

BEFORE THE
SURFACE TRANSPORTATION BOARD

ARIZONA ELECTRIC POWER
COOPERATIVE, INC.,

Complainant,

v.

THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY
COMPANY and

UNION PACIFIC RAILROAD
COMPANY,

Defendants.

Docket No. 42058



ENTERED
Office of the Secretary
APR 22 2002
Part of
Public Record

UP'S PETITION TO CLARIFY THE COLORADO RATE DISPUTE

Complainant Arizona Electric Power Cooperative, Inc. ("AEPCO") refuses to tell Union Pacific Railroad Company ("UP") which Colorado rates it intends to challenge in this proceeding. AEPCO's refusal would require UP to submit evidence on Colorado coal rates that should not be litigated and that may not even be in dispute. UP needs to know now which rates are at issue. AEPCO should not be allowed to challenge rates that have never moved any traffic. Nor should it be allowed to challenge rates that UP never intended to establish for AEPCO's use.

Accordingly, UP asks the Board to clarify that AEPCO may challenge only the two Colorado rates in UP's Tariff 4244 (the "Tariff 4244 rates"). Those are the only Colorado coal rates AEPCO actually uses.

I. BACKGROUND

Late in 2000, AEPCO asked UP to provide rates for movements of Colorado coal from Energy and Axial, Colorado, to AEPCO's power plant in Arizona. See Ex. A.¹ In a December 18 letter, UP advanced an array of possible rates – eight of them. See Ex. F. The rates differed depending on the combination of origin (Energy or Axial), car source (railroad-owned or shipper-supplied), and car type (steel or aluminum).

AEPCO responded two days later by asking UP to publish the rates it had advanced in the December 18 letter. See Ex. G. UP promptly replied that it needed more information to determine which rates it should establish to meet AEPCO's transportation requirements. See Ex. H.

After further exchanges of information, AEPCO on March 7, 2001 asked UP to establish common carrier rates for movements in shipper-supplied, aluminum cars. AEPCO told UP that it had entered into a coal supply agreement, that it would lease a trainset of aluminum cars, and that it would begin shipping Colorado coal in April 2001.²

Two days later, on March 9, 2001, AEPCO amended its complaint in this proceeding, expanding its original complaint to include a challenge to UP's rates for Colorado coal. The amended complaint referred to the rates UP had advanced in the December 18 letter.³

¹ The correspondence between UP and AEPCO leading up to Tariff 4244 is attached as Exhibits A through I. AEPCO originally asked UP for rates for three Colorado origins. UP pointed out that the mine at the third origin had closed. AEPCO withdrew its request for rates from that origin. See Exs. B & D.

² See Defendants' Motion for Partial Dismissal of AEPCO's Amended Verified Complaint and for a Stay of Further Proceedings, Meidl V.S. at 2.

³ See Amended Verified Complaint, ¶¶ 6-7 & Att. B.

UP subsequently published Tariff 4244, containing the rates AEPCO requested on March 7. UP has updated the Tariff 4244 rates, so only Tariff 4244 contains current rates.⁴

AEPCO's Colorado coal has moved only in shipper-supplied, aluminum cars under Tariff 4244. AEPCO's March 7 request did not ask UP to establish rates for Colorado coal moving in railroad-owned equipment or in steel cars, nor has AEPCO subsequently asked for such rates. The only Colorado rates that UP has charged and that AEPCO has paid are those for shipper-supplied, aluminum cars in Tariff 4244.

AEPCO refuses to revise its complaint or to confirm that it will challenge only the Tariff 4244 rates. Indeed, it refuses to disclose which rates it challenges. At a February 22, 2002 meeting, UP asked AEPCO either to amend its complaint to refer to Tariff 4244 or to stipulate that it challenges only the rates established in Tariff 4244. AEPCO refused to amend its complaint, but said it would consider a stipulation. On April 1, AEPCO "decline[d] to make the requested stipulation." See Letter from Christopher A. Mills to Eric C. Bosset, dated Apr. 1, 2002 (attached as Exhibit J). Instead, it said that its "opening evidence will identify the rates that are under challenge." Consequently, neither UP nor the Board knows which Colorado rates AEPCO plans to challenge.

⁴ Since the original publication, UP amended Tariff 4244 twice: (i) the tariff was amended to reflect a rate increase effective January 1, 2002, and (ii) the tariff was also amended at AEPCO's request to clarify that the original annual volume commitment expired March 31, 2002, and to establish new rates effective April 1 through August 31, 2002, to move an additional 160,000 tons. The tariff will be amended further once AEPCO notifies UP when it intends to ship additional Colorado coal and how much Colorado coal it will ship.

