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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.

**ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
PETITION FOR RECONSIDERATION**

Michael A. Nelson
101 Main Street
Dalton, MA 01226
(413) 684-2044

Transportation Consultant

Eric Von Salzen
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W.
Suite 800
Washington, DC 20001
(202) 842-2345

Counsel for Arkansas Electric Cooperative
Corporation

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PREFACE

The Board should reconsider its Decision served March 15, 2011, in this Docket ("2011 Decision"), because the decision involves material error in the following principal respects:

1. The Board ignored material evidence submitted by AECC 1/ regarding the efficiency advantages of the proposed through route compared to UP's existing circuitous route, and regarding the inadequate service provided by UP. AECC's evidence on these critical issues is not even mentioned, much less evaluated, in the Board's Discussion and Conclusions.
2. The Board failed to apply the standards that it had announced in Entergy Arkansas, Inc. v. UP, STB Docket No. 42104, Decision served June 26, 2009 ("2009 Decision") for evaluating a proposed through route. The standards announced in the 2009 Decision are not even mentioned in the Board's Discussion and Conclusions in the 2011 Decision. Moreover, the standards applied in the 2011 Decision are contrary to the statute and the Board's own regulations.
3. The Board has left MNA unprotected and vulnerable to adverse action by UP.

SUMMARY OF ARGUMENT

Material evidence in the record submitted by AECC shows that the proposed BNSF/MNA through route from the southern Powder River Basin to the Independence Steam Electric Station

1/ AECC uses the same conventional abbreviations for railroads, companies, and locations as it used in its Opening and Rebuttal Arguments.

(Independence) at Newark, AR would be more efficient than the circuitous UP/MNA route, and would mitigate inadequate service provided by UP. Thus, UP's foreclosure of such a BNSF/MNA through route is contrary to the competition policies of 49 U.S.C. § 10101 and is otherwise anticompetitive. The Board failed to consider this evidence – it did not even mention it -- in denying Entergy's and AECC's request to prescribe such a through route.

In the 2009 Decision, the Board described what Entergy and AECC would have to show to satisfy the requirements of 49 USC 10705 and the Board's competitive access rules for prescription of a through route from the southern PRB to Independence. Yet in the 2011 Decision, the Board did not follow its prior ruling – it did not even mention that the 2009 Decision established the law of this case regarding these requirements – and it imposed other and different requirements, which are contrary to the statute and regulations, and denied the petition for failure to satisfy them.

The 2011 Decision does nothing to protect MNA from adverse actions by UP that are likely to remove MNA as a prospective competitor in the future.

As the Board said in the 2009 Decision, this case involves important matters of first impression. Shippers, carriers, and the economy as a whole have waited over 30 years for a precedent to be set regarding the establishment of through routes under the Staggers Act regulatory reforms. The 2011 Decision fails to provide the promised precedent. It ignores the evidence and it disregards the law of this case.

Therefore, the Board should reconsider its 2011 Decision, and grant the relief requested by AECC. 2/

2/ If the Board declines to grant such relief, it should at least act to preserve the status quo pending any changes in its competitive access rules that may result from the process the Board initiated recently in Ex Parte 705.

DISCUSSION

1. The Board Ignored AECC's Evidence On Crucial Issues In This Case

The Board's Discussion and Conclusions regarding the request by AECC and Entergy for a through route from the southern PRB to Independence runs from p. 7 to p. 17 of the 2011 Decision. In those 11 pages, the Board does not devote a single word to the evidence submitted by AECC. AECC is not even mentioned. None of AECC's expert witnesses is mentioned.

Yet AECC submitted substantial and material evidence on crucial issues in this case, evidence that refutes the conclusions on which the Board based its denial of the AECC and Entergy through-route request.

A. *AECC's Evidence Shows That a BNSF/MNA Through Route Would Be More Efficient Than the Circuitous UP/MNA Route*

The Board correctly describes as the "crux of this case" the evidence directed to "whether UP/MNA has engaged in anticompetitive conduct by foreclosing the use of a 'better' alternative BNSF/MNA route." 2011 Decision at 11. AECC submitted substantial evidence showing that the proposed through route would indeed be more efficient than the circuitous UP route, but the Board ignored that evidence and concluded that the through route "has not been shown to be a superior route to serve Entergy [i.e., Independence]." *Id.* at 13.

The Board bases its conclusion that the proposed through route is not superior to the existing UP/MNA route on four "facts": A comparison of the round-trip mileage of the two routes, a comparison of variable costs over the two routes, the "difficult terrain between Lamar and the Independence plant" (which the Board says explains why UP uses its Oklahoma route, rather than a shorter route via Kansas City), and the need for "significant upgrades" on the line. 2011 Decision at 13-14. AECC's evidence shows that none of these "facts", separately or combined, supports the Board's conclusion.

