

231771

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ARIZONA ELECTRIC POWER)
 COOPERATIVE, INC.,)
)
 Complainant,)
)
 v.)
)
 BNSF RAILWAY COMPANY and)
)
 UNION PACIFIC RAILROAD COMPANY,)
)
 Defendants.)

Docket No. 42113

FILED
Office of the Secretary
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Public Record

**UNION PACIFIC RAILROAD COMPANY'S REPLY TO ARIZONA ELECTRIC
POWER COOPERATIVE, INC.'S PETITION TO ORDER DEFENDANTS TO
PUBLISH RATES**

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Railroad Company*

January 30, 2012

UP has offered to discuss these technical issues with AEPCO, but AEPCO has said that it will not engage in discussions unless UP and BNSF agree to establish joint rates. Given AEPCO's refusal to engage in a dialogue, the Board should convene a technical conference to assist the parties in resolving their differences, which we describe in more detail below.

BACKGROUND

The Board did not prescribe joint rates in the *Decision*. UP and BNSF complied with the *Decision* by establishing proportional rates for issue traffic that do not exceed 180% of their variable costs of providing the service.

AEPCO filed its complaint on December 30, 2008. In its request for relief, AEPCO did not ask the Board to prescribe any particular form of rates if it found the challenged rates to be unreasonably high. Rather, AEPCO asked the Board to prescribe "the maximum reasonable rates that Defendants may assess and collect from AEPCO for the described transportation." (Compl., p. 5.)

The Board served the *Decision* on November 22, 2011. In the *Decision*, the Board found the challenged rates to be unreasonably high and prescribed maximum reasonable rates for future shipments. The Board did not prescribe any particular form of rates. Rather the Board ordered the defendants "to establish and maintain rates for movements of issue traffic that do not exceed the maximum reasonable revenue-to-variable cost levels prescribed in this decision." *Decision* at 39; *see also id.* ("[D]efendants will be ordered to establish and maintain rates for movements of the issue traffic that do not exceed 180% of the variable costs of providing service.").

Following the Board's issuance of 2010 URCS data, UP calculated rates for movements of the issue traffic that would represent 180% of its variable costs of providing service for the traffic as of January 1, 2012. UP developed one rate for issue traffic that originates at BNSF-

served mines in New Mexico, which UP handles from Deming, New Mexico, to AEPCO's generating plant near Cochise, Arizona, and a second rate for issue traffic that originates at BNSF-served mines in the Northern Powder River Basin, which UP handles from Pueblo, Colorado, to Cochise.

On December 28, 2011, UP sent AEPCO a draft of the tariff it planned to make effective on January 1, 2012, together with a worksheet showing how it had calculated the rates.¹ UP also explained to AEPCO that it was establishing proportional rates to simplify administration of the prescription.² Specifically, UP explained that using proportional rates would make it easier to perform any retroactive rate adjustments that become necessary as a result of the pending case regarding the accounting treatment of the Berkshire Hathaway's acquisition of BNSF, as any adjustments would involve only BNSF's variable cost calculations.³

On December 29, 2011, AEPCO objected to UP's use of proportional rates, asserting that "[a] proportional rate is simply not a joint through rate," but AEPCO did not explain the basis for its concern.⁴ If AEPCO was concerned that BNSF might not establish proportional rates for its

¹ See Email from Louise A. Rinn to Robert D. Rosenberg, Dec. 28, 2011 (Exhibit A hereto).

² *Id.*

³ See *Western Coal Traffic League – Petition for Declaratory Order*, STB Docket No. FD 35506. AEPCO petitioned the Board for reconsideration or reopening of the *Decision* "to be able to obtain the benefit of lower rates for past shipments made at newly established rates if it is determined that BNSF's Phase III URCS costs should not reflect some or all of the acquisition premium." Complainant's Petition Responding to the Order Served by the Board in Finance Docket No. 33506 on December 9, 2011, at 2 (Dec. 20, 2011). The Board granted AEPCO's petition in a decision served on January 30. See *Az. Elec. Power Coop., Inc. v. BNSF Ry. & Union Pacific R.R.*, Docket No. NOR 42113 (STB served Jan. 20, 2012).

