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P-R-O-C-E-E-D-I-N-G-S

9:30 a.m.

CHAIRMAN ELLIOTT: Good morning,
everyone, welcome.

Today we will hear oral arguments
in the case of Entergy Arkansas and Entergy
Services v Union Pacific Railroad, and
Missouri and Northern Arkansas Railroad,
docket number 42104.

In an effort to move things along,
the Board Members will not be making opening
remarks this morning. I want to cover a few
procedural matters before we begin.

We have asked each party to make a
short statement of its argument, counsel
should be prepared to answer questions, from
the Board, at any time during the allotted
time.

We have read your Pleadings, and
there is no reason to repeat every Argument.
We have the following time allotments for
Counsel.

1 Complainants, Entergy Arkansas and
2 Entergy Services, have been allotted a total
3 of 20 minutes. They have been asked -- they
4 have asked to use 12 for opening, and reserved
5 eight minutes for rebuttal.

6 If you wish to make a change to
7 your reserved rebuttal time, please advise us
8 when you begin your opening presentation.

9 Intervenor Arkansas Electric
10 Cooperative has been allotted a total of ten
11 minutes. Arkansas Electric Cooperative has
12 asked to use seven minutes for opening, and
13 has asked to reserve 3 minutes for rebuttal.

14 Again, if you wish to make a
15 change to your reserved rebuttal time, please
16 advise us when you begin your opening
17 presentation.

18 Counsel for Defendants Union
19 Pacific, Missouri and Northern Arkansas
20 Railroad, and BNSF Railway will be allotted a
21 total of 30 minutes.

22 Before Defendants begin their

1 presentation please advise us how much time
2 counsel, for each defendant, will use of the
3 total allotted 30 minutes.

4 Any party making a PowerPoint
5 presentation, or using similar hard copy
6 aides, using materials previously placed in
7 the record, should have provided those
8 materials in hard copy, in 8 and a half by 11
9 size, to opposing counsel and the Board.

10 We have received no objection to
11 the materials proffered, we will have the
12 pages used today, and such presentations,
13 bound into the transcript of this proceeding.

14 Finally, I want to note that some
15 of the materials filed in this proceeding have
16 been designated as confidential. To provide
17 a full and complete argument in this case, it
18 may be necessary to touch upon these items
19 generally.

20 The Board will, however, make any
21 effort to avoid reference to specific data or
22 information.

1 Speakers, please note that the
2 timing lights are in front of me. You will
3 see a yellow light when you have one minute
4 remaining, and a red light when your time has
5 expired.

6 A yellow one minute light will be
7 accompanied by a single chime, and the red
8 light signifying that your time has expired,
9 will be accompanied by two chimes.

10 Please keep to the time you have
11 been allotted. When you see the red light,
12 and hear the double chime, please finish your
13 thought and take a seat.

14 In addition, just a reminder,
15 everyone please turn off your cell phones. We
16 will proceed counsel for Entergy Arkansas and
17 Entergy Services, please step up to the podium
18 and introduce yourself, and indicate if you
19 wish to change your time for rebuttal, and
20 then begin. Thank you.

21 MR. LOFTUS: Good morning,
22 Chairman Elliott, Vice Chairman Mulvey,

1 Commissioner Nottingham.

2 My name is Michael Loftus, I'm
3 appearing on behalf of Entergy. I would like
4 to note that there are three representatives
5 of Entergy here this morning, Hori Khan,
6 assistant General Counsel, Ryan Tushinski,
7 Solid Fuel Supply System Planning and
8 Operations Manager, and Stewart Barrett,
9 Director of Commercial Operations.

10 In the Board's Order -- I would
11 also like to note that I'm accompanied, at
12 counsel table, by Andy Kolesar, one of my
13 partners, and also Frank Pergolizzi is here.

14 In the Board's Order announcing
15 this hearing, you stated that the Board is
16 particularly interested in the parties' views
17 concerning the applicability of statutory
18 provisions bearing on through-routes, between
19 railroads, and how those provisions relate to
20 each other, and that is where we begin.

21 We are operating here, at the
22 Board's suggestion, in its June 2009 Decision,

1 under Section 10705 of 49USC.

2 10704A1 directs the Board to
3 prescribe a through-route when it considers it
4 desirable in the public interest.

5 Entergy submits that its evidence
6 demonstrates that it is desirable, in the
7 public interest, to prescribe a through-rate
8 for BNSF and MNA, interchanging at Lamar, in
9 particular.

10 Now, 10705A2 is the short haul
11 provision. It is not applicable on the facts
12 of this case, neither MNA nor BNSF, is being
13 short hauled.

14 In fact, MNA says a through-route
15 already exists through Lamar and that, and
16 this is a quote, Lamar is the most efficient
17 and least costly interchange location.

18 BNSF says it will cooperate to
19 establish a through-route through Lamar. So
20 neither of these two carriers are complaining
21 about interference with their routing
22 discretion, which 10705 is intended to

1 consider.

2 UP, in its arguments, and we have
3 in this case the unusual circumstance that the
4 principal evidentiary and argumentative
5 opposition comes from Union Pacific, not one
6 of the -- or both of the carriers that would
7 be involved in the through-route.

8 UP stresses that Entergy has not
9 demonstrated violations of competition
10 policies, or otherwise anti-competitive
11 actions.

12 And in doing so it relies,
13 extensively, on the DC Circuit's decision, in
14 Midchek. We have explained, at some length,
15 in our legal argument, in our rebuttal filing,
16 that the DC Circuit's rationale, in that case,
17 relied heavily on the permissive nature of the
18 Board's authority, under reciprocal switching
19 and terminal trackage rights provisions that
20 were at issue there.

