

UNITED STATES
SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENTS

ARIZONA ELECTRIC POWER :
COOPERATIVE, :
 :
COMPLAINANT :
 :
v. : STB DOCKET No.
 : 42113
BURLINGTON NORTHERN & :
SANTA FE UNION PACIFIC, :
 :
DEFENDANTS. :
 :

Tuesday,
September 28th, 2010

Washington, D.C.

The above-named proceeding
commenced at 9:30 a.m., at the U.S. Surface
Transportation Board, First Floor Hearing
Room, 395 E. Street, S.W., Washington, D.C.

before:

DANIEL R. ELLIOTT III CHAIRMAN
FRANCIS P. MULVEY, VICE CHAIRMAN

CHARLES D. NOTTINGHAM, COMMISSIONER

APPEARANCES:

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CONTENTS

COMPLAINANT'S ARGUMENT BY MR. ROSENBERG6

DEFENDANT'S ARGUMENT BY MR. ROSENTHAL 40

DEFENDANT'S ARGUMENT BY MR. SIPE. 62

COMPLAINANT'S REBUTTAL BY MR. ROSENBERG . . . 74

P-R-O-C-E-E-D-I-N-G-S

9:30 a.m.

CHAIRMAN ELLIOTT: Good morning,
welcome. Today we will hear oral arguments in
the matter of Arizona Electric Power Company
Cooperative v BNSF and Union Pacific, STB
Docket number 42113.

In an effort to move things along
the Board members will not be making opening
remarks this morning, but I wanted to cover a
few procedural matters before we begin.

We have asked each party to make a
short statement of their arguments, and
counsel should be prepared to answer
questions, from the Board, at any time during
your allotted time.

Counsel for Complainant has been
allotted 30 minutes total, and is requested to
open with 25 minutes, and reserve five minutes
for rebuttal.

Counsel for Defendant, BNSF and
Union Pacific have been allotted a total of 30

1 minutes, and have agreed to allocate this time
2 between the two.

3 Speakers please note that the
4 timing lights are in front of me. You will
5 see a yellow light when you have one minute
6 remaining, and a red light when your time has
7 expired.

8 The yellow one minute light will
9 be accompanied by a single chime, and the red
10 light, signifying that your time has expired,
11 will be accompanied by two chimes.

12 Please keep to the time you have
13 been allotted. When you see the red light,
14 and hear the double chime, please finish your
15 thought, and take a seat.

16 Counsel for BNSF and Union
17 Pacific, please inform the Board before you
18 begin your presentations, the amount of time
19 you have opted for, as between the two of you,
20 so that we may set the timer accordingly.

21 Additionally, just a reminder to
22 everyone here, please turn off your cell

1 phones. Counsel for AEPCO, you may now begin.

2 As noted, you have requested 25 minutes, 20
3 for an opening, and 5 for rebuttal.

4 Please step up to the podium,
5 introduce yourself, for the record, and begin.
6 Before you get started, one of the issues that
7 I thought was really important, when I was
8 looking through the briefs, was the recession
9 issue, and how that is dealt with.

10 I noticed that you had used
11 certain numbers and that Defendants had used
12 different numbers. And then there didn't seem
13 like any of the current numbers, where the
14 traffic has spiked back up, had been used.

15 And I was just curious, also, to
16 hear how you thought we should address that,
17 in this proceeding. That, to me, was one of
18 the most important issues that I was looking
19 at going through. Thanks.

20 MR. ROSENBERG: Thank you, good
21 morning. I am Robert Rosenberg, of Slover &
22 Loftus, appearing on behalf of the

1 Complainant, Arizona Electric Power
2 Cooperative, or AEPCO.

3 Let me note that, to my left, is
4 Skip Whitley, who is AEPCO's corporate
5 counsel, and is AEPCO's senior official that
6 currently has direct responsibility for
7 AEPCO's coal supply, and coal transportation
8 matters.

9 By way of brief background, AEPCO
10 is a relatively small, consumer-owned, non-
11 profit rural electrical cooperative. It is
12 directly responsible for supplying power to,
13 roughly, 130,000 homes and businesses,
14 primarily in rural Arizona.

15 To serve those customers, AEPCO
16 burns roughly 1.2 to 1.5 million tons of coal
17 per year, at its Apache Generating Station,
18 located near Cochise, Arizona.

19 AEPCO is a classic captive
20 shipper, as coal can be delivered to Apache
21 only by Union Pacific. This rate case,
22 AEPCO's third, marks the latest chapter in

1 AEPCO's ongoing efforts to obtain reasonable
2 rates for moving coal to Apache.

3 Let me have projected on the
4 screen, a PowerPoint -- there it is. And I
5 have distributed copies, as well, in case the
6 scale is too small in the screen.

7 That is a schematic of AEPCO's
8 stand-alone railroad, which may make it easier
9 to follow some of my comments.

10 AEPCO based its approach, in this
11 rate case, directly on the Board's ruling in
12 AEPCO's prior rate case, as well as other
13 recent Board Orders.

14 In particular, AEPCO constructs
15 the Vaughn-El Paso segment, and does not use
16 the trackage rights approach, disallowed in
17 AEPCO's earlier rate case.

18 Otherwise AEPCO utilizes the SAC
19 approach that it proposed, and the Board
20 approved, in AEPCO's prior rate case.

21 That specifically includes routing
22 the New Mexico traffic via Vaughn-El Paso, and

1 having the reasonableness of the PRB rates
2 determined using a SAR that also handles the
3 New Mexico rates.

4 Neither aspect of AEPCO's
5 presentation should be particularly
6 exceptional. The coal rate guidelines
7 specifically contemplate, and authorize,
8 rerouting traffic over a longer route, to
9 achieve a common use of density.

10 That is what AEPCO has done here.
11 To require the stand-alone railroad to
12 replicate the incumbent's operations violates
13 the "least cost most efficient" essence to
14 stand-alone costing.

15 It also constitutes an
16 impermissible entry barrier. Furthermore,
17 Congress specifies, in the Conference Report
18 to the Staggers Act, that the rate standards
19 for joint rates should be the same as for
20 single line rates.

21 VICE-CHAIRMAN MULVEY: Let me ask
22 you one question. You are adding this traffic

1 to Amarillo, which is pretty far to the east
2 of the existing lines.

3 Is there any limit to how much you
4 can reroute traffic to achieve your traffic
5 densities, or to achieve lower costs? I mean,
6 could you run the thing to South Carolina, for
7 example, then run it back again?

8 Would that be permissible,
9 theoretically?

10 MR. ROSENBERG: Well, first let me
11 make clear that the New Mexico traffic does
12 not go to Amarillo, it goes to Vaughn, and
13 then it has --

14 VICE-CHAIRMAN MULVEY: You are
15 running PRB traffic down there?

16 MR. ROSENBERG: Right, the PRB
17 traffic does go, it is a modest extension, it
18 reflects desirable densities, and there
19 become, I think, practical limits, and also
20 with limits with divisions, would add
21 additional cost.

22 So we think that this extension,

1 here, is well within the realm of
2 reasonableness. And I don't think the
3 railroads have even attacked that element of
4 PRB routing.

5 COMMISSIONER NOTTINGHAM: Mr.
6 Rosenberg, if I could just follow-up on that
7 point? What is it about Amarillo that is
8 attractive, from your perspective?

9 Is it that it is, also, a major
10 east-west intermodal corridor, so you pick up
11 a whole lot more density? Is that one of the
12 features? What else can you tell us about the
13 attractiveness of picking up Amarillo?

14 MR. ROSENBERG: It reflects
15 desirable densities, there are higher
16 densities there than along the other routing,
17 and that it utilizes a higher density network,
18 so it reflects least cost, most efficient
19 principles, as contemplated in the coal rate
20 guidelines.

21 COMMISSIONER NOTTINGHAM: Can you
22 imagine a case where coal traffic is

1 interposed along a very congested, intermodal,
2 primarily intermodal corridor, which to such
3 an extent, would require the railroad involved
4 to actually build out new capacity to
5 accommodate the proposed coal traffic, having
6 a high density coal corridor, and a high
7 density intermodal corridor on limited track
8 capacity, obviously could result in some
9 situations and build out and expansion
10 requirements.

11 How would those types of
12 considerations, or how should they be factored
13 into the economic analysis of a case like
14 this?

15 MR. ROSENBERG: Well, the shipper
16 is effectively required to conduct the
17 simulation, the operation, the railroad, using
18 the RTC program.

19 If the RTC program shows that the
20 railroad doesn't provide reasonable equivalent
21 service, then you need to start adding
22 additional facilities in order for the service

1 to be equivalent, or you look at a different
2 configuration.

3 And, you know, we submitted an RTC
4 simulation, here, and it shows that our
5 performance is, at least, as good and in most
6 respects better than the incumbent's.

7 It is also the case here, and
8 typically there is some traffic that the
9 incumbents have that the stand-alone railroad,
10 the shipper decides not to handle, and that is
11 taken into account in the analysis as well.

12 COMMISSIONER NOTTINGHAM: Thank
13 you.

14 MR. ROSENBERG: I will continue
15 where I think I was.

16 The railroads are not allowed to
17 split their joint through-rate into two parts,
18 and require AEPCO to replicate each part
19 separately.

20 Instead of moving freight from the
21 origins to the Apache destination, in the
22 least cost, most efficient manner, without

1 entry barriers.

2 While the railroads claim that
3 AEPCO's SAR involve some sort of cross
4 subsidy, they make no attempt to back up that
5 claim with a PPL Montana, or other Ottertail
6 type analyses, which is the Board's specified
7 standard for determining if the SAR has an
8 impermissible cross subsidy.

9 Furthermore, about two thirds of
10 the SAR route miles that are used to handle
11 the New Mexico traffic, are also used to
12 handle the PRB traffic.

13 It is, thus, logical and efficient
14 that SAR facilities, used to handle the New
15 Mexico's traffic, are also used to handle the
16 PRB issue traffic.

17 CHAIRMAN ELLIOTT: Quick question
18 about the PRB traffic. Can the plant, at
19 issue, burn the PRB coal, are you aware?

20 MR. ROSENBERG: Yes. Some years
21 ago, around the time of AEPCO's earlier rate
22 case, AEPCO invested a substantial sum in a

1 coal blending facility, at the plant, that
2 enables it to burn a range of coals.

3 And it has received, it has burnt
4 some PRB coal, it has burnt Colorado coal, it
5 has burnt, you know, it is burning primarily
6 New Mexico coal now.

7 You know, the coals each have some
8 desirable characteristics, they have some
9 undesirable characteristics, particularly
10 coal, in certain cases.

11 And the blending facility lets
12 AEPCO mix those coals to achieve an efficient
13 and effective blend.

14 CHAIRMAN ELLIOTT: Thank you.

15 COMMISSIONER NOTTINGHAM: Mr.
16 Rosenberg, if I could follow-up on that?
17 Where does your client get its coal currently,
18 or where is it, predominantly, purchase or
19 source its coal over recent years?

20 MR. ROSENBERG: Well, it has been
21 a mix. Since the most recent contract
22 expired, and AEPCO has been looking at the

1 railroads' rates, and because of other
2 factors, they have been getting coal from New
3 Mexico.

4 Prior to that, under the contract,
5 a good bit of the coal came from the Colorado
6 and, also, from the Powder River Basin, as
7 well as in New Mexico.

8 I think in years past they have
9 taken coal even from Utah, I believe. So it
10 is, you know, it is a function of the markets,
11 and in large part the railroads are in a
12 position to dictate where AEPCO's coal comes
13 from.

14 AEPCO needs a blend that will work
15 in its plants, and it wants the lowest
16 delivered cost, consistent with that, and the
17 railroad prices are a major input into that.

18 COMMISSIONER NOTTINGHAM: When
19 AEPCO requested a tariff rate for the Powder
20 River Basin coal, that triggered this
21 complaint, what kind of volume are we talking
22 about, and what was the source?

1 Was it a specific mine that was up
2 and running, and open, or was it a mine that
3 might have capacity of coal in the future?

4 The record is a little bit
5 confusing on those points.

6 MR. ROSENBERG: Okay. My
7 recollection may be a little bit off. But I
8 think there was, initially, a request for
9 Decker and Spring Creek, they are located in
10 Montana, and I think also mines in what is
11 called the Northern Wyoming basin, the mines
12 that are captive to BNSF.

13 AEPCO also had a request for rates
14 from the southern basin, and also from
15 Colorado. And that is tied up into litigation
16 in Tucson. And that is in New Mexico, one
17 subdocket, so we are not able to prosecute a
18 rate case, as to those rates, at this time.

19 AEPCO also requested rates from
20 the Signal Peak mine, which is located further
21 north. That mine is coming on-line, it is
22 having some issues getting up to full

1 capacity.

2 But that coal has coal
3 characteristics that are very similar to the
4 Colorado coal, or also similar to the coal
5 from the McKinley mine, which is located in
6 New Mexico, and had a higher BTU content, and
7 lower sulphur content and other desirable
8 qualities.

9 And AEPCO hasn't yet taken coal
10 from that mine. Again, there is not a lot of
11 coal that is available for third party
12 purchases, but there stands to be, over time.

13 The way AEPCO designed its stand-
14 alone cost presentation, it doesn't build out
15 to that mine, to allow service to begin from
16 there until 2012.

17 COMMISSIONER NOTTINGHAM: How does
18 that work? You mentioned that the Signal Peak
19 is not on-line, as having some "issues".

20 MR. ROSENBERG: Well, if I could -
21 -

22 COMMISSIONER NOTTINGHAM: I mean,

1 we are trying to work here, to resolve,
2 hopefully, a very real and significant
3 commercial dispute.

4 And I'm worried that part of the
5 dispute might involve something somewhat
6 hypothetical. Not the SARR, that is fine,
7 that is the hypothetical part of the case that
8 is, obviously, built into our process.

9 But a mine that is not actually
10 ready to produce coal, to be delivered, you
11 request a rate for that. What if the railroad
12 had said, we can't give you a rate until we
13 learn more about the mine's operating
14 availability, and whether they are open for
15 business?

16 Would, I mean, would you still be
17 here complaining about that rate? It sounds
18 somewhat a little bit speculative to me. And
19 I know your client has to plan for the future,
20 you can't just wait until you are a week away
21 from running out of coal.

22 You have to be lining up new

1 sources in the future, I understand that. But
2 help me understand and get a little more
3 comfortable with the Signal Peak situation.

4 MR. ROSENBERG: Okay, well it is
5 not -- I don't think the situation is nearly
6 as speculative as your questions might
7 indicate.

8 The mine is operating, BNSF is
9 hauling coal from that mine. It hasn't hit,
10 I think, the 10 million tons a year that is
11 the -- that is what is projected.

12 But a lot of money has been
13 invested, the mine is operating, I think there
14 is coal that is going to First Energy in Ohio,
15 who was the big investor in the mine.

16 We did request a rate, we did get
17 a rate. You know, we would be able to, you
18 know, if we entered into a contract we would
19 be able to ship it now.

20 In part because of the
21 arrangements we entered into, AEPCO entered
22 into when the rate case was starting, based

1 upon the coal market conditions at this time.

2 And some of this is, you know, is
3 frankly of a highly confidential nature, and
4 I don't want to be disclosing all the details.
5 It is explained in our evidence.

6 AEPCO doesn't anticipate, if
7 things happen, if there are force majeure
8 events, if production doesn't occur, AEPCO may
9 take the coal before then.

10 But it becomes, you know, more and
11 more of a material need, starting in 2012.
12 And, again, we do have the rate, and there is
13 coal that is moving, that BNSF is handling,
14 that moves from that mine to other
15 destinations.

16 COMMISSIONER NOTTINGHAM: Okay.
17 And just to finish this line, and I want to
18 let you get back to your time. But what type
19 of volumes are we talking about?

20 Did you order a car load or two
21 for a test burn, or was this a request for
22 unit train service of coal over a long period

1 of time?

2 I'm trying to understand the type
3 of transaction we are talking about here.

4 MR. ROSENBERG: Okay. AEPCO has
5 had at least two trainloads, I believe, from
6 the Decker Mine. Again, AEPCO has stockpiled,
7 until the time that it is, from when this
8 earlier contract was in effect, coal from
9 McKinley and also coal from Colorado, that is
10 very useful to AEPCO operationally.

11 So there have been trainloads.
12 There may be more before its current New
13 Mexico contract runs out, depending on
14 production, depending on burn levels, and
15 those factors.

16 COMMISSIONER NOTTINGHAM: So there
17 have been two trainloads delivered from the
18 Decker mine?

19 MR. ROSENBERG: I believe so, yes.

20 COMMISSIONER NOTTINGHAM: Any
21 other trainloads delivered under this tariff
22 from the Powder Basin mines?

1 MR. ROSENBERG: Not, I don't
2 believe so. I could be off by a trainload or
3 two, but I think that is correct.

4 COMMISSIONER NOTTINGHAM: These
5 would be unit trainloads? I mean entire
6 trains.

7 MR. ROSENBERG: Yes, it is a unit
8 train that goes up there, it comes back, then
9 it heads someplace else.

10 COMMISSIONER NOTTINGHAM: Thank
11 you.

12 VICE-CHAIRMAN MULVEY:
13 Commissioner Nottingham makes a point that
14 SAR, after all, is a hypothetical railroad, we
15 deal in hypotheticals.

16 But it strikes me that there
17 should be some attempt to show that the
18 railroad that you propose, the SAR, should
19 have some semblance to a real world operation.

20 I have a question as to whether
21 the SAR that is proposed to be constructed has
22 24 interchanges and, yet, it doesn't have any

1 switches built into it.

2 You would expect the SAR to be
3 interchanging traffic with connecting
4 carriers. But the assumption is that there
5 really aren't any, that it is basically a
6 bridge carrier.

7 How are we supposed to look at the
8 SAR that you have created it and consider it
9 a kind of real world operation?

10 I mean you, for example, use the
11 URCS cost of the Defendant, which is based
12 upon coal traffic. And yet your SAR will
13 carry mostly intermodal traffic, unless I'm
14 mistaken.

15 So could you reconcile your SAR
16 with real world operations, and why we should
17 accept that SAR?

18 MR. ROSENBERG: Well, the SAR
19 reflects the facilities that AEPCO utilizes,
20 and AEPCO is a unit train shipper. It also
21 reflects other traffic, grouped together,
22 consistent with the coal rate guidelines.

1 You know, to serve AEPCO you don't
2 need to switch individual car loads. The
3 segments that AEPCO utilizes handle New Mexico
4 Vaughn train loads, and AEPCO basically
5 captures, in its SAR the facilities that are
6 needed to handle its traffic, and other third
7 party traffic that is efficient and cost
8 effective.

9 You mentioned the 24 interchanges.
10 I think a number of those are probably the
11 coal mines, and that points where it
12 interchanges with other carriers.

13 But it does have the interchanges
14 where it takes trainloads intact, and moves
15 them on. That is the portion of the system
16 that AEPCO utilizes, to require the SAR to
17 engage in individual trainloads, and other
18 sorts of things, is to require AEPCO to have
19 to cross-subsidize the Defendant's other
20 traffic.

21 And the grouping principle is, the
22 coal rate guidelines say that that is key to

1 contestable markets. And that is what a
2 railroad is built around.

