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August 9, 2004



VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423-0001

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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten copies of the Reply of Complainants Arizona Public Service Company and PacifiCorp to Petition for Leave to File Attached Exhibit.

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

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads 'C. Michael Loftus'.

C. Michael Loftus
Attorney for Arizona Public Service
Company and PacifiCorp

CML/jwp
Enclosures

cc: Samuel M. Sipe, Jr., Esq.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

ARIZONA PUBLIC SERVICE COMPANY,
and PACIFICORP,

Complainants,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 41185



**REPLY OF COMPLAINANTS ARIZONA PUBLIC SERVICE
COMPANY AND PACIFICORP TO PETITION
FOR LEAVE TO FILE EXHIBIT**

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") July 20, 2004 Petition for Leave to File Attached Exhibit ("Petition"). APS/PacifiCorp respectfully submit that BNSF's Motion should be denied for the reasons set forth herein.

I.

BACKGROUND

Following the submission of APS/Pacificorp's Rebuttal evidence on April 27, 2004 and BNSF's Errata on May 28, 2004, the Board requested, inter alia, that the parties update Exhibit TDC-6 to reflect the differences in stand-alone cost ("SAC")

between APS/Pacificorp's Rebuttal calculations and BNSF's Reply. See July 2, 2004 from David M. Konschnik to APS/Pacificorp and BNSF (attached hereto as Exhibit 1). As the Board is aware, Exhibit TDC-6 compares the parties' differences on 11 specific issues (e.g., capacity limits at Cholla, exclusion of pre-2007 non-McKinley Tons). The Board's letter requested a straightforward update of that exhibit.

Based on the Board's request, APS/Pacificorp developed an updated exhibit and provided it to BNSF for review. BNSF objected to APS/Pacificorp's proposed exhibit. In particular, BNSF wanted the exhibit to reflect the "capital allocation adjustment" referenced in Mr. Konschnik's letter.¹ To that end, BNSF developed its own version of TDC-6, which it transmitted to APS/Pacificorp on July 13, 2004 (attached as Exhibit 2 to BNSF's Petition).

In its modified version of TDC-6, BNSF purports to apply its DCF Adjustment on an item-by-item basis rather than as single annual adjustment figures as it had done on Reply. BNSF's Reply evidence did not contain any such breakdown of the moneys included in its DCF Adjustment. In a July 14, 2004 letter to BNSF's counsel (attached as Exhibit 3 to BNSF's Petition), APS/Pacificorp objected to BNSF's proposed

¹ In its Reply evidence, BNSF never mentioned a "capital allocation adjustment." Instead it referred to its unprecedented attempt to collect reparations for pre-May 2003 shipments as a "DCF Adjustment." It is unclear why the Board has chosen to characterize BNSF's adjustment in this fashion since BNSF did not describe the adjustment in its Reply in language which supports such a characterization. For this reason APS/Pacificorp refer herein to BNSF's "DCF Adjustment".

exhibit because it constitutes new evidence and because it exceeds the scope of the Board's request.

Since BNSF stated that it wanted to include the DCF Adjustment in the updated TDC-6, APS/Pacificorp offered to add two columns to the Exhibit that would show the impact of BNSF's DCF Adjustment (as presented in its Reply evidence) on its proposed SAC rates. Id. BNSF declined this suggestion. Thus, on July 20, 2004 APS/Pacificorp and BNSF filed a revised Exhibit TDC-6 as per the Board's instructions, with no DCF Adjustment data, and BNSF filed its Petition.

As APS/Pacificorp explain, infra, BNSF's Petition should be rejected because it introduces new, unsupported evidence. Such evidence could have been presented by BNSF, in the same format, in its Reply on Reopening. BNSF's failure to submit this evidence earlier bars its introduction at this late juncture.

II.

