

BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. EP 722

RAILROAD REVENUE ADEQUACY

ENTERED
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July 8, 2015
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Public Record

DOCKET NO. EP 664 (Sub-No. 2)

PETITION OF THE WESTERN COAL TRAFFIC LEAGUE TO INSTITUTE A RULEMAKING PROCEEDING
TO ABOLISH THE USE OF THE MULTI-STAGE DISCOUNTED CASH FLOW MODEL IN DETERMINING
THE RAILROAD INDUSTRY'S COST OF EQUITY CAPITAL

**ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
NOTICE OF INTENT TO PARTICIPATE
IN PUBLIC HEARING**

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Dated: July 8, 2015

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Pursuant to the Board's notice served May 8, 2015, Arkansas Electric Cooperative Corporation (AECC) gives notice of its intent to participate in the Public Hearing scheduled for July 22-23, 2015. At the Hearing, AECC's views will be presented by Eric Von Salzen, AECC's outside counsel, and Michael A. Nelson, AECC's Transportation Consultant. AECC requests that the Board allow it 40 minutes to present its comments, approximately 25 minutes of which will be allocated to the issues in EP 722, and the balance to issues in EP 664 (Sub-No. 2). The key points AECC intends to address at the Hearing are summarized in the attachment to this Notice.

Respectfully submitted,



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**KEY POINTS TO BE ADDRESSED BY
ARKANSAS ELECTRIC COOPERATIVE CORPORATION
AT PUBLIC HEARING, JULY 22-23, 2015**

AECC's overall objective in this matter is the establishment of Board practices that reflect the achievement of revenue adequacy by the Class I railroad industry. The Board's annual revenue adequacy determination shows that the Class I railroad industry surpassed the revenue adequacy level in 2011, and that earnings above the revenue adequacy level have been substantial and escalating since that time. ^{1/} Available information for 2014 indicates that this pattern has continued, with excess earnings exceeding \$2.5 billion. ^{2/} What this means is that the Class I railroad industry has achieved "a reasonable level of profitability for a healthy carrier" that "fairly rewards the rail company's investors and assures shippers that the carrier will be able to meet their service needs." ^{3/} Given this, "captive coal shipper[s] should not be required to pay more than is necessary for the rail carrier(s) involved to earn adequate revenues." ^{4/}

^{1/} See Comments of Arkansas Electric Cooperative Corporation (September 5, 2014) ("AECC Comments") at page 13, fn 11, citing Christensen Associates, An Update to the Study of Competition in the U.S. Freight Railroad Industry (January 2010) Table 3-13 on p. 3-18, as discussed in Docket No. EP 705, Competition in the Railroad Industry, "Initial Comments of Arkansas Electric Cooperative Corporation" (April 12, 2011) VS Nelson at page 8.

^{2/} See STB Docket No. EP 558 (Sub-No. 18), Railroad Cost of Capital – 2014, Reply Comments of AECC (May 11, 2015) ("EP 558 AECC Reply Comments") at pages 4-6.

^{3/} Coal Rate Guidelines, Nationwide, 1 ICC2d 520, 1CC LEXIS 254, *37 (1985), *aff'd sub nom. Consolidated Rail Corp. v. U.S.*, 812 F.2d 1444 (3rd Cir. 1987).

^{4/} Id., *37-38.

This understanding of the statute was expressly adopted by the ICC 30 years ago in the Coal Rate Guidelines. When Congress amended (in other respects) and re-enacted the Staggers Act through the ICC Termination Act (ICCTA), it implicitly ratified that understanding. “Congress is presumed to be aware of an administrative or judicial interpretation when it re-enacts a statute without change.” 5/

It is the charge of this Board to “maintain and revise as necessary standards and procedures for establishing revenue levels for rail carriers providing transportation subject to its jurisdiction . . . that are adequate. . . .” 6/ When “revenue adequacy” is attained, Congress requires this Board to “maintain reasonable rates where there is an absence of effective competition.” 7/ This mandate is simply unambiguous.

5/ Forest Grove School District v. T. A., 557 U.S. 230, 239-40 (2009) (quoting Lorillard v. Pons, 434 U.S. 575, 580 (1978)). See, also Commissioner Of Internal Revenue v. Estate Of Noel, 380 U.S. 678, 682 (1965) (“We have held in many cases that such a long-standing administrative interpretation, applying to a substantially re-enacted statute, is deemed to have received congressional approval and has the effect of law.”); Altman v. Securities And Exchange Comm’n, 666 F.3d 1322 (D.C. Cir. 2011) (citing Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 846 (1986)). Altman quoted Schor as follows:

It is well-established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the “congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.” quoting from NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974).

6/ 49 USC § 10704(a)(2), as discussed in Reply Comments of Arkansas Electric Cooperative Corporation (“AECC Reply”) at 5 and 6.

7/ 49 USC 10101 (6), as discussed in AECC Reply at 6.

“An agency may not rewrite clear statutory terms.” 8/ “Where Congress has established a clear line, the agency cannot go beyond it.” 9/ Here, Congress has drawn a line at railroad attainment of revenue adequacy. Accordingly, this Board faces a plain requirement to curtail railroad earnings in excess of the revenue adequacy level.

In addition to the statutory framework, AECC intends to discuss at the Hearing its evidence and analysis showing that allowing rail earnings to increase above the revenue adequacy level is both harmful to the economy and contrary to the public interest. AECC will discuss its recommendations regarding specific reforms in the provisions governing Full SAC and Simplified SAC rate cases 10/, as well as increased opportunities for intramodal competition. 11/ AECC will also discuss its proposed new revenue adequacy constraint, 12/ and changes in the Board’s Return on Investment methodology to eliminate double-counting of the effects of inflation. 13/

AECC will also address several specific issues that the Board identified in its Notice of the Hearing, and on which AECC presented substantive evidence and analysis in its comments.

8/ Util. Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2446 (2014).

9/ City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).

10/ AECC Comments at pages 18-20, 25-27.

11/ AECC Comments at pages 24-25, 27-29.

12/ AECC Comments at pages 20-24.

13/ AECC Comments at pages 29-31.