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BEFORE THE
SURFACE TRANSPORTATION BOARD



In the Matter of:

Review of Rail Access and Competition Issues

STB Ex Parte No. 575

213891

**REPLY OF ENTERGY SERVICES, INC.
IN SUPPORT OF RENEWED PETITION OF THE WESTERN COAL TRAFFIC
LEAGUE FOR RULEMAKING TO ELIMINATE UNREASONABLE "PAPER
BARRIERS" TO INTERCHANGE**

Entergy Services, Inc. ("Entergy") respectfully submit its comments to the Surface Transportation Board in support of the Renewed Petition of The Western Coal Traffic League for rulemaking to eliminate unreasonable "paper barriers" to interchange.¹

I. STATEMENT OF INTEREST

Entergy is a public utility subsidiary of Entergy Corporation, an investor owned registered public utility holding company. Entergy provides management and administrative services to the public utility subsidiaries of Entergy Corporation, which together serve more than 2,000,000 customers located in Arkansas, Louisiana, Mississippi, and Texas. Its affiliate Entergy Arkansas, Inc. is the majority owner and the operator of the White Bluff and Independence coal-fired generation plants, each of which typically burns in excess of 6 million tons of Powder River Basin (PRB) coal annually. Its affiliate Entergy Gulf States, Inc. owns and operates the Nelson coal-fired generation unit located near Lake Charles, Louisiana, which typically burns in excess of 2 million tons of PRB coal annually.

Among Entergy's duties and responsibilities in managing its coal-fired plants is to assure that there is a reliable, economic supply of coal to those plants. The delivered cost of fuel accounts for approximately 75% of the costs of operating these plants. It is thus critical that Entergy assure that the coal supply and delivery costs at its plants are competitive with the costs incurred by other utilities. This is of growing importance to the wholesale market, where the electric utility industry has become increasingly open to competition. It is well known, and demonstrated by both experience and FERC data, that coal-fired generation plants with competitive transportation options enjoy more favorable delivered fuel costs than do plants that lack such alternatives.

One of the steps that Entergy has taken to assure the competitiveness of its coal-fired plants is to introduce rail transportation competition wherever possible. For example, Entergy's White Bluff plant at Redfield, Arkansas initially was captive to the Union Pacific Railroad Company ("UP"). As a result of a build-in/build-out condition imposed in the UP/SP merger proceeding,² a build-out authorized to implement the merger condition,³ and an agreement reached between Entergy and UP, White Bluff is now served at destination by UP and BNSF Railway Company. Similarly, the Nelson unit near Lake Charles, Louisiana formerly had only one option for rail service, joint service by BNSF and The Kansas City Railway Company ("KCS"). In 1997, however, Entergy (through its affiliate Southern Gulf Railway Company) completed construction of a spur connecting the Nelson plant to nearby UP lines. The Nelson plant now has the capability to receive coal via four different routings: UP direct; UP/KCS joint-line; BNSF direct; and BNSF/KCS

¹ Renewed Petition submitted March 21, 2005.

² *Union Pacific Corporation, et al.*, Finance Docket No. 32760 (hereinafter "UP/SP"), Decision No. 44 at 185 (served Aug. 12, 1996); Decision No. 88 (served Mar. 21, 2000).

³ *Entergy Arkansas, et al.*, Finance Docket No. 33782 (served May 4, 2000).

joint-line. The cost of the spur was recovered before a single coal-carrying train crossed it. The mere presence of the spur enabled Entergy to obtain lower transportation rates than otherwise would have been available.

More recently, BNSF and UP have evidenced an unwillingness to engage in competitive commercial negotiations for rail transportation services. Both railroads have instead implemented public pricing regimes under which there is little opportunity for shippers to alter the terms and rates of service, even where the destination plant has dual access. While UP and BNSF's recent pricing tactics are cause for concern that the benefits of the above competitive options have been somewhat muted, Entergy continues to believe that the presence of competition increases the ability of utility companies to obtain the best transportation rates available, even in the present inflated transportation market.

In contrast to its White Bluff and Nelson plants, Entergy's Independence plant presently lacks the ability to avail itself of competitive rail service. The Independence plant is located on an old Missouri Pacific Railroad Company (MP) line, known as the Carthage Subdivision, which runs between Kansas City, Missouri, and Diaz Junction, Arkansas. This line is presently operated by the Missouri and Northern Arkansas Railroad Company, Inc. ("MNA")⁴ pursuant to pair of between MNA and MP agreements dated December 11, 1992.⁵ MP has since merged with UP, which has assumed the lease agreement. As explained more fully below, the restrictive terms of the lease agreement governing MNA's operation of the Carthage Subdivision present a "paper barrier" that precludes the ability of MNA to interchange with railroads other than UP, even though the Carthage Subdivision has physical connections and theoretically could be used to

⁴ MNA is a subsidiary of RailAmerica, Inc. (formerly known as RailTex, Inc.).