II. AEPCO REFUSES TO SPECIFY THE RATES IN DISPUTE

A complainant is required to provide sufficient information to put the defendant and the Board on notice of the specific rates in dispute. See generally 49 C.F.R. § 1111.1. The Board has confirmed that complainants in rate cases are required to identify the rates they intend to challenge before filing their opening evidence. See DHX, Inc. v. Matson Navigation Co., Docket No. WCC-105 (STB served Mar. 28, 2002), slip op. at 3 n.5 (requiring the plaintiff to file an amended complaint to “specify which particular . . . rates it is challenging”). But AEPCO is playing hide the ball. It told UP that it must wait for AEPCO’s opening evidence to learn which rates AEPCO challenges. See Ex. J. The Board should not allow AEPCO to engage in such gamesmanship.

Unless the Board clarifies that the complaint excludes the six rates for railroad-owned equipment and steel cars, UP will be forced to submit evidence on rates that AEPCO may not intend to dispute. UP found itself in the same predicament in Wisconsin Power & Light Company v. Union Pacific Railroad Company, STB Docket No. 42051 (“WPL”), resulting in wasted effort.

In WPL, the complainant challenged rates that UP had established for transportation from eleven coal mines, even though it moved coal from only two of the mines under the challenged rates. Unsure how to proceed, UP submitted opening evidence that addressed variable costs of movements where coal had moved under the challenged rate, as well as variable costs of movements from two other mines from which there had been some pre-tariff contract moves. The complainant, however, submitted evidence on only the two rates that it had used. The Board reasonably decided not to consider rates under which no traffic had moved,

because it lacked sufficient evidence regarding costs. WPL at 7 & nn.2-3. UP's efforts to present evidence regarding rates that had not moved any traffic were wasted.

Under the Board's rules, both UP and AEPCO must submit opening-round evidence on revenue-to-variable-cost percentages. Unless the Board clarifies this proceeding's scope, UP will be required to expend resources to develop evidence for never-used rates on the chance that AEPCO might seek to challenge them.

III. THE BOARD SHOULD LIMIT THE COLORADO RATE DISPUTE TO THE RATES AEPCO USES TO MOVE COAL

The Board should not permit AEPCO to challenge rates that it does not use. AEPCO has never used six of the rates listed in the December 18 letter, nor has it ever expressed any intent to use those rates in the future. AEPCO requested and UP established rates for Colorado coal moving only in shipper-supplied, aluminum cars. The Board should not waste its resources or those of a defendant railroad by entertaining challenges to rates that are not used – particularly when the shipper requested, received, and uses other rates.

In WPL, the Board recognized the practical evidentiary problems that arise in challenges to rates that have not moved traffic, and it declined to address such rates. The Board similarly declined to address challenges to rates where cost evidence was incomplete or lacking in West Texas Utilities Co. v. Burlington Northern Railroad Company, 1 S.T.B. 638, 644 (1996) ("WTU"), aff'd sub nom. Burlington N.R.R. v. S.T.B., 114 F.3d 206 (D.C. Cir. 1997). In both cases, the Board concluded that it would not address rates that had not moved any traffic.

The Board should clarify that it will follow its WPL and WTU precedent and not entertain challenges to rates that never moved any traffic.⁵

IV. AEPCO CANNOT CHALLENGE THE RATES THAT UP OFFERED IN ITS
DECEMBER 18 LETTER BUT NEVER ESTABLISHED

AEPCO cannot challenge rates that UP never actually established. Tariff 4244 contains the only rates that AEPCO has used. In addition, only Tariff 4244 has been updated to provide current rates. See n.4, supra. Tariff 4244 is the only authoritative source for rates UP actually established.

The Board's jurisdiction in rate reasonableness cases extends only to rates that have been "established" by rail carriers. See 49 U.S.C. § 10701(d)(1) ("the rate established by [a carrier with market dominance] must be reasonable") (emphasis added); 49 U.S.C. § 10707(d)(1)(A) ("the Board shall find that the rail carrier establishing the challenged rate does not have market dominance if . . . the rate charged results in an revenue-variable percentage . . . that is less than 180 percent") (emphasis added). The Board may prescribe a maximum rate only after deciding that a rate "charged or collected" by a rail carrier is unreasonable. 49 U.S.C. § 10704(a)(1). UP has not charged or collected rates other than those in Tariff 4244. UP's December 18 letter advanced rates for Colorado coal moving in railroad-owned equipment and steel cars, but UP never established those rates. Indeed, AEPCO later requested rates only for movements in shipper-owned, aluminum cars.

⁵ UP's Tariff 4244 contains rates from both Energy and Axial, Colorado. AEPCO has shipped only Axial coal thus far. UP is not asking the Board to prohibit AEPCO from challenging the Energy rates at this time, but it reserves its right to seek further clarification if AEPCO has not moved Energy coal by the time the Board re-institutes a procedural schedule.

