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I. IN DUKE ENERGY, THE BOARD INEXPLICABLY DEPARTED FROM TEN YEARS OF PRECEDENT THAT OTTER TAIL RELIED UPON TO PREPARE ITS SAC PRESENTATION.

In Duke Energy, the Board announced a dramatic and sudden departure from nearly ten years of precedent, which held that actual market-based divisions are the best evidence of the appropriate division of cross-over revenues. Instead, the Board concluded that actual divisions would not be particularly instructive. Id. at 20, note 29. In reliance upon ten years of precedent to the contrary, Otter Tail submitted Opening Evidence in this proceeding on June 14, 2003 that, for the first time in a SAC case, developed an algorithm based upon actual BNSF divisions data to determine the appropriate division of cross-over revenues. Otter Tail was able to do this because BNSF produced actual divisions data in discovery, something that defendant-railroads had refused to do in previous cases. The apparent effect of the Duke Energy decision, however, is to summarily reject Otter Tail's evidence, even before the record in this proceeding is closed.

A. For Nearly Ten Years, The Board Has Held That Actual Divisions Are The Best Evidence Of The Revenue A SARR Would Earn On Cross-Over Traffic.

The first in a series of ICC and STB decisions holding that actual divisions are the best evidence of the appropriate division of cross-over revenues is Bituminous Coal – Hiawatha, Utah to Moapa, Nevada, 10 I.C.C. 2d 259 (1994) ("Nevada Power II"). After concluding that cross-over traffic should be included in the SARR and treated as if it would be interchanged with the incumbent carrier at the appropriate end points of the SARR, the ICC turned to the question of how revenues should be allocated between the SARR and the incumbent for this cross-over traffic:

In the absence of any better evidence, we will prorate the revenues attributable to the cross-over traffic among the SARR and the incumbent carriers on a mileage basis, as proposed by NPC. This approach is consistent with the treatment in our staff's preliminary analysis of historically interlined traffic *for which actual (market-based) divisions are not available.*

Id. at 267-68 [footnote and citation omitted] [emphasis added]. In a separate statement commenting on the decision, Chairman McDonald expounded upon the significance of this statement:

A third generic issue settled by this decision is how to estimate the revenue that a SARR would earn on cross-over traffic. Because this traffic is not currently interlined, there are no actual revenue shares, or “divisions” data, available. *We find that the proper approach is to estimate what the market-based divisions would be, and this will be the standard for future cases.*

Id. at 280 (Chairman McDonald commenting) [underline in original; italics added]. Thus, from the outset of the ICC’s acceptance of cross-over traffic, the agency’s objective has been to estimate actual, market-based, divisions.

Since Nevada Power II, the Board consistently has approved some form of mileage pro-rate method for the purpose of estimating actual market-based divisions. In McCarty Farms, Inc. v. Burlington Northern, Inc., 2 S.T.B. 460 (1997), the Board modified the straight mileage proration method used in Nevada Power II by adopting the modified mileage proration method (“MMP”), in order to “account for the non-mileage-based costs incurred when carriers switch freight cars (at origin, destination, and interchange points).” Id. at 472.

In FMC Wyoming Corp. v. Union Pac. R.R. Co., STB Docket No. 42022 (served May 12, 2000), the Board unequivocally reaffirmed its holding in Nevada Power II that the actual market-based divisions are the best evidence for the proper allocation of cross-over revenues. Citing to both Nevada Power II and McCarty Farms, the Board stated that “This [MMP] is the best procedure for allocating revenues to carriers *where market-based divisions are not available.*” FMC at 27, note 62 [emphasis added]. The Board noted that FMC had requested actual divisions from UP in discovery, but that UP’s refusal had

denied FMC the opportunity to produce an alternative algorithm that might be more suitable [than MMP] for estimating market

based divisions for these movements. Thus, *in the absence of any better evidence*, we [the Board] use FMC's [MMP] method to estimate [SARR] divisions for these movements.

