

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB DOCKET NO 42104

ENTERGY ARKANSAS, INC AND ENTERGY SERVICES, INC

v

UNION PACIFIC RAILROAD COMPANY

AND

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC

FINANCE DOCKET NO 32187

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC

—LEASE, ACQUISITION AND OPERATION EXEMPTION—

MISSOURI PACIFIC RAILROAD COMPANY AND BURLINGTON NORTHERN
RAILROAD COMPANY

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OPENING COMMENTS OF
ARKANSAS ELECTRIC COOPERATIVE CORPORATION

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Dated July 11, 2008

AECC-2

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OPENING COMMENTS OF
ARKANSAS ELECTRIC COOPERATIVE CORPORATION

I INTRODUCTION

Pursuant to the procedural schedule established in the Board's May 19, 2008 Decision, Arkansas Electric Cooperative Corporation (AECC) hereby submits its opening comments in support of the Verified Complaint of Entergy Arkansas, Inc , and Entergy Services, Inc (jointly, Entergy) seeking a remedy for the adverse impacts of interchange commitments on rail service to the Independence Steam Electric Station (ISES) at Newark, AR.

AECC is a membership-based generation and transmission cooperative that provides wholesale electric power to electric cooperatives, which in turn serves approximately 460,000 customers located in each of the 75 counties in Arkansas. In order to serve its member distribution cooperatives, AECC has entered into arrangements with other utilities within the state to share generation and transmission facilities. The largest of AECC's generation assets are its ownership interests in ISES and in the White Bluff plant at Redfield, AR, each of which

typically burns in excess of 6 million tons of Powder River Basin (PRB) coal annually AECC holds a 35 percent interest in each of these plants (for which Entergy is the operator and majority owner) In addition, AECC holds a 50 percent interest (with AEP) in the Flint Creek plant, which is located in Gentry, AR This plant normally burns in excess of 2 million tons of PRB coal annually

Because of its substantial ownership position in ISES, AECC has a direct interest in the issues under consideration in this proceeding

II INTERCHANGE COMMITMENTS AND SERVICE PROBLEMS

Entergy's evidence in this proceeding shows that ISES has experienced a series of substantial rail delivery service problems during the past 15 years Service problems have been highlighted in a number of filings with the Board made by Entergy and/or AECC in prior proceedings ^{1/} On three different occasions, these problems were so severe that ISES was required to impose burn restrictions Although ISES maintains prudent target inventory levels and valid transportation contracts to move needed coal, rail service problems have repeatedly forced ISES and its owners (and ultimately its customers) to incur extraordinary costs and endure operational disruptions because of unscheduled curtailments of plant output.

While Union Pacific (UP) has argued that the Missouri & Northern Arkansas (MNA) interchange commitments did not change the pre-existing competitive situation at ISES,

^{1/} See, for example, STB Ex Parte No. 672, Rail Transportation of Resources Critical to the Nation's Energy Supply, "Written Submission of Arkansas Electric Cooperative Corporation" (July 5, 2007), and "Supplemental Written Submission of Arkansas Electric Cooperative Corporation" (December 28, 2007), and STB Ex Parte No. 575, Review of Rail Access and Competition Issues - Renewed Petition of The Western Coal Traffic League, "Summary of Presentation by Jeffrey G. Herndon on behalf of Entergy Services, Inc., Entergy Arkansas, Inc., and Arkansas Electric Cooperative Corporation" (July 27, 2006)

the fact is that the occurrence of major delivery problems at this plant coincides closely with the introduction of MNA as the serving carrier. The original MNA sale/lease transactions occurred in 1992, the series of service problems began in 1993 and has persisted throughout MNA's tenure.

This is not a coincidence. As discussed below, when service problems have arisen on UP, MNA has been prevented by the interchange commitments from cooperating with BNSF to provide service to ISES, even though UP would likely have done so if it still operated the MNA line.

If UP found itself unable to provide service to ISES, ^{2/} and had not divested MNA, it would have been in UP's interest to cooperate with BNSF on various interline routings to ISES, because UP would have been able to achieve substantial contribution from such routings. This interline service would have allowed ISES to avoid burn restrictions. However, with the divestiture of UP's line to MNA, such routings would provide contribution for UP only through the "barrier" rental terms, and it would be economically irrational for MNA to cooperate with BNSF in a manner that triggered those terms.

Similarly, absent the divestiture of MNA, if both UP and BNSF had problems moving coal from online sources (as occurred on the PRB Joint Line in 2005), UP would have had an incentive to participate in interline movements of substitute fuels originated by other carriers (e.g., coal or lignite from Oklahoma or Texas originated by KCS), because UP would have earned a substantial contribution from such movements. With the divestiture of MNA, such movements would provide contribution for UP only through the "barrier" rental terms, and it

^{2/} This was the case in the Midwest flooding of 1993 and the service "meltdown" following the UP/SP merger.

would be economically irrational for MNA to cooperate with other carriers in a manner that triggered those terms

Thus, the interchange restrictions at issue here leave ISES worse off than it was before the spin-off to MNA. This distinguishes the present case from other shortline spin-offs that produce public benefits (e.g., through cost savings), in which interchange commitments have little or no adverse effect on service and competition. In the case of the MNA spin-off, the chilling effect of the interchange commitments on cooperation with other carriers for ISES movements in the presence of service problems contributes to huge resource costs that dwarf whatever public benefits might otherwise be claimed.

