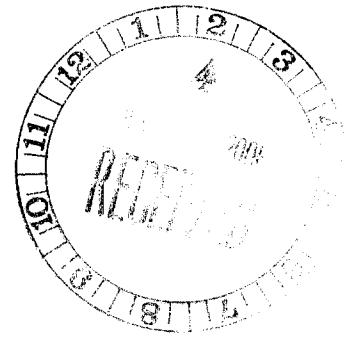


ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD



EX PARTE NO. 657 (SUB-NO. 1)

MAJOR ISSUES IN RAIL RATE CASES

214445

OPENING COMMENTS OF PPL ENERGYPLUS, LLC

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PPL EnergyPlus, LLC ("PPL") is the unit of PPL Corporation responsible for energy marketing and services. PPL's responsibilities include purchasing coal for coal-fired generation, as well as purchasing rail transportation services and associated equipment (including rail cars) and services.

PPL and its affiliated units of PPL Corporation have participated in numerous rate cases and rulemaking proceedings before the ICC and STB since the 1970s. Because PPL provides fuel and services in connection with numerous coal-fired electric generating stations that are captive to a single rail carrier, and because PPL has paid and continues to pay rail rates that exceed the jurisdictional threshold, PPL has a direct interest in STB rail rate regulation.

In the view of most captive rail shippers, STB rail rate regulation is ineffective and arguably broken. Railroads and their allies support the status quo, but railroads have every reason to oppose effective rate regulation. The appearance of rate regulation without the reality of limits on differential pricing by market dominant railroads provides the best of both worlds for railroads. They are immunized from exposure to sanctions under the antitrust laws for anticompetitive conduct or for monopolization on the theory that captive shippers have recourse to regulatory remedies. And yet that recourse is illusory. Statutory protections have, as a practical matter, been vitiated by ICC and STB decisions favoring railroad revenue adequacy above all other goals.

The railroads, with encouragement from Wall Street, have not hesitated to capitalize on what is widely seen as green light from the Board to impose massive rate increases, and to enhance their revenues by charging separately for services formerly cov-

ered by line-haul rates, and by turning existing charges, such as demurrage and fuel surcharges, into lucrative profit centers.¹

The Act mandates that rail rates and charges on captive traffic must be reasonable. It necessarily follows that those paying rates and charges on captive traffic must have a means by which their concerns over rate reasonableness can be litigated before the Board, whose jurisdiction over such issues is exclusive. However, the vast majority of the nation's captive shippers are being ignored by the STB.

The largest group of captive shippers for whom rail rate regulation has been a failure is shippers for whom "a full stand-alone cost presentation would be too costly, given the value of the case." This group includes almost every captive shipper whose shipments do not involve large volume shipments between a small number of origin-destination pairs.

Most shippers of most commodities that move by rail ship their commodities to or from numerous origins and destinations scattered over many states or regions, serving as many customers as they can. Rate regulation under SAC for such shippers would involve a hypothetical competitor of enormous size, essentially replicating most if not all of a Class I railroad. The litigation cost would be prohibitive.

Such shippers had no maximum rate methodology at all (other than SAC) until 1996. Since 1996, when the Board issued its decision in Ex Parte No. 347 (Sub-No. 2), Rate Guidelines – Non-Coal Proceedings, 1 S.T.B. 1004 (1996), only one case has been

¹ While the Board has scheduled a hearing on railroad fuel surcharges for May 11, 2006, it appears to have undermined its own hearing by indicating, prior to considering any public comments, that the level of fuel surcharges is subject to challenge only in rate cases, and not through the exercise of the Board's jurisdiction over unreasonable railroad practices. PPL does not agree with this position but would note here that it makes the availability to all shippers of effective rail rate regulation even more important.

filed under the "simplified" methodology, and that case hardly inspires confidence in the STB among captive shippers.

First, the case was settled in short order, suggesting that the rate at issue was never intended to be collected. Railroad defenses of challenged rates in other simplified rate cases, if any, are likely to be more vigorous. Second, the railroad did not contest the right of the shipper, a large petroleum and chemical company, to file its complaint under the Board's simplified procedures. In other contexts, railroads have argued that the simplified procedures should be available only to "truly small shippers" with very small cases. The first of these criteria – the small size of the prospective complainant – finds no support in the statute. Together the two criteria are plainly designed to preclude simplified rate cases except where the shipper and case are too small to litigate effectively. The railroads, with their greater resources of money and data, will rarely, if ever, lose rate cases if the simplified methodology is limited as they suggest.

Instead of rejecting such one-sided standards, the Board has exacerbated the situation through its implementation of the simplified methodology. The Board's benchmarks virtually guarantee that railroads will enjoy extremely high margins on captive traffic at issue in a simplified case even if a shipper is able to show that its rail rates are far above the Board's jurisdictional threshold. And in BP Amoco, the Board refused to consider adjusting the RSAM figure to eliminate freight transported at less than variable cost. Assuming there is any justification for such non-compensatory rail service in today's capacity constrained environment (which PPL doubts), there can be no possible justification for permitting differential pricing of captive traffic to offset the revenue shortfall.

