

Subcommittee on Surface Transportation and Merchant Marine of the  
Senate Committee on Commerce Science and Transportation

Written Testimony of Mark W. Schwirtz, Chief Operating Officer  
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My name is Mark W. Schwirtz. I am the Chief Operating Officer and Senior Vice President of Arizona Electric Power Cooperative, Inc. (or AEPCO), located in Benson, Arizona. AEPCO deeply appreciates the opportunity to appear before you today.

AEPCO is a nonprofit rural electric cooperative, financed in large part through the Rural Utilities Service of the Department of Agriculture. AEPCO serves its ratepayers, located primarily in rural, economically disadvantaged areas of Arizona, on a cost pass-through basis. AEPCO generates much of its power by burning coal at its Apache Generating Station in Cochise, Arizona. The cost of coal together with coal transportation constitutes our single largest expense. Because AEPCO is a classic "captive" coal shipper, the transportation rates that we pay our carriers, the Union Pacific and the Burlington Northern Santa Fe, are very high, and factor directly into our rates for electric power.

AEPCO's predicament vividly illustrates why captive shippers need to be protected from monopolistic, market-dominant carriers, and why this Committee must exercise diligent oversight over regulatory agencies that fall within its jurisdiction. Moreover, if, as now appears to be the case, regulatory agencies such as the Surface Transportation Board are unable to meet their statutory and regulatory duties, then more self-executing regulatory

approaches, such as competitive access, should be implemented. In that regard, the legislative proposals that have already been introduced and assigned to this Committee merely call for the adoption of the sort of pro-competition approaches to other "natural" monopolies that have been adopted in a myriad of other industries.

From the late 1970's through the mid-1980's, AEPCO was engaged in a protracted rate case with the UP's and BNSF's predecessors before the Surface Transportation Board's predecessor, the Interstate Commerce Commission. That litigation lasted over ten years, during which our efforts to obtain a meaningful review of our carrier-imposed rates were repeatedly blocked. Only after the 9th Circuit, in AEPCO v. United States, 816 F.2d 1366, 1368 (9th Cir. 1987), likened our rate case to the interminable Jarndyce v. Jarndyce litigation in Charles Dickens's Bleak House, and found that AEPCO had "suffered the arcane rigors of the regulatory process long enough," and only after Congress expressed its concern about the situation, was AEPCO able to achieve a settlement that afforded its ratepayers a modicum of reasonable rail rates.

Unfortunately, the rates achieved nearly fifteen years ago have proven to be of fleeting value. Railroad costs have continued to fall very substantially since that time. While, as the railroads are quick to note, average rail rates, even for coal, have also declined, AEPCO has faced continuous railroad rate increases over that period. As a result, AEPCO's rail rates no longer bear any reasonable relationship to the railroads' costs of providing service.

Accordingly, on December 29, 2000, AEPCO filed a new rate case with the Board. AEPCO originally challenged BNSF's and UP's rates for moving coal to AEPCO's Apache power plant only from the New Mexico origins that have always been AEPCO's primary

source of coal. However, the railroads quickly initiated discovery designed to demonstrate that AEPCO will likely need to obtain significant volumes of coal from other sources in the future. AEPCO then amended its complaint on March 9, 2001, to include rates from Colorado and Powder River Basin (or PRB) origins that BNSF and UP had previously established. AEPCO's objective in amending its complaint was to avoid the burden and inefficiencies of piecemeal litigation and obtain rates that covered all of its long-term coal supply options, including the PRB. The PRB is the nation's largest source of coal, and the coal is relatively low-priced and low in sulfur. AEPCO believed that including the additional origins in its rate case would make the litigation process as efficient as possible for all concerned, especially compared to bringing an additional rate case in a few years.

The railroads responded by doing everything in their power to frustrate AEPCO's rate case. In quick order, they withdrew their PRB rates, refused to move the PRB coal that AEPCO had bought, sought to dismiss the PRB rate challenge, attempted to consolidate AEPCO's rate case with those of three other shippers, refused to respond to discovery, and even initially refused to reestablish PRB rates as ordered by the Board. All of these actions served to delay AEPCO's rate case.

