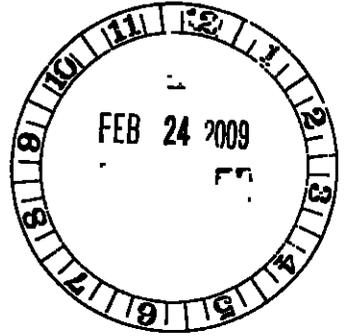


BEFORE THE
SURFACE TRANSPORTATION BOARD



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

Docket No 42113

224596

UNION PACIFIC'S MOTION TO HOLD PROCEEDINGS IN ABEYANCE

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February 24, 2009

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ARIZONA ELECTRIC POWER)	
COOPERATIVE, INC.)	
)	
Complainant,)	
)	
v.)	Docket No. 42113
)	
BNSF RAILWAY COMPANY and)	
)	
UNION PACIFIC RAILROAD)	
COMPANY,)	
)	
Defendants.)	
)	

UNION PACIFIC'S MOTION TO HOLD PROCEEDINGS IN ABEYANCE

The Board should hold in abeyance the portion of this rate complaint proceeding in which Arizona Electric Power Cooperative, Inc ("AEPCO") seeks to require Union Pacific Railroad Company ("UP") to establish common carrier rates for coal shipments from UP-served mines in Colorado and Wyoming's Southern Powder River Basin ("SPRB") to the Apache Generating Station at Cochise, Arizona, until a court determines whether those shipments are already subject to a rail transportation contract between UP and AEPCO.

UP believes that it is not required to establish common carrier rates for shipments from UP-served mines in Colorado and the SPRB to the Apache Generating Station because a rail transportation services contract exists that establishes rates and terms for such shipments for a period beginning January 1, 2009. In fact, UP filed a declaratory judgment action in the U.S. District Court for the District of Arizona to vindicate its contractual rights even *before* AEPCO

amended its complaint to seek common carrier rates from Colorado and the SPRB to the Apache Generating Station. See Exhibit A (hereinafter, "UP Complaint").

Board precedent requires the agency to suspend proceedings and "defer to the courts in rate disputes in which the reasonable possibility of a rate contract is raised in some minimal evidentiary fashion." *Toledo Edison Co v Norfolk & W Ry*, 367 I.C.C. 869, 871 (1983) (quoting *Petition of the Denver & Rio Grande W R R & Salt Lake, Garfield & W Ry for Review of a Decision of the Pub Serv Comm'n of Utah Pursuant to 49 U.S.C. 11501*, ICC Docket No. 39060 (ICC served March 2, 1983), at 4); see also *PSI Energy, Inc v CSX Transp., Inc (Motion to Modify Procedural Schedule)*, STB Docket No. 42034 (STB served Sept. 11, 1998), at 3 ("[W]here there is a genuine dispute regarding the scope of a railroad transportation contract, the interpretation of which is necessary to resolve essential issues in a railroad rate complaint," the Board "suspend[s] proceedings in the rate complaint until the contract is interpreted in court.").

As discussed below, there is ample evidence that UP and AEPSCO have a contract governing the transportation of coal between UP-served mines in Colorado and the SPRB to the Apache Generating Station.

I. BACKGROUND FACTS

In 2003, AEPSCO and UP settled a portion of a rate complaint in which AEPSCO had asked the Board to prescribe maximum rail rates for the transportation of coal from mines in Colorado and the SPRB to the Apache Generating Station by entering into a transportation services contract in the form of a Term Sheet dated February 3, 2003 (the "Term Sheet").¹ UP

¹ The Board ultimately dismissed the remaining portion of AEPSCO's rate complaint, which challenged the reasonableness of joint rates charged by UP and the Burlington Northern and (continued...)

and AEPCO had planned to incorporate the Term Sheet's provisions in a more formalized document, but the parties never formalized their agreement, and they operated under the Term Sheet until it expired on December 31, 2008. UP Complaint ¶¶ 7-8.

On April 2, 2008, UP provided AEPCO with a Confidential Proposal for a new transportation services contract to govern the transportation of coal from Colorado and the SPRB to the Apache Generating Station beginning January 1, 2009 (the "Confidential Proposal"). The Confidential Proposal addressed the same basic transportation terms as the parties' Term Sheet. Specifically, the Confidential Proposal set forth, among other provisions, the origin coal mines and the destination, base transportation rates from each mine to the destination, provisions establishing a maximum annual volume, provisions for adjusting the base rates over the term of the contract, train size minimums and maximums, the maximum lading weight per railcar, equipment supply arrangements, provisions for unloading trains and switching railcars, service terms, and a liquidated damages provision. *Id.*, ¶¶ 9-11.

