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November 17, 2006

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W. Room 711
Washington, D.C. 20423-0001



**RE: STB Finance Docket No. 34918, Keokuk Junction Railway Co. d/b/a
Peoria & Western Railway – Lease and Operation Exemption – BNSF
Railway Company between Vermont and Farmington, Illinois**

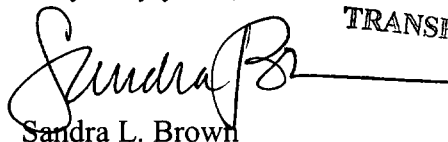
Dear Secretary Williams:

Enclosed for filing are the original and eleven copies of a “Petition to Revoke or Reject Notice of Exemption for filing in the above captioned proceeding. Also enclosed is a check to cover the \$200.00 filing fee pursuant to 49 C.F.R. § 1002.2(61)(i).

Please time and date stamp the extra copy of this document and return it with our messenger.

Please feel free to contact me if you have any questions.

Very truly yours,


Sandra L. Brown

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34918



KEOKUK JUNCTION RAILWAY CO. d/b/a PEORIA & WESTERN RAILWAY -
LEASE AND OPERATION EXEMPTION - BNSF RAILWAY COMPANY
BETWEEN VERMONT and FARMINGTON, ILLINOIS

PETITION TO REVOKE OR REJECT NOTICE OF EXEMPTION

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SURFACE
TRANSPORTATION BOARD

ATTORNEYS FOR AMEREN ENERGY FUELS AND
SERVICES COMPANY

November 17, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34918



**KEOKUK JUNCTION RAILWAY CO. d/b/a PEORIA & WESTERN RAILWAY
LEASE AND OPERATION EXEMPTION – BNSF RAILWAY COMPANY
BETWEEN VERMONT and FARMINGTON, ILLINOIS**

PETITION TO REVOKE OR REJECT NOTICE OF EXEMPTION

Ameren Energy Fuels and Services Company (“AFS”), hereby files this petition (“Petition”) pursuant to 49 C.F.R. 10502(d) to revoke or reject the verified Notice of Exemption filed August 4, 2006 by Keokuk Junction Railway Co. (“KJRY”), d/b/a/ Peoria & Western Railway (“PWRY”) in Finance Docket No. 34918, *Keokuk Junction Railway Co. d/b/a Peoria & Western Railway--Lease and Operation Exemption--BNSF Railway Company* (“Notice”). As the Board is aware, AFS has been in discussions with KJRY to gain an understanding of the true nature of the proposed transaction and to address the significant competitive harm to the Duck Creek generating plant that will result from the proposed transaction. The parties have failed to reach an agreement and thus unmitigated competitive harm will result from the proposed transaction which makes the transaction inappropriate for the exemption process. Accordingly, AFS respectfully requests that the Verified Notice of Exemption be revoked or rejected.¹

¹ The exemption is not yet effective because the Board granted a housekeeping stay on August 10, 2006 and stated that the exemption may not go into effect until further order of the Board. Therefore, the exemption need only be rejected not technically revoked. Nonetheless, the standards for revocation are met as explained below.

BACKGROUND

As stated in AFS's Motion for Abeyance, the Duck Creek generating plant ("Duck Creek" or "Duck Creek plant") is owned by Ameren Energy Generating Company ("AERG") and is located along the line proposed to be leased by BNSF to KJRY/PWRY. AERG is one of Ameren Corporation's non-regulated generation subsidiaries (Ameren Corporation and its subsidiaries are hereinafter collectively referred to as "Ameren" unless further distinction is necessary).

Ameren acquired the Duck Creek plant in 2003. At that time Duck Creek was captive for rail service via the Burlington Northern Santa Fe ("BNSF") which serves the plant over BNSF's Yates City Subdivision that extends from Vermont (Milepost 94.3) and Farmington (Milepost 52.20), in Fulton County, Illinois ("the Vermont Line"). Duck Creek is located near Dunfermline (Milepost 66) which is just south of the Vermont Line's intersection of the KJRY line at Canton, Illinois. The portion of the Vermont Line used for the Duck Creek service is approximately 28 miles of the approximately 42 miles that BNSF proposes to lease to KJRY in this proceeding.

