

205425

**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**

MAY 20 2002

**Part of
Public Record**

UP'S REPLY TO AEPCO'S REQUEST FOR CLARIFICATION

In its "Reply to UP's Petition to Clarify the Colorado Rate Dispute," Complainant Arizona Electric Power Cooperative, Inc. ("AEPCO") requests an order requiring Union Pacific Railroad Company ("UP") to maintain indefinitely the rates in UP's Tariff 4244, which are scheduled to expire on August 31, 2002. See AEPCO Reply at 7.¹ The Board should reject AEPCO's request. Once AEPCO provides its post-August 31 transportation requirements for Colorado coal, UP will amend Tariff 4244 to establish rates and terms to meet those requirements, as it has consistently committed to do and has actually done.

¹ UP is not replying to AEPCO's reply. See 49 C.F.R. § 1104.13(c). UP is replying only to AEPCO's new request for relief.

UP's Tariff 4244, as amended, establishes rates for AEPCO to ship a minimum of 160,000 tons of Colorado coal between April 1, 2002, and August 31, 2002. UP established those terms because they met AEPCO's transportation requirements, as AEPCO had explained those requirements to UP. See Letter from Mark W. Schwirtz to Steve Meidl, dated Jan. 28, 2002 (AEPCO "expect[s] to ship approximately 160,000 tons during the period starting April 1, 2002 and ending in August 2002") (attached as Exhibit A to the Verified Statement of James A. Lorenz).²

UP did not establish rates applicable beyond August 2002, because AEPCO stated that it did not expect to ship Colorado coal between September 2002 and the end of 2002, and it had no concrete shipping plans in 2003. See id. ("We are hopeful that shipments would resume . . . starting in January 2003 and continue for six months for a total of 200,000 tons, but we have not yet entered into definitive coal supply arrangements for that purpose.").

UP assured AEPCO that it is eager to move additional Colorado coal for AEPCO after August 2002. See Letter from Steve Meidl to Mark W. Schwirtz, dated January 14, 2002 ("UP would be pleased to move substantially more Colorado coal") (attached as Exhibit B to the Verified Statement of James A. Lorenz).

UP remains eager to move Colorado coal for AEPCO. In its Petition, UP noted that it anticipated amending Tariff 4244 further "once AEPCO notifies UP when it intends to ship additional Colorado coal and how much Colorado coal it will ship." Petition at 3 n.4.

² Tariff 4244 originally contained a 500,000-ton volume requirement and expired on June 30, 2002. AEPCO asked UP to amend the tariff so the 500,000-ton requirement would expire on March 31, 2002, and a new volume requirement would apply for the remainder of 2002. See Lorenz V.S., Ex. A & B.

AEPCO saw this statement as sinister,³ but UP was merely reinforcing what it has often said to AEPCO: tell us how much coal you will move and when you need to move it, and we will be pleased to establish a rate and provide the requested service.

UP is unable to establish rates before AEPCO describes its transportation requirements. UP's rates depend on a shipper's anticipated volume, timing, and equipment requirements. See *Lorenz V.S.* ¶¶ 6-9. As UP has explained to AEPCO, the volume and timing of shipments affect UP's use of track capacity, locomotives, cars, and crews, which in turn affects UP's rates. See *Lorenz V.S.*, Ex. B; see also Letter from Greg Dixon to Mark W. Schwartz, dated Dec. 28, 2000 (attached as Exhibit C to the Verified Statement of Jim Lorenz). Without such information, UP cannot gauge the crews and power it must have in place to meet AEPCO's requirements or evaluate the market factors that are relevant in setting an appropriate rate. For example, volume and timing affect whether UP will be able to establish efficient, unit-train service with continuous cycles, or will be forced to run less-efficient, individual trains. See *Lorenz V.S.* ¶ 7. Individual trains often require UP to reposition locomotives or cars at extra expense and make crew planning more difficult. Id. Timing is also important because UP's rates are affected by market conditions. Id. ¶ 8. Equipment requirements are particularly important – if the shipper wants to use railroad equipment, the railroad must ensure that it has sufficient equipment available to meet the shipper's needs. Id. ¶ 9.

³ Contrary to AEPCO's ungrounded suspicion, UP does not intend to file a motion to dismiss if Tariff 4244 is not amended. See AEPCO Reply at 8. Even if AEPCO never shipped another ton of Colorado coal, it would be entitled to challenge the Tariff 4244 rates under which coal moved.

UP is not required by statute or regulation to establish rates before AEPCO describes its anticipated volume, timing, and equipment requirements. The Board's rules recognize that carriers' rates will vary depending on their customers' requirements. A carrier is not required to establish a rate until it receives the information required to set a rate. See 49 C.F.R. § 1300.3; see also Central Power & Light Co. v. Southern Pacific Transportation Co., 1 S.T.B. 1059, 1063 n.7 (1996) (noting that "the shippers and the carriers indicated that they recognize that a shipper requesting a rate must provide sufficient information to enable the railroad to respond"). Railroads are not required to establish and maintain arrays of rates from which shippers can pick and choose. Nor are they required to establish rates for purposes of litigation. See Central Power & Light, 1 S.T.B. at 1064 (rejecting utilities' "mistaken belief that, under the common carrier obligation, a carrier must hold out to provide all possible rates and services that a shipper may request").