In its Table 1, on p. 13 of the 2011 Decision, the Board compares the UP/MNA and BNSF/MNA routes in terms of mileage. However, this comparison is based on “round-trip” mileage - i.e., the combined mileage of the loaded movement to the plant and the empty return to the mine – UP returns empties via MNA to an interchange at Kansas City. This route, which matches a portion of the proposed through route, is significantly shorter than the route used by UP for the loaded cars. A round-trip mileage comparison was offered by UP its reply evidence, but AECC showed in its rebuttal that the round-trip mileage comparison was invalid.

As AECC’s evidence showed, the round-trip mileage comparison “is quite misleading”, because “the shorter empty return movement on the UP route essentially camouflages the longer loaded movement.” Nelson RVS at 23. The loaded movement is the principal source of gross ton miles (GTM) and costs. “A shorter loaded movement is more beneficial to the railroad and to economic efficiency than is a shorter empty movement.” *Id.* at 25. Thus, the same “shortness” that makes the MNA route preferable for the return of empties is even more beneficial for the loads (i.e., due to the greater GTM involved in the loaded movement). Nelson RVS at 22-23 highlighted how UP’s evidence corroborated the overriding importance of loaded miles, and not empty miles, in the incurrence of costs. Yet the Board ignored AECC’s evidence on this crucial point and relied instead on a flawed comparison of round-trip mileage.

The GTM generated by the loaded and empty movements to/from each mine shown in the Board’s Table 1 can be calculated from mileages found in the Board’s workpapers and the formula presented on Line 219 of the Board’s URCS workpapers. These figures show that, depending on the origin mine, movement of PRB coal to Independence generates 5.0-8.0 percent more GTM when transported via the circuitous UP route rather than via the BNSF/MNA route, and that use of the UP route wastes 550-892 million cost-causing GTM’s each year – depending on the mix of mine origins --

due to its circuitry for the loaded movement. 3/ A workpaper showing the results of these GTM calculations is attached.

The Board's second reason for thinking that the proposed through route is not superior to the existing UP/MNA route is a comparison of the variable costs of the routes, ostensibly calculated in accordance with URCS, and also shown in Table 1 on p. 13 of the 2011 Decision. This comparison was not submitted into the record by any party, but was calculated by Board staff. In accordance with the Board's suggestion at p. 13 n. 37 of the 2011 Decision, AECC obtained the workpapers for these calculations from the Board's staff, and has found that the resulting values are unreliable for several reasons.

For example, the tare weight (25.8 tons) shown on line 212 of each of the Board's URCS printouts is inconsistent with the shipment weight of 120 tons per car. Under the 286,000 lb weight limit, PRB coal trains must use aluminum cars with a tare weight of 23 tons or less in order to move 120 tons per car. 4/ The Board's URCS analyses assume a gross weight of 145.8 tons/car (i.e., 291,600 lb/car), which is not permissible under the 286k limit. Indeed, the overstated tare weights almost certainly cause the Board to exaggerate the savings associated with shortening the empty movement on the current UP/MNA route, because the actual reduction in GTM from shortening the empty movement is smaller than assumed in the Board's computation.

3/ To put this into perspective, switching from the UP route to the BNSF/MNA through route would produce GTM savings approximately equivalent to 4.0-6.4 years of railroad industry-average productivity improvement, based on the RCAF-5 value of 1.2% per year reported in Ex Parte 290 (Sub-no. 5), Quarterly Rail Cost Adjustment Factor, decision served Mar. 18, 2011, at 2.

4/ The Board has already been made aware of the infirmities of URCS for PRB unit coal train movements, not the least of which is the fact that URCS predates many of the productivity improvements that have been adopted in PRB flows, including use of lightweight aluminum cars. See, e.g., Ex Parte 431 (Sub-no. 3), Review of the Surface Transportation Board's General Costing System, "Written Submission of Arkansas Electric Cooperative Corporation" (Apr. 23, 2009), at 5-7.