The distinction between rates a carrier advances and rates it establishes has practical significance. When a shipper requests information about possible rates and service terms, a carrier can respond by advancing several options. The customer learns about the choices, and then can specify those it prefers. The carrier can then establish rates and terms suited to the shipper's needs, without subjecting all of the other alternatives to rate regulation. The Board's rules allow carriers to engage in this dialogue in order to better understand their customers' specific transportation requirements.⁶

The Board's regulations prescribe the process by which rail carriers must "establish" rates. See 49 C.F.R. § 1300.3 (a carrier "must promptly establish and provide to the requester a rate" when a shipper "requests that the carrier establish a rate") (emphasis added). The correspondence between UP and AEPCO demonstrates that UP's December 18 letter did not "establish" rates under 49 C.F.R. § 1300.3.

The December 18 letter was merely part of a dialogue between UP and AEPCO that began in November 2000 and continued until UP established the rates in Tariff 4244 in March 2001. AEPCO understood that the December 18 letter did not establish rates, because the parties subsequently corresponded about AEPCO's uncertain transportation plans. Once AEPCO made known its choice of timing, equipment ownership, and equipment type, UP established the rates in Tariff 4244.

⁶ The Board encouraged such dialogue in adopting regulations implementing the statutory requirement in 49 U.S.C. § 11101(b) that railroads provide rates and service terms on request. See Disclosure, Publication, and Notice of Change of Rates and Other Service Terms for Rail Common Carriage, 1 S.T.B. 153, 158 (1996).

UP issued Tariff 4244 on March 26, 2001, so it does not fault AEPCO for referring to the December 18 letter in its March 9, 2001 Amended Verified Complaint. UP does not understand, however, why AEPCO refuses either to amend its complaint or to stipulate that only the published shipper-supplied, aluminum car rates for Colorado coal are in dispute. Because the Board has no jurisdiction to entertain an AEPCO challenge to rates that UP offered but never established, it should clarify that this proceeding involves only the published tariff rates.

V. CONCLUSION

AEPCO is required to identify the rates it challenges, but AEPCO refused to do so. Because the Board has jurisdiction only over established rates, the Board should clarify that the only Colorado rates at issue in this proceeding are those in Tariff 4244 that AEPCO uses.

Respectfully submitted,



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Counsel for Defendant Union Pacific
Railroad Company

JAMES V. DOLAN
LOUISE A. RINN
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179

April 22, 2002

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, hereby certify that on this 22nd day of April, 2002, I caused copies of UP's Motion for Clarification to be served on the following individuals:

Christopher A. Mills, Esq. (by hand)
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036

Patricia E. Cooper, Esq. (by overnight mail)
Arizona Electric Power Cooperative, Inc.
1000 S. Highway 80
Benson, AZ 85602

Cynthia Quarterman, Esq. (by hand)
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, DC 20036

Michael E. Roper, Esq. (by overnight mail)
The Burlington Northern and Santa Fe Railway Company
3017 Lou Menk Drive
Fort Worth, TX 76131



Michael L. Rosenthal

EXHIBIT A



Arizona Electric Power Cooperative, Inc.

3525 N. US Highway 191 S. • Cochise, AZ 85606 • Phone 520-384-4256

November 20, 2000

Via Certified Mail and Facsimile

Mr. Greg Dixon
Business Manager
Union Pacific Railroad Co.
1416 Dodge Street
Omaha, NE 68179

Mr. Randall R. Reyff
Manager, Coal Marketing
Burlington Northern Santa Fe
P.O. Box 961051
Forth Worth, TX 76161-0051

Gentlemen:

It does not appear likely that we will reach a new agreement to cover the transportation of our coal purchases after December 31, 2000 to Cochise, Arizona.

Please accept this letter as the request of Arizona Electric Power Cooperative Inc. to establish rates pursuant to 49 U.S.C. Section 11101 and 49 C.F.R. Part 1300. The transportation for which we seek common carrier rates is described in the enclosed attachment and is essentially the same transportation which you have heretofore rendered either under Agreement BNSF-C-12075 or in connection with various test and spot movements. As you will appreciate, the levels of the rates you establish will greatly influence which origin or origins supply our coal.

You may communicate your rate or rates to us jointly or separately as dictated by the circumstances of the movement for which the rate is being established. Please contact the undersigned in writing if you require clarification or additional information. Otherwise we look forward to the receipt of the requested rates as mandated by the above-referenced requirements.

Sincerely,

Mark W. Schwirtz
Senior VP and Chief Operating Officer

enc.

c/D. Kimball w/enc.
R. Hewlett w/enc.
P. Cooper w/enc.
E. Regis w/enc.

S:\Legal\Facsimile\Wpfiles\2000\Schwirtz RRCCRates.wpd

A Touchstone Energy® Cooperative



Commodity: Coal, STCC 11-21-Series

Origins: McKinley Mine, NM
Lee Ranch Mine, NM
York Canyon Mine, NM
Spring Creek, MT
PRB Wyoming Mines, WY
Axial, CO
Empire, CO
Energy, CO

Destination: AEP CO's Apache Generating Station at Cochise, AZ.