UP hopes that AEPCO continues to move Colorado coal using UP service. At this point, however, AEPCO has not provided the information necessary for UP to establish rates for post-August 31 coal movements. AEPCO may not force UP to establish and maintain hypothetical rates while withholding its transportation requirements. Once AEPCO's post-August 31 plans become more concrete, UP will promptly provide rates and terms that meet AEPCO's transportation requirements.

Respectfully submitted,



J. MICHAEL HEMMER
ERIC C. BOSSET
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
Tel: (202) 662-6000
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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

May 20, 2002

CERTIFICATE OF SERVICE

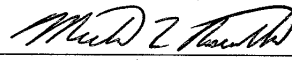
I, Michael L. Rosenthal, hereby certify that on this 20th day of May, 2002, I caused copies of "UP's Reply to AEPCO's Request for Clarification" to be served on the following individuals:

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

SURFACE TRANSPORTATION BOARD

STB Docket No. 42058

ARIZONA ELECTRIC POWER COOPERATIVE, INC.
v.
THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY and UNION PACIFIC RAILROAD COMPANY

VERIFIED STATEMENT

OF

JAMES A. LORENZ

1. My name is James A. Lorenz and I am Senior Business Manager in Energy Marketing for Union Pacific Railroad Company ("UP"). My responsibilities include the account of Arizona Electric Power Cooperative ("AEPCO") and the delivery of coal to its Apache Station located at Cochise, Arizona. I became responsible for the AEPCO account in March, 2002. My responsibilities include negotiating rates, coordinating the utilization and placement of private equipment, monitoring service, and understanding the coal sourcing options and plans of each customer assigned to me.
2. In this statement, I address AEPCO's request that the Board order UP to maintain indefinitely the rates in UP's Tariff 4244, which are scheduled to expire on August 31, 2002.

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3. UP's Tariff 4244, as amended, establishes rates for AEPCO to ship a minimum of 160,000 tons of Colorado coal between April 1, 2002, and August 31, 2002. UP established those terms based AEPCO's statement that it intended to ship approximately 160,000 tons between April and August at the rate of about three trainloads a month. See Ex. A.
 4. At that time, AEPCO stated that it did not expect to ship Colorado coal between September 2002 and the end of 2002. AEPCO also stated that it had no concrete shipping plans Colorado coal in 2003. AEPCO was "hopeful" that shipments would resume in January and continue for six months, but it had "not yet entered into definitive coal supply arrangements for that purpose." See id.
 5. Because AEPCO's plans beyond August 2002 were uncertain with respect to source, volume, and timing, UP could not commit to a rate beyond August, 2002. See Ex. B.
 6. UP is unable to commit to coal rates until the shipper describes its transportation requirements. UP's coal rates depend on a shipper's anticipated volume, timing, and equipment requirements. Without such information, UP cannot gauge the crews and power it must have in place to meet shippers' requirements or evaluate the market factors that are relevant in setting an appropriate rate.
 7. The volume and timing of a movement affect whether UP will be able to establish efficient, unit-train service with continuous cycles, or will be forced to run less-efficient individual trains. Individual trains often require UP to reposition locomotives or cars at extra expense and make crew planning more difficult.

8. Timing is also important because UP's rates are affected by market conditions. For example, if a shipper plans to move only a few trains, then it is critical for rate purposes to know whether the movement will take place during slack or peak demand periods. If a shipper plans an ongoing series of movements, then even if the movements span both slack and peak demand periods, the overall supply-demand relationship is different, and the rate may be different as well.

9. Equipment requirements are particularly important. If the shipper wants to use railroad equipment, the railroad must ensure that it has sufficient equipment available to meet the shipper's needs.

10. UP has handled AEPCO's rate requests the same way it handles requests from its other coal customers: UP has provided rates and terms once it understood AEPCO's transportation requirements. UP wants to move as much Colorado coal as possible for AEPCO, but it cannot establish rates until AEPCO provides UP more specific information about the movement.

VERIFICATION

STATE OF NEBRASKA)
)
COUNTY OF DOUGLAS) ss:

I, JAMES A. LORENZ, Senior Business Manager in Energy Marketing for Union Pacific Railroad Company, being duly sworn, depose and state that I have read the foregoing Verified Statement, that I know its contents, and that those contents are true as stated to the best of my knowledge, information, and belief.


JAMES A. LORENZ

SUBSCRIBED AND SWORN TO before me this 17th day of May, 2002


Notary Public

My commission expires:

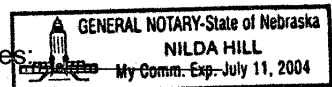


EXHIBIT A



Arizona Electric Power Cooperative, Inc.