As the Board is aware and has encouraged, Ameren has aggressively sought to establish competitive transportation alternatives at all of its coal-fired plants via shipper-made infrastructure investments. In order to achieve this goal, Ameren has invested its own capital to build and purchase rail lines and Ameren has made significant investments in rail infrastructure and equipment in order to expand competitive railroad options at its plants.² In keeping with

² For example, Ameren recently obtained construction authority from the STB for a new common carrier rail line that will be built at Ameren's Coffeen Power Plant near Coffeen, Illinois. *Ameren Energy Generating Co. - Construction and Operation Exemption - In Coffeen and Walshville, IL*, F.D. 34435 (STB served Feb. 17, 2006). When this line of rail is constructed, it will establish dual rail service opportunities at that location.

Ameren's goal for competitive service at all of its plants, in 2005 Ameren constructed a new private track extending from the Duck Creek plant to a point of connection with the KJRY east of Canton, Illinois. This track was constructed in order to establish competitive access for Duck Creek to the Union Pacific Railroad ("UP") via KJRY's connection to UP at Hollis.³

The Notice of the proposed lease transaction was filed at the Board on August 4, 2006. On August 10, 2006, the Board granted Ameren's request that the KJRY's Notice be placed under a housekeeping stay.⁴ The Board imposed a Protective Order for the proceeding on August 25, 2006.⁵ On September 1, 2006 the Notice was published specifically noting that the effective date of the exemption had been stayed until further order of the Board.⁶ On September 18, 2006, KJRY filed a request to lift the housekeeping stay ("KJRY Request to Lift Stay"). On September 21, 2006, Ameren file a Motion to Compel Discovery. On October 13, 2006 KJRY produced a copy of the lease agreement to Ameren's outside counsel in a substantially more complete form than had been previously produced but with all monetary amounts still redacted. The Board issued two other decisions, the last which held the proceeding in abeyance until November 15, 2006.⁷

³ KJRY obtained the LaHarpe to Hollis line in the *Keokuk Junction Railway Co. – Feeder Line Acquisition – Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL*, F.D. No. 34335 (STB served Feb. 7, 2005) proceeding.

⁴ *Keokuk Junction Railway Company d/b/a/ Peoria & Western Railway - Lease and Operation Exemption - BNSF Railway Co*, F.D. 34918 (STB served Aug. 10, 2006).

⁵ *Keokuk Junction Railway Company d/b/a/ Peoria & Western Railway - Lease and Operation Exemption - BNSF Railway Co*, F.D. 34918 (STB served Aug. 25, 2006).

⁶ *Keokuk Junction Railway Company d/b/a/ Peoria & Western Railway - Lease and Operation Exemption - BNSF Railway Co*, F.D. 34918 (STB served Sept. 1, 2006).

⁷ *Keokuk Junction Railway Company d/b/a/ Peoria & Western Railway - Lease and Operation Exemption - BNSF Railway Co*, F.D 34918 (STB served Oct. 12, 2006) and (STB served Nov. 3, 2006).

After reviewing the additional lease terms provided to date by KJRY, Ameren has diligently worked with KJRY to understand the true nature of the transaction and to try to come to an agreement with KJRY on how to address the anti-competitive aspects that the proposed transaction will have on Duck Creek. While KJRY has acknowledged an understanding of Ameren's concerns with respect to the competitive harm that Duck Creek faces via the proposed transaction, the parties were unable to come to an agreement on how to rectify the competitive harm. Thus, Ameren must ask the Board to reject the Notice since it cannot be implemented without competitive harm which makes the proposed transaction not appropriate for the class exemption rules.

