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**BY E-FILING**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

Re: Docket No. 42104, Entergy Arkansas, Inc. and Entergy Services, Inc.  
v. Union Pacific Railroad Company and Missouri & Northern Arkansas  
Railroad Company, Inc. and BNSF Railway Company

Dear Ms. Brown:

Attached for e-filing in the above referenced docket is Union Pacific's Reply to Arkansas Electric Cooperative Corporation's Petition for Reconsideration.

Thank you for your attention to this matter.

Sincerely,



Michael L. Rosenthal

cc: Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

ENTERGY ARKANSAS, INC. and	)	
ENTERGY SERVICES, INC., Complainants,	)	
	)	
v.	)	Docket No. 42104
	)	
UNION PACIFIC RAILROAD COMPANY and	)	
MISSOURI & NORTHERN ARKANSAS	)	
RAILROAD COMPANY, INC. and BNSF	)	
RAILWAY COMPANY, Defendants.	)	
	)	

**UNION PACIFIC'S REPLY TO ARKANSAS ELECTRIC COOPERATIVE  
CORPORATION'S PETITION FOR RECONSIDERATION**

UP hereby replies to AECC's petition seeking reconsideration of the Board's Decision served March 15, 2011, in this docket (the "2011 Decision").<sup>1</sup> AECC shows no new evidence, changed circumstances, or material error. Accordingly, the Board should deny AECC's petition.

AECC claims that the Board's 2011 Decision involves material error in three respects. UP addresses each claim of error below. UP shows:

1. AECC is wrong to claim that the Board erred by ignoring AECC's evidence. The Board correctly concluded that the current UP/MNA route is superior to the proposed BNSF/MNA through route and that UP did not engage in anticompetitive conduct.

2. AECC is wrong to claim that the Board erred by ignoring its prior decision in this proceeding regarding the showing required to obtain a prescribed through route. The Board

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<sup>1</sup> UP uses the same abbreviations the Board used in the 2011 Decision.

correctly concluded that Entergy and AECC had not made a showing sufficient to satisfy an even “more relaxed standard” than the standard in the Board’s competitive access regulations.

3. AECC is wrong to claim that the Board erred by not freezing in place UP’s current relationship with MNA so that AECC could challenge it again sometime in the future. The Board correctly held that AECC was not entitled to any relief.

**I. THE BOARD CORRECTLY FOUND THAT THE PROPOSED BNSF/MNA THROUGH ROUTE WAS NOT “A BETTER ROUTE” THAN THE CURRENT ROUTE AND THAT UP HAD NOT ENGAGED IN ANTICOMPETITIVE CONDUCT.**

AECC is wrong to claim that the Board ignored evidence submitted by AECC that “refutes the conclusions on which the Board based its denial of the AECC and Entergy through-route request.” Petition at 2. AECC’s evidence did not refute the Board’s conclusions. The Board correctly found that “the proposed route has not been shown to be a better route to serve Entergy.” 2011 Decision at 14. The Board also correctly found that UP had not engaged in anticompetitive conduct. *See id.* at 8-11. AECC does not show that the Board committed material error in reaching those conclusions.

**A. The Board Correctly Found That “The Proposed Route Has Not Been Shown to be a Better Route to Serve Entergy.”**

AECC argues that the Board ignored evidence submitted by AECC that the proposed BNSF/MNA through route would be more efficient than the current UP/MNA route. However, the Board carefully considered the extensive record developed in this proceeding and concluded that “the proposed route has not been shown to be a better route to serve Entergy.” 2011 Decision at 14. AECC does not identify any material error in the Board’s 2011 Decision.