The Confidential Proposal stated that the proposed terms would expire on May 4, 2008, unless they were accepted by AEPCO. It also stated that the proposed terms, if agreed to by the parties, would be binding on both parties and would be incorporated into a more formalized transportation services agreement, which would contain additional, but not conflicting, terms, and which UP would prepare upon receipt of AEPCO's written assent to the terms of the Confidential Proposal. *Id.*, ¶ 12.

Santa Fe Railway Company from New Mexico mines to the Apache Generating Station, because AEPCO failed to set forth necessary elements of the stand-alone cost case. *Ariz Elec Power Coop v Burlington N & Santa Fe Ry*, STB Docket No. 42058 (STB served Mar 15, 2005), *aff'd*, *Ariz Elec Power Coop v STB*, 454 F.3d 359 (D.C. Cir. 2006)

In a letter from AEPCO to UP dated June 4, 2008, AEPCO's Senior Vice President and Chief Operating Officer stated that AEPCO "accepts Union Pacific Railroad's (UP) transportation proposal dated April 2, 2008" and that "[w]e look forward to working with you to develop a transportation service agreement." Along with the letter, AEPCO provided a copy of the Confidential Proposal that had been signed by its Senior Vice President and Chief Operating Officer. AEPCO transmitted the letter and signed copy of the Confidential Proposal as attachments to an email dated June 5, 2008. *Id.*, ¶ 13, *see also* Exhibit B (AEPCO's June 4, 2008 letter) & Exhibit C (Confidential Proposal signed by AEPCO).

In response to AEPCO's letter and signed copy of the Confidential Proposal, UP prepared a draft document that incorporated the terms of the Confidential Proposal in a more formalized transportation services agreement. UP provided a draft of this document to AEPCO on June 26, 2008, transmitting the draft as a reply to AEPCO's June 5, 2008 email. UP Complaint ¶ 14; *see also* Exhibit D (UP's June 26, 2008 email and attachments).

On September 22, 2008, AEPCO's Corporate Counsel wrote to UP and asked UP to establish common carrier rates for transporting coal from mines in Colorado and the SPRB to the Apache Generating Station beginning January 1, 2009. UP Complaint ¶ 15, *see also* Exhibit E (AEPCO's September 22, 2008 letter). On October 10, 2008, UP responded to AEPCO's September 22 letter. UP stated that it would not establish the requested common carrier rates because the parties had entered into a contract that governed the transportation of coal from mines in Colorado and the SPRB to the Apache Generating Station beginning January 1, 2009. UP Complaint ¶ 16, *see also* Exhibit F (UP's October 10, 2008 letter). On October 29, 2008, AEPCO responded to UP's October 10 letter. AEPCO's Corporate Counsel denied that the parties had entered into any agreement regarding transportation services after December 31,

2008, and he repeated AEPCO's request that UP establish common carrier rates UP Complaint ¶ 17, *see also* Exhibit G (AEPCO's October 29, 2008 letter)

UP and AEPCO engaged in efforts to resolve their dispute amicably, but those efforts failed, whereupon UP filed its Complaint for Declaratory Relief in the U.S. District Court for the District of Arizona on January 20, 2009.

On December 30, 2008, while UP and AEPCO were still attempting to resolve their dispute regarding shipments from Colorado and the SPRB, AEPCO filed a rate complaint against UP and BNSF Railway Company ("BNSF"), in which AEPCO alleged that common carrier rates established by BNSF and UP for unit train coal transportation service between BNSF-served mines in New Mexico and the Apache Generating Station were unreasonably high. On January 30, 2009, some ten days after UP filed its Complaint for Declaratory Relief, AEPCO amended its rate complaint to request that the Board order UP to establish common carrier rates from UP-served mines in Colorado and the SPRB to the Apache Generating Station.²

II. ARGUMENT

The Board should hold in abeyance the portion of this proceeding in which AEPCO seeks to require UP to establish common carrier rates for shipments from UP-served