A more significant problem in the Board's URCS tabulations is its introduction of an undocumented and untested analysis procedure that deviates from established unit train costing methods. This novel procedure attempts to "split" unit train movements into their loaded and empty "halves", run URCS separately on each "half", then sum the separate results to get the round trip total. This may sound reasonable, but the results it produces make no sense. For example, the Board workpaper denoted as "8 of 17" estimates, using the established URCS methodology for unit trains, a round trip variable cost of \$225,152.80 for a 1201 mile route (790 miles on UP; 411 miles on MNA). For the empty return portion of that same route, Workpaper 10 of 17 shows a "one-way" cost of \$51,964.16. If the Board's ad hoc methodology works, the difference of \$173,188.64 should reflect the cost of the corresponding loaded movement. The workpapers, however, never report that value – or any set of values that would make it possible to validate the methodology directly. But the workpapers do show several other "one-way" costs for loaded movements ranging from 1231-1314 miles, all of which have reported costs in a range of \$196,013.69-\$197,702.00. See Workpapers 3, 5, 11 and 16 of 17. The wide disparity between this range and the \$173,188.64 figure for a route nearly the same length makes it impossible to have confidence in the specific numerical results of the Board's untested methodology.

For these reasons the reported URCS results should not be given significant weight.

Even with all of its flaws, Table 1 of the 2011 Decision shows that the round-trip mileage of the through route is less than the mileage of the current UP/MNA route, and the URCS costs of the through route are less than the costs of the UP/MNA route. The Board's own findings are that the BNSF/MNA route is more efficient than the current UP/MNA route (particularly from mines north of

North Antelope, on which Independence will be relying increasingly in the future 5/). Table 1 thus supports the grant of the requested relief under Section 10705.

However, the Board trumps its own mileage and cost findings with its third “fact”, the assertion that the through route “would take the loaded coal trains over . . . the . . . challenging topography” of the Ozark Mountains. 2011 Decision at 12. The Board reaches its conclusion that topography makes the through route inferior to the current UP/MNA route by comparing it to a hypothetical UP-MNA route to the Independence plant with interchange at Kansas City for both the loaded and empty movements. The hypothetical route would be shorter than either the existing route or the through route, and its URCS costs would be less. The Board then simply assumes 6/ without any evidence that the reason UP doesn’t use that (apparently preferable) route is that UP doesn’t want to “traverse the difficult terrain” involved, and that the same terrain makes the through route “inferior to the current route”.

The Board ignores AECC’s evidence regarding the topography of the proposed through route and in the process makes a crucial factual error here. The proposed through route does not make

5/ In Table 1, most of the coal for Independence comes from North Antelope, the mine for which the through route has the smallest mileage advantage over the current UP/MNA route, but evidence in the record shows that when the legacy contract with North Antelope expires, ongoing procurement would be distributed among various southern PRB mines. Gray RVS at 5-7 (some details classified). This is confirmed by publicly-available DOE Form 923 data, which show Independence sourcing greater volumes from Cordero than from North Antelope in the last half of 2010. See <http://eia.doe.gov/cneaf/electricity/page/eia423.html> (2010 Jan-Dec data).

6/ In the context of this proceeding, this assumption by the Board is entirely circular. The question presented in this case is whether UP is using its market power to impose a circuitous route when a shorter, lower-cost route is available. The Board simply assumes that UP’s decision not to use the Kansas City route results from substantial unmeasured costs, which create a substantial “value” of “avoiding the terrain”, rather than the exercise of market power. 2011 Decision at 14. Also, it should be noted that the Board’s willingness to assume that the actual costs faced by railroads vary widely from those calculated by URCS further undermines the confidence that should be placed in specific URCS results.

use of the portion of MNA between Kansas City and Lamar, which formerly was used by UP to reach the Independence plant from Kansas City, and is where the most difficult terrain is located. That northern portion of MNA line, in the area immediately south of Kansas City (where MNA operates on trackage rights over UP), includes a long ascent of a steep (1.3+ percent grade) hill at Independence, MO, a climb that is especially arduous for heavy-haul traffic. The proposed through route uses BNSF's line from Kansas City to Lamar, bypassing this troublesome segment of MNA. AECC explained this in rebuttal, as part of its demonstration that the proposed through route does not involve any more challenging topography than does the UP/MNA route.

AECC's engineering witnesses, Jerry Heavin and David Brookings (each with about 40 years experience in the railroad industry) testified that the proposed through route "is not adversely affected by grade". Heavin & Brookings VS at 7. AECC's Mr. Nelson discussed how, with the proposed through route having a ruling grade the same as UP's (1.0%), the proposed through route will be able to operate trains with basically the same numbers of cars and locomotives as does UP (which UP did not dispute). Nelson RVS at 27 (citing UP Reply Argument at 49-50, showing that UP agrees that the proposed through route does not use the Kansas City-Lamar portion of the MNA). The workpapers supporting the Board's URCS computations reflect the equivalence of the two operations. Thus, the proposed through route combines the "best of both worlds" -- it operates with the same "technology" as UP, but does so over a much shorter route to get each load to the plant. These strong fundamentals define the superiority of the BNSF/MNA through route relative to UP's Oklahoma route for the Independence movement.