On December 31, 2001, over a year after AEPCO filed its original complaint, and over nine months after AEPCO amended its complaint, the Board finally denied the railroads' motion to dismiss the PRB rate challenge and addressed other discovery matters. However, the railroads promptly responded by refusing to produce the information AEPCO needs to proceed with its rate case, particularly regarding the PRB rates. The railroads even claimed that AEPCO needed to present separate evidence to challenge the Colorado and PRB rates. AEPCO has since filed additional motions to compel and has responded to

other railroad motions, but the Board has not ruled on any of these pending matters. Indeed, both of AEPCO's motions to compel have been pending for longer than the 75 days that the Board's regulations provide are to be sufficient for completing all discovery. As a result of the Board's lack of action, AEPCO's rate case is, as of this moment, effectively dead in the water.

The lack of progress in our rate case and associated uncertainty creates major operational problems for us. As long as the litigation remains pending, we do not know what our railroad rates will be and, in the case of the PRB and some other origins, whether we will even have any rates at all. Since our rail rates are subject to change or possibly termination, efforts to develop our delivered cost of coal from different origins involve exercises in substantial uncertainty, which undermines our ability to make important coal procurement decisions, and also to fulfill our duty to provide power to our members and other customers at the lowest possible cost.

Moreover, AEPCO's experience has not been unique. Unfortunately, other western coal shippers have experienced very similar delays in their rate cases.

The intolerable delay cannot be reconciled with the Board's obligations. Under the Board's regulations (49 C.F.R. § 1111.8), the evidentiary filings in a rate case are to be completed within seven months of the filing of the complaint, and the governing statute (49 U.S.C. § 10704(c)(1)) specifies that rate cases should be decided within nine months of the completion of the evidentiary record. Hence, rate cases should be decided within sixteen months of filing. Moreover, the governing statute (49 U.S.C. § 10704(d)) further instructs the Board to "establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates ... includ[ing] measures for avoiding delay in the

discovery and evidentiary phases of such proceedings ... and for ensuring prompt disposition of motions."

These requirements have been completely disregarded in AEPCO's case. AEPCO's complaint has now been pending for over nineteen months, three more than the period in which cases are supposed to be decided. AEPCO's case has not been decided. In fact, not one page of evidence has been filed, and there is not even a procedural schedule. The Board has said that it will establish a procedural schedule once discovery is completed, but, so far, the railroads have been refused to respond to discovery on the PRB rates and other matters, even though their motion to dismiss the PRB rates was supposedly denied seven months ago.

AEPCO, like other shippers, viewed the passage of the ICC Termination Act of 1995 and the establishment of the Board as a sign that rate cases would receive the attention they deserve and would be decided on a reasonably prompt basis. At first, the Board seemed interested in fulfilling that objective. More recently, however, the Board has seemed more interested in other matters, such as mergers, and has allowed rate cases and captive shippers to suffer from apparent neglect. At this point, it is difficult for AEPCO to discern any meaningful difference between the Board and the Commission that the Ninth Circuit criticized in no uncertain terms fifteen years ago.

Accordingly, AEPCO urges this Committee to exercise its oversight function to ensure that the Board discharges its statutory and regulatory responsibilities in a timely manner. AEPCO would request that, as a minimum measure, the Committee require the Board to submit a quarterly report on the status of all pending rate cases, indicate whether the cases are "on track," and if the cases are not adhering to the required schedule, identify

the source of delay, which litigant (or the Board) is responsible for the delay, and what measures, if any, the Board is taking to ensure that the case proceeds to a timely resolution. Such a reporting requirement could do much to help focus the Board's attention and facilitate this Committee's efforts to remain informed.

In addition, given the Board's current difficulties in fulfilling its regulatory responsibilities, it is also appropriate to consider changing the regulatory approach. In recent years, several "competitive access" bills have been introduced to substitute competition for substantive rate regulation. While the railroad industry is quick to characterize these proposals as "re-regulation," they are, in fact, deregulatory in nature, and are intended to subject so-called "natural" monopolies to the type of competition that is standard throughout the rest of the economy. These approaches may also require less in the way of regulatory resources. If the Board is not going to implement the rate regulation that currently exists, Congress should give serious consideration to these other types of proposals, which have been adopted in a myriad of other industries.

Again, on behalf of AEPCO, I thank you for the opportunity to bring our concerns before you.