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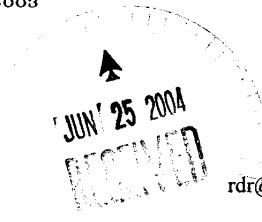
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June 25, 2004

BY HAND DELIVERY

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

ENTERED
Office of Proceedings

JUN 22 2004

Part of
Public Record

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 (16) copies of Complainant Arizona Electric Power Cooperative, Inc. Petition Regarding Briefing Procedures. In addition, we have enclosed three computer diskettes containing electronic versions of this Reply in WordPerfect 9.0 format.

We have enclosed an additional hard-copy of the filing to be date-stamped and returned to the bearer of this letter. Thank you for your attention to this matter.

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

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COMPLAINANT ARIZONA ELECTRIC POWER COOPERATIVE, INC.
PETITION REGARDING BRIEFING PROCEDURES

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Dated: June 25, 2004

Attorneys for Complainant

**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

**COMPLAINANT ARIZONA ELECTRIC POWER COOPERATIVE, INC.
PETITION REGARDING BRIEFING PROCEDURES**

Pursuant to 49 C.F.R. § 1117.1, Complainant Arizona Electric Power Cooperative, Inc. ("AEPCO"), hereby submits its petition regarding appropriate briefing procedures to be established in the above-captioned proceeding.

AEPCO requests that briefing be staggered so that the Defendants The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") (jointly, "BNSF/UP" or "Railroads") file their brief first and AEPCO files its reply brief second, that both sides be given the same amount of time, approximately three weeks to a month, to prepare their brief, and that briefs be limited to 8,500 words. AEPCO further asks that the Board rule on AEPCO's pending Motion to Strike before briefs are due, that the Board specify any matters it desires that the parties address in their briefs, and that the Board instruct that briefs are not to be used as a vehicle for presenting new evidence.

I. BACKGROUND

Appropriate briefing procedures can be established only after taking into account recent developments in the proceeding. Specifically, Defendants filed a self-described "Clarification" on May 7, 2004, in which they altered their position stated in their Supplemental Reply Evidence regarding terminal costs and related divisions for the intermodal traffic included in AEPCO's stand-alone traffic group. Their "Clarification" also noted their future brief would provide additional information regarding the line-haul costs for the intermodal traffic.

On May 19, 2004, AEPCO moved to strike Defendants' "Clarification," explaining that Defendants' modification of their claimed intermodal traffic divisions constituted impermissible new evidence. AEPCO further noted that in view of the Defendants' stated intent to submit new information in their brief regarding intermodal line-haul costs, briefing needed to be staggered in order to afford AEPCO a fair opportunity to reply.

Defendants replied to AEPCO's Motion to Strike on June 8, 2004, restating their position on intermodal terminal costs and opposing AEPCO's staggered briefing proposal. The parties discussed briefing procedures at their June 15, 2004 technical conference, but reached no resolution. The parties concluded that the Board would need to decide the matter, and the parties agreed to submit their briefing proposals to the Board. AEPCO notes that Defendants were unwilling to agree to any due date for submitting such proposals, and AEPCO is thus filing first, recognizing that doing so will enable Defendants to respond to AEPCO's filing without AEPCO's having any right to reply.

II. NEED FOR STAGGERED BRIEFING

Under the present circumstances, staggered briefing is required to provide AEPCO with a fair opportunity to respond to the contentions that Defendants have stated they intend to present in their brief. While, as Defendants stated in their Reply, simultaneous briefing may have been the norm in past rate cases, there is no good reason for following that approach here (which, frankly, has not worked very fairly or soundly in other cases, as defendants have typically used their briefs to present additional factual information). Especially with the adoption of narrative evidentiary submissions, the distinctions between evidence and briefs have become very fine indeed.

The most recent evidentiary filings in the proceeding, which are the likely focus of any briefing, were the supplemental reply (BNSF/UP) and rebuttal (AEPCO) filings on stand-alone cost issues, which the Board staggered under its November 19, 2003 order. Both filings contained ample argument as well as evidence. As AEPCO made the most recent filing (on April 2, 2004), any briefing by AEPCO at this juncture would consist largely of what AEPCO has most recently said as it has no additional opposing evidence or argument to which to respond. In contrast, Defendants have made clear their intent to present some new contentions, explanations, and/or evidence in their brief. Simultaneous briefing will thus leave AEPCO without a meaningful opportunity to respond. While a motion to strike might lie, especially to the extent Defendants, as in their Clarification, seek to deviate from their case-in-chief and/or introduce new evidence, such motions are a poor substitute for having fair procedures in the first place. Moreover, such motions are ill-suited for substantive rejoinder, especially as the opposing party has

the ability to respond to the motion (which explains Defendants' unwillingness to submit briefing proposals simultaneously), thereby compounding the harm.

