

BEFORE THE SURFACE TRANSPORTATION BOARD

EX PARTE NO. 754

OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

**WRITTEN TESTIMONY ON BEHALF OF
ARIZONA ELECTRIC POWER COOPERATIVE, INC.
AND THE FREIGHT RAIL CUSTOMER ALLIANCE**

Arizona Electric Power Cooperative, Inc. (AEPCO), and the Freight Rail Customer Alliance (FRCA), respectfully submit the following as their written testimony.

1. AEPCO and FRCA intend to appear at the Surface Transportation Board (Board or STB) hearing through Emily F. Regis.
2. Ms. Regis serves as AEPCO's Fuel Resource Administrator since 2000. AEPCO is a nonprofit rural electric generation and transmission cooperative headquartered at 1000 South Highway 80, Benson, Arizona 85602. AEPCO serves its six retail distribution member cooperatives that, in turn, serve more than 400,000 people in Arizona, California, and New Mexico. To serve its member cooperatives and other wholesale electric power customers, AEPCO depends on coal transported by BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP).
3. Ms. Regis also serves as Vice President of FRCA. FRCA is an alliance of freight rail shippers impacted by continued unrestrained freight rail market dominance over rail-dependent shippers. FRCA represents large trade associations that

in turn represent more than 3,500 electric utility, agriculture, chemical and alternative fuel companies and their customers.

4. In addition, Ms. Regis currently serves as President of the National Coal Transportation Association (NCTA), and as AEPCO's designated representative to the Western Coal Traffic League (WCTL). This statement is submitted on behalf of AEPCO and FRCA, which also support and concur in the separate submissions of WCTL and NCTA. Except where otherwise indicated or suggested, references to "we," "our," and "members" in this statement refer to AEPCO and FRCA.

5. AEPCO and FRCA deeply appreciate that the Board has chosen to hold a public oversight hearing regarding railroad demurrage and accessorial charges. This topic is important to essentially anyone that ships by rail, as well as their suppliers and customers. AEPCO and FRCA's members have directly experienced the various problems that prompted the Board to schedule this hearing.

6. AEPCO and FRCA also commend the Board for the recent release of the long-awaited report of its rate reform task force and look forward to the opportunity to comment upon it. The demurrage and accessorial problems, like the high rates and poor service experienced by many shippers, reflect railroad market power and market dysfunction. Even very large companies and very large shippers, despite their supposed leverage, can and do suffer from these problems, which are typically far worse for smaller shippers. Effective oversight – which includes the availability and use of viable, cost-effective remedies – are required to realize the statutory requirements for railroads to provide service upon reasonable request, at reasonable rates for shippers that

lack effective competition, and with reasonable charges and practices for all shippers. We are hopeful that the recommendations made in this report, combined with further public review and comment, will lead to much needed rate reform decisions as soon as possible.

7. Our concerns with respect to demurrage and accessorial charges and practices fall into five categories, with some overlap among them.

8. First, we are being charged separately for additional amounts that were previously encompassed in the line-haul transportation. We are being charged more in order to receive the same bundle of service as before. Because more of these costs are classified as “charges” instead of “rates,” we may have less recourse before the Board. For example, if we brought a successful rate case before the Board, as AEPCO and some of FRCA’s members have done, the relief we would receive would typically apply only to the rates and not to the charges, meaning we could prevail in the rate case, but still be exposed to higher charges, even though charges are also supposed to be reasonable.

9. Second, many, if not most, of the charges at issue are associated with the adoption or implementation of Precision Scheduled Railroading (PSR) and its variants. In particular, our members have generally not experienced a significant change in demurrage and accessorial charges and related practices in this regard with BNSF, as BNSF is the one Class I railroad that has not adopted PSR. In our view, the railroads do not need to adopt PSR in order to be profitable and sustainable enterprises, particularly since they were already profitable and sustainable before adopting PSR. Instead, the railroads are pursuing PSR to achieve even lower operating ratios, and thereby even

higher stock prices. All of the U.S.-based Class I railroads had already lowered their operating ratios, and raised their market capitalizations, before they became infatuated with PSR. For most shippers, PSR translates into having their carriers handle less traffic at a lower operating cost to the railroads, but at higher rates and charges to the shippers. In other words, PSR may provide a path for railroads to increase their margins, but not to enhance their services.

10. Third, the implementation of PSR has brought about a substantial disruption and deterioration in service. We are painfully aware that the West has experienced very adverse weather conditions this past winter and this spring. Even so, the railroad service we have received has been less predictable and more disrupted on UP than on BNSF. CSX and NS customers have also suffered during PSR implementation. We are particularly concerned that the reduction in total capacity, or what is sometimes referred to as surge capacity, associated with PSR means that there will be little opportunity to make-up those service deficits during the remainder of the year. In other words, volumes will be lost forever, rather than merely deferred. At the same time, the Nation's supply chains have become more fragile, without any benefit of offsetting cost savings to shippers.