² AEPCO's Amended Complaint also alleged that the rates allegedly established by BNSF and UP for unit train coal transportation service between BNSF-served mines in Wyoming and Montana and the Apache Generating Station are unreasonably high. As UP explained in its Answer to AEPCO's Amended Complaint, AEPCO's complaint refers to an expired offer to establish rates. However, BNSF and UP have established common carrier rates from those origins in response to a subsequent request from AEPCO. By means of a letter filed with the Board on February 20, 2009, AEPCO seeks to revise its Amended Complaint by substituting BNSF's Common Carrier Authority BNSF 57988 for the expired offer. This Motion does not address any of the rates in that portion of AEPCO's Amended Complaint.

mines in Colorado and the SPRB until the U.S. District Court in Arizona determines whether those shipments are subject to a rail transportation contract between UP and AEPCO.³

Board precedent requires the agency to suspend proceedings and “defer to the courts in rate disputes in which the reasonable possibility of a rate contract is raised in some minimal evidentiary fashion.” *Toledo Edison*, 367 I C C at 871 (quoting *Petition of the Denver & Rio Grande W R R* at 4), see also *PSI Energy* at 3 (Board should suspend proceedings “where there is a genuine dispute”); *W Res, Inc v Atchison, Topeka & Santa Fe Ry.*, STB Docket No. 41604 (STB served May 31, 1996), at 2 (“Santa Fe will not be required to comply with the Board’s [prior] directive” to establish a common carriage rate “pending action by the court”) The Board has refused to hold proceedings in abeyance “only when there was no genuine basis for believing in the existence of a contract bearing on the complaint.” *PSI Energy* at 3 n.4 (citing *Pa Power & Light Co. v Consol. Rail Corp*, ICC Docket No. 41295 (ICC served Jan. 17, 1995. correction served Feb. 3, 1995)); see also *E I du Pont de Nemours & Co v CSX Transp, Inc*, STB Docket No. 42099 (STB served Dec. 20, 2007), at 5 (CSX failed to “demonstrate a reasonable possibility that a rail transportation governs the movement in question”) (citing *Toledo Edison*).

The Board’s policy of suspending complaint proceedings to await judicial resolution of contract disputes makes sense in this case because the Board would have no jurisdiction over AEPCO’s claim if the transportation at issue is subject to a contract between UP and AEPCO. A rail carrier is not required to establish common carrier rates for transportation

³ If, as UP anticipates, the court finds that such shipments are subject to a contract, the Board should then dismiss that portion of AEPCO’s complaint if AEPCO does not voluntarily withdraw its complaint insofar as it is directed at shipments originating at UP-served mines in Colorado and the SPRB.

that is governed by a rail transportation contract. *See PSI Energy at 3, W Res, Inc v Atchison, Topeka & Santa Fe Ry*, STB Docket No. 41604 (STB served May 17, 1996), at 4 (“[Santa Fe] must comply with any reasonable requests for service that are not covered by [a] transportation contract”); 49 C.F.R. § 1300.1(c) (rate establishment regulations “do not apply to any transportation or service provided by a rail carrier under contract”); *cf* 49 U.S.C. § 10709(c)(1) (“A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part . . .”)

In addition, the Board has no role in resolving the contract dispute between UP and AEPSCO because questions concerning the existence of transportation contracts have been “delegated to the courts by the contract provisions of the Staggers Act” *Toledo Edison*, 367 I.C.C. at 873. The Staggers Act made clear that “to entertain and decide questions concerning the existence and validity of contracts in terms of the common law of contracts is a purely judicial task which is not to be performed by the [Board].” *Rates on Iron Ore, Randville to Escanaba via Iron Mountain*, 367 I.C.C. 506, 510 (1983); *accord* *Petition of the Denver & Rio Grande W R R*, at 2 (“[T]he sole remedy for breaches of an alleged contract, or a determination of whether in fact a contract exists, lies in an appropriate court.”); *Kansas Power & Light Co v Burlington N R R*, 740 F.2d 780, 785 (10th Cir. 1984) (“The courts, not the ICC, . . . is the appropriate forum for determining the existence of an enforceable contract.”) The Board’s policy of suspending complaint proceedings to await judicial resolution of contract disputes thus “allocates the decisional burden to the proper forum in conformity with the congressional objectives of section [10709]” *Toledo Edison*, 367 I.C.C. at 873

In this case, UP and AEPSCO have a “genuine dispute” about the existence of a contract governing coal shipments from UP-served mines in Colorado and the SPRB to the

Apache Generating Station, and the evidence raises a “reasonable possibility” that a contract governs those shipments *PSI Energy* at 3; *Toledo Edison*, 367 F.3d at 871.

