

BEFORE THE
SURFACE TRANSPORTATION BOARD



ARIZONA ELECTRIC POWER
COOPERATIVE, INC

Complainant,

v

BNSF RAILWAY COMPANY and

UNION PACIFIC RAILROAD
COMPANY,

Defendants

224556

Docket No 42113

ENTERED
Office of Proceedings
FEB 19 2009
Part of
Public Record

UNION PACIFIC'S ANSWER TO AEPCO'S AMENDED COMPLAINT

Defendant Union Pacific Railroad Company ("UP") hereby answers the Amended Complaint filed by Arizona Electric Power Cooperative, Inc ("AEPCO") in this proceeding. UP responds to the allegations in each separately numbered paragraph of the Amended Complaint as follows:

1 UP admits that AEPCO is a customer-owned electric generating company. UP denies the remaining allegations in Paragraph 1 of the Amended Complaint because it lacks knowledge or information sufficient to form a belief as to their truth.

2 UP admits that AEPCO operates the Apache Generating Station at Cochise, Arizona (the "Apache Generating Station"), which includes two coal-fired units. UP denies the remaining allegations in Paragraph 2 of the Amended Complaint because it lacks knowledge or information sufficient to form a belief as to their truth.

3 UP admits that it provides common carrier and contract service and that it engages in the transportation of property in interstate and intrastate commerce UP further admits that it is subject to certain provisions of the ICC Termination Act and that it is subject, in certain circumstances, to the jurisdiction of the Surface Transportation Board, but the scope of the ICC Termination Act and the Surface Transportation Board's jurisdiction are questions of law as to which no response is required, to the extent a response is deemed to be required, UP denies the allegations UP denies the remaining allegations in Paragraph 3 of the Amended Complaint because it lacks knowledge or information sufficient to form a belief as to their truth

4 UP admits that AEPCO has previously obtained coal from mines served by either or both BNSF Railway Company ("BNSF") and UP, and that UP operates the only rail line that directly serves the Apache Generating Station UP denies the remaining allegations in Paragraph 4 of the Amended Complaint because it lacks knowledge or information sufficient to form a belief as to their truth

5 UP admits the allegations in Paragraph 5 of the Amended Complaint

6 UP denies the allegations in Paragraph 6 of the Amended Complaint UP avers by way of further response that AEPCO never sought to negotiate a contract with UP governing the terms and conditions for AEPCO coal shipments from New Mexico or from mines located in Wyoming or Montana that are served exclusively by BNSF ("Northern PRB origins") to the Apache Generating Station after December 31, 2008, and that UP and AEPCO have a binding contract governing the terms and conditions for AEPCO coal shipments from UP-served mines in Colorado and the Southern Powder River Basin ("SPRB") to the Apache Generating Station

7 UP admits that, since January 1, 2009, AEPCO has shipped coal from mines located in New Mexico to the Apache Generating Station using Common Carrier Pricing Authority BNSF 57966 UP denies the allegation in Paragraph 7 of the Amended Complaint that AEPCO intends to transport coal it purchases from Northern PRB origins pursuant to the terms set forth in the document attached as Attachment B to the Amended Complaint because it lacks knowledge or information sufficient to form a belief as to their truth UP avers by way of further response that AEPCO has no right to transport coal pursuant to the terms set forth in Attachment B to the Amended Complaint because that document reflects an offer to establish common carrier rates and service terms, and AEPCO never accepted the offer before it expired UP also avers by way of further response that it has provided a rate factor in response to a subsequent request by AEPCO to BNSF to establish common carrier rates for Northern PRB origins as required under 49 C F R part 1300

8 UP denies the allegations in Paragraph 8 of the Amended Complaint

9 UP denies the allegations in Paragraph 9 of the Amended Complaint, except that UP admits that it could not prevail on the issue of whether there is qualitative evidence of effective competition from other carriers or modes of transportation for the movements of coal to the Apache Generating Station under the standards currently being applied by the Board

10 UP denies the allegations in Paragraph 10 of the Amended Complaint

11. UP denies the allegations in Paragraph 11 of the Amended Complaint UP avers by way of further response that UP and AEPCO have a binding contract governing the terms and conditions for AEPCO coal shipments from UP-served mines in Colorado and the SPRB to the Apache Generating Station, and thus UP is under no obligation to establish common

carrier rates from such origins to the Apache Generating Station UP also avers by way of further response that on January 20, 2009 – ten days before AEPCO filed the Amended Complaint – UP filed a complaint for declaratory relief in the U S District Court for the District of Arizona seeking a judicial declaration that UP has a contract with AEPCO to transport coal from UP-served mines in Colorado and the SPRB to the Apache Generating Station beginning January 1, 2009

12 UP denies the allegations in Paragraph 12 of the Amended Complaint

13 UP denies the allegations in Paragraph 13 of the Amended Complaint, except that UP admits that, if this case is not dismissed on the basis of lack of market dominance or other grounds, the reasonableness of the challenged rates should be examined using the constrained market pricing principles adopted in *Coal Rate Guidelines – Nationwide*, 1 I C C 2d 520 (1985), as further refined and applied in subsequent decisions by the Interstate Commerce Commission and the Surface Transportation Board

14 Paragraph 14 of the Amended Complaint states a legal conclusion to which no response is required, to the extent that a response is deemed to be required, UP denies the allegations in this Paragraph

DEFENSES

1 The Board lacks jurisdiction to consider the Amended Complaint as it relates to the terms set forth in Attachment B to AEPCO's Amended Complaint because that document reflects an offer to establish common carrier rates and service terms and AEPCO never accepted that offer before it expired

2 The Board lacks jurisdiction to consider the Amended Complaint as it relates to common carrier rates from UP-served SPRB or Colorado origins to the Apache

Generating Station because UP and AEPCO have a binding contract governing the terms and conditions of transportation from those origins to the Apache Generating Station

WHEREFORE, UP requests that the Complaint be dismissed with prejudice and that no relief of any kind be awarded to AEPCO, that UP be awarded its costs, and that the Board grant UP such other and further relief as may be appropriate

Respectfully submitted,



J MICHAEL HEMMFR
LOUISE A RINN
TONYA W CONLEY
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
Telephone (402) 544-3309
Facsimile (402) 501-0129

LINDA J MORGAN
MICHAEL L ROSENTHAL
CHARLES H P VANCE
Covington & Burling LLP
1201 Pennsylvania Avenue, N W
Washington, D C 20004
Telephone (202) 662-6000
Facsimile (202) 662-6291

Attorneys for Union Pacific Railroad Company

February 19, 2009

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 19th day of February, 2009, I caused copies of Union Pacific's Answer to AEPSCO's Amended Complaint to be served by hand and by e-mail on

William L. Slover
Robert D. Rosenberg
Christopher A. Mills
Daniel M. Jaffe
Slover & Loftus
1224 Seventeenth Street, NW
Washington, D.C. 20036

and by overnight mail and e-mail on

Patrick F. Ledger
Arizona Electric Power Cooperative Inc
Corporate Counsel
1000 S Highway 80
Benson, Arizona 85602



Michael L. Rosenthal