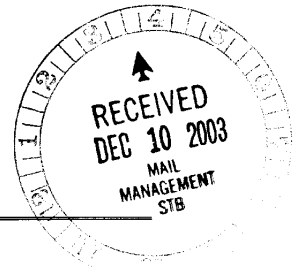


209585

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

ENTERED
Office of Proceedings

DEC 10 2003

U.S. of

**DEFENDANTS' REPLY TO
REQUEST FOR A TECHNICAL CONFERENCE**

Complainant Arizona Electric Power Cooperative, Inc. ("AEPCO") has filed a request for a "technical conference," purportedly for the purpose of confirming that it has "correctly calculated the revenues for its traffic group" and that it may "rely on trackage rights between [Vaughn and El Paso], as indicated by the November 2003 Decision." Request, pp. 1-2. AEPCO states that its November 26 election to rely on the rebuttal evidence it filed in July 2003 was conditioned on "obtain[ing] confirmation" of these matters. Id. at 1. AEPCO asserts that, without such confirmation, it cannot make an "informed and sound decision" whether to rely on its July 2003 rebuttal evidence or file new opening evidence. Id. at 2.

In fact, AEPCO has already elected to rely on its rebuttal evidence. A technical conference or other similar procedure to address technical issues may be useful at some point in

this case, either after defendants have filed their reply evidence or after all evidence has been submitted, but not now.

1. AEPCO's request for a technical conference is plainly premature in view of the posture of this proceeding. In its order served November 19, 2003, the Board required AEPCO to "notify the Board and the defendants by November 26, 2003 whether it wished to file new opening evidence or to rely on the [rebuttal] evidence that it filed in July 2003." Decision at 7. The alternatives were clear, and AEPCO did not seek reconsideration. In its November 26 filing, AEPCO stated that it would rely on its rebuttal evidence as its case-in-chief. AEPCO's Response, p. 10. (In fact, this was AEPCO's fourth opportunity to structure its approach to the SAC issues in this case, following its opening evidence, its decision not to revise its evidence in response to UP's motion to dismiss, and its decision to dramatically alter its evidence on traffic group revenues in its July 2003 rebuttal.) In these circumstances, there is no basis for holding a technical conference. AEPCO does not need information in order to prepare a filing. It has already filed the SAC evidence on which it intends to rely, and, under the schedule prescribed by the Board's November 19 order, it will have ample opportunity to review defendants' reply and file a further rebuttal. It may well be that a technical conference would ultimately be useful to illuminate or help resolve differences between the parties' SAC evidence, but this will be the case only after the parties' evidentiary filings, once technical disputes have ripened.

2. Holding a technical conference at this time would be burdensome and prejudicial to the defendants. Although defendants object to the position in which they have been placed (see Defendants' letter filed December 4, 2003), they are working hard to comply with the schedule the Board has set. In the two weeks since AEPCO's November 26 statement that it would rely on its July 2003 rebuttal, defendants have been moving ahead to prepare reply

SAC evidence to submit by the Board's January 26 deadline. Defendants are holding a major planning and coordination session for that work today. The Board has imposed a very tight deadline on defendants -- which is especially difficult to meet in light of the upcoming holiday period -- and it is simply not feasible to devote resources to a technical conference, particularly one in which defendants would be asked to describe evidence they have not yet filed. Extension of the schedule is no answer. BNSF and the Board are already juggling multiple rate cases, and altering the existing deadlines will place BNSF in a particularly difficult situation in view of the procedural schedules in its other cases. Moreover, AEPCO's repeated efforts to complicate this proceeding have already created extraordinary inefficiencies and imposed significant costs on defendants (and the Board). It is unfair to allow AEPCO to subject defendants to further inconvenience and costs of start-and-stop litigation. The Board should adhere to its established deadlines and hold AEPCO to its election.

3. Moreover, AEPCO misperceives the purpose of holding a technical conference. It asserts that a conference would allow the Board "to provide appropriate guidance and any needed clarification" with respect to traffic group revenues and trackage rights matters. Request, pp. 2-3.¹ However, the Board does not resolve legal disputes between the parties or issue interpretations of its prior decisions in technical conferences. These conferences are conducted by Board staff and provide an opportunity for parties to reach agreement on technical matters. They are not an appropriate forum for the resolution of legal disputes by the Board. See

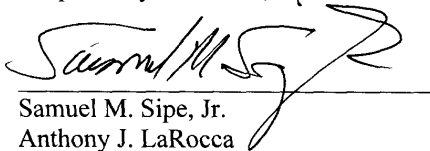
¹ AEPCO states that, in requesting a technical conference, it "does not intend to preclude the Board from ruling directly on AEPCO's November 26, 2003 response." Request, p. 3. AEPCO's "response" did not seek rulings from the Board, and AEPCO did not seek reconsideration of the Board's November 19 order. The Board should address the various issues AEPCO raises, if at all, in its decision on the merits in this matter. See Defendants' letter filed December 4, 2003.

Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology, STB Ex Parte No. 638 (STB served Apr. 3, 2003) at 6-7.

* * *

In summary, the Board should deny AEPCO's request as premature and prejudicial to defendants. As noted above, defendants are willing to discuss technical issues at a point when such discussions would be constructive. If the Board and AEPCO believe it would be useful, defendants will be prepared to make themselves available to address such issues, either at the close of all evidence or after defendants submit their reply evidence. At an appropriate time, defendants would be willing to consult with the Board's staff and AEPCO's counsel about how to make any such session as productive as possible.

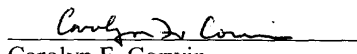
Respectfully submitted,


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December 10, 2003

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2003, I caused a copy of the foregoing
“Defendants’ Reply to Request for a Technical Conference” to be served by hand on:

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