

44635
EB

SERVICE DATE – SEPTEMBER 2, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42113

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

v.

BNSF RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

Digest:¹ The Board clarifies its earlier decision by directing the parties, for purposes of the 2010-2013 rate prescription calculation, to use the corrected URCS costs, or if there are no corrected URCS costs, the most recent available URCS costs for the corresponding year.

Decided: August 31, 2015

Union Pacific Railroad Company (UP) requests that the Board clarify its decision regarding the calculation of maximum lawful rates in this proceeding. Ariz. Elec. Power Coop. v. BNSF Ry. (May 14 Decision), NOR 42113 (STB served May 14, 2015). Specifically, UP requests clarification on whether the parties should use indexed 2010 UP Uniform Railroad Costing System (URCS) costs or 2011 UP URCS costs to calculate the 2011 maximum lawful rates. In the alternative, if the Board denies the request for clarification, UP requests reconsideration of the May 14 Decision on the grounds of material error. We will grant UP's petition for clarification and deny UP's petition for reconsideration as moot.

BACKGROUND

On November 22, 2011, the Board ruled on a complaint filed by Arizona Electric Power Cooperative, Inc. (AEPCO) and found that the challenged rates charged by BNSF Railway Company (BNSF) and UP exceeded the level defendants needed to charge to earn a reasonable return on the full replacement cost of the facilities used to serve AEPCO. Ariz. Elec. Power Coop. v. BNSF Ry. (November 2011 Decision), NOR 42113 (STB served Nov. 22, 2011). In that decision, the Board prescribed the maximum lawful rate that the carriers could charge, which amounted to 180% of the variable cost of providing the service.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

On May 2, 2011, in Western Coal Traffic League—Petition for Declaratory Order, Docket No. FD 35506, the Western Coal Traffic League (WCTL) filed a petition asking the Board to adjust BNSF’s URCS costs for 2010 and subsequent years to exclude the write-up in BNSF’s net investment base attributable to the difference between the book value and the price that Berkshire Hathaway, Inc. (Berkshire) paid to acquire BNSF in 2010, and to make corresponding changes in BNSF’s annual URCS depreciation calculations. The Board instituted a proceeding and subsequently advised parties with BNSF rate prescriptions in effect in January 2012 that, if they believed the Board should temporarily lift the prescriptive effect of their 2012 rate prescriptions pending final resolution of issues raised in the WCTL petition, they should petition the Board to reconsider or reopen relevant Board decisions. W. Coal Traffic League—Pet. for Declaratory Order, FD 35506, slip op at 1 (STB served Sept. 28, 2011); W. Coal Traffic League—Pet. for Declaratory Order, FD 35506, slip op. at 2 (STB served Dec. 9, 2011). In response, on December 20, 2011, AEPCO petitioned the Board to reopen this proceeding so that the rates could be adjusted accordingly should the Board determine that BNSF’s URCS costs should not reflect some or all of the acquisition premium. On January 20, 2012, the Board found that changed circumstances justified reopening this proceeding and temporarily lifting the prescriptive effect of the rate prescriptions in this case. Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113 (STB served Jan. 20, 2012).

On July 25, 2013, the Board concurrently issued two decisions relevant here. One prohibited BNSF from revaluing its railroad assets to reflect the write-up during the years 2010, 2011, and 2012, while also holding that BNSF must mark up its rail assets in accordance with Generally Accepted Accounting Principles (GAAP)² for 2013 and beyond, subject to a four-year transition period. W. Coal Traffic League—Pet. for Declaratory Order (WCTL Order), FD 35506, slip op. at 2 (STB served July 25, 2013). The second decision directed the parties in this proceeding to confer and advise the Board on approaches to reinstating the rate prescription. Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113, slip op. at 3 (STB served July 25, 2013). The parties were unable to come to an agreement on the appropriate approach for the Board to reinstate the rate prescription.³

On May 14, 2015, the Board reinstated the rate prescription in this proceeding for the years 2009-2013, directing the parties to use the most recent, corrected financial data available to restate variable costs for 2010-2012, while continuing to hold the case in abeyance for 2014-2018, to allow the asset markup resulting from Berkshire’s acquisition of BNSF to be fully reflected in BNSF’s variable costs and the rate prescription. For 2014-2016, the Board held, when each year’s financial data becomes available, the Board will prescribe the rate for that year.

² GAAP are accounting standards, conventions, and rules that companies use to, among other things, record assets and liabilities. In the United States, the Securities and Exchange Commission (SEC) has the authority to establish GAAP. However, the SEC has historically allowed the private sector to establish the guidance. U.S. Sec. & Exch. Comm’n, Generally Accepted Accounting Principles, http://investor.gov/glossary/glossary_terms (follow “Generally Accepted Accounting Principles” hyperlink”) (last visited Aug. 31, 2015).

³ BNSF Comment 1, Sept. 23, 2013.

The Board concluded that once the asset markup is fully incorporated, the Board will reinstitute the rate prescription for 2017-2018.