3 If you go down to, say, where the
4 power plant is at Cochise, Arizona, and you
5 look at UP's main line, you will see all of
6 these large trains moving past it, and moving
7 to or from El Paso, and then moving up to
8 Vaughn.

9 That is the traffic in the area,
10 that is the traffic that AEPCO incorporates,
11 and that is what the coal rate guidelines say
12 to do. That is what contestable markets say
13 to do.

14 To require AEPCO to take on other
15 things, is to impose an entry barrier, and to
16 undermine the least cost, most efficient
17 principle.

18 VICE-CHAIRMAN MULVEY: Thank you.

19 CHAIRMAN ELLIOTT: Would you mind
20 -- I know you have been peppered with
21 questions since you got out of the box.

22 But I'm still very curious about

1 how we are going to deal with the recession.
2 And my understanding is that you received some
3 data, pre-recession, you have done your
4 numbers, and then the railroad came along and
5 made some adjustments for the recession.

6 There are some arguments that
7 there might have been some cherry picking.
8 And then, also, there is another argument that
9 the recent uptick in numbers have not been
10 addressed.

11 And what I'm concerned about, you
12 know, if we keep going along, and along, that
13 this case could drag out farther.

14 And I was wondering, I mean,
15 obviously the recession occurred. What is
16 your idea of the best way to deal with those
17 numbers, the uptick and, obviously, the pre-
18 recession good numbers?

19 MR. ROSENBERG: Well, let me
20 contrast what AEPCO did with what the
21 railroads did. What AEPCO did is, of
22 necessity, we worked with the data and the

1 forecast that the railroads provided, as well
2 as other publicly available data.

3 The last complete set of data that
4 the railroads provided, went through the first
5 quarter of 2009. That is what we worked from
6 in devising our traffic route.

7 And then we used a combination of
8 railroad forecasts and other public
9 information, to forecast what would happen.

10 And, you know, that shows a
11 decline in 2Q through 4Q '09. And we reflect
12 that. And then we use the original forecast
13 that we put together, as adjusted for, you
14 know, certain technical errors, and certain
15 additional information provided, of a
16 different sort.

17 What the railroads purport to have
18 done, is to have selected their own traffic
19 route, including the earlier data, but also
20 data from 2Q '09 through 4Q '09, which is more
21 recent, except that they did not provide that
22 data in a complete manner, they didn't put it

1 in the record.

2 So they put together a traffic
3 route but we, frankly, don't have the data to
4 see what is in it, and what is not in it.
5 However, from what we can discern, it is
6 incomplete.

7 It was selected in a manner that
8 truncated our traffic route selection, and it
9 doesn't take into account when, you know, to
10 a full extent when traffic moves, you know, it
11 switches to move from a different origin to
12 the same destination, or from the same origin
13 to a different destination, or involves new
14 origins, or destinations.

15 That is part of the flexibility,
16 that reflects the operation of the market.
17 And their analysis truncates that. And other
18 examples, they tried to get something similar
19 to our traffic route, but they say they have
20 taken the case of the BNSF non-coal trains.

21 They do it by the train symbol.
22 But they include a train symbol only if 90

1 percent of a particular train symbol was
2 included in AEPCO's traffic route.

3 So, for example, if AEPCO included
4 89.6 percent of trains with a certain symbol,
5 they discard those trains altogether. So they
6 end up with a different traffic route.

7 And, again, they didn't produce
8 the data, so we can't tell what is in it.
9 Again, AEPCO went on a train by train basis,
10 deciding which trains to include, which trains
11 not to include.

12 For example, if the train had an
13 external reroute, AEPCO would exclude that
14 train. You know, everything suggests that the
15 railroads didn't engage in that process, they
16 engaged in something more simple, more
17 arbitrary, and that yields a more favorable
18 answer to them.

19 But even if they had done it
20 properly and, again, our position is that they
21 didn't, they simply took the favorable data
22 that was available to them, in this case data

1 showing 2009 decreases, but they ignored more
2 recent data, and you can, you know any of the
3 Wall Street analysts, things showing the
4 increase in double digits, double digit
5 increases in traffic, in 2010.

6 So they engaged in this selective
7 updating, which is asymmetric, and unfair.
8 And our point is that if they took all the
9 evidence, into account, it would show our
10 initial forecast as reasonable, and even
11 conservative, particularly looking at how the
12 railroad's volumes, revenues, and profits are
13 recovering.

14 VICE-CHAIRMAN MULVEY: I have a
15 procedural question. You mentioned the
16 construction of your traffic group. And I
17 gather that you were not happy with the
18 discovery process, that you felt that BNSF was
19 too slow, or didn't give you all the
20 information you needed to build your traffic
21 group.

22 Is that correct? And, if so, why

1 didn't you petition the Board for a motion to
2 compel, so that they would have to give you
3 the data, if you thought that their responses
4 were insufficient?

5 MR. ROSENBERG: Okay. We got
6 enough data to work from, from the 2Q '08
7 through 1Q '09 period.

8 What our objection is, primarily,
9 in our evidence is to the railroads' effort to
10 rely on the 2Q through 4Q '09 data, that
11 hadn't been provided to us previously, and
12 they did not provide it in their work papers.

13 As a consequence we could not work
14 from it. Frankly, if they had done it, then
15 in order to select, you know, to devise our
16 traffic route, we would have had to have done
17 what we did with the initial evidence, which
18 was to go trainload by -- we would have to go
19 car by car, train by train, and assemble a
20 whole new traffic route.

21 That would take a number of
22 additional months. We couldn't have done it

1 in the initial procedural schedule, it
2 entailed enormous expense.

3 And then after we did that, then
4 the railroads would claim that it was a new
5 traffic route, they would want to put in some
6 sort of rebuttal, and then we would have to
7 respond to that.

8 So we would be in this perpetual
9 game of catch-up, and it would endanger our,
10 or the Board's ability to comply with the
11 three year deadline.

12 I will also say that discovery
13 never goes as smoothly and as quickly as we
14 would like in a rate case. But our objection
15 here is to their, you know, selective use of
16 data that was not even put into the record.

17 But it is clear that they didn't
18 use the sort of process that the shipper is
19 required to utilize.

20 VICE-CHAIRMAN MULVEY: Thank you.
21 Over the past six years, I have noticed that
22 the discovery process doesn't always go

1 smoothly.

2 I want to point out that the
3 members had some questions prepared by staff.
4 I have seven pages of questions in front of
5 me, and I was just wondering if the Chair
6 would want to continue a little bit longer on
7 this, because there is so much to ask.

8 CHAIRMAN ELLIOTT: Sure, I know.
9 Commissioner Nottingham has questions, also.

10 COMMISSIONER NOTTINGHAM: Is it
11 fair to say that we will have the opportunity
12 to ask questions as --

13 CHAIRMAN ELLIOTT: He is going to
14 come back on rebuttal.

15 COMMISSIONER NOTTINGHAM: I have
16 one follow-up on that point. We, obviously,
17 take very seriously, here at the Board any
18 assertion that a party has withheld
19 information during discovery.

20 And I know, I assume that we have
21 many practitioners observing this proceeding,
22 and I want to make sure they all know that if

1 you are ever in a dispute, pending before the
2 STB, and you think another party is not being
3 forthcoming discovery, what you do is you
4 reach out to the Board and file the
5 appropriate motions to compel that
6 information, if you think it is actually
7 important to your client.

8 In this case I'm hearing that
9 maybe you felt it wasn't important because you
10 had already made up your mind that there was
11 one time period that you wanted to capture for
12 your base period, because, perhaps, it
13 reflected a peak, economic peak level of
14 traffic. And no matter what the other
15 parties, or the Defendants provided or didn't
16 provide in the way of more recent data, that
17 wasn't of use to you.

18 And so I guess what I'm asking you
19 is why are you complaining about that, if you
20 had no intention of using the contemporaneous,
21 more recent data that the railroads, at least
22 in part, provided?

1 MR. ROSENBERG: I'd like to -- I'm
2 forced to take issue with your
3 characterization. Once we had finally gotten
4 a complete set of data that we could work
5 with, that includes revenue tapes, it includes
6 train movement, it includes car data.

7 And we need to take it apart, put
8 it together, and assemble. We had gotten the
9 data through 1Q '09. That gave us a complete
10 set, and we started working with it.

11 It takes a considerable period of
12 time, and we put our evidence in, and I think
13 it was, I think it was January of 2009, and we
14 worked, as quickly as we could, putting the
15 data together.

16 Also doing the RTC simulation.
17 That was timely with what we had at the time.
18 It had taken us a good bit of time to get the
19 complete data that we had, and we worked from
20 it in a reasonable manner.

21 And we had complete data, and we
22 were able to proceed with our case, that had

1 already been delayed. We are conscious of the
2 three year limit.

3 The recession did not start in
4 2009, it started in 2008, and we reflected
5 that data. We relied on things that reflected
6 it. We believed then, and we still believe
7 now, that we had made an accurate estimate of
8 long-term trend.

9 You know --

10 COMMISSIONER NOTTINGHAM: Mr.
11 Rosenberg, if I could -- thank you, I think
12 you have responded. I just want to make sure
13 I understand.

14 Your client got all the data it
15 needed to bring the case that you felt you
16 wanted to bring, is that correct?

17 MR. ROSENBERG: We got enough data
18 that we could work with comfortably, yes.

19 COMMISSIONER NOTTINGHAM: Because
20 if you hadn't, if your client was going to be
21 disadvantaged, you would have obviously come
22 to the Board.

1 You are no stranger to our
2 process. You would have come and asked for
3 relief, correct?

4 MR. ROSENBERG: Well, we try not
5 to come to the Board unnecessarily. We try to
6 work with opposing counsel, frankly. And in
7 most cases we are able to compromise and work
8 it out.

9 We have both been through this a
10 number of times. If we can come to a
11 reasonable accommodation, we do so. You know,
12 the objection here is that they put in their
13 reply evidence, and they don't provide the
14 data to back it up.

15 Plus the analysis that they do
16 does not comport with how a shipper would go
17 about selecting its traffic route. It is
18 defective data wise, it is also defective
19 analytically.

20 COMMISSIONER NOTTINGHAM: Do you
21 have that this purported lack of some data is
22 important enough for the Board to make sure

1 that we take action to correct and fill out
2 the record?

3 Or is this a non-issue? I'm just
4 trying to understand. You are sort of saying
5 on the one hand it is a non-issue, because you
6 were able to bring the case you wanted to
7 bring.

8 But then you are saying, on the
9 other hand, you are actually concerned that
10 the Defendants allegedly didn't provide all
11 the information that you might have wished
12 they had provided.

13 Do we need to -- what do you
14 suggest that the Board do about this?

15 MR. ROSENBERG: I suggest that the
16 Board look at the evidence that is presented,
17 and utilize the best evidence of record, which
18 is our evidence.

19 I'm certainly not suggesting that
20 we go through another year, or so, of delay to
21 have us reassemble a traffic route from more
22 recent data, and then have three more rounds

1 of evidence.

2 AEPCO is a mid-sized shipper, it
3 doesn't deserve a process like that.

4 COMMISSIONER NOTTINGHAM: Thank
5 you.

6 CHAIRMAN ELLIOTT: Thank you, Mr.
7 Rosenberg.

8 Now counsel for BNSF and Union
9 Pacific, please step up to the podium in the
10 order you have agreed to, introduce yourself
11 for the record, and state the amount of
12 allocated time that you will be using.

13 MR. ROSENTHAL: Good morning. My
14 name is Michael Rosenthal, I represent Union
15 Pacific Railroad Company, and I plan to use
16 about 20 minutes of the Defendant's time.

17 Mr. Sipe, who represents BNSF
18 Railway Company will use the remaining time.

19 I plan to focus on the issues
20 presented by AEPCO's use of a hypothetical
21 interchange point between BN and UP. Mr. Sipe
22 will provide BN's perspective on that issue,

1 and he will also address the treatment of
2 Southwestern Railroad, and jurisdictional cost
3 calculations, and both of us will be happy to
4 answer your questions on other issues.

5 We think the central question in
6 this case is whether AEPCO can base its stand-
7 alone cost presentation on the premise that
8 the Defendant's interchange their traffic
9 somewhere other than the points that are part
10 of the challenged rates.

11 We think the answer is no, for two
12 reasons. First, the answer is no because the
13 interchange point is an essential part of a
14 joint rate, and the statute requires the Board
15 to determine the reasonableness of the actual
16 rates that carriers establish.

17 AEPCO's stand-alone cost
18 presentation is premised on different
19 interchange points than UP and BN established
20 for the issue traffic.

21 So the Board can't determine, from
22 AEPCO's evidence, whether the challenged rates

1 are reasonable.

2 Second, the answer is no because
3 disregarding the actual participation of each
4 Defendant, in the issue traffic, produces a
5 meaningless stand-alone cost analysis.

6 Rather than address the cost
7 associated with the Defendant's actual
8 responsibilities for transporting the issue
9 traffic, and the revenue available to cover
10 those costs, AEPCO presumed that one Defendant
11 displaces the other for significant portion of
12 the routes.

13 And as a result its stand-alone
14 cost presentation does not address whether the
15 rates, for the services provided, are
16 reasonable.

17 Let me try to explain how we get
18 to these points. The tariff governing the New
19 Mexico issue traffic, specifically identifies
20 the interchange point between BN and UP, as
21 Deming, New Mexico.

22 The tariffs governing the Wyoming

1 and Montana issue traffic identify the
2 interchange points as Pueblo, Colorado.

3 In the real world BN moves the New
4 Mexico issue traffic east to Belen, New
5 Mexico, and south to Rincon, and the
6 Southwestern Railroad, which interchanges the
7 traffic at Deming with UP.

8 UP then carries the traffic to the
9 Atlas Plant and Cochise.

10 VICE-CHAIRMAN MULVEY: Excuse me,
11 doesn't the Board's policies allow the
12 Complainant to reroute the traffic to create
13 the most efficient line?

14 And isn't that what they have
15 done? I mean, in their rerouting of traffic,
16 one would presume it could cause a change in
17 the interchange points?

18 MR. ROSENTHAL: The Board's rules
19 allow the rerouting of traffic. But that is
20 not just what has happened here.

21 What has happened is the
22 Complainant, AEPCO, has presumed a change in

1 the Defendant's responsibilities for handling
2 the issue traffic. And that brings, with it,
3 a change in the traffic that can be part of
4 the issue traffic group.

5 And that causes a major distortion
6 in the stand-alone cost analysis. This isn't
7 simply a question of rerouting the issue
8 traffic, it is a change in the Defendant's
9 responsibilities, it is a change in the rate,
10 and it is a change in the traffic group.

11 VICE-CHAIRMAN MULVEY: Do you
12 think the Board needs to be more specific as
13 to what it is going to call permissible
14 reroutings, and changes, in creating a SAR?

15 Or do you think the Board's rules
16 and regulations right now are fine, and it is
17 just that you feel that the Complainant has
18 abused them?

19 MR. ROSENTHAL: Well, I think the
20 Board's precedent is clear that rerouting is
21 one thing, and assuming that the traffic and
22 revenues of one carrier are available to the

1 other carrier, when in the absence of some
2 sort of cost-sharing, or revenue-sharing
3 arrangement.

4 I think the Board has
5 been clear in its precedent where the line is,
6 and what makes for a sensible cost test. This
7 case presents the problem in a slightly
8 different light than in prior cases.

9 But I think the lines were drawn
10 by the prior cases, and the precedent is out
11 there.

12 VICE-CHAIRMAN MULVEY: Thank you,
13 that is fine.

14 MR. ROSENTHAL: I was showing the
15 routes, and I don't have to go through them.
16 But what is happening is that we have the real
17 world interchanges, again, at Deming and at
18 Pueblo.

19 And the problem, the reason we are
20 where we are in this case is because AEPCO
21 knows what would have happened if it had based
22 its stand-alone cost presentation on the

1 actual service provided by the Defendants.

2 We did the analysis, and AEPCO
3 essentially concedes that if you had done the
4 stand-alone cost analysis, based on the actual
5 routes, the Board would have to dismiss the
6 case.

7 So essentially AEPCO tries to
8 avoid the result by disregarding the
9 challenged rates. And it is easier to see and
10 understand what AEPCO has done, by looking at
11 a simplified schematic of the routes, which we
12 have prepared.

13 Essentially, AEPCO developed its
14 stand-alone cost presentation, as though BN
15 and UP interchange all of the issue traffic at
16 Vaughn, New Mexico.

17 So for the Wyoming and Montana
18 traffic, AEPCO presumed a change in the end
19 point of BN's responsibility from Pueblo to
20 Vaughn. And it used that new end point to
21 justify taking BN's non-issue traffic, moving
22 south of Pueblo, and using that revenue to

1 offset what are, actually, UP's costs to move
2 the traffic from Pueblo to Vaughn.

3 And this BN's non-issue traffic
4 includes huge volumes of intra-modal traffic,
5 moving over BN's transcon line, through Vaughn
6 and Amarillo.

7 The answer to Commissioner
8 Nottingham's question about what was so
9 attractive about Amarillo? But this is
10 traffic, it is transcon traffic, it is traffic
11 that in the real world shares no facilities
12 with the issue traffic.

13 And it is not actually available
14 to cover UP's costs to handle the traffic
15 south of Pueblo. You see, essentially, the
16 same thing with the New Mexico route.

17 AEPCO presumed the change, in the
18 end point of the end responsibility for the
19 New Mexico issue traffic to Vaughn, and used
20 the new endpoint to justify taking revenue
21 from UP's non-issue traffic, moving between
22 Vaughn and Deming, and using that revenue to

1 offset what are actually BN's costs to
2 transport the issue traffic between Billing
3 and Deming.

4 And AEPCO tries to defend this by
5 saying that what it is doing is that it has
6 just rerouted the issue traffic as permitted
7 by coal rate guidelines, but as I addressed
8 this with Vice-Chairman Mulvey, it didn't
9 simply reroute the traffic.

10 It presumed the change in BN's and
11 UP's responsibilities for transporting the
12 traffic and, therefore, a change in the
13 traffic and revenue that are available to
14 offset the costs of the issue traffic.

15 And so what you ultimately have is
16 AEPCO's stand-alone cost presentation, that is
17 based on service the Defendants don't provide,
18 it relies on traffic and revenue that do not
19 pay, and cannot be expected to pay for the
20 costs of the service that are actually being
21 provided.

22 And the result is that AEPCO's

1 stand-alone cost analysis can't be used to
2 address the critical issue in a stand-alone
3 cost case, which is whether the issue traffic
4 is cost subsidizing portions of the
5 Defendants' network that it doesn't use.

6 And this approach conflicts with
7 the statute, and with the purpose of the
8 stand-alone cost test. The statute recognizes
9 that an interchange point is an essential part
10 of the joint rate.

11 Section 10703 expressly recognizes
12 that the rate established by the carriers, for
13 intra-line transportation, is applicable to a
14 specific through-out, that the carries
15 established.

16 And the establishment of the
17 through-out necessarily entails the
18 specification of an interchange point.

19 So by presuming different
20 interchange points, and the carriers
21 established, AEPCO is, essentially, asking the
22 Board to regulate non-existent rates.

1 And under section 10751, the
2 Board's rate -- reasonableness jurisdiction
3 extends only to a rate established by a rail
4 carrier.

5 Under Section 10704(a), the Board
6 may prescribe a maximum rate, only after it
7 determined that a rate charged, or collected,
8 by a carrier is unreasonable.