III AVENUES FOR RELIEF

In its decision last year in Review Of Rail Access And Competition Issues – Renewed Petition Of The Western Coal Traffic League, STB Ex Parte No. 575, served Oct. 30, 2007, at 14-15, the Board held that rail customers may challenge interchange commitments (“paper barriers”) on a case-by-case basis.

[W]e conclude that the Board should consider the propriety of interchange commitments on a case-by-case basis

* * *

[S]hippers may, on a case-by-case basis, attempt to show that a particular interchange commitment is causing, or would cause, a violation of the Interstate Commerce Act or that it is, or would be, contrary to a particular statutory provision under which approval was, or is being, sought. For example, a shipper may allege that a particular interchange commitment precludes, or would preclude, the provision of adequate, efficient through service at reasonable rates. Shippers may also move, under 49 U.S.C. 722(c), to reopen a proceeding authorizing a prior transaction or to partially revoke an exemption granted under 49 U.S.C. 10502.

However, the Board also acknowledged that interchange commitments may be implicated as a cause of service failures by railroads, for which affected shippers may seek redress through other means

Due to the variety of interchange restrictions, the condition of short lines, and the intermodal options available to shippers, we cannot devise a single rule that would address each service problem that may relate to an interchange commitment. Shippers who believe that a rail carrier is not providing adequate service due to the condition of its lines or certain other service problems have recourse before the Board, including, among other things, the emergency and alternative service rules, the feeder line provisions, and enforcement of the statutory common carrier obligation. Shippers may argue in such cases that an interchange commitment contributes to the service problem.

Id., at 11

Thus, the Board's decision in Ex Parte 575 clearly invites shippers that suffer harm because of service failures caused or exacerbated by interchange restrictions to seek relief on a case-by-case basis, the Board has indicated that it will review such interchange commitments and weigh the benefits of specific commitments against their costs. This is precisely what Entergy has done in this case. We are concerned, however, that railroads opposing such relief will assert that shippers are required to use different remedies under existing Board procedures to address chronic service problems, even where interchange commitments are a significant cause of such problems.

Ex Parte 575 must be understood to offer shippers a new remedy in addition to remedies already available under existing Board procedures. It should be the shipper's option to decide whether to seek relief by challenging the interchange commitment, or to use a pre-existing remedy for service problems. Whichever course the shipper chooses, that choice should not be treated as a waiver of any other available remedy for the same harm.

For example, ISES might reasonably be viewed as a candidate to make use of the Board's competitive access procedures. As described by the Board, the competitive access rules were promulgated "to offer a competitive remedy where a bottleneck carrier has exploited its market power by providing inadequate service over its own lines or foreclosing more efficient service over another carrier's lines."^{3/} ISES has certainly experienced inadequate service stemming from the market power held by UP/MNA, and it is unable to make use of routings (such as a BNSF-Lamar (MO)-MNA route) that would be shorter and apparently more efficient than UP's circuitous route to ISES via eastern Oklahoma and Little Rock.^{4/}

Based on the chronic and severe service problems it has experienced, ISES might also be viewed as a reasonable candidate to make use of the feeder line development program. Acquisition of some or all of the rail assets operated by MNA would appear to meet the statutory criteria established in 49 USC § 10907, and would provide an effective remedy for the problems ISES has experienced.

In the context of both the competitive access approach and the feeder line development approach, the interchange commitments form part of the environment that has fostered the service problems (although ISES would arguably qualify for relief under those approaches even if the interchange commitments were not given explicit attention).

^{3/} Central Power & Light Co. v. Southern Pacific Transportation Co., STB No. 41242, et al., served Dec. 31, 1996, at 9.

^{4/} BNSF interchange with MNA at Lamar, MO would avoid several problems associated with interchange at other possible locations (Kansas City, Aurora, or Fort Scott). For example, if a Kansas City interchange were hypothetically used, southbound loaded trains would need to ascend long, steep grades in the vicinity of Independence and Lee's Summit, MO on MNA's trackage rights over UP south of Kansas City, and in the vicinity of Ore, MO on MNA's line south of Pleasant Hill, MO.

The shipper should be able to utilize the Board's new policy of case-by-case relief to address all problems caused or exacerbated by interchange commitments. If the Board determined in a particular case that relief could not be granted under its new case-by-case policy, or that only partial relief was appropriate, the shipper should not be denied the opportunity to seek relief through the Board's existing remedies

This is the first case seeking relief under the case-by-case procedure announced by the Board in Ex Parte 575. This case provides an appropriate opportunity for the Board to make clear that its new policy announced in Ex Parte 575 to provide remedies for problems caused by interchange commitments supplements, but does not replace, existing remedies for service and competitive problems

IV CONCLUSION

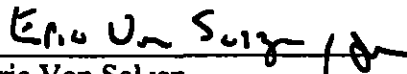
AECC appreciates the opportunity that the Board has provided for Entergy and AECC to seek relief from the adverse effects of the MNA interchange commitments. AECC joins with Entergy in requesting that the Board grant the relief sought

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Opening Comments Of Arkansas Electric Cooperative Corporation to be served by first class mail, postage prepaid, on this 11th day of July 2008, on:

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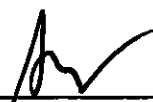
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