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BEFORE THE
SURFACE TRANSPORTATION BOARD

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ARIZONA ELECTRIC POWER
COOPERATIVE, INC.

Complainant,

v.

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

Defendants.

Docket No. 42058

Office of Proceedings

JAN 27 2004

Part of
Public Record

DEFENDANTS' MOTION TO DISMISS ON REOPENING

Pursuant to 49 C.F.R. § 1111.5, defendants The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") (jointly, the "Railroads") hereby submit this Motion to Dismiss on Reopening ("Motion to Dismiss"). The grounds for this motion are set out below.

I. INTRODUCTION

Arizona Electric Power Cooperative, Inc. ("AEPCO") filed its opening SAC evidence in this proceeding on February 7, 2003. To support its claim that the challenged rates are unreasonable, AEPCO posited a SARR that purports to generate stand-alone revenues significantly in excess of stand-alone costs. Defendants challenged the adequacy of AEPCO's opening SAC evidence on several grounds, including AEPCO's improper reliance on trackage rights over nearly one-third of the SARR—the segment from Vaughn, NM, to El Paso, TX — instead of submitting evidence on the costs to construct and operate over this portion of the SARR route. See UP Petition to Require Submission of New Opening Evidence or,

Alternatively, to Dismiss, at 22-25 (filed April 18, 2003) ("UP Petition"); Reply Evidence of Union Pacific Railroad Co. Concerning Stand-Alone Costs, at I-16 to 20 (filed May 27, 2003); Reply Evidence of The Burlington Northern and Santa Fe Railway Co., at I-13 to 21 (filed May 27, 2003). On November 19, 2003, the Board served a decision in which it accepted defendants' position that AEPCO's evidence on the Vaughn-to-El Paso portion of the SARR was inadequate. *Arizona Electric Power Cooperative, Inc. v. Burlington Northern and Santa Fe Railway Co. and Union Pacific Railroad Co.*, Docket No. 42058 (served Nov. 19, 2003) ("November 19th Order"). However, instead of dismissing AEPCO's case, the Board reopened the record to accept additional evidence on this and other SAC issues.

On reopening, AEPCO did not even attempt to correct the errors the Board identified in AEPCO's case-in-chief on the costs to construct and operate a line from Vaughn to El Paso. In fact, AEPCO submitted no additional evidence at all, on this or any other issue. *See* Response of Complainant Arizona Electric Power Cooperative, Inc. to the Board's November 19, 2003 Decision, at 3-7 (filed Nov. 26, 2003). As a result, AEPCO's case-in-chief on a critical element in its SAC presentation remains fundamentally deficient. AEPCO's failure to correct the flaws identified by the Board regarding the Vaughan-to-El Paso segment is fatal to AEPCO's case.

As discussed further below, it is inappropriate to expect defendants to develop evidence on the issue of Vaughn-to-El Paso transportation costs that would allow the Board to assess AEPCO's SAC claims. There is no basis for disregarding the longstanding rule that the complainant in a SAC case has the burden of proof and imposing on defendants the burden to present the evidence that is missing from AEPCO's case-in-chief. Moreover, the ICC has already found that the defendant in a SAC case cannot be expected to posit the assumptions on traffic and plant configuration that are necessary to evaluate the full cost of providing service

over the rail lines at issue in a SAC case. *See McCarty Farms, et. al. v. Burlington Northern, Inc.*, ICC Docket No. 37809, at 7 (served Feb. 5, 1988) ("*McCarty*").

AEPCO also cannot try to repair its flawed evidence on rebuttal. The Board has long held that a complainant may not submit its case-in-chief on rebuttal. There is no basis for suspending that rule here. Even if the Board was justified in giving AEPCO another opportunity to submit its case-in-chief on the costs of the Vaughn-to-El Paso line, there would be no rational basis for allowing AEPCO to do so after defendants have submitted their reply evidence.

The only viable alternative is for the Board to dismiss AEPCO's complaint without further proceedings. The Board's November 19th Order clarified the standards that the Board would apply in assessing evidence about the Vaughn-to-El Paso segment and it reopened the proceeding, giving AEPCO an opportunity to submit evidence that could meet that standard. Despite that clear opportunity to repair its case-in-chief, AEPCO failed to do so. Its complaint should be dismissed.

II. ARGUMENT

A. AEPCO Has Failed To Present Evidence That Would Support A Finding That The Challenged Rates Are Unreasonable

AEPCO's SAC presentation contains a fundamental gap – namely, it does not include the evidence necessary to conduct a SAC analysis that includes SARR operations between Vaughn and El Paso. AEPCO's evidence does not address the costs of constructing, maintaining, or operating a Vaughn-El Paso line. No calculation of SAC costs for a SARR that includes operations between Vaughn and El Paso can be obtained from this record.