9 And that is not what AEPCO is
10 challenging.

11 COMMISSIONER NOTTINGHAM: Mr.
12 Rosenthal, if I could ask -- you are arguing
13 about the cross subsidy and the importance of
14 cross subsidy in our analysis.

15 Are you, basically, arguing that
16 as long as there is no cross subsidy any rate
17 would be valid?

18 MR. ROSENTHAL: Well, what we are
19 arguing, there are different ways that tests
20 of carriers rates can be constructed within
21 constrained market pricing.

22 The test that AEPCO chose to

1 proceed under, in this proceeding, the stand-
2 alone cost test, requires AEPCO to show that
3 Defendants are using its rates to cross
4 subsidize portions of the network that AEPCO
5 isn't using.

6 So what we are saying is that
7 under the test that AEPCO chose to proceed
8 with, they haven't proven their case.

9 COMMISSIONER NOTTINGHAM: If I
10 could just follow-up? We get different types
11 of cases, obviously. One recent hearing we
12 had that resulted in actually a settlement,
13 recently, involved the possibility of barge
14 alternative.

15 How would your analysis on the
16 interchange argument, and maintaining the
17 existing interchange, work if the shipper
18 proposed a barge operation as an alternative
19 to the joint, the joint line rail service?

20 MR. ROSENTHAL: That is a good
21 question. And it highlights that there are,
22 really, two different issues going on here.

1 It highlights what the key issue is in this
2 case.

3 And the key issue is traffic
4 selection, in a stand-alone cost case, and
5 traffic grouping.

6 And one of AEPCO's points is the
7 Board's rules might allow barge, the Board's
8 rules might allow a Complainant to build a
9 coal slurry pipe line.

10 But even in that case you would
11 still have the question of what traffic do you
12 include in the traffic group, what traffic is
13 part of this, what revenue should we include?

14 And just, you know, to take a wild
15 example. If it was a coal slurry pipeline,
16 AEPCO wouldn't be carrying a lot of the
17 intermodal traffic, in this case, that is
18 having a major effect on the rates.

19 So I think the issue is still
20 there, it is still the one that we are focused
21 on, which is which traffic is part of this
22 case? And what we are saying is that AEPCO,

1 by rerouting, can't circumvent the Board's
2 usual rule that you can't use traffic and
3 revenues of one carrier, to offset the costs
4 of another, absent some sort of revenue
5 sharing arrangement.

6 VICE-CHAIRMAN MULVEY: On this
7 interchange point, again, couldn't UP and BNSF
8 simply have offered individual rates to the
9 interchange? So that from A to B is the BNSF
10 rate, and B to C the UP rate?

11 If the rates are the rule 11
12 rates, rather than joint rates, could the
13 rates have been separately challenged, and the
14 argument to move the interchange could not be
15 made, is that correct?

16 You had the option was to have
17 separate rates to the interchange, did you
18 not?

19 MR. ROSENTHAL: I think that is
20 right. I mean, if you talk about how carriers
21 could react, there are different ways of
22 setting rates under the Board's rules, under

1 10701(c), carriers generally have the
2 initiative to establish any rate that is
3 lawful.

4 And, presumably, they could have
5 structured something different that would
6 have, you know, perhaps established, even more
7 firmly.

8 Although the tariffs, here,
9 specify the interchange point. And the
10 Board's rules say you have to challenge from
11 origin to destination. So I'm not sure that
12 the practical result would have been
13 different.

14 But if what you are saying is the
15 carriers could have made this even clearer,
16 and --

17 VICE-CHAIRMAN MULVEY: Had you
18 done that they could not have moved the
19 interchange point, because the rate was to the
20 interchange point, and from the interchange
21 point to the mine.

22 MR. ROSENTHAL: I don't think they

1 can move the interchange point in this case,
2 either. I think the Board's rules are pretty
3 clear, and the statute is pretty clear, that
4 you've got, that the interchange point is part
5 of the rate, and you have to challenge the
6 rate.

7 And anything else is -- it just
8 gets you into a manipulation of revenues and
9 costs. And, as I have said, the Board has
10 addressed it, it addressed it in the first
11 AEPCO case.

12 It said that you can't pretend
13 that the revenues of one carrier are available
14 to the other. It goes beyond the creativity
15 that parties are allowed in designing the
16 stand-alone cost railroads, and it distorts
17 the SAC analysis.

18 It doesn't tell you whether the
19 rate that Union Pacific and BNSF established
20 for this traffic is reasonable. And that is,
21 ultimately, the purpose of this test.

22 VICE-CHAIRMAN MULVEY: Thank you.

1 MR. ROSENTHAL: So you know --
2 yes?

3 CHAIRMAN ELLIOTT: Mr. Rosenthal,
4 sorry. Just so that you don't run out of
5 time, I would be interested in what you are
6 thinking. I assume that you think, with
7 respect to the recession, we heard Mr.
8 Rosenberg's piece, that we assume that you
9 think that your evidence is the best evidence
10 of record.

11 And I did notice, assuming that we
12 accept it, we take into consideration
13 recession, in the way you suggest, that there
14 has been this uptick.

15 And I'm also very aware of Mr.
16 Rosenberg's concerns that we don't want to go
17 through this all again.

18 Is there any there other
19 information, out there, possibly that we can
20 use, to maybe take some of this into
21 consideration?

22 MR. ROSENTHAL: Let me just try to

1 go through this a little more systematically.

2 CHAIRMAN ELLIOTT: Thank you.

3 MR. ROSENTHAL: I want to address
4 your concerns. First, both parties recognized
5 that there was a recession, and that the
6 traffic levels in 2009 were less than some
7 early forecasts that were produced, by the
8 parties, in discovery predicted.

9 Both parties recognized that we
10 were starting with a traffic base that was
11 based primarily in 2008, with the first
12 quarter of 2009.

13 So both parties tried to make an
14 adjustment. What AEPCO did, and I'm
15 characterizing it, and you can try to follow
16 it in their evidence, it is a bit difficult.

17 But they looked at what the
18 projections were, this sort of pre-recession
19 projections were. Then they looked at the
20 overall traffic result in 2009, and tried to
21 make an assumption that if the carriers had
22 predicted something pre-recession, you could

1 apply essentially the same presumptions in
2 reverse to what the traffic would have done
3 given the recession.

4 And what we said is, we think
5 there is an easier way. We think you can
6 focus on the traffic that actually moved in
7 2009, look at the actual lanes involved, and
8 see how traffic changed.

9 So we both tried to make an
10 adjustment. AEPCO seems to have a
11 misunderstanding of what the railroad's tried
12 to do.

13 We didn't try to select a new
14 traffic route. What we tried to look at were
15 origin and destination pairs that had traffic
16 moving in both periods and say, what happened
17 to the traffic?

18 We tried to develop an index and
19 scale it up or scale it down. And Mr.
20 Rosenberg says, well, we wouldn't have
21 accounted for new traffic, traffic that wasn't
22 in the first period, but suddenly appeared in

1 the second.

2 And in our response is, well that
3 is true, but we also took out of our analysis
4 traffic that existed in the first period, and
5 completely disappeared in the second period.

6 This isn't perfect. But what we
7 ended up focusing on were changes in volume
8 for lanes where there was traffic in both
9 periods.

10 It may not be a perfect
11 adjustment, neither was perfect. But we think
12 that by focusing on the traffic, and the
13 lanes, rather than using pre-recession
14 forecasts, and system average traffic, we
15 think we got a better estimate.

16 With regard to post 2009 data, you
17 know, it is a separate issue. There were
18 separate data used to project what would
19 happen in 2009, and what would happen after
20 2009.

21 After 2009, again, there were
22 projections, there were forecasts in the

1 record produced by the railroads. AEPCO chose
2 one, I don't want to get into highly
3 confidential information, but there were
4 different forecasts with different predictions
5 about the pace of economic recovery.

6 AEPCO chose one, the railroads
7 agreed with the choice, and we moved on with
8 the case. And whether that forecast, which
9 projected things out a number of years, not
10 just to 2010, but I believe, it may be highly
11 confidential, but for a number of years.

12 Whether that forecast will prove
13 true, or false, it is much too early to say,
14 it is much too early to say.

15 CHAIRMAN ELLIOTT: So the
16 railroads actually agreed with AEPCO's
17 approach to the uptick?

18 MR. ROSENTHAL: The railroads
19 produced several forecasts of what traffic
20 would do. The forecasts were based on post-
21 recession assumptions, when the recession
22 would end, how quickly traffic would recover.

1 AEPCO picked one, the railroad
2 said fine. So for future projections there
3 was, really, no disagreement about the source
4 of the data.

5 And for the 2009, both parties
6 recognized that there needed to be an
7 adjustment. The question was, the methodology
8 of making the adjustment.

9 CHAIRMAN ELLIOTT: But the basis
10 of the assumption, and the basis of the
11 traffic both differ. In other words, BNSF,
12 UP's base, and AEPCO's base, from which the
13 growth and traffic would take place differ, is
14 that not true?

15 MR. ROSENTHAL: There is a slight,
16 there is a difference in base. There were
17 sort of two separate issues. One had to do
18 with coal traffic, one had to do with non-coal
19 traffic.

20 For the coal traffic what AEPCO
21 actually did, in rebuttal, was we had
22 criticized their use of April 2009 data, April

1 2009 projection.

2 In the rebuttal they switched to a
3 2010 data source that actually took into
4 account the effects of the recession.

5 So for coal there is, actually,
6 much less of a difference between the parties
7 than there was at the beginning. For non-
8 coal, it really is a different methodology of
9 how to account for what happened in 2009.

10 We didn't try to construct a new
11 traffic group. We tried, like AEPCO did, to
12 index it. We just used a different data
13 indexing process.

14 CHAIRMAN ELLIOTT: Thank you, Mr.
15 Rosenthal. Mr. Sipe?

16 MR. SIPE: Good morning, Chairman
17 Elliott, Vice-Chairman Mulvey, and
18 Commissioner Nottingham.

19 My name is Sam Sipe, I'm here
20 today on behalf of BNSF Railway. I have three
21 points I would like to make this morning, in
22 the ten minutes allotted to me.

1 First, BNSF emphatically concurs
2 that the interchange issue that Mr. Rosenthal
3 has addressed in some detail, is the key to
4 this case.

5 It will determine the outcome.
6 Some of the other issues that you have
7 identified here this morning are important
8 and, of course, should be properly resolved
9 for purposes of not only getting it right this
10 time, but for purposes of guiding the parties
11 in future cases.

12 But this interchange issue is
13 going to determine the outcome of the SAC test
14 in this case. Because, as Mr. Rosenthal
15 noted, if you do it right, and do the analysis
16 based on the actual interchanges that the
17 Defendants used to provide the service to
18 AEPCO, they don't get over the hump on the
19 stand-alone cost test.

20 This issue, to speak to Vice-
21 Chairman Mulvey's question about the clarity
22 of the Board's precedent, this issue regarding

1 the interchange, and how the Board's rerouting
2 precedent applies, is an issue of first
3 impression in this case, because it is a
4 multi-carrier case.

5 It is because there are two
6 defendants in the route that we need some
7 clarification to the facts here regarding the
8 prior precedent that talks about rerouting in
9 the context of a single carrier case.

10 AEPCO tries to downplay the
11 interchange issue by characterizing its SAR
12 configuration, as involving an internal
13 reroute, and contending that AEPCO internally
14 reroutes both the New Mexico and PRB traffic,
15 consistent with established Board precedent.

16 And, yes, the Board says you can
17 do internal reroutes of issue traffic. But
18 there is no internal reroute here with respect
19 to the real world service provided by each
20 Defendant.

21 In the real world the interchange
22 points agreed to by the carriers, define the

1 boundaries of their responsibility for
2 providing service.

3 Thus the interchange point, in an
4 inter-line rate case is the equivalent of an
5 origin or destination in a single carrier
6 case. And it is axiomatic that the stand-
7 alone railroad must serve both the origin and
8 the destination.

9 So, too, in an inter-line case,
10 the design of the stand-alone railroad must
11 respect the interchange point, because it
12 defines the boundary of the participating
13 carrier's responsibility for transporting the
14 traffic.

15 In addition to defining their
16 respective geographic boundaries
17 responsibilities, by their specification of an
18 interchange point, BNSF and UP have distinct
19 corporate boundaries.

20 They are not responsible for
21 paying one another costs, and they don't have
22 access to one another's revenues. AEPCO's

1 shifting of the interchange points away from
2 those agreed to by the carriers, not only
3 results in a meaningless cross subsidy
4 analysis, as Mr. Rosenthal explained, it also
5 represents an impermissible blurring of
6 corporate boundaries, by using BNSF revenues
7 to offset UP costs, and vice versa.

8 The Board recognized, in the prior
9 AEPCO case, that it would not be appropriate
10 to claim a carrier's revenues to offset costs
11 for which it is not responsible.

12 The Board should respect the
13 carriers specification of interchange points,
14 because doing so will respect the corporate
15 boundaries of the two Defendants.

16 And I would note there is
17 precedent on this issue of, if you will, the
18 boundaries of a Defendant's responsibility,
19 and it is a little bit different, a little bit
20 different subject from the rerouting.

21 And the principle, which we have
22 addressed in our brief, was reiterated by the

1 Board in TMPA, when it said the analysis of
2 the reasonableness of a Defendant carrier's
3 rate should be based on the extent of the
4 Defendant carrier's participation in the
5 movement.

6 COMMISSIONER NOTTINGHAM: Mr.
7 Sipe, if I could ask? On your point about the
8 sanctity of the interchange points, as
9 determined by the railroads, what can railroad
10 customers, shippers, do if they are concerned
11 about the routing, they think the routing that
12 the railroads have determined and set up
13 disadvantaged them?

14 Should they petition the Board for
15 alternative routing, and in this case,
16 possibly through Amarillo, and then make
17 certain showings to have the routing
18 determined?

19 Because, surely, railroads
20 understandably are in the business of
21 producing the highest value possible to their
22 shareholders and not necessarily always

1 providing the lowest possible rate to their
2 customers.

3 You know, I think we are all
4 concerned that the interchange points
5 determined by the railroads might not always
6 be determined purely on efficiency, and rail
7 operational grounds, but could this be for
8 economic gain, and real customers might want
9 to petition for an alternative routing?

10 MR. SIPE: It is a good question,
11 Commissioner Nottingham, and it is a question
12 that, I believe, has a very straightforward
13 answer.

14 There is a statutory provision,
15 section 10705, and there is Board rules,
16 competitive access rules implementing that
17 statute that says: If a shipper can
18 demonstrate the railroad routing is
19 inefficient, the shipper is entitled to have
20 the traffic rerouted.

21 Here, in this case, if you focus
22 for example on the New Mexico traffic, there

1 is no way in the world that the Board would
2 ever find that AEPCO's proposed rerouting of
3 the traffic is more efficient than the actual
4 real world routing.

5 AEPCO increases the length of haul
6 by a very substantial amount, the variable
7 costs of handling this traffic over AEPCO's
8 proposed reroute would be far higher than they
9 are on the actual issue traffic movement.

10 So, you know, we would say fine
11 if their problem is that we haven't given them
12 an inefficient routing, you know, bring it on
13 under the competitive access rules in section
14 10705.

15 VICE-CHAIRMAN MULVEY: You are
16 basically saying that it is a reasonableness
17 issue, and that the creation of the SAR by
18 AEPCO is unreasonable, it goes too far, and
19 that it overcapitalizing the SAR in order to
20 justify it, or in terms of relying on it.

21 The problem, of course, a point
22 that was raised before. What if it was a

1 water carrier that was going to be part of the
2 joint movement, instead of two railroads, and
3 that might require a different interchange
4 point to get to where the water carrier is
5 located.

6 Wouldn't you be able to justify
7 changing the interchange points in those
8 cases?

9 MR. SIPE: As Mr. Rosenthal said,
10 in responding to a similar question, the issue
11 here is what traffic is available to offset
12 the costs of the stand-alone facility.

13 And we think the traffic has to be
14 the traffic associated with a Defendant
15 carrier's participating in the movement. It
16 doesn't make sense for AEPCO to be claiming
17 revenues from BNSF on those movements from
18 Amarillo to Vaughn, for example, which have
19 nothing to do with New Mexico issue traffic.

20 So how that would all play out in
21 the hypothetical situation of a water carrier
22 movement with a different interchange point,

1 I can't tell you what the mechanism would be,
2 Vice-Chairman Mulvey.

3 But I will say to you that it
4 would be inappropriate to allow the
5 complaining shipper to rely on traffic that
6 has nothing to do with the issue traffic.

7 And that is a sort of first
8 principle of SAC. You know, grouping of SAC
9 traffic which is, frankly, what allows
10 shippers to win the cases, when they win.

11 Grouping is supposed to involve
12 sharing of facilities with the issue traffic.
13 And they are not doing that here.

14 There is one other point I would
15 like to make. Mr. Rosenthal mentioned that I
16 would say something about the Southwestern
17 Railway variable costs.

18 And I'm going to take a pass on
19 that, unless you want to ask me about it,
20 because we have addressed it thoroughly in the
21 brief.

22 But there is another point that I

1 would like to mention to the Board. And that
2 involves the methodology for allocating
3 revenues on cross-over traffic.

4 If I may, I will be very brief.
5 The Board's use of modified ATC, instead of
6 original ATC to allocate revenue on cross-over
7 traffic, has been remanded, by the DC Circuit
8 to the Board, in the pending Western Fuels
9 case.

10 In the present case Defendants
11 argued, in their reply evidence, which was
12 submitted before the DC Circuit's remand, that
13 original ATC is the proper approach to apply.

14 And the DC Circuit's remand
15 reinforced that position. Defendants
16 submitted evidence on original ATC revenues,
17 in their electronic work papers in this case.

18 BNSF believes that the Board
19 should refrain from addressing the proper
20 approach to revenue allocation, in this case,
21 while the issue is pending in Western Fuels.

22 Before issuing a decision in this

1 case, the Board should determine whether the
2 choice of revenue allocation methodology makes
3 any difference in the results here.

4 We don't think it will make any
5 difference. But if you decide that it does,
6 then we would request that the Board hold this
7 case in abeyance, until it decides the revenue
8 allocation issue in the Western Fuels case.
9 Thank you.

10 CHAIRMAN ELLIOTT: Thank you, Mr.
11 Sipe. Mr. Rosenberg, you have five minutes on
12 rebuttal.

13 MR. ROSENBERG: Thank you. Let me
14 address a few points in rebuttal, very
15 quickly.

16 CHAIRMAN ELLIOTT: And, by the
17 way, you should keep your answers to Vice-
18 Chairman Mulvey's questions short, because he
19 has seven pages of questions.

20 MR. ROSENBERG: I'm aware of that,
21 I will do my best. First, the Railroad
22 Counsel said that the answer about rerouting

1 the traffic, and using a different interchange
2 was important. And they said that it was
3 pretty clear.

4 We agree that it is important, and
5 it is pretty clear. In fact the Board
6 addressed it in AEPCO's prior rate case. And
7 when the Board said that AEPCO could reroute
8 the New Mexico traffic through Vaughn-El Paso.

9 The railroads, while they claim
10 that you should stick to the present, they are
11 actually asking you to jettison it. And you
12 shouldn't.