⁴ See Email from Robert D. Rosenberg to Louise A. Rinn, Dec. 29, 2011 (Exhibit B hereto).

portion of the service for the issue traffic, that concern would have evaporated the next day, when BNSF set AEPCO its tariff and a worksheet showing its rate calculations.⁵

UP's and BNSF's proportional rates took effect on January 1, 2012.⁶

UP and BNSF complied with the *Decision*. The *Decision* did not require UP and BNSF to establish joint rates. UP and BNSF have established rates for movements of the issue traffic that do not exceed 180% of their variable costs of providing the service. AEPCO would be paying precisely the same amounts if the defendants had established joint rates.

ARGUMENT

AEPCO's claim that the *Decision* required UP and BNSF to establish and maintain joint rates is refuted by the *Decision* itself. The *Decision* prescribed the level of the rates that UP and BNSF must charge, but it did not prescribe the form those rates should take. Moreover, there is also no merit to AEPCO's claim that the use of proportional rates has proven "problematic from a ministerial perspective." (Petition at 4.) AEPCO's Petition shows that the parties have certain technical disagreements regarding their rate calculations, but the disagreements have nothing to do with the use of proportional rates.

I. The *Decision* Allowed The Defendants To Establish Proportional Rates.

AEPCO's claim that the *Decision* required BNSF and UP to establish and maintain joint rates is false. The *Decision* says nothing about the form the prescribed rates should take. In the

⁵ See Email from Anthony LaRocca to Robert D. Rosenberg, Dec. 30, 2011 (Exhibit C hereto).

⁶ In accordance with the Board's decision in *Oklahoma Gas & Electric Co. v. Union Pacific Railroad Co.*, STB Docket No. 42111 (STB served Oct. 26, 2009), UP established new, lower proportional rates, effective January 19, 2012, following the release of the Producer Price Index for the fourth quarter of 2011. See Email from Louise A. Rinn to Robert D. Rosenberg, Jan. 18, 2012 (Exhibit D hereto).

Decision, the Board prescribed the maximum reasonable through rates. The Board did not deprive the defendants of their statutory initiative to determine the form of the rates.

When the Board prescribes a maximum reasonable through rate but does not prescribe the form of the rate, the defendants retain the discretion to determine the form the rate will take. The Interstate Commerce Commission made this point in the key case cited by AEPCO, *Tex-O-Kan Flour Mills Co. v. Abilene & Southern Railway Co.*, 263 I.C.C. 91 (1945). In *Tex-O-Kan Flour Mills*, the Commission rejected arguments by the defendants that they could comply with its rate prescription by establishing proportional rates because its order expressly “requir[ed] the establishment of joint rates.” *Id.* at 94. The Commission explained that it could have left the defendants with discretion to determine the form of the rates, but it had not done so:

“Having concluded that the through rates are unreasonable, we could have prescribed merely the maximum reasonable through rates without requiring their establishment as joint rates, leaving to the defendants the determination of the method of publication.” *Id.* at 95.

In this case, the Board did *not* require the defendants to establish the prescribed rates as joint rates; instead, it left to BNSF and UP “the determination of the method of publication.” *Id.*

Because the Board did not order the defendants to establish joint rates, AEPCO is not entitled to the relief sought in its Petition. See *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, NOR 42056, slip op. at 2 (STB served Jan. 20, 2012) (“We cannot ‘enforce’ a rate prescription ... that we did not order”).⁷

⁷ AEPCO’s quotation of UP’s recent filing in the *SunBelt* rate case reinforces the point. As AEPCO observes, UP told the Board that it could not insist that SunBelt use a local rate “‘if the Board were to prescribe a joint rate for future movements of SunBelt’s traffic.’” (Petition at 5 (quoting UP’s Reply to Motion for Clarification at 16, *SunBelt Chlor Alkali P’ship v. Norfolk S. Ry. & Union Pac. R.R.*, NOR 42130 (filed Jan. 6, 2012)).) Here, however, the Board has *not* prescribed the form of the rate for future movements, so UP is free to choose the form.