⁵ See Exhibit 10.18 to RailTex, Inc. SEC Form S-1 (filed Nov. 19, 1993).

interchange traffic with UP at Kansas City, Missouri and with BNSF at Kansas City, Missouri and Ft. Scott, Kansas.

Indeed, traffic to the Independence plant historically interchanged between the Carthage Subdivision and both BNSF and UP at these points. Initial coal transportation service to the plant was provided by BNSF and MP pursuant to tariff. BNSF transported coal from the PRB to Kansas City, where it was interchanged to MP. MP then transported the coal via the Carthage Subdivision to the plant. In 1983, Entergy entered a long-term rail transportation contract with UP and MP, pursuant to which coal was routed via UP to Kansas City, where it was interchanged to MP. As with the previous tariff movement, MP transported the coal via the Carthage Subdivision from Kansas City to the plant. In 1989, UP and Entergy amended their transportation contract and altered the routing of Entergy's Independence-bound trains. Under the new routing, which remains in use today, traffic is routed via UP through Little Rock, Arkansas to Diaz Junction, where it is interchanged to MNA for final delivery to the Independence plant. All of the loaded trains that have moved to Independence since 1989 have been routed through Little Rock and Diaz Junction. During the 1997-1998 UP service meltdown a limited number of empty trains were routed by UP via the Carthage Subdivision, and recently most of the return movements have utilized the Carthage Subdivision operated by MNA to return the empty cars to Kansas City for interchange with UP.

II. DISCUSSION

The MNA/UP lease agreement covers 389 miles of track in Arkansas, Missouri and Kansas. Of particular interest to Entergy, the lease includes those portions of the Carthage Subdivision between Pleasant Hill, Missouri and Bergman, Arkansas and between Guion,

Arkansas and Diaz Junction, Arkansas, a total distance of 282 miles. The 102-mile gap between Bergman and Guion is covered by the MNA/UP purchase agreement of the same date. Those agreements, which must be viewed as intertwined and therefore interpreted together, provide compensation to UP in the form of (i) \$7.5 million for the Bergman-Guion line segment,⁶ (ii) a preset division of revenues on jointly handled traffic specified as payment from UP in dollars per carload or per loaded coal train,⁷ and (iii) an annual rental payment that varies from \$90 million per year to zero, decreasing as the percentage of traffic interchanged by MNA with UP increases from 0-4% to 95-100%.⁸ Other economically beneficial terms to UP include a reduction in MNA's revenue division on certain traffic effective January 1, 1995,⁹ an escalation adjustment factor of 50% of the RCAF-U, subject to a cap of 3.0% per year¹⁰ (a favorable escalation term not seen by many shippers), a right to obtain trackage rights for the Diaz Junction-to-Independence, Arkansas segment - including the right to serve the Independence plant on an exclusive basis - for a payment to MNA of \$60,000 per year this right is exercised,¹¹ and prohibition of interchange with any carrier other than UP at Kansas City.¹² The sale and lease agreements basically relieve UP of the operating and maintenance costs¹³ and the common

⁶ Line Sale Contract at § 4.

⁷ Lease Agreement at Exhibit E.

⁸ Lease Agreement at § 4.03. An excerpt from the MNA/UP agreement showing the rental fee and related interchange percentage ratios may be found at Attachment 3 to the WCTL Renewed Petition.

⁹ Lease Agreement at Exhibit E. In addition, an amendment effective March 1, 1993—less than three months after the contract date—cut the division on the Independence movement by over 50%, thereby stripping out a substantial portion of MNA's contribution opportunity from this traffic.

¹⁰ *Id.*

¹¹ Lease Agreement at § 3.01.

¹² Lease Agreement at Section 5.05.

¹³ Lease Agreement at § VI.

carrier obligation associated with these lines, while leaving UP with virtually total commercial control over all significant actual or potential interline movements.

It is not surprising that the lease and sale agreements favor UP's private interests. The real question is, does the public interest benefit from the arrangement? As Vice-Chairman Mulvey recently stated in dissenting from approval of the lease of a line from a Class I railroad to a Class III where the transaction included paper barriers, "[W]hile restrictions on interchange may be in the private interests of two railroads, they nevertheless operate as a restraint of trade and run counter to the public interest."¹⁴

WCTL's petition articulates important public interest considerations that justify Board investigation of paper barrier issues, and Entergy supports Board involvement on those grounds. Entergy further believes that there are additional public interest considerations stemming from the Board's merger standards that should lead the Board to give particularly careful scrutiny now to paper barrier issues. As articulated in the discussion of public interest issues contained in the Board's merger rules, "[a]pplicants shall also explain how they would at a minimum preserve competitive and market options such as those involving the use of major existing gateways ... and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement."¹⁵

¹⁴ *Buckingham Branch Railroad Company*, Finance Docket No. 34495 (served Nov. 5, 2004) at p. 7.

