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March 16, 2009



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VIA HAND DELIVERY

The Honorable Anne K Quinlan
Secretary
Surface Transportation Board
395 E Street, S W
Washington, D C 20423-0001

ENTERED
Office of Proceedings

MAR 16 2009

Part of
Public Record

Re Docket No 42113, Arizona Electric Power Cooperative, Inc
v BNSF Railway Company and Union Pacific Railroad
Company

Dear Secretary Quinlan

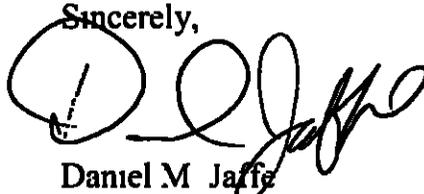
Enclosed for filing UNDER SEAL in the above-referenced proceeding please find an original and ten copies of the Highly Confidential Version of the Reply of Arizona Electric Power Cooperative, Inc to Defendant Union Pacific Railroad Company's Motion to Hold Proceedings in Abeyance

Also enclosed for filing in the public docket are an original and ten copies of the Public Version of Complainant's Reply

An additional copy of Complainant's Reply is also enclosed. Kindly indicate receipt and filing by time-stamping this extra copy and returning it to the bearer of this letter

Thank you for your attention to this matter

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel M. Jaffe". The signature is written in a cursive style with a large initial "D" and "J".

Daniel M. Jaffe
An Attorney for Arizona Electric Power
Cooperative, Inc.

Enclosures

cc. Counsel for Defendant Union Pacific Railroad Company
Counsel for Defendant BNSF Railway Company

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



ARIZONA ELECTRIC POWER
COOPERATIVE, INC.

Complainant,

v

BNSF RAILWAY COMPANY and
UNION PACIFIC RAILROAD COMPANY

Defendants

224687

Docket No 42113

ENTERED
Office of Proceedings

MAR 16 2009

Part of
Public Record

**REPLY OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. TO
DEFENDANT UNION PACIFIC RAILROAD COMPANY'S MOTION TO HOLD
PROCEEDINGS IN ABEYANCE**

ARIZONA ELECTRIC POWER
COOPERATIVE INC

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Dated March 16, 2009

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INTRODUCTION

In this complaint case Arizona Electric Power Cooperative, Inc (“AEPSCO”) challenges the reasonableness of specified railroad rates for unit coal train movements from mines from which AEPSCO has traditionally purchased its annual coal requirements for its Apache generating station at Cochise, Arizona. A prerequisite to proceeding with a complaint case under 49 U.S.C. § 10701 is the establishment by the railroad(s) of common carrier rates. After repeated efforts, AEPSCO finally succeeded in securing the establishment of common carrier rates by defendant BNSF Railway Company (“BNSF”) for coal train movements from Wyoming, Montana and New Mexico to Cochise. Defendant Union Pacific Railroad Company (“UP”), on the other hand, refuses to establish rates to Cochise from the mines it serves in Colorado and Wyoming. UP bases its refusal on its belief that it has a valid contract with AEPSCO for these movements and for that reason it is not required to establish common carrier rates. Accordingly, UP asks that the Board delay further action on the portion of AEPSCO’s complaint which challenges UP’s rates, until such time as a court in Arizona rules whether or not there is, in fact, a valid contract between UP and AEPSCO.

I. TRANSPORTATION FACTS AND CIRCUMSTANCES

As relevant to its motion before the Board, UP’s recitation of Background Facts (Motion, shts 3-6) accurately sets forth the fact that on April 2, 2008 it made a Confidential Proposal (“Proposal”) to AEPSCO for contract rates and services from mines

in Colorado and Wyoming to Cochise, Arizona (Exh. 1, hereto). On June 4, 2008, AEPCO attempted to accept the Proposal ("Acceptance") (Motion, Exh. B). On September 22, 2008, AEPCO requested that UP establish common carrier rates from its Colorado and Wyoming origins to Cochise (Motion, Exh. E). On October 10, 2008, UP declined AEPCO's request because of its belief that on June 4th AEPCO had accepted its April 2nd contract rate Proposal thereby creating an enforceable contract and for that reason it was not required to comply with AEPCO's request for a common carrier schedule (Motion, Exh. F). Finally, on October 29, 2008 (Motion, Exh. G), AEPCO disputed UP's contract claims on the basis *inter alia* that UP's Proposal had expired before being accepted and, therefore no contract arose.

On January 20, 2009, UP filed a complaint seeking declarations by a court in Arizona, and on March 12, 2009 AEPCO moved to dismiss UP's Complaint (Exh. 2, hereto).