Again, the Board ignored this evidence. The Board claimed that "there is no dispute that the terrain of the alternative BNSF/MNA route is inferior to that of the current route". 2011

Decision at 14. On the contrary, AECC's evidence shows that there is no topographic reason not to use the shorter, cheaper BNSF/MNA through route.

The Board also asserts it is undisputed that the through route is inferior to the current route due to curvature issues (2011 Decision at 14), citing UP testimony that "the more direct MNA routing had 'at least double the curvature' of the more circuitous route" (*Id.* at 12 n.34). However, AECC's evidence showed that UP's claims regarding curvature were unfounded. The measurement of curvature used by UP did not distinguish between shallow curves vs. sharp ones, and UP offered no evidence linking the measured curvature to any specific magnitude of cost. Furthermore, UP ignored the fact that many of the curves on the BNSF/MNA route occur on a gentle river downgrade, and took no account of the speed at which the curves are traversed, nor the presence of track lubrication devices, or any of numerous other factors that realistically would affect the relationship between curves and costs. See Nelson RVS at 26-27.

Although the Board asserts that "there is no dispute" that, compared to the through route, the current route "would permit greater train speeds, reduce the number of locomotives needed, improve fuel consumption, reduce wear and tear on the track and rolling stock, and take advantage of a higher density line" (2011 Decision at 14), AECC's evidence refuted these claims. For example, UP claimed that curvature would cause longer transit times, but provided no evidence that the effects of curvature on transit times would offset the advantages of the shorter BNSF/MNA through route. AECC used actual transit time data for the UP route vs. the MNA route to demonstrate that curvature on the MNA route does not undermine its advantages for the Independence movement relative to UP's route via Oklahoma. Nelson RVS at 29-31. In reality, curvature is so far down the list of factors that affect costs that – unlike loaded route length – the Board's official cost analysis tool (URCS) contains no provision for differentiating movement costs on the basis of curvature.

AECC examined the BNSF/MNA route in the context of UP's criticisms, and presented evidence that (a) its ruling grades, curves, and other characteristics fall within acceptable ranges, so that (b) its shorter length is by far the most important consideration in assessing its relative efficiency for this type of heavy-haul operation. Heavin & Brookings RVS at 1-3. Indeed, as shown in Nelson RVS at 33-34, UP's own evidence demonstrates that rolling stock costs were increased by UP's diversion of the Independence movement from the "mountainous terrain" to the longer UP route via Oklahoma.

Finally, the Board asserts that the "parties all agree" that the MNA would require "significant upgrade" "to be able to haul loaded coal trains to the [Independence] plant." 2011 Decision at 13. On the contrary, AECC presented evidence that the MNA does not need significant upgrades to handle the volume of coal traffic that would initially be available to this route, and that higher volumes of traffic that might become available in later years would provide revenue to support any capital improvements that the parties decided would be desirable (as is basically the case for any rail line). Heavin & Brookings RVS at 3-6. Nelson RVS at 30-31 discusses issues related to resolution of past maintenance deferrals by MNA that enter into consideration of capital needs.

The Board also overlooked AECC's evidence of other efficiency advantages of the proposed BNSF/MNA route compared to the current UP/MNA route:

- The current pattern of movement for Independence traffic between Kansas City and the plant, which is based almost entirely on directional operations, tends to create crew deadheading. The introduction of the balanced operations contemplated in the requested through route, all else equal, should reduce crew deadheading and related costs (Nelson RVS at 18);
- UP's evidence shows how the through route would yield a net reduction of staging facilities, because the reliance on existing MNA sidings would obviate the need for the staging trackage UP currently requires at Newport and Kansas City. That staging trackage forms an additional dimension of the inefficiency associated with UP's shift of the Independence movement to the Oklahoma route (Nelson RVS at 19,);
- The Board should be cautious in establishing any precedent that appears to justify the use of circuitous routes to serve captive plants, because the jurisdictional threshold may create artificial incentives in some circumstances for carriers to serve captive plants inefficiently (Nelson RVS at 33);

- Inefficient routes, such as UP's, tend to exacerbate service problems (Nelson RVS at 33); and,
- The Board's URCS and mileage analyses do not take into account MNA's substantial advantages over UP in unit costs and operating flexibility, which are shown explicitly in UP's own data (Nelson RVS at 26; Heavin & Brookings RVS at 4).