Routes: As Determined By Carriers To Deming, NM; Deming to Cochise via UP

Rates Per Net Ton:

Origin	Shipper Cars ¹	Carrier Cars ¹
McKinley Mine, NM	a ¹	a
	b ¹	b
Lee Ranch Mine, NM	a	a
	b	b
York Canyon Mine, NM	a	a
	b	b
Spring Creek, MT	a	a
	b	b
PRB Wyoming Mines, WY	a	a
	b	b
Axial, CO	a	a
	b	b
Empire, CO	a	a
	b	b
Energy, CO	a	a
	b	b

Minimum Tender: 110 cars (98 cars at the McKinley Mine)
Annual Volume: A 500,000 ton minimum from any origin
Loading Time: 4 hours
Unloading Time: 5 hours

- ¹ Rapid Discharge Cars
- ² "a." minimum loading of 98 tons per car and
"b." minimum loading of 115 tons per car

EXHIBIT B

G. C. DIXON
BUSINESS MANAGER
ENERGY

UNION PACIFIC RAILROAD COMPANY



1416 DODGE STREET
OMAHA, NEBRASKA 68179
(402) 271-5233
FAX (402) 271-3378

December 1, 2000

Via Facsimile and First Class Mail

Mr. Mark W. Schwartz
Senior Vice President and Chief Operating Officer
Arizona Electric Power Cooperative, Inc.
3525 N. U.S. Highway 191 S.
Cochise, Arizona 85606

Dear Mark:

We have received your request that Burlington Northern Santa Fe and Union Pacific establish common carrier rates from various origins to your Apache Plant near Cochise. With respect to the UP-served origins specified in your November 20 letter, we have one point of difference.

You ask for rates pertaining to transportation of coal from Empire, Colorado to the Apache Plant. As you know, the Empire Mine is currently idled, and we have been given to understand that no production is planned next year. Accordingly, we assume you will have no objection if we do not offer a rate in connection with Empire, Colorado.

Except for Empire, Colorado, we anticipate providing rates pertaining to the other UP Colorado origins specified in the November 20 letter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Greg Dixon".

UNION PACIFIC RAILROAD COMPANY

G. C. DIXON
BUSINESS MANAGER
ENERGY



1418 DODGE STREET
OMAHA, NEBRASKA 68179
(402) 271-5233
FAX (402) 271-3378

CC: Mr. L. M. Fritz, UP

Mr. H. L. Arms, UP

EXHIBIT C

G. C. DIXON
BUSINESS MANAGER
ENERGY

UNION PACIFIC RAILROAD COMPANY



1416 DODGE STREET
OMAHA, NEBRASKA 68179
(402) 271-6233
FAX (402) 271-3378

December 1, 2000

Via Facsimile and First Class Mail

Mr. Mark W. Schwirtz
Senior Vice President and Chief Operating Officer
Arizona Electric Power Cooperative, Inc.
3525 N. U.S. Highway 191 S.
Cochise, Arizona 85606

Dear Mark:

We have received your request that Burlington Northern Santa Fe and Union Pacific establish common carrier rates from various origins to your Apache Plant near Cochise. The details in your November 20 request differ in several respects from the transportation proposals we have been discussing with you (e.g. train size, minimum lading weight, carrier-supplied equipment, coal availability, etc.). Accordingly we seek confirmation or clarification on the following points:

1. At the end of October you told us that AEPCO would not be able to obtain coal from the McKinley Mine and that you were seeking rates from alternative origins to fill that gap. But your November 20 letter asks for rates from McKinley and proposes a 500,000-ton minimum annual volume. Please confirm that this origin can supply that much coal to AEPCO during 2001.
2. If AEPCO has assurance from Pittsburgh And Midway that AEPCO can obtain a supply of at least 500,000 tons of coal from the McKinley Mine in 2001, please clarify the proposed train sizes and lading weights at the McKinley Mine in light of prior loading history. You have requested rates under the assumption that the Mine can load 115 tons per car, however, prior experience indicates that loadings are in the range of 108 up to perhaps 110 tons per car. You may wish to contact the Mine to clarify its loading capability. We would appreciate your advising or confirming the actual weight per car you would propose for loading at McKinley Mine, given the loading capabilities that will be in place next year.

G. C. DIXON
BUSINESS MANAGER
ENERGY

UNION PACIFIC RAILROAD COMPANY



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Additionally, you have suggested rates should be based upon loading 98 cars per train at the McKinley Mine. It is our understanding that 98 cars has been the maximum train size that can be loaded at McKinley, and we would expect the average train size actually loaded for AEPSCO to be somewhat less than that. What is the average train size AEPSCO expects to load at McKinley during 2001?

3. For the first time you ask for rates in carrier-supplied cars. You also ask for rates from several different origins, some of which cannot supply all of your requirements due to the characteristics of the coal. For example, if you continuously cycle a trainset between mines in one region and Cochine or shift the trainset between New Mexico or Colorado/PRB origins, that makes a significant difference in the cycle time and resource requirements of the carriers. Please indicate whether your intention is to take coal from two or more locations steadily through the year or to take coal from different mines at different times.