11. Fourth, we understand that, under some agency precedent, railroads may establish demurrage and accessorial charges that are not merely cost-based, but that include an additional component. To that extent, the charges serve as a penalty, in order to incent shipper, conduct that the railroads deem desirable. The railroads might claim that the higher charges are designed to result in more efficient or superior service or

system operation, particularly under PSR. However, our experience, as noted above, is that adoption of PSR has been accompanied by a disruption and a deterioration in service. The result is that PSR customers take a double-hit: not only are they required to pay more in demurrage (or detention, in the case of shipper-supplied railcars) and accessorial charges, but they also experience a diminished level of service. In other words, shippers have to pay their carriers more in order to receive less.

12. This outcome is not consistent with the statutory requirement that practices and charges be reasonable, regardless of whether the carrier enjoys market dominance over the traffic. The outcome is also not consistent with the common carrier obligation to provide service upon reasonable request. The railroads were, and are, plainly capable of providing the pre-PSR level of service, but have chosen to go in a different direction and have forced shippers to bear the brunt of their decision.

13. Fifth, there is an absence of fundamental fairness and basic reciprocity between shippers and railroads in the PSR world. Shippers are punished financially for not being able to receive a return train at the appointed time, or for taking too long to receive or unload a railcar. In contrast, railroads enjoy free rein to supply reduced and inconsistent service, without any monetary consequences, other than the lower operating ratios that appear to be their governing objective. Furthermore, PSR means that even long-time shippers with substantial customer volumes are having to deal with new railroad personnel to arrange for service and address the numerous charges and other issues that have arisen, thus adding an additional level of disruption.

14. The remainder of this statement illustrates the above concerns with specific examples and concludes with two related proposals as to how the system might work better.

15. One example of these problems occurred at AEPCO when UP insisted on taking our railcar trainset for its empty return movement before unloading had been completed. AEPCO utilizes a rapid-discharge bottom dump system. The system unloads cars far more rapidly than the rotary dump system used by most other utilities that receive coal unit train service. One trade-off is that the cars may need to be run through the dumper a second time, particularly if the coal has been frozen and/or spent an excessive amount of time in the railcar due to a slow transit time. In this instance, the cars were about to be sent to a repair shop for routine maintenance. It was particularly important that the cars be emptied completely before leaving the plant because the shop would impose an extra fee for having to dump any coal.

16. We needed to run the cars through the dumper a second time, had some remaining “free time” after the first run through, specifically requested that the cars be run through a second time, and were willing to pay for the additional unloading time, at the fee for additional unloading time as increased by PSR. However, UP insisted on taking the train after the first run through the dumper, thereby exposing AEPCO to additional charges from its car repair shop. In addition, the weight of the residual coal causes UP to consume additional fuel to move the cars to the repair shop. Furthermore, UP’s own circulars require cars to be fully unloaded before being released for the empty

movement. Failure to do so can cause trouble for the shipper, the carrier, and the mine when a non-empty railcar is next loaded at the mine.

17. AEPCO's problems with its trainset were not over. AEPCO's trainset eventually made its way to the repair shop in Wyoming and was serviced. The shop notified UP that the cars would be ready to return to service on April 26, but UP did not retrieve the cars until May 6. AEPCO had arranged for a coal delivery using the trainset in late April, and UP and the mine had previously confirmed AEPCO's reservation for that train slot. However, UP was unable to move the train until May, exposing AEPCO to the risk of having to renegotiate with its coal supplier. AEPCO also faces potential charges from the shop operator if cars are not promptly retrieved. If UP had arrived to pick up a train that was not ready until seven days later, UP would have subjected AEPCO to additional charges. UP's poor and less-than precise, predictable, or reliable service has created additional complications for AEPCO. PSR in this instance does not mean precision scheduled railroading as much as it means shifting the costs of UP's unreliable and unpredictable service onto its customers and others.

18. Another example of asymmetrical treatment is when an FRCA member sought to arrange for a trainset to be picked up on one day, but the railroad did not pick up the trainset until 9:00 pm the following day. If a shipper had failed to receive or present a train by that amount of time, it would have certainly received a large demurrage or wait charge and possibly some additional charges. However, UP is not subject to any charge for failing to provide timely service, and is not required to provide

reciprocal free time to the shipper. The charges and financial responsibility are all one-sided.