Overall, the substantial evidence submitted by AECC, which the 2011 Decision ignored, establishes that the proposed through route is significantly more efficient than the circuitous UP route for PRB coal movements to Independence, and that UP is relying on nothing other than its market power to foreclose access to that route.

B. AECC's Evidence Shows That a BNSF/MNA Through Route Would Mitigate Inadequate Service Provided By UP

As the Board acknowledges, UP's service to Independence was seriously disrupted for substantial periods on three occasions between 1993 and 2007. 2011 Decision at 8. Yet the Board concludes that these disruptions do not support the need for a through-route alternative because they were not the result of "competitive abuse". *Id.* at 9. As we discuss in Part 2, below, the Board ruled in its 2009 Decision that, under its competitive access rules, inadequate service is a ground for prescribing a through route and does not require a showing that the bad service is a result of "competitive abuse".

UP presented no evidence to establish that it responded to the various service problems at competitively-served power plants as lethargically as it responded to service problems at Independence, or that competitively-served plants ran out of coal and incurred large adverse economic impacts comparable to those at Independence each time there has been a service disruption. There is no basis in the record on which the Board or anyone could believe that captive and competitively-served coal shippers faced the same options for responding to the service disruptions.

Evidence submitted by AECC, but ignored by the Board, shows that the poor service and anticompetitive conduct are closely linked. As discussed in Nelson RVS at 7-8, competitive harm is manifest in the response of the carrier to the disruption of service, whether or not market power caused

the disruption. The Board nevertheless offers a series of ostensible reasons for disregarding the ability of competition from BNSF to remedy or mitigate service problems at Independence, undeterred by the fact that the record specifically refutes the proffered reasons. First, the Board claims that a BNSF alternative would not have mitigated the harms Entergy (and AECC) suffered during 1993 and 2005. 2011 Decision at 9. On the contrary, AECC's evidence showed that in the episode beginning in 2005, UP operated under a lengthy period of force majeure and an embargo on new business, while BNSF was able to take advantage of its multiple routes out of the PRB to lift its force majeure quickly (by comparison) and move coal for the customers it could serve. Nelson RVS at 8. Coal shippers with access to BNSF thereby had options that captive UP customers (such as Independence) did not. In this and in the previous disruptions, if Independence had available the requested through route it would have had options for recovering from the service disruptions that in practice it could not utilize due to the market power exerted by UP. If UP faced market forces, it would have had a greater incentive to restore service to Independence more quickly, or risk losing the traffic.

The Board treats as "credible" UP's claim that its service level during the 2005 period was comparable to BNSF's, so the presence of a competitive alternative from BNSF would not have "mitigated the harms [Independence] suffered during those periods." 2011 Decision at 9. The Board first cites a UP comparison of cycle times between UP and BNSF. However, the harms to Entergy/AECC in the 2005 period resulted from UP's throughput deficiencies, i.e., its failure to deliver the volume of coal required, not cycle time considerations per se. ^{7/} As discussed in Nelson RVS at 32, the issue is not

^{7/} Even if cycle times were relevant, the cited UP comparison of cycle time data on its face involves movements to the White Bluff plant, not Independence. BNSF's route to White Bluff (via Jonesboro, AR) is far longer than UP's, so if BNSF's cycle times and UP's were comparable, that would suggest the existence of performance problems on UP. The BNSF-MNA route to Independence is shorter than UP's, so its expected cycle time performance relative to UP would be stronger than at White Bluff.

whether UP has faster cycle times; it is whether the availability at Independence of service from the through route would protect Independence against future recurrences of profound and extended service (i.e., throughput) inadequacies by motivating UP to ensure that they do not occur or by providing Independence with a tangible option for alternative service if they do.

The Board also accepts a UP comparison showing that BNSF and UP combined were able to deliver most of the PRB tonnage committed in the total PRB marketplace during this time. 2011 Decision at 9. However, the Board ignores AECC's evidence that UP captive customers like Independence, which could not use BNSF service, were subjected to a protracted service and operational disruption beginning in 2005 for the third time since 1993. Nelson RVS at 8. The contrast between the experience of Independence and the market as a whole summarizes succinctly the entire service issue.

The Board asserts that, in response to the 1997 service crisis, UP acquired additional cars and rerouted the empty cars, and during the 2005-2007 service crisis embargoed new business and later resumed normal service to Independence, which the Board calls "actions that are not consistent with an abuse of monopoly power." 2011 Decision at 10. The Board ignored AECC's evidence that Independence, as a result of the market power exerted by UP, was denied service options that could have resulted in recovery from the service disruptions sooner. Nelson RVS at 8. Proof of market power surely does not require a showing that the monopolist never corrects its service failures.