21 The Board's authority, in
22 contrast, is here mandatory for through-route,

1 if desirable in the public interest, under
2 10705A1. And, indeed, in both Bottleneck one,
3 and in its June 29, 2009 decision in this
4 case, the Board noted that the requirements
5 for obtaining a through-route are less
6 rigorous than for obtaining reciprocal
7 switching, or terminal trackage rights.

8 At worst the standard that Entergy
9 must satisfy, here, would be that articulated
10 in the Board's June 2009 decision, and in
11 Bottleneck that, and I quote, The Board may
12 exercise its authority, under section 10705,
13 to order a carrier to open another route, if
14 a party demonstrates that the bottleneck
15 railroad has exploited its market power by,
16 one, providing inadequate service over its
17 lines or, two, for closing more efficient
18 service over another carrier's line.

19 And there is language, to the very
20 same effect at 1STB1068, in Bottleneck 1. We
21 submit that Entergy has demonstrated, on this
22 record, that UP exploited its market power,

1 both by providing inadequate service, and by
2 foreclosing more efficient service.

3 VICE CHAIRMAN MULVEY: Excuse me
4 one moment. You mentioned about providing
5 inadequate service. And your example of that
6 goes back to the 2005-2006 problems that UP
7 experienced in the bottom of the basin.

8 But didn't BNSF also experience
9 those same kinds of problems, in one of those
10 more Acts of God, than poor service, on the
11 part of UP, in your example, as your example
12 of poor surface?

13 MR. LOFTUS: Well, Vice Chairman
14 Mulvey, there are three periods during which
15 Entergy received extremely poor service,
16 involving very large volume shortfalls from
17 UP.

18 The first was '93 to '95, the
19 second one was '97 to '98, and the third was
20 2005, running up past 2006, really. And the
21 record, I would say, is still unclear as to
22 what the real cause of the problems in the

1 basin, beginning with the derailments in 2005,
2 was.

3 That is a contested issue, as you
4 know, from submissions in this case, and in
5 various other proceedings before the Board, it
6 is coal shipper's view that a lot of those
7 problems were caused by deferred maintenance,
8 and could have been avoided.

9 So, no, they do not -- we do not
10 accept them as an Act of God type event. Now,
11 was BNSF also affected? Yes, it was. But it
12 was not affected to the same extent.

13 And, more importantly, with
14 respect to the foreclosure aspect of it, BNSF
15 was not involved in preventing Entergy from
16 obtaining alternate service during those time
17 periods, from MNA and BNSF.

18 BNSF really never had the
19 opportunity to provide service, or to work
20 with Entergy, to set that up.

21 VICE CHAIRMAN MULVEY: A follow-up
22 question, and that is that, you know, when you

1 talk about lack of competition, you talk about
2 competitive power, normally that manifests
3 itself in some manner in the rate base.

4 Now, I know we can't talk about
5 what the rate is, because that was filed under
6 seal, but can you give us, at least, a range
7 or an estimate as to what kind of rate that
8 Entergy is paying now, under its contract with
9 UP?

10 Is it over 500, or 200 to 500, or
11 is it less than 180? Just something of a
12 range, without giving a specific number.

13 MR. LOFTUS: Well, without giving
14 you a range, I would say that the record does
15 reflect what the level of the rates is, and I
16 would say that the record also reflects how
17 that rate came to be where it is.

18 The record reflects that there
19 have been repeated litigations between Entergy
20 and the Union Pacific, regarding breaches of
21 that contract, and damages sustained by
22 Entergy as a result of those breaches.

1 And the very large volumes of coal
2 that were affected, and so on. So I think
3 what the record reflects is that there is this
4 contract, the rates are at the level shown on
5 the record, and they are at the level they
6 currently are, because of a series of
7 revisions, to the contractual arrangements, as
8 a result of settlements of these various
9 litigations.

10 VICE CHAIRMAN MULVEY: Thank you.

11 CHAIRMAN ELLIOTT: Do you, I noted
12 in UP's filing that they cite to a specific
13 RVC ratio, and I didn't see anything, in your
14 rebuttal, disputing that.

15 Do you dispute that RVC ratio? It
16 is on page 11 of their --

17 VICE CHAIRMAN MULVEY: Union
18 Pacific's Reply Evidence in Argument.

19 CHAIRMAN ELLIOTT: Yes.

20 VICE CHAIRMAN MULVEY: And it is
21 in brackets, so I'm not going to say it.

22 MR. LOFTUS: I'm not seeing it.

1 Could you give me a line?

2 CHAIRMAN ELLIOTT: It is section
3 4, and then if you go down one, two, three,
4 four down.

5 MR. LOFTUS: Did you say page 11?

6 VICE CHAIRMAN MULVEY: Page 11 of
7 Union Pacific's Reply.

8 MR. LOFTUS: 65?

9 VICE CHAIRMAN MULVEY: It is a
10 verified statement, I think of --

11 CHAIRMAN ELLIOTT: No, it is not.
12 That is, actually, in the argument.

13 MR. LOFTUS: Okay, I have it.

14 CHAIRMAN ELLIOTT: You have it,
15 great.

16 MR. LOFTUS: I cannot tell you
17 whether we would accept that number or not.

18 CHAIRMAN ELLIOTT: Okay, I just
19 saw it in theirs, and then I didn't see a
20 response. Of course I didn't read every
21 verified statement, so it is possible.

22 COMMISSIONER NOTTINGHAM: Dan, if

1 I could just follow-up?

2 CHAIRMAN ELLIOTT: Sure.

3 COMMISSIONER NOTTINGHAM: And I
4 certainly would support granting Counsel a
5 little bit extra time, since we just asked him
6 a question that required a little time to
7 search, and I appreciate that.