We anticipate providing rates to be effective January 1, 2001 promptly after receiving the foregoing information.

Sincerely,

A handwritten signature in cursive script, appearing to read "Greg Dixon".

CC: Mr. Randall R. Reyff
Director, Coal Marketing
Burlington Northern Santa Fe
P.O. Box 961051
Fort Worth, TX 76131-2830

Mr. L. M. Fritz, UP

Mr. H. L. Arms, UP

EXHIBIT D



Arizona Electric Power Cooperative, Inc.

3525 N. US Highway 191 S. • Cochise, AZ 85606 • Phone 520-384-4256

December 5, 2000

Via Facsimile and Certified Mail

Mr. Greg Dixon
Business Manager
Union Pacific Railroad Co.
1416 Dodge Street
Omaha, NE 68179

Dear Greg:

This letter responds to your letter of December 1, 2000 concerning Empire, Colorado. Our specific interest is in coal from RAG's Twentymile Coal Company/Foidel Creek Mine and Kennecott Colorado Coal Company's Colowyo Mine.

Providing rates pertaining to the other Union Pacific Colorado origins, as specified in the November 20, 2000 letter, would be sufficient at this time.

Sincerely,

Mark W. Schwartz
Senior VP & Chief Operating Officer

Certified Mail/RRR: 7099 3220 0001 7932 8475

c/W. Slover, S&L
D. Kimball
R. Hewlett
E. Regis
File: Union Pacific

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A Touchstone Energy® Cooperative



EXHIBIT E



December 5, 2000

Via Facsimile and Certified Mail

Dear Greg:

Here are the specific confirmations and clarifications you sought on December 1, 2000 in connection with our request dated November 20, 2000. As I said at that time, the specifics of AEP's actual Post-2000 coal acquisition program will be greatly influenced by the rail rates we have requested.

As to your specific requests, we provide the following:

1. AEPCO has options to acquire up to 500,000 tons of coal annually from the McKinley Mine in 2001 or thereafter.
2. If AEPCO acquires coal from the McKinley Mine after 2000, you may assume that the average train size will be similar to the past sizes which you have been transporting.
3. We will take coal steadily from one, two, or more mines, depending upon transportation rates and coal prices.

We look forward to your response.

Sincerely,


Mark W. Schwartz
Senior VP & Chief Operating Officer

Certified Mail/RRR: 7099 3220 0001 7932 6785

c/R. Reyff, BNSF
W. Slover, S&L
D. Kimball
R. Hewlett
E. Regis
File: Union Pacific

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EXHIBIT F

G. C. DIXON
BUSINESS MANAGER
ENERGY

UNION PACIFIC RAILROAD COMPANY



1416 DODGE STREET
OMAHA, NEBRASKA 68179
(402) 271-5233
FAX (402) 271-3378

December 18, 2000

Via Facsimile and UPS Next Day Mail

Mr. Mark W. Schwartz
Senior Vice President and Chief Operating Officer
Arizona Electric Power Cooperative, Inc.
3525 N. U.S. Highway 191 S.
Cochise, Arizona 85606

Dear Mark:

This is in response to your letters of November 20 and December 5, 2000 requesting rates for transportation of a minimum annual volume of 500,000 tons of coal from UP-served origins in Colorado to AEPCO's Apache Plant near Cochise, Arizona.

Union Pacific is agreeable to establishing the following rates and associated conditions of common carrier service:

Commodity: Coal STCC 112

Origins: (1) Energy, CO
(2) Axial, CO

Destination: AEPCO's Apache Plant near Cochise, AZ

Rail Transportation Route: UP-Direct

Train Size: 105 cars per train

Equipment: (1) Steel or aluminum rapid discharge railcars provided by Shipper at no cost to UP
(2) Steel or aluminum rapid discharge railcars provided by UP

G. C. DIXON
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Mr. Mark W. Schwirtz

Railcars provided for transportation of coal from Origin to Destination in accordance with the conditions of this letter shall meet or exceed AAR Interchange Rules, and shall have been inspected and approved in accordance with FRA regulations. The use of such equipment shall be governed by AAR Interchange Rules, including those rules governing railcar repair, damage, or destruction.

Minimum Lading Weight: 95 tons per car

**Minimum Annual
Volume Requirement:** 500,000 tons per year

Volume Shortfall Payment: If Shipper fails to ship the Minimum Annual Volume Requirement, Shipper shall make a Volume Shortfall Payment to UP. The Volume Shortfall Payment shall be equal to the lesser of: (1) the product of the actual Net Tons shipped multiplied by the Shortfall Rate; or (2) the product of the Shortfall Tons multiplied by the weighted average Rail Transportation Rate applied by UP.

The Shortfall Rate is equal to the sum of the weighted average Rail Transportation Rate plus \$1.00.

The Shortfall Tons shall be calculated as the difference between the Minimum Annual Volume Requirement and the actual Net Tons shipped at the Rail Transportation Rate(s).

