

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

238509

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ARIZONA ELECTRIC POWER  
COOPERATIVE, INC.,

Complainant,

v.

BNSF RAILWAY COMPANY and  
UNION PACIFIC RAILROAD COMPANY,

Defendants.

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ENTERED  
Office of Proceedings  
May 29, 2015  
Part of  
Public Record

Docket No. 42113

**UNION PACIFIC RAILROAD COMPANY'S PETITION  
FOR CLARIFICATION OR RECONSIDERATION**

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May 29, 2015



the parties to calculate maximum lawful rates for 2011 by combining (i) 2011 BNSF URCS, (ii) 2011 Western Region URCS, and (iii) indexed 2010 UP URCS. But mixing and matching actual 2011 URCS data for BNSF and the Western Region with indexed 2010 URCS data for Union Pacific would indisputably produce less accurate results than would consistent use of actual 2011 URCS data, and as the Decision recognizes, there is no reason to accept such inaccuracy in this proceeding, which remained ongoing when actual 2011 UP URCS data became available.

AEPCO is apparently taking its position because the Decision did not expressly address Union Pacific's argument that the parties should use 2011 UP URCS rather than indexed 2010 UP URCS.<sup>1</sup> However, the Decision plainly contemplates use of 2011 UP URCS by rejecting AEPCO's argument for using indexed 2010 URCS data as a proxy for 2011 URCS costs:

We do not agree with AEPCO that, in this case, we should use old data and index it to reach a proxy for current data when current data are readily available . . . .

Decision at 6; *see also id.* at 6-7 (“[I]ndexing is not necessary here . . . , given that more recent data are available.”); *id.* at 8 (“[T]he most recent, most accurate, available URCS data should be used for each year when rates are prescribed.”). In fact, the Board relied on the precedent Union Pacific cited for the proposition that actual URCS data, rather than indexed URCS data, should be used when the actual data are available in time to be incorporated into a rate prescription. *Id.*

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<sup>1</sup> Union Pacific expressly argued that 2011 UP URCS should be used to calculate maximum lawful rates for 2011. *See* Union Pacific's Comments Regarding Reinstitution of Rate Prescription at 3-4 (attached hereto as Exhibit A).

In the Decision, the Board observed that certain updates to Union Pacific's R-1 reports for 2010-2012 had not affected UP URCS, *see* Decision at 8, but that observation standing alone does not clearly indicate whether actual 2011 UP URCS or indexed 2010 UP URCS should be used together with 2011 BNSF URCS and 2011 Western Region URCS to calculate maximum rates for 2011.

at 6 (citing *FMC Wyo. Corp. v. Union Pac. R.R.*, 4 S.T.B. 699, 747 (2000) (cited in Union Pacific's Comments at 3-4)).

AEPCO might try to distinguish the Board's use of 2011 BNSF URCS and 2011 Western Region URCS by arguing that some correction to 2010 BNSF URCS and 2010 Western Region URCS was necessary, while there was no need to change 2010 UP URCS. But the Decision did not turn on the need to correct 2010 BNSF and Western Region URCS—the Board could have indexed the *corrected* 2010 URCS, as AEPCO urged. See Decision at 5, 7. Instead, the Board clearly and repeatedly rejected the idea of indexing old URCS data “as a proxy for current data when current data were readily available.” *Id.* at 6; see also *id.* at 6-7; *id.* at 8. In this case, actual 2011 URCS data became available for BNSF, the Western Region, and Union Pacific while this proceeding remained ongoing, and the Board correctly ruled that the parties were required to use the actual data, rather than indexed 2010 URCS data, in accordance with precedent. The Board should clarify its ruling so the parties can proceed to calculate maximum lawful rates for 2011.

## **II. Petition for Reconsideration**

Although Union Pacific believes the Board intended to require the parties to use actual 2011 UP URCS to calculate maximum lawful rates for 2011, if the Board should decline to provide the requested clarification, Union Pacific hereby petitions, in the alternative, for reconsideration of the Decision on the grounds of material error.

A requirement that the parties use indexed 2010 UP URCS to calculate maximum lawful rates for 2011 would conflict with the Board's decision in this case that the parties must use 2011 BNSF and Western Region URCS and its decision *FMC Wyoming* that actual URCS should be used when they are available in time to be incorporated into rate case decisions. In addition, the consequences would be material: AEPCO would obtain more reparations if indexed 2010 UP

URCS were used as a proxy for more accurate, actual 2011 UP URCS, since indexing did not fully capture the increase in Union Pacific's URCS costs from 2010 to 2011.

As discussed above, the Board held that the most recent, most accurate, actual URCS should be used when they are available in time to be incorporated into a decision. There is no justification for using actual 2011 BNSF URCS to calculate the costs of moving the issue traffic over BNSF and actual 2011 Western Region URCS, *which is calculated using actual 2011 UP URCS*, to calculate the costs of moving the issue traffic over SWRR,<sup>2</sup> but then not use actual 2011 UP URCS to calculate the costs of moving the issue traffic over Union Pacific.

In 2011, BNSF and Union Pacific charged joint rates for transporting issue traffic to AEPCO. Thus, when the Board reopened this case and lifted the prescriptive effect of the rate prescription, it did not and could not limit the reopening to BNSF. *See Ariz. Elec. Power Coop. v. BNSF Ry.*, NOR 42113 (STB served July 25, 2013). Then, before the Board reinstated the prescriptive effect of the rate prescription (through 2013) and ordered the parties to calculate the maximum reasonable rates for 2011, actual 2011 URCS data had become available for BNSF, the Western Region, and Union Pacific. Under these circumstances, the Board's *FMC Wyoming* precedent and its rulings that "indexing is not necessary here . . . , given that more recent data are available," Decision at 6, and that "the most recent, most accurate URCS data should be used for each year when rates are prescribed," *id.* at 8, apply equally to actual 2011 URCS data for BNSF, the Western Region, and Union Pacific. Creating a special rule that would require use of Union Pacific's old, 2010 URCS data and indexing it as a proxy for more accurate, readily available,

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<sup>2</sup> In the Decision, the Board says it will recalculate Western Region URCS using the most recent, corrected BNSF URCS for 2010-2012, *see* Decision at 8, but 2011 Western Region URCS that are calculated using corrected 2011 BNSF URCS, 2011 UP URCS, and 2011 URCS from other railroads in the Western Region have been available on the Board's website ever since the Board issued corrected 2011 BNSF URCS.

actual 2011 UP URCS data would be arbitrary, capricious, and constitute material error because it would be contrary to well-reasoned decisions requiring the use actual URCS data rather than indexed data when actual data are available in time to be incorporated into a rate prescription.

Respectfully submitted,



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May 29, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of May, 2015, I caused copies of the foregoing filing to be served by electronic mail and first-class mail, postage prepaid, on:

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Michael L. Rosenthal

# EXHIBIT A





(“[D]efendants’ rationale regarding separating the rates because of the BNSF/Berkshire Hathaway issue is reasonable.”).<sup>1</sup>

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,*

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<sup>1</sup> 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.

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**CERTIFICATE OF SERVICE**

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