8 But that is the Chairman's
9 prerogative. But if I could just follow-up on
10 that, is it fair to say that this is not --
11 your case is not based on the premise that you
12 are currently being charged an unreasonably
13 high rate, is that fair?

14 MR. LOFTUS: That is fair.

15 COMMISSIONER NOTTINGHAM: Getting
16 back to the service concerns, I think we are -
17 - I certainly am very well aware of the
18 unfortunate service situation going back to
19 the 2005-2006 period, it was the time actually
20 I was coming to the Board, and came to the
21 Board.

22 And there was some correspondence,

1 and other indicators of concern from a number
2 of shippers. In fact, those concerns really
3 were a driving reason why the Board created
4 the Rail Energy Transportation Advisory
5 Committee.

6 I think we have come a long way in
7 improving lines of communication. We haven't
8 seen any type of widespread service disruption
9 of that sort since, and we hope not to.

10 But can you think of, Counsel, if
11 you were to advise your client, or a client,
12 experiencing arguably severe service problems,
13 what are the kind of range of alternative
14 petitions, and procedures a shipper can
15 pursue, or avail themselves of, here at the
16 Board?

17 MR. LOFTUS: Well, there are
18 procedures available for seeking emergency
19 service, and the -- there are also, where
20 there is contract service involved, there are
21 opportunities to try and enforce contract
22 service commitments.

1 And there are always questions, I
2 think, about the overlap of the Board's
3 jurisdiction, where it is contract service.
4 But, certainly, there are mechanisms
5 available, before the Board, in periods of
6 serious service problems, of seeking relief
7 from the Board.

8 And I think the record would
9 reflect that Entergy has done that, in some of
10 these periods.

11 COMMISSIONER NOTTINGHAM: Let's
12 explore that, because I think it is important,
13 because it is challenging for the Board to
14 revisit a service situation some years after
15 the fact.

16 To me it is less important whether
17 or not UP did a good job of doing preventive
18 maintenance on those tracks, or didn't do a
19 good job.

20 It is, really, what was the
21 reality in the ground, and then what did the
22 shipper ask of the Board, and was there a

1 directed service, and emergency service
2 petition filed.

3 I don't recall that, some of this
4 pre-dates my tenure at the Board. I want to
5 make sure we are clear on that.

6 Ideally if, in my view, if a
7 shipper is faced with severe service
8 disruptions, they avail themselves of all
9 those tools and processes, before the Board
10 sometime close in time to the actual problem,
11 not several years later, in the context of the
12 complex complaint raising several theories of
13 damages.

14 But can you help me understand,
15 did your client actually petition the Board
16 formally? I think I recall some
17 correspondence, but what is your recollection
18 on that point?

19 MR. LOFTUS: My recollection is
20 that in that instance Entergy did not formally
21 petition the Board for relief. In the UP
22 service crisis it did, it appeared before the

1 Board, and in the proceedings the Board held
2 in connection with that, and sought relief
3 from the Board.

4 And so as I say, at times it has,
5 and at other circumstances it did not. And if
6 you could, with the Chairman's permission, if
7 you could try to address the second prong of
8 what I believe I heard your argument to be,
9 that you also have an argument relating to the
10 efficiency component, the more efficient
11 nature, perhaps, of the alternative route, the
12 through-route that you are seeking here?

13 MR. LOFTUS: That is correct.

14 COMMISSIONER NOTTINGHAM: Could
15 you expand on that?

16 MR. LOFTUS: I would be happy to.
17 The route is shorter, the route -- and it is,
18 by our count, 121 miles, or 9.8 percent longer
19 over the UP MNA route.

20 The cost evidence we submitted
21 shows that the variable costs for BNSF and
22 MNA, to provide the service, would be 14

1 dollars and 24 cents a ton, versus 14 dollars
2 and 88 cents, for UP MNA, on the existing
3 route.

4 Which we calculate, after you take
5 into consideration the cost of the interchange
6 at Lamar, would generate about a 22 million
7 dollar service cost reduction to the carriers,
8 over the 2011-2020 time period we focused on.

9 VICE CHAIRMAN MULVEY: Normally
10 where are the cross ratios, that you are
11 quoting here, for the existing route, as well
12 as the third route, the shorter route, seem
13 fairly close.

14 And that doesn't take into account
15 what has been argued would be the necessary
16 upgrade cost if, indeed, you were to ship the
17 volumes you are shipping now, Independence on
18 UP, your contract expires, and you move all of
19 that onto the new route, that theoretically,
20 it is argued, would cause much more to be
21 invested in that route.

22 But given that they are so close

1 to begin with, is there any threshold that the
2 Board should be considering as to how great
3 the differential should be between the
4 existing route versus the preferred route?

5 Because, as you point out, these
6 numbers are not widely different. It is not
7 like we are talking about 22 dollars versus 12
8 dollars. We are talking 14 dollars and some
9 change, versus 14 dollars and a little more
10 change.

11 And given the extra cost that
12 could be associated with that, if you begin
13 shipping more than the amount you are allowed
14 to now, that could easily eradicate that.

15 Could you comment on that?

16 MR. LOFTUS: Well, the Board has
17 stated that, you know, it is really a question
18 of first impression, and that you will
19 consider all relevant factors in making this
20 decision, about whether it is more efficient
21 or not.

22 And we think that when you

1 consider all the relevant factors, that
2 includes what we call paper barrier, what you
3 call interchange commitment, and related
4 terms, and --

5 VICE CHAIRMAN MULVEY: I've used
6 that term, paper barrier, as well.

7 MR. LOFTUS: Thank you. And that
8 is a factor. We believe that the Board could
9 well find that it is in the public interest,
10 even if the costs were very close.

