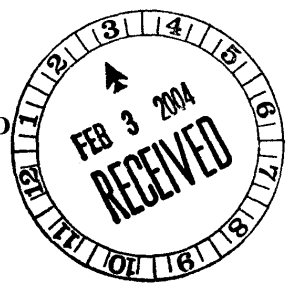


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BEFORE THE  
SURFACE TRANSPORTATION BOARD



ARIZONA ELECTRIC POWER  
COOPERATIVE, INC.,  
  
Complainant,  
  
v.  
  
THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY and  
UNION PACIFIC RAILROAD COMPANY,  
  
Defendants.

Docket No. 42058

**DEFENDANTS' REPLY TO AEPCO'S MOTION FOR EXTENSION OF TIME**

Defendants oppose AEPCO's request for a lengthy extension of time to file its supplemental rebuttal evidence. We think five weeks is too long. We proposed to AEPCO an extension of no more than two weeks, and we ask the Board to grant no more than that.

We oppose this extension because it is unfair to defendants. We oppose it because it conflicts with the Board's scheduling order. We oppose it because, after the Board issued its scheduling order, AEPCO's counsel voluntarily created the scheduling conflict in which they now find themselves.

We also wish to comment on AEPCO's expression of frustration about delays to this case, even as AEPCO seeks to delay this case again.

1. AEPCO's Five-Week Extension Would Be Unfair

Defendants undertook extraordinary efforts to comply with the Board's procedural schedule. We curtailed our efforts as necessary to meet a tight schedule and sacrificed developing additional evidence and argument.

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Defendants had only 22 business days, including the Christmas and New Year's weeks, to prepare their supplemental reply evidence. We could not begin our work in earnest until after the Board-ordered technical conference on December 18, 2003, because AEPCO continued to hold out the prospect of filing a new case-in-chief until then. During those 22 days, defendants' counsel and consultants had many other significant obligations.<sup>1</sup> Nevertheless, we complied with the Board's order.

AEPCO should make compromises and sacrifices to comply with the schedule. If AEPCO expected to need more time, it should have made that request when the railroads could also obtain additional time.

2. AEPCO's Request Conflicts With The Board's Order

The Board made clear in its November 19 decision that it would not tolerate further delay in this case. It established tight deadlines and even encouraged the parties to "propose a more accelerated schedule, if possible." November 19 Decision at 6. In response, defendants' counsel, consultants, and in-house personnel engaged in extraordinary efforts to submit their supplemental reply evidence without delay.

When the Board says that it will not tolerate further delay, it presumably means what it says. Five weeks of delay is too much.

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<sup>1</sup> For example, on January 6, UP's counsel filed an extensive application regarding TTX Company's pooling authority in TTX Company – Flatcar Pooling. FTI Consulting was heavily involved in preparing supplemental evidence for January 5 and January 12 filings in Duke Energy v. CSX. It was also heavily involved in preparing a petition for reconsideration for a January 21 filing in Carolina Power & Light v. Norfolk Southern. On January 20, BNSF's counsel filed a statement of clarification, supported by a verified statement from consultants at FTI, in Public Service Company of Colorado v. BNSF. Defendants' in-house lawyers also had to juggle work on the reply with many pre-existing commitments.

3. AEPCO's Counsel Voluntarily Created The Conflicts About Which They Complain

AEPCO's counsel are responsible for the scheduling conflicts about which they now complain. AEPCO's counsel claim conflicts arising out of their roles in AEP Texas North v. BNSF and Arizona Public Service v. BNSF. The Board established the schedule in AEPCO on November 19, 2003. In a motion filed two weeks later, AEPCO's counsel asked the Board to establish the schedule in Arizona Public Service v. BNSF that they now cite as a conflict.<sup>2</sup> One month later, they asked the Board to establish the schedule in AEP Texas North v. BNSF that they now cite as a conflict.<sup>3</sup> AEPCO's counsel thus knew about the schedule in AEPCO when they agreed to the schedules in their other cases. They should not be heard to complain about conflicting commitments that they created after the Board established the schedule in this case.<sup>4</sup>

AEPCO suggests that it did not seek an extension earlier because it "did not anticipate" that defendants' reply "would be so extensive." Motion at 3. However, defendants' supplemental reply evidence is less extensive than replies filed in comparable stand-alone cost cases. AEPCO also asserts that defendants could have filed much of their evidence in their original replies. Id. But even if that assertion were true, which it is not, the Board did not limit the scope of defendants' supplemental reply filing. Moreover, defendants informed AEPCO that

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<sup>2</sup> See STB Docket No. 41185, decision served Dec. 8, 2003.

<sup>3</sup> See STB Docket No. 41191, decision served Jan. 13, 2004.

<sup>4</sup> AEPCO also notes that its consulting firm in this case, L.E. Peabody & Associates, Inc., is involved in Otter Tail Power v. BNSF. AEPCO implies that L.E. Peabody's work in Otter Tail will interfere with its work in this case because Otter Tail reply evidence is due on February 23, 2004. However, Otter Tail is not scheduled to file evidence on that date. February 23 is the date on which BNSF is scheduled to reply to the amended version of Otter Tail's opening evidence. See Decision served Dec. 12, 2003.

they intended to file full reply evidence.<sup>5</sup> Thus, if AEPCO expected defendants to file something less than a full reply, its expectations were entirely unreasonable.

4. AEPCO's Complaints About Delay

This case took far too long because of AEPCO's choices. AEPCO complains that it has been "greatly frustrated and burdened" by the delays in this case (Motion at 1), but it has only itself to blame. AEPCO's alleged scheduling dilemma is only the latest in a series of self-inflicted delays.

This could have been a straightforward case about coal moving from New Mexico mines to AEPCO's Arizona plant. AEPCO, however, vastly complicated the case by amending its initial complaint to add origins in Colorado and the Powder River Basin. After the Board rejected AEPCO's efforts to use these other movements to create cross-subsidies, AEPCO abandoned this strategy. Then, rather than construct its SARR from origin to destination along the route used today, AEPCO designed a railroad 220 miles longer in order to employ one defendant's trackage rights over the other defendant for a portion of the route. According to the Board's November 19 decision, the only reason this case was not dismissed was the Board's concern that an earlier decision might have misled AEPCO. See November 19 Decision at 6.

AEPCO complains that defendants' "repeated motions" have "greatly protracted" this case (Motion at 4), but the Board has consistently upheld defendants' legal positions. The real problem has been AEPCO's ill-advised approach to litigating this case. The Board should not further extend these proceedings by granting AEPCO's request for a lengthy extension.

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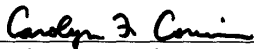
<sup>5</sup> Letter from Carolyn F. Corwin, Esq., and Samuel M. Sipe, Jr., Esq., to Hon. Vernon A. Williams, dated December 4, 2003.

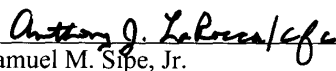
Defendants recognize that AEPCO's counsel and consultants face significant demands in the coming month, and we remain willing to consent to a two-week extension of time. Such an extension should be more than sufficient for AEPCO to complete its supplemental rebuttal filing. With an additional two weeks, AEPCO would have a total of six weeks to prepare its supplemental rebuttal evidence, which should be more than enough given the limited scope of rebuttal. AEPCO's request for longer extension, supported only by claims of scheduling conflicts that could have been avoided and baseless aspersions regarding defendants' conduct during this proceeding, is not persuasive. It should be denied.

Respectfully submitted,

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Dated: February 3, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that on February 3, 2004, a true and correct copy of the foregoing document was served by hand on:

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