was incumbent upon them to provide market-based division data. AEPCO believes that implicit in the Board’s requirement that defendants produce their market divisions data before advocating an alternative to the MMP method is the requirement that defendants explain how that data supports the particular alternative that the defendants are proposing. In other words, the purpose of the MMP method is to approximate real-world commercial divisions, and if defendants want to demonstrate that the MMP method results in a poor approximation or that some other method would result in a closer approximation, then they need to rely upon their real-world divisions.¹⁶ Otherwise, there would be little or no reason to condition defendants’ ability to challenge the MMP method on the production of such data.

¹⁶See, e.g., TPMA at 31 (“Normally, when two or more railroads serve a shipper in joint-line service, they negotiate a market-based revenue division of the rate.”) (emphasis added; footnote omitted).

Of course, the Railroads ignored their divisions data altogether in their critique of the MMP method, and BNSF even claimed, through Dr. Ordovery, that such data is entirely irrelevant because any division allocation method would be arbitrary. It is thus readily apparent that the Railroads did not meet their burden for challenging the MMP method, which should be sufficient for resolving the matter in AEPCO's favor.

2. AEPCO's Evidence on Market Divisions was Permissible Rebuttal

Assuming arguendo that Defendants had made their necessary threshold showing, AEPCO's Rebuttal Evidence presented, as noted, analysis of the market division data of both BNSF and UP and showed that their data supported use of the MMP method. The Defendants complain in their Motion that this analysis constituted impermissible rebuttal that could and should have been presented on Opening, particularly since AEPCO's presentation on Rebuttal supposedly deprives the Railroads of any opportunity to respond.

The Railroads' arguments fail on at least three grounds. First, it was, as explained supra, incumbent upon the Railroads to address the market divisions evidence on Reply. Their failure to do so does not in any way preclude AEPCO from presenting relevant evidence on Rebuttal in response to the challenges that the Railroads did present in their SAC Replies (should Defendants be found to have met their threshold burden).

Second, AEPCO could not have presented such information on Opening because it did not receive the BNSF division data (associated with the pricing authorities)

until January 30, 2003, just over a week before Opening Evidence was due on February 7, 2003. Defendants' Motion attempts to make much of the fact that AEPCO did not even request the data until January 16, 2003, but the Railroads' factual assertion is so incomplete as to be misleading. In particular, the Railroads ignore the fact that BNSF did not provide the decoders for its train event data until December 23, 2002, more than two weeks after the ostensible close of discovery, and just days before the year-end holidays.¹⁷ AEPCO required the decoders in order to identify its traffic group through the matching of the train event and traffic tape data. Accordingly, it took AEPCO several weeks to identify those pricing authorities that were relevant, and AEPCO promptly requested the relevant authorities on January 16, 2003. AEPCO had no reason to expect that the pricing authorities would yield data responsive to divisions, particularly since the Railroads had objected on grounds of relevance to producing any information on market divisions.¹⁸ In any event, AEPCO did not have a reasonable opportunity to analyze the division data for purposes of preparing its Opening Evidence. AEPCO's failure to present any analysis of the data on Opening should thus be readily understandable.¹⁹

¹⁷A copy of the transmittal letter from BNSF's counsel is attached as Exhibit A.

¹⁸See AEPCO Op. electronic workpaper "AEPCO Divisions Discovery.pdf."

¹⁹BNSF's belated production of the train event decoders substantially impaired AEPCO's preparation of its Opening Evidence. AEPCO was, however, loathe to request any extension of the procedural schedule in view of both the two-year delay that AEPCO had already experienced and the certainty that the Railroads would insist that any delay amount to months rather than weeks because of their other pending rate cases.

Third, the Railroads' claim that they were deprived of an opportunity to respond is makeweight for several reasons. First, they have only themselves to blame for their failure to have addressed the data in their SAC Replies, and they are not entitled to relief from their own strategic choices, particularly when the Board has indicated that the data is relevant to the extent carriers wish to challenge the MMP method. Second, BNSF has taken the position that the data is simply irrelevant (notwithstanding the Board's indications to the contrary). Finally, briefing (if ordered by the Board) would provide the Railroads with an additional opportunity to address the data.²⁰ However, AEPCO should not be prejudiced because of strategic decisions that the Railroads made, particularly their decision to ignore their own data that rebuts their criticisms of the MMP method.