Simultaneous briefing is also fundamentally inconsistent with the assignment of the vast bulk, if not all, of the burden of proof to the shipper. Because the shipper has the burden of proof, the shipper should also have the right to close. See, e.g., 75A Am. Jur. 2d Trial § 535 ("as a general rule, ... the party who has the burden of proof ... has the right to open and close"). For that reason, staggered briefing is the norm in many analogous contexts including appellate and motion practice before courts and numerous administrative agencies, including the Board itself. In particular, the stand-alone cost filings in the instant proceeding were staggered throughout.

Having two rounds of briefing is also not a sound alternative, at least in the instant proceeding. As noted, AEPCO has made the most recent evidentiary filing, which included argument, so there is much for Defendants to address and little for AEPCO to say that it has not already (and very recently) said. Having two rounds of briefing would also create an inherent incentive for at least the Defendants to avoid presenting information in the first round so as to deprive AEPCO of a chance to respond. Multiple rounds of simultaneous briefing is also inconsistent with the allocation of the burden of proof. Finally, the proceeding involves a relatively small coal movement and has already seen a disproportionate volume of paper in terms of motions (particularly Defendants' motions to dismiss and the equivalent) and evidentiary filings, such that the parties should not have to incur the burden of filing two rounds of briefs (plus whatever oral argument and post-oral argument briefing the Board might order).

The need for staggered briefing is amplified by the extreme position advanced by Defendants in their Reply to AEPCO's Motion to Strike. Specifically, Defendants assert that they have the right to modify their position, rather than retain their original position or accept the validity of their adversary's position, and their modification entails a new analysis and new calculations. While striking the material is the appropriate remedy, AEPCO is entitled to a full opportunity to respond to Defendants' full contentions to the extent those contentions become part of the record.¹

Due process considerations thus require that the briefing be staggered so as to provide AEPCO with a full opportunity to respond to Defendants.

III. LENGTH OF BRIEFS

AEPCO and both Defendants, in their joint motion filed September 22, 2003, asked that briefs be limited to 8,500 words, excluding any cover page, tables of content and authorities, glossary of terms, or certificate of service. While the use of a word rather than a page total was intended to account for differences in footnotes (and discourage excessive use of footnotes), the word count equated to approximately 25 pages of 12 point Times New Roman.

¹Defendants also assert they can modify their position and/or submit reply evidence because they "were the first to take into account the Board's decision that rejected MMP and stated that divisions should be cost-based" (Reply at 3). The fact that Defendants submitted their supplemental evidence after the Board rendered its recent decisions does not provide them with any entitlement "to respond to the opposing party's criticism of their evidence" (*id.*) by introducing a modification that constitutes new evidence or deviate from their case-in-chief. Defendants' modification is plainly not permissible, but even if it were, AEPCO would be entitled to a full opportunity to respond to Defendants' assertions, which would be undermined by simultaneous briefing.

AEPCO continues to believe that the 8,500 word count is ample. Twenty-five pages is more than sufficient to join on major issues, and the additional length is likely to be used for new evidentiary assertions rather than argument as such. Specifying a longer maximum length will also increase the costs for both parties and the burden for the Board's staff.

The fact that both sides have now submitted lengthy supplemental evidentiary filings and accompanying argument on stand-alone cost issues should serve to reduce the need for extensive briefing, especially as the revenue adjustment and trackage rights fee issues that prompted the additional filings are now at least largely resolved.² Recent decisions rendered by the Board in other rate cases after the parties agreed to the original briefing length should also limit the range of dispute and scope of briefing. Accordingly, AEPCO believes that the original briefing limit agreed to by the parties should continue to apply.

IV. TIMING AND OTHER CONSIDERATIONS

A period of three weeks to a month should be sufficient for each party to prepare its brief, at least of the length to which the parties previously agreed. Some modest adjustment may, however, be necessary in the event of conflicts arising from preexisting vacation commitments.

²While Defendants' Supplemental Reply uses the same trackage rights fee as AEPCO, Defendants did not stipulate to the fee level at the technical conference, thus implying that they intend to advance a different figure in their brief. AEPCO deserves an opportunity to respond to such contentions as well.

AEPCO also urges the Board to rule on AEPCO's Motion to Strike Defendants' "Clarification" as soon as possible so that the parties will know if that matter needs to be briefed.

V. INSTRUCTION AGAINST INTRODUCING NEW EVIDENCE

In light of Defendants' Clarification and their stated intent in their Reply to AEPCO's Motion to Strike, it is particularly necessary for the Board to include its standard instruction in its briefing order that introduction of new evidence on briefs is not permitted.

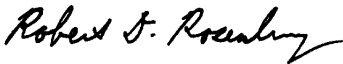
VI. CONCLUSION

For the reasons stated above, the Board should order staggered briefs of not more than 8,500 words.

Respectfully submitted,

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COOPERATIVE, INC.

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Dated: June 25, 2004

Attorneys for Complainant

Certificate of Service

I hereby certify that this 25th day of June 2004, I have caused a copy of the foregoing Petition to be served upon counsel for Defendants as follows:

By Hand:

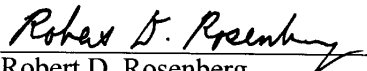
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