II. The Defendants' Use Of Proportional Rates Will Not Deprive AEPCO Of Any Benefits Of Prevailing In A Rate Case.

The Board's decision to leave BNSF and UP with the discretion to establish proportional rates was reasonable because their use of proportional rates will have no detrimental impact on AEPCO. Indeed, AEPCO is unable to identify any harm it would suffer from the use of proportional rates.

AEPCO make three arguments about the potential for harm, but none has any merit.

First, AEPCO argues that the establishment of proportional rates "appears to be a step on a slippery slope ... that would maximize BNSF's and UP's opportunity to thwart any challenges to their rates." (Petition at 7.) AEPCO's "slippery slope" claim is nonsensical because AEPCO has already challenged the rates and won.⁸

Second, AEPCO argues that is unclear whether joint and several liability applies to participants in proportional rates, and that joint and several liability, "may yet be an issue for collecting reparations." (Petition at 9.) AEPCO's "joint and several liability" claim also makes no sense because there is no dispute that AEPCO's payments for which reparations are owed were made under joint rates, so it is irrelevant whether joint and several liability applies to participants in proportional rates.

⁸ AEPCO certainly cannot challenge the level of the rates the defendants will be charging under the prescription in this case, no matter what form they take, because rate levels prescribed by the Board are lawful, by definition. *See Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932).

AEPCO also speculates that the use of proportional rates might somehow matter in the event BNSF or UP someday seeks to reopen this case and argues for use of a revised stand-alone railroad. (Petition at 7 n.9.) UP cannot imagine how it might matter, but it is willing eliminate AEPCO's concern by stipulating that its use of proportional rates to satisfy the rate prescription would have no bearing on the stand-alone railroad, should this case ever be reopened.

Third, AEPCO argues that the calculation of proportional rates is more complex and potentially problematic than calculation of joint rates. (Petition at 10-11.) AEPCO attempts to support this claim by noting disagreements with BNSF's and UP's calculations of the prescribed rates. (*Id.* 10-11 & Att. No. 5.) However, all the disagreements involve issues that would have arisen even if BNSF and UP established joint rates, as discussed in the next section.

III. The Defendants' Use Of Proportional Rates Does Not Make Calculations Of Prescribed Rates More Complex.

AEPCO's disagreements with BNSF's and UP's calculations involve issues that have nothing to do with BNSF's and UP's use of proportional rates. Once those issues are resolved, the parties should be able to implement the Board's rate prescription without additional disputes.

First, AEPCO makes the more general complaint that if the railroads use proportional rates, it will always be required to review two sets of data. (Petition at 10.) However, even if BNSF and UP were required to charge joint rates, one railroad would simply provide its rate factor to the other; neither would check the other's work.⁹ Thus, if AEPCO disagreed with the joint rate established by the railroads, all the parties would have to work together to identify the source of the error. In fact, AEPCO and the defendants will find it much easier to identify and resolve any discrepancies if each railroad provides its calculations separately.

Second, AEPCO notes certain specific disagreements with the parties' calculations. In particular, AEPCO observes that UP calculated the average tons per car and cars per train from all New Mexico origins, rather than from the Lee Ranch and El Segundo mines separately. (*Id.* at 10-11.) AEPCO disagrees with UP's approach. (*Id.* at 11.) However, the disagreement is

⁹ For example, AEPCO and BNSF apparently disagree on the figures used to index BNSF's URCS costs. (*Id.*, Att. No. 5.) UP would not have detected an issue if it had simply provided a rate factor to BNSF (or if BNSF had simply provided a rate factor to UP) that was used to form a joint rate.

