

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



ENTERGY ARKANSAS, INC. and
ENTERGY SERVICES, INC., Complainants

v.

UNION PACIFIC RAILROAD
COMPANY and MISSOURI &
NORTHERN ARKANSAS RAILROAD
COMPANY, INC., Defendants.

Docket No. 42104

222307

ENTERED
Office of Proceedings

MAY - 8 2008

Part of
Public Record

MISSOURI & NORTHERN ARKANSAS
R.R. - LEASE, ACQUISITION AND
OPERATION EXEMPTION - MISSOURI
PACIFIC R.R. and BURLINGTON
NORTHERN R.R.

Finance Docket No. 32187

222308

COMPLAINANTS' MOTION TO EXTEND PROCEDURAL SCHEDULE

REDACTED, PUBLIC VERSION
- HIGHLY CONFIDENTIAL MATERIAL DELETED -

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ENTERGY ARKANSAS, INC. and
ENTERGY SERVICES, INC.

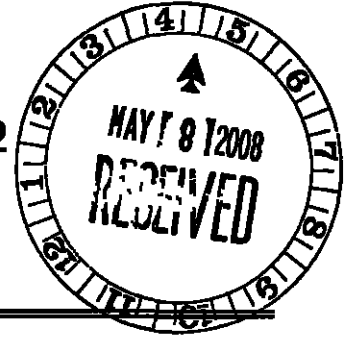
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Dated: May 8, 2008

Attorneys & Practitioners

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Complainants Entergy Arkansas, Inc. ("EAI") and Entergy Services, Inc. ("ESI") (collectively, "Entergy"), hereby move for an order extending the procedural schedule in this case.

Entergy has consulted with Defendant Union Pacific Railroad Company ("UP") and Defendant Missouri & Northern Arkansas Railroad Company, Inc.

("M&NA") with regard to Entergy's request to adjust the procedural schedule in this case. The parties have been unable to reach agreement on the extension of the discovery period or upon a specific modification of the evidentiary schedule for the case. In fact, UP has indicated that it will oppose any effort to engage in follow-up discovery or to agree to anything other than two-week extension to the evidentiary schedule. (Entergy will be filing a motion to compel the completion of UP's document production and to compel the deposition of one or more UP personnel). M&NA, in turn, has suggested that it cannot agree to the deposition of M&NA personnel, but does not oppose an adjustment of the evidentiary schedule.

A. Background

Through the instant proceeding, Entergy seeks relief from the continued enforcement of the paper barrier restriction set forth in the 1992 Lease between UP and M&NA ("UP/M&NA Lease"). That agreement imposes a substantial annual rental obligation upon M&NA, but relieves that obligation in part or in whole if M&NA limits its interchange of traffic with a carrier other than UP.

Entergy served separate discovery requests in this case upon both UP and M&NA on March 17, 2008. Each carrier served its formal written responses and objections to those requests on April 16, 2008. As described below, document production has been ongoing, and as of the filing of this motion, Entergy has not received all of the documents to be produced in response to its requests.

Entergy filed a motion to compel M&NA's production of documents on April 28, 2008. Entergy and M&NA resolved certain of the matters at issue in that motion, and by decision served May 2, 2008, the Board issued an order resolving the remaining matter.

Entergy filed a motion to compel UP's production of documents on April 29, 2008. UP filed its reply in opposition to Entergy's motion on May 1, 2008. The Board granted Entergy's motion in part by decision served May 7, 2008.

In accordance with the schedule currently in effect in this proceeding, the parties are to conclude discovery on May 10, 2008, and Entergy is to submit its Opening Evidence and Argument on June 10, 2008.

B. The Need for Additional Time for Discovery

There are several compelling reasons why the Board should extend the discovery and evidentiary schedules in this case.

As an initial matter, the parties have not completed their production of documents in response to initial discovery requests and appear not to be in a position to do so prior to the existing discovery cut-off, particularly in light of the Board's May 7 decision granting, in part, Entergy's motion to compel UP's production of documents.¹ Entergy's ability to prepare its opening evidence and argument in this case will be

¹ Neither railroad has completed its document production in response to Entergy's March 17 requests, and Entergy has not yet completed its production of documents in response to UP's April 4, 2008 requests.

compromised by the fact that the production of documents in response to Entergy's requests is not complete.