Thus, in reaching its conclusion that UP's poor service to Independence over extended periods of time between 1998 and 2007 did not reflect UP's market power, and would not be ameliorated by the existence of a competitive through route, the Board simply ignored overwhelming evidence to the contrary presented by AECC.

2. The Board Ignored Its Own Prior Decision In This Case, Which Described What AECC and Entergy Would Have To Show To Obtain Prescription Of A Through Route

In its 2009 Decision at 2, the Board held that 49 USC § 10705 provides “a straightforward path” for Entergy and AECC to obtain “a Board order . . . directing MNA to interchange with a long haul carrier other than UP” for transportation of coal from the southern PRB to Independence. As the Board explained:

[A] shipper’s right to adequate service, reasonable rates, or any other statutory right (including access to an alternate through route) cannot be contracted away by an agreement between carriers. [citation omitted.] Thus, if a certain combination of carriers is providing inadequate service or is foreclosing the possibility of a more efficient route, the fact that they have an interchange commitment agreement does not limit the Board’s ability to order alternative service over the carriers’ lines or to require the carriers to open a new interchange with another carrier.

Id., at 3 (emphasis in original) (citing Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, Ex Parte No. 575 et al., Decision served Oct. 30, 2007, at 13, 15 n. 38.)

In the 2009 Decision, the Board identified three reasons for relief under Section 10705 in this case. First, “an abuse of market power” by UP: Independence “is served solely by UP/MNA today, and Entergy [and AECC] alleges that UP, in conjunction with MNA, has exploited that market power to foreclose competition.” Second, the alternative routing “may be feasible”. Third, “AECC alleges that the alternative routing is shorter than the route imposed by the UP/MNA agreement.” Id., at 7.

A rail carrier has no right to “defeat legitimate competitive efforts of other rail carriers and shippers by foreclosing more efficient service.” Id. Thus:

[I]f Entergy or AECC can demonstrate that, due to this interchange commitment, UP and MNA are providing inadequate service or foreclosing more efficient service over another carrier, [the Board] may direct that a new route be opened and order MNA to establish a common carrier rate for interchange with that other carrier.

Id. Accordingly, the Board ordered that Entergy may “amend its complaint . . . to seek relief in the form of a prescription of a through route under 49 U.S.C. 10705.” Entergy [and AECC] did so, and these proceedings followed.

The Board’s ruling in the 2009 Decision regarding what Entergy and AECC must show to obtain prescription of a through route from the southern PRB to Independence is law of the case, which continues to govern that issue in this subsequent stage of the same case. See AEP Texas North Co. v. BNSF Railway, STB Docket No. 41191 (Sub-No. 1), served Sept. 10, 2007 (2007 STB Lexis 524 *6).

Yet the Discussion and Conclusions in the 2011 Decision makes no reference to the Board’s 2009 ruling that established the standard that Entergy and AECC must meet to obtain prescription of the through route. Instead, the Board cited its Competitive Access Rule, 49 CFR § 1144.2 (a) (1), and an ICC decision, and asserted “that a showing of anticompetitive conduct” is required for “all requests for § 10705 relief”. 2011 Decision at 7. The Board then referred to its decision in Central Power & Light Co. v. Southern Pacific Transportation Co., 1 STB 1059 (1996) (“CP&L”), aff’d MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999), and said that CP&L “suggests” a “more relaxed standard than set forth in our regulations”, under which a through route could be prescribed if it was shown to be “better” or “more efficient” than the existing route.

CP&L is no mere “suggestion”, nor does it reflect a departure from “our regulations”. It is the Board’s authoritative interpretation of its regulations, expressly intended to provide guidance to captive shippers, in connection with a Board ruling that the remedy the shippers had sought was not the appropriate one. Similarly, the 2009 Decision expressly held that the right way for Entergy and AECC to seek relief under the circumstances they faced was a through route application under Section 10705.

Thus, the law of this case is established by the 2009 Decision: If Entergy or AECC demonstrate that UP and MNA are providing inadequate service or are foreclosing more efficient service

over another carrier, and the other requirements of the rule are met, the Board must direct that a new route be opened and order MNA to establish a common carrier rate for interchange with that other carrier. 2009 Decision at 7. As discussed above, that is exactly what AECC's evidence demonstrates.