AEPCO argues that SARR traffic moving between Vaughn and El Paso would pay BNSF's trackage rights fee for using UP's Vaughn-El Paso line. It asserts that such a fee would be sufficient to cover UP's system-average, fully allocated costs. But that argument has no

bearing on a SAC analysis. It does not address SAC costs or SARR revenues for a Vaughn-El Paso line. Accordingly, AEPCO has not satisfied the SAC test.

Defendant Railroads argued both in the UP Petition and in their Reply Evidence that AEPCO's proposed use of BNSF's trackage rights fee did not satisfy the SAC test. In its November 19th Order, the Board agreed. As the Board observed, "the SAC test could not serve its purpose if the SAC analysis failed to take into account the full costs of providing and maintaining the physical plant needed to serve the traffic—costs which the joint-rate defendants collectively must bear." November 19th Order at 6. The Board unequivocally held AEPCO's proposed use of trackage rights invalid precisely because AEPCO failed to fully account for costs: "using such arrangements between joint-rate defendants to avoid a significant portion of the capital costs of providing service would defeat the SAC test." *Id.* In short, the Board held that AEPCO's evidence could not support a claim for relief.

Earlier, in response to UP's Petition, AEPCO had declined to submit new evidence on the trackage rights point. The Board's November 19th Order gave AEPCO another opportunity to submit a new opening case-in-chief on this point, and AEPCO declined to do so. Thus, the record remains in a state that the Board has already deemed to be inadequate to support AEPCO's claim that the challenged rates exceed a reasonable maximum. Accordingly, the record in this case cannot support a finding that the challenged rates are unreasonable. Given AEPCO's refusal to accept the opportunity to create an adequate record afforded by the Board's November 19th Order, the Board must recognize AEPCO's failure of proof and dismiss the case.

B. The Board Cannot Impose The Burden On Defendants To Submit Evidence On The Costs To Construct And Operate The Vaughn-To-El Paso Segment Of The SARR.

Although it found AEPCO's case-in-chief to be flawed, the Board concluded that it should not dismiss the complaint. The Board apparently believed that AEPCO might have been

misled by statements in a prior Board decision suggesting that it could rely on a trackage rights agreement between the defendants as a substitute for assessing the full costs of the Vaughn-to-El Paso segment of the SARR. November 19th Order at 6.

The Board's concern over AEPCO's mistaken reliance on prior Board statements does not justify giving AEPCO yet another chance to submit the evidence needed to evaluate its SAC claims. AEPCO is an experienced litigant before the Board, and it knew that it was submitting evidence that had no precedent. No prior SAC complainant has ever succeeded in using a trackage rights agreement over a defendant's line as a substitute for presenting traditional SAC evidence on the costs to construct and operate over that line. When AEPCO chose to present such evidence, it took the chance that the Board would reject it.

Moreover, the Board's apparent concern that AEPCO was misled cannot rationally justify a requirement that *defendants* submit the cost evidence necessary to determine whether the challenged rate exceeds a reasonable maximum. The complainant in a SAC case always has the burden of coming forward with evidence on the basic assumptions underlying its SAC presentation. *See Coal Rate Guidelines, Nationwide*, STB Ex Parte No. 347 (Sub-No. 1), at 18; (served Aug. 8, 1985); *Texas Municipal Power Agency v. Burlington Northern & Santa Fe Railway Co.*, STB Docket No. 42056, at 4 (served Mar. 24, 2003) ("*TMPA*"). This burden has never rested with the defendant. The Board's concern over AEPCO's misinterpretation of prior Board statements would justify, at most, another opportunity for AEPCO to present the evidence it failed to present in its opening evidence, not a reversal of the governing rules regarding the submission of evidence.

Moreover, defendants cannot be expected to present the type of evidence that is needed to assess the costs to provide transportation over the Vaughn-to-El Paso segment. The Board's

November 19th Order made it clear that the SAC analysis in this case must account for the “full costs of providing and maintaining the physical plant needed to serve the traffic” over the Vaughn-to-El Paso segment. November 19th Order at 6. Defendants simply could not calculate a usage fee for UP’s Vaughn-El Paso line that would “satisfy the objectives of the SAC test” without conducting a SAC analysis. *Id.* The way to develop an appropriate “usage fee” consistent with the objectives of the SAC test would be to determine the amount of revenue needed to ensure full recovery of the costs of the line at issue. However, to calculate a fee that would ensure the full cost recovery, defendants would have to identify the forward looking costs of constructing and operating the line, as well as the revenues available to cover those costs from shippers using the line — in other words, they would have to conduct a SAC analysis.