Loading: Shipper or Shipper's Mine Operator shall be responsible for the loading of railcars, including, but not limited to, improper loading, underloading, or overloading, and for providing Loading Facilities.

Shipper's Mine Operator shall visually inspect railcars prior to loading in order to identify railcars that contain debris, are not suitable for Coal loading, or are of such type that can not be unloaded at Destination. Shipper's Mine Operator shall record such railcar(s) and request the train conductor to remove the railcar(s) at the next railroad terminal. Shipper's Mine Operator shall also telephone UP and request such railcars be removed from the train. Shipper's Mine Operator shall

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also alert the receiver of the coal that such railcar(s) should not be unloaded at Destination.

UP shall provide to Shipper or Shipper's Mine Operator at Origin not less than three hours advance notice by radio, telephone, or electronic means of communication of the arrival of empty trains at a Loading Facility.

A charge of \$1000 shall be assessed for failure of the Mine Operator to provide UP a minimum of 36 hours advance cancellation notice of a scheduled train loading.

At Origins, UP shall provide locomotives and train crews to transport trains through Loading Facilities in a manner which will facilitate the full and uniform loading of each railcar.

A train's loading time shall commence when the train has arrived at Shipper's Mine Operator's designated notification point on its trackage and the train crew has requested loading instructions from Shipper's Mine Operator, or when the train is constructively placed as defined below, and shall end when loading of the train is completed and Shipper or Shipper's Mine Operator gives transportation instructions to UP ("Loading Time").

Shipper shall pay no additional charge if loading of the train is completed and Shipper or Shipper's Mine Operator gives transportation instructions to UP within the first three hours of Loading Time ("Loading Free Time"). For each hour or fraction thereof that a train's Loading Time exceeds its Loading Free Time, Shipper shall pay UP an Origin Detention Charge of \$350; PROVIDED, HOWEVER, when a Loading Disability occurs during a train's Loading Free Time, Shipper's Loading Free Time shall be extended for the duration of Loading Disability Time; and, PROVIDED, FURTHER, that when a Loading Disability occurs after a train's Loading Free Time expires, Shipper shall be required to pay an Origin Detention Charge during Loading Disability Time.

If, after a train crew has been called for duty at the final crew change point, the train cannot be positioned on Shipper's Mine Operator's track at an Origin due to any cause attributable to Shipper or Shipper's Mine Operator, in whole or in part, that train shall be considered constructively placed.

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A constructively placed train shall be held at the nearest available hold point as determined by UP. Immediately upon arrival of the train at the hold point, UP shall notify Shipper or Shipper's Mine Operator by radio or telephone, such notice to be confirmed in writing, or by electronic means of communication, of the date, hour and minute that hold time begins. Immediately upon departure of the train from the hold point, UP shall notify Shipper or Shipper's Mine Operator by radio or telephone, such notice to be confirmed in writing, or by electronic means of communication, of the date, hour and minute that hold time ends.

For purposes of computing the Loading Time of a constructively placed train:

(a) the time elapsed while transporting a constructively placed train from the hold point to a Loading Facility shall be excluded from Loading Time; and

(b) if the train must reverse direction to reach an available hold point, the time elapsed from UP's receipt of the hold notice to the return of the train to the point of reverse direction shall be included in Loading Time.

"Loading Disability" means any of the following events which is beyond the control of Shipper and/or Shipper's Mine Operator and directly results in the inability to load coal into a train at an Origin: (i) an Act of God, (ii) a strike, lockout or other labor disturbance, (iii) a riot or other civil disturbance, (iv) snow and/or ice accumulation sufficient to immobilize train operations and prevent loading of such train, (v) governmental acts or regulations, or (vi) mechanical or electrical breakdown, explosion or fire in a Loading Facility then being utilized by Shipper. "Loading Disability Time" means the period of time for which Shipper or Shipper's Mine Operator is prevented from loading a train at an Origin due to a Loading Disability. Shipper or Shipper's Mine Operator shall notify UP immediately by telephone (i) as to the nature and time of commencement of the Loading Disability and (ii) as to the time of termination of the Loading Disability. Shipper shall confirm such telephone notification in writing to UP within ten days after the Loading Disability is terminated.

Unloading: Shipper shall be responsible for the provision of appropriate unloading facilities, and shall be responsible for unloading of railcars at Destination. UP shall, upon request from Shipper, move railcars through unloading facilities in a manner consistent with the safe, efficient, and complete unloading of the railcars.

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Mr. Mark W. Schwirtz

Shipper shall take delivery of coal trains upon arrival at Destination. Shipper shall be allowed five hours free time for unloading of a train at Destination, commencing with the Actual Placement of a train at the unloading facilities, or with the Constructive Placement of a train ("Unloading Free Time"). Unloading Free Time shall be extended for a period of time equivalent to that by which unloading is delayed or prevented as a result of an Unloading Disability or any occurrence attributable to UP which prevents or impedes unloading. If a train is not unloaded and released to UP within the applicable Unloading Free Time, Shipper shall pay UP a "Destination Detention Charge" of \$440.00 per hour for each hour or fraction thereof that a train is held in excess of Unloading Free Time.