unrelated to the use of proportional rates. If UP and BNSF had established joint rates, UP's portion of the joint rate still would have reflected use of the same methodology that it used to calculate proportional rates.¹⁰ Certainly, UP and AEPCO must resolve their disagreement with regard to the methodology used to calculate the portion of the prescribed rate associated with UP's handling of New Mexico issue traffic from UP's interchange with BNSF to AEPCO's plant, but their disagreement will not be resolved through a requirement that the defendants establish joint rates. UP believes this issue can be resolved privately by the parties, but if AEPCO is unwilling to discuss the issue directly with UP, UP is willing to participate in a technical conference sponsored by the Board.¹¹

Third, AEPCO argues that disagreements might arise because BNSF and UP might use different data sources to develop tons per car or cars per train. (*Id.*) Again, such disagreements would have nothing to do with the use of proportional rates: BNSF and UP would be as likely to use different data in calculating their factors in a joint rate. The way to address this issue is for the parties to agree on which data sources they will use in the future. Again, UP believes this

¹⁰ This is an example of how the use of proportional rates made it easier to identify a disagreement that otherwise would have been buried in a calculation of joint rates.

¹¹ UP believes that use of weighted averages better represents its costs of handling the New Mexico (and Northern Powder River Basin) issue traffic because its operations do not change depending on the origin mine. However, if AEPCO truly believes the use of weighted averages somehow matters, UP would be willing to reconsider its position.

UP also notes that the size of difference between UP's rates and the rates calculated by AEPCO results in part from a clear error in AEPCO's calculations: AEPCO erroneously used data from El Segundo mine shipments that occurred in 4Q 2011 rather than 3Q 2011. This is apparent because AEPCO's calculation of tons per car for El Segundo differ from BNSF's calculations, even though BNSF calculated separate figures for each mine origin. UP's and BNSF's approach was in accordance with the Board's decision in *Oklahoma Gas & Electric*.

can be resolved privately, but it is willing to participate in a technical conference sponsored by the Board if AEPCO is unwilling to discuss the issue directly with UP.¹²

Finally, AEPCO complains that it will have to reconcile and pay two separate freight bills if the defendants charge proportional rates. (*Id.* at 10.) As UP discussed above, the use of proportional rates should actually make it easier to identify errors, but the even better approach would be for the parties to agree on the use of methodologies and data sources, so issues do not arise. If the parties agree on methodologies and data sources, the bills should be correct, and with electronic billing, AEPCO can pay its bills without using even a single stamp.

CONCLUSION

AEPCO is wrong to claim that the Board ordered BNSF and UP to establish and maintain joint rates in the *Decision*. BNSF and UP retained discretion to publish proportional rates, and they exercised that discretion to avoid potential difficulties associated with an ongoing Board proceeding that might affect BNSF's variable cost calculations. AEPCO is not harmed by the use of proportional rates, and it may well benefit from the clarity the use of proportional rates will provide if disagreements arise regarding rate calculations under the prescription.

Accordingly, the Board should deny AEPCO's Petition.

¹² UP believes that one reason BNSF's calculations of cars per train differ from UP's and AEPCO's calculations is that BNSF rounded to a whole number, which is consistent with the Board's Phase III URCS model. If AEPCO does not agree that its own calculations are mistaken, that would be an additional topic for a technical conference.

AEPCO also notes another difference in the parties' positions that could be addressed in a technical conference: AEPCO apparently is unwilling to use data from actual movements to calculate operating characteristics for rates from Northern Powder River Basin and Montana origins. (*Id.* at 11 n.12.)