The evidence shows that UP and AEPCO possessed the requisite intent to enter into a rail transportation contract that incorporates the terms set forth in UP’s Confidential Proposal. The Confidential Proposal plainly involves contract rates, not common carrier rates. The first page of the Confidential Proposal expressly refers to “Contract Base Rate(s)” for each origin and separately explains that the “Contract Rate(s) is in U.S. dollars and cents per net ton of 2,000 pounds.” Exhibit C. In fact, the Confidential Proposal refers throughout the document to “Contract Rate(s).” *Id.*

AEPCO plainly understood that the Confidential Proposal involved contract rates, not common carrier rates. When AEPCO’s Chief Operating Officer provided AEPCO’s signed copy of the Confidential Proposal to UP, his transmittal letter stated that AEPCO was looking forward to working with UP to formalize the parties’ “transportation service agreement.” Exhibit B. Moreover, AEPCO plainly understood that it was making a binding commitment when it agreed to the terms of the Confidential Proposal. The Confidential Proposal states, directly above the signature line, that “[t]he terms of this proposal, as agreed to by the parties, will be binding on both parties.” Exhibit C.

UP’s intent to enter into a contract that incorporates the terms set forth in the Confidential Proposal is evidenced by, among other things, UP’s response to receiving the signed copy of the Confidential Proposal from AEPCO. After receiving the signed copy, UP took the next step contemplated by the Confidential Proposal by preparing a draft of the formalized agreement and then transmitted the draft to AEPCO as a response to the email in

which AEPCO had transmitted its signed copy of the Confidential Proposal to UP. See Exhibit D.

UP has received correspondence from AEPCO suggesting that AEPCO might argue that the parties do not have a contract because AEPCO never signed a formalized agreement and thus “no executed contract exists.” Exhibit G. Under the common law of contracts, however, a contract may be formed, even if not formally executed, if it is clear that the parties intended to bind themselves to its terms. A court will look to surrounding circumstances and the conduct of the parties to determine their intent. See generally, e.g., *Johnson Int'l, Inc v City of Phoenix*, 967 P.2d 607, 612 (Ariz. Ct. App. 1998). AEPCO also might argue that the parties do not have a contract because the draft formalized agreement that UP provided to AEPCO contained terms that were not part of the Confidential Proposal. See Exhibit G. However, the Confidential Proposal stated that the proposal “would be binding on both parties” even though the formalized agreement “will also contain additional, but not conflicting provisions.” Exhibit C. Under the common law of contracts, a contract may be formed even if parties have left certain terms for later resolution, as long as the parties possessed the requisite intent to be bound. See generally, e.g., *AROK Constr Co v Indian Constr Servs*, 848 P.2d 870, 874 (Ariz. Ct. App. 1993).

UP believes that it will prevail when these issues, and any others that AEPCO may raise, are litigated. However, these issues should be litigated in court, not decided by the Board. See *Toledo Edison*, 367 I.C.C. at 873; *Rates on Iron Ore*, 367 I.C.C. at 509; *Petition of the Denver & Rio Grande W R R* at 2. The Board “could be perceived as attempting to displace the jurisdiction of the court if [it] were to proceed” to resolve these issues of contract law. *PSI Energy* at 3. For purposes of this proceeding, the Board should do no more than acknowledge

that UP has presented evidence sufficient to demonstrate “a reasonable possibility that a rail transportation contract governs the movement[s] in question ” *E I du Pont* at 5 (citing *Toledo Edison*).

Even if UP’s evidence regarding the parties’ actions with respect to the Confidential Proposal is not sufficient on its own to persuade the Board, UP’s filing a declaratory judgment action against AEPCO in U S. District Court should tip the balance in favor of holding these proceedings in abeyance. UP’s filing demonstrates UP’s “good faith belief in its contract arguments” and constitutes “[a]dditional evidence” that “a reasonable possibility of a contract exists ” *Toledo Edison*, 367 I.C.C. at 872. Indeed, UP filed its declaratory judgment action even *before* AEPCO amended its complaint to address shipments from UP-served mines in Colorado and the SPRB, which shows that UP is genuinely concerned about protecting its contractual rights and is not advancing this motion for purposes of delay. *See id* (explaining that a “defendant’s initiation of a court proceeding in support of its contract claim” helps “separate genuine from frivolous contract rate defenses”).