Actual Placement is made when the first railcar of a train has been placed in the proper position to unload. If Actual Placement of a train is prevented at Destination, UP may place the train at an available hold point until such time as Shipper notifies UP that Actual Placement can be made. Constructive Placement begins when UP determines a train must be placed at an available hold point because Actual Placement has been delayed or prevented, and ends when Actual Placement has been made.

An Unloading Disability means any of the following events which directly results in the inability to unload a train at Destination: (i) an Act of God; (ii) a strike or other labor disturbance; (iii) a riot or other such civil disturbance; (iv) unusual snow or ice accumulation sufficient to prevent or delay unloading of a train; or (v) mechanical or electrical breakdown, explosion, or fire affecting the unloading facilities at Destination.

Out-Of-Route Movement: An "Out-of-Route Movement" shall be any Shipper-requested movement of an empty train, or any part thereof, that differs from the normal route of empty movement of trains under the Agreement. If, at Shipper's verbal request, confirmed in writing, UP provides an Out-of-Route Movement to any rail station or trackage located at a point which is not directly intermediate between Origin and Destination but is served by UP, Shipper shall pay UP the following Out-of-Route Charge:

G. C. DIXON
BUSINESS MANAGER
ENERGY

UNION PACIFIC RAILROAD COMPANY



1416 DODGE STREET
OMAHA, NEBRASKA 68179
(402) 271-5233
FAX (402) 271-3378

Mr. Mark W. Schwartz

<u>Out-of-Route Charge per mile per railcar for Out-of-Route-Movement</u>	<u>Number of Railcars per Out-of-Route Movement</u>
\$1.25	25 or less
\$1.10	26 to 75
\$1.00	76 or more

The Out-of-Route Charge shall be calculated based upon the actual miles, subject to a minimum distance of 75 miles, for each empty movement.

Accessorial Services: Rules, regulations, and charges applicable to weighing, overloaded railcars, and other services related thereto not specifically enumerated in this letter shall be governed by Tariff UP 6004. A copy of the Tariff is enclosed for your reference.

Rail Transportation Rates:

<u>Origin</u>	<u>Car Supply</u>	<u>Car Type</u>	<u>Rail Transportation Rate (\$ Per Ton)</u>
Energy, CO	Private	Steel	20.12
Energy, CO	Private	Aluminum	18.76
Energy, CO	UP	Steel	22.39
Energy, CO	UP	Aluminum	21.01
Axial, CO	Private	Steel	20.75
Axial, CO	Private	Aluminum	19.34
Axial, CO	UP	Steel	23.14
Axial, CO	UP	Aluminum	21.76

Billing And Payment: Shipper shall be assessed freight charges for transportation of coal from Origin to Destination in an amount equal to the applicable Rail Transportation Rate multiplied by the greater of: (1) the actual lading weight per train, or (2) the minimum lading weight determined by multiplying the Train Size by the Minimum Lading Weight per railcar. Shipper shall pay freight charges within 10 days from the date freight bills are received. Charges assessed for all other services performed by UP shall be paid within ten days of receipt of a bill for such services. If Shipper does not make timely payment or if adverse credit conditions have developed which in the reasonable judgement of UP impairs Shipper's ability to meet payment terms, UP may

G. C. DIXON
BUSINESS MANAGER
ENERGY

UNION PACIFIC RAILROAD COMPANY



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Mr. Mark W. Schwirtz

require Shipper to pay in cash in advance of service for each train transported by UP.

Other Applicable

Provisions: Shipments made and other services rendered pursuant to the provisions of this letter shall be subject to Uniform Freight Classification 6000 Series and its successor, and provisions of applicable tariffs, rules, regulations, and statutory provisions.

Effective Date: January 1, 2001

Expiration Date: December 31, 2001

Please let us know if you desire publication of the foregoing rates and conditions. We will hold open this offer of publication until January 1, 2001, at which time it will be subject to review and modification.

Rather than publishing common carrier provisions, our strong preference continues to be to enter into a contract with AEPCO along the lines of our recent contract offers to you. If you conclude a contractual relationship would be preferential to a common carrier publication, let us know.

Sincerely,

CC: Mr. A. W. Peters, UP

Mr. L. M. Fritz, UP

Mr. H. L. Arms, UP

Enclosure

EXHIBIT G



Arizona Electric Power Cooperative, Inc.

3525 N. US Highway 191 S. • Cochise, AZ 85606 • Phone 520-384-4256

Via Facsimile and U.S. Mail

December 20, 2000

Mr. Greg Dixon
Business Manager - Energy Business Unit
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179

Dear Greg:

Thank you for the information on your common carrier pricing which was dated December 18, 2000. Please accept this letter as AEPCO's affirmative response to your inquiry as to whether we desire publication.

We look forward to the receipt of your tariff.