ARGUMENT

BNSF's Petition does not meet the standard established by the Board for the acceptance of a petition to late file such material. In particular, the Board has held that "such a petition should show that the information sought to be introduced is central to the petitioning party's case, could not reasonably have been introduced earlier, and would materially influence the outcome of the proceeding." Docket No. 42072, Carolina Power & Light Co. v. Norfolk Southern Ry. Co. (STB served May 12, 2003) at 1-2 ("CPL").

Putting aside whether BNSF can satisfy prongs one and three of the above test, BNSF clearly fails on point two in that it could have presented in its Reply evidence a breakdown of its claimed DCF Adjustment into portions BNSF might claim are attributable to different issues in the case. If BNSF had done so, it presumably also would have explained the rationale for its allocation of dollars to different issues and the manner in which it calculated such allocations. APS then would have had an opportunity, in the preparation of its rebuttal filing, to analyze and respond to any such breakdown of the DCF Adjustment through appropriate responsive evidence and argument.

Under such circumstances, doing what BNSF seeks to do through its Petition might be considered “updating” its earlier evidence to take into account differences between APS/PacifiCorp’s opening evidence and their rebuttal evidence. In fact, however, the allocation of its DCF Adjustment that BNSF has submitted is all new. This is reflected in the fact that of 23 files contained in the CD-Rom. BNSF submitted in its supporting electronic workpapers, 21 are new. No such files were submitted by BNSF in its Reply evidence. To the contrary, the DCF Adjustments were presented by BNSF simply as annual amounts to be added to the rates for the years 2003 through and including 2008 calculated without consideration of the claimed revenue shortfall from the pre-May 21, 2003 period. Not only does BNSF’s new exhibit contain substantial new evidence, it is evidence that has not been explained or supported by any witness.

The Board has repeatedly requested that parties not introduce new evidence after the close of the record. See, e.g., Docket No. 42058, Arizona Electric Power Cooperative, Inc. v. Union Pacific R.R. (STB served Aug. 2, 2004) at 2; Docket No. 42057, Public Service of Colorado d/b/a Xcel Energy v. Burlington Northern and Santa Fe Ry. Co. (STB served Aug. 8, 2003) at 1. When parties have ignored such requests, the Board has generally rejected such advances. See, e.g., CPL at 1-2 (“CPL”).

Here, BNSF essentially acknowledges the “newness” of its evidence, but argues that the Board should nevertheless accept it because its version of TDC-6 will provide “additional useful information” and “a more complete record.” Petition at 5-6. Indeed, BNSF even acknowledges that “the Board has not requested BNSF to submit the exhibit” Id. at 5. BNSF’s arguments do not justify the introduction of the new evidence.

The Board has held that the introduction of a new procedure or methodology, when a party has not had an opportunity to respond, is inappropriate. See Docket No. 42051, Wisconsin Power and Light Co. v. Union Pacific R.R. (STB served May 14, 2002) at 5 n.11 (“the introduction of a new procedure for estimating variable MOW costs on rebuttal is inappropriate.”); accord STB Ex Parte No. 347 (Sub-No. 3), General Procedures for Presenting Evidence in Stand-alone Cost Rate Cases (STB served March 12, 2001) 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.”).

Contrary to BNSF’s statements, APS/Pacificorp is prejudiced by BNSF’s exhibit. The Board has recognized that at some point the record must be final or else decisions can never be rendered. CPL at 1. Introducing a completely new allocation of BNSF’s DCF Adjustment after the record is closed is no simple update of data for the Board nor does it allow for proper rebuttal by APS/Pacificorp.

Finally, for all the reasons addressed by APS/PacificCorp in their Rebuttal Statement of Fact and Argument and in their Brief on Reopening filed August 6, 2004, BNSF’s DCF Adjustment is precluded both by applicable law and contract. It is a pointless exercise to engage in any allocation of this adjustment to any of the other issues in dispute. See APS/Pacificorp Reb. Arg. at 11-12. APS/PacificCorp Br. at 3-7.

III.