13 Let's see, I want to clarify my
14 comments on the updated evidence as to
15 volumes. When I said that AEPCO had the best
16 evidence of record, I should say that AEPCO
17 has the only evidence of record that you can
18 utilize, because the railroads did not submit
19 complete data.

20 Also, the idea of filing a, you
21 know, a Motion to Compel, or other discovery
22 request, when the evidence has already gone in

1 is, you know, would be problematic, because
2 discovery has already closed.

3 Discovery is supposed to happen
4 before the evidence comes in, not afterwards.
5 With respect to not updating the projections
6 for the recession, about the non-coal values,
7 I think Mr. Rosenthal described it properly.

8 But what happens is that the
9 railroads previously had a forecast that AEPCO
10 utilized, that showed volumes going down, and
11 then recovering and trending upwards.

12 What the railroads are trying to
13 do is to lock in a greater than projected
14 decrease, and keep that intact throughout the
15 remainder of the DCF period, so the volumes
16 are always below the projections.

17 Our point is that with the
18 recovery, so far, with the data that is
19 available, it shows that the original
20 projections are reasonable, if not
21 conservative.

22 It has also been indicated, or

1 implied that the UP's Vaughn-El Paso traffic
2 shares no facilities with the traffic moving
3 to AEPCO.

4 And, in fact, with our stand-alone
5 railroad, 85.7 percent of the traffic that we
6 depict, as moving over the Vaughn-El Paso
7 segment, actually moves west on UP, past
8 Cochise to points further west.

9 So it is traffic that is logically
10 and reasonably available. With that I would
11 be glad to respond to as many of the pages
12 that Vice-Chairman Mulvey has, as I can, in
13 the time available.

14 VICE-CHAIRMAN MULVEY: I think, in
15 the interest of time, I would ask the Chairman
16 to keep the record open, as we usually do, and
17 we will submit some of these questions to be
18 responded to for the record to both AEPCO and
19 the two railroads.

20 COMMISSIONER NOTTINGHAM: Mr.
21 Chairman, if I could, Mr. Rosenberg, I'm
22 trying to figure out a way to harmonize

1 section 10705 regarding competitive access
2 with the stand-alone rail cost model.

3 Should -- do you believe that
4 shippers should make some type of efficiency
5 argument, or showing, if they are going to
6 adjust interchange points, and reroute traffic
7 in their SARR?

8 Or does efficiency have absolutely
9 nothing to do with the stand-alone railroad
10 model?

11 MR. ROSENBERG: What AEPCO did is
12 AEPCO filed a rate case. What we are saying
13 is that the rate is too high, that we pay too
14 much, that we end up cross-subsidizing other
15 traffic.

16 And enriching the carriers
17 excessively. That is what the stand-alone
18 cost analysis does. That is what we
19 demonstrated.

20 The Board's earlier reasoning is
21 that if the railroads have the capability to
22 adopt a different routing, then the stand-

1 alone railroad has that same routing, has that
2 same flexibility, and applies it in the stand-
3 alone world.

4 And that is exactly what we did.
5 Frankly, we think that the railroad position
6 is a little bit contrived. And if I can
7 belabor an example?

8 Suppose with the New Mexico
9 traffic that we had filed a 10705 case, and we
10 are saying that the way the traffic should be
11 handled is that BNSF should take it, and
12 handle it, as far as it can go, which would be
13 to handle it going first to Vaughn, and then
14 to EL Paso, using the track price that we
15 tried to use in the earlier case, and we are
16 not allowed.

17 Then El Paso would be handed off
18 to UP. That is consistent with the
19 preferences given the originating carrier.

20 Even if we had done that we would
21 not be able, based upon the earlier rate case,
22 to use the trackage rights. What the

1 railroads are trying to do is to make it more
2 difficult to bring a rate case where there is
3 a joint line, a joint through-rate movement
4 involved.

5 That is inconsistent with AEPCO's
6 prior rate cases, and inconsistent with the
7 coal rate guidelines. It is also inconsistent
8 with the Staggers Act Conference Report, where
9 it says the same rate standard, for other
10 rates, should apply to joint line rates.

11 It is unnecessary --

12 COMMISSIONER NOTTINGHAM: Mr.
13 Rosenberg, if I could get you to try to answer
14 the question a little more precisely.

15 How does efficiency, how should
16 efficiency play into our consideration of a
17 case like this? Does it have absolutely no
18 bearing, whatsoever, on the case? Or should
19 we be keeping some sense of the efficient
20 operation of the national interstate rail
21 system in mind, as we try to reach an
22 equitable outcome in this case?

1 MR. ROSENBERG: I think efficiency
2 is being used in two different senses. And it
3 is the nature of the analysis.

4 It is one thing when you are
5 looking at the world as it currently stands,
6 you know, the railroads legacy, what they have
7 inherited.

8 If you are looking at the
9 railroads as they stand today, you have the
10 line that runs from Belen to Deming. It is
11 logical for the railroads to use it.

12 In the stand-alone world you start
13 with a clean sheet of paper, where you need to
14 recoup all of your investments. You know, a
15 different routing makes sense.

16 The railroads get to have the
17 higher of the stand-alone costs, or the
18 jurisdictional threshold. That protects them
19 more than adequately under these
20 circumstances.

21 COMMISSIONER NOTTINGHAM: So did I
22 hear you say that in the real world

1 efficiency, of course, should matter. But
2 that in case such as this, it should not
3 matter?

4 MR. ROSENBERG: No, I'm saying
5 that efficiency is applied differently in the
6 two contexts, and the railroads are the
7 beneficiary of having the rate determined as
8 the higher of the jurisdictional threshold, or
9 the stand-alone cost.

10 In this case our stand-alone cost
11 analysis shows that the railroads, at the
12 jurisdictional threshold, receive more than
13 they need to be able to handle the traffic.

14 Yet the rate is going to be set at
15 the jurisdictional threshold instead. That is
16 a cross subsidy, it is what the statute, as
17 applied by the Board calls for.

18 And that is sufficient under these
19 circumstances.

20 COMMISSIONER NOTTINGHAM: Mr.
21 Rosenberg, just one follow-up. Regarding,
22 changing topics a little bit.

1 Regarding AEPCO's hypothetical
2 railroad operating plan, if I understand the
3 hypothetical railroad proposed, it would be
4 about 3,310 track miles that would carry a
5 substantial amount of intermodal and general
6 freight traffic, but it would have no
7 classification yards, nor intermediate
8 switching anywhere on its system?

9 Is that -- that sounds remarkable
10 to me. Is that a fair characterization of the
11 hypothetical railroad you are proposing?

12 MR. ROSENBERG: AEPCO's traffic
13 route consists of unit coal trains, and it
14 consists of overhead traffic plus a limited
15 number of intermodal trains that it originates
16 at El Paso.

17 That is traffic that the
18 Defendants handle, and that is the traffic
19 that AEPCO has included, proceeding on the
20 least cost, most efficient basis, which is
21 what the coal rate guidelines contemplate.

22 To require AEPCO to -- AEPCO's SAR

1 to engage in other activities is to force
2 AEPCO to pay for other traffic, to construct
3 facilities that are not needed, to handle its
4 traffic, or the other traffic that it has
5 selected for its traffic route.

6 COMMISSIONER NOTTINGHAM: But in
7 the real world of railroading, a 3,310 track
8 mile system, carrying a great diversity of
9 traffic would, in fact, have intermediate
10 switching at multiple locations, it would seem
11 to me.

12 And it would probably have
13 classification yard facilities as well. Those
14 things cost money, and how do you account for
15 that in your hypothetical railroad?

16 MR. ROSENBERG: The hypothetical
17 railroad does not need those facilities in
18 order to be able to handle AEPCO's traffic.
19 To force AEPCO, and the other shippers, to pay
20 for those facilities that they don't need,
21 constitutes cross-subsidy of costs, it
22 constitutes an inefficiency that is

1 inconsistent with the coal rate guidelines,
2 contestable market theory, and stand-alone
3 costing.

4 VICE-CHAIRMAN MULVEY: This case,
5 this hearing is a good example of no good deed
6 goes unpunished.

7 The Board, over the past few
8 years, has made a lot of effort to try and
9 simplify the whole rate case process,
10 including opening up processes to small
11 shipments.

12 But, obviously, we still have
13 very, very complex cases. And this particular
14 case is especially complex.

15 I wanted to ask a question about
16 some of the Board's changes. We have adopted
17 the average total cost approach, and the
18 maximum markup methodology recently.

19 And I was wondering to what extent
20 those changes in our processes affected
21 AEPCO's approach to building its traffic
22 group, and its operating plans?

1 And if those changes had an
2 effect, what was the effect in constructing
3 the traffic group and operating plans, the
4 maximum markup methodology and the average
5 total cost approach?

6 Or is that a question better
7 submitted for the record?

8 MR. ROSENBERG: It is probably
9 better submitted for the record. But if I can
10 venture, it made it more complicated. But, I
11 mean, --

12 VICE-CHAIRMAN MULVEY: But I'm not
13 surprised.

14 MR. ROSENBERG: Let's see,
15 originally, when we submitted our opening
16 evidence, we had to run it on the beta version
17 of Office10, because the spreadsheets were
18 just too large to run otherwise.

19 So, you know, so this is a good
20 sized railroad, it makes it more complicated.
21 I would have to, you know, check with our
22 consultants as to whether or not we would have

1 done anything differently as a consequence.

2 One of the things is that in
3 trying to put a rate case together, a lot of
4 the stuff comes together at the end, because
5 everything cannot be fully contemplated, in
6 advance, particularly with demands of the RTC
7 analysis.

8 So you anticipate, you know, the
9 Board sets up rules, and we try to work with
10 it. And in this case we believe that we have.

11 VICE-CHAIRMAN MULVEY: Thank you.

12 CHAIRMAN ELLIOTT: Thank you, Mr.
13 Rosenberg. Thank you, Counsel, very much for
14 appearing today, and for your excellent
15 arguments, and we will take the matter under
16 advisement, and the meeting of the Board is
17 now adjourned.

18 (Whereupon, at 10:50 a.m., the
19 above-entitled matter was concluded.)
20
21
22

A				
abeyance 73:7 ability 33:10 able 17:17 20:17,19 36:22 38:7 39:6 70:6 78:21 81:13 83:18 above-entitled 86:19 above-named 1:18 absence 45:1 absent 53:4 absolutely 77:8 79:17 abused 44:18 accept 24:17 56:12 access 65:22 68:16 69:13 77:1 accommodate 12:5 accommodation 38:11 accompanied 5:9 5:11 account 13:11 29:9 31:9 62:4,9 83:14 accounted 58:21 accurate 37:7 achieve 9:9 10:4,5 15:12 Act 9:18 79:8 action 39:1 activities 83:1 actual 41:15 42:3,7 46:1,4 58:7 63:16 69:3,9 add 10:20 adding 9:22 12:21 addition 65:15 additional 10:21 12:22 28:15 32:22 Additionally 5:21 address 6:16 41:1 42:6,14 49:2 57:3 73:14 addressed 27:10 48:7 55:10,10 63:3 66:22 71:20	74:6 addressing 72:19 adequately 80:19 adjourned 86:17 adjust 77:6 adjusted 28:13 adjustment 57:14 58:10 59:11 61:7 61:8 adjustments 27:5 adopt 77:22 adopted 84:16 advance 86:6 advisement 86:16 AEPCO 2:2 6:1 7:2 7:9,15,19 8:10,14 8:18 9:10 13:18 14:22 15:12,22 16:14,19 17:13,19 18:9,13 20:21 21:6,8 22:4,6,10 24:19,20 25:1,3,4 25:16,18 26:10,14 27:20,21 30:3,9 30:13 40:2 41:6 42:10 43:22 45:20 46:2,7,10,13,18 47:17 48:4 49:21 50:9,22 51:2,4,7 52:16,22 55:11 57:14 58:10 60:1 60:6 61:1,20 62:11 63:18 64:10 64:13 66:9 69:5 69:18 70:16 74:7 74:15,16 75:9 76:3,18 77:11,12 82:19,22 83:2,19 AEPCO's 7:4,5,7 7:22 8:1,7,12,17 8:20 9:4 14:3,21 16:12 30:2 40:20 41:17,22 48:16,22 52:6 60:16 61:12 65:22 69:2,7 74:6 79:5 82:1,12,22 83:18 84:21	ago 14:21 agree 74:4 agreed 5:1 40:10 60:7,16 64:22 66:2 allegedly 39:10 allocate 5:1 72:6 allocated 40:12 allocating 72:2 allocation 72:20 73:2,8 allotted 4:16,18,22 5:13 62:22 allow 18:15 43:11 43:19 52:7,8 71:4 allowed 13:16 55:15 78:16 allows 71:9 alternative 51:14 51:18 67:15 68:9 altogether 30:5 Amarillo 10:1,12 11:7,13 47:6,9 67:16 70:18 amount 5:18 40:11 69:6 82:5 analyses 14:6 analysis 12:13 13:11 29:17 38:15 42:5 44:6 46:2,4 49:1 50:14 51:15 55:17 59:3 63:15 66:4 67:1 77:18 80:3 81:11 86:7 analysts 31:3 analytically 38:19 another's 65:22 answer 4:14 30:18 41:4,11,12 42:2 47:7 68:13 73:22 79:13 answers 73:17 anticipate 21:6 86:8 Apache 7:17,20 8:2 13:21 apart 36:7	APPEARANCES 2:1 appeared 58:22 appearing 6:22 86:14 applicable 49:13 applied 81:5,17 applies 64:2 78:2 apply 58:1 72:13 79:10 approach 8:10,16 8:19 49:6 60:17 72:13,20 84:17,21 85:5 appropriate 35:5 66:9 approved 8:20 April 61:22,22 arbitrary 30:17 area 26:9 argued 72:11 arguing 50:12,15 50:19 argument 3:12,14 3:17 27:8 51:16 53:14 77:5 arguments 1:4 4:4 4:13 27:6 86:15 Arizona 1:5 4:5 7:1 7:14,18 26:4 arrangement 45:3 53:5 arrangements 20:21 asked 4:12 38:2 asking 35:18 49:21 74:11 aspect 9:4 assemble 32:19 36:8 assertion 34:18 associated 42:7 70:14 assume 34:20 56:6 56:8 assuming 44:21 56:11	assumption 24:4 57:21 61:10 assumptions 60:21 asymmetric 31:7 ATC 72:5,6,13,16 Atlas 43:9 attacked 11:3 attempt 14:4 23:17 attractive 11:8 47:9 attractiveness 11:13 authorize 9:7 availability 19:14 available 18:11 28:2 30:22 42:9 44:22 47:13 48:13 55:13 70:11 75:19 76:10,13 Ave 2:13,20 average 59:14 84:17 85:4 avoid 46:8 aware 14:19 56:15 73:20 axiomatic 65:6 AZ 2:8 a.m 1:18 4:2 86:18
				B
				B 53:9,10 back 6:14 10:7 14:4 21:18 23:8 34:14 38:14 background 7:9 barge 51:13,18 52:7 barrier 9:16 26:15 barriers 14:1 base 35:12 41:6 57:10 61:12,12,16 based 8:10 20:22 24:11 45:21 46:4 48:17 57:11 60:20 63:16 67:3 78:21 basically 24:5 25:4 50:15 69:16

