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June 15, 2004

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423



ENTERED
Office of Proceedings

JUN 15 2004

Re: Docket No. 41185, Arizona Public Service Co. & PacifiCorp v. The Burlington Northern and Santa Fe Railway Company **Part of Public Record**

Dear Secretary Williams:

Please find enclosed for filing in the above-referenced proceeding an original and ten copies of Complainants Arizona Public Service Company and PacifiCorp's Reply to Motion for Establishment of a Briefing Schedule.

An additional copy of the filing also is enclosed. Kindly indicate receipt and filing by time-stamping this extra copy and returning it to the bearer of this letter.

Sincerely,

C. Michael Loftus

CML/jwp

Enclosures

cc: Samuel M. Sipe, Jr.
Linda S. Stein

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



ARIZONA PUBLIC SERVICE COMPANY,)
and PACIFICORP,)

Complainants,)

v.)

Docket No. 41185

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY,)

Defendant.)

**COMPLAINANTS ARIZONA PUBLIC SERVICE
COMPANY'S AND PACIFICORP'S REPLY TO
MOTION FOR ESTABLISHMENT OF BRIEFING SCHEDULE**

Complainants Arizona Public Service Company ("APS") and PacifiCorp (collectively referred to as "APS/PacifiCorp"), hereby submit their Reply to The Burlington Northern and Santa Fe Railway Company's ("BNSF's") June 8, 2004 Motion for Establishment of a Briefing Schedule ("Motion"). APS/PacifiCorp respectfully submit that BNSF's Motion should be denied for the reasons set forth herein.

I.

BACKGROUND

This reopened Docket Number 41185 arises from a complaint filed by APS/PacifiCorp before the Interstate Commerce Commission on January 3, 1994, challenging rates for rail transportation between the McKinley Mine, located near Gallup,

New Mexico, and the Cholla Electric Steam Generation Station, located near Joseph City, Arizona, which is jointly owned by APS and PacifiCorp. In July, 1997, this Board issued a decision which declared the challenged rates to be unreasonable, awarded reparations for past movements and prescribed maximum reasonable rates for the future. See Arizona Public Service Co. v. Atchison Topeka & Santa Fe Ry., 2 S.T.B. 367 (1997) (“1997 Decision”); aff’d. on reconsideration Arizona Public Service Company and PacifiCorp v. The Atchison, Topeka and Santa Fe Railway Company, 3 S.T.B. 70 (1998) (“1998 Decision”).

In this reopened proceeding the Board is considering whether, and how, the Stand-Alone Cost (“SAC”) analysis in the 1997 Decision and the 1998 Decision should be modified in light of certain changed circumstances. The Board’s decisions served May 12, 2003 (“May 2003 Decision”) and October 14, 2003 (“October 2003 Decision”) reopened this proceeding, defined the scope of reopening as limited to the original 1994 SARR configuration and traffic group, and lifted the rate prescription.¹

In its May 2003 Decision, the Board ordered the parties to “submit a procedural schedule to govern whatever limited discovery may be necessary and for the subsequent submission of evidence in the reopened proceeding.” Id. at 6. The Board

¹ As Complainants have previously noted, APS/PacifiCorp believe that the Board committed material errors in its May 2003 Decision and October 2003 Decision and reserve all rights to seek judicial review of these decisions upon the issuance of a final decision in this reopened proceeding.

also suggested a procedure with APS/PacifiCorp opening, BNSF replying, and APS/PacifiCorp rebutting. Id. In the Board's subsequent decision denying APS/PacifiCorp's petition for reconsideration, the Board again directed the parties to submit a proposed procedural schedule in accordance with the terms of the Board's May 2003 Decision. See October 2003 Decision at 8. Shortly thereafter, counsel for the parties conducted a conference to discuss procedural matters in the case, and agreed upon the timing and order of the parties' filings to be made in this reopened proceeding. Following the parties' conference, APS/PacifiCorp filed, with the concurrence of BNSF, the parties' proposed procedural schedule, which schedule was adopted by the Board, without change, in a decision served October 30, 2003.² That schedule provides only for opening, reply, and rebuttal evidentiary filings. It does not provide for the submission of separate briefs.

At the parties' conference on the procedural schedule, BNSF did not object to the order of presentation suggested by the Board or suggest that a separate, post evidentiary briefing would be necessary because of that order of presentation. The parties completed discovery, and submitted their opening, reply and rebuttal filings in accordance with the governing procedural schedule. Each of these filings consisted of

² The procedural schedule was modified by the Board in a decision served December 8, 2003, to allow for an approximately six-week extension in the schedule, at the joint request of the parties. No other changes other than the six week extension were requested by the parties or made by the Board in its December 8, 2003 decision.

both evidence and argument in accordance with the customary procedure before the Board. APS/PacifiCorp's rebuttal filing was made on April 27, 2004, and the proceeding has been ripe for a decision on the merits since that time. APS/PacifiCorp's counsel was contacted by BNSF's counsel concerning the possibility of establishing a briefing schedule on June 7, 2004.

II.

ARGUMENT

BNSF's Motion is predicated on two arguments. First, BNSF references recent SAC cases where the Board has ordered the filing of post-evidentiary briefs by the parties. BNSF argues that "[w]hile the scope of this reopened proceeding is considerably narrower than the scope of the typical SAC case" the Board should nonetheless order the filing of briefs because the limited issues raised are "complex and, in some instances, novel." Motion at 3.