CONCLUSION

For the foregoing reasons, APS/PacifiCorp respectfully request that the Board deny BNSF's Petition.

Respectfully submitted,

ARIZONA PUBLIC SERVICE
COMPANY
400 North 5th Street
Phoenix, Arizona 85004

PACIFICORP
825 N.E. Multnomah
Portland, Oregon 97232

OF COUNSEL:

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1224 Seventeenth Street, N.W.
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By: C. Michael Loftus 
Christopher A. Mills
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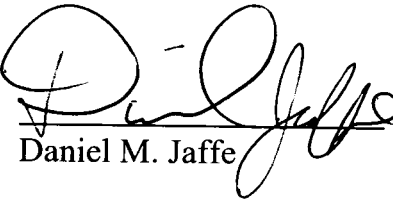
Dated: August 9, 2004

Attorneys for Complainants

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2004, I served a copy of the foregoing Reply to Petition for Leave to File Attached Exhibit by hand upon counsel for Defendant, as follows:

Samuel M. Sipe, Jr., Esq.
Linda S. Stein, Esq.
Brooke L. Gaede, Esq.
Steptoe & Johnson, L.L.P.
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Washington, D.C. 20036-1795


Daniel M. Jaffe



Surface Transportation Board
Washington, D.C. 20423

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Re: Arizona Public Service Co. and PacifiCorp v. The Burlington Northern and Santa Fe Railway Co., Docket No. 41185

Dear Counsel:

By July 20, 2004, the parties are asked to update Exhibit TDC-6, set forth in Arizona's rebuttal testimony, to reflect the final evidence submitted by both parties. (That exhibit identifies the differences in stand-alone cost (SAC) rates between Arizona's opening evidence and BNSF's reply evidence that assumes resourced coal begins in 2007, but does not reflect changes Arizona made in its rebuttal evidence.) The parties shall submit one joint exhibit, with electronic workpapers.

In addition, the parties are asked to provide the following information to the Board (and serve copies on each party to the proceeding) in tabular format, with workpapers:

BNSF

1. The rates BNSF would have the Board prescribe, using its final evidence, from 2003-2008 with and without the proposed capital allocation adjustment advocated by BNSF. (As BNSF has filed two alternative DCF spreadsheets, it should provide this information under both alternatives.)

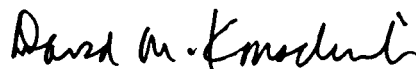
2. The same information as above, but using the inflation forecasts developed by Global Insight and used by the Board in recent SAC cases.¹
3. The same information as above, but using the Global Insight inflation forecasts and including non-McKinley tonnage in the DCF starting in 1997 (as advocated by Arizona), with the associated timing of construction of an expanded interchange at Defiance, NM.

Arizona

1. The rates Arizona would have the Board prescribe, using its final evidence, from 2003-2008 with and without the proposed capital allocation adjustment advocated by BNSF.
2. The same information, but using the inflation forecasts developed by Global Insight and used by the Board in recent SAC cases.
3. The same information, but using the Global Insight inflation forecasts and excluding non-McKinley tonnage in the DCF until McKinley shuts down (one scenario advocated by BNSF), with the associated timing of construction of an expanded interchange at Defiance, NM.

If there is a need to contact me, I can be reached at (202) 565-1651 or at konschnikd@stb.dot.gov.

Sincerely,



David M. Konschnik
Director
Office of Proceedings

¹ See Public Serv. Co. of Colorado D/B/A Xcel Energy v. The Burlington N. & S.F. Ry. Co., STB Docket No. 42057 (STB served June 8, 2004), at 34. The Global Insight methodology was also used but not identified by name in Duke Energy Corp. v. CSX Transp., Inc., STB Docket No. 42070 (STB served Feb. 4, 2004) and Duke Energy Corp. v. Norfolk S. Ry. Co., STB Docket No. 42069 (STB served Nov. 6, 2003).