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May 4, 2007

VIA E-FILING

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 34974
Keokuk Junction Railway Co. d/b/a/ Peoria & Western Railway – Lease And
Operation Exemption – BNSF Railway Company

Dear Secretary Williams:

On April 23, 2007, Edison Electric Institute (“EEI”) filed a letter (“April 23 Letter”), served upon all parties of record in this proceeding, intended to “express EEI’s views” concerning the transaction that is the subject of the above-referenced petition for exemption proceeding. In a response filed on April 27, 2007, Keokuk Junction Railway Co. d/b/a Peoria & Western Railway (“KJRY”) pointed out that EEI’s letter was untimely, otherwise procedurally defective, and, accordingly, should be rejected. On May 1, 2007, EEI filed another letter (“May 1 Letter”), insisting that its April 23 Letter constituted “public comments” by a supposed non-party and that such public commentators may file comments (and/or evidence) for the record at any time before the issuance of a final decision in any contested petition for exemption proceeding, including, of course, this one.¹ Neither Board precedent, Board regulation, nor any provision of the Administrative Procedures Act (“APA”) supports allowing EEI to file its untimely comments at this stage of the proceeding. As such, the April 23rd and May 1st letters

¹ The overarching question EEI assiduously avoids in both of its letters is *why* it has waited so long to try to participate in this proceeding, especially since EEI claims to have been following this matter for quite some time. The absence of such an explanation suggests that EEI has no good reason and that it is attempting to weigh in at this late date to prolong the proceeding.

cannot be placed into the official record of the proceeding and cannot be relied upon by the Board in its decision making process.

EEI's May 1 Letter claims that its April 23 Letter should be added to the record because: (1) the Board's March 6 Decision instituting a proceeding (which did not call for the submission of any further filings) pertained to the filing of "evidence" by parties of record only and not to the filing of "public comments" by non-parties; (2) 49 CFR 1121.4 allows public comments to be filed at any time while Board action on an individual petition for exemption is still pending; and (3) agency common law generally permits, and even encourages, the filing of tardy comments by entities that have not previously indicated to the Board an interest in a particular proceeding. Each of these assertions is meritless, and none of them justify or excuse EEI's lateness or the prejudice to KJRY, BNSF, and the supporting shippers were the Board to accept the April 23 Letter.

The Board's March 6 Decision did not provide an open door for "public comments." One will search long and hard for any indication in that decision that such public comments would be allowed. Indeed, the March 6 Decision provided precisely the opposite when it stated that the Board would not provide for any further opportunity for the submission of evidence and did not publish a notice in the Federal Register requesting public comment in accordance with 49 CFR 1121.4(c). EEI ignores this fact and claims that there is a distinction between "public comments" and "evidence," but in doing so, it cites to no statute, regulation, or precedent supporting such a claim, nor could it, as none exists. Clearly, had EEI's April 23 Letter been timely filed contemporaneously with Ameren's reply comments (as it should have been), it certainly would have been accepted as "evidence and argument," and EEI would have become a party to the proceeding.²

EEI's attempt to excuse its filing as "public comments" completely ignores the basic fact that KJRY's petition for exemption, which involves a licensing process, is akin to an adjudication under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), and thus is governed by the standard requirements for procedural due process. This is not a rulemaking proceeding whereby any person may file comments without necessarily becoming a party of record and may do so until the record closes. In this proceeding, the Board is not developing public policy or undertaking an investigation, but rather the Board is serving as an adjudicatory body, employing the corresponding rules of procedures and due process.³ As such, in this type of proceeding, the

² The definition of a "party" at 49 CFR 1101.2(d) is very broad, and includes entities such as EEI.

³ See generally, Adequacy Of Intercity Rail Passenger Service, Ex Parte No. 277 (Sub-No. 3), 351 I.C.C. 883, 1976 ICC LEXIS 81, *41, n. 14 (ICC served March 29, 1976)(noting distinction between adjudications, which require rules of evidence, and rulemakings, which allow for more flexible procedures).

proper course for a party wishing to submit untimely comments is to obtain leave to intervene and to become a party to the proceeding.⁴

Likewise, EEI's artificial and self-serving distinction between "evidence" and "public comment" is its blatant misreading of 49 CFR 1121.4, creating a gaping procedural loophole for its benefit and for that of its member company, Ameren. The March 6 Decision did not solicit public comments in this proceeding and section 1121.4(a) specifically states that "public comments are generally not sought during consideration of exemption petition proposals." Thus, under the Board's own rules – the very ones that EEI relies upon to submit late-filed "public comments" – public participation in petition for exemption proceedings is the *exception*, not the *rule*. Because EEI anticipated filing comments here, it should have either done so contemporaneously with Ameren, or it should have at that time requested that the Board institute a proceeding under which public comments would be sought and considered.

Although public comments may be appropriate in the petition for exemption context, such comments must be procedurally proper and filed within Board-prescribed timeframes. EEI's claim that agency "common law" supports the random filing of untimely "public comments" at any time is simply not supported by case law or precedent. Indeed, *not even one* of the cases cited in EEI's May 1 Letter ever uses the term "public comment," and none of them support the proposition that an interested party, purporting to represent some segment of the public, may file comments in a pending proceeding at any time. In contrast, there is clear precedent for striking untimely comments. Central Michigan Railway Company – Abandonment – East Of Ionia To West Of Owosso- Michigan, 8 I.C.C. 2d 1166, 1991 ICC LEXIS 231, * 7 (ICC served Sept. 19, 1991). Moreover, the "CIRY/PIRY," "PYCO Industries,"⁵ and "Withdrawal of Antitrust Immunity" cases to which EEI refers are not petition for exemption cases at all.⁶ All but three of the seven decisions upon which EEI relies deal with challenges to late filings and/or replies to replies filed by existing parties of record in the case. The "Coffeen" case (STB Finance Docket No. 34435), on the other hand, is clearly distinguishable, in that the challenged filing by Norfolk Southern Railway Company ("NS") did not go directly to the merits of Ameren's petition for exemption, but rather to the question of whether the petition for exemption process should be used for construction cases of the sort that Ameren proposed there.⁷

⁴ See 49 C.F.R. §1112.4. EEI's position would nullify this regulation.

⁵ There is no decision in either of the cited feeder line proceedings – Finance Docket Nos. 34890 and 34922 – served on January 25, 2006. (EEI consistently, and incorrectly, refers to Finance Docket proceedings under the complaint designation "STB Docket No.") Neither proceeding had yet begun by that date. KJRY presumes that EEI may be referring to another, related proceeding in Finance Docket No. 34802.

⁶ In fact, the last of these three is a rulemaking proceeding with entirely different notice and comment processes.

⁷ In that instance and unlike EEI, NS properly filed a notice of appearance and did not designate its filing as "public comments" in an effort to bypass the applicable procedures.

Finally, in the “HolRail” proceedings (STB Finance Docket Nos. 34421 and 34421 (Sub-No. 1)), the late-filed comments were submitted pursuant to a petition to intervene as *amicus curiae*, which, again, EEI did not seek to do here. In sum, not one of the cases to which EEI so sloppily refers support the proposition that “public comments” – as a special designation of filings – may be filed at any time in a disputed petition for exemption proceeding.

EEI also attempts to justify its actions through a dismissive assertion that its April 23 Letter is not prejudicial, when the opposite is quite clearly the case. EEI is well aware that KJRY sought expedited consideration of its petition, and, having read that petition, EEI presumably understands why KJRY and Central Illinois Energy (one of the shippers supporting the filing) seek prompt action. EEI is no newcomer to the Board’s processes, and it is well aware that any late filing, assuming it is even accepted into the record, will ensure that the proceeding is delayed to some degree or another as either the opposing side seeks additional time to respond or else the Board will have to act on that filing, either by rejecting it in the course of a decision or by accepting it and considering it. EEI’s claim that its filing will not delay this proceeding is also premised on the assumption (or, perhaps, hope) that no other party will desire or be allowed to file “public comments” and that KJRY will not be allowed to respond, or, to avoid further delay, will elect not respond, thus achieving their apparent goal of “having the last word.” Either way, the prejudice to KJRY and the shippers is obvious.⁸

In the end, EEI has articulated a rule for so-called “public comments” that is no rule at all – one could submit filings in any petition for exemption proceeding at any time, provided that the filer declares the filing to be “public comments,” even where the Board has not sought public comments and even when they are not filed within any applicable procedural regulations. Such a loophole would unfairly delay the process, would lead to considerable inefficiency, would undermine the purpose for procedural schedules, and would be highly prejudicial to those seeking expedited consideration. Accordingly, EEI’s letters should be rejected as a formal filing to be considered on the merits of the proceeding and on the record. If it is allowed for any reason at all, then KJRY should be given an opportunity to respond to the merits of the assertions contained therein. Alternatively, EEI’s April 23 Letter should be accorded the designation and proportional weight of correspondence, which does not become an official part of the record and is not to be considered in deciding the merits of a proceeding.

Sincerely,



William A. Mullins

cc: Parties of Record

⁸ Indeed, if the Board does accept EEI’s late filed comments into the record, due process requires that KJRY be provided an opportunity to respond to EEI’s assertions.