The 2009 Decision does not require that Entergy and AECC demonstrate that the through route is more efficient than the current route by some particular percentage of round-trip miles, or some particular percentage of URCS costs, or some other specific deviation from any other metric. The Board's findings establish that the through route is more efficient than the UP/MNA route via Oklahoma, and the evidence shows that there are no factors other than UP's contractual control over MNA that prevent use of the more efficient route. That alone satisfies the standard for prescribing a through route established in the 2009 Decision. Moreover, as discussed in Part 1.A., above, the Board ignored AECC's evidence that the proposed through route would be significantly more efficient than the existing UP/MNA route.

The 2009 Decision also does not require that Entergy and AECC demonstrate that the through route will necessarily avoid all the service inadequacies experienced on the existing route. The 2009 Decision provides that a through route may be prescribed if Entergy or AECC demonstrate that UP and MNA are "providing inadequate service". UP/MNA service has repeatedly been inadequate. Entergy and AECC were not required to prove that UP's market power caused the bad service, nor that service over the through route would necessarily have remedied fully all of the service infirmities experienced from UP/MNA service. Anyone with imagination can come up with reasons why service on the hypothetical through route might have been unsatisfactory at times (as the Board's 2011 Decision does). But the only way to capture the benefits of competition is to establish the competing through route. The Board's approach here guarantees that those benefits will not be achieved. Furthermore, as

discussed in Part 1.B., above, the Board ignored AECC's evidence that the prescription of the proposed through route would probably significantly improve service to Independence.

The 2011 Decision speaks repeatedly of a supposed requirement that through-route applicants prove that the incumbent carriers are guilty of "competitive abuse". Although the Board has sometimes used that phrase as a kind of short-hand for conduct that may call for a remedy under the competitive access rules, this is the first case in which the Board has denied a through route application because the anticompetitive conduct of the incumbent wasn't "abusive" enough. Certainly, the 2009 Decision, the law of this case, did not impose any requirement that Entergy and AECC show the extreme "abuse" by UP and MNA connoted by the Board's references to "competitive abuse" in the 2011 Decision.

Inadequate rail service and inefficient routing practices can rapidly accrue costly economic impacts. AECC's evidence shows that the competitive harms caused by UP foreclosure of the BNSF/MNA route are the foreseeable result the conduct of a firm (in this case, UP) exercising market power. Nelson RVS at 9. Even UP did not dispute the magnitude of AECC's estimates showing substantial damage as a result of service problems. The Board's own analysis shows that UP's diversion of the Independence movement costs over \$11 million/year in incremental variable costs. 8/ Where such large adverse impacts arise due to the absence of competition, Section 10705 and related regulations provide a clear path for the Board to introduce remedial competition.

8/ 2011 Decision at 14. The Board's URCS workpapers include estimates of the variable costs of UP single-line service (as such service was provided prior to the creation of MNA). These estimates suggest that substantial additional costs were introduced by the conversion of the route from single-line to interline service, so that the total impact on variable costs of UP's diversion of the Independence movement is greater than the \$11 million/year estimate referenced by the Board.

Section 10705 says that the Board “may” prescribe a through route, and “shall” do so “when it considers it in the public interest”. 49 USC § 10705. The Board’s regulations substantially narrow the broad discretion delegated to the Board by Congress. Under 49 CFR § 1144.2 (a), the Board shall prescribe a through route if it determines that it is “necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101.” The “competition policies” of Section 10101 are:

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system . . . ;

* * *

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

* * *

(9) to encourage honest and efficient management of railroads;

* * *

(12) to prohibit predatory pricing and practices, to avoid undue concentration of market power, and to prohibit unlawful discrimination;

* * *

There’s not a word about “abuse”.

What the Board said in the 2009 Decision is that a through route would be prescribed if the applicants demonstrate that “the bottleneck railroad has exploited its market power by (1) providing inadequate service over its lines or (2) foreclosing more efficient service over another carrier’s line.”

2009 Decision at 7. Thus,

If Entergy or AECC can demonstrate that, due to this interchange commitment, UP and MNA are providing inadequate service or foreclosing more efficient service over another carrier, we may direct that a new route be opened and

order MNA to establish a common carrier rate for interchange with that other carrier.

Id. That is the only “competitive abuse” that Entergy and AECC must show, and they have done so.

By failing to follow its own 2009 ruling in this case, the Board has applied the law incorrectly and improperly denied the relief to which Entergy and AECC are entitled. As discussed in Part 1, above, AECC’s evidence shows that UP’s conduct satisfies the statutory standard for prescription of a through route.

