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SERVICE DATE – DECEMBER 22, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42110

SEMINOLE ELECTRIC COOPERATIVE, INC.

v.

CSX TRANSPORTATION, INC.

Decided: December 18, 2008

Seminole Electric Cooperative, Inc. (SECI) asks us to enjoin CSX Transportation, Inc. (CSXT) from applying new rates that CSXT has established for the transportation of coal to SECI's Seminole Generating Station (SGS) pending Board resolution of SECI's rate reasonableness complaint. Because SECI has failed to demonstrate irreparable harm, we will deny its request.

BACKGROUND

On October 3, 2008, SECI filed a complaint challenging the reasonableness of the rates established by CSXT for transportation of coal from various origins to SGS, near Palatka, FL, effective January 1, 2009. SECI alleges that CSXT possesses market dominance over the traffic and seeks to have lower rates prescribed as the maximum reasonable rates pursuant to the Board's stand-alone cost (SAC) test.

SECI, a non-profit electric generation and transmission cooperative, sells and transmits bulk supplies of wholesale electricity, primarily to its ten member distribution cooperatives. These members provide retail electric distribution services to residential, commercial and industrial consumers. SECI and its members serve nearly 900,000 metered residential and business consumers in 46 of Florida's 67 counties. The primary energy resource serving SECI and its member systems is SGS.

Along with its complaint, SECI also filed a petition for injunctive relief under 49 U.S.C. 721(b)(4) and 49 CFR 1117. SECI sought a Board order enjoining CSXT from applying the new rates in Tariff CSXT-8200. On October 17, 2008, CSXT submitted a reply in opposition.

On November 18, 2008, SECI filed a letter notifying the Board that CSXT had issued a new tariff (Tariff CSXT-32531) lowering the common carrier rates that will apply to SECI's coal movements effective January 1, 2009. Because the newest rates remain above the current rates in the parties' rail transportation contract, SECI continues to request injunctive relief to enjoin CSXT from applying the rates in Tariff CSXT-32531.

PRELIMINARY MATTER

On October 22, 2008, SECI filed a motion to strike portions of CSXT's reply to the petition for injunctive relief. SECI asks that the requested material be struck from the record because it was derived from negotiations and submitted in violation of a confidentiality agreement between the parties.¹ In its response, CSXT contends that it did not publicly disclose any confidential information and that the information was submitted to the Board under seal to respond to claims made in the petition for injunctive relief. CSXT further argues that its contract with SECI allows for disclosure to the Board and that there is no agreement to keep current negotiations confidential.

The motion to strike will be denied, as we find no written contract or prior course of conduct that provides an agreement between the parties to prevent CSXT from bringing relevant information to the Board's attention, if submitted under seal. The parties had previously contemplated that relevant information disclosed during contract negotiations could be submitted, under seal, in rate reasonableness proceedings before the Board. Specifically, in 1998, when the parties were negotiating the current contract, they entered into a confidentiality agreement to govern those negotiations that contained a clear exception: either party could disclose confidential information to the Board concerning contract negotiations if they could not agree to a contract and SECI were to file a rate complaint with the Board. See SECI Motion To Strike at 4. The only requirement was that such disclosure had to be made under seal. When the parties began negotiations for a new contract nearly a decade later, they did not enter into any confidentiality agreement (and the confidentiality agreement in the existing contract did not cover future negotiations). As such, there is no written confidentiality agreement to govern the recent contract negotiations.²

We do not agree with SECI that permitting this evidence to be submitted will have a chilling effect on future contract negotiations. If parties want to keep contract negotiations confidential—even from being filed under seal in Board or court proceedings—they can enter into a confidentiality agreement that so states.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 721(b)(4), the Board may “when necessary to prevent irreparable harm, issue an appropriate order . . .” To obtain an injunction, the requesting party must show: (1) it is likely to succeed on the merits; (2) it will be irreparably harmed in the absence of the requested relief; (3) issuance of the injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest. See DeBruce Grain, Inc. v. Union Pacific

¹ To protect the confidentiality of the disputed information, which was filed under seal, we are not summarizing the information.

² We also reject SECI's claim that these communications were pursuant to settlement negotiations. The communications all appeared to have taken place before SECI filed its complaint with the Board. To recast any contract negotiation as an attempt to settle threatened litigation erases any distinction between the two contexts.

Railroad Company, STB Docket No. 42023, slip op. at 3 n.3 (STB served Dec. 22, 1997), citing Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977). Here, SECI has failed to demonstrate irreparable harm in the absence of injunctive relief. Therefore, its petition will be denied.