basin 16:6,20 17:11 17:14 22:22 basis 30:9 61:9,10 82:20 bearing 79:18 beginning 62:7 behalf 2:2,10 6:22 62:20 belabor 78:7 Belen 43:4 80:10 believe 16:9 22:5 22:19 23:2 37:6 60:10 68:12 77:3 86:10 believed 37:6 believes 72:18 beneficiary 81:7 Benson 2:8 best 27:16 39:17 56:9 73:21 74:15 beta 85:16 better 13:6 59:15 85:6,9 beyond 55:14 big 20:15 Billing 48:2 bit 16:5 17:4,7 19:18 34:6 36:18 57:16 66:19,19 78:6 81:22 blend 15:13 16:14 blending 15:1,11 blurring 66:5 BN 40:21 41:19 42:20 43:3 46:14 BNSF 2:10 4:6,21 5:16 17:12 20:8 21:13 29:20 31:18 40:8,17 53:7,9 55:19 61:11 62:20 63:1 65:18 66:6 70:17 72:18 78:11 BN's 40:22 46:19 46:21 47:3,5 48:1 48:10 Board 1:1,19 4:9 4:15 5:17 8:13,19	32:1 34:17 35:4 37:22 38:5,22 39:14,16 41:14,21 44:12 45:4 46:5 49:22 50:5 55:9 64:15,16 66:8,12 67:1,14 68:15 69:1 72:1,8,18 73:1,6 74:5,7 81:17 84:7 86:9 86:16 Board's 8:11 14:6 33:10 43:11,18 44:15,20 50:2 52:7,7 53:1,22 54:10 55:2 63:22 64:1 72:5 77:20 84:16 boundaries 65:1,16 65:19 66:6,15,18 boundary 65:12 box 2:8 26:21 bridge 24:6 brief 7:9 66:22 71:21 72:4 briefs 6:8 bring 37:15,16 39:6 39:7 69:12 79:2 brings 44:2 BTU 18:6 build 12:4,9 18:14 31:20 52:8 building 84:21 built 19:8 24:1 26:2 Burling 2:12 BURLINGTON 1:9 burn 14:19 15:2 21:21 22:14 burning 15:5 burns 7:16 burnt 15:3,4,5 business 19:15 67:20 businesses 7:13	C 53:10 calculations 41:3 call 44:13 called 17:11 calls 81:17 capability 77:21 capacity 12:4,8 17:3 18:1 captive 7:19 17:12 capture 35:11 captures 25:5 car 21:20 25:2 32:19,19 36:6 Carolina 10:6 carrier 24:6 44:22 45:1 50:4,8 53:3 55:13 64:9 65:5 70:1,4,21 78:19 carriers 24:4 25:12 41:16 49:12,20 50:20 53:20 54:1 54:15 57:21 64:22 66:2,13 77:16 carrier's 65:13 66:10 67:2,4 70:15 carries 43:8 49:14 carry 24:13 82:4 carrying 52:16 83:8 case 7:21 8:5,11,12 8:17,20 11:22 12:13 13:7 14:22 17:18 19:7 20:22 27:13 29:20 30:22 33:14 35:8 36:22 37:15 39:6 41:6 45:7,20 46:6 49:3 51:8 52:2,4,10,17 52:22 55:1,11 60:8 63:4,14 64:3 64:4,9 65:4,6,9 66:9 67:15 68:21 72:9,10,17,20 73:1,7,8 74:6 77:12 78:9,15,21 79:2,17,18,22	81:2,10 84:4,9,14 86:3,10 cases 15:10 38:7 45:8,10 51:11 63:11 70:8 71:10 79:6 84:13 catch-up 33:9 cause 43:16 causes 44:5 cell 5:22 central 41:5 certain 6:11 15:10 28:14,14 30:4 67:17 certainly 39:19 Chair 34:5 Chairman 1:22,22 4:3 14:17 15:14 26:19 34:8,13 40:6 56:3 57:2 60:15 61:9 62:14 62:16 63:21 73:10 73:16,18 76:15,21 86:12 challenge 54:10 55:5 challenged 41:10 41:22 46:9 53:13 challenging 50:10 change 43:16,22 44:3,8,9,10 46:18 47:17 48:10,12 changed 58:8 changes 44:14 59:7 84:16,20 85:1 changing 70:7 81:22 chapter 7:22 characteristics 15:8,9 18:3 characterization 36:3 82:10 characterizing 57:15 64:11 charged 50:7 CHARLES 1:23 check 85:21	cherry 27:7 chime 5:9,14 chimes 5:11 choice 60:7 73:2 chose 50:22 51:7 60:1,6 Circuit 72:7 Circuit's 72:12,14 circumstances 80:20 81:19 circumvent 53:1 claim 14:2,5 33:4 66:10 74:9 claiming 70:16 clarification 64:7 clarify 74:13 clarity 63:21 classic 7:19 classification 82:7 83:13 clean 80:13 clear 10:11 33:17 44:20 45:5 55:3,3 74:3,5 clearer 54:15 client 15:17 19:19 35:7 37:14,20 closed 75:2 coal 7:7,7,16,20 8:2 9:6 11:19,22 12:5 12:6 14:19 15:1,4 15:4,6,10,17,19 16:2,5,9,12,20 17:3 18:2,2,4,4,9 18:11 19:10,21 20:9,14 21:1,9,13 21:22 22:8,9 24:12,22 25:11,22 26:11 48:7 52:9 52:15 61:18,20 62:5,8 79:7 82:13 82:21 84:1 coals 15:2,7,12 Cochise 7:18 26:4 43:9 76:8 collected 50:7 Colorado 15:4 16:5
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17:15 18:4 22:9 43:2 combination 28:7 come 34:14 37:21 38:2,5,10 comes 16:12 23:8 75:4 86:4 comfortable 20:3 comfortably 37:18 coming 17:21 commenced 1:18 comments 8:9 74:14 commercial 19:3 Commissioner 1:23 11:5,21 13:12 15:15 16:18 18:17,22 21:16 22:16,20 23:4,10 23:13 34:9,10,15 37:10,19 38:20 40:4 47:7 50:11 51:9 62:18 67:6 68:11 76:20 79:12 80:21 81:20 83:6 common 9:9 Company 4:5 40:15,18 compel 32:2 35:5 74:21 competitive 68:16 69:13 77:1 Complainant 1:7 2:2 4:17 7:1 43:12,22 44:17 52:8 COMPLAINAN... 3:12,19 complaining 19:17 35:19 71:5 complaint 16:21 complete 28:3,22 36:4,9,19,21 74:19 completely 59:5 complex 84:13,14 complicated 85:10	85:20 comply 33:10 comport 38:16 compromise 38:7 concedes 46:3 concerned 27:11 39:9 67:10 68:4 concerns 56:16 57:4 concluded 86:19 concurs 63:1 conditions 21:1 conduct 12:16 Conference 9:17 79:8 confidential 21:3 60:3,11 configuration 13:2 64:12 conflicts 49:6 confusing 17:5 congested 12:1 Congress 9:17 Connecticut 2:20 connecting 24:3 conscious 37:1 consequence 32:13 86:1 conservative 31:11 75:21 consider 24:8 considerable 36:11 consideration 56:12,21 79:16 considerations 12:12 consistent 16:16 24:22 64:15 78:18 consists 82:13,14 constitutes 9:15 83:21,22 constrained 50:21 construct 62:10 83:2 constructed 23:21 50:20 constructing 85:2	construction 31:16 constructs 8:14 consultants 85:22 consumer-owned 7:10 contemplate 9:7 82:21 contemplated 11:19 86:5 contemporaneous 35:20 contending 64:13 content 18:6,7 CONTENTS 3:10 contestable 26:1,12 84:2 context 64:9 contexts 81:6 continue 13:14 34:6 contract 15:21 16:4 20:18 22:8,13 contrast 27:20 contrived 78:6 cooperative 1:6 2:7 4:6 7:2,11 copies 8:5 corporate 7:4 65:19 66:6,14 correct 23:3 31:22 37:16 38:3 39:1 53:15 corridor 11:10 12:2,6,7 cost 9:13 10:21 11:18 13:22 16:16 18:14 24:11 25:7 26:16 41:2,7,17 42:5,6,14 44:6 45:6,22 46:4,14 48:16 49:1,3,4,8 51:2 52:4 55:16 63:19 77:2,18 81:9,10 82:20 83:14 84:17 85:5 costing 9:14 84:3 costs 10:5 42:10	47:1,14 48:1,14 48:20 53:3 55:9 65:21 66:7,10 69:7 70:12 71:17 80:17 83:21 cost-sharing 45:2 counsel 4:14,17,21 5:16 6:1 7:5 38:6 40:8 73:22 86:13 course 63:8 69:21 81:1 cover 4:10 42:9 47:14 Covington 2:12 create 43:12 created 24:8 creating 44:14 creation 69:17 creativity 55:14 Creek 17:9 critical 49:2 criticized 61:22 cross 14:3,8 50:13 50:14,16 51:3 66:3 81:16 cross-over 72:3,6 cross-subsidize 25:19 cross-subsidizing 77:14 cross-subsidy 83:21 curious 6:15 26:22 current 6:13 22:12 currently 7:6 15:17 80:5 customers 7:15 67:10 68:2,8	36:15,19,21 37:5 37:14,17 38:14,18 38:21 39:22 59:16 59:18 61:4,22 62:3,12 74:19 75:18 DC 72:7,12,14 DCF 75:15 deadline 33:11 deal 23:15 27:1,16 dealt 6:9 decide 73:5 decides 13:10 73:7 deciding 30:10 decision 72:22 Decker 17:9 22:6 22:18 decline 28:11 decrease 75:14 decreases 31:1 deed 84:5 defective 38:18,18 defend 48:4 Defendant 4:21 24:11 42:4,10 64:20 67:2,4 70:14 defendants 1:11 2:10 6:11 35:15 39:10 46:1 48:17 49:5 51:3 63:17 64:6 66:15 72:10 72:15 82:18 Defendant's 3:14 3:17 25:19 40:16 41:8 42:7 44:1,8 66:18 define 64:22 defines 65:12 defining 65:15 delay 39:20 delayed 37:1 delivered 7:20 16:16 19:10 22:17 22:21 demands 86:6 Deming 42:21 43:7
---	--	---	---	--

45:17 47:22 48:3 80:10 demonstrate 68:18 demonstrated 77:19 densities 10:5,18 11:15,16 density 9:9 11:11 11:17 12:6,7 depending 22:13 22:14 depict 76:6 described 75:7 deserve 40:3 design 65:10 designed 18:13 designing 55:15 desirable 10:18 11:15 15:8 18:7 destination 13:21 29:12,13 54:11 58:15 65:5,8 destinations 21:15 29:14 detail 63:3 details 21:4 determine 41:15,21 63:5,13 73:1 determined 9:2 50:7 67:9,12,18 68:5,6 81:7 determining 14:7 develop 58:18 developed 46:13 devise 32:15 devising 28:6 dictate 16:12 differ 61:11,13 difference 61:16 62:6 73:3,5 different 6:12 13:1 28:16 29:11,13 30:6 41:18 45:8 49:19 50:19 51:10 51:22 53:21 54:5 54:13 60:4,4 62:8 62:12 66:19,20	70:3,22 74:1 77:22 80:2,15 differently 81:5 86:1 difficult 57:16 79:2 digit 31:4 digits 31:4 direct 7:6 directly 7:12 8:11 disadvantaged 37:21 67:13 disagreement 61:3 disallowed 8:16 disappeared 59:5 discard 30:5 discern 29:5 disclosing 21:4 discovery 31:18 33:12,22 34:19 35:3 57:8 74:21 75:2,3 dismiss 46:5 displaces 42:11 dispute 19:3,5 35:1 disregarding 42:3 46:8 distinct 65:18 distortion 44:5 distorts 55:16 distributed 8:5 diversity 83:8 divisions 10:20 Docket 1:8 4:7 doing 36:16 48:5 66:14 71:13 double 5:14 31:4,4 downplay 64:10 drag 27:13 drawn 45:9 DWIGHT 2:6 D.C 1:15,19 2:5,14 2:21	78:15,21 early 57:7 60:13,14 easier 8:8 46:9 58:5 east 10:1 43:4 east-west 11:10 economic 12:13 35:13 60:5 68:8 effect 22:8 52:18 85:2,2 effective 15:13 25:8 effectively 12:16 effects 62:4 efficiency 68:6 77:4 77:8 79:15,16 80:1 81:1,5 efficient 9:13 11:18 13:22 14:13 15:12 25:7 26:16 43:13 69:3 79:19 82:20 effort 4:8 32:9 84:8 efforts 8:1 either 55:2 El 26:7 78:14,17 82:16 Electric 1:5 4:5 7:1 electrical 7:11 electronic 72:17 element 11:3 Elliott 1:22 4:3 14:17 15:14 26:19 34:8,13 40:6 56:3 57:2 60:15 61:9 62:14,17 73:10,16 86:12 emphatically 63:1 enables 15:2 endanger 33:9 ended 59:7 endpoint 47:20 Energy 20:14 engage 25:17 30:15 83:1 engaged 30:16 31:6 enormous 33:2 enriching 77:16 entailed 33:2 entails 49:17	entered 20:18,21 20:21 entire 23:5 entitled 68:19 entry 9:16 14:1 26:15 equitable 79:22 equivalent 12:20 13:1 65:4 errors 28:14 especially 84:14 ESQ 2:3,6,12,17 essence 9:13 essential 41:13 49:9 essentially 46:3,7 46:13 47:15 49:21 58:1 establish 41:16 54:2 established 41:19 49:12,15,21 50:3 54:6 55:19 64:15 establishment 49:16 estimate 37:7 59:15 events 21:8 evidence 21:5 31:9 32:9,17 36:12 38:13 39:16,17,18 40:1 41:22 56:9,9 57:16 72:11,16 74:14,16,17,22 75:4 85:16 exactly 78:4 example 10:7 24:10 30:3,12 52:15 68:22 70:18 78:7 84:5 examples 29:18 excellent 86:14 exceptional 9:6 excessively 77:17 exclude 30:13 Excuse 43:10 existed 59:4 existing 10:2 51:17	expansion 12:9 expect 24:2 expected 48:19 expense 33:2 expired 5:7,10 15:22 explain 42:17 explained 21:5 66:4 expressly 49:11 extends 50:3 extension 10:17,22 extent 12:3 29:10 67:3 84:19 external 30:13
F				
facilities 12:22 14:14 24:19 25:5 47:11 71:12 76:2 83:3,13,17,20 facility 15:1,11 70:12 fact 74:5 76:4 83:9 factored 12:12 factors 16:2 22:15 facts 64:7 fair 34:11 82:10 false 60:13 far 10:1 69:8,18 75:18 78:12 farther 27:13 favorable 30:17,21 FE 1:10 features 11:12 feel 44:17 felt 31:18 35:9 37:15 figure 76:22 file 35:4 filed 77:12 78:9 filing 74:20 fill 39:1 finally 36:3 find 69:2 fine 19:6 44:16 45:13 61:2 69:10				

finish 5:14 21:17	game 33:9	82:21 84:1	23:14 40:20 70:21	individual 25:2,17
firmly 54:7	gather 31:17	guiding 63:10	82:1,3,11 83:15	53:8
first 1:19 10:10	general 82:5	<hr/> H <hr/>	83:16	inefficiency 83:22
20:14 28:4 41:12	generally 54:1	hand 39:5,9	hypotheticals	inefficient 68:19
55:10 57:4,11	Generating 7:17	handed 78:17	23:15	69:12
58:22 59:4 63:1	geographic 65:16	handle 13:10 14:10	<hr/> I <hr/>	inform 5:17
64:2 71:7 73:21	getting 16:2 17:22	14:12,14,15 25:3	idea 27:16 74:20	information 28:9
78:13	63:9	25:6 47:14 78:12	identified 63:7	28:15 31:20 34:19
five 4:19 73:11	give 19:12 31:19	78:13 81:13 82:18	identifies 42:19	35:6 39:11 56:19
flexibility 29:15	32:2	83:3,18	identify 43:1	60:3
78:2	given 58:3 69:11	handled 78:11	ignored 31:1	inherited 80:7
Floor 1:19	78:19	handles 9:2	III 1:22	initial 31:10 32:17
focus 40:19 58:6	glad 76:11	handling 21:13	imagine 11:22	33:1
68:21	go 10:12,17 26:3	44:1 69:7	impermissible 9:16	initially 17:8
focused 52:20	32:18,18 33:22	happen 21:7 28:9	14:8 66:5	initiative 54:2
focusing 59:7,12	38:16 39:20 45:15	59:19,19 75:3	implementing	input 16:17
follow 8:9 57:15	56:16 57:1 78:12	happened 43:20,21	68:16	insufficient 32:4
follow-up 11:6	goes 10:12 23:8	45:21 58:16 62:9	implied 76:1	intact 25:14 75:14
15:16 34:16 51:10	33:13 55:14 69:18	happening 45:16	importance 50:13	intention 35:20
81:21	84:6	happens 75:8	important 6:7,18	interchange 40:21
force 21:7 83:1,19	going 6:19 20:14	happy 31:17 41:3	35:7,9 38:22 63:7	41:8,13,19 42:20
forced 36:2	27:1,12 34:13	harmonize 76:22	74:2,4	43:2,17 46:15
forecast 28:1,9,12	37:20 44:13 51:22	haul 69:5	impose 26:15	49:9,18,20 51:16
31:10 60:8,12	63:13 70:1 71:18	hauling 20:9	impression 64:3	51:17 53:7,9,14
75:9	75:10 77:5 78:13	heads 23:9	inappropriate 71:4	53:17 54:9,19,20
forecasts 28:8 57:7	81:14	hear 4:4 5:14 6:16	include 29:22	54:20 55:1,4 63:2
59:14,22 60:4,19	good 4:3 6:20 13:5	80:22	30:10,11 52:12,13	63:12 64:1,11,21
60:20	16:5 27:18 36:18	heard 56:7	included 30:2,3	65:3,11,18 66:1
forthcoming 35:3	40:13 51:20 62:16	hearing 1:19 35:8	82:19	66:13 67:8 68:4
FRANCIS 1:22	68:10 84:5,5	51:11 84:5	includes 8:21 36:5	70:3,7,22 74:1
frankly 21:3 29:3	85:19	help 20:2	36:5,6 47:4	77:6
32:14 38:6 71:9	gotten 36:3,8	high 12:6,6 77:13	including 28:19	interchanges 23:22
78:5	governing 42:18,22	higher 11:15,17	84:10	25:9,12,13 43:6
freight 13:20 82:6	great 83:8	18:6 69:8 80:17	incomplete 29:6	45:17 63:16
front 5:4 34:4	greater 75:13	81:8	inconsistent 79:5,6	interchanging 24:3
Fuels 72:8,21 73:8	grounds 68:7	highest 67:21	79:7 84:1	interest 76:15
full 17:22 29:10	group 31:16,21	highlights 51:21	incorporates 26:10	interested 56:5
fully 86:5	44:4,10 52:12	52:1	increase 31:4	intermediate 82:7
function 16:10	62:11 84:22 85:3	highly 21:3 60:2,10	increases 31:5 69:5	83:9
further 17:20 76:8	grouped 24:21	hit 20:9	incumbents 13:9	intermodal 11:10
Furthermore 9:16	grouping 25:21	hold 73:6	incumbent's 9:12	12:1,2,7 24:13
14:9	52:5 71:8,11	homes 7:13	13:6	52:17 82:5,15
future 17:3 19:19	growth 61:13	hopefully 19:2	index 58:18 62:12	internal 64:12,17
20:1 61:2 63:11	guess 35:18	huge 47:4	indexing 62:13	64:18
<hr/> G <hr/>	guidelines 9:6	hump 63:18	indicate 20:7	internally 64:13
gain 68:8	11:20 24:22 25:22	hypothetical 19:6,7	indicated 75:22	interposed 12:1
	26:11 48:7 79:7			interstate 79:20

inter-line 65:4,9 intra-line 49:13 intra-modal 47:4 introduce 6:5 40:10 invested 14:22 20:13 investments 80:14 investor 20:15 involve 14:3 19:5 71:11 involved 12:3 51:13 58:7 79:4 involves 29:13 72:2 involving 64:12 issue 6:9 14:16,19 36:2 40:22 41:20 42:4,8,19 43:1,4 44:2,4,7 46:15 47:12,19 48:2,6 48:14 49:2,3 52:1 52:3,19 59:17 63:2,12,20,22 64:2,11,17 66:17 69:9,17 70:10,19 71:6,12 72:21 73:8 issues 6:6,18 17:22 18:19 40:19 41:4 51:22 61:17 63:6 issuing 72:22 <hr/> J <hr/> January 36:13 jettison 74:11 Johnson 2:18 joint 9:19 13:17 41:14 49:10 51:19 51:19 53:12 70:2 79:3,3,10 JR 2:6,17 jurisdiction 50:2 jurisdictional 41:2 80:18 81:8,12,15 justify 46:21 47:20 69:20 70:6 <hr/> K <hr/>	keep 5:12 27:12 73:17 75:14 76:16 keeping 79:19 key 25:22 52:1,3 63:3 kind 16:21 24:9 know 13:3 15:5,7 16:10 19:19 20:17 20:18 21:2,10 25:1 26:20 27:12 28:10,14 29:9,10 30:14 31:2 32:15 33:15 34:8,20,22 37:9 38:11 52:14 54:6 56:1 59:17 68:3 69:10,12 71:8 74:21 75:1 80:6,14 85:19,21 86:8 knows 45:21 <hr/> L <hr/> L 2:12 lack 38:21 lanes 58:7 59:8,13 large 16:11 26:6 85:18 latest 7:22 lawful 54:3 learn 19:13 left 7:3 legacy 80:6 length 69:5 Let's 74:13 85:14 level 35:13 levels 22:14 57:6 light 5:5,6,8,10,13 45:8 lights 5:4 limit 10:3 37:2 limited 12:7 82:14 limits 10:19,20 line 9:20 21:17 26:5 43:13 45:5 47:5 51:19 52:9 79:3 79:10 80:10 lines 10:2 45:9 <hr/>	lining 19:22 litigation 17:15 little 17:4,7 19:18 20:2 34:6 57:1 66:19,19 78:6 79:14 81:22 LLP 2:4,12 load 21:20 loads 25:2,4 located 7:18 17:9 17:20 18:5 70:5 locations 83:10 lock 75:13 Loftus 2:4 6:22 logical 14:13 80:11 logically 76:9 long 21:22 50:16 longer 9:8 34:6 long-term 37:8 look 13:1 24:7 26:5 39:16 58:7,14 looked 57:17,19 looking 6:8,18 15:22 31:11 46:10 80:5,8 lot 11:11 18:10 20:12 52:16 84:8 86:3 lower 10:5 18:7 lowest 16:15 68:1 <hr/> M <hr/> M 2:6,17 main 26:5 maintaining 51:16 majeure 21:7 major 11:9 16:17 44:5 52:18 making 4:9 61:8 manipulation 55:8 manner 13:22 28:22 29:7 36:20 market 21:1 29:16 50:21 84:2 markets 16:10 26:1 26:12 marks 7:22 <hr/>	markup 84:18 85:4 material 21:11 matter 4:5 35:14 81:1,3 86:15,19 matters 4:11 7:8 maximum 50:6 84:18 85:4 McKinley 18:5 22:9 mean 10:5 18:22 19:16 23:5 24:10 27:14 43:15 53:20 85:11 meaningless 42:5 66:3 mechanism 71:1 meeting 86:16 members 4:9 34:3 mention 72:1 mentioned 18:18 25:9 31:15 71:15 methodology 61:7 62:8 72:2 73:2 84:18 85:4 Mexico 8:22 9:3 10:11 14:11 15:6 16:3,7 17:16 18:6 22:13 25:3 42:19 42:21 43:4,5 46:16 47:16,19 64:14 68:22 70:19 74:8 78:8 Mexico's 14:15 Michael 2:12 40:14 mid-sized 40:2 mile 83:8 miles 14:10 82:4 million 7:16 20:10 mind 26:19 35:10 79:21 mine 17:1,2,20,21 18:5,10,15 19:9 20:8,9,13,15 21:14 22:6,18 54:21 mines 17:10,11 22:22 25:11 <hr/>	mine's 19:13 minute 5:5,8 minutes 4:18,19,19 5:1 6:2 40:16 62:22 73:11 mistaken 24:14 misunderstanding 58:11 mix 15:12,21 model 77:2,10 modest 10:17 modified 72:5 money 20:12 83:14 Montana 14:5 17:10 43:1 46:17 months 32:22 morning 4:3,10 6:21 40:13 62:16 62:21 63:7 motion 32:1 74:21 motions 35:5 move 4:8 29:11 47:1 53:14 55:1 moved 54:18 58:6 60:7 movement 36:6 67:5 69:9 70:2,15 70:22 79:3 movements 70:17 moves 21:14 25:14 29:10 43:3 76:7 moving 8:2 13:20 21:13 26:6,6,7 46:21 47:5,21 58:16 76:2,6 multiple 83:10 multi-carrier 64:4 Mulvey 1:22 9:21 10:14 23:12 26:18 31:14 33:20 43:10 44:11 45:12 48:8 53:6 54:17 55:22 62:17 69:15 71:2 76:12,14 84:4 85:12 86:11 Mulvey's 63:21 73:18 <hr/>
--	---	---	--	---

