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BEFORE THE
SURFACE TRANSPORTATION BOARD

ARIZONA ELECTRIC POWER)
COOPERATIVE, INC.,)

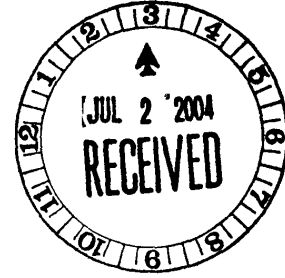
Complainant,)

v.)

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

Defendants.)

Docket No. 42058



ENTERED
Office of Proceedings

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**DEFENDANTS' REPLY TO ARIZONA ELECTRIC POWER COOPERATIVE'S
PETITION REGARDING BRIEFING PROCEDURES**

Defendants The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") (jointly, the "Railroads") hereby reply to Arizona Electric Power Cooperative's ("AEPCO") Petition Regarding Briefing Procedures, filed June 25, 2004 ("Briefing Petition"). The thrust of AEPCO's Briefing Petition is that the Board should call for staggered briefs, with AEPCO having an opportunity to reply to the Railroad briefs but without a reciprocal opportunity for the Railroads. For the reasons set out below, the Board should reject AEPCO's request for staggered briefing. AEPCO has provided no valid basis for departing from the Board's customary practice of simultaneous briefing in SAC cases. The Railroads also urge the Board to establish a 40-page limit on briefs, consistent with the Board's recent practice, in light of the fact that the record now contains extensive evidence on SAC issues.

The Board's longstanding practice has been to call for simultaneous briefs from opposing parties at the close of evidence in a SAC case.¹ The purpose of those briefs is to provide the parties with an opportunity to summarize the record that has been created, to highlight the evidence in the record that each party believes to be critical to the Board's determination, and to "allow each party to set forth its position on key issues in light of the full record."² Since the record has already been created and the briefs are intended to focus the Board's attention on issues of importance in the record, the Board has never found it necessary to stagger the filing of briefs submitted by the parties in rounds of opening and reply briefs. There is no reason to depart from the Board's established practice in this case.

AEPCO's primary argument for establishing a staggered briefing schedule in this case is that AEPCO would like an opportunity to respond to any new information that the Railroads may try to introduce into the record in violation of the Board's rules governing the scope of final briefs. But AEPCO's speculation that the Railroads may disregard the Board's rules does not provide a basis for departing from the Board's standard practice of simultaneous briefs. The Railroads are well aware of the limits on the contents of final briefs and they have no intention of exceeding those limits. Moreover, the Board's procedural rules provide adequate recourse to any party -- complainant or defendant -- that objects to the content of a pleading submitted to the

¹ See, e.g., *Public Service Company of Colorado v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42057, at 2 (served Aug. 8, 2003) ("Xcel"); *Duke Energy Corp. v. Norfolk Southern Railway Co.*, STB Docket No. 42069, slip op. at 2 (served Dec. 13, 2002); *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42056, slip op. at 2 (served May 28, 2002) ("TMPA"); *PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42054, slip op. at 2 (served Dec. 12, 2001); *Wisconsin Power and Light Co. v. Union Pacific Railroad Co.*, STB Docket No. 42051, slip op. at 2 (served Nov. 15, 2000).

² *Xcel*, slip op. at 1.

Board. There is no reason to bias the briefing process in favor of one party based only on speculation as to the content of future pleadings.

AEPCO's second argument in favor of staggered briefing is that AEPCO should be entitled to file a responsive brief because it would have little to say if simultaneous briefs are required. This argument hardly justifies a departure from the established practice. If AEPCO believes that its position has already been fully explained to the Board, it can rest on the existing record. The fact that the Railroads believe that final briefs are important while AEPCO does not is no justification for a change in practice that would grant AEPCO yet another opportunity to reply to the Railroad's arguments while denying that same opportunity to the Railroads.

Finally, AEPCO argues that as the party with the burden of proof it should be allowed to respond to the briefs filed by the Railroads. But AEPCO has already had the opportunity to open and close the evidentiary record in this case. AEPCO misconceives the purpose of final briefs in SAC cases. Briefs are not intended as an additional venue for the submission of evidence. In the evidentiary phase of a SAC case, the party with the burden of proof does have the opportunity to open and close the record. But final briefs serve to summarize the evidence already in the record and provide the Board with a useful framework within which to evaluate that evidence. Briefs would be of much less use to the Board if the briefing process were permitted to degenerate, as AEPCO proposes, into yet another round of tit-for-tat filings.

AEPCO also urges the Board to limit final briefs to the equivalent of 25 pages. In recent cases, the Board has provided for briefs of 40 pages in recognition of the size and scope of the record created in a SAC case and the complexity of many of the underlying issues. While both parties had proposed at an earlier stage of this proceeding that shorter briefs might be

appropriate, the record has expanded substantially since then.³ Far from justifying short, 25 page briefs, as AEPCO claims, the lengthy supplemental filings that have been made since September 2003 have created a record in this case that is similar to the record created in other SAC proceedings and therefore supports the use of standard brief page limits of 40 pages. If AEPCO does not need the entire 40 pages, it is free to submit a shorter brief. The Railroads, however, should not be deprived of the opportunity to deal fully with the existing record.

AEPCO also requests that the “Board specify any matters it desires that the parties address in their briefs.” Briefing Petition at 1. In its orders establishing briefing schedules in some recent SAC cases, the Board has identified specific issues for the parties to address in their final briefs.⁴ If the Board concludes that it would be helpful to have the parties address specific issues in their briefs, the Railroads have no objection to this procedure so long as the parties continue to have an opportunity to address other issues that they believe to be important.

On the question of timing, the Railroads respectfully request that the Board provide at least four weeks notice of the due date for filing briefs.

³ Joint Motion to Establish a Schedule for Briefs (filed Sept. 22, 2003).

⁴ *TMPA*, slip op. at 2; *Xcel*, slip op. at 2.

J. MICHAEL HEMMER
LOUISE A. RINN
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179
(402) 271-3309



CAROLYN F. CORWIN
DAVID L. MEYER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

*Attorneys for Union Pacific
Railroad Company*

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Respectfully submitted,

RICHARD E. WEICHER
MICHAEL E. ROPER
DAVID M. PRYOR
The Burlington Northern and
Santa Fe Railway Company
2500 Lou Menck Drive
Fort Worth, TX 76131
(817) 352-2353



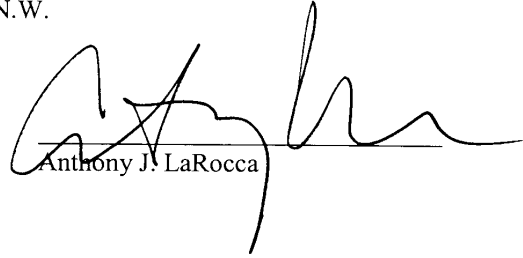
SAMUEL M. SIPE, JR.
ANTHONY J. LAROCCA
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

*Attorneys for The Burlington Northern
and Santa Fe Railway Company*

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2004, I caused a copy of the foregoing Defendants' Reply to Arizona Electric Power Cooperative's Petition Regarding Briefing Procedures to be served by hand upon the following counsel for Arizona Electric Power Cooperative, Inc.:

William L. Slover
Christopher A. Mills
Robert D. Rosenberg
Andrew B. Kolesar III
Daniel M. Jaffe
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036



Anthony J. LaRocca