Nor does it make sense to ignore the contribution to railroad fixed costs of rail freight transported at rates below 180% of variable cost. The revenue contribution of such traffic has never been higher, and Norfolk Southern was found revenue adequate in 2004. However, the RSAM figures for Norfolk Southern released on April 25, 2006 exceed those for NS in 2003 and 2002.²

Another large group of captive shippers for whom rail rate regulation is ineffective includes those being hit with large rate increases by railroads that have achieved or are about to achieve revenue adequacy. NS was found revenue adequate in 2004 and can expect to be found revenue adequate for the foreseeable future. Other Class I railroads are likely to be found revenue adequate in 2005, based on their record earnings and profits.

Of course, recognition of a railroad as revenue adequate under STB standards tends to lag far behind the achievement of revenue adequacy as measured by the financial markets, and many shippers believe more than one Class I railroad has been revenue adequate for years.

So far as PPL can discern, these developments have not led the Board to apply greater scrutiny to the danger of abuse of market power in ratemaking by monopoly railroads. On the contrary, decisions such as PPL Montana, Otter Tail, Duke Energy and Carolina Power & Light have unleashed a feeding frenzy by railroads, and the clear impact of PPL Montana and Otter Tail is that rail rates charged to captive shippers in isolated locations or served over low-density lines appear effectively deregulated. There is little or no chance of a successful challenge to such rates under the SAC test, even though

² Ex Parte No. 347 (Sub-No. 2), Rate Guidelines – Non-Coal Proceedings, decision served August 25, 2006.

railroads should be moderating their rates on captive traffic as their overall revenues become adequate and more than adequate.

The Board should not wait four or five years to begin considering the implications for rail rate regulation of a railroad's achieving and surpassing revenue adequacy. It could fruitfully begin now to consider when stable revenue adequacy has been achieved. Is it when a railroad has been officially revenue adequate for 3-5 years? What if a railroad's revenues are far higher than "adequate"? Should captive shippers have to wait 5 years for relief under the Revenue Adequacy Constraint even though the railroad in question is enjoying revenues do not just meet but significantly exceed levels necessary to attract capital? How should the Revenue Adequacy Constraint work, consistent with the need to avoid driving railroads back to revenue inadequacy? What implications should revenue adequacy have for the simplified methodology?

Even among captive shippers who might formerly have hoped for rate relief under the SAC test, there is a large group that no longer has that hope in the aftermath of PPL Montana and Otter Tail. In fact, the number of captive shippers disenfranchised by those decisions is far higher than those for whom SAC may still offer some protection.

In October 2003, in testimony before Congress, former STB Chairman Nober said that "only about 75 coal shippers have a meaningful opportunity to challenge rail rates [under SAC]. This is unacceptable." Today, that number should be reduced from 75 to 10 or 12. If the Board intends that, in all future rate cases, complaints will be dismissed if there is a segment of a SARR that does not support itself, such shippers join other shippers for whom SAC does not work.

Similarly, if the Board intends that, in all future rate cases, relief from gouging will be limited to the amount of gouging over the segment where rates exceed SAC by the smallest margin, regardless of how much gouging there is as to the traffic as a whole, the Board is dramatically curtailing the effectiveness of rail rate regulation.

Another underserved segment of the Board's shipper constituency is captive shippers forced to pay exorbitant rail charges, as opposed to line haul rates. PPL notes that astronomical increases in switching charges have been challenged in the complaint and petition filed recently by Albemarle Corporation in STB Docket Nos. 42097 and 42096. However, that case appears to involve a challenge at a single location under the SAC test. It is not clear what remedy is available to shippers facing exorbitant charges at multiple locations or who cannot afford litigation under SAC.

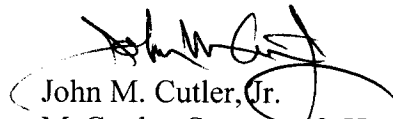
Many shippers are finding that rail charges are rising as fast as, or faster than, rail rates. Unless the Board can provide effective regulation as to excessive rail charges, railroads will not need to charge excessive rates in order to extract excessive revenues from captive shippers.

Against this background, PPL finds it odd that the Board has elected to institute a proceeding whose focus is limited to certain details of SAC cases. The number of affected shippers is likely to be minuscule, and the issues could have been addressed in the few remaining pending SAC cases, as shippers requested. There are other deficiencies in STB rail rate regulation that are of far greater importance to far more captive shippers, but these are not being addressed.

To be sure, SAC remains the rate reasonableness methodology under which the largest number of rate cases have been litigated, and obvious defects in SAC, such as its

susceptibility to "gaming" by defendant railroads, should be corrected. With respect to the issues identified in the Board's Notice of Proposed Rulemaking served February 27, 2006, PPL states that it generally agrees with and supports the opening comments being filed in this proceeding by Western Coal Traffic League and Concerned Captive Coal Shippers. PPL intends to review the other opening comments filed in this proceeding and may address the relevant issues in more detail in subsequent filings in this docket.

Respectfully submitted,


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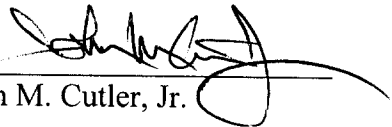
Attorney for
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Dated: May 1, 2006

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CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of May, 2006, caused copies of the foregoing comments to be served by first class mail, postage prepaid on all parties of record.


John M. Cutler, Jr.

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