P.O. Box 670 • Benson, Arizona 85602-0670 • Phone 520-586-3631

January 28, 2002

Union Pacific Railroad Company
Attn: Steve Meidl
1416 Dodge Street, Room 500
Omaha, Nebraska 68179

VIA FACSIMILE

Re: TARIFF UP-4244

Dear Steve:

We write to respond to your letter dated January 14, 2002, which was sent in response to our letter of January 9, 2002, which in turn superseded our letter of January 4, 2002.

We find a number of your characterizations to be irrelevant and/or inaccurate. As a common carrier, UP has a duty to hold out to provide service upon reasonable request, which AEPCO has made. AEPCO's letter clearly requested a rate for 200,000 tons over a 12-month period. UP should have established a rate responsive to that request, not use the request as a vehicle to engage in the equivalent of contract negotiations and/or make self-serving (albeit unfounded) statements to further its litigation position. Moreover, it is nonsensical for UP to speak of what constitutes optimal use of its resources for serving Colorado origins without taking into account that Colorado volumes that do not move to AEPCO are likely to move to other customers, just as volumes that AEPCO does not take from Colorado are likely to be obtained from other origins and delivered by UP. Furthermore, UP's speculation as to AEPCO's shipment plans is simply erroneous, as detailed below. Additionally, requiring AEPCO to specify its shipment plans in detail in order to obtain a common carrier rate can compromise AEPCO's commercial ability to procure coal at desirable prices.

Nonetheless, to the extent it is helpful for UP to know of our current plans for Colorado shipments, which are subject to change, they are as follows. Assuming UP cycle times remain relatively stable, we expect to satisfy the current 500,000 ton minimum volume by the end of March. We then expect to ship approximately 160,000 tons during the period starting April 1, 2002 and ending in August 2002 at the rate of about 3 trainloads a month (ideally 4 in June and 2 in August), assuming stable UP cycle times. This rate is generally consistent with our shipments for much of the past year, and it is below the rates of 600,000 tons a year or even 200,000 tons for four months posited in your letter. We are hopeful that shipments would resume at the same rate of about 3 trainloads a month starting in January 2003 and continue for six months for a total of 200,000 tons, but we have not yet entered into definitive coal supply arrangements for that purpose. However, we would need only four trains during the first three months of 2003 to reach the 200,000 ton level.

S:\LEGAL\MARKETING\FILES\2002\TariffUP Jan28.wpd

A. J. Dickinson Energy Cooperative



January 28, 2002

We look forward to receiving your prompt response.

Mark W. Schwartz

c/D. Kimball
R. Hewlett
P. Cropper
E. Regis
File - US Correspondence

EXHIBIT B

UNION PACIFIC RAILROAD COMPANY



January 14, 2002

Mr. Mark W. Schwirtz
Arizona Electric Power Cooperative, Inc.
3525 N. US Highway 191 S.
Cochise, Arizona 85606

Re: Tariff UP-4244

Dear Mark,

This letter responds to your letters of January 4 and January 9, 2002 regarding Tariff UP-4244's expiration date and the minimum annual volume commitment.

The 500,000 ton annual volume commitment was adopted at the request of AEPCO. Based on Item 1000, the twelve-month period begins in the month shipments begin under the rate. It appears that AEPCO will have no difficulty satisfying that commitment by March 31, 2002. Our records show AEPCO has shipped 408,600 tons through nine months ending December 2001 and is on a pace to ship 544,800 tons within the 12-month period. We published the original expiration date of June 30, 2002 due to uncertainty as to when AEPCO would begin its shipments.

UP will modify the expiration date, and other terms as necessary, when it understands what your transportation requirements are. Until you sent these letters, AEPCO had provided no information regarding its plans for Colorado coal after the original volume period expires. Even with those letters, we are confused about AEPCO plans. Although you state AEPCO offers a 12-month annual volume commitment of 200,000 tons, we understand that AEPCO has committed to take 200,000 tons beyond its original 500,000 ton purchase by July, 2002. That would be 200,000 tons in four months (April through July) or a pace of 600,000 tons per year. Please be advised that 200,000 tons, whether bunched into a single 4-month period or stretched out over 12 months, prevents optimal use of track, locomotive and crew capacity.

While the letter claims that "current conditions in the coal markets and UP service performance to date" makes lowering the 12-month minimum to 200,000 appropriate, that statement is both vague and confusing. As the experience of the last nine months shows, 500,000 tons over a year is a sustainable pace for a true unit-train operation. And we are advised that AEPCO is committed to take another 200,000 tons by July, which is far less than a 12-month period. Moreover, you finish by indicating that AEPCO has not yet made plans for Colorado coal shipments in 2002.

Please clarify whether you wish UP to provide rate(s) for:

1. 200,000 tons shipped between April 1, 2002 and July 31, 2002.
2. 200,000 tons shipped between April 1, 2002 and March 31, 2003.
3. Some other volume for a different period of time.

UP would be pleased to move substantially more Colorado coal than 200,000 tons for the balance of

2002 and offer rates for your consideration as you make your plans.

Mark, if you wish to discuss this further, please call me.

Sincerely,

Steve Meidl

Steve Meidl
Business Manger

EXHIBIT C

G. C. DIXON
BUSINESS MANAGER
ENERGY

UNION PACIFIC RAILROAD COMPANY



1416 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