Finally, practical considerations favor holding in abeyance the portion of this proceeding in which AEPCO seeks to require UP to establish common carrier rates for shipments from UP-served mines in Colorado and the SPRB. AEPCO intends to challenge any common carrier rates UP establishes for shipments from mines in Colorado and the SPRB. Amended Complaint ¶ 12 & Wherefore Clause. A rate case involving UP shipments from Colorado and the SPRB would be a massive and expensive undertaking for all involved, and the “resources of the Board and the [parties] would be wasted if [the Board] were to proceed with a complaint . . . and the court were later to uphold [UP’s position].” *PSI Energy* at 3

AEPCO would not be prejudiced if the Board holds a portion of this proceeding in abeyance. AEPCO could still proceed with the portions involving joint rates charged by UP and BNSF. Moreover, AEPCO would not be disadvantaged were it to prevail in court and subsequently bring a separate case challenging UP's single-line rates from Colorado and SPRB mines because its stand-alone cost presentation to test UP's single-line rates could not, in any event, have drawn on revenues from rates paid to BNSF. See *Ariz. Elec. Power Coop. v. Burlington N. & Santa Fe Ry.*, STB Docket No. 42058 (STB served Aug. 20, 2002). Furthermore, "[a]ll procedural and substantive rights before this [Board] are preserved if the court finds that no contract governs the dispute[]" *Toledo Edison*, 367 I.C.C. at 873.

III. CONCLUSION

Board precedent and practical considerations require the Board to hold in abeyance the portion of this proceeding in which AEPCO seeks to require UP to establish common carrier rates for coal shipments from UP-served mines in Colorado and the SPRB to Apache Station until a court determines whether those shipments are subject to a rail transportation contract between UP and AEPCO.

Respectfully submitted,



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February 24, 2009

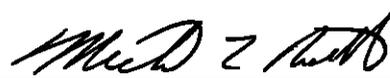
CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 24th day of February, 2009, I caused copies of Union Pacific's Motion to Hold Proceedings in Abeyance to be served by hand and by e-mail on:

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12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE DISTRICT OF ARIZONA

14 UNION PACIFIC RAILROAD COMPANY,) No.
15)
16 Plaintiff,) **COMPLAINT FOR DECLARATORY**
17) **RELIEF**
18 vs)
19)
20 ARIZONA ELECTRIC POWER)
21 COOPERATIVE, INC ,)
22)
23 Defendant)
24)
25)
26)

27 **Nature of the Action**

28 1. This is an action for declaratory relief in which Union Pacific Railroad Company
29 ("UP") seeks to vindicate its rights under a rail transportation services contract with Arizona
30 Electric Power Cooperative, Inc ("AEP") The contract establishes rates and terms for
31 transporting coal from UP-served mines in Colorado and the Southern Powder River Basin of
32 Wyoming to AEP's electric generation facility at Cochise, Arizona, which is called "Apache
33 Station," for a period beginning January 1, 2009 AEP has denied that the parties entered into
34 a contract, and it has demanded that UP establish common carrier rates for transporting coal to

1 Apache Station UP seeks declarations that (i) UP and AEPCO entered into a binding contract,
2 and (ii) UP is not required to establish common carrier rates for the transportation at issue In the
3 alternative, UP seeks a declaration that UP and AEPCO have a binding commitment that
4 obligates both parties to negotiate in good faith toward a transportation services contract
5 conforming to certain agreed-upon terms

6 **Jurisdiction and Venue**

7
8 2 This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 because
9 the parties are citizens of different states and the amount in controversy exceeds the sum of
10 \$75,000, exclusive of interest and costs. This Court also has jurisdiction over this action
11 pursuant to 28 U.S.C. § 1337 because this action arises under the Interstate Commerce
12 Commission Termination Act, an Act of Congress regulating commerce. This Court is
13 authorized to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202

14 3 Venue in this district is proper under 28 U.S.C. § 1391(a) because AEPCO resides
15 in this district