¹⁵ 49 C.F.R. § 1180.1(c)(2)(i). The importance of this principle has been reiterated in several merger decisions, including the Board's April 9, 2004 decision in *Canadian National Railway Company*, Finance Docket No. 34424: "The Board will hold applicants to their pledge that they will waive any defenses they might otherwise have ... under the general principle that the Board does not separately regulate bottleneck rates, in circumstances where a shipper prior to the ... [t]ransaction would have been entitled to regulation of a bottleneck rate under the Board's 'contract exception' to the general rule."

For coal moving to the Independence plant, the paper barriers under which MNA now operates foreclose MNA's providing viable "competitive and market options" that MNA's predecessor MP could have provided, would have provided, and as noted above historically did provide.¹⁶ For example, but for the paper barriers, MNA could quote a rate to haul coal from Kansas City to Independence and back on the old Carthage Subdivision, and then both BNSF and UP would be obligated to provide service from the PRB to Kansas City. Similarly, should BNSF agree to provide service from the PRB to Kansas City, MNA could then be required to haul the coal on the Carthage Subdivision to Independence and back.

A more independent MNA would also provide options for Entergy to respond to the widespread service and operating problems that have become disturbingly routine in recent years. If one of the PRB railroads were to experience service problems as a result of merger integration difficulties, natural disasters, traffic fluctuations, management misjudgments, etc., a more independent MNA would enable Entergy to compensate by making greater use of the other PRB railroad. As noted above, UP used the Carthage Subdivision during the UP/SP service crisis to reroute Entergy trains from Independence on a limited basis. During the same service crisis, however, UP refused Entergy's request to allow BNSF to deliver trains to Independence to supplement UP's deficient coal transportation service. Absent UP's consent, MNA was powerless to accept any traffic from BNSF without risking imposition of the penalty provisions of its lease from UP. As a result, Entergy suffered serious deficiencies in its coal deliveries and was forced to take unusual actions to conserve coal, including at times the curtailment of generation of

¹⁶ The UP/MP/WP merger was consummated while the Independence plant was under construction.

electricity. Particularly given the railroads' recent and continuing claims of capacity constraints, the availability of competitive rail service would provide a form of insurance that will not exist if paper barriers like the one in the MNA lease continue to be treated as valid.

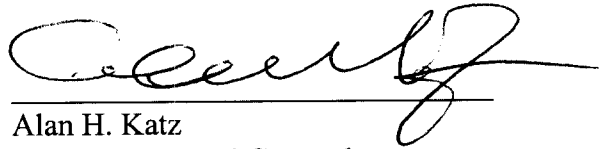
Paper barriers make it impossible for MNA to replicate the beneficial competitive pressures on rates and service that were provided by an independent MP. UP basically acquired a line of railroad that did not fit its long-term needs, saddled it with paper barriers that neuter its competitive influences (contrary to the public interest standards articulated in the Board's current merger policy), and then spun it off as an indentured servant.

UP has enjoyed the fruits of this situation for more than a decade. It is time for the Surface Transportation Board to review its policies concerning paper barriers and to evaluate paper barriers—including those faced by MNA—under a public interest standard. Adoption of the policy and procedure proposed by the Western Coal Traffic League would well serve the public interest and the Board's statutory responsibilities.

III. RELIEF REQUESTED

Entergy Services, Inc. respectfully requests that the Surface Transportation Board initiate a rulemaking to consider amending its policies and procedures for evaluating paper barriers to interchange and to adopt such policies and procedures as recommended by the Western Coal Traffic League and thereafter entertain requests for review of paper barriers upon requests of interested shippers or rail carriers.

Respectfully submitted,



Alan H. Katz
Assistant General Counsel
Entergy Services, Inc.
639 Loyola Avenue, 26th Floor
New Orleans, LA 70113
(504) 576-2240
Attorney for Entergy Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being served by U.S. mail as follows:

Kelvin J. Dowd
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20003

Keith T. Borman
General Counsel
American Short Line and
Regional Railroad Association
50 F Street, N.W., Suite 7020
Washington, DC 20004

Louis P. Warchot
Senior Vice President, Law Department
Association of American Railroads
50 F Street, N.W., Suite 12041
Washington, DC 20001

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