

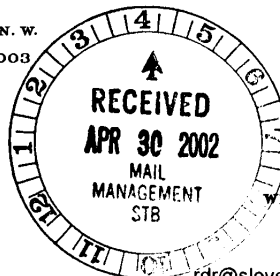
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April 30, 2002



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BY HAND

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

Re: Docket No. 42058, Arizona Electric Power
Cooperative, Inc. v. The Burlington Northern
and Santa Fe Railway Company and Union Pacific
Railroad Company

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding
are an original and ten copies of AEPCO's Reply to UP's Petition
to Clarify the Colorado Rate Dispute of Arizona Electric Power
Cooperative, Inc. Three diskettes containing the electronic text
of the motion in WordPerfect format are also enclosed.

If there are any questions concerning this matter,
please contact the undersigned.

Respectfully submitted,

ENTERED
Office of the Secretary

MAY 1 2002

Part of
Public Record

Robert D. Rosenberg
An Attorney for Arizona
Electric Power Cooperative,
Inc.

RDR:kaw
Enclosures
cc: Service List
Patricia E. Cooper, Esq.

v.

Docket No. 42058

AEPCO'S REPLY TO UP'S PETITION
TO CLARIFY THE COLORADO RATE DISPUTE

**Part of
Public Record**

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Dated: April 30, 2002

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ARIZONA ELECTRIC POWER)
COOPERATIVE, INC.)
Complainant,)
)
v.) Docket No. 42058
)
THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY and)
UNION PACIFIC RAILROAD COMPANY)
Defendants.)
)

Complainant Arizona Electric Power Cooperative, Inc. ("AEPCO"), hereby replies in opposition to "UP's Petition to Clarify the Colorado Rate Dispute" (the "Petition") filed by Defendant Union Pacific Railroad Company ("UP") in the above-captioned proceeding on April 23, 2002.

- 3 -

Nothing more is required to establish common carrier rates that are the subject of AEPCO's pending complaint.

To be sure, matters would be simpler if UP had promptly published rates for Colorado (Energy and Axial) moving in steel and/or carrier cars in a form equivalent to UP Tariff 4244, as AEPCO requested in its December 20, 2000 letter to UP (Exhibit G to UP's Petition).¹ However, the fundamental intent of the provisions of the ICC Termination Act of 1995 ("ICCTA") amending 49 U.S.C. § 11101 and the STB's subsequent regulations at 49 C.F.R. Part 1300 was to replace "the prior system of rail tariff filings, which Congress regarded as outdated, unnecessary, and too regulatory" with "a more modern, flexible, efficient, and simplified system." Disclosure, Publication and Notice of Change of Rates and Other Service Terms for Rail Common Carriage, 1 S.T.B. 153, 155 (1996). UP's effort to hide behind its Tariff 4244 and to dismiss its December 18, 2000 letter as a mere precursor to a formal rail tariff that it might later establish constitutes precisely the sort of antiquated approach that the STB rejected in adopting its 1996 regulations. Id. at 155-56.

In that regard, UP's claimed "distinction between rates a carrier advances and rates it establishes" (Petition at 7) is

¹UP plainly should not be entitled to rely upon its lack of strict compliance with AEPCO's December 20, 2000 letter, as such a result would permit UP to be the beneficiary of its own wrongdoing.

misdirected. As UP notes, the STB's order did distinguish between informal "(often orally and sometimes anonymously)" rate discussions and formal rate requests. 1 S.T.B. at 156. However, AEPCO's November 20, 2000 letter, which expressly invoked both 49 U.S.C. § 11101 and 49 C.F.R. Part 1300 and referenced the failure of the contract negotiations, cannot be read as anything other than a formal rate request. UP and BNSF also clearly viewed AEPCO's letter as a formal request as demonstrated by the timing and nature of their subsequent communications (see attachments to UP's Petition).² UP's effort to minimize its December 18, 2000 as an informal musing as to rates cannot be reconciled with the record.

The fact that AEPCO may not have yet shipped coal under some of the rate permutations in UP's December 18, 2000 letter does not render those rates immune from challenge. Throughout the late 1970's, shippers, including AEPCO, challenged rates before their power plants were operational and shipments had commenced. See, e.g., Incentive Rate on Coal -- Gallup, New Mexico to Cochise, Arizona, 357 I.C.C. 683 (1977). UP's Colorado

²UP and BNSF also jointly established BNSF 9044 (copy attached to AEPCO's original Verified Complaint dated Dec. 29, 2000) on _____, 2000, in response to the same and related correspondence occurring at the same time (see Exhibit E to UP's Petition).

rates, even if unused,³ are still properly subject to challenge by AEPCO.