11 We also believe that when it comes
12 to the rates paid, given that the very
13 substantial damages that Entergy has suffered
14 when service was bad, that it could even be
15 possible to find it in the public interest, if
16 it costs a little bit more to move it over the
17 BNSF and MNA route, that it could still be
18 more efficient.

19 As providing protection against
20 that exposure, when UP service is inferior.

21 So --

22 VICE CHAIRMAN MULVEY: The Board's

1 decision, in a number of its decisions,
2 referred to the idea that although through-
3 route prescriptions be judged under a less
4 stringent standard, as you mentioned, than the
5 more intrusive remedies of total access
6 trackage rights, though still under the
7 Board's competitive access rules.

8 Now, the competitive access rules
9 don't lay out how much weight the Board should
10 apply to any of the factors it considers.

11 In your view, what should be the
12 most heavily weighted factors in the Board's
13 analysis of this kind of case? And are you
14 saying it is, basically, overall public policy
15 would outweigh cost decisions, or are there
16 cost decisions that must be taken into
17 consideration as well?

18 MR. LOFTUS: Well, the Board has
19 been very clear, in its statements, that if
20 there is a showing of inadequate service, or
21 foreclosure more efficient service, relief is
22 appropriate.

1 IT doesn't say relief is
2 appropriate if you've satisfied, and then run
3 through various factors referred to in the
4 regs, or anything of that nature. It doesn't.

5 It says, you show us one or two
6 that is appropriate for relief. And we
7 believe that we have satisfied those. Here,
8 in this case, where there is an interchange
9 commitment, a paper barrier, at issue, the
10 Board addressed that at page 3 of its June
11 decision.

12 And it says, an interchange
13 commitment is not going to prevent us from
14 granting a relief if we find it to be in
15 public interest.

16 And we believe that, in fact, that
17 is a factor that suggests it is in the public
18 interest to use the through-route authority to
19 addressed that issue, as well.

20 COMMISSIONER NOTTINGHAM: Mr.
21 Loftus, if I could explore, I guess, maybe the
22 bigger picture. I want to make sure I

1 understand the type of relief that your client
2 is seeking, and what it would take, in the way
3 of decision, from this Board, to perhaps
4 address those concerns and, frankly, satisfy
5 your client.

6 If I understand you correctly,
7 ultimately, at the end of the day, your client
8 is seeking at least more than one alternative
9 source for a reliable stream of coal from the
10 Powder River basin, that is competitively
11 priced.

12 As opposed to right now, you feel
13 like you are stuck with one transportation
14 provider. You would like access to that
15 second. You would like to be able to either
16 get a rate from BNSF and/or rate from UP and
17 then decide which one your client would like
18 to avail themselves of, or perhaps both.

19 Is that a fair summation of your
20 client's ultimate objective in this matter?

21 MR. LOFTUS: It is fair. I would
22 only quibble with one aspect. And that is

1 that the reliability of service is, also, a
2 very important element of it.

3 COMMISSIONER NOTTINGHAM: Fair
4 enough. With that in mind, I think we are all
5 generally familiar with the Powder River
6 Basin, and the fact that you've got the
7 Southern Powder River Basin that is served by
8 the joint line, with the two railroads on it.

9 And then you have the Northern
10 Powder River Basin lines, some of which are
11 solely served by the BNSF. Is there anything
12 about, and the record seems to reflect that by
13 and large your client has sought and received
14 coal from the Southern Powder River Basin.

15 Is there any reason why your
16 client can't use northern Powder River Basin
17 coal, anything about the makeup of the coal,
18 or the characteristics, that makes that not a
19 viable option?

20 MR. LOFTUS: I would not claim to
21 be fully up to speed on the ability of the
22 Entergy plants involved to utilize northern

1 Powder River Basin coal, you know, in terms of
2 how much of it they could use.

3 But I believe that they are
4 capable of using it. That would be my
5 supposition.

6 VICE CHAIRMAN MULVEY: Well,
7 couldn't they use BN and MNA exactly the route
8 you are prescribing? Presuming that they can
9 use the northern Powder River Basin coal, and
10 I believe the record indicated that in the
11 past, that they did.

12 That would give you that routing,
13 and you would simply switch from the southern
14 Powder River Basin coal, to northern Powder
15 River Basin coal, that could move by BN and
16 MNA over, basically, the route that you are
17 looking for us to prescribe. Isn't that true?

18 MR. LOFTUS: I would say that is
19 true, the Board said as much in its June of
20 '09 decision. We have asked the Board to
21 confirm that.

22 In this case we believe that we

1 would clearly be entitled to a through-route,
2 you know, without question on the Board
3 precedent, in those circumstances.

4 VICE CHAIRMAN MULVEY: You could
5 solve this problem without having the Board
6 decide this case in your favor. I mean, if we
7 decide the case on public policy basis, that
8 is one thing.

9 But even without doing that, if
10 you are dissatisfied with UP service, you
11 could simply change the contracts and begin
12 receiving Powder River Basin coal via
13 BNSF/MN&A, or BNSF/UP connection to the
14 Independence plant, is that correct?

15 MR. LOFTUS: It is, Vice Chairman
16 Mulvey. But the elephant in the room is the
17 lease, and its paper barrier provisions.
18 Entergy attacked it directly on the first
19 phase of these proceedings, as an unlawful
20 practice.

21 And the Board said no, we don't
22 think you are taking the right approach. We

1 think that you should proceed under 10705, and
2 we think that if you do, you will be able to
3 get the relief you are seeking.