DISCUSSION AND CONCLUSIONS

The Board did not explicitly state which UP URCS the parties are to use to calculate the 2011 rates. UP and AEPCO do not agree on whether the Board intended the parties to use the indexed 2010 UP URCS or the 2011 UP URCS to calculate the 2011 maximum lawful rates.⁴ UP interprets the May 14 Decision as directing the parties to use the 2011 UP URCS,⁵ while AEPCO reads the decision as neither affecting UP's costs nor supporting any changes to the treatment of UP's URCS for 2011 rates.⁶

UP states that, by its language, the May 14 Decision plainly contemplates use of the 2011 UP URCS when it rejects arguments for using indexed 2010 URCS data as a proxy for URCS costs.⁷ AEPCO states that the Board's decision does not purport to adjust UP's 2011 rates nor does it support UP's position,⁸ and argues that, in reality, UP now seeks the true-up that the Board rejected in the May 14 Decision.⁹ To avoid possible ambiguity, and because the Board did not explicitly state which UP URCS the parties should use for 2011, we will clarify the Board's May 14 Decision.

As the Board has stated, this is not a typical case. Unique circumstances surrounded the Berkshire acquisition of BNSF and, ultimately, the Board addressed those circumstances by ordering BNSF to remove the acquisition premium from its 2010-2012 variable costs, restate its variable costs for those years, and incrementally include the acquisition premium over the four-year period from 2013-2016. May 14 Decision, slip op. at 4-5 (citing WCTL Order, slip op. at 27-30). For each of the years from 2010-2012, the Board issued a corrected URCS.¹⁰ AEPCO previously argued that to calculate the rate prescription, the parties should replace the URCS that would have been used for each year with the same year's corrected URCS. May 14 Decision, slip op. at 5-6. This approach would maintain the regulatory lag that normally occurs in the application of URCS to prescribed rates and, AEPCO argued, avoid establishing the type of "true-up" the Board previously rejected. Id. at 6 (citing Okla. Gas & Elec. v. Union Pac. R.R., NOR 42111, slip op. at 9 (STB served July 24, 2009), clarified by Okla. Gas & Elec. v. Union Pac. R.R., NOR 42111 (STB served Oct. 26, 2009)).

⁴ UP Pet. for Clarification 2; AEPCO Reply 1-2, June 12, 2015.

⁵ UP Pet. 2.

⁶ AEPCO Reply 2.

⁷ UP Pet. 3 (citing May 14 Decision, slip op. at 6, 6-7, 8).

⁸ AEPCO Reply 2.

⁹ AEPCO Reply 3, 4.

¹⁰ The Board found no reason to issue corrected UP URCS for 2010-2012 because there were no changes in the underlying data. May 14 Decision, slip op. at 8.

This case, however, does not present the “true-up” situation that occurred in the Oklahoma Gas & Electric proceeding. Here, as the Board has previously explained, there is no interim rate to be calculated because this proceeding remains open and the rate prescription is not currently in effect. May 14 Decision, slip op. at 6 (stating that here the Board was “not correcting rates set under a prior order, but instead using the most recent data available to prescribe rates at the most accurate level possible when the rate prescription goes into effect.”). Requiring the parties here to use the most recent available URCS data for each year “is consistent with Board precedent to use actual URCS when they are available in time to be incorporated into a rates decision.” Id. (citing FMC Wyo. Corp. v. Union Pac. R.R., 4 S.T.B. 699, 747 (2000)). Although the Board found no reason to issue corrected UP URCS for 2010-2012 because there were no corrections to the underlying data, May 14 Decision, slip op. at 8, it does not follow that the most recent and accurate data available for those years should not be used to calculate rates.

Such a clarification is entirely consistent with the May 14 Decision with respect to the Board’s finding regarding the Western Regional URCS costs, which serve as a proxy for the costs of the Southwest Railroad (SWRR), a short line used to complete the movement of issue traffic in this case. As noted, the Western Regional URCS costs are a composite average of both BNSF and UP URCS costs. In this context, the Board again found that “the most recent, most accurate, available URCS data should be used for each year when rates are prescribed.” May 14 Decision, slip op. at 8. Under AEPCO’s interpretation, we would use the most recent available UP URCS costs to calculate the SWRR’s costs, and then use indexed UP URCS costs to calculate UP’s contribution to the same issue movement. The Board did not intend such inconsistent treatment of the UP URCS costs.

Accordingly, the Board clarifies that, in this proceeding, when the maximum lawful rates are calculated, the parties are directed to use the most recent available BNSF, UP, and Western Region URCS costs for each year. Thus, for the 2010-2013 rate prescription calculations, the parties are to use the corrected URCS or, if there are no corrected URCS, the most recent available URCS for the corresponding year.

Because we have addressed UP’s petition for clarification, there is no reason to consider its petition for reconsideration. The petition for reconsideration is denied as moot.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The parties are directed, for purposes of the 2010-2013 rate prescription calculations, to use the corrected URCS or, if there are no corrected URCS, the most recent available URCS for the corresponding year.

2. UP's petition for reconsideration is denied.
3. This decision will be effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.