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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



KANSAS CITY POWER & LIGHT COMPANY,

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

Docket No. 42095

ENTERED
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OCT 10 2006
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Public Record

UNION PACIFIC'S REPLY BRIEF IN RESPONSE TO ORDER TO SHOW CAUSE

The Board's July 26, 2006 Show Cause Order asked both Union Pacific Railroad Company ("UP") and Kansas City Power & Light Company ("KCPL") to address the threshold issue of whether the Board may entertain KCPL's challenge to rates established under Option 2 of UP Circular 111 or whether the challenged rates are contract rates that fall outside the Board's jurisdiction pursuant to 49 U.S.C. § 10709.

In their opening briefs, the parties agree, essentially for identical reasons, that the Board should entertain KCPL's complaint because the challenged rates are common carrier rates rather than contract rates. The parties agree that the fundamental issue is one of intent; that UP's manifested intent was to establish common carrier rates; and that the parties did not mutually intend to enter into a contract with each other. *See* UP Br. at 2-5; KCPL Br. at 15-20. They also agree that Option 2's key features are permissible elements of common carrier arrangements. *See* UP Br. at 6-8; KCPL Br. at 22-26. The Board should thus conclude that Option 2 rates are common carrier rates and that this proceeding should not be dismissed for lack of jurisdiction pursuant to 49 U.S.C. § 10709.

UP does not share KCPL's view that the Board's Order was improper. The Board expressed concern that the resources devoted to this proceeding would be wasted if a court later ruled that the parties had created a binding contract, because "judicial enforcement of a contract [would] override [its] maximum reasonable rate determination." *Rates on Iron Ore, Randville to Escanaba via Iron Mountain*, 367 I.C.C. 506, 511 (1983).¹ KCPL's complaint appears to be that the Board should not have raised that issue on its own. KCPL claims that the Board "delay[ed] the proceeding on account of the possibility that the transportation at issue might be the subject of a contract," despite past statements that it would not impose such delays unless a party has presented evidence showing "a reasonable possibility that a contract between the parties may have existed." KCPL Br. at 6, 13 (quoting *Toledo Edison Co. v. Norfolk & W. Ry.*, 367 I.C.C. 869, 872-73 (1983)).²

The Board's Order does not conflict with the precedent cited by KCPL. The precedent cited by KCPL addresses how the agency should respond when a party argues that the agency lacks jurisdiction over a rate because the rate was established through a binding contract; it does not preclude the Board from addressing potential concerns about its own jurisdiction even when parties have not. Thus, although the Board would not have jurisdiction to rule that UP and

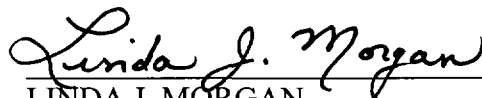
¹ We doubt that it escaped the Board's attention that some coal shippers have questioned the legal status of Option 2 rates. For example, Western Coal Traffic League, whose members include KCPL, filed a complaint in federal court last year alleging that Option 2 rates were not lawful common carrier rates. The court dismissed the complaint on the ground that the League had failed to adequately allege that it had standing. See *Western Coal Traffic League v. BNSF Ry & Union Pacific R.R.*, No. 4:05-CV-679-Y (N.D. Tex. Mar. 29, 2006).

² KCPL frames much of its argument in terms of "jurisdiction" – it claims that the Board "does not have jurisdiction to consider" whether the parties might have "entered into a binding contract when KCPL tendered the Circular 111 Volume Commitment Certificate for the Item 4140 Option 2 rates." KCPL Br. at 7. But that assertion contradicts KCPL's later recognition that the agency would have "jurisdiction" to determine whether a party has presented evidence showing "a reasonable possibility that a contract between the parties may have existed" and could properly hold a rate case in abeyance if it made that determination. *Id.* at 13-14.

KCPL entered into a binding contract, it plainly has jurisdiction to address whether Option 2 rates are common carrier rates within its jurisdiction – *i.e.*, whether UP satisfies its statutory obligation to provide common carrier rates on request by establishing Option 2 rates. *Cf. Nat'l Grain & Feed Ass'n v. Burlington N.R.R.*, 8 I.C.C.2d 421, 437-39(1992), *aff'd in relevant part, rev'd on other grounds sub nom. Nat'l Grain & Feed Ass'n v. United States*, 5 F.3d 306 (8th Cir. 1993). KCPL's complaint apparently led the Board to consider the legal status of Option 2 rates, and the Board would be acting well within its jurisdiction to remove any doubts that might later cause delay in this proceeding or future proceedings by ruling that Option 2 rates are common carrier rates.

KCPL is also wrong to claim that the Board delayed this proceeding as part of the Order. The Board never said that it would hold this proceeding in abeyance while it considered the issue posed by the Order. The Order itself does not state that this proceeding is being held in abeyance until the Board renders a decision. This proceeding is being held in abeyance solely as a consequence of the Board's February 27, 2006 decision in *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1).

Respectfully submitted,



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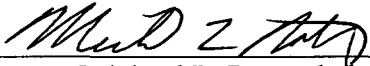
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October 10, 2006

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 10th day of October, 2006, I caused a copy of Union Pacific's Reply Brief in Response to Order to Show Cause to be served by hand on Kelvin J. Dowd of Slover & Loftus, 1224 Seventeenth Street, N.W., Washington, D.C. 20036.



Michael L. Rosenthal