4 Were Entergy to demand a northern
5 Powder River Basin joint rate, through-rate,
6 through-route, it would not be in a
7 circumstance where the Board was involved and
8 could rule, as we have asked the Board to rule
9 in this case.

10 That UP not be permitted to
11 interfere with the through-route we ask you to
12 order by utilizing these terms of UP and MNA
13 and a lease which would allow it to disrupt
14 that.

15 VICE CHAIRMAN MULVEY: Thank you.

16 MR. LOFTUS: Thank you.

17 CHAIRMAN ELLIOTT: Mr. Von Salzen?
18 I believe you have seven minutes, and then
19 three minutes on rebuttal.

20 MR. VON SALZEN: Yes, thank you
21 very much.

22 I'm Eric Von Salzen, representing

1 Arkansas Electric Cooperative, Corporation.

2 I have asked our transportation consultant,
3 Michael Nelson, to join me to respond to any
4 questions that the Board might have that
5 relate to the technical issues that I prefer
6 not to have to answer.

7 AECC endorses the arguments made
8 by Entergy, and I'm not going to repeat those
9 arguments. What I would like to, also
10 endorse, is something that MNA said in its
11 reply argument, and I assume will say this
12 morning.

13 And that is that the Board, quote,
14 should take all action necessary to preserve
15 the existing lease between the Union Pacific
16 Railroad and MNA, and we agree.

17 Indeed, it is a central aspect of
18 the relief that AECC and Entergy are seeking
19 here, that UP precluded from using contractual
20 provisions of the MNA lease to prevent the
21 establishment of an effective BNSF/MNA
22 through-route to Independence.

1 You have the power, indeed, you
2 have the duty to preserve the MNA lease if you
3 find that the BNSF/MNA through-route is,
4 quote, desirable in the public interest.

5 That is what 10705 says. There
6 are some special considerations that apply to
7 the short haul situation that everybody, I
8 think, has agreed we don't have a short-haul
9 situation in this case.

10 The statute is so clear that we
11 may ask ourselves why we have to be here,
12 asking the Board to prescribe a through-route
13 that both BNSF and MNA ought to be tickled
14 pink to establish voluntarily.

15 And, of course, the reason we have
16 to invoke Section 10705 is solely because of
17 Union Pacific, which would not be a
18 participant in the through-route, but a
19 competitor of it.

20 Union Pacific claims the
21 contractual power to prevent the establishment
22 of the through-route by imposing unbearable

1 penalties on MNA, if MNA participates in any
2 through-route that competes with UP's existing
3 route.

4 The evidence establishes, and I'm
5 not going to repeat Mr. Loftus' argument, that
6 we have satisfied both of the standards that
7 the Board outlined in its June 20th, 2009,
8 Decision.

9 The foreclosing of the more
10 efficient service, and the exploitation of
11 market power by providing inadequate service.
12 If we have established those things,
13 nevertheless, UP contends that the Board must
14 allow UP to exercise a contractual veto to
15 prevent the establishment of the through-
16 route.

17 UP argues, throughout this case,
18 that its lawyers were so clever, in the way
19 they drafted the MNA lease, that this Board is
20 left helpless to grant effectual relief under
21 Section 10705.

22 If the penalty rent provision --

1 CHAIRMAN ELLIOTT: Mr. Von Salzen

2 --

3 MR. VON SALZEN: Yes?

4 CHAIRMAN ELLIOTT: Going back to
5 the questions we were asking earlier about the
6 norther Powder River Basin, do you think that
7 that, if we followed, as we request, in a
8 rebuttal statement, saying that we clarify
9 whether or not that BNSF would have to quote
10 a rate down there.

11 And then I think what I'm hearing
12 says that that would be good, as long as UP
13 couldn't interfere with it, subsequently.

14 Exactly how would UP interfere
15 with it, if we did require, or said that that
16 was acceptable, for BNSF to quote the rate
17 down there for the northern Powder River?

18 MR. VON SALZEN: Well, I think as
19 Mr. Loftus said, you have to make it clear
20 that UP does not have the power to stop any
21 through-route by exercising the contractual
22 provisions that it is relying on.

1 I mean, you know, that is why we
2 are here today.

3 CHAIRMAN ELLIOTT: And you mean
4 the contractual provisions of the interchange
5 commitment?

6 MR. VON SALZEN: Of the
7 interchange commitment.

8 CHAIRMAN ELLIOTT: And you think
9 that -- so let's say, hypothetically, UP
10 determined that really that is not what this
11 contract was meant to do, to interfere with
12 this interchange commitment, in a situation
13 which is totally beyond MNA's control.

14 And if they said no, MNA, you can
15 continue, and you can handle this traffic
16 through without invoking the penalty
17 provisions, would that be acceptable at that
18 point?

19 MR. VON SALZEN: That is not what
20 UP has said in the record of this case. And
21 we are -- you said what you said in your June
22 2009 Decision.

1 What UP has said, as I understand
2 it, is you really shouldn't have gone that
3 far, that is not really at issue here, and you
4 should be reluctant to get into issues that
5 aren't before you.

6 What is before you is a specific
7 proposed through-route. I don't want to lose
8 track of the importance of the relief that
9 Entergy and AECC are seeking in this case, by
10 talking about some other alternative.

11 I do think that, in principle, if
12 the Board adheres to its 2009 ruling, which is
13 that if a through-route is established, it
14 overrides the contractual provisions on which
15 UP is relying and UP cannot use those
16 contractual provisions to defeat a prescribed
17 through-route, the one that we are talking
18 about in this case.

19 Presumably those same principles
20 would apply to a different through-route. We
21 are here on a specific through-route, and in
22 the 2009 decision you made it very clear, that

1 those contractual provisions, on which UP
2 relies, cannot be used to defeat a through-
3 route if this Board prescribes it.