DISCUSSION

Under 49 U.S.C. § 10502(d), "[t]he Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title." Ameren acknowledges that the party seeking revocation has the burden of proof and that petitions to revoke must be based on reasonable, specific concerns. *CSX Transp., Inc.--Aban.--In Randolph County, WV*, 9 I.C.C.2d 447, 449 (1992) and *I&M Rail Link LLC – Acquisition and Operation Exemption – Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway*, F.D. 33326 (STB served Apr. 2, 1997), *aff'd sub nom. City of Ottumva v. STB*, 153 F3d. 879 (8th Cir. 1998). When revocation is sought, the Board's inquiry is similar to the analysis for determining if an exemption was proper at the outset of a proceeding; it focuses on the sections of the Rail Transportation Policy of 49 U.S.C. § 10101 ("RTP") related to the underlying statutory sections from which the exemption was sought. *Missouri Pac. R. Co.--Aban. Exempt.--In Pittsburgh, Hughes, and Seminole Counties, OK*, 9

I.C.C.2d 18, 25 (1992). Ameren's revocation request satisfies the burden of proof and unequivocally shows that the transaction under the proposed Notice would be in contravention of the RTP as revealed by the specific fact that the proposed transaction would create competitive harm by reducing carrier competition at Duck Creek.

The transaction contemplated under the Notice would now place KJRY into the BNSF movement which would create a type of bottleneck situation for Ameren by placing KJRY as the sole destination carrier for both the movement with UP and the movement with BNSF. In addition this transaction would effectively force the Duck Creek plant back in a captive status similar to a "2-to-1" situation, by eliminating competitive rail transportation options that Ameren has spent significant resources to create for its coal movements into Duck Creek. This resulting diminution of competition is not appropriate for a Notice under the class exemption rules and cannot be permitted. Moreover, the Notice is misleading and should be declared void *ab initio*.

I. THE NOTICE OF EXEMPTION SHOULD BE DECLARED VOID *AB INITIO*

Under 49 CFR 1150.42(c) if a Notice contains false or misleading information it will be declared void *ab initio*. At the very least, KJRY's Notice is misleading. KJRY's failure to disclose that KJRY already serves the sole shipper on the line via the only other access point to the plant gives the misleading impression that the proposed transaction is just like a typical lease transaction. Nothing could be further from the true facts. The fact that KJRY is attempting to lease a line that will guarantee that the sole shipper on the line is captive to KJRY is a vital piece of information that should have been disclosed in the Notice. KJRY's failure to disclose such information is misleading and is grounds to declare the Notice void *ab initio*.

In addition, the failure of KJRY to disclose in the Notice its proposed operations as a handling carrier is also misleading. Compare Notice with KJRY Request to Lift Stay at 8. In fact, even in the first redacted version of the lease provided to Ameren's counsel the handling carrier definition and associated terms were redacted. Now that Ameren's counsel has reviewed most, but still not all of the Lease terms, some items regarding the BNSF/KJRY transaction have been cleared up.⁸ However, there still remain serious competitive problems with the proposed transaction and KJRY's failure to provide a full version of the lease undermines any attempt to quantify the magnitude of the competitive issues. In any event, the failure to disclose the handling carrier arrangement in the Notice also supports a finding that the Notice should be declared void *ad initio*.

Finally, to the extent that KJRY's Notice attempts to gain STB authority to operate over "industrial spur" at Dunfermline also supports a finding that the Notice is misleading or false. The only "industrial spur" at Dunfermline that Ameren is aware of is Ameren's private track that leads to Duck Creek. This track is outside the Board's jurisdiction and is not subject to authorization for any transaction at the Board. It is not clear what KJRY hopes to gain from attempting to include this track in its proposed transaction but it is misleading to include it in the Notice.

⁸ Counsel remains perplexed as to why certain provisions and even the whole definitions section were redacted from the first version of the lease produced since the provisions were vital to understanding the true nature of the lease. This missing and slow-to-come information, along with the redactions that continue to be withheld and the unwillingness of KJRY to fully address Ameren's legitimate concerns provides continued support of Ameren's fear regarding the nefarious purpose of the proposed transaction.