1. AECC’s sole argument in this proceeding that the proposed BNSF/MNA through route would be better than the current UP/MNA route was that the BNSF/MNA route involved fewer loaded miles. *See AECC Op.* at 7-8 & *Nelson VS* at 9-10. In its Petition, AECC

argues that the Board erred by comparing the two routes in terms of round-trip mileage. *See* Petition at 2. Specifically, AECC argues that the Board should have focused on “the overriding importance of loaded miles, and not empty miles, in the incurrence of costs” because loaded miles generate more gross ton miles than empty miles. *Id.*

However, the Board did not base its decision solely on a comparison of round-trip miles. The Board arrived at its conclusion by “[w]eighing the totality of evidence.” 2011 Decision at 13. Thus, the Board considered round-trip mileages, but it also compared the two routes by calculating their variable costs using URCS. *See id.* at 13-14. The URCS cost comparisons take into account the difference in gross ton miles for the loaded and empty portions of movements – the issue that AECC says the Board ignored. In fact, the Board performed a more complete analysis than AECC proposed by considering both the loaded and the empty portions of the routes. That was not error. To the contrary, it would have been an error for the Board to ignore the empty portion of the routes.

2. AECC also argues that the Board erred in relying on its URCS cost calculations. *See* Petition at 3. Specifically, AECC complains that the Board used incorrect tare weights in its calculations, *see id.*, and introduced “an undocumented and untested analysis procedure,” *id.* at 4.

However, AECC does not show that the Board committed any error in its URCS cost calculations. *First*, AECC fails to acknowledge that the tare weight at issue was a system-average tare weight. The Board’s use of a system-average tare weight was consistent with the Board’s decision not to permit movement-specific adjustments to URCS. *See* 2011 Decision at 12 n.37.

*Second*, as UP showed in its evidence, if the Board had allowed adjustments to URCS, the costing results would have been even more favorable to UP's position in this case. *See* UP Reply at 57-58. Thus, although UP disagrees with the Board's decision not to allow movement-specific adjustments to URCS in a proceeding under 49 U.S.C. § 10705, AECC cannot show any harm from the Board's use of system-average figures.

*Third*, AECC had access to the Board's URCS workpapers, so it cannot complain that the Board's approach was "undocumented." Moreover, if the Board's results truly made "no sense," as AECC claims (Petition at 4), AECC could have identified the error.<sup>2</sup>

In sum, AECC has not shown that the Board's approach to URCS involved material error – that is, error significant enough to affect the outcome.<sup>3</sup>

3. AECC also argues that the Board erred by concluding that topographical differences between the current UP/MNA route and the proposed BNSF/MNA through route favored the current route. *See* Petition at 5-8. In particular, AECC claims the Board ignored testimony from its experts that "the proposed through route does not involve any more challenging topography than does the [current] UP/MNA route." *Id.* at 6.

However, AECC mischaracterizes its experts' testimony. AECC's experts argued that the topographical characteristics of the MNA portion of the proposed BNSF/MNA through

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<sup>2</sup> AECC did not hesitate to embrace the Board's URCS calculations when they appeared to support its arguments. *See* Petition at 6.

<sup>3</sup> AECC also claims that the Board's URCS cost calculations were flawed because they failed to reflect that "Independence [is] sourcing greater volumes [of coal] from Cordero than from North Antelope in the last half of 2010." Petition at 5 n.5. AECC's sourcing claim is absolutely false. The exact numbers are confidential, but the Independence plant obtained only a tiny fraction of its coal from Cordero mine in the second half of 2010. The vast majority of coal moving to the Independence plant came from North Antelope. UP believes this point is irrelevant, but would be more than willing to provide the details in a verified statement, if it would aid the Board's resolution of this matter.

route did not preclude the movement of loaded coal trains, but they never denied the topography was more challenging than the current route. Messrs. Heavin and Brookings, AECC's engineering experts, ultimately claimed only that the "MNA line is *suitable* as part of a through route for unit coal trains between the PRB and Independence." Heavin & Brookings RVS at 1 (emphasis added). They gave examples of coal train operations over what they said was more difficult topography, but they did not dispute the real "topographical differences" between the current and proposed routes. *Id.* at 3. They certainly never claimed the proposed route was *better* than the current route in any respect, other than loaded route length. *See id.* However, as the Board correctly observed, loaded route length plainly is not the only relevant consideration – otherwise, UP would be using a different route. *See* 2011 Decision at 14.