16 **The Parties**

17 4 Plaintiff UP is a corporation organized under the laws of Delaware, with its
18 principal place of business in Omaha, Nebraska

19 5. Defendant AEPCO is a corporation organized under the laws of Arizona, with its
20 principal place of business in Benson, Arizona

21 **The Present Controversy**

22
23 6 Under federal law, a railroad is required to establish common carrier rates for
24 transporting coal at the request of a shipper, unless those rates would apply only to traffic that is
25 already governed by a transportation service contract Common carrier rates and service terms
26 are subject to regulation by the federal Surface Transportation Board ("STB") By contrast, rates

1 and terms under transportation services contracts are not subject to regulation by the STB and the
2 remedy for transportation services contracts is to be found in court.

3 7 In 2003, AEPCO and UP settled a dispute in which AEPCO had asked the STB to
4 prescribe maximum common carrier rail rates for the transportation of coal from mines in
5 Colorado and the Southern Powder River Basin of Wyoming ("SPRB") to Apache Station by
6 entering into a transportation services contract in the form of a Term Sheet dated February 3,
7 2003 (the "Term Sheet").

8 8 LP and AEPCO had planned to incorporate the Term Sheet's provisions in a more
9 formalized document, but the parties never formalized their agreement, and they operated under
10 the Term Sheet until it expired on December 31, 2008.

11 9 On April 2, 2008, UP provided AEPCO with a Confidential Proposal for a new
12 transportation services contract to govern the transportation of coal from Colorado and the SPRB
13 to Apache Station beginning January 1, 2009 (the "Confidential Proposal").

14 10. The Confidential Proposal addresses the same basic transportation terms as the
15 parties' Term Sheet

16 11 The Confidential Proposal sets forth the material terms that are essential to
17 establish and implement a rail transportation services contract. The Confidential Proposal sets
18 forth, among other provisions, the origin coal mines and the destination, base transportation rates
19 from each mine to the destination, provisions establishing a maximum annual volume, provisions
20 for adjusting the base rates over the term of the contract, train size minimums and maximums,
21 the maximum lading weight per railcar, equipment supply arrangements, provisions for
22 unloading trains and switching railcars, service terms, and a liquidated damages provision

23 12. The Confidential Proposal stated that the proposed terms would expire on May 4,
24 2008, unless they were accepted by AEPCO. The Confidential Proposal also stated that the
25
26

1 proposed terms, if agreed to by the parties, would be binding on both parties and would be
2 incorporated into a more formalized transportation services agreement, which would contain
3 additional, but not conflicting, terms, and which UP would prepare upon receipt of AEPCO's
4 written assent to the terms of the Confidential Proposal

5 13. In a letter from AEPCO to UP dated June 4, 2008, AEPCO's Senior Vice
6 President and Chief Operating Officer stated that AEPCO "accepts Union Pacific Railroad's
7 (UP) transportation proposal dated April 2, 2008" and that "[w]e look forward to working with
8 you to develop a transportation service agreement" Along with the letter, AEPCO provided a
9 copy of the Confidential Proposal that had been signed by its Senior Vice President and Chief
10 Operating Officer AEPCO transmitted the letter and signed copy of the Confidential Proposal
11 as attachments to an email dated June 5, 2008

12 14. In response to AEPCO's letter and signed copy of the Confidential Proposal, UP
13 prepared a draft document that incorporated the terms in the Confidential Proposal in a more
14 formalized transportation services agreement UP provided the draft to AEPCO on June 26,
15 2008 UP transmitted the draft as a reply to AEPCO's email dated June 5, 2008.

16 15 On September 22, 2008, AEPCO's Corporate Counsel wrote to UP and asked UP
17 to establish common carrier rates for transporting coal from mines in Colorado and the SPRB to
18 Apache Station beginning January 1, 2009

19 20 16 On October 10, 2008, UP responded to AEPCO's letter of September 22. UP
21 stated that it would not establish the requested common carrier rates because the parties had
22 entered into a contract that governed the transportation of coal from mines in Colorado and the
23 SPRB to Apache Station beginning January 1, 2009

24 25 17. On October 29, 2008, AEPCO responded to UP's letter of October 10. AEPCO's
26 Corporate Counsel denied that the parties had entered into any agreement regarding

1 transportation services after December 31, 2008, and he repeated AEPCO's request that UP
2 establish common carrier rates.