3. AEPCO's R/VC Analysis also Constituted Proper Rebuttal

The Railroads' claim (Motion at 13-16) that AEPCO was required to submit its variable costing analysis of the various non-coal cross-over movements on Opening, if at all, is so groundless as to be remarkable. All AEPCO Witness Whitehurst did was (a) critique BNSF Witness Klick's use of URCS costing for his three hand-picked

²⁰Indeed, AEPCO is concerned that the Railroads may be "saving" such criticisms for their brief precisely because in order to deprive AEPCO of the opportunity to respond. AEPCO's counsel is well aware of the proclivity of defendants to treat briefing as a means of submitting surrebuttal. See, e.g., Docket No. 42069, Duke Energy Corp. v. Norfolk Southern Railway Company (STB served March 21, 2003), and Docket No. 42072, Carolina Power & Light Company v. Norfolk Southern Railway Company (STB served May 12, 2003) (both rejecting evidence presented by defendant Norfolk Southern in its brief on grounds that defendant had failed to demonstrate why evidence could not have reasonably been introduced previously).

movements, and (b) present a costing of a broader (and random) sample of non-coal cross-over movements. AEPCO had no way of knowing what -- if any²¹ -- evidence the Railroads might present on the issue. As discussed more fully infra, a complainant cannot fairly or reasonably be required to anticipate and address what claims a defendant might present, and it is plainly unreasonable and inappropriate to require a complainant to impeach (and then rehabilitate) its own evidence on Opening.

There can be no serious question that AEPCO was entitled to critique Mr. Klick's variable costing of the three selected movements. After all, AEPCO could not have known that the Railroads would present any variable costing at all, which movements they might select, and how they might choose to cost them. Moreover, AEPCO was certainly entitled to present a costing analysis of a broader and randomly determined selection of movements on Rebuttal. To hold otherwise is effectively to determine that a party may not present rebuttal evidence at all, which is fundamentally inconsistent with imposing the ultimate burden of proof on that party.

The Railroads also appear to claim that AEPCO's Rebuttal exceeded the scope of BNSF's Reply. As best as AEPCO can determine, the Railroads' position appears to be that Mr. Klick claimed only that the MMP method "allocate[s] to the ACE a

²¹As noted supra, if the Railroads intended to challenge the MMP method, AEPCO would have expected them to have analyzed their market divisions data as part of any such challenge but the Railroads did not, and AEPCO did not receive the Railroads' data in time to address it in its own Opening Evidence.

disproportionately large percentage of contribution that can be used to defray [the ACE's] unattributable costs,” and not that the resulting allocation left the residual incumbent with an insufficient contribution to cover (what the Railroads term directly attributable) off-line costs. Motion at 15, quoting BNSF SAC Reply at III.A-49. The Railroads thus claim that AEPCO was precluded from applying its variable cost analysis to off-SARR costs.

The Railroads’ assertion amounts to semantic nonsense and also mischaracterizes their own Reply Evidence. It should be readily apparent that calculating divisions for cross-over traffic entails a zero-sum exercise, that is, whatever the SARR does not receive falls to the residual incumbent(s), and vice versa. Accordingly, claiming that the SARR’s share is “disproportionately large” necessarily implies that the residual incumbent’s share is inappropriately low. Indeed, the BNSF Reply made that very point in noting, inter alia, (a) that the residual BNSF’s returns would be “*lower* than those experienced by BNSF historically” and (b) that “the residual BNSF’s ability to defray its unattributable costs would be diminished,” particularly as (c) under “the third movement, in fact, the residual BNSF is left with a division of revenue that is *below* its attributable costs (calculated using URCS).” BNSF SAC Reply at III.A-51 (original italics; underscoring added). See also UP SAC Reply at III-A-15 (claiming “that the SARR achieves its extraordinary financial performance by leaving costs with the incumbents while grabbing a disproportionate share of the revenue”).

In view of such statements, it could not possibly be impermissible for AEPCO to have applied the same variable costing as the Railroads (with only an adjustment for the specific type of intermodal railcar) to a broader and randomly selected universe of movements.²² Nor, in view of Defendants' statements, could it be inappropriate for AEPCO to show that: (a) the mark-ups experienced by the residual incumbents were only slightly less than those experienced by the incumbents; (b) that the residual incumbents retained a substantial contribution to defray their unattributable costs; (c) that divisions for the residual incumbents were below the attributable cost level (100% of variable costs) only where the incumbents' returns for the full movements were also below that level; and (d) that the cross-over traffic would remain desirable to the residual incumbents as long as they recouped anything above their directly variable costs.²³ AEPCO Rebuttal at III-A-68 to 70. AEPCO was certainly entitled to respond to BNSF's contentions in the manner indicated.