II. ARGUMENT

A. THE APPLICABLE LAW

As the authorities referenced in UP's Argument reflect, on numerous different occasions, the agency has addressed the "is there a contract" question in determining its jurisdiction over rail rate issues. The Board has primary authority to determine its own jurisdiction. *Burlington N. Inc v Chicago & N W Transp Co* . 649 F 2d 556, 558 (8th Cir. 1991). The principles which govern that query are distilled in its most recent determination, *E I DuPont De Nemours & Co v CSX Transp, Inc* , STB Docket Nos 42099, 42100, and 42101 (STB served Dec 20, 2007) ("*DuPont*") There the Board summarized its approach to the contract defense claim as follows:

When the question is whether a valid rail transportation contract exists, the Board will often defer to the courts. But before we will dismiss a rate complaint, the defendant railroad must demonstrate a reasonable possibility that a rail transportation contract governs the movement in question

DuPont, slip op at 5 (emphasis added).

In the application of the "reasonable possibility" standard in circumstances comparable to those which exist in this case, the agency has stated "The potential for delay in deferring to a court's jurisdiction is a serious concern and we must assure ourselves that the action is correctly taken." *Toledo Edison Co v Norfolk & W Ry Co* , 367 I C C 869, 872 (1983) ("*Toledo*") Moreover, the burden of persuading the Board that it is acting correctly if it holds a portion of AEPSCO's complaint case in abeyance, lies

solely with UP *Toledo*, 367 I C C at 871 When the undisputed facts and circumstances of the AEPCO/UP relationship are examined by the Board pursuant to its "reasonable possibility" standard, it must conclude that there is no reasonable possibility that a contract exists between AEPCO and UP and, for this reason, UP has failed to meet the burden of persuasion placed on it by the Board to secure an abeyance.

B. APPLICATION OF THE REASONABLE POSSIBILITY TEST

Under the law of contracts, there must be an offer, an acceptance, and consideration to create an enforceable contract Richard A. Lord, *Williston on Contracts* § 4.3 (4th ed. 2007). The undisputed facts, as revealed in the documents presented by UP, show that sometime prior to April 2, 2008, UP unilaterally devised its contract Proposal to AEPCO As described by UP, the Proposal contained numerous "terms." UP goes on to identify and list a great many terms contained in its Proposal (Motion, sh1 4). Conspicuously missing from UP's catalogue of Proposal terms however, is the one dealing with its expiration which term is dispositive of the motion before the Board. That term is as follows:

{

}, AEPCO had given UP no response of any sort to its Proposal Therefore, under the express expiration term of the Proposal, the Proposal failed to exist after the expiration date and time See Richard A Lord, *Williston on*

Contracts § 6 57 (4th ed 2007) (an offer, unless sooner withdrawn, stands open during the stated time frame and once the time expires, there is nothing an offeree can do to revive an offer), *New York Life Ins Co v Lawrence*, 56 Ariz 28, 34. 104 P 2d 165, 167 (1940) (the result of a failure to accept or reject an offer within the time specified by the parties is that the “offer is considered as withdrawn.”). Because the offer ceased to exist after { }, AEPCO’s power of acceptance was also terminated on that date. See Restatement (Second) of Contracts § 41 (1981) (“An offeree’s power of acceptance is terminated at the time specified in the offer . . .”), Richard A. Lord, *Williston on Contracts* § 5:2 (4th ed. 2007) (lapse of the time specified in an offer terminates offeree’s power of acceptance), *Houston Dairy Inc v John Hancock Mut Life Ins Co*, 643 F.2d 1185, 1187 (5th Cir. 1981) (holding that where the offeror gave the offeree seven days to accept, an attempted acceptance eighteen days later was ineffective to form a contract)

Hence, some thirty (30) days later, { }, when, with no intervening developments, AEPCO attempted to accept the Proposal (Motion, Exh B), there was no Proposal in effect, AEPCO had no power of acceptance, and for these reasons no contract arose or could arise. Accordingly, there is no “reasonable possibility” under these undisputed facts that any enforceable contract exists between UP and AEPCO for any coal transportation on the basis of UP’s Proposal and AEPCO’s purported acceptance as claimed by UP (Motion, Exh. F).