Moreover, to carry out such an analysis, it would be necessary to identify the most efficient configuration of the facilities to provide the transportation and to identify the traffic that could be handled profitably over that segment. The ICC made it clear that the complainant in a SAC case, not the defendant, must select the route, the traffic group and the facilities for the SARR and any subset of the SARR. *McCarty* at 7; *see also Rate Guidelines--Non-Coal Proceedings*, STB Ex Parte No. 347 (Sub-No. 2), at 28 (served Dec. 31, 1996). Indeed, in the *McCarty* case, the ICC rejected the defendant’s evidence because the defendant sought to posit SAC assumptions that are deemed to be exclusively the responsibility of the complainant. *McCarty* at 7.

In light of this precedent, it would be arbitrary and irrational to require the *defendants* to make the judgments as to the costs and traffic that would be necessary to present SAC evidence regarding the segment of the ACE between Vaughn and El Paso. The complainant must make those judgments and AEPCO has failed to do so here.

C. AEPCO Cannot Present Its Evidence On The Vaughn-To-El Paso Costs For The First Time On Rebuttal

The Board and the ICC before it have established two fundamental rules governing the complainant's presentation of evidence in a SAC case. The first is that the complainant, who bears the burden of proof, must present its entire case-in-chief on opening. *General Procedures for Presenting Evidence in Stand-Alone Rate Cases*, Ex Parte No. 347 (Sub-No. 3), at 5 (served Mar. 9, 2001) ("*General Procedures*") ("[I]n presenting evidence, the party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence."). As part of its case-in-chief, the complainant must also demonstrate the reasonableness of its SAC assumptions and selections. *TMPA* at 4; *see also Duke Energy Corp. v. Norfolk Southern Railway Co.*, STB Docket No. 42069, at 15 (served Nov. 6, 2003) ("*Duke*") ("[T]he shipper must plan to submit its best, least-cost, fully supported case on opening."); *Wisconsin Power & Light Co. v. Union Pacific R.R. Co.*, STB Docket No. 42051, at 73 (served September 13, 2001) ("[T]he proponent of a SAC model cannot wait until rebuttal to develop its case-in-chief.").

The second rule relates to the scope of a complainant's rebuttal evidence. The Board has emphasized in recent cases that a complainant's rebuttal evidence must be limited to addressing the challenges presented by defendants to the complainant's opening case-in-chief; the complainant may not present for the first time evidence that should have been presented in its case-in-chief. *See Duke* at 15 ("[A] shipper is not free on rebuttal to significantly redesign its SARR or alter the core assumptions upon which its case-in-chief is based."); *General Procedures* at 5 ("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."); *TMPA* at 56 ("[W]e 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.”)

The Board could not permit AEPCO to present rate evidence regarding the Vaughn-to-El Paso segment on rebuttal. An agency is obligated to follow its established rules and practices. *See The Atchison, Topeka & Santa Fe v. Wichita Board of Trade*, 412 U.S. 800, 807-8 (1973); *National Labor Relations Board v. International Union of Operating Engineers Local 925*, 460 F.2d 589, 604 (5th Cir. 1972); *Henry v. Immigration and Naturalization Service*, 74 F.3d 1, 6 (1st Cir. 1996). Any departure from precedent must have a reasonable basis and must be clearly explained. *Davila-Bardales v. Immigration and Naturalization Service*, 17 F.3d 1, 5 (1st Cir. 1994). There is no conceivable reason to depart from the established rules governing the presentation of evidence here.

The Board decided that AEPCO should have another opportunity to present its case-in-chief relating to transportation between Vaughn and El Paso because of a concern that a prior Board decision may have misled AEPCO into submitting inadequate evidence. But even if such a concern justified a decision to allow AEPCO to refile its opening evidence, it could not possibly justify allowing AEPCO to file its case-in-chief on this issue on rebuttal, thereby depriving defendants of an opportunity to respond to the complainant’s evidence. Defendants could not reasonably anticipate the strategic choices a complainant might make (*e.g.*, with respect to routing and traffic choices) in presenting such evidence. As a result, defendants would be prejudiced, and the Board would be deprived of a fully developed record. The Board’s concern over AEPCO’s misinterpretation of prior Board statements does not provide any reasonable basis for departing from the procedural rules governing the presentation of evidence.

III. CONCLUSION

The Board has gone out of its way to give AEPCO yet another opportunity to present a proper case-in-chief relating to the costs to provide transportation for SARR shippers from Vaughn to El Paso, and AEPCO has declined to do so. Since the defendants cannot be expected to present the type of evidence needed to make a cost assessment that would be consistent with the SAC test and since the complainant may not present new evidence on this issue for the first time on rebuttal, the record in this case cannot support a finding in AEPCO's favor. The complaint should therefore be dismissed.

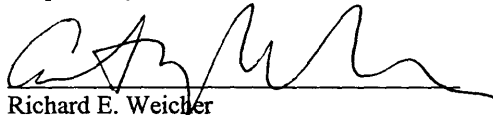


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Dated: January 26, 2004

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2004, a true and correct copy of the foregoing document was served by hand on:

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