AECC also challenges the Board's analysis of the benefits of avoiding the MNA line's difficult topography as "circular," repeating an earlier claim that UP "is using its market power to impose a circuitous route when a shorter, lower-cost route is available." Petition at 5 n.6. But AECC still has not explained how imposing an inefficient route would benefit UP, and no explanation is readily apparent. UP provided un rebutted evidence that it shifted Entergy's traffic off the MNA line several years before entering into the lease with MNA and that it reduced Entergy's rate to offset Entergy's slightly increased car ownership costs associated with the fact that the current route is slightly longer than the former loaded route over MNA. *See* UP Reply at 7 & Gough VS at 6. UP's actions would have been irrational if the current route were not more efficient than the former route.

AECC also mischaracterizes the evidence in the record regarding the relative efficiency and cost-effectiveness of the current and proposed routes. Petition at 7. As the Board recognized, UP's expert witnesses submitted evidence that showed the relative advantages of the

current route in terms of train speed, fuel consumption, and curvature. *See* 2011 Decision at 14; *see also* UP Reply, Plum & Newland VS at 7-11; *id.*, Hughes VS at 5-7; Errata to UP's Reply at 2. AECC claims in its Petition that its witnesses refuted UP's evidence, but they did not.

In its Petition, AECC focuses on the issue of curvature. However, the Board used curvature as just one example of how the current route is more favorable than the proposed route. *See* 2011 Decision at 14. Moreover, although AECC's witness Nelson noted that many factors "could affect the relationship between curves and costs," he did not dispute that curvature would affect train speed and fuel consumption. Nelson RVS at 26-27. AECC also claims that Nelson used actual transit time data to show that curvature would not "offset the advantages of the shorter BNSF/MNA through route." Petition at 7. But, in fact, Nelson never presented any evidence regarding BNSF/MNA transit times. *See* Nelson RVS at 29-31.<sup>4</sup>

In sum, the Board did not err in its characterization of the evidence in the record regarding the impact of topography or the relative efficiency of the current UP/MNA route and the proposed BNSF/MNA through route.<sup>5</sup>

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<sup>4</sup> Nelson actually argued that the current UP loaded route was inferior to the former UP/MNA loaded route based on a comparison of (i) hundreds of records of *empty* returns on UP's current empty route (via MNA and Kansas City), with (ii) a few records of empty returns on UP's route via Okalahoma, a route that UP uses for empty traffic only when service disruptions or other issues prevent its use of the normal empty route via MNA. Even if Nelson's comparison were accurate, it would not be surprising to find that trains forced to depart from their normal empty routing would have longer transit times. (UP had no opportunity to address Nelson's bogus comparison because it was presented in AECC's rebuttal evidence.) In any event, Nelson's analysis says nothing about the transit times that would be associated with a BNSF/MNA through route.

<sup>5</sup> AECC also argues that Nelson demonstrated that "rolling stock costs were *increased*" by UP's adoption of the current route. Petition at 8 (citing Nelson RVS at 33-34). But, as discussed on page 5 above, UP's overall efficiency gain from adopting the current route plainly exceeded the costs associated with the few additional miles traveled by Entergy's cars because UP willingly reduced Entergy's rate to offset the increase in Entergy's car ownership costs.

4. AECC also argues that the Board erred in asserting that the “parties all agree” that the MNA lines would require “significant upgrades” to handle loaded coal trains moving to the Independence plant. Petition at 8 (quoting 2011 Decision at 13). AECC argues that AECC’s witnesses did not agree with that statement.

However, the Board was correct. Messrs. Heavin and Brookings agreed that “[t]o perform an acceptable interchange of empty and loaded coal trains at Lamar . . . new interchange tracks must be constructed.” Heavin & Brookings RVS at 23. AECC did not ask its witnesses to estimate the costs of constructing an interchange; instead, AECC relied on a Entergy witness, Mr. Crouch, to address the potential interchange infrastructure at Lamar. *See* Nelson RVS at 14. Mr. Crouch estimated that construction costs would exceed \$2.4 million. *See* Entergy Rebuttal Workpaper “Lamar Interchange Rebuttal Cost Estimate.pdf.” UP believes that Mr. Crouch’s estimate was too low, but \$2.4 million is still “significant.”