UP's motion also advances several different theories which it surmises that AEPCO "might argue" to the Board to try and show that no contract exists (Motion, sht. 10). However, UP conspicuously fails to mention the dispositive point; namely, that its Proposal had expired a month before it was purportedly accepted by AEPCO. Given the undisputed fact that UP's Proposal had expired and given the clear rule of law that an expired offer cannot be accepted, there is no reasonable possibility under these circumstances that an enforceable contract exists between UP and AEPCO¹

C. EVEN IF THE BOARD SOMEHOW FINDS THAT THE DOCUMENTS ESTABLISH A REASONABLE POSSIBILITY THAT A CONTRACT EXISTS, THE SUPPOSED CONTRACT DOES NOT RELIEVE UP OF ITS OBLIGATION TO ESTABLISH COMMON CARRIER RATES

Even were it to be assumed *arguendo* that the Proposal and/or the expired Acceptance, and/or the [un] Signed Contract (Motion, Exh D) somehow created a valid contract, the supposed contract did not relieve UP of its obligation to establish and defend common carrier rates as argued by UP. This is so because of a unique aspect of the supposed contract: {

¹ UP might have, but did not argue to the Board, that a valid contract arose between AEPCO and UP because UP treated AEPCO's acceptance of its expired Proposal as a counteroffer which it then accepted. Had UP made this argument to the Board, it would have also failed. See discussion in Exh 2, hereto, shts 8-13

}

Because AEPCO is under absolutely no obligation {

} under the supposed contract, it is free, without violating the supposed contract, to

1. Seek the establishment of common carrier rates, and to
2. Test the reasonableness of those rates before this Board.

Given the option which confronted it {

} Nothing in the supposed contract prevented AEPCO from making the choice that it has made²

The law mandates that UP establish common carrier rates upon "reasonable request." *See* 49 U.S.C. § 11101(a) Given the unusual circumstances before it, {

} the Board would be hard-pressed to conclude that AEPCO's request for the establishment of common carrier rates is not a reasonable one under the circumstances

² The Board has recognized that "no volume requirement" rates fall into a class of their own. *See Union Pacific R R Co – Petition for Declaratory Order*, STB Finance Docket No. 35021 (STB served May 16, 2007).

D. PRACTICAL CONSIDERATIONS DO NOT FAVOR GRANTING UP'S MOTION

UP further argues that if the Board permits AEPCO to proceed with its complaint case against UP's rates from Colorado and Wyoming and that later the court upholds UP's contract claim, the resources of UP and the Board which were expended in going forward with this proceeding, in the meantime, would have been wasted. The facts and circumstances of AEPCO's complaint case do not support UP's claims of potential waste and its avoidance.

In an ordinary rate case UP's argument for an abeyance on these grounds might have some merit as the abeyance would halt all case activity, effort and expense. If it then turned out that somewhere down the line a court concluded that the Board did not have jurisdiction, the abeyance would have saved the money and resources which had been expended in going forward with the case before the Board. Here, however, the proceeding differs from the ordinary rate case in that it implicates multiple origins and two (2) railroad defendants. In this circumstance, if the Board stays the portion of the case which assails UP's rates from mines in Colorado and Wyoming, the case will still go forward as to the BNSF origins in Montana and Wyoming and as to the joint UP/BNSF movement from the New Mexico origins. No Board resources will be conserved in this event and the effort and expense required of UP will still be considerable. If UP were to then prevail in court, UP would have wasted nothing. If it were to fail, however, the costs to UP to go back and produce additional evidence and data etc. will probably be

considerably greater than had it been produced along with the data it produced in the first place. Because of the multiple origins, multiple defendants nature of AEPCO's complaint, UP's arguments about the conservation of effort and resources in support of its motion are misplaced and erroneous

CONCLUSION

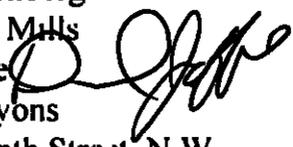
In the past, the Board has not hesitated to take jurisdiction over rail pricing issues in complaint cases where railroads proffer supposed contracts so as to avoid regulatory scrutiny of their pricing to captive shippers. See *Pennsylvania Power & Light Co v Consolidated Rail Corp*, STB Docket No 41295 (STB served Jan 17, 1995). Here the very documents upon which UP predicates its contract claims establish instead that no contract exists. At best, they show that a contract proposal was made by UP, but expired before it was accepted by AEPCO. UP presents no evidence, other than the Proposal and alleged acceptance, to support its contract claim. For these reasons, UP has failed to show the "reasonable possibility" of a contract and its motion must be denied.

RESPECTFULLY SUBMITTED,

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Dated: March 16, 2009

EXHIBIT 1

REDACTED

EXHIBIT 2

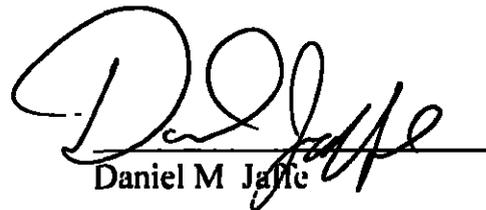
REDACTED

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March 2009, I caused copies of the Reply of Complainant Arizona Electric Power Cooperative, Inc. to Defendant Union Pacific Railroad Company's Motion to Hold Proceedings in Abeyance, including both the Highly Confidential and Public versions thereof, to be served by hand upon counsel for Defendants, as follows:

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