Id. at 30 [emphasis added]. Clearly, the "more suitable" procedure and the "better evidence" would have been actual market-based divisions. In fact, the Board reiterated the significance of actual divisions when it held that standard division sheets "are not as instructive as UP's actual divisions of total movement revenue." Id. at 31. In this proceeding, Otter Tail has used actual BNSF divisions data produced in discovery to develop the algorithm that FMC was unable to develop due to UP's refusal to produce its actual divisions data.

While never completely wedding itself to the MMP methodology, the Board's objective always has been to apply a methodology to approximate market-based divisions. In TMPA, the most recent SAC decision preceding Duke Energy, the Board observed:

Normally, when two or more railroads serve a shipper in joint-line service, they negotiate a *market based revenue division* of the rate. *Lacking information to determine BNSF's typical percentage division in various market-driven situations*, TMPA divided the revenues on cross-over traffic between the [SARR] and the residual BNSF based on the [MMP] method that has been used in prior SAC cases.

Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co., STB Docket No. 42056 (served March 24, 2003). Thus, not only has the Board never given any indication that actual divisions would not be instructive for the proper allocation of cross-over revenue, it repeatedly has stated that actual divisions would be the best evidence.

B. Duke Energy Departs From Ten Years Of Precedent.

Nearly ten years of consistent precedent has been reversed by Duke Energy without even acknowledging the reversal, much less explaining it. In Duke Energy, the Board concluded that the MMP method is flawed and adopted a variation upon MMP that the Board referred to as the "Modified Straight-Mileage Prorate" ("MSP") method. This change in methodology, in and of

itself, is not a radical departure from precedent, since the Board never has committed itself to a single methodology. Regardless of the methodology used, however, the Board consistently has described it as a proxy for actual, market-based, divisions. The Board could have made the same representation in Duke Energy and remained consistent with its past precedent. But, the Board instead chose to inject the following sentence into a footnote:

Nor would information about NS's actual divisions with other carriers (which Duke requested in discovery but did not receive) be particularly instructive, as those divisions presumably reflect a wide range of commercial considerations across a broad spectrum of traffic and gateways.

Duke Energy at 20, note 29. This statement directly contradicts the precedent discussed above, including explicit language to the contrary in Nevada Power II and FMC. Yet, the Board made no reference to those decisions, nor did it attempt to explain how the “best evidence” suddenly no longer is “instructive.” Furthermore, this statement is unnecessary dicta in Duke Energy, since actual divisions were not even placed into evidence.

C. Duke Energy Has Prejudiced Otter Tail's SAC Presentation.

The Duke Energy decision has placed Otter Tail in a quandary. In its Opening Evidence, Otter Tail relied upon ten years of Board precedent when it used actual BNSF divisions to develop a market-based algorithm to determine revenue divisions for cross-over traffic. But, after ten years of stating that actual divisions are the best evidence of appropriate market-based divisions for cross-over traffic, the Board has departed from this precedent by stating that actual divisions are not particularly instructive. Otter Tail, thus, has designed its SARR and selected its traffic group according to a standard to which the Board no longer adheres.

Otter Tail intends to vigorously contest the Board's departure from precedent in Duke Energy, since the Board decided to alter course in dicta that clearly had no bearing on the outcome of that case. As such, the issue of actual divisions was not squarely before the Board in

Duke Energy, as it would be in this proceeding, and thus arguments on that issue would not have been fully developed. Nevertheless, Otter Tail cannot blithely ignore the Board's departure from precedent either. Therefore, Otter Tail is compelled to modify its SAC presentation to present evidence that is consistent with the Board's newly adopted MSP methodology.¹

It is not possible simply to apply the MSP methodology to Otter Tail's current stand-alone traffic group without substantial prejudice to Otter Tail. In order to stay within the statistical boundaries of its regression algorithm based upon the actual divisions data produced by BNSF, Otter Tail established a 1.1% mileage floor for the coal traffic included on the SARR. In other words, an interline movement was included only if each railroad handled the traffic at least 1.1% of the total movement miles.² As a result, Otter Tail excluded 31.7 million tons of cross-over coal traffic that BNSF originates in the PRB.³ It is not necessary, however, to exclude this traffic under the newly adopted MSP methodology. Therefore, if Otter Tail had known that the Board was going to reverse ten years of precedent that expressed a preference for actual divisions, it would have included the additional 31.7 million tons of coal in its SARR traffic group.