When a party asks the Board to suspend a rate increase for the duration of a rate complaint, it must present a strong case that an injunction is warranted, as broad policy concerns counsel against granting this kind of relief. First, the statute already provides for reparations with interest to compensate the shipper if the new rate is found to be unreasonably high. Second, in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress sought to facilitate railroads' rate-making initiative by repealing the rate suspension procedures under which rate adjustments could be prohibited from taking effect without first being investigated, even without a showing of irreparable harm. Third, rail rates are significant components of the prices of many goods and services offered throughout the economy, so that any action the Board may take in a particular rate case may have effects elsewhere, and the Board cannot address all of the potential ripple effects when it considers the reasonableness of a rate charged by a railroad. Thus, as the Board has observed, "[p]ractically speaking, the only way to prevent such a process from potentially spiraling out of control — other than declining to address such effects in the first place — would be to deprive railroads of the pricing initiative given to them under 49 U.S.C. 10701(c) by freezing their rates. Such an approach to regulation would frustrate the Board's policies and Congressional intent in granting railroads latitude in setting rates."³

Here, SECI has not made a strong showing that the Board should suspend the proposed rate increase. SECI asserts that there are two ways that it can account for the increase in costs while the current proceeding is pending before the Board: it could either (i) increase its current rates to its wholesale members, subject to a refund if the rates are found unreasonable, or (ii) defer passing through a portion of the rate increase to its wholesale members and, if the rate increase is found reasonable, recover the deferred amount through future rate increases.

Under the first scenario, SECI claims its current ratepayers may suffer irreparable harm without an injunction. It argues that, if CSXT raises its rates and Board eventually finds those rates unreasonable and orders reparations, the refunds would go to future ratepayers, who may not be the same current ratepayers that absorbed the higher cost, as some ratepayers will have left the region.

³ Arizona Pub. Serv. Co. & Pacificorp v. Burlington N. & S.F. Fe Ry. Co., STB Docket No. 42077 (STB served Oct. 14, 2003). An exception is where the Board has already acted to constrain the rate a carrier can charge, but changed circumstances suggest a new rate prescription is warranted. In those circumstances, the Board will lift the prescriptive effect of the old rate prescription, but order the defendant railroad not to raise its rate and instruct both parties to keep account of the amounts paid during the reopening proceeding until the agency can resolve what the new rate prescription should be. See Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No. 1) (STB served Oct. 30, 2006) (Major Issues).

We do not believe this kind of harm justifies suspending a rate increase. First, any complainant could make the same argument, as no company has a fixed base of customers that never changes over time. Second, if we grant the injunction, we risk an offsetting irreparable harm to future ratepayers, who perhaps moved into the area, if the challenged rate is ultimately found reasonable, or the maximum rate is above the rate paid by SECI during the proceeding. In that case, SECI will have to reimburse CSXT (with interest) for the difference, a cost that would be passed to future ratepayers. Third, there is no evidence that the magnitude of the increase would cause irreparable harm to its customers. CSXT notes that SECI's estimates indicate that wholesale members could face up to 10 percent rate increases and that its members' retail customers' rates may increase by approximately 6 percent, or \$6.50 per month.⁴

If SECI does not pass the costs to ratepayers immediately, it claims that it will suffer irreparable harm because it cannot absorb the higher costs without borrowing, and that its current rate of finance is four times the current rate that governs interest on reparations. This argument is also inadequate to support suspending a rate. First, SECI has provided no evidence that the harm it faces, if any, is more than monetary. A monetary or "economic loss by itself does not constitute irreparable harm."⁵ Second, CSXT can make the same argument in reverse: that its cost of capital is higher than the proscribed interest rate so that it too would not be fully compensated if we grant the injunction, but later find the higher rate reasonable. Third, this argument amounts to an improper collateral attack on the interest rate we prescribe when reparations are awarded.

In the end, if we grant the request and prevent CSXT from raising its rates for this customer, the only persons that might suffer irreparable harm are SECI's competitors. Holding the transportation rates artificially low for the duration of the rate case—which might last several years—could give SECI a competitive advantage over other electric utility companies in the region. See, e.g., Arizona Public Service Co., et al. v. BNSF Ry. Co., 6 S.T.B. 851 (2003). Any lost profits those competitors might suffer as a result of that artificial advantage bestowed on SECI could never be remedied by the Board. SECI has provided no compelling reason for the agency to place its thumb on the competitive scales.

In sum, SECI has not shown that an injunction is necessary or appropriate here. Because SECI has not shown that irreparable harm will occur, and some showing of each of the Holiday Tours factors is necessary, there is no need to analyze whether SECI has met its burden in addressing the other factors. If SECI demonstrates that CSXT's rates are unreasonable under the SAC test, we would order reparations to SECI reflecting the difference between the challenged rates and the maximum reasonable rates along with interest.

⁴ CSXT Reply at 9; SECI V.S. Geeraerts at 4. These calculations were based on Tariff CSXT-8200. CSXT has since published a new tariff (CSXT-32531) that would lower those transportation rates. While the record does not indicate the potential impact on retail customers of CSXT-32531, it would presumably be lower as well.

⁵ Consolidated Rail Corp.—Abandonment—Between Corry and Meadville, Docket No. AB-167 (Sub-No. 1129) (ICC served Oct. 5, 1995).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. SECI's request for injunctive relief is denied.
2. SECI's motion to strike is denied.
3. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary