

13 CHAIRMAN NOBER: Well, I have no further
14 questions, so why don't we turn to Defendants. And
15 thank you, very much for your presentation. You have
16 five minutes left for rebuttal, and I'm sure we'll
17 have some additional questions then.

18 How are you all going to divide up your
19 time, Mr. Sipe, Mr. Meyer?

20 MR. MEYER: Our plan is that I will
21 address the trackage rights issue, initially. I'll
22 turn to Mr. Sipe, who will address revenue allocation

1 issues, and related matters, and then it will come
2 back to me for some operating expense issues.

3 CHAIRMAN NOBER: So you're going to just
4 kind of tag-team it?

5 MR. MEYER: And then back to Sam for DCF
6 and variable costs.

7 CHAIRMAN NOBER: Okay. Well, as soon as
8 we get a --

9 MR. MEYER: We don't really need this,
10 right?

11 CHAIRMAN NOBER: I've found when I do
12 speeches, that they don't work and, instead, they have
13 somebody at the computer and when I point it and push
14 the button, they watch for when I hit my thumb, and
15 just hit the computer screen. Maybe we should just
16 move to that.

17 MR. MEYER: Well, I think we'll get this
18 working momentarily. Just give me the green light.

19 CHAIRMAN NOBER: Are you ready?

20 MR. MEYER: Yes.

21 CHAIRMAN NOBER: Okay.

22 MR. MEYER: Good morning Chairman Nober,

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1 Vice-Chairman Mulvey, and Commissioner Buttrey. My
2 name is David Meyer, on behalf of Union Pacific
3 Railroad Company. With me today is Sam Sipe, on
4 behalf of the Burlington Northern and Santa Fe
5 Railway. We'll be sharing the burden of responding to
6 AEPCO's points and explaining to you why this case
7 ought to be decided in Defendant's favor.

8 I'd like to begin with a question that was
9 of interest to all of the Board members today, and
10 that is the issue of trackage rights, and AEPCO's
11 choice regarding the routing and the design of its
12 stand-alone railroad network.

13 We believe that this case should begin and
14 end with the question of AEPCO's flawed stand-alone
15 railroad network design. Despite the opportunity STB
16 afforded to AEPCO in its November 2003 decision to
17 supplement its case with evidence addressing the
18 stand-alone costs for the portion of the proposed
19 stand-alone network between Vaughn and El Paso, AEPCO
20 did not do so. As a result, there is no evidence in
21 this record -- AEPCO has placed no evidence in this
22 record addressing the key issue underlying this and

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1 any other stand-alone cost case, whether the revenues
2 from the issue traffic cover the full SAC costs of
3 building and operating the entire railroad network
4 needed to handle that traffic.

5 We believe that AEPCO has failed to carry
6 its burden of showing what Mr. Rosenberg described as
7 a salient element of any stand-alone cost case, and we
8 think as a result that AEPCO's stand-alone case must
9 now be rejected and its complaint dismissed.

10 Let me begin by providing a brief overview
11 of the stand-alone network that AEPCO has proposed.

12 Slide, please.

13 What you see here is the actual route of
14 the issue traffic. From the mine in Defiance, New
15 Mexico, through Belen, following a BNSF line south to
16 Rincon, an interchange with the Union Pacific Railroad
17 at Deming, New Mexico, to the power plant at Cochise,
18 Arizona.

19 The line between Belen and Deming is a low
20 density line. AEPCO chose to do away with that line
21 when it rerouted the issue trafficed. As shown here
22 in the next slide -- this is the existing route --

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1 AEPCO chose the blue route, extending the length of
2 haul along BNSF's heavily traffic transcontinental
3 main line, more than 100 miles east of Belen to
4 Vaughn, New Mexico, and extending the length of haul
5 along Union Pacific's southern quarter of
6 transcontinental main line, almost 100 miles east of
7 Deming to El Paso, New Mexico. That left it with a
8 gap of over 200 miles in a stand-alone network.

9 Coal trains from Defiance via Vaughn,
10 could not reach Cochise without connecting between
11 Vaughn and El Paso. AEPCO chose not to build that
12 line. Instead, it asserts that it would be entitled
13 to use truckage rights for over 220 miles between
14 Vaughn and El Paso.

15 This route, by the way, is far inferior to
16 the existing route in every respect. It is far longer
17 in distance, it has considerably more elevation
18 change, considerably more curvature. Trains consume
19 considerably more fuel, and their round trip cycle
20 times are considerably longer. AEPCO went out of its
21 way to avoid building a complete SARR network and to
22 take advantage of these trackage rights. We believe

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1 that that is impermissible. We believe that the route
2 is -- as a matter of law, cannot be relied upon to
3 support a stand-alone cost result in this case.

4 Chairman Nober, you asked what the
5 November 2003 decision meant to the Plaintiffs. Well,
6 to the Defendants, that decision was quite clear. It
7 agreed with the proposition I just stated, that a
8 complainant may not rely on trackage rights of one
9 defendant over another defendant in order to achieve
10 the purposes of a stand-alone cost test which are,
11 after all, to determine the total investment cost and
12 operating cost that the revenues from the issue
13 traffic must recover.

14 That result should not have been
15 surprising to anyone. The coal rate guidelines and
16 the Board -- the ICC's, excuse me -- PEPCO decision
17 from the 1980s made clear that groping for a trackage
18 rights fee that is sufficient to cover the costs of a
19 line, just restates the basic SAC test, but in a
20 different guise. I refer to note 60 in the Coal Rate
21 Guidelines, in particular.

22 In November 2003, therefore, this Board

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1 decided that AEPCO's design was flawed but,
2 nevertheless, allowed AEPCO another chance; one more
3 chance, and it was given an option. It's first choice
4 was to submit new evidence on stand-alone costs, a new
5 case in chief. It's second option was not to do so,
6 but to run the risk that Defendants could establish
7 that the 3.2 mils trackage rights charge was
8 inadequate for purposes of a SAC test, a SAC analysis.
9 Indeed, in the decision the Board noted, just a few
10 sentences before, that it believed that that was
11 likely the case, but the evidence had, up to that
12 point, not addressed the issue.

13 Contrary to AEPCO's suggestion, we think
14 it absolutely clear that the Board did not tell AEPCO
15 that it could choose to stand pat, submitting no
16 additional evidence, and then be entitled to rely on
17 the same trackage rights that the Board had already
18 said did not serve the objective of the SAC test, no
19 matter what evidence the Defendant's put into the
20 record. In the Defendant's supplemental rebuttal --
21 excuse me -- supplemental reply evidence, the
22 Defendant's made the showing contemplated by the

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1 Board's November decision.

2 First, with evidence, we showed that the
3 3.2 mils fee yields only enough revenue to build
4 approximately 12 miles of single track main line,
5 based on very conservative assumptions. Clearly, the
6 3.2 mils trackage rights fee is not sufficient to
7 recover the full SAC costs of building and operating
8 the Vaughn/El Paso line.

9 Second, we showed that no calculation of
10 a, quote, user fee, or trackage rights fee, could
11 shortcut the process of determining the proper stand-
12 alone cost rate ceiling. Why? Because calculating
13 any trackage rights fee begs the ultimate question in
14 the case, as the Coal Rate Guidelines explains.

15 Among the questions that must be asked to
16 even consider what level of trackage rights fee are,
17 what other traffic will share the line? Is it just
18 the issue traffic or is there other traffic that
19 would share the burdens associated with the line?
20 What revenue -- not trackage rights charges, but what
21 revenue would that traffic contribute to the burdens
22 of the line? What are the operating costs associated

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1 with handling that traffic? What facilities does that
2 traffic require to meet existing service requirements,
3 and what is the cost of constructing those facilities?

4 These, and all of the other subsidiary
5 questions in any stand-alone cost analysis, would have
6 to be addressed in order to even begin to understand
7 what the revenue requirement was for the line, and
8 then to go from there to calculate, or attempt to
9 calculate, what an average fee would be to recover
10 that revenue requirement. It really simply restates
11 the stand-alone cost test in different terminology.
12 But here, as in prior cases, the Board made clear that
13 it was AEPCO's responsibility, the shipper's
14 responsibility, not the defendant's responsibility, to
15 present a SAC case. That was what AEPCO was entitled
16 to do, and chose not to do, to present a new SAC case
17 in chief that included all of the elements, all of the
18 salient elements, to use Mr. Rosenberg's term, of any
19 SAC presentation. And certainly one of the salient
20 elements is a complete route, all the way from origin
21 to destination, not one with a 220-mile gap.

22 AEPCO responded to Defendant's reply

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1 evidence with no evidence of its own. First, it
2 criticizes defendant's analysis for failing to take
3 into account the fact that there is other traffic on
4 UP's existing line between Vaughn and El Paso. Well,
5 that's certainly true but, the effort of identifying
6 what traffic should share the stand-alone railroad
7 system as cross-over traffic, precisely what traffic
8 it will be, what the cost of handling that traffic
9 are, what revenues from that traffic will be on the
10 stand-alone cost system, again, simply re-introduces
11 the stand-alone cost analysis, which was AEPCO's
12 entitlement to bring forward in a new case in chief. It
13 did not propose, and still has not proposed, to share
14 the burden of that line with any other traffic.

15 Second, AEPCO simply re-argues the proposition
16 that the Board in the UPSP merger case has considered
17 and adjudicated the adequacy of a 3.2 mils trackage
18 rights charge, or some other charge in the stand-alone
19 cost context. Well, that's simply not the case.
20 There has never been any analysis by this Board of
21 whether any trackage rights fee comports with stand-
22 alone cost principals, other than the analysis in this

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1 case, which determined that a stand-alone cost -- that
2 a fee would not comport with such principals.

3 In a merger case, where the 3.2 mils
4 standard was addressed and UPSP, the question is
5 whether the trackage rights charge is sufficiently low
6 to allow the tenant to compete on a fair -- on a fair
7 basis. There is no consideration of whether system
8 average costs, investment costs, much less line
9 specific costs, relating specifically to the assets
10 needed to handle particular traffic and meet
11 particular service needs, would be met by a 3.2 mils
12 charge, an 8.32 mils charge, a 9.02 mils charge, or
13 any other charge, UPSP's case and Union Pacific's
14 presentation in that case, bears no relationship to
15 any stand-alone cost issue.

16 Again, every calculation was a system
17 average calculation. It did not address the
18 particulars of the line from Vaughn to El Paso, the
19 traffic on that line, and the service needs relating
20 to that line. It did not even address true
21 replacement cost, even in the context of system
22 average cost that it was addressing.

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1 And, finally, a fundamental inconsistency
2 between any trackage rights fee and the Board's stand-
3 alone cost principal, is that a trackage rights fee
4 assumes a proportionate sharing in the burdens of the
5 line by all the traffic on the line. That is not --
6 that is clearly inconsistent with the Coal Rate
7 Guidelines, which recognize that traffic with lesser
8 elasticity would be expected to bear a higher share of
9 the burden of maintaining and operating a line than
10 other traffic.

11 The Board got it right the first time in
12 November 2003. Trackage rights fee in this case does
13 not substitute for stand-alone cost analysis. No
14 trackage rights fee could. And in this case, having
15 come forward with no evidence whatsoever to establish
16 what a stand-alone cost would yield for this line,
17 there is a critical gap -- not only in the route of
18 the issue traffic, but in the case that AEPCO has put
19 on. As a result, their complaint ought to be
20 dismissed.