In addition, although AECC witnesses Heavin and Brookings argued that limited operation of loaded unit coal trains over MNA would be “feasible” (assuming there was first a connection to BNSF), they acknowledged that additional capital investment would be required for the route to be used regularly to move unit coal trains, including a capital bridge program. *See* Heavin & Brookings VS at 4; Heavin & Brookings RVS at 19. Mr. Crouch recommended bridge upgrades at a cost of more than \$2.5 million, according to his workpapers. *See* UP Reply at 50 & n.43; *see also* Crouch RVS at 18-19 (“I recommended upgrading the timber bridges to a design load rating of 286k in opening, and provided an approach to estimating the costs . . .”). Again, UP believes that Mr. Crouch’s estimate was too low, but \$2.5 million is “significant.”

Finally, UP and MNA provided extensive evidence that operating loaded unit coal trains over a BNSF/MNA through route would require significant upgrades to the MNA line.

Even if AECC did not agree, or would quibble over the definition of “significant,” the Board did not commit material error by agreeing with UP and MNA.

5. AECC briefly lists several other purported “efficiency advantages” of the proposed BNSF/MNA through route that its witnesses identified. Petition at 8. However, as AECC’s citations to the record show, AECC’s witnesses first identified these purported advantages on rebuttal, which gave UP and MNA no opportunity to respond. Therefore, it would have been error for the Board to rely on them.<sup>6</sup> Moreover, AECC does not show how this grab bag of supposed advantages, even if they were valid, would have been sufficient to alter the Board’s decision.<sup>7</sup> Accordingly, AECC has not shown that the Board committed material error.

**B. The Board Correctly Found That the “Isolated Service Disruptions” Experienced by Entergy in the Past “Do Not Establish a Showing of Anticompetitive Conduct on UP’s Part With Respect To Entergy.”**

In its Petition, AECC seeks to relitigate the Board’s conclusion that evidence regarding the three periods since the 1980s in which UP service to the Independence plant was disrupted did not support allegations that UP engaged in anticompetitive conduct. *See* 2011 Decision at 8-11. AECC argues that the Board “ignored AECC’s evidence that Independence, as

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<sup>6</sup> *See, e.g., AEP Texas North Co. v. BNSF Ry.*, STB Docket No. 41191 (Sub-No. 1) (STB served May 29, 2008) at 8 n.22 (“Our policy is not to consider evidence submitted for the first time on rebuttal.”); *North America Freight Car Ass’n v. BNSF Ry.*, STB Docket No. 42060 (Sub-No. 1) (STB served Jan. 26, 2007) at 12 (“We may not consider this new argument, raised for the first time in rebuttal, because BNSF did not have an opportunity to address it.”).

<sup>7</sup> In fact, AECC’s arguments have no merit. For example, AECC claimed that a BNSF/MNA route would reduce “crew deadheading” (Nelson RVS at 18), but there was no evidence that “crew deadheading” is a problem with the current route. AECC also argued that a BNSF/MNA route would “yield a net reduction of staging facilities” because trains to the Independence plant could be staged on existing MNA sidings, rather than at UP facilities (*id.* at 19), but UP’s existing facilities would not disappear if Entergy’s traffic shifted to a BNSF/MNA through route, so there could be no “net reduction of staging facilities.” In addition, the evidence showed that MNA does not have sufficient staging facilities. *See* UP Reply, Wheeler & Plum VS at 9-15.

a result of the market power exerted by UP, was denied service options that could have resulted in recovery from the service disruptions sooner.” Petition at 11.