II THE NOTICE MUST BE REJECTED OR REVOKED BECAUSE IT IS NOT APPROPRIATE FOR THE CLASS EXEMPTION RULES GOVERNING SECTION 10902 TRANSACTIONS

In the event that the Board does not declare the Notice void *ab initio*, the Notice should be revoked or rejected because it does not meet the standards for the class exemption rules. The class exemption rules for transactions under 49 U.S.C. § 10902 were created to streamline the process for transactions that typically met certain criteria. *Class Exem. For Acq. Of Oper. Under 49 U.S.C. 10902*, 1 S.T.B. 95 (1996). Importantly, not every transaction is appropriate for such exemption procedures. In establishing the rules, the Board acknowledged that the rules apply to transactions that are not likely to change rail operations or competitive relationships between railroads. *Id.* at 103. Further, that the class exemption rules were created for transactions where competition or transportation options for the shipping public will not be lessened. *Id.* Moreover, the class exemption rules were not designed for controversial transactions. *Id.* at 107. The facts surrounding the proposed Notice fail these qualifications in every regard. The transaction proposed under the Notice is controversial and the competitive implications make the transaction inappropriate for the class exemption provisions.

In reviewing similar requests for revocation, the Board has revoked certain exemptions when there are issues that cannot be resolved without the benefit of more information before the Board.⁹ *Jefferson Terminal Railroad Company—Acquisition and Operation Exemption—Crown Enterprises, Inc.*, F.D. 33950 (STB served Mar. 19, 2001) (“*Jefferson*”); *see also*, *Riverview Trenton Railroad Company—Acquisition and Operation Exemption—Crown*

⁹ It would be instructive for the Board to remind KJRY that under Board precedent and the RTP, if the transaction is re-filed as an individual petition for exemption under 49 U.S.C. § 10502 or an application under 49 U.S.C. § 10902, specific conditions will be necessary to address the competitive harm to Ameren’s Duck Creek plant.

Enterprises, Inc., F.D. 33980 (STB served Feb. 14, 2002); *The Land Conservancy of Seattle and King County—Acquisition and Operation Exemption—The Burlington Northern Santa Fe Railway Company*, F.D. 33389 (STB served Sept. 26, 1997) (“*The Land Conservancy*”). In addition, the Board makes clear that the exemption process is to be used where the transaction is straightforward. *See Land Conservancy at 9-10 and Jefferson at 10.* The fact that KJRY already had access to the sole shipper on the line it proposed to lease is the type of information that prohibits this transaction from being viewed as straightforward. This missing but vital information makes it clear that this is not a typical transaction that can avail itself of the class exemption rules.¹⁰ Furthermore, the competitive issues that arise from the transaction clearly support that the transaction cannot be regarded as “uncomplicated.” *See BNSF Railway Co. – Acquisition and Operation Exemption – State of South Dakota*, F.D. 34645 (STB Served Jan. 14, 2005). As in the present case, KJRY’s Notice is not straightforward, unopposed, non-controversial or uncomplicated given Ameren’s objections and the competitive harm that would be created. Consequently, the Notice must be rejected or revoked.

Most important is that the proposed transaction is not consistent with the goals of the RTP. In fact, the Notice does not conform to any of the goals of the RTP because of the competitive harm that would result from the transaction. The importance of protecting competition is repeated throughout the RTP:

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; ...

¹⁰ The Board recently recognized that the short notice periods under these 49 CFR 1150 subpart E transactions and similar exemptions do not provide sufficient time for the public to review the proposed transactions, so the Board has expanded the time periods. *Public Participation in Class Exemption Proceedings*, Ex Parte No. 659 (STB served Oct. 19, 2006) (new rules are effective November 23, 2006). Ameren supports the Board’s decision to provide the public more time to review these transactions.

- (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
- (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes; [and]
- (12) to prohibit predatory pricing and practices, to avoid undue concentration of market power, and to prohibit unlawful discrimination ...

However, the transaction presented to the Board under this Notice does not protect competition. Instead, the transaction proposed under the Notice would result in a diminution of competition and is contrary to the goals of the RTP. The proposed transaction will not permit “competition and the demand for services to establish reasonable rates,” will not support “effective competition among rail carriers,” will not “foster sound economic conditions,” and will not “prohibit predatory pricing and practices, [] avoid undue concentration of market power, and [] prohibit unlawful discrimination.” Thus the proposed transaction is not consistent with the RTP.

Specifically, the proposed transaction, as admitted by KJRY, will create a situation whereby KJRY will be the “only carrier that serves the Duck Creek Plant if the transaction is consummated.” See KJRY Request to Lift Stay at 3.¹¹ KJRY decries in the KJRY Request to Lift Stay that Ameren is not harmed because KJRY will merely be a “handling carrier” and will receive a fixed division from BNSF. KJRY Request to Lift Stay at 3 and 8. Not only was this not evident in the Notice nor from the lease agreement originally produced by KJRY, it also misses the point of how the proposed transaction will harm Ameren. Since KJRY already serves

¹¹ Inclusion of KJRY in the BNSF routing will also add an interchange to a previously single origin to destination route making the movement potentially more costly for Ameren. Although this is not a primary factor for revocation, the Board has acknowledged that this scenario is less efficient and thus it will harm Ameren. See *Indiana & Ohio Central Railroad, Inc. – Acquisition and Operation Exemption – CSX Transportation, Inc.*, F.D. 34536 (STB served Aug. 23, 2005) (dissent by Mulvey).

the Duck Creek plant via a separate connection with UP the fact that KJRY might receive a fixed fee from the KJRY/BNSF move does not prohibit KJRY from controlling whether the Duck Creek traffic moves via BNSF or UP depending on which movement best benefits KJRY and not from true efficiency or competitive forces.¹² Importantly, this transaction assures that KJRY will get the traffic no matter what the cost to Ameren because Duck Creek will be captive to KJRY.¹³ KJRY's claim that it will be a "neutral" carrier, KJRY Request to Lift Stay at 6, is unsupported because KJRY will not receive a fixed fee for the KJRY/UP movement and thus, KJRY is not neutral in the Duck Creek rate bidding. The proposed transaction will thus extinguish competition at the Duck Creek plant which is not only not appropriate under the exemption rules such a lessening of competition must not be permitted at all.¹⁴

The Board has a long established standard that the diminution of competition such as the creation of a bottleneck or a reduction from "2-to-1" service is a type of competitive harm that the Board will prevent or correct. *See, e.g. Burlington Northern, et al. – Merger Santa Fe Pacific, et al.* 10 I.C.C.2d 661 (1995); *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996) and *Wisconsin Central Trans. Corp.—Continuance In Control—Fox Valley Western Ltd.*,

¹² In KJRY's Request to Lift Stay, KJRY ignores the competitive harm created by the transaction to make Ameren captive to KJRY. Instead, KJRY attempts to shift the focus to what BNSF's intentions may be for the transaction. *See* Request to Lift Stay at 8, fn5. While Ameren may also question BNSF's motives, the real question here is the diminution in competition resulting from KJRY becoming the only carrier serving the Duck Creek destination.

¹³ Captivity for Duck Creek appears to be the only reason to support why KJRY would want to lease this line. There is no other traffic on the line. While KJRY claims, in its Request to Lift Stay at 9, that KJRY "intends to reactivate non-Ameren customers on the Line" no such shipper has been identified.

¹⁴ Ameren acknowledges that if another independent short line not associated with KJRY was attempting to lease the BNSF line Ameren would not be objecting to the transaction on competitive grounds. Furthermore, while mitigation might work in other contexts it is clear to Ameren from its negotiations with KJRY that appropriate mitigation cannot be crafted to protect the competition created by the investments made by Ameren at Duck Creek.

F.D. 32036 (ICC served Feb. 11, 1993). In fact, the Board has now recognized the importance of enhancing competition in proposed transactions and not just merely preserving it as Ameren seeks here. *Major Rail Consolidation Procedures*-- Ex Parte No. 582 (Sub-No. 1), 49-50 (STB served June 11, 2001).

Even outside the merger context, the Board has established that it will not permit a transaction to create a new diminution of competition. *Waterloo Railway Co. – Adverse Abandonment – Lines of Bangor and Aroostook R.R. Co. et al.*, Docket No. AB-124(Sub-No. 2) (STB served May 3, 2004) (“*Waterloo*”). In situations where a proposed action will deprive a party of rail service competition currently available the Board has found that “the burden to show that the Board should extinguish competition where it already exists is a difficult one to meet because the Board is guided by its governing statutes and policies, which make competition important.” *Waterloo* at 5. The Board precedent further supports that “the strong statutory and Board policies favoring the preservation of rail-to-rail competition and the provision of adequate service for shippers” means the Board cannot deprive Ameren of the competitive “options that it already has absent a very strong showing that such action is in the public interest.” *Id.* at 6. There can be no public interest showing that would ever support permitting a transaction that would in essence wipe-out the competition gained by a shipper-made investment from a rail build-out. To allow such action would be antithesis to the RTP and to the Board’s stated policies on rail build-outs.

Finally, Ameren recognizes that often the sale or lease of a line such as is proposed in the Notice is touted as being beneficial because it ensures continued rail service on a line that might otherwise be lost from abandonment or that service might improve because short lines often provide better service on such lines than do the Class I carriers. The potential abandonment

claim is not applicable here since Ameren would be willing to buy the line under the Offer of Financial Assistance (“OFA”) provisions for abandonment proceedings or would be willing to buy the line outside of the OFA process in order to ensure continued rail service for Ameren or any other shipper that might be located on the line in the future. Ameren has successfully bought an active common carrier rail line before to preserve rail service on a line that might otherwise have been abandoned. *See Ameren Corporation – Control Exemption – Missouri Central Railroad Company*, F.D. 33805 (STB served Nov. 5, 1999). However, whether KJRY could provide better service than BNSF is irrelevant to this transaction. KJRY is not interested in receiving new or more business by performing efficient and cost-effective service to a shipper since it already has access to that shipper. Thus, KJRY’s interest can only be to create captivity. The reasonable and specific facts shown above support a finding that KJRY’s Notice runs contrary to a host of provisions of the RTP of 49 U.S.C. § 10101. Therefore, the Notice must be revoked or rejected.

CONCLUSION

The proposed Notice contains misleading information which supports a declaration that the Notice is void *ad initio*. Alternately, the Notice must be rejected or revoked because it is not appropriate for the class exemption rules. The Notice is controversial and would result in competitive harm which cannot be permitted under a Notice using the class exemption rules for Section 10902 transactions. Therefore, Ameren respectfully requests that the Notice be declared void *ab initio* or revoked and the proceeding dismissed.

Respectfully submitted,

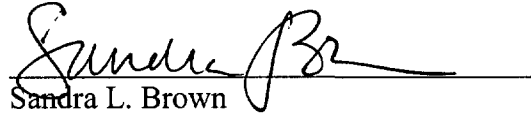
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*ATTORNEYS FOR AMEREN ENERGY FUELS AND
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CERTIFICATE OF SERVICE

This is to certify that on this 17th day of November 2006 I caused the foregoing Petition to Revoke or Reject the Notice of Exemption of the Keokuk Junction Railway Corporation in the Finance Docket No. 34918 to be served upon counsel for all known parties of record by first class mail, postage prepaid, or by more expeditious means.


Sandra L. Brown