UP's references to Wisconsin Power & Light Company v. U.P. and West Texas Utilities Co. v. B.N.R.R., 1 S.T.B. 638, 644 (1966), aff'd sub nom. Burlington N.R.R. v. S.T.B., 114 F.3d 206 (D.C. Cir. 1997) (Petition at 5) are inapposite and actually support AEPCO's position. Those decisions turned on the shipper's failure to submit any evidence on the costs associated with alternative movements and/or the fact that the tariff rates in issue did not cover other origins. In contrast, AEPCO specifically requested, and UP established, rates from both origins Colorado in private, carrier, steel, and aluminum cars, and AEPCO presently intends to submit evidence on all of the rates established by UP's December 18, 2000 letter. UP's cited cases thus support AEPCO's position.

AEPCO does acknowledge the possibility that it may later decide to limit its challenge of UP's Colorado rates to only those published in UP Tariff 4244, or even to just the rate for Axial (Colowyo) in shipper-supplied aluminum cars. However, AEPCO cannot begin to make that determination until it has received the information it needs in discovery. In that regard,

³UP is not even seeking (for now) to dismiss the challenge as to the Energy, CO rates, despite the fact that AEPCO has not used them (Petition at 6 n.5)

AEPCO continues to await the receipt of large categories of information from UP. For example, AEPCO has yet to receive a single rail transportation contract from UP.

AEPCO further acknowledges that its subsequent decision not to challenge all of the Colorado rates could cause UP's submission of opening variable cost evidence on unchallenged Colorado rates to involve some "wasted effort" (Petition at 4). Given how BNSF and UP have violated their common carrier obligations by failing to maintain PRB rates, UP's concern regarding its "wasted effort" warrants little weight. Moreover, it is not clear that UP will be submitting any variable cost evidence on opening at all,⁴ and the additional effort to adjust data based on private aluminum cars to account for steel and/or carrier-supplied carriers is apt to be minimal.

Nonetheless, if UP will commit to notifying AEPCO at a reasonable time (e.g., four weeks) before the due date for submitting opening evidence (which date AEPCO hopes that the Board will soon establish) whether UP's opening evidence will contain information on variable costs, AEPCO will commit to notifying UP within one week later of the specific Colorado rates AEPCO will be challenging. This approach should more than

⁴The experience of AEPCO's counsel is that defendant carriers sometimes forego offering variable cost evidence on opening.

satisfy any legitimate concerns that UP may have concerning its efforts.

To the extent that the Board wishes to clarify matters, it would be helpful for the Board to clarify that UP's duty under 49 U.S.C. § 11101 and 49 C.F.R. Part 1300 also extends to the Colorado rates. At p. 3 n.4 of its Petition, UP notes that it has amended Tariff 4244 so that it is now scheduled to expire on August 31, 2002, and that UP does not intend to reestablish any other Colorado rates until "AEPCO notifies UP when it intends to ship additional Colorado coal and how much Colorado coal it will ship." UP's position on the Colorado rates is the functional equivalent to that of BNSF/UP with respect to the PRB rates. The Board's December 31, 2001 decision correctly found that BNSF and UP had an ongoing duty to maintain PRB rates and denied their motion to dismiss AEPCO's PRB rate challenge, even if AEPCO had no immediate plans to ship under those rates. That same principle is fully applicable to UP's rates for moving coal from Colorado to AEPCO's Apache Generating Station. By ruling on the matter now, the Board can spare the parties and itself the considerable "wasted effort" that is likely to arise after August 31, 2002, when AEPCO suspects that UP will otherwise file yet another motion to dismiss.

As explained above, UP's petition is devoid of any merit. The various Colorado rates were established, not merely

advanced, and the rates can be challenged, even if they have not been utilized. UP's concerns about its "wasted effort" in filing opening variable evidence are entirely speculative at this point, but if UP affirmatively indicates at a reasonable time that it intends to file such evidence on opening, AEPCO will notify UP as to which rates it intends to challenge.

Respectfully submitted,

ARIZONA ELECTRIC POWER
COOPERATIVE INC.

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CERTIFICATE OF SERVICE

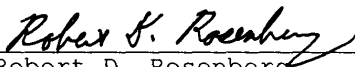
I hereby certify that I have today, April 30, 2002
served copies of the foregoing AEPCO'S Reply to UP's Petition to
Clarify the Colorado Rate Dispute as follows:

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