However, AECC does not identify any relevant evidence that the Board ignored. AECC simply takes issue with the Board’s conclusions. After reviewing the extensive record in this case, the Board concluded that (i) with regard to the service disruptions in the 1993 and 2005 periods, “the lack of alternative routing neither caused nor exacerbated Entergy’s injuries,” and (ii) with regard to the service disruption in the 1997 period, UP’s response was “not consistent with Entergy’s allegation of competitive abuse,” and “the record bearing on” Entergy’s allegation “that UP refused to allow MNA and BNSF to establish a through route” was “inconclusive.” 2011 Decision at 9, 10.<sup>8</sup>

AECC claims that the Board ignored evidence that BNSF was able to recover more quickly than UP following the service disruption in 2005. *See* Petition at 10. However, AECC’s witness did not show that BNSF had recovered more quickly: Mr. Nelson noted that BNSF had lifted its force majeure before UP. *See* Nelson RVS at 8. UP showed that the two are not the same thing. UP presented actual evidence demonstrating that it was providing better service to Entergy than BNSF during that period. *See* UP Reply at 40-43 & Gough VS at 3-4. The Board examined the evidence carefully and concluded that “the lack of alternative routing neither caused nor exacerbated Entergy’s injuries.” 2011 Decision at 9.

AECC also claims that “the Board ignore[d] AECC’s evidence that UP captive customers like Independence, which could not use BNSF service, were subjected to a protracted

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<sup>8</sup> UP disagrees with the Board’s view that the record regarding whether UP refused to allow MNA and BNSF to establish a through route was “inconclusive.” UP believes the record clearly shows that Entergy never asked UP to allow BNSF and MNA to establish a through route to the Independence plant. *See* UP Reply at 38-39.

service and operational disruption beginning in 2005 for the third time since 1993.” Petition at 11. But that claim is pure nonsense. The Board clearly recognized that the Independence plant and other UP customers, regardless of whether they were served solely by UP, were affected by service disruptions during the period at issue. *See* 2011 Decision at 9-11. However, the Board correctly determined that the service disruptions did not reflect anticompetitive conduct on UP’s part. *See id.* at 11.

## **II. THE BOARD DID NOT IGNORE ITS 2009 DECISION IN THIS CASE.**

AECC argues that the Board erred by not applying the standard it announced in its decision served June 26, 2009 (the “2009 Decision”). *See* Petition at 12. AECC’s arguments are disjointed, but AECC appears to be saying that the Board should have granted Entergy’s request for a through route prescription without requiring a showing that UP engaged in anticompetitive conduct, but merely upon a showing that the proposed BNSF/MNA through route was “better” or “more efficient” than the current route, or that UP had provided Entergy with “inadequate service.” *See id.* at 13-14.

But AECC cannot prevail regardless of whether the Board’s standard does or does not require a showing of anticompetitive conduct. As the Board explained in the 2011 Decision, the evidence in this case “*is insufficient to meet either standard.*” 2011 Decision at 8 n.16 (emphasis added).

AECC responds to this fatal problem with its argument by misrepresenting the Board’s factual findings. AECC claims that the “Board’s findings establish that the [proposed] through route is more efficient than the UP/MNA route.” Petition at 14. But that is not what the Board found. It is precisely the opposite of what the Board found. The Board found that “the

evidence supplied by the parties establishes that the existing UP-MNA routing is more efficient ('better') than the BNSF-MNA routing Entergy has requested." 2011 Decision at 8.<sup>9</sup>

AECC also argues that Entergy was entitled to a through route prescription under the standard announced in the 2009 Decision because AECC showed that "UP/MNA service has repeatedly been inadequate." Petition at 14. But AECC had to show more than prior instances of inadequate service. Even setting aside the issue of anticompetitive conduct, the very portion of the 2009 Decision that AECC chose to quote made clear that relief would be appropriate only if UP and MNA were providing inadequate service "*due to [the] interchange commitment.*" 2009 Decision at 7 (quoted in Petition at 16) (emphasis added). As discussed above, the Board found that UP's past service problems were *not* due to the interchange commitment: "the lack of alternative routing neither caused nor exacerbated Entergy's injuries." 2011 Decision at 9.

Accordingly, even if Entergy could have obtained a through route prescription simply by showing that a BNSF/MNA through route would be more efficient than the current UP/MNA route or that the interchange commitment caused or contributed to UP's past service problems – that is, without any showing of anticompetitive conduct – Entergy would not have been entitled to relief in this case.

Moreover, as UP explained in its Reply Evidence and Argument, Entergy was not entitled to a through route prescription under 49 U.S.C. § 10705 absent proof of anticompetitive conduct. *See* UP Reply at 18-23. As the Board recognized in the 2011 Decision, the Board's "regulations state that a showing of anticompetitive conduct applies to all requests for § 10705 relief." 2011 Decision at 7. Even if the Board could interpret the statute in a way that would

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<sup>9</sup> Indeed, the Board's finding on this issue is the basis for AECC's first set of claims that the Board committed material error in the 2011 Decision.

justify adopting different regulations, it could not depart from its current regulations without conducting a new rulemaking proceeding. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999).

UP also believes that Board precedent is consistent with the competitive access regulations. In the 2011 Decision, the Board expressed concern that the 2009 Decision and its decision in *Central Power & Light* (“CP&L”)<sup>10</sup> might suggest that a party could obtain a through route prescription without making “an anticompetitive conduct showing.” 2011 Decision at 7. However, the 2009 Decision and *CP&L* make clear that a party seeking a through route prescription must show anticompetitive conduct as a predicate to obtaining relief.

In *CP&L*, the Board never said that a shipper would be entitled to a through route prescription merely by showing that the alternate route would be “better” for that shipper. To the contrary, the Board made clear that a showing of anticompetitive acts was an essential predicate for obtaining relief. The Board recognized that Congress intended to give railroads significant discretion to route their traffic to maximize overall efficiency, and thus that it was important to distinguish between (i) a permissible refusal to open an additional through route at a particular shipper’s desired interchange point, and (ii) an anticompetitive “foreclosure” of service over an additional route. *See CP&L*, 1 S.T.B. at 1065-69. The Board noted that prescriptive relief might be warranted when a bottleneck carrier’s “foreclosure” of service over an alternate through route was preventing a shipper from taking advantage of “better” service that was being offered over a non-bottleneck segment. *See id.* at 1069. However, the Board made clear that, to establish “foreclosure,” a shipper must show “act[s] that are ‘anticompetitive.’” *Id.* at 1071.

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<sup>10</sup> *Central Power & Light Co. v. Southern Pacific Transportation Co.*, 1 S.T.B. 1059 (1996).

The Board's 2009 Decision was consistent with the Board's competitive access regulations and *CP&L*. The Board's 2009 Decision clearly makes the point that a showing of anticompetitive conduct is a necessary predicate for obtaining relief under section 10705: the Board stated that Entergy could pursue relief under section 10705 because "Entergy has essentially alleged an abuse of market power." 2009 Decision at 7. The 2009 Decision also makes clear that factors addressing whether a proposed route is "better" or "more efficient" than the current route go to the service and operational criteria for relief under the competitive access regulations, not the competitive criteria for relief. In other words, they are among the "relevant factors" the Board must consider in deciding whether to prescribe a through route, *assuming* proof of anticompetitive "foreclosure." *See id.* at 8 (citing *CP&L*).<sup>11</sup>

Finally, AECC argues that the Board erred in applying its competitive access rules because the Board found that UP's conduct was "abusive," but not "'abusive' enough." Petition at 15.<sup>12</sup> This is a gross mischaracterization of the record in this case and the 2011 Decision. AECC's claims that UP had engaged in anticompetitive conduct turned on claims

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<sup>11</sup> Significantly, AECC and Entergy apparently understood that the Board's 2009 Decision required a showing of anticompetitive conduct as a predicate for obtaining a through route prescription. AECC devoted a section of its Opening Evidence to the argument that "UP Has Abused Its Market Power." *See* AECC Op. at 6-7. Entergy did the same. *See* Entergy Op. at 21-23. In addition, one of Entergy's witnesses, Mr. Crowley, devoted a significant portion of his opening and rebuttal verified statements to an attempt to show that UP had abused its market power. *See* Crowley VS at 6-7; Crowley RVS at 3-8.