Respectfully submitted,

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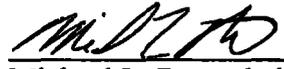
January 30, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2012, I caused copies of the foregoing filing to be served by electronic mail and first-class mail, postage prepaid, on:

William L. Slover
Robert D. Rosenberg
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Slover & Loftus LLP
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Washington, DC 20036

Samuel M. Sipe
Anthony J. LaRocca
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1330 Connecticut Avenue, NW
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Michael L. Rosenthal

EXHIBIT A

From: Louise A. Rinn <LARINN@up.com>
Sent: Wednesday, December 28, 2011 3:58 PM
To: rdr@sloverandloftus.com
Cc: Rosenthal, Michael; Danielle E. Bode; ssipe@steptoe.com; ALaRocca@steptoe.com
Subject: AEPCO Rate Prescription
Attachments: UP 4221 Tariff with Cochise Item 2300.pdf; Calculations for UP 1-1-12 prescribed rate.pdf

Robert -- Attached are (i) a copy of the draft tariff that UP intends to publish on Friday 12/30/11 to become effective on 1/1/12 establishing proportional rates from Deming and Pueblo to be used in combination with BNSF rates from complaint origins to form a through movement to AEPCO at Cochise and (ii) a worksheet showing how UP calculated the rate.

We believe that establishing proportional rates simplifies future administration in light of the pendency of FD 35506 WCTL Petition for Declaratory Order regarding the purchase accounting treatment for the Berkshire Hathaway acquisition of BNSF. In addition, , we believe it is easier for both AEPCO and UP, as the destination carrier, to establish and update quarterly two rates from the different interchanges rather than separate rates for each BNSF-origin. We anticipate updating the rates in accordance with the procedures specified in the OG&E case when the PPI index is released in mid-January.

(See attached file: UP 4221 Tariff with Cochise Item 2300.pdf)

(See attached file: Calculations for UP 1-1-12 prescribed rate.pdf)

Please let me know if you have any questions or comments.

In the meantime, my best wishes for a happy and healthy New Year.

Lou Anne Rinn
Associate General Counsel
Union Pacific Railroad
402.544.3309
**

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EXHIBIT B

From: Robert Rosenberg <rdr@sloverandloftus.com>
Sent: Thursday, December 29, 2011 11:55 AM
To: Louise A. Rinn
Cc: Rosenthal, Michael; Danielle E. Bode; ssipe@steptoe.com; ALaRocca@steptoe.com
Subject: RE: AEPCO Rate Prescription

Dear Lou Anne:

Thank you for your note.

With respect, AEPCO cannot agree that UP's approach complies with the Board's Order. BNSF/UP previously established joint through rates, AEPCO successfully challenged those rates, and the Board prescribed the maximum reasonable levels for those joint through rates. A proportional rate is simply not a joint through rate, regardless of whether BNSF establishes a corresponding proportional rate for the origins.

We urge the carriers to comply with the Board's prescription. If the carriers do not comply promptly, AEPCO will be compelled to seek enforcement at the Board. We would hope that such action would not be necessary, especially as the carriers have maintained a joint through rate from at least New Mexico origins for the past eleven years.

AEPCO provided the carriers with its calculations of the maximum reasonable joint through rates on December 13, 2011. To date, the carriers have not expressed any disagreement with AEPCO's calculations

Please let us know as soon as possible if the carriers do not intend to establish a joint through rate in compliance with the Board's order so that we can file with the Board. Also, please let us know as soon as possible if the carriers disagree with AEPCO's prescription calculations or the reparations calculations.

We do wish all of you a happy and healthy New Year.

Robert

From: Louise A. Rinn [mailto:LARINN@up.com]
Sent: Wednesday, December 28, 2011 3:58 PM
To: Robert Rosenberg
Cc: mrosenthal@cov.com; Danielle E. Bode; ssipe@steptoe.com; ALaRocca@steptoe.com
Subject: AEPCO Rate Prescription

Robert -- Attached are (i) a copy of the draft tariff that UP intends to publish on Friday 12/30/11 to become effective on 1/1/12 establishing proportional rates from Deming and Pueblo to be used in combination with BNSF rates from complaint origins to form a through movement to AEPCO at Cochise and (ii) a worksheet showing how UP calculated the rate.