Sincerely,

Mark W. Schwartz
Senior Vice President and
Chief Operating Officer

c/R. Hewlett
E. Regis
UP File

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A Touchstone Energy® Cooperative



EXHIBIT H

G. C. DIXON
BUSINESS MANAGER
ENERGY

UNION PACIFIC RAILROAD COMPANY



1418 DODGE STREET
OMAHA, NEBRASKA 68179
(402) 271-5233
FAX (402) 271-3378

December 28, 2000

Sent via fax (520)384-6601
and U. S. Mail

Mr. Mark W. Schwartz
Sr. Vice President and Chief Operating Officer
Arizona Electric Power Cooperative
3525 North US Highway 191 South
Cochise, AZ 85606

Dear Mark:

Your letter of December 20, 2000, requested publication of common carrier rates for transportation of coal from Energy, Colorado and Axial, Colorado to the Apache Plant near Cochise, Arizona.

In connection with the publication of common carrier authority, please advise of the following:

1. Volumes of coal AEPCO expects to ship from each origin;
2. When shipments of coal will commence; and
3. Whether AEPCO will provide rail cars for coal shipments or AEPCO desires UP to provide rail cars for coal shipments.

We are in need of responses to the above items as soon as possible to be prepared for commencement of coal transportation from the above origins to the Apache Plant.

Sincerely,

Greg Dixon
alb

CC: A. W. Peters
L. M. Fritz
H. L. Arms

BCC: LouAnne Rinn

EXHIBIT I

G. C. DIXON
BUSINESS MANAGER
ENERGY

UNION PACIFIC RAILROAD COMPANY



1416 DODGE STREET
OMAHA, NEBRASKA 68179
(402) 271-5233
FAX (402) 271-3378

January 12, 2001

Via Facsimile and First Class Mail

Mr. Mark W. Schwirtz
Senior Vice President and Chief Operating Officer
Arizona Electric Power Cooperative, Inc.
3525 N. U.S. Highway 191 S.
Cochise, Arizona 85606

Dear Mark:

We talked by telephone on December 28, 2000 about AEPCO's plans for shipping coal from Axial, Colorado and/or Energy, Colorado to the Apache Plant. As promised, I followed up with a letter requesting three items of information, and we are awaiting your response.

In the meantime, I want to follow up on what UP is doing based upon its understanding of AEPCO's shipping plans for Colorado coal. You recall that during our December 28 telephone conversation, you advised AEPCO would not ship coal from Colorado origins to the Apache Plant until at least two months later. You also advised that you had not received responses to RFP's you had sent the Colorado coal producers, and that the timing of AEPCO's shipping plans would depend upon the responses you receive from the producers. Lastly, you indicated that if AEPCO began to ship Colorado coal, you would prefer for AEPCO to provide railcars for transportation of coal from those origins. This confirms that UP is agreeable to AEPCO providing the railcars.

Since uncertainty exists about Colorado coal shipments, and since AEPCO would not ship coal from Colorado origins before March, 2001, we have decided to postpone publication of common carrier authority until we have received more concrete information from you about AEPCO's shipping plans.

When you have made your decisions regarding Colorado coal shipments for this year, and respond to our December 28 letter, please bear in mind that, for new coal movements, we need advance notice both to publish the requisite common carrier price authority and to make plans for having power and crews

G. C. DIXON
BUSINESS MANAGER
ENERGY

UNION PACIFIC RAILROAD COMPANY



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available when and if AEPCO chooses to ship Colorado coal. If AEPCO changes its mind and decides it wants UP to provide railcars, we would need at least 30 days advance notice to position a trainset for loading at a Colorado origin.

We look forward to your response to our December 28 letter and hope we will be able to serve you by moving coal between Axial and Energy, Colorado and your Apache Plant.

Sincerely,

A handwritten signature in cursive script, appearing to read "G. C. Dixon".

CC: Mr. A. W. Peters, UP
Mr. L. M. Fritz, UP
Mr. H. L. Ams, UP

EXHIBIT J

SLOVER & LOFTUS

ATTORNEYS AT LAW

**1334 SEVENTEENTH STREET, N. W.
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WRITER'S E-MAIL:

cam@sloverandloftus.com

April 1, 2002

VIA FACSIMILE

Eric C. Bosset, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

Re: Docket No. 42058, Arizona Electric
Power Cooperative v. BNSF and UP

Dear Eric:

This is in response to your request that AEPCO stipulate that it is not challenging in this proceeding the "unpublished" Colorado rates for railroad equipment or steel cars, but is challenging only the Colorado rates established in UP Tariff 4244.

After further consideration of this matter, and particularly BNSF's and UP's resistance to establishing long-term rates from either the PRB or Colorado origins, AEPCO is compelled to keep its options open. Accordingly, AEPCO declines to make the requested stipulation. AEPCO's opening evidence will identify the rates that are under challenge.

Sincerely,



Christopher A. Mills

CAM:lma

cc: Louise A. Rinn, Esq.