19. The problems are exacerbated by the nature of standard force majeure provisions. Such provisions purport, on their face, to apply to both the shipper and the carrier when an event beyond a party's control prevents its compliance with its transportation obligations, such as loading or unloading for the shipper, or providing line-haul transportation for the carrier. There is typically a 72-hour minimum period before force majeure protection begins. The waiting period may appear neutral, but many of the problems that can occur with loading or unloading can be resolved within 72 hours. As a result, force majeure seldom provides a defense to the demurrage and accessorial charges that can confront shippers, and shippers are forced to pay for excessive unloading time and/or a locomotive release/deadhead charge. However, the railroads seldom face liability for failing to accomplish any single task within 72 hours (at least in the case of coal and similar shipments), whereas shippers can be charged if they are even one minute late. In contrast, the events that do disrupt the railroads, such as derailments, flooding, and other outages, typically last far longer than 72 hours. Force majeure provisions thus function in an asymmetrical manner. That asymmetry is compounded by the higher demurrage and accessorial charges that are part of the PSR framework.

20. Constructive placement is another difficult area for shippers. Railroads control the movement of trains and cars, yet if one arrives while another is being unloaded, and the shipper cannot handle both at the same time, the railroad will constructively place the train or cars and start charging demurrage after the shipper's free

time expires. The shipper could have been waiting for days for its freight to arrive, but because both trains (or sets of cars in the case of a manifest shipper) arrive within the same window – a matter that is largely, if not entirely, within the carrier’s control – the shipper has to pay additional amounts. With PSR, the railroads should be able to reduce or eliminate constructive placement, at least so long as a shipper loads or unloads on a timely basis, but UP and other railroads have instead made constructive placement more stringent in UP Tariff 6041-B and similar tariffs. While UP claimed at the time that the more stringent measures were directed only at “bad actors,” they have instead applied very broadly. At least one FRCA member is looking at hundreds of thousands of dollars in constructive placement charges. Another member has experienced sharp increases, far beyond what could be explained by mere inflation.

21. Sound PSR might, in theory, have the potential to provide some benefit for shippers, even for those that, like AEPCO and some other FRCA members, have the ability to hold large stockpiles. PSR might allow smaller stockpiles to be maintained, along with smaller allocations for rolling stock. Shippers might thus avoid the need to acquire additional trainsets when cycle times are slow, or having to park those trainsets when cycle times are fast.

22. However, as the rules are presently configured, shippers bear the burdens, and railroads reap the rewards, of PSR. If a shipper is exposed to financial risk or penalty when it fails to or is unable to perform, reciprocal exposure should attach to the railroad. The railroad should not be able to expand its market dominance over rates

to include demurrage and accessorial charges, yet that is what has happened, and is becoming worse, in the PSR environment.

23. AEPCO and FRCA offer several suggestions for the Board to consider in helping to address the current problems with demurrage and accessorial charges and their relation to service and rate issues.

24. First, the carriers should not be allowed to establish new charges for services that were previously provided as part of the regular line-haul rate services, at least not without a showing that the line-haul rates have been reduced commensurately. Otherwise, demurrage and accessorial charges become a means to impose rate increases that may otherwise evade regulatory review.

25. Second, carriers should not be allowed to use demurrage and accessorial charges as a profit center. The Board I recognized and embraced the principle in addressing the safe harbor for railroad fuel surcharges. The same principle should apply here. Total railroad collections for demurrage and accessorial charges should not exceed the aggregate amount of costs that shippers create for those activities. Even if the Board allows some penalty component to improve service or lower costs for the network as a whole, the penal component should be limited, such as an additive of no more than 25% of the underlying cost-based component.

26. Third, the Board should consider adopting the approach that the Federal Energy Regulatory Commission (FERC) requires of jurisdictional public utilities and natural gas pipelines. Penalties apply when a customer seeks to use more than its allocated share of capacity, especially at a time when doing so causes harm to the system

or other customers. Under those circumstances, the customer pays a penalty, the severity of which varies based on the severity of the violation and associated harm. However, the penalty revenues are not retained by the utility or pipeline, but are instead distributed to those customers that followed the rules properly. In this manner, the wrongdoer pays an appropriate penalty that is punishment for the past and that provides an incentive for the future, the carrier is made financially neutral, and the shippers that acted appropriately receive the benefit of the penalty proceeds. FERC's system is superior to one where the carrier makes the rules (acts as judge), determines who has violated the rules (acts as jury), and retains the proceeds of the penalties it imposes (acts as a volume-incented executioner).

27. Fourth, insofar as possible, the principle of reciprocity should apply. The railroads should not be allowed to extract increased revenues from demurrage and accessorial charges when they are providing poor service. Similarly, carriers should not be allowed to bunch their trains and then force shippers to accept constructive placement and associated demurrage and accessorial charges. Charges should be excused under such circumstances. At a minimum, shippers should receive offsetting free time and other credits.

Respectfully submitted

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