<p>N</p> <p>name 40:14 62:19</p> <p>national 79:20</p> <p>nature 21:3 80:3</p> <p>near 7:18</p> <p>nearly 20:5</p> <p>necessarily 49:17 67:22</p> <p>necessity 27:22</p> <p>need 12:21 21:11 25:2 36:7 39:13 64:6 80:13 81:13 83:17,20</p> <p>needed 25:6 31:20 37:15 61:6 83:3</p> <p>needs 16:14 44:12</p> <p>neither 9:4 59:11</p> <p>network 11:17 49:5 51:4</p> <p>never 33:13</p> <p>new 8:22 9:3 10:11 12:4 14:11,14 15:6 16:2,7 17:16 18:6 19:22 22:12 25:3 29:13 32:20 33:4 42:18,21 43:3,4 46:16,20 47:16,19,20 58:13 58:21 62:10 64:14 68:22 70:19 74:8 78:8</p> <p>non 7:10 62:7</p> <p>non-coal 29:20 61:18 75:6</p> <p>non-existent 49:22</p> <p>non-issue 39:3,5 46:21 47:3,21</p> <p>north 17:21</p> <p>Northern 1:9 17:11</p> <p>note 5:3 7:3 66:16</p> <p>noted 6:2 63:15</p> <p>notice 56:11</p> <p>noticed 6:10 33:21</p> <p>Nottingham 1:23 11:5,21 13:12 15:15 16:18 18:17 18:22 21:16 22:16</p>	<p>22:20 23:4,10,13 34:9,10,15 37:10 37:19 38:20 40:4 50:11 51:9 62:18 67:6 68:11 76:20 79:12 80:21 81:20 83:6</p> <p>Nottingham's 47:8</p> <p>number 4:7 25:10 32:21 38:10 60:9 60:11 82:15</p> <p>numbers 6:11,12 6:13 27:4,9,17,18</p> <p>N.W 2:4,13,20</p> <hr/> <p>O</p> <p>objection 32:8 33:14 38:12</p> <p>observing 34:21</p> <p>obtain 8:1</p> <p>obviously 12:8 19:8 27:15,17 34:16 37:21 51:11 84:12</p> <p>occur 21:8</p> <p>occurred 27:15</p> <p>offered 53:8</p> <p>Office10 85:17</p> <p>official 7:5</p> <p>offset 47:1 48:1,14 53:3 66:7,10 70:11</p> <p>Ohio 20:14</p> <p>Okay 17:6 20:4 21:16 22:4 32:5</p> <p>Once 36:3</p> <p>ongoing 8:1</p> <p>on-line 17:21 18:19</p> <p>open 4:19 17:2 19:14 76:16</p> <p>opening 4:9 6:3 84:10 85:15</p> <p>operating 19:13 20:8,13 82:2 84:22 85:3</p> <p>operation 12:17 23:19 24:9 29:16 51:18 79:20</p>	<p>operational 68:7</p> <p>operationally 22:10</p> <p>operations 9:12 24:16</p> <p>opportunity 34:11</p> <p>opposing 38:6</p> <p>opted 5:19</p> <p>option 53:16</p> <p>oral 1:4 4:4</p> <p>order 12:22 21:20 32:15 40:10 69:19 83:18</p> <p>Orders 8:13</p> <p>origin 29:11,12 54:11 58:15 65:5 65:7</p> <p>original 28:12 72:6 72:13,16 75:19</p> <p>originally 85:15</p> <p>originates 82:15</p> <p>originating 78:19</p> <p>origins 13:21 29:14</p> <p>Ottertail 14:5</p> <p>outcome 63:5,13 79:22</p> <p>overall 57:20</p> <p>overcapitalizing 69:19</p> <p>overhead 82:14</p> <hr/> <p>P</p> <p>P 1:22</p> <p>pace 60:5</p> <p>Pacific 1:10 4:6,22 5:17 7:21 40:9,15 55:19</p> <p>pages 34:4 73:19 76:11</p> <p>pairs 58:15</p> <p>paper 80:13</p> <p>papers 32:12 72:17</p> <p>part 13:18 16:11 19:4,7 20:20 29:15 35:22 41:9 41:13 44:3 49:9 52:13,21 55:4</p>	<p>70:1</p> <p>participating 65:12 70:15</p> <p>participation 42:3 67:4</p> <p>particular 8:14 30:1 84:13</p> <p>particularly 9:5 15:9 31:11 86:6</p> <p>parties 35:15 55:15 57:4,8,9,13 61:5 62:6 63:10</p> <p>parts 13:17</p> <p>party 4:12 18:11 25:7 34:18 35:2</p> <p>Paso 8:15,22 26:7 74:8 76:1,6 78:14 78:17 82:16</p> <p>pass 71:18</p> <p>pay 48:19,19 77:13 83:2,19</p> <p>paying 65:21</p> <p>peak 17:20 18:18 20:3 35:13,13</p> <p>pending 35:1 72:8 72:21</p> <p>Pennsylvania 2:13</p> <p>peppered 26:20</p> <p>percent 30:1,4 76:5</p> <p>perfect 59:6,10,11</p> <p>performance 13:5</p> <p>period 21:22 32:7 35:11,12 36:11 58:22 59:4,5 75:15</p> <p>periods 58:16 59:9</p> <p>permissible 10:8 44:13</p> <p>permitted 48:6</p> <p>perpetual 33:8</p> <p>perspective 11:8 40:22</p> <p>petition 32:1 67:14 68:9</p> <p>phones 6:1</p> <p>pick 11:10</p> <p>picked 61:1</p>	<p>picking 11:13 27:7</p> <p>piece 56:8</p> <p>pipe 52:9</p> <p>pipeline 52:15</p> <p>place 61:13</p> <p>plan 19:19 40:15 40:19 82:2</p> <p>plans 84:22 85:3</p> <p>plant 14:18 15:1 26:4 43:9</p> <p>plants 16:15</p> <p>play 70:20 79:16</p> <p>please 5:3,12,14,17 5:22 6:4 40:9</p> <p>plus 38:15 82:14</p> <p>podium 6:4 40:9</p> <p>point 11:7 23:13 31:8 34:2,16 40:21 41:13 42:20 46:19,20 47:18 49:9,18 53:7 54:9 54:19,20,21 55:1 55:4 65:3,11,18 67:7 69:21 70:4 70:22 71:14,22 75:17</p> <p>points 17:5 25:11 41:9,19 42:18 43:2,17 49:20 52:6 62:21 64:22 66:1,13 67:8 68:4 70:7 73:14 76:8 77:6</p> <p>policies 43:11</p> <p>portion 25:15 42:11</p> <p>portions 49:4 51:4</p> <p>position 16:12 30:20 72:15 78:5</p> <p>possibility 51:13</p> <p>possible 67:21 68:1</p> <p>possibly 56:19 67:16</p> <p>post 59:16 60:20</p> <p>Powder 16:6,19 22:22</p> <p>power 1:5 4:5 7:1</p>
--	---	---	---	---

7:12 26:4 PowerPoint 8:4 PPL 14:5 practical 10:19 54:12 practitioners 34:21 PRB 9:1 10:15,16 11:4 14:12,16,18 14:19 15:4 64:14 pre 27:17 precedent 44:20 45:5,10 63:22 64:2,8,15 66:17 precisely 79:14 predicted 57:8,22 predictions 60:4 predominantly 15:18 preferences 78:19 premise 41:7 premised 41:18 prepared 4:14 34:3 46:12 prescribe 50:6 present 72:10 74:10 presentation 9:5 18:14 41:7,18 42:14 45:22 46:14 48:16 presentations 5:18 presented 39:16 40:20 presents 45:7 presumably 54:4 presume 43:16 presumed 42:10 43:22 46:18 47:17 48:10 presuming 49:19 presumptions 58:1 pretend 55:12 pretty 10:1 55:2,3 74:3,5 previously 32:11 75:9 pre-recession 27:3	57:18,22 59:13 price 78:14 prices 16:17 pricing 50:21 primarily 7:14 12:2 15:5 32:8 57:11 principle 25:21 26:17 66:21 71:8 principles 11:19 prior 8:12,20 16:4 45:8,10 64:8 66:8 74:6 79:6 probably 25:10 83:12 85:8 problem 45:7,19 69:11,21 problematic 75:1 procedural 4:11 31:15 33:1 proceed 36:22 51:1 51:7 proceeding 1:18 6:17 34:21 51:1 82:19 process 19:8 30:15 31:18 33:18,22 38:2 40:3 62:13 84:9 processes 84:10,20 produce 19:10 30:7 produced 57:7 60:1 60:19 produces 42:4 producing 67:21 production 21:8 22:14 profit 7:11 profits 31:12 program 12:18,19 project 59:18 projected 8:3 20:11 60:9 75:13 projection 62:1 projections 57:18 57:19 59:22 61:2 75:5,16,20	proper 72:13,19 properly 30:20 63:8 75:7 propose 23:18 proposed 8:19 12:5 23:21 51:18 69:2 69:8 82:3 proposing 82:11 prosecute 17:17 protects 80:18 prove 60:12 proven 51:8 provide 12:20 28:21 32:12 35:16 38:13 39:10 40:22 48:17 63:17 provided 28:1,4,15 32:11 35:15,22 39:12 42:15 46:1 48:21 64:19 providing 65:2 68:1 provision 68:14 public 28:8 publicly 28:2 Pueblo 43:2 45:18 46:19,22 47:2,15 purchase 15:18 purchases 18:12 purely 68:6 purport 28:17 purported 38:21 purpose 49:7 55:21 purposes 63:9,10 put 28:13,22 29:2 33:5,16 36:7,12 38:12 86:3 putting 36:14 P-R-O-C-E-E-D-... 4:1 P.O 2:8	41:5 44:7 47:8 51:21 52:11 61:7 63:21 68:10,11 70:10 79:14 84:15 85:6 questions 4:15 20:6 26:21 34:3,4,9,12 41:4 73:18,19 76:17 Quick 14:17 quickly 33:13 36:14 60:22 73:15	11:19 14:21 16:19 17:18 19:11,12,17 20:16,17,22 21:12 24:22 25:22 26:11 33:14 41:14 44:9 48:7 49:10,12 50:2,3,6,7,16 53:10,10 54:2,19 55:5,6,19 65:4 67:3 68:1 74:6 77:12,13 78:21 79:2,6,7,9 81:7,14 82:21 84:1,9 86:3 rates 8:2 9:1,3,19 9:20 16:1 17:13 17:18,19 41:10,16 41:22 42:15 46:9 49:22 50:20 51:3 52:18 53:8,11,12 53:12,13,17,22 79:10,10 reach 35:4 79:21 react 53:21 ready 19:10 real 19:2 23:19 24:9,16 43:3 45:16 47:11 64:19 64:21 68:8 69:4 80:22 83:7 really 6:7 24:5 51:22 61:3 62:8 realm 11:1 reason 45:19 reasonable 8:1 12:20 31:10 36:20 38:11 42:1,16 55:20 75:20 reasonableness 9:1 11:2 41:15 50:2 67:2 69:16 reasonably 76:10 reasoning 77:20 reasons 41:12 reassemble 39:21 rebuttal 3:19 4:20 6:3 33:6 34:14 61:21 62:2 73:12
R				
R 1:22				
rail 50:3 51:19 68:6 77:2 79:20				
railroad 8:8 9:11 12:3,17,20 13:9 16:17 19:11 23:14 23:18 26:2 27:4 28:8 40:15 41:2 43:6 61:1 65:7,10 67:9 68:18 73:21 76:5 77:9 78:1,5 82:2,3,11 83:15 83:17 85:20				
railroading 83:7				
railroads 11:3 13:16 14:2 16:1 16:11 27:21 28:1 28:4,17 30:15 32:9 33:4 35:21 55:16 60:1,6,16 60:18 67:9,12,19 68:5 70:2 74:9,18 75:9,12 76:19 77:21 79:1 80:6,9 80:11,16 81:6,11				
railroad's 31:12 58:11				
Railway 40:18 62:20 71:17				
raised 69:22				
range 15:2				
rate 7:21 8:11,12 8:17,20 9:6,18				
Q				
qualities 18:8				
quarter 28:5 57:12				
question 9:22 14:17 23:20 31:15				

73:14 receive 81:12 received 15:3 27:2 recession 6:8 27:1 27:5,15,18 37:3 56:7,13 57:5 58:3 60:21,21 62:4 75:6 recognized 57:4,9 61:6 66:8 recognizes 49:8,11 recollection 17:7 reconcile 24:15 record 6:5 17:4 29:1 33:16 39:2 39:17 40:11 56:10 60:1 74:16,17 76:16,18 85:7,9 recoup 80:14 recover 60:22 recovering 31:13 75:11 recovery 60:5 75:18 red 5:6,9,13 reflect 28:11 reflected 35:13 37:4,5 reflects 10:18 11:14,18 24:19,21 29:16 refrain 72:19 regard 59:16 regarding 63:22 64:7 77:1 81:21 82:1 regulate 49:22 regulations 44:16 reinforced 72:15 reiterated 66:22 relatively 7:10 relied 37:5 relief 38:3 relies 48:18 rely 32:10 71:5 relying 69:20 remainder 75:15	remaining 5:6 40:18 remand 72:12,14 remanded 72:7 remarkable 82:9 remarks 4:10 reminder 5:21 replicate 9:12 13:18 reply 38:13 72:11 Report 9:17 79:8 represent 40:14 represents 40:17 66:5 request 17:8,13 19:11 20:16 21:21 73:6 74:22 requested 4:18 6:2 16:19 17:19 require 9:11 12:3 13:18 25:16,18 26:14 70:3 82:22 required 12:16 33:19 requirements 12:10 requires 41:14 51:2 reroute 10:4 30:13 43:12 48:9 64:13 64:18 69:8 74:7 77:6 rerouted 48:6 68:20 reroutes 64:14,17 rerouting 9:8 43:15 43:19 44:7,20 53:1 64:1,8 66:20 69:2 73:22 reroutings 44:14 reserve 4:19 resolve 19:1 resolved 63:8 respect 56:7 64:18 65:11 66:12,14 75:5 respective 65:16 respects 13:6	respond 33:7 76:11 responded 37:12 76:18 responding 70:10 response 59:2 responses 32:3 responsibilities 42:8 44:1,9 48:11 65:17 responsibility 7:6 46:19 47:18 65:1 65:13 66:18 responsible 7:12 65:20 66:11 result 12:8 42:13 46:8 48:22 54:12 57:20 resulted 51:12 results 66:3 73:3 revenue 36:5 42:9 46:22 47:20,22 48:13,18 52:13 53:4 72:6,20 73:2 73:7 revenues 31:12 44:22 53:3 55:8 55:13 65:22 66:6 66:10 70:17 72:3 72:16 revenue-sharing 45:2 reverse 58:2 right 10:16 44:16 53:20 63:9,15 rights 8:16 78:22 Rincon 43:5 River 16:6,20 Robert 2:3 6:21 Room 1:19 Rosenberg 2:3 3:12 3:19 6:20,21 10:10,16 11:6,14 12:15 13:14 14:20 15:16,20 17:6 18:20 20:4 22:4 22:19 23:1,7 24:18 27:19 32:5	36:1 37:11,17 38:4 39:15 40:7 58:20 73:11,13,20 76:21 77:11 79:13 80:1 81:4,21 82:12 83:16 85:8 85:14 86:13 Rosenberg's 56:8 56:16 Rosenthal 2:12 3:14 40:13,14 43:18 44:19 45:14 50:12,18 51:20 53:19 54:22 56:1 56:3,22 57:3 60:18 61:15 62:15 63:2,14 66:4 70:9 71:15 75:7 roughly 7:13,16 rounds 39:22 route 9:8 14:10 28:6,19 29:3,8,19 30:2,6 32:16,20 33:5 38:17 39:21 47:16 58:14 64:6 82:13 83:5 routes 42:12 45:15 46:5,11 routing 8:21 11:4 11:16 67:11,11,15 67:17 68:9,18 69:4,12 77:22 78:1 80:15 RTC 12:18,19 13:3 36:16 86:6 rule 53:2,11 rules 43:18 44:15 52:7,8 53:22 54:10 55:2 68:15 68:16 69:13 86:9 ruling 8:11 run 10:6,7 56:4 85:16,18 running 10:15 17:2 19:21 runs 22:13 80:10 rural 7:11,14	S SAC 8:18 55:17 63:13 71:8,8 Sam 62:19 SAMUEL 2:17 sanctity 67:8 SANTA 1:10 SAR 9:2 14:3,7,10 14:14 23:14,18,21 24:2,8,12,15,17 24:18 25:5,16 44:14 64:11 69:17 69:19 82:22 SARR 19:6 77:7 saying 39:4,8 48:5 51:6 52:22 54:14 69:16 77:12 78:10 81:4 says 58:20 64:16 68:17 79:9 scale 8:6 58:19,19 schedule 33:1 schematic 8:7 46:11 screen 8:4,6 seat 5:15 second 42:2 59:1,5 section 49:11 50:1 50:5 68:15 69:13 77:1 see 5:5,13 26:5 29:4 46:9 47:15 58:8 74:13 85:14 segment 8:15 76:7 segments 25:3 select 32:15 58:13 selected 28:18 29:7 83:5 selecting 38:17 selection 29:8 52:4 selective 31:6 33:15 semblance 23:19 senior 7:5 sense 70:16 79:19 80:15 senses 80:2 sensible 45:6
--	---	---	--	---

separate 53:17 59:17,18 61:17 separately 13:19 53:13 September 1:14 seriously 34:17 serve 7:15 25:1 65:7 service 12:21,22 18:15 21:22 46:1 48:17,20 51:19 63:17 64:19 65:2 services 2:7 42:15 set 5:20 28:3 36:4 36:10 67:12 81:14 sets 86:9 setting 53:22 settlement 51:12 seven 34:4 73:19 Seventeenth 2:4 shareholders 67:22 shares 47:11 76:2 sharing 53:5 71:12 sheet 80:13 shifting 66:1 ship 20:19 shipments 84:11 shipper 7:20 12:15 13:10 24:20 33:18 38:16 40:2 51:17 68:17,19 71:5 shippers 67:10 71:10 77:4 83:19 short 4:13 73:18 show 23:17 31:9 51:2 showed 75:10 showing 31:1,3 45:14 77:5 showings 67:17 shows 12:19 13:4 28:10 75:19 81:11 Sierra 2:7 Signal 17:20 18:18 20:3 significant 19:2 42:11	signifying 5:10 similar 18:3,4 29:18 70:10 simple 30:16 simplified 46:11 simplify 84:9 simply 30:21 44:7 48:9 53:8 simulation 12:17 13:4 36:16 single 5:9 9:20 64:9 65:5 Sipe 2:17 3:17 40:17,21 62:15,16 62:19 67:7 68:10 70:9 73:11 situation 20:3,5 70:21 situations 12:9 six 33:21 sized 85:20 Skip 7:4 slight 61:15 slightly 45:7 Slover 2:4 6:21 slow 31:19 slurry 52:9,15 small 7:10 8:6 84:10 smoothly 33:13 34:1 someplace 23:9 somewhat 19:5,18 sorry 56:4 sort 14:3 28:16 33:6,18 39:4 45:2 53:4 57:18 61:17 71:7 sorts 25:18 sounds 19:17 82:9 source 15:19 16:22 61:3 62:3 sources 20:1 south 10:6 43:5 46:22 47:15 southern 17:14 Southwest 2:7	Southwestern 41:2 43:6 71:16 speak 63:20 Speakers 5:3 specific 17:1 44:12 49:14 specifically 8:21 9:7 42:19 specification 49:18 65:17 66:13 specified 14:6 specifies 9:17 specify 54:9 speculative 19:18 20:6 spiked 6:14 split 13:17 spreadsheets 85:17 Spring 17:9 staff 34:3 Staggers 9:18 79:8 stand 18:13 41:6 51:1 65:6 77:22 78:2 80:9 standard 14:7 79:9 standards 9:18 stands 18:12 80:5 stand-alone 8:8 9:11,14 13:9 41:17 42:5,13 44:6 45:22 46:4 46:14 48:16 49:1 49:2,8 52:4 55:16 63:19 65:10 70:12 76:4 77:2,9,17 80:12,17 81:9,10 84:2 start 12:21 37:3 80:12 started 6:6 36:10 37:4 starting 20:22 21:11 57:10 state 40:11 statement 4:13 STATES 1:1 Station 7:17	statute 41:14 49:7 49:8 55:3 68:17 81:16 statutory 68:14 STB 1:8 4:6 35:2 step 6:4 40:9 Steptoe 2:18 stick 74:10 stockpiled 22:6 straightforward 68:12 stranger 38:1 Street 1:19 2:4 31:3 strikes 23:16 structured 54:5 stuff 86:4 subdocket 17:17 subject 66:20 submit 74:18 76:17 submitted 13:3 72:12,16 85:7,9 85:15 subsidize 51:4 subsidizing 49:4 subsidy 14:4,8 50:13,14,16 66:3 81:16 substantial 14:22 69:6 82:5 suddenly 58:22 sufficient 81:18 suggest 39:14,15 56:13 suggesting 39:19 suggests 30:14 sulphur 18:7 sum 14:22 supply 7:7 supplying 7:12 Suppose 78:8 supposed 24:7 71:11 75:3 sure 34:8,22 37:12 38:22 54:11 surely 67:19 Surface 1:1,18 surprised 85:13	switch 25:2 switched 62:2 switches 24:1 29:11 switching 82:8 83:10 symbol 29:21,22 30:1,4 system 25:15 59:14 79:21 82:8 83:8 systematically 57:1 S.W 1:19
T				
take 5:15 21:9 26:14 29:9 32:21 34:17 36:2,7 39:1 52:14 56:12,20 61:13 71:18 78:11 86:15 taken 13:11 16:9 18:9 29:20 36:18 takes 25:14 36:11 talk 53:20 talking 16:21 21:19 22:3 talks 64:8 tapes 36:5 tariff 16:19 22:21 42:18 tariffs 42:22 54:8 technical 28:14 tell 11:12 30:8 55:18 71:1 ten 62:22 terms 69:20 test 21:21 45:6 49:8 50:22 51:2,7 55:21 63:13,19 tests 50:19 thank 6:20 13:12 15:14 23:10 26:18 33:20 37:11 40:4 40:6 45:12 55:22 57:2 62:14 73:9 73:10,13 86:11,12 86:13 Thanks 6:19				

theoretically 10:9 theory 84:2 thing 10:6 44:21 47:16 80:4 things 4:8 21:7 25:18 26:15 31:3 37:5 60:9 83:14 86:2 think 10:19,22 11:2 13:15 16:8 17:8 17:10 20:5,10,13 23:3 25:10 35:2,6 36:12,13 37:11 41:5,11 44:12,15 44:19 45:4,9 52:19 53:19 54:22 55:2 56:6,9 58:4,5 59:11,15 67:11 68:3 70:13 73:4 75:7 76:14 78:5 80:1 thinking 56:6 third 7:22 18:11 25:6 thirds 14:9 thoroughly 71:20 thought 5:15 6:7,16 32:3 three 33:11 37:2 39:22 62:20 threshold 80:18 81:8,12,15 through-out 49:14 49:17 through-rate 13:17 79:3 tied 17:15 time 4:15,16 5:1,6 5:10,12,18 14:21 17:18 18:12 21:1 21:18 22:1,7 35:11 36:12,17,18 40:12,16,18 56:5 63:10 76:13,15 timely 36:17 timer 5:20 times 38:10	timing 5:4 TMPA 67:1 today 4:4 62:20 80:9 86:14 tons 7:16 20:10 topics 81:22 total 4:18,22 84:17 85:5 track 12:7 78:14 82:4 83:7 trackage 8:16 78:22 traffic 6:14 8:22 9:8,22 10:4,4,11 10:15,17 11:22 12:5 13:8 14:11 14:12,15,16,18 24:3,12,13,21 25:6,7,20 26:9,10 28:6,18 29:2,8,10 29:19 30:2,6 31:5 31:16,20 32:16,20 33:5 35:14 38:17 39:21 41:8,20 42:4,9,19 43:1,4,7 43:8,12,15,19 44:2,3,4,8,10,21 46:15,18,21 47:2 47:3,4,10,10,10 47:12,14,19,21 48:2,6,9,12,13,14 48:18 49:3 52:3,5 52:11,12,12,17,21 53:2 55:20 57:6 57:10,20 58:2,6,8 58:14,15,17,21,21 59:4,8,12,14 60:19,22 61:11,13 61:18,19,20 62:11 64:14,17 65:14 68:20,22 69:3,7,9 70:11,13,14,19 71:5,6,9,12 72:3,7 74:1,8 76:1,2,5,9 77:6,15 78:9,10 81:13 82:6,12,14 82:17,18 83:2,4,4	83:5,9,18 84:21 85:3 train 21:22 23:8 24:20 25:4 29:21 29:22 30:1,9,9,12 30:14 32:19,19 36:6 trainload 23:2 32:18 trainloads 22:5,11 22:17,21 23:5 25:14,17 trains 23:6 26:6 29:20 30:4,5,10 30:10 82:13,15 transaction 22:3 transcon 47:5,10 transport 48:2 transportation 1:1 1:19 7:7 49:13 transporting 42:8 48:11 65:13 treatment 41:1 trend 37:8 trending 75:11 tried 29:18 57:13 57:20 58:9,11,14 58:18 62:11 78:15 tries 46:7 48:4 64:10 triggered 16:20 true 59:3 60:13 61:14 truncated 29:8 truncates 29:17 try 38:4,5 42:17 56:22 57:15 58:13 62:10 79:13,21 84:8 86:9 trying 19:1 22:2 39:4 75:12 76:22 79:1 86:3 Tucson 17:16 Tuesday 1:13 turn 5:22 two 5:2,11,19 13:17 14:9 21:20 22:5	22:17 23:3 41:11 51:22 61:17 64:5 66:15 70:2 76:19 80:2 81:6 type 14:6 21:18 22:2 77:4 types 12:11 51:10 typically 13:8 <hr/> U <hr/> ultimately 48:15 55:21 undermine 26:16 understand 20:1,2 22:2 37:13 39:4 46:10 82:2 understandably 67:20 understanding 27:2 undesirable 15:9 unfair 31:7 Union 1:10 4:6,22 5:16 7:21 40:8,14 55:19 unit 21:22 23:5,7 24:20 82:13 UNITED 1:1 unnecessarily 38:5 unnecessary 79:11 unpunished 84:6 unreasonable 50:8 69:18 updated 74:14 updating 31:7 75:5 uptick 27:9,17 56:14 60:17 upwards 75:11 UP's 26:5 47:1,14 47:21 48:11 61:12 76:1 URCS 24:11 use 8:15 9:9 24:10 28:12 33:15,18 35:17 40:15,18,20 49:5 53:2 56:20 61:22 72:5 78:15	78:22 80:11 useful 22:10 usual 53:2 usually 76:16 Utah 16:9 utilize 33:19 39:17 74:18 utilized 75:10 utilizes 8:18 11:17 24:19 25:3,16 U.S 1:18 <hr/> V <hr/> v 1:8 4:6 valid 50:17 value 67:21 values 75:6 variable 69:6 71:17 Vaughn 10:12 25:4 26:8 46:16,20 47:2,5,19,22 70:18 78:13 Vaughn-El 8:15,22 74:8 76:1,6 venture 85:10 versa 66:7 version 85:16 vice 1:22 63:20 66:7 73:17 Vice-Chairman 9:21 10:14 23:12 26:18 31:14 33:20 43:10 44:11 45:12 48:8 53:6 54:17 55:22 62:17 69:15 71:2 76:12,14 84:4 85:12 86:11 violates 9:12 volume 16:21 59:7 volumes 21:19 31:12 47:4 74:15 75:10,15 <hr/> W <hr/> wait 19:20 Wall 31:3 want 21:4,17 33:5 34:2,6,22 37:12
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56:16 57:3 60:2 68:8 71:19 74:13 wanted 4:10 35:11 37:16 39:6 84:15 wants 16:15 Washington 1:15 1:19 2:5,14,21 wasn't 35:9,17 58:21 water 70:1,4,21 way 7:9 18:13 27:16 35:16 56:13 58:5 69:1 73:17 76:22 78:10 ways 50:19 53:21 week 19:20 welcome 4:4 went 28:4 30:9 west 76:7,8 Western 72:8,21 73:8 whatsoever 79:18 Whitley 2:6 7:4 wild 52:14 win 71:10,10 wise 38:18 wished 39:11 withheld 34:18 wondering 27:14 34:5 84:19 words 61:11 work 16:14 18:18 19:1 32:6,12,13 36:4 37:18 38:6,7 51:17 72:17 86:9 worked 27:22 28:5 36:14,19 working 36:10 world 23:19 24:9 24:16 43:3 45:17 47:11 64:19,21 69:1,4 78:3 80:5 80:12,22 83:7 worried 19:4 wouldn't 52:16 58:20 70:6 Wyoming 17:11	42:22 46:17 <hr/> Y yard 83:13 yards 82:7 year 7:17 20:10 33:11 37:2 39:20 years 14:20 15:19 16:8 33:21 60:9 60:11 84:8 yellow 5:5,8 yields 30:17 <hr/> 0 08 32:6 09 28:11,20,20 32:7 32:10 36:9 <hr/> 1 1Q 32:7 36:9 1.2 7:16 1.5 7:16 10 20:10 10:50 86:18 10701(c) 54:1 10703 49:11 10704(a) 50:5 10705 68:15 69:14 77:1 78:9 10751 50:1 11 53:11 1201 2:13 1224 2:4 130,000 7:13 1330 2:20 <hr/> 2 2Q 28:11,20 32:6 32:10 20 6:2 40:16 20004-2401 2:14 20036 2:5,21 2008 37:4 57:11 2009 28:5 31:1 36:13 37:4 57:6 57:12,20 58:7 59:16,19,20,21 61:5,22 62:1,9	2010 1:14 31:5 60:10 62:3 2012 18:16 21:11 202 2:5,15,22 2165 2:8 24 23:22 25:9 25 4:19 6:2 28th 1:14 <hr/> 3 3,310 82:4 83:7 30 4:18,22 347-7170 2:5 395 1:19 <hr/> 4 4Q 28:11,20 32:10 40 3:14 42113 1:9 4:7 429-6486 2:22 <hr/> 5 5 6:3 520 2:9 586-5000 2:9 <hr/> 6 6 3:12 62 3:17 662-5448 2:15 <hr/> 7 74 3:19 <hr/> 8 85.7 76:5 85602 2:8 89.6 30:4 <hr/> 9 9:30 1:18 4:2 90 29:22		
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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: STB Docket No.
42113

Before: United States Surface Transportation Board

Date: September 28th, 2010

Place: Washington, DC

was duly recorded and accurately transcribed under
my direction; further, that said transcript is a
true and accurate record of the proceedings.



Court Reporter

NEAL R. GROSS

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WASHINGTON, D.C. 20005-3701

DEFENDANTS' ORAL ARGUMENT EXHIBITS

AEPCO v. BNSF & UP

STB Docket No. 42113

September 28, 2010

**The Burlington Northern and Santa Fe Railway Company ("BNSF")
Common Carrier Pricing Authority BNSF 57966**

Effective Date: January 1, 2009

Commodity: Raw Subbituminous Coal, STCC 11-21-series. Not applicable for transportation of beneficiated, enhanced or synthetic coal; provided however, Coal treated with additives used exclusively for dust control or to reduce freezing shall not be considered "enhanced" or "beneficiated".

Origins: Lee Ranch Mine (Lee Ranch), NM – "LRM"
El Segundo Mine (El Segundo), NM – "ESM"
McKinley Mine (North Tipton), NM – "MCM"

Destination: Arizona Electric Power Cooperative, Inc. Apache Generating Plant near Cochise, AZ.

Route: BNSF – Deming, NM – Union Pacific Railroad Company ("UP").

Through Rates and Minimum Weights: Weights stated in Net Tons Coal;
Rates stated in U.S. Dollars Per Net Ton Coal:

<u>Origin</u>	Minimum Weight Per <u>Carload</u>	Shipper- provided <u>Railcars</u>
Lee Ranch, NM	116	\$ 13.94
El Segundo, NM	116	\$ 13.94
North Tipton, NM	110	\$ 15.98

Freight Charges will be assessed on the basis of the applicable Minimum Weight per Trainload or the actual weight of Coal per Trainload whichever is greater.

**The Burlington Northern and Santa Fe Railway Company ("BNSF")
Common Carrier Pricing Authority BNSF 57988**

Effective Date: February 19, 2009

Commodity: Raw Subbituminous Coal, STCC 11-21-series. Not applicable for transportation of beneficiated, enhanced or synthetic coal; provided however, Coal treated with additives used exclusively for dust control or to reduce freezing shall not be considered "enhanced" or "beneficiated".

Origins:

- Spring Creek Mine – Nerco Jct, MT
- Decker Mine – Decker, MT
- BNSF Gillette Area Mines – Campbell County, WY:
- Eagle Butte Mine – Eagle Butte Jct., WY
- Buckskin Mine – Buckskin Jct., WY
- Rawhide – Rawhide Jct., WY
- Clovis Point – Clovis Point Jct., WY
- Dry Fork – Dry Fork Jct., WY

Destination: Arizona Electric Power Cooperative, Inc. Apache Generating Plant near Cochise, AZ.

Route: BNSF – Pueblo, CO - Union Pacific Railroad Company ("UP").

Through Rates and Minimum Weights: **Weights stated in Net Tons Coal;**
 Rates stated in U.S. Dollars Per Net Ton Coal:

<u>Origin</u>	Minimum Weight Per <u>Carload</u>	Shipper- provided <u>Railcars</u>
Spring Creek - Nerco Jct, MT	118	\$ 39.15
Decker Mine - Decker, MT	118	\$ 39.15
Gillette Area Mines, WY	118	\$ 37.50
(Eagle Butte Jct., Buckskin Jct., Rawhide Jct., Clovis Point Jct., Dry Fork Jct.)		

Freight Charges will be assessed on the basis of the applicable Minimum Weight per Trainload or the actual weight of Coal per Trainload whichever is greater.

**The Burlington Northern and Santa Fe Railway Company ("BNSF")
Common Carrier Pricing Authority BNSF 58039**

Effective Date: The later of: (a) September 1, 2009 or (b) the date on which the Signal Peak Mine commences unit train operations

Commodity: Raw Subbituminous Coal, STCC 11-21-series. Not applicable for transportation of beneficiated, enhanced or synthetic coal; provided however, Coal treated with additives used exclusively for dust control or to reduce freezing shall not be considered "enhanced" or "beneficiated".

Origins: Signal Peak Mine - Peaks, MT

Destination: Arizona Electric Power Cooperative, Inc. Apache Generating Plant near Cochise, AZ.

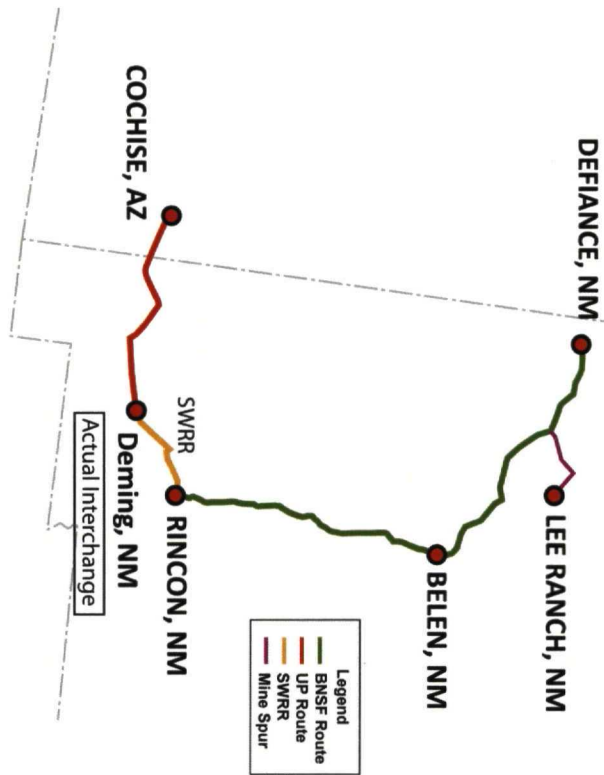
Route: BNSF - Pueblo, CO - Union Pacific Railroad Company ("UP").