<sup>12</sup> At times, AECC seems to take issue with the Board's use of the phrase "competitive abuse" in the 2011 Decision, but AECC plainly recognizes it is "short-hand" for the phrase "an act that is contrary to the competitive policies of 49 U.S.C. § 10101 or is otherwise anticompetitive," which comes from the Board's competitive access rules. *See* Petition at 15. Indeed, AECC used the term "abuse" in its filings. *See, e.g.*, AECC Op. at 6 (claiming its evidence shows that "UP has abused its market power"); AECC Reb. at 3 (claiming it had shown that "UP had abused its market power"). Moreover, although AECC argues that the Board failed to follow its 2009 Decision, that decision used the term "abuse" to describe the required showing under section 10705. *See* 2009 Decision at 7 (allowing Entergy to proceed under section 10705 because "Entergy has essentially alleged an abuse of market power").

about UP's service problems. The Board reviewed the record and concluded that it did "not establish a showing of anticompetitive conduct on UP's part with respect to Entergy." 2011 Decision at 11; *see also id.* at 5 ("[T]he UP service problems on which the request [for a through route] is premised do not constitute competitive abuse."); *id.* at 8 ("Entergy has not proven that the past service problems involving the southern PRB were the result of competitive abuse.").

AECC's Petition relies on mischaracterizations of the evidence and the 2011 Decision. It does not show any material error in the 2011 Decision.

### **III. THE BOARD DID NOT ERR BY NOT ENJOINING UP AND MNA FROM ALTERING THEIR RELATIONSHIP.**

AECC's final claim of error was that the Board should have precluded UP and MNA from altering their relationship "during the pendency of Ex Parte 705, any supplemental proceedings pertaining to the implementation of the competitive access criteria and for whatever future time period the Board may find to be in the public interest." Petition at 18.

AECC never asked the Board to impose this form of "relief" in the event the Board denied its request for a route prescription, and thus there is no material error in the fact that the Board did not impose it in the 2011 Decision.<sup>13</sup> AECC notes that it requested certain forms of relief in its prior filings, but those requests were predicated on AECC's and Entergy's prevailing in their attempt to obtain a route prescription: AECC sought relief *in addition to* a through route prescription "[t]o make the through route an effective remedy." AECC Op. at 9. But AECC and Entergy did not prevail on their request to obtain a through route prescription.

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<sup>13</sup> *See Texas Municipal Power Agency v. Burlington Northern & Santa Fe Ry.*, 7 S.T.B. 803, 805 (2004) ("[I]f a party were free to reshape its case, so long as it did so within 20 days after a decision, the administrative process might never end."); *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), slip op. at 13 (STB served Mar. 19, 2008) ("[N]ew arguments that could have been presented earlier cannot be raised for the first time on reconsideration.").

AECC argues that the Board should freeze in place the status quo because the law may change some day in some way that would give it a better chance of prevailing if it could bring the same case sometime in the future. But that is a possibility in every case. It is no justification for enjoining the *prevailing parties* from ever changing the status quo.

Moreover, AECC cites no authority under which the Board could have imposed the relief it requests. AECC refers to the Board's decision to hold two rate cases in abeyance during the proceedings in Ex Parte No. 657 (Sub-No. 1). *See* Petition at 18. But the Board had not decided those two cases before it held them in abeyance.<sup>14</sup> Here, there is nothing to be held in abeyance.

The Board has decided this case. AECC lost. AECC is not entitled to any relief.

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<sup>14</sup> AECC could have asked the Board to hold this case in abeyance before the outcome was known. The Board instituted Ex Parte No. 705 in January 2011, two months before it decided this case. Instead, AECC waited until it knew it lost this case.

Also, this is not analogous to the situation in Ex Parte No. 657 (Sub-No. 1) because the Board has said that the proceeding in Ex Parte No. 705 "will not focus on interchange commitments or the approach adopted in EP 575." *Competition in the Railroad Industry*, STB Ex Parte No. 705 (STB served Jan. 11, 2011) at 5.

Respectfully submitted,



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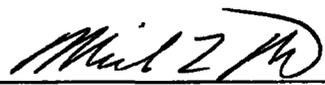
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*Attorneys for Union Pacific Railroad Company*

April 25, 2011

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 25th day of April, 2011, I caused copies of Union Pacific's Reply to Arkansas Electric Cooperative Corporation's Petition for a Stay to be served on counsel for the parties of record by email and first-class mail, postage prepaid.

  
\_\_\_\_\_  
Michael L. Rosenthal