Moreover, AEPCO was entitled to respond to assertions the Railroads made elsewhere in their Reply Evidence that a SARR could not possibly or legitimately be based on a large proportion of intermodal traffic because such traffic yields returns that

²²Mr. Whitehurst criticized other aspects of Mr. Klick's costing of his three selected BNSF intermodal movements. However, for the 150 randomly-selected movements from both UP and BNSF, Mr. Whitehurst's costing procedure was the same as Mr. Klick's, except for adjusting for the specific type of intermodal railcar.

²³It is unclear whether Defendants challenge the last point as constituting improper rebuttal.

are only “marginal,” such that any result to the contrary could arise only because of distortions introduced through use of the MMP Method. See, e.g., BNSF Reply at III.A-39 and UP Reply at III-A-15. In this regard, the Defendants plainly did contend that the ACE’s divisions left the residual incumbents with insufficient coverage of their off-SARR costs, notwithstanding their claim to the contrary in their Motion at 15. Since the issue was raised both implicitly and explicitly (albeit with little, if any, supporting evidence), AEPCO was procedurally entitled to address it on Rebuttal in any way it saw fit, just as AEPCO was entitled to show that Mr. Klick’s analysis was incomplete or insufficiently representative. Furthermore, it is inherently inequitable – indeed, so much so as to be absurd – for the Railroads to claim that they can introduce an R/VC analysis (no matter how limited and incomplete) on Reply, but that AEPCO is barred from presenting a similar analysis on Rebuttal.

C. Appropriate Standards for Opening, Reply and Rebuttal Evidence

Defendants, citing PPL Montana and other recent decisions, assert that AEPCO was derelict in not submitting its case in chief in full on Opening and that consequently AEPCO is foreclosed from addressing any of its deficiencies (principally relating to the revenue adjustment and MMP method) on Rebuttal.

Defendants’ assertions are erroneous for a number of reasons. As explained supra, AEPCO has not made any structural or other changes to the SARR traffic group, configuration, or operations that it presented on Opening, except to accept the Railroads’

criticism of the revenue adjustment, a modification that is fully permissible under PEPCO, Xcel, and even PPL Montana.²⁴ Moreover, Mr. Whitehurst's testimony merely responded to the analysis that BNSF and Mr. Klick presented on rebuttal, and Mr. Crowley merely analyzed market divisions data (much of its belatedly produced) that the Railroads were obligated (but failed) to address on Reply.

Nonetheless, Defendants assert that AEPCO's Rebuttal is still impermissible because it presents matters that "could and should" have been presented on Opening. AEPCO disagrees both that it was obligated to present such matters on Opening and that it was precluded from presenting such matters on Rebuttal. Moreover, under the Board's own admonitions, it was the Railroads that were derelict in not addressing the other aspects of AEPCO's SAC presentation, notwithstanding any doubts they might have had concerning the revenue adjustment.

Board precedent makes clear that there is no requirement for "the proponent to anticipate in its opening evidence every possible defense of criticism of the SAC model." PEPCO, *supra*, at 3. An abundance of other authority is to the same effect. "As a rule, a party is under no obligation to anticipate and negate in its own case in chief any facts or theories that may be raised by another party." 29 Am. Jur. 2d Evidence § 158 at

²⁴PPL Montana rejected the shipper's effort to modify its earlier acceptance of the carrier's position when faced with what the shipper regarded as a new regulatory standard that it could not have reasonably anticipated; there was no suggestion that the shipper's original acceptance of the carrier's position itself constituted impermissible rebuttal.

p. 185 (2d ed. 1994) (footnote omitted); 1 Jones on Evidence § 3:12 at p. 241 (7th ed. 1992) (footnote omitted).

There is thus no need for a party to engage in anticipatory rebuttal; instead, the party may wait and then rebut the evidence that its adversary chooses to introduce in response to the opening evidence. See, e.g., 9 Cyclopedia of Federal Procedure § 31.44 (3rd. Ed. 1993) (“But a plaintiff is not required to anticipate his adversary’s defense, and after establishing a prima facie case may not be denied the opportunity to introduce rebuttal evidence on the ground that it should have been offered as part of the evidence in chief.”) (footnote omitted); Martin v. Weaver, 666 F.2d 1013, 1020 (6th Cir. 1981) (“(w)here ... (the) evidence is real rebuttal evidence, the fact that it might have been offered in chief does not preclude its admission in rebuttal,” particularly as “the plaintiff has no duty to anticipate or to negate a defense theory in plaintiff’s case-in-chief”) (citations omitted); Gossett v. Weyerhaeuser Company, 856 F.2d 1154, 1157 n.3 (8th Cir. 1988) (“A plaintiff is not obligated to anticipate and negate in its own case in chief any facts or theories that may be raised on defense.”); Edwards v. Stills, 984 S.W.2d 366, 389 (Ark. 1998) (“Genuine rebuttal is evidence that is offered in reply to new matters; however, the fact that the evidence could have been presented in the case-in-chief does not preclude its introduction on rebuttal if it serves to refute evidence raised by the defense.”); Morrison v. Air California, 699 P.2d 600, 602 (Nev. 1985) (“Evidence will not be excluded from rebuttal merely because it might have been made part of the case in

chief.”) (citation omitted); Carolan v. Hill, 553 N.W.2d 882, 889 (Iowa 1996) (“The fact that testimony might have been useful and usable in the case-in-chief does not necessarily preclude its use in rebuttal.”). Indeed, “[e]ven if it be considered that the plaintiff attempted to anticipate the affirmative defense, but failed to cover all matters, rebuttal evidence is generally allowed.” Ford v. A.A.A. Highway Express, Inc., 29 S.E.2d 760, 764 (S.C. 1994).

Accordingly, AEPCO was plainly not required to offer on Opening everything that it might have said in defense of the use of the MMP method, and AEPCO was plainly entitled to see what criticisms Defendants might offer on Reply and then address those criticisms on Rebuttal. Again, AEPCO did not alter its use of the MMP method on Rebuttal in any way.²⁵

AEPCO is well aware of the Board’s recent admonitions (which generally postdate AEPCO’s submission of its Opening Evidence) that parties should put their best foot forward in their initial substantive filings and not plan to rely on subsequent modifications:

However, a shipper should put forward its best case because the Board may reject some of its evidence. Indeed, in a SAC rate case, the Board typically rejects portions of the evidence of each party as to both the level of the SAC rate and the level

²⁵Nonetheless, AEPCO submits that it would have been permissible to make some modifications or adjustments in response to meritorious criticisms (had any been presented), just as it was permissible for AEPCO to eliminate the revenue adjustment on Rebuttal. See, e.g., Xcel, supra.

of the regulatory floor (the variable cost calculation) and restates both numbers accordingly. A party that does not put forward its best case as to all elements of its case assumes the risk of that strategic choice.

PPL Montana at 2.²⁶ However, the obligation to present full and complete evidence applies to both shippers and defendants, as confirmed by the Board's statement that "[a] party," not just a shipper, is at "risk" if it "does not put forward its best case as to all elements." If there is to be such a rule, then it is vital that it be applied fairly to both shippers and carriers.²⁷

Defendants failed to meet that obligation by focusing on the revenue adjustment to the near total exclusion of other SAC matters. Defendants should certainly have realized that success in their effort to eliminate the revenue adjustment would still leave any potential questions as to the ACE's ability to handle the traffic that generated the unadjusted revenues (which, as noted, is actually the same traffic that generated the adjusted revenues), the capital and operating costs associated with providing that service, and other assumptions for the DCF model. Rate case filings do not proceed in seriatim issue by issue, as doing so would cause rate cases to become endless because of both the

²⁶AEPCO believes that the revenue adjustment in its Opening Evidence constituted its best case at the time in view of the discrepancies between the Defendants' train and traffic data.

²⁷See, e.g., Duke v. Norfolk Southern (STB served March 21, 2003) and Carolina Power & Light Co. (STB served May 12, 2003), supra (both rejecting evidence presented by defendant carrier in its brief on grounds that defendant had failed to demonstrate why evidence could not have reasonably been introduced previously).

number of issues and their interrelatedness. Accordingly, it is standard practice for defendants to claim simultaneously that the shipper has overstated its traffic group and that the shipper's SARR has insufficient capacity to handle the overstated traffic group.