In order to present an optimally efficient SARR using the new MSP methodology, Otter Tail will need to add the excluded traffic to its stand-alone system. This additional traffic likely will impact the operating plan and investment base that Otter Tail presented in its Opening Evidence, and may suggest other modifications that would be necessary to design an optimally efficient SARR to handle this larger traffic group and to maximize revenue contribution to the

¹ Even if the Board were to eliminate its footnote 29 dicta from the Duke Energy decision, it would be unfair in the extreme not to permit Otter Tail to supplement its evidence, since the Board and its staff clearly have revealed their new views on the use of actual divisions.

² OTP Opening Ev. at III-A-19, note 24.

³ Id.

SARR. Otter Tail, however, requires time to assess the additional revenues, operating expenses, and investment costs associated with this traffic. Unfortunately, there is insufficient time to do so before the submission of rebuttal evidence.

II. THE BOARD SHOULD MODIFY THE PROCEDURAL SCHEDULE IN ORDER TO ALLOW OTTER TAIL TO PRESENT SUPPLEMENTAL EVIDENCE IN RESPONSE TO DUKE ENERGY.

The Board served the Duke Energy decision just 18 days before rebuttal evidence is due in this proceeding, and in the midst of Otter Tail's preparation of that evidence. For the reasons presented above, the decision undoubtedly has a significant impact upon Otter Tail's SAC analysis and will require modifications to that presentation. However, Otter Tail lacks sufficient time and resources to evaluate the full impact of the Duke Energy decision and to prepare supplemental evidence, while also preparing rebuttal evidence in support of a SAC presentation that would be modified anyway by the supplemental evidence submitted in response to Duke Energy. Therefore, Otter Tail requests a modification to the procedural schedule.

Supplemental evidence in response to Duke Energy should be filed prior to final rebuttal evidence. Clearly, if Otter Tail files supplemental evidence, BNSF is entitled to a reply and Otter Tail is entitled to a rebuttal. The number of additional pleadings, however, will be reduced if Otter Tail files supplemental opening evidence, BNSF files supplemental reply evidence, and then Otter Tail files a single rebuttal submission that consolidates its supplemental rebuttal with its final rebuttal. Furthermore, because the supplemental evidence would modify the operating plan and investment base for the SARR, it makes no sense to submit final rebuttal evidence on November 24, 2003, in support of a SARR that will be modified by subsequent supplemental evidence.

The procedural schedule at least should be modified simply to give the Board adequate time to decide Otter Tail's Petition to Supplement the Evidentiary Record, without leaving Otter

Tail in limbo as to whether it must file rebuttal evidence on November 24, 2003. Thus, if necessary, the Board may rule on Otter Tail's Motion to Modify the Procedural Schedule separately from a decision on the Petition to Supplement the Evidentiary Record.

For the reasons stated above, Otter Tail requests the following new procedural schedule:

1. January 9, 2004: Otter Tail shall file Supplemental Evidence.
2. February 9, 2004: BNSF shall reply to Otter Tail's Supplemental Evidence.
3. March 11, 2004: Otter Tail and BNSF shall submit final rebuttal evidence.

If the Board denies Otter Tail's Petition to Supplement the Evidentiary Record, Otter Tail asks the Board at least to defer the filing of final rebuttal evidence until two weeks after the Board serves its decision on this Motion.

WHEREFORE, for the foregoing reasons, Otter Tail requests that the Board grant "Otter Tail's Petition to Supplement the Evidentiary Record and Motion To Modify Procedural Schedule" in this proceeding, as proposed herein.

Respectfully submitted,



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Dated: November 10, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2003, I served a copy of the Complainant's Motion to Modify Procedural Schedule and Petition to Supplement the Evidentiary Record by hand delivery to counsel for Defendant at the following address:

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