In this regard, Entergy also notes that its lead counsel for this proceeding, Mr. Loftus, underwent surgery on the vertebrae in his neck on Wednesday, May 7. His recovery is expected to last two weeks.

Moreover, there are also compelling reasons to extend the procedural schedule in this case in order to permit Entergy to engage in follow-up discovery regarding certain of the documents that the railroads have produced in recent days. In particular, UP made the *first* installment of its document production in response to Entergy's March 17, 2008 requests on Friday, May 2, 2008. As Entergy indicated to UP by telephone conference on May 6, 2008, and as Entergy explained in detail by letter dated May 7, 2008 (*see* Attachment 1 hereto), there are a number of respects in which the documents that UP produced to Entergy on May 2 were incomplete and raise questions that require additional follow-up discovery. To that end, Entergy's May 7 letter requested the production of certain additional documents and requested that UP make one or more of its employees available for deposition in order to address the subjects that Entergy identified in its letter.

The most significant questions raised by UP's May 2 document production relate to a Highly Confidential { [REDACTED] } (see [REDACTED])

Attachment 2 hereto). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } *See Entergy v. UP/M&NA*, STB Docket No. 42104, *et al.*

(STB served May 7, 2008), at 4-5 (“As explained by the Board, when the sale/lease is being negotiated, the selling carrier will most certainly consider the capitalized value of the expected revenue stream from the line to be spun-off and insist that the purchase or lease terms reflect that value through either the purchase price or some other mechanism, such as an interchange commitment.”); *see also Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League*, STB Ex Parte No. 575 (STB served Oct. 30, 2007), at 10 (“The revenue stream resulting from the agreement should be no more than what the carrier would have received had it not divested or leased the rail facilities in question, or had it demanded more in the sale price or rental fee.”).

{ [REDACTED]

[REDACTED]

[REDACTED]

In addition, in its May 2, 2008 letter conveying its document production to Entergy (*see* Exhibit No. 2 to Attachment 1 hereto), UP raised the claim that { [REDACTED] [REDACTED] } In its May 7, 2008 letter, Entergy requested that UP provide documents through which it will be able to evaluate UP's claim in this regard.

Entergy received M&NA's first installment of public document production in this case on April 16, 2008, and received M&NA's first installment of Highly Confidential document production on May 5, 2008. Included amongst those Highly Confidential documents were { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Entergy has requested follow-up discovery from M&NA with regard to each of these categories of documents, both in the form of additional document production and in the form of the deposition of one or more M&NA employees (*see* Attachment 4 hereto).

* * *

The follow-up discovery as to both UP and M&NA is directly relevant to the issues in dispute in this case, and Entergy has acted promptly to seek additional discovery upon receipt of the subject documents from the railroads. Entergy respectfully requests that the Board grant Entergy a reasonable period of time in which to prepare its opening evidence in this case after the completion of follow-up discovery regarding the documents that the railroads have produced.

C. Proposed Schedule

In light of the foregoing, Entergy requests that the Board issue an order adopting the following procedural schedule for this case.

- Completion of production of documents in response to follow-up requests (May 30)
- Completion of deposition(s) (June 13)
- Entergy's Opening Evidence and Argument (July 10)
- Defendants' Reply Evidence and Argument (August 14)
- Entergy's Rebuttal Evidence and Argument (September 18)

Entergy understands that this schedule may present conflicts in August for certain UP personnel who have some involvement with this proceeding. To the extent the proposed schedule presents a conflict with UP personnel who are involved in the actual preparation of reply evidence in this case, Entergy is willing to work with UP to adjust the proposed schedule to allay any concerns in this regard.

CONCLUSION

For the foregoing reasons, Entergy requests that the Board afford expedited consideration to this motion and issue an order modifying the schedule in this case as set forth above.

Respectfully submitted,

ENTERGY ARKANSAS, INC. and
ENTERGY SERVICES, INC.

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Dated: May 8, 2008

Attorneys & Practitioners

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of May, 2008 caused highly confidential and redacted copies of the foregoing to be served by email and first-class mail, postage-prepaid upon counsel for the parties of record in this case.



Andrew B. Kolesar III

Attachment 1

[REDACTED]

Attachment 2

[REDACTED]

Attachment 3

[REDACTED]

Attachment 4

[REDACTED]