4 So that is why we are here. You
5 invited us to come here, to exercise our
6 rights, under 10705, and to ask the Board to
7 exercise its power, indeed its duty, to
8 prescribe the through-route, because that is
9 the way you advised us that we could address
10 the problem of the paper barriers, penalty
11 rent provision --

12 VICE CHAIRMAN MULVEY: When you
13 say through-route, are you referring,
14 specifically, to a through-route that would be
15 MNA/BNSF, or what counts is the through-route
16 being the tracks that MNA commonly uses?

17 The contractual agreement between
18 MNA and UP allows for UP to take back the
19 track, or to void the contract with MNA, if
20 they deliver to the bottom of the basin.

21 Now, if indeed the Entergy wants
22 to use northern Powder River Basin coal, and

1 UP exercises its rights to take back that
2 trackage, wouldn't UP then have to interchange
3 with BNSF and you would still have the route,
4 but instead of MNA/BNSF it would be UP/BNSF,
5 and wouldn't they be required to quote a rate
6 for that service?

7 MR. VON SALZEN: The ability of
8 UP, under its contract, to cancel the lease in
9 order to prevent the establishment of the
10 through-route, which is one of the concerns we
11 have in the case that is now before you, is
12 one of the contract provisions that we believe
13 the Board has said you have the power to
14 override, if it is necessary, in order to
15 preserve a through-route that you have
16 established.

17 Exactly how that would work if
18 there were a different through-route than the
19 one we are talking about in this case, we'd
20 obviously have to examine, together, how that
21 would work.

22 VICE CHAIRMAN MULVEY: Well,

1 wouldn't the route, when I think of the route,
2 I'm thinking of the tracks themselves, instead
3 of MNA operating over those tracks, then UP
4 would be taking them back, and it would be UP
5 operating over those tracks.

6 You are defining, are you
7 distinguishing that as a different route?
8 Because it is UP rather than MNA?

9 MR. VON SALZEN: That is not what
10 we are talking about in this case. What we
11 are talking about is a BNSF/MNA through-route
12 presumably with an interchange at Lamar --

13 CHAIRMAN ELLIOTT: At Lamar --

14 CHAIRMAN ELLIOTT: -- and it
15 would, and UP could defeat that through-route
16 if you allow it to exercise the authorities
17 that it claims under its lease.

18 It claims authority, under the
19 terms of its lease, that would prevent you
20 from doing what section 10705, not only
21 authorizes you to do, it mandates you to do.

22 It says shall establish a through-

1 route. If you determine that it is desirable
2 in the public interest. If you, after this
3 hearing, go back and decide, yes, that is
4 desirable in the public interest, that there
5 be another route to this Independence Plant,
6 that is desirable in the public interest.

7 What UP has said in its papers,
8 and I assume will say to you now, and in a few
9 moments, is we can stop you. We have written
10 our contract in such a way, we can stop you
11 from doing it.

12 And that issue is going to come
13 up, hypothetically would come up, whatever the
14 route was. But what we have is the specific
15 route that is now before you, and the
16 arguments and the evidence that the parties
17 have presented with respect to that particular
18 route.

19 I don't want to get us distracted
20 from a specific route, and the specific
21 evidence that is before us, by worrying too
22 much about hypotheticals that would happen if

1 there were a different route, that we, in the
2 evidence, have not --

3 CHAIRMAN ELLIOTT: Mr. Von Salzen,
4 I worry that you may be overly dismissive of
5 a very seemingly real alternative that is
6 available here, that provides your client, and
7 your client's rate paying electric utility
8 customers, something that looks like very real
9 meaningful relief.

10 Basically, if I follow your line
11 of argument, I could describe it as follows,
12 that you are representing yourself as having
13 a client who is basically captive to one
14 railroad, for a certain type of coal that is
15 needed to keep your utilities running.

16 When, in fact, there is actually a
17 second railroad that is ready, that should be
18 by law, ready willing and able to ship very
19 similar coal, from a very similar part of the
20 world, northern Powder River Basin, to your
21 client, giving you two options to choose from
22 and, therefore, ending the captivity,

1 therefore start ending your clients problems.

2 So let me back up here. Are you
3 suggesting that currently, or even in the
4 past, a railroad can contract away its
5 statutory obligations to serve, if that is
6 what they try to do, in a paper barrier, or
7 any other type of contract?

8 MR. VON SALZEN: Absolutely not.
9 That is our whole point. They don't have the
10 power to exercise the provisions of the lease
11 that would prevent the effectiveness of the
12 through-route, if you prescribe it, as we have
13 requested.

14 COMMISSIONER NOTTINGHAM: So
15 whether it is the MNA that ultimately owns
16 the, what I will call the southern section of
17 track that leads to your client's facilities,
18 or is it UP, or another railroad in the
19 future?

20 Whoever it is, is going to have
21 the legal obligation to interchange with the
22 BNSF for any and all coal coming out of the

1 northern Powder River Basin, where BNSF is the
2 sole transportation provider.

3 MR. VON SALZEN: I don't -- I'm
4 really trying to keep away from the
5 hypothetical about the northern --

6 COMMISSIONER NOTTINGHAM: It is
7 not really a hypothetical, it is a very --

8 MR. VON SALZEN: It is a
9 hypothetical, because there is no evidence, in
10 this record, about coal transportation from
11 the northern Powder River Basin, there is no -
12 - I don't know.

13 I'm not an expert in public
14 utilities, or coal burning technology, or
15 whatever. What I do know is that right now
16 the Independence Plant uses souther Powder
17 River Basin coal.