Through Rates and Minimum Weights: Weights stated in Net Tons Coal;
Rates stated in U.S. Dollars Per Net Ton Coal:

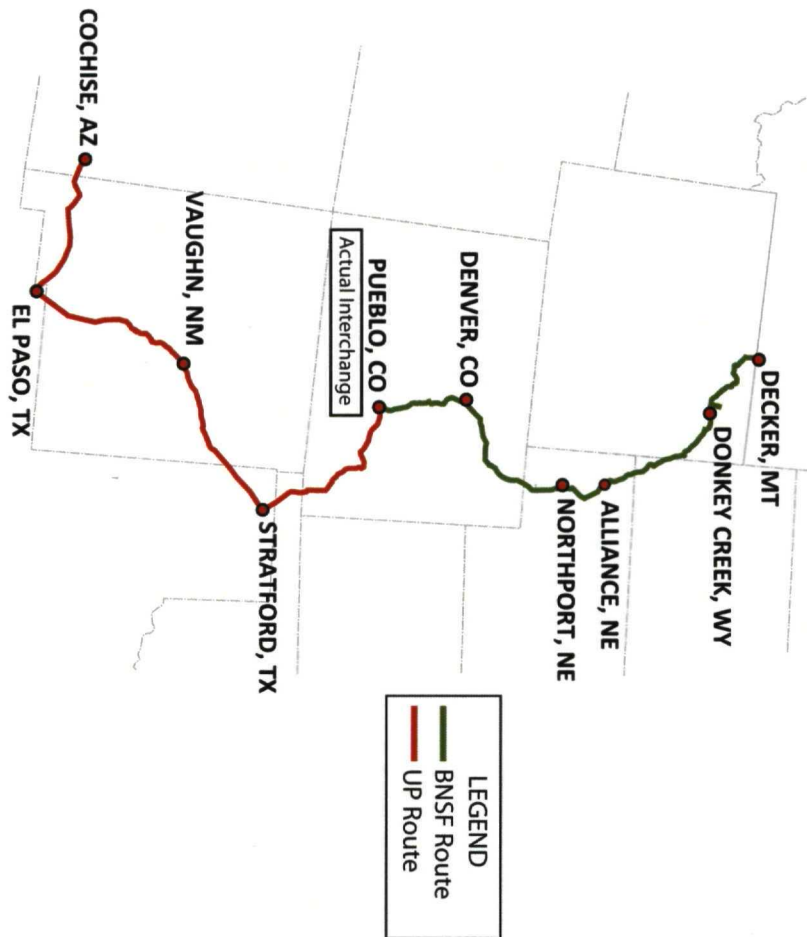
<u>Origin</u>	<u>Minimum Weight Per Carload</u>	<u>Shipper- provided Railcars</u>
Signal Peak - Peaks, MT	118	\$44.23

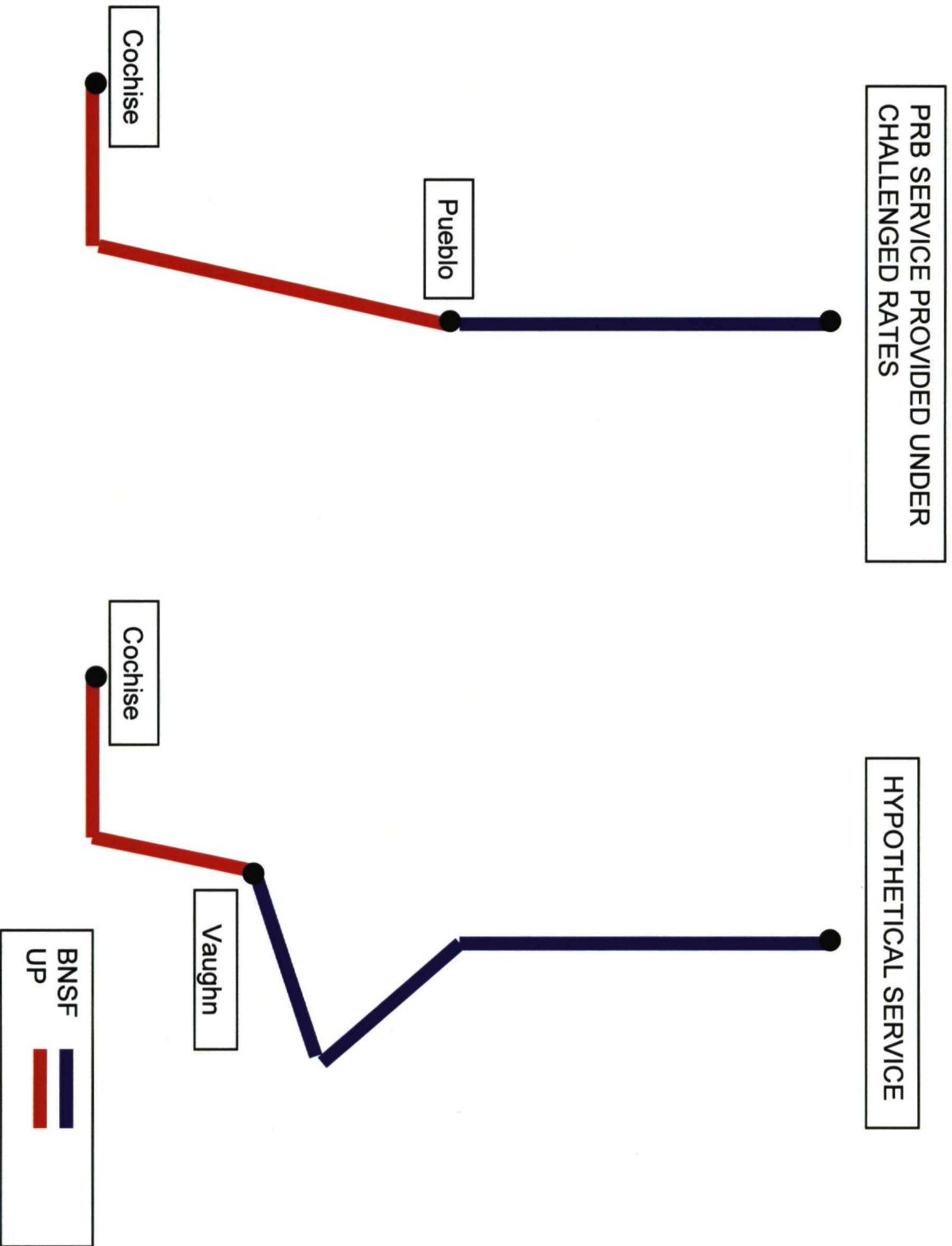
Freight Charges will be assessed on the basis of the applicable Minimum Weight per Trainload or the actual weight of Coal per Trainload whichever is greater.

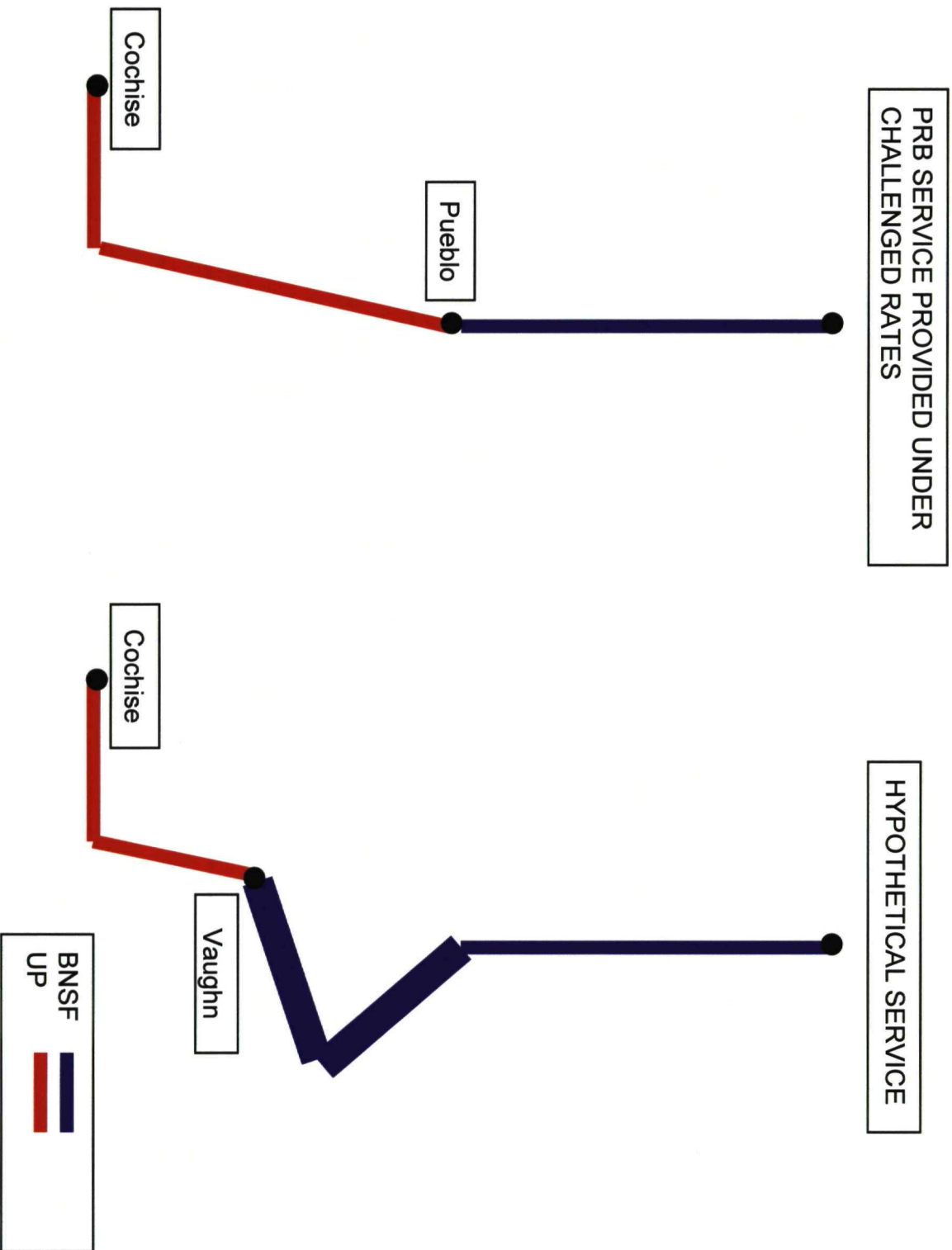
NEW MEXICO ISSUE TRAFFIC
ACTUAL ROUTE



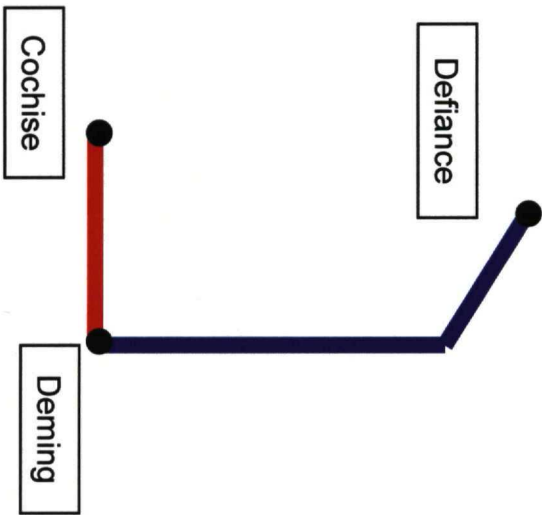
PRB ISSUE TRAFFIC
ACTUAL ROUTE



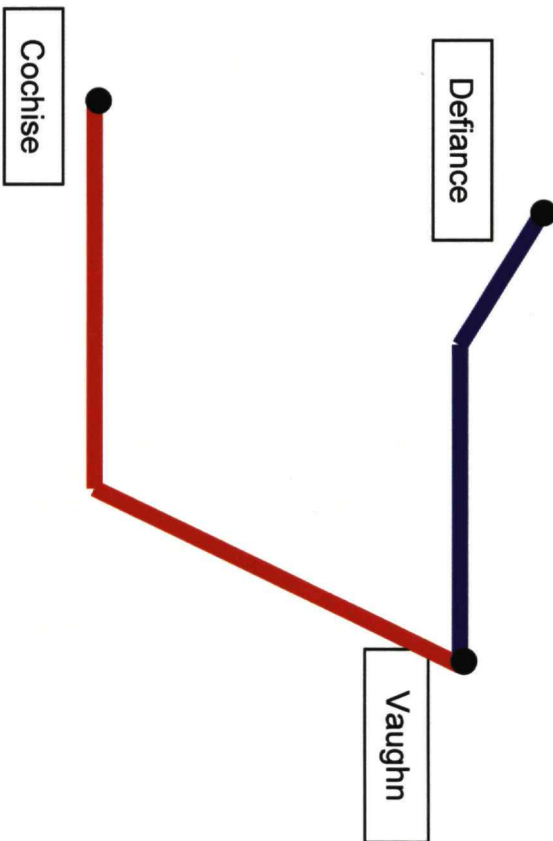




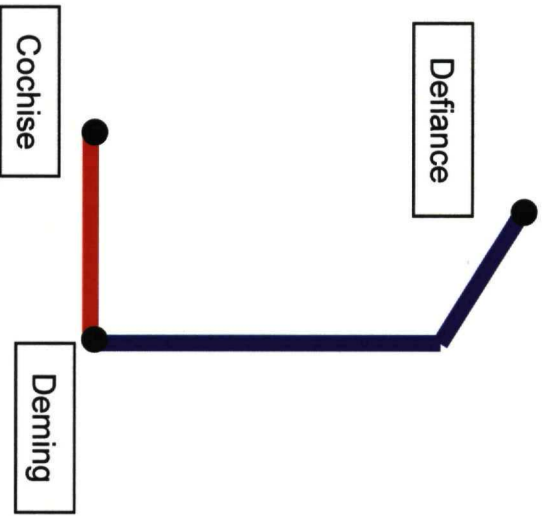
NEW MEXICO SERVICE PROVIDED
UNDER CHALLENGED RATE



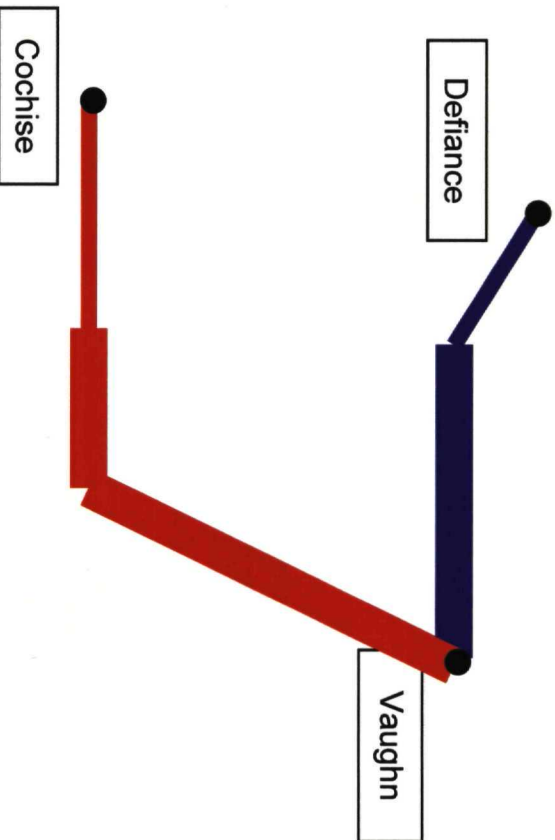
HYPOTHETICAL SERVICE



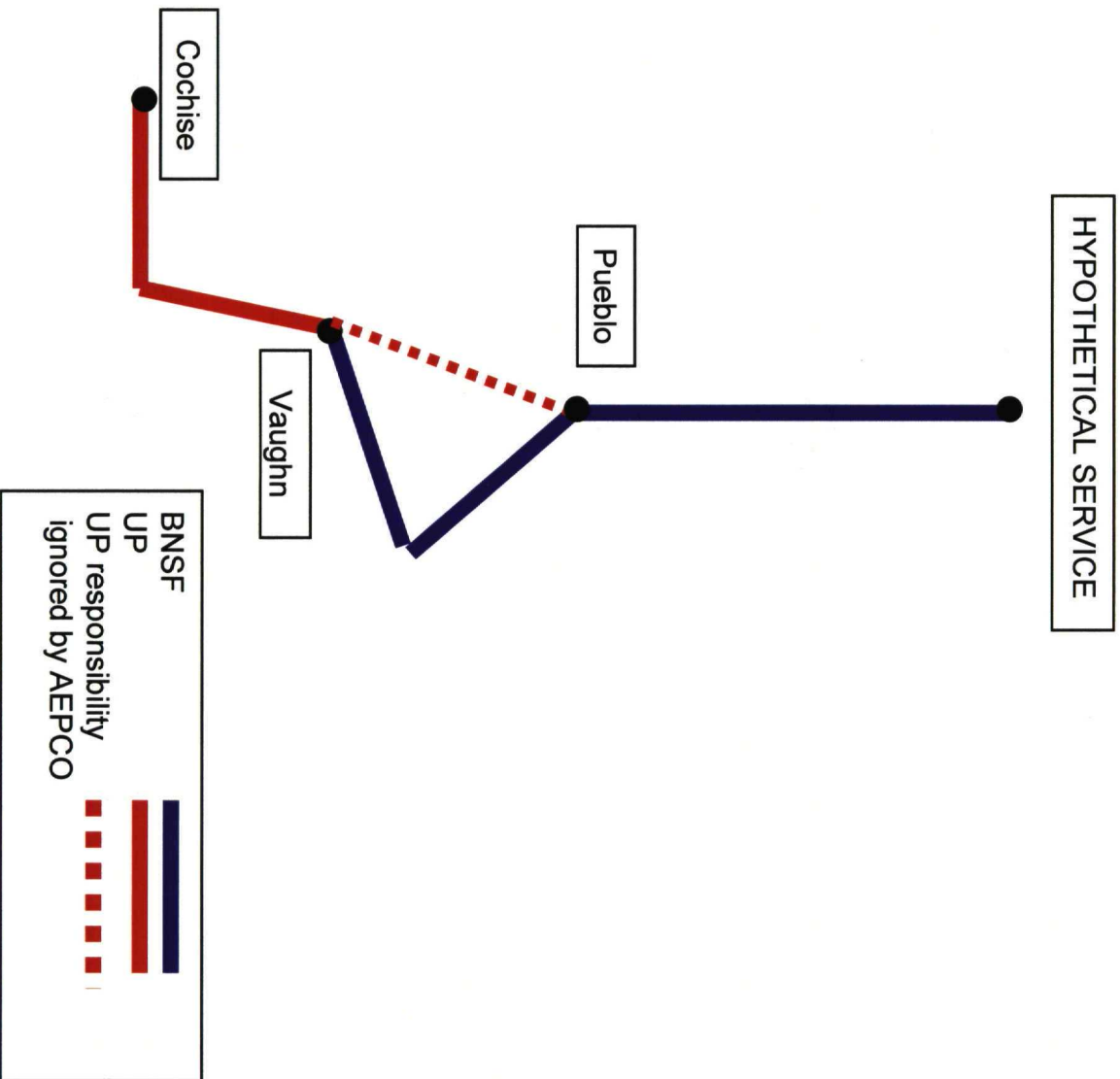
NEW MEXICO SERVICE PROVIDED
UNDER CHALLENGED RATE



HYPOTHETICAL SERVICE



BNSF
Up



Schematic Of The Arizona and Northern Stand-Alone Railroad

