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SERVICE DATE – LATE RELEASE APRIL 25, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42104

ENTERGY ARKANSAS, INC. & ENTERGY SERVICES, INC.

v.

UNION PACIFIC RAILROAD COMPANY,
MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC., &
BNSF RAILWAY COMPANY

Decided: April 25, 2011

The request to stay the decision served in this proceeding on March 15, 2011 (March 15 decision) is being denied.

BACKGROUND

In its March 15 decision, the Board found that the Independence Steam Electric Station (ISES), a Newark, Arkansas coal-fired electric utility plant co-owned by Entergy Arkansas, Inc., Entergy Services, Inc., and Arkansas Electric Cooperative Corporation (AECC), had a statutory right to coal transport service by BNSF Railway Company (BNSF) and Missouri & Northern Arkansas Railroad Co., Inc. (MNA) from the northern Powder River Basin (PRB) mines.¹ The Board decision found that ISES had a competitive transportation alternative to the service jointly provided by UP and MNA. But the Board denied other relief because it found that the complainants did not show that the service problems of which they complained were the result of anticompetitive conduct by UP or MNA, and that the BNSF/MNA through route sought by the complainants was not better or more efficient than the existing route.² The March 15 decision became effective on the date of service.

On April 4, 2011, AECC filed both a petition for reconsideration and a petition to stay the effectiveness of the Board's decision. UP and MNA filed replies to the AECC petition for stay on April 5 and 6, 2011, respectively.

¹ The Board acknowledged that Union Pacific Railroad Co. (UP) has a contractual right to replace MNA and work with BNSF to provide ISES service from the northern PRB mines.

² The Board was also unable to reach a majority decision on the complainants' request that agency approval of the UP-MNA lease be revoked. However, that request was considered in a docket – Docket No. FD 32187 – that is not included in the pending AECC petitions.

AECC states that 49 C.F.R. § 1115.3(f) authorizes the Board to enter a stay either on its own motion or in response to a petition. AECC contends that its concurrently filed petition for reconsideration raises “substantial issues” regarding the March 15 decision, and that the parties’ “convenience” would be best served with a stay, suspending the time for initiating judicial review until the Board resolves those issues.

UP and MNA contend that a stay should not issue. UP argues that AECC’s petition was out of time as 49 C.F.R. § 1115.3(f) requires such a filing be made within 10 days of the Board’s served decision, and AECC did not make its filing until 20 days after that date. UP also argues that: (1) the Board action cannot be stayed since it was effective upon service and involved no grant of relief susceptible to a stay; (2) AECC’s concerns regarding the timing of judicial review are already addressed since a timely petition for reconsideration rendered the Board’s action non-final for AECC;³ and (3) AECC’s claims in support of a stay fail to demonstrate that a stay is appropriate. MNA agrees that the March 15 decision’s effective date and the petition’s late filing preclude a stay. MNA also takes issue with the sufficiency of AECC’s arguments.

DISCUSSION AND CONCLUSIONS

In deciding a petition for stay, the Board follows the traditional stay criteria by requiring a party seeking a stay to establish that: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay.⁴ The petitioner carries the burden of persuasion on all of the elements required for such extraordinary relief.⁵ A stay petition must be filed within 10 days of the action’s service date. 49 C.F.R. § 1115.3(f)

AECC has failed to meet the standards for obtaining a stay. AECC’s summary claims regarding its concurrently filed petition for reconsideration, the “convenience of the parties” being “served,” and judicial review logistics do not address the likelihood of success, the irreparable harm absent relief, the balance of the equities, or the public interest. Further, the stay

³ Although AECC did not submit the required filing fee for a petition for reconsideration until April 5, 2011, and its petition could be considered as filed one-day late on that date, its petition for reconsideration will be considered as timely filed under § 1115.3, because its failure to include the filing fee with its petition (submitted to the Board on April 4, 2011) was an inadvertent error and all parties were timely served with the petition.

⁴ See Washington Metro. Area Transit Comm’n v. Holidays Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958).

⁵ Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

petition was submitted 10 days out of time (a petition to stay was due on March 25, 2011) and AECC does not proffer a reasonable excuse for such a delay. Finally, AECC's timely petition for reconsideration is sufficient to toll the deadline for its obtaining judicial review of the March 15 decision.⁶

The Board will address AECC's petition for reconsideration in a separate decision.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for a stay is denied.
2. This decision is effective on its date of service.

By the Board, Daniel R. Elliott, Chairman.

⁶ E.g., BellSouth Corp. v. FCC, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994). Because the AECC petition was submitted 10 days late and failed to meet the standards for a stay, the Board need not address the UP and MNA concerns regarding the compatibility of a stay with the March 15 decision effective date or whether any relief therein could be stayed.