3 18 A ripe case or controversy between the parties exists requiring resolution by this
4 Court regarding (i) the existence of an agreement between UP and AEPCO, and (ii) whether UP
5 must establish the common carrier rates requested by AEPCO.
6

7 **Claims for Relief**
8 **Count I – Declaratory Relief**
9 **Existence of a Transportation Services Contract Between UP and AEPCO**

10 19 UP hereby incorporates and realleges each and every allegation set forth in
11 paragraphs 1-18 of this Complaint as though fully set forth herein

12 20 This is a request for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202
13 UP seeks a judicial declaration that UP has a contract with AEPCO to transport coal from mines
14 in Colorado and the SPRB to Apache Station beginning January 1, 2009, under the terms set
15 forth in the Confidential Proposal signed by AEPCO.

16 21 UP and AEPCO entered into a contract for the transportation of coal from mines
17 in Colorado and the SPRB to Apache Station beginning January 1, 2009 by manifesting their
18 mutual assent to be bound by the terms set forth in the Confidential Proposal signed by AEPCO

19 22 AEPCO has denied entering into a contract with UP, it has failed to acknowledge
20 its contractual obligations to UP, and it has taken actions inconsistent with its obligations under
21 the contract by requesting that UP establish common carrier rates for the transportation of coal
22 from mines in Colorado and the SPRB to Apache Station beginning January 1, 2009

23 23 An actual and justiciable controversy exists between UP and AEPCO as to the
24 existence of a contract between UP and AEPCO with regard to the transportation of coal from
25 mines in Colorado and the SPRB to Apache Station beginning January 1, 2009 This
26

1 controversy is of sufficient immediacy and magnitude to warrant the issuance of declaratory
2 relief, which will resolve some or all of the existing controversy between UP and AEPCO.

3
4 **Count II – Declaratory Relief**
No Obligation to Establish Common Carrier Rates

5 24 UP hereby incorporates and realleges each and every allegation set forth in
6 paragraphs 1-18 of this Complaint as though fully set forth herein

7 25. This is a request for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202
8 UP seeks a judicial declaration that it has no obligation to establish common carrier rates in
9 response to AEPCO's request for common carrier rates for the transportation of coal from mines
10 in Colorado and the SPRB to Apache Station beginning January 1, 2009

11 26. AEPCO has requested that UP establish common carrier rates for the
12 transportation of coal from mines in Colorado and the SPRB to Apache Station beginning
13 January 1, 2009

14 27 UP and AEPCO entered into a contract for the transportation of coal from mines
15 in Colorado and the SPRB to Apache Station beginning January 1, 2009 by manifesting their
16 mutual assent to be bound by the terms set forth in the Confidential Proposal signed by AEPCO,
17 and thus UP has no obligation to provide common carrier rates for that transportation.

18 28. An actual and justiciable controversy exists between UP and AEPCO as to UP's
19 obligation to establish the requested common carrier rates This controversy is of sufficient
20 immediacy and magnitude to warrant the issuance of declaratory relief, which will resolve some
21 or all of the existing controversy between UP and AEPCO
22

23 **Count III – Declaratory Relief (In the Alternative)**
24 **Obligation to Negotiate in Good Faith**

25 29. UP hereby incorporates and realleges each and every allegation set forth in
26 paragraphs 1-18 of this Complaint as though fully set forth herein

1 B Enter judgment declaring that UP is not required to establish common carrier rates
2 for the transportation of coal from mines in Colorado and the SPRB to Apache Station beginning
3 January 1, 2009,

4 C In the alternative that relief is not granted under Paragraph A of this Prayer for
5 Relief, enter judgment declaring that AEPCO is required to negotiate with UP toward a
6 formalized transportation services contract conforming to the terms set forth in the Confidential
7 Proposal signed by AEPCO for the transportation of coal from mines in Colorado and the SPRB
8 to Apache Station beginning January 1, 2009;

9
10 D. Grant UP such other and further relief, including costs, as the Court may deem
11 just and proper

12 DATED this 20th day of January, 2009

13
14 BEAUGUREAU, HANCOCK,
 STOLL & SCHWARTZ, P.C.

15 By: /s/ Terrance L. Sims
16 Anthony J Hancock
 Terrance L Sims
17 302 East Coronado Road
 Phoenix, Arizona 85004
18 Attorneys for Plaintiff
 Union Pacific Railroad Company
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