We believe that establishing proportional rates simplifies future administration in light of the pendency of FD

35506 WCTL Petition for Declaratory Order regarding the purchase accounting treatment for the Berkshire Hathaway acquisition of BNSF. In addition, we believe it is easier for both AEPCO and UP, as the destination carrier, to establish and update quarterly two rates from the different interchanges rather than separate rates for each BNSF-origin. We anticipate updating the rates in accordance with the procedures specified in the OG&E case when the PPI index is released in mid-January.

(See attached file: UP 4221 Tariff with Cochise Item 2300.pdf)

(See attached file: Calculations for UP 1-1-12 prescribed rate.pdf)

Please let me know if you have any questions or comments.

In the meantime, my best wishes for a happy and healthy New Year.

Lou Anne Rinn
Associate General Counsel
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**

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**

EXHIBIT C

From: LaRocca, Anthony <ALaRocca@step toe.com>
Sent: Friday, December 30, 2011 4:18 PM
To: Robert Rosenberg (rdr@sloverandloftus.com)
Cc: Mulligan, Jill K; Sipe, Samuel; Rosenthal, Michael
Subject: FW: AEPCO Rate Prescription
Attachments: BNSF 58279 AEPCO NM origins.pdf; BNSF 58281 AEPCO Signal Peak origin.pdf; BNSF 58280 AEPCO PRB origins.pdf; AEPCO Rates 2011Q4.pdf

Robert: Attached are the BNSF pricing authorities for the New Mexico, PRB and Signal Peak origins to be used with the UP price authorities for movements to the plant. Also attached is a table showing the assumptions used to calculate the rates for each movement. Please let me know if you would like to discuss this. Tony

EXHIBIT D

From: Louise A. Rinn <LARINN@up.com>
Sent: Wednesday, January 18, 2012 4:16 PM
To: rdr@sloverandloftus.com
Cc: Rosenthal, Michael; Danielle E. Bode; ssipe@steptoe.com; ALaRocca@steptoe.com
Subject: AEPCO Rates
Attachments: UP 4221 Item 2300-A Cochise.pdf; 011812 Rate 2010 URCS 4Q11 Level.xlsx; 4Q11 Operating Stats.xlsx; STB Indexing of UPRR 2010 URCS 011812.xls

Robert --

UP's rates for AEPCO established in response to the STB prescription order expire today. Accordingly, UP is publishing a new rate item establishing rates effective January 19, 2012. The new rates reduce the Deming- to- Cochise rate by \$0.05/ton and the Pueblo- to- Cochise rate by \$0.11/ton based on the quarterly change in the cost index. A copy of the new tariff item and the workpapers for the calculations are attached for your reference.

(See attached file: UP 4221 Item 2300-A Cochise.pdf)(See attached file: 011812 Rate 2010 URCS 4Q11 Level.xlsx)(See attached file: 4Q11 Operating Stats.xlsx)(See attached file: STB Indexing of UPRR 2010 URCS 011812.xls)

In our reply to AEPCO's petition due January 29, we will identify reasons for the differences in the parties' calculations and why we believe that the rate prescription did not specify the form of the rate. In the meantime, however, I believe that you and I would agree that it is unfortunate that our clients did not confer in an attempt to resolve, or at least reduce, the differences in our calculations for the rate prescription. As it happens, your December 29, 2011 e-mail reply to me which is attached to AEPCO's Petition was not delivered to me or my colleague in the UP Law Department, Danielle Bode. We experienced intermittent problems with incoming e-mails over the holidays, including another note from you forwarding AEPCO calculations of reparations and prescribed rates. And while Mike Rosenthal was ultimately able to find a way to deliver those calculations, we still have not received AEPCO's workpapers on the rate prescription. Notwithstanding that failure in communication, UP remains willing to confer with AEPCO on either or both technical issues in calculating the prescribed rates and the format of the rates as proportional or joint. I understand, however, if you wish to see our January 29 filing before replying.

Lou Anne Rinn
Associate General Counsel
Union Pacific Railroad
402.544.3309
**

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