3. The Board’s 2011 Decision Leaves MNA Vulnerable To Adverse Actions By UP Under The Lease

Although the 2011 Decision gives UP what it wants – denial of a through route from the southern PRB to Independence that could compete with the UP route – it leaves MNA vulnerable to adverse actions by UP to preclude MNA from competing with UP in the future. For example, the lease ostensibly gives UP the right to oust MNA as the destination carrier at Independence and serve Independence itself. AECC included in its request for prescription of a through route provisions to protect MNA against such adverse actions by UP. See Opening Argument of Arkansas Electric Cooperative Corporation at 2, 8-12; Rebuttal Argument of Arkansas Electric Cooperative Corporation at 2, 4-8, 13. In denying the through route, the Board also denied MNA this protection.

While the Board has denied the through route on first impression, it has also initiated a process (in Ex Parte 705) to review its application of the competitive access procedures, including through routes. Following the Ex Parte 705 proceedings, the Board may adopt changes in the its regulations regarding through routes (and other competitive access remedies) that liberalize the requirements for future through route applications. Thus, even if the Board allows the denial of the present application to stand (as the foregoing discussion shows it should not do), a new through route application involving MNA might be submitted for Independence in the future under less restrictive standards.

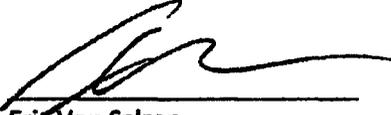
The Board should ensure that UP does not take steps in the interim that would alter the competitive access options available at Independence, particularly steps that would impede or remove MNA as a prospective participant in a through route. This would be analogous to the protections afforded by the Board to AEP Texas-North and Western Fuels to ensure their pending cases were not disadvantaged by the Board-initiated review of rate case procedures conducted in Ex Parte 657 (Sub-no. 1), Major Issues in Rail Rate Cases.

In this context, AECC reminds the Board that at the time of the MNA exemption the terms and conditions of the sale and lease which are involved in this case were kept secret or confidential and were known only to UP, MNA and the ICC. None of the customers being served on the line at the time were informed of the terms and conditions and therefore had absolutely no opportunity or ability to object to them. Accordingly, through whatever mechanism, it is essential that the Board protect MNA from adverse actions by UP that would prevent MNA from participating in a through route in the future. This protection should continue during the pendency of Ex Parte 705, any supplemental proceedings pertaining to implementation of the competitive access criteria, and for whatever further time period the Board may find to be in the public interest.

CONCLUSION

The 2011 Decision ignores the evidence and misapplies the law. It should be reconsidered and the relief requested should be granted.

Respectfully submitted,



Eric Von Salzen
McLeod, Watkinson & Miller
Suite 800
One Massachusetts Ave., NW
Washington, DC 20004-1109
(202) 842-2345

Michael A. Nelson
101 Main Street
Dalton, MA 01226
413-684-2044

Transportation Consultant

Counsel for Arkansas Electric Cooperative Corporation

Dated: April 4, 2011

WORKPAPER 1

GTM Per Train Cycle by Mine and Route

	UP Route	BNSF/MNA Through Route
North Antelope		
Loaded Miles	1314	1231
Empty Miles	1165	1240
Total Miles	2479	2471
Loaded GTM (millions)	25.367	23.764
Empty GTM (millions)	3.617	3.850
Total GTM (millions)	28.984	27.614
UP Route GTM/ Through Route GTM	1.050	---
401.23 x (UP Route GTM - Through Route GTM)	549.69 million	---

Cordero		
Loaded Miles	1349	1237
Empty Miles	1201	1246
Total Miles	2550	2483
Loaded GTM (millions)	26.042	23.880
Empty GTM (millions)	3.729	3.869
Total GTM (millions)	29.771	27.749
UP Route GTM/ Through Route GTM	1.073	

WORKPAPER 1

	UP Route	BNSF/MNA Through Route
401.23 x (UP Route GTM - Through Route GTM)	811.29 million	

Caballo Rojo		
Loaded Miles	1354	1233
Empty Miles	1205	1242
Total Miles	2559	2475
Loaded GTM (millions)	26.139	23.803
Empty GTM (millions)	3.742	3.856
Total GTM (millions)	29.881	27.659
UP Route GTM/ Through Route GTM	1.080	
401.23 x (UP Route GTM - Through Route GTM)	891.53 million	

Assumes:

cars per train = 135 (per Board URCS workpapers, line 201)

Shipment weight/car = 120 tons (per Board URCS workpapers)

Tare weight/car = 23 tons (calculated as 143 tons allowable gross weight less 120 tons shipment weight)

train cycles/year = (6,500,000 net tons/year)/(16,200 net tons/cycle) = 401.23

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing documents to be served electronically, on this 4th day of April 2011, on all persons on the Board's service list in Docket 42104.



Eric Von Salzen