18 There are, presumably, reasons
19 that it is using southern Powder River Basin
20 coal, rather than northern Powder River Basin
21 coal.

22 COMMISSIONER NOTTINGHAM: Counsel,

1 if I could just interject, as you just
2 interjected right in the middle of my
3 questioning. I understand you introduced
4 somebody who is here to answer technical
5 questions, because you said you would prefer
6 not to, and we respect that.

7 Would you like to consult with
8 your colleague so that we can find out whether
9 there is any reason why Northern Powder River
10 Basin coal would be unacceptable to your
11 client?

12 MR. VON SALZEN: I don't know if
13 Mr. Nelson can address that or not. I would
14 be more than happy to have you address that
15 question to him.

16 COMMISSIONER NOTTINGHAM: Mr.
17 Nelson, could you -- is there anything wrong
18 with Northern Powder River Basin coal?

19 MR. NELSON: My expertise does not
20 cover that issue, unfortunately.

21 COMMISSIONER NOTTINGHAM: Just so
22 I know, so I don't waste time or trouble you,

1 what is your expertise, why are you with us
2 this morning?

3 MR. NELSON: I submitted two
4 verified statements that address an assortment
5 of topics in this proceeding. But the issues
6 related to hypothetical consumption of
7 Northern Powder River Basin coal is not part
8 of my expertise, so it was not part of my
9 testimony.

10 COMMISSIONER NOTTINGHAM: You
11 don't, in the course of your work, you don't
12 advise Entergy, or similar utilities, about
13 where to source coal?

14 MR. NELSON: Not Northern Powder
15 River Basin versus Southern Powder River
16 Basin, no.

17 COMMISSIONER NOTTINGHAM: So is it
18 fair to say, to your knowledge, you don't have
19 any specific knowledge about whether or not
20 northern Powder River Basin coal can
21 adequately meet the needs of your client?

22 MR. NELSON: That is correct.

1 COMMISSIONER NOTTINGHAM:

2 Certainly if anybody else, before us today,
3 has technical expertise, that is -- more than
4 just a random hypothetical line of
5 questioning, it is very important, because we
6 have assertions being made, I believe, that
7 skirt the issue, or somehow insinuate that a
8 railroad can contract away its statutory
9 obligation to serve, to provide service.

10 And I just want to make real sure
11 that we don't allow that to go out unanswered,
12 uncorrected, if at all possible.

13 MR. VON SALZEN: You made that
14 very point absolutely clear in the June 2009
15 Decision, which is why we are here. Because
16 for the Southern Powder River Basin coal
17 movement, the question is whether, and I know
18 my time is up, so I'm just going to finish
19 this one sentence.

20 The question is whether UP can
21 prevent the effectiveness of a through-route,
22 prescribed by this Board, the Southern Powder

1 River Basin coal movement, by exercising the
2 authority that it has reserved to itself under
3 the lease.

4 And our argument, as set forth in
5 our brief, and as Mr. Loftus has said, on
6 behalf of Entergy, is that UP does not have
7 the authority to override this Board's power,
8 and this Board's duty under Section 10705.

9 VICE CHAIRMAN MULVEY: Would it be
10 fair to say that because there is such a large
11 coal reserve in the Powder River Basin, that
12 there is a North and a South Powder River
13 Basin, that that is a complicating factor, and
14 that the Board should ignore the existence of
15 the northern Powder River Basin, and just
16 focus on whether or not UP has the right to
17 preclude BNSF from serving with MNA, the
18 southern Powder River Basin coal to your
19 plant?

20 MR. VON SALZEN: I wouldn't quite
21 put it in the sense of ignoring. But I think
22 you have to deal with the record, and the

1 issue that has been presented to you by the
2 parties, under the guidance of this Board, in
3 the 2009 decision.

4 And that is what we have done.

5 And we ask the Board to consider the
6 application that the parties have presented to
7 you, and the evidence that the parties have
8 presented to you, that is now here.

9 VICE CHAIRMAN MULVEY: You moved
10 the coal out of the Powder River Basin,
11 southern part, under contract with the mines,
12 and then under contract with the railroads.

13 Are those contracts near? I know
14 it is in the record, but for argument's sake,
15 are those contracts near expiration, or have
16 those contracts been extended?

17 MR. VON SALZEN: I don't know, I
18 don't recall anything on the record about the
19 contracts with the mines.

20 The contract with UP, I think, the
21 record is clear, and I don't think this is
22 confidential, that it runs through mid 2015.

1 And that is, obviously, when that contract
2 expires, something is going to happen in terms
3 of renegotiations.

4 VICE CHAIRMAN MULVEY: Well the
5 mine contract, of course, is with the mines in
6 the Southern Powder River Basin, the mines are
7 not all owned by the same coal companies, I
8 mean, they are different mines.

9 MR. VON SALZEN: Right.

10 VICE CHAIRMAN MULVEY: So if you
11 got a contract with the Southern Powder River
12 Basin that extended to, say, to 2040 or 2050,
13 then the Northern Powder River Basin
14 alternatives would not be realistic, because
15 you have a contract with the southern mines.

16 Does your expert know how long
17 those contracts call for?

18 MR. NELSON: Mine contracts, no, I
19 do not.

20 MR. VON SALZEN: And I don't
21 recall there being anything in this record
22 about that.

1 VICE CHAIRMAN MULVEY: I don't
2 think there is, I wasn't sure. The record is
3 voluminous, and we have lots of it, but you
4 can't remember everything.

5 I thought that I read, some place
6 in the record, that at one point Entergy did
7 take coal from the Northern Powder River
8 Basin, and then later switched to the south.
9 But I'm not sure if that was in the record, or
10 not.

