

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

234870

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Docket No. 42113

ARIZONA ELECTRIC POWER)
COOPERATIVE, INC.,)

Complainant,)

v.)

BNSF RAILWAY COMPANY and)

UNION PACIFIC RAILROAD COMPANY,)

Defendants.)

**UNION PACIFIC RAILROAD COMPANY'S COMMENTS
REGARDING REINSTITUTION OF RATE PRESCRIPTION**

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September 23, 2013

("[D]efendants' rationale regarding separating the rates because of the BNSF/Berkshire Hathaway issue is reasonable.")¹

UP recognizes that the Board's decision in *Western Coal* will likely increase the amount of reparations due to AEPCO during the 2010-2011 period in which defendants had charged joint rates. In addition, although the *Western Coal* decision directly affects only BNSF's URCS costs, UP may well be obligated to bear some of the increased amount due to the nature of joint rates. Because the precise amount of additional reparations cannot be known until the Board issues revised BNSF URCS data for 2010 and 2011, UP does not see any benefit to reinstating the prescription in this proceeding until then.

Whenever the Board reinstates the prescription, it will have to address the mechanics involved in calculating the jurisdictional threshold in 2010 and 2011. After conferring with the other parties, UP understands that there may be some disagreement about those mechanics. UP believes that the Board should calculate the jurisdictional threshold in each year using the most accurate URCS cost information available (though we recognize that BNSF's URCS costs must be revised for the reasons set forth in *Western Coal*). This means: (1) for 2010, using revised 2010 BNSF URCS and existing 2010 UP and Western Region URCS; and (2) for 2011, using revised 2011 BNSF URCS and existing 2011 UP and Western Region URCS.

In the course of our exchanges with the other parties, UP understood that there may be some objection to using 2011 UP URCS to calculate the jurisdictional threshold in 2011, rather than using indexed 2010 UP URCS. Although indexing is commonly used when it is impractical to wait for a particular year's URCS to become available, Board precedent requires use of more accurate, actual URCS when they are available in time to be incorporated into decisions. *See*,

¹ UP's interest would extend to the impact of this issue on rates prescribed in 2012 and beyond if it were required to establish joint rates with BNSF.

e.g., FMC Wyo. Corp. v. Union Pac. R.R., 4 S.T.B. 699, 747 (2000) (“In addition, UP’s 1998 URCS (run of October 5, 1999) is now available and we use this information to calculate variable costs for 1998 traffic.”). If there is to be any change to the jurisdictional threshold for 2011—and all parties appear to agree there must be some change to take account of the Board’s decision in *Western Coal*—there is no sound reason not to use 2011 UP URCS. This is especially true because the rate charged in 2011 was a joint rate, and any change to the jurisdictional threshold may well affect reparations owed by UP.

UP also understood that there may be a disagreement about whether the Board should recalculate Western Region URCS for 2010 and 2011, which are developed in part using BNSF URCS, and which are implicated in this case because of the involvement of Southwest Railroad. UP believes that it would be inappropriate to recalculate Western Region URCS. In *Western Coal*, the Board found no evidence that the BNSF asset valuations used to calculate 2010 and 2011 Western Region URCS were inaccurate. *Western Coal*, slip op. at 23. Rather, the Board precluded BNSF from revaluing its railroad assets during the years when Berkshire Hathaway had unauthorized control over BNSF. *See id.* at 28. The Board also required BNSF to transition to a full asset markup over four years to mitigate the potential effect of a sudden increase in the jurisdictional threshold on shippers’ ability to challenge BNSF’s rates. *See id.* at 30. Neither of the reasons for the Board’s actions justifies revisiting 2010 and 2011 Western Region URCS—particularly in a case involving an already-successful rate challenge. Western Region URCS are developed using data from Class I railroads as a proxy for data from smaller railroads. As there is no evidence that the BNSF data used to develop the 2010 and 2011 Western Region URCS were inaccurate, there is no reason to revisit those calculations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 2013, I caused copies of the foregoing filing to be served by electronic mail and first-class mail, postage prepaid, on:

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