Here, the Defendants elected to confine their challenge largely to the revenue adjustment. They plainly could have challenged more. In particular, they challenged the exclusion of switching at Belen and the handling of trains bound for or originated at Phoenix: such criticisms necessarily subsume an identification and understanding of the specific trains and traffic handled by the SARR. Defendants were thus in a position to challenge all of the other aspects of the ACE that railroads have previously challenged in rate cases. Their choice not to do so was voluntary, and the principles of burden of proof,²⁸ finality and administrative efficiency, and procedural fairness, noted by Defendants in their own Motion at 4-6, provide no basis for relieving the Railroads of the consequences of their choice.

III. CONCLUSION

AEPCO submitted proper rebuttal evidence, and the Defendants' Motion must be denied.

²⁸While the shipper may have the ultimate burden of proof as to such matters, defendants have at least the burden of going forward, *i.e.*, if a shipper offers some evidence as to an issue and Defendants offer none, then the shipper has plainly offered the best (and only) evidence of record and thus met its burden of proof.

AEPCO was plainly entitled on Rebuttal to accept the Railroads' criticism of the revenue adjustment rather than defend it, particularly as the revenue adjustment had no significant bearing on the outcome of the maximum reasonable rate determination, which will be governed by the jurisdictional threshold. Moreover, AEPCO's acceptance of the revenue adjustment had no bearing on the other aspects of its SARR in that the ACE handles the same trains, over the same infrastructure, and with the same operations and associated capital and operating costs, with or without the revenue adjustment. The Railroads could certainly have challenged those other aspects of the ACE if they had wanted, as demonstrated by the limited criticisms that they did present, and they are entitled to neither a second chance to submit additional evidence nor to have AEPCO's evidence struck.

Defendants' attempt to strike AEPCO's Rebuttal Evidence concerning the MMP method is even more flawed. AEPCO's R/VC analysis was directly responsive to the analysis that the Railroads chose to present. AEPCO was also entitled to address the data on market divisions that was not fully available to AEPCO at the time of its Opening Evidence. It further constituted valid rebuttal, even if the Railroads did not address that information in their Replies (despite their burden to do so).

The Railroads made a strategic choice when they limited their SAC Reply filings, and they should not be relieved of the consequences of that choice. Moreover, denying the Motion will impose no particular hardship on the Railroads. Their filings

indicate that they believe their stronger arguments relate to variable costs, and it appears that the jurisdictional threshold, not SAC, will govern the ultimate resolution.

Therefore, the Motion should be resolved, and the case, which has already suffered extensive delays, should proceed to briefing (if ordered by the Board) and a decision on the merits as quickly as possible.

Respectfully submitted,

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COOPERATIVE, INC.

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Dated: August 12, 2003

Attorneys for Complainant

Certificate of Service

I hereby certify that this 12th day of August 2003, I have caused a copy of the foregoing Reply to be served upon counsel for Defendants as follows:

By Hand:

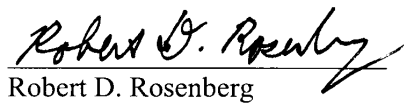
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December 23, 2002

Via HAND DELIVERY

Robert D. Rosenberg, Esq.
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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 Robert:

In a telephone conversation with Mr. LaRocca, you asked BNSF to update its discovery responses relating to forecasts in two areas. First, you asked about a reference to public pricing for coal transportation in a recent speech by BNSF's Mr. Rose. In that presentation, Mr. Rose indicated that BNSF was planning to introduce public pricing authorities for its coal transportation. BNSF is still working on those plans. We will provide you with any public pricing authorities that BNSF introduces when they become available. On the issue of forecasts, BNSF has not prepared any forecasts or projections of rates or tonnage relating to the public pricing initiative under consideration.

You also asked about forecasts for coal movements from the McKinley mine. Enclosed is information BNSF has recently received from its shippers and the McKinley mine on likely 2003 movements.

In a letter dated December 12 to Ms. Quarterman, you requested record layout and decoders for the train event tape cartridges produced by BNSF. I have enclosed those materials.

Also enclosed are additional discovery materials related to locomotive utilization and joint facility invoices.

WASHINGTON

PHOENIX

LOS ANGELES

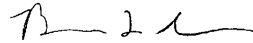
LONDON

BRUSSELS

Robert D. Rosenberg, Esq.
December 23, 2002
Page 2

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

Sincerely,

A handwritten signature in black ink, appearing to read "B. L. Gaede", with a stylized flourish at the end.

Brooke L. Gaede

Enclosures

cc: Michael Rosenthal