Contrary to BNSF's assertions, unlike in a full SAC case, additional briefing is not necessary in order to help "focus the issues and assist [the Board] in analyzing the record." See Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company (STB served March 25 2003) at 1; accord Docket No. 42072, Carolina Power & Light Company v. Norfolk Southern Railway Company (STB served May 12, 2003) at 1. As BNSF acknowledges, this is not a typical full SAC case with a vast multitude of individual issues at stake on which the parties' evidence is in

conflict. This is a reopened SAC proceeding, with a few well-defined issues limited to changed circumstances relating to declines in traffic volumes from, and the eventual closure of, the McKinley Mine, and the update of forecasts and indices that were relied upon in the Board's 1997 Decision and 1998 Decision but have proven to be inaccurate.³ Because of the unique circumstances of this case and the limited number and scope of issues involved, the parties' evidentiary submissions on reopening were focused on these discrete issues, on which ample clarification has been provided.⁴

Each of the parties has already submitted extensive legal argument. BNSF's argument in its reply consists of 37 pages. APS/PacifiCorp presented 32 pages of argument on opening and 39 pages in rebuttal.

There is nothing inherently complex in the parties' evidentiary submissions on which the Board might require further elucidation through the filing of post-evidentiary briefs. BNSF specifically points to only one subject: the "pattern of cost recovery over the 20-year DCF period and the requirement that stand-alone costs be recovered over the 20-year DCF period" as to which it claims the Board would benefit

³ In its May 2003 and October 2003 decisions, the Board specifically limited the evidence to be considered (May 2003 Decision at 5-6; October 2003 Decision at 3) and denied APS/PacifiCorp's request that the Board grant reopening for consideration of all relevant facts and circumstances relating to the issue traffic since the Board's 1997 and 1998 Decisions.

⁴ Also, because of the limited scope of this proceeding, the procedural schedule proposed by the parties and adopted by the Board in this case, even with the involved six-week extension, was far more expeditious than the normal schedule provided for in full SAC cases under 49 C.F.R. § 1111.9.

from briefing. BNSF appears to be referring to its claims made on Reply that APS/PacifiCorp's DCF analysis contains a "conceptual error" relating to rates included in the analysis.

While admittedly technical in nature, this issue is not particularly complex, nor does it involve a contentious challenge to the methodology employed and/or the accuracy of calculations. BNSF addressed its "conceptual error" claims, at length, in its Reply (see V.S. Baranowski at 9-17, 24-26; Reply Argument at 29) and APS/PacifiCorp responded to these claims on Rebuttal (see Rebuttal V.S. Crowley at 6-11, Rebuttal Argument at 5-19). This topic has been fully addressed by the parties.

BNSF's second argument for briefing is that it is necessary "so that the Board may have a fair and balanced overview of the record." BNSF specifically argues that, because the May 2003 Decision suggested a procedure that afforded APS/PacifiCorp the opportunity to make opening and rebuttal filings, but only afforded BNSF the opportunity to file a reply, "basic fairness requires that BNSF be given the opportunity, in the form of a final brief, to address the record on reopening as a whole." Motion at 3-4.

BNSF clearly has not been prejudiced under the governing procedural schedule. BNSF was provided a full and fair opportunity to present its case on reply and address all issues raised by APS/PacifiCorp. Until the time of the filing of its Motion, BNSF had never raised any concerns over the Board's decisions addressing the

procedural schedule to govern this reopened proceeding (or the lack of briefs contained within that schedule). To the contrary, BNSF explicitly agreed to the procedural schedule adopted by the Board in this reopened proceeding. See Proposed Procedural Schedule (filed Oct. 24, 2003); Joint Motion for Extension of Procedural Schedule (filed December 4, 2003).

APS/PacifiCorp's rebuttal filing was, in all respects, responsive to BNSF's reply. APS/PacifiCorp did not introduce any evidence that was not proper rebuttal and BNSF does not suggest in its motion requesting briefs that they did so.

BNSF has had ample opportunity to present whatever legal argument it desired and, as noted above, has already taken full advantage of that opportunity. The Board has emphasized in recent decisions the importance of shippers including in their opening filings a complete presentation of their position to afford carriers adequate opportunity to respond. The same principle should, of course, be true for carriers. To the extent BNSF made a strategic decision not to present fully in its reply filing whatever legal argument it wished to make, the Board should not sanction and encourage such tactics. The obvious reason for such a strategic choice would be to limit the shippers' opportunity to respond to the carrier's position, as fully articulated, in the shipper's rebuttal evidence.

The issues in this proceeding have been fully addressed by each of the parties. BNSF has presented no justification for introducing the delay associated with

additional, cumulative and unnecessary briefing. In fact, its request for a briefing schedule was itself unnecessarily delayed, coming six (6) weeks after the evidentiary record was closed and the matter was ready for decision.

III.

CONCLUSION

For the foregoing reasons, APS/PacifiCorp respectfully request that the Board deny BNSF's Motion. Should the Board decide that it desires further briefing of some specific issue or issues, APS/PacifiCorp request that the Board specify the issue(s) and limit the scope (and the length) of the briefs accordingly.

Respectfully submitted,

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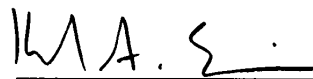
Dated: June 15, 2004

Attorneys for Complainants

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2004, I served a copy of the foregoing Reply to Motion for Establishment of a Briefing Schedule by hand upon counsel for Defendant, as follows:

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