11 MR. VON SALZEN: I don't recall,
12 specifically.

13 VICE CHAIRMAN MULVEY: Okay, thank
14 you.

15 COMMISSIONER NOTTINGHAM: Mr. Von
16 Salzen, if I could, just to clarify. One of
17 the reasons that we have hearings, of course,
18 is to further develop the record.

19 One of the reasons we have a court
20 reporter with us keeping the record is that it
21 is important that everything that is said, and
22 explored, and questioned and answered, be part

1 of the ultimate record.

2 And so I recognize you may have a
3 favorite, a particular argument you are trying
4 to emphasize. But please don't try to argue
5 that the Board can't explore the full range of
6 the issues before us.

7 Especially when your own client, I
8 believe, brought this issue up, in argument
9 number 7, of the seven different arguments
10 that were raised in your client's filings,
11 raises the question of whether the Board may
12 require BNSF and MNA to quote a rate
13 pertaining to Northern Powder River Basin
14 coal.

15 So it is squarely before us thanks
16 to the, what I will call the good and capable
17 lawyering of the counsel in front of us. And
18 I think it is real important that we explore
19 that.

20 And I appreciate counsel for
21 getting it in the record, and putting it very
22 squarely before us.

1 MR. VON SALZEN: That is an
2 argument that Entergy made, AECC has not
3 specifically addressed that issue. But the
4 point that I was trying to make is that that
5 is not a reason to disregard the request, or
6 the establishment of a BNSF/MNA through-route,
7 via Lamar for Southern Powder River Basin
8 coal.

9 That is a separate issue, an
10 important issue, the Board in fact addressed
11 it in the 2009 Decision, I guess, in dictum.
12 But nevertheless you said it, and I think it
13 is true.

14 And I am certainly not suggesting
15 that we disregard it. But I'm saying it is a
16 separate issue from what is the primary
17 purpose of our being here, which is the
18 establishment of a through-route BNSF Lamar
19 MNA Independence for souther Powder River
20 Basin coal.

21 CHAIRMAN ELLIOTT: Thank you, Mr.
22 Van Salzen.

1 MR. VON SALZEN: Thank you all.

2 CHAIRMAN ELLIOTT: Mr. Rosenthal,
3 on behalf of Union Pacific Railroad. I see
4 that you have 13 minutes.

5 MR. ROSENTHAL: I do, and I have
6 slides. But if you have copies in front of
7 you, I don't think I will go through the
8 distraction of putting them up. I'm also not
9 sure I will get to very many of them.

10 Chairman Elliott, Vice Chairman
11 Mulvey, Mr. Nottingham, good morning. I'm
12 Michael Rosenthal and I'm appearing on behalf
13 of Union Pacific Railroad Company.

14 It is clear what Entergy and AECC
15 really want in this proceeding. They want a
16 Board Order allowing MNA to use UP's property,
17 without any obligation to pay rent, or
18 interchange traffic with UP.

19 Congress has given the Board only
20 limited authority to order one railroad to
21 open its property to another. And that
22 authority doesn't extend to cases under

1 Section 10705.

2 The Board recognized the limits on
3 its authority when it stated, in its June 2009
4 Decision, that if Entergy chose to pursue a
5 claim, under Section 10705, any relief would
6 be narrowly tailored.

7 It would simply require MNA to
8 interchange with a party other than UP. The
9 Board didn't promise Entergy that a claim
10 under 10705 would solve all of its problems.

11 The Board offered Entergy the
12 option of pursuing a claim, under 10705, if it
13 believed it would be useful. There were other
14 types of relief that were addressed, there was
15 the possibility of revoking the exemption and
16 returning the line to Union Pacific.

17 There was the possibility of rate
18 cases. The Board didn't promise that Entergy
19 could get everything it might want, under
20 10705.

21 And we think the law is clear, and
22 the Board is correct. But, ultimately, there

1 is no reason for the Board to address the
2 remedies, because the facts in this case don't
3 come close to supporting prescription of a
4 through-route, much less some sort of more
5 extreme relief.

6 The facts show that UP and MNA are
7 providing Entergy with excellent service, at
8 extremely low rates, using the current route.
9 If the Board could prescribe a through-route,
10 based on the facts in this record, there would
11 be, essentially, no stopping point.

12 You would be setting a precedent
13 that is contrary to Congress' intent, in
14 section 10705, a precedent that would lead to
15 inefficiency and higher costs, that would
16 ultimately show up in shipper's bills.

17 CHAIRMAN ELLIOTT: Mr. Rosenthal,
18 what about the route we were discussing
19 earlier, the northern route from the PRB
20 through BNSF? It is unclear, in UP's filings,
21 whether or not they object to that, or not.

22 Do you have any position on that?

1 MR. ROSENTHAL: Yes, I just want
2 to clarify UP's position on that.

3 CHAIRMAN ELLIOTT: Good, that is -
4 -

5 MR. ROSENTHAL: It is a valid
6 point that was raised by the other side, as
7 Commissioner Nottingham pointed out.

8 Union Pacific's point was, if
9 Entergy wants to source coal from the Northern
10 Powder River Basin , from a mine that Union
11 Pacific can't serve, Entergy is entitled to a
12 through-route that would allow it to receive
13 that coal.

14 What that through-route would be,
15 is a question. And it would, initially, be
16 resolved under the Board's bottleneck rules.
17 The rate carriers that might be involved,
18 would discuss a route, would propose a rate.

19 It might be a BN rate to Kansas
20 City, with an interchange to UP. Perhaps BN
21 would suggest an interchange at Lamar with
22 MNA, we don't think so, given the facts in

1 this case.

2 So, just to be perfectly clear, I
3 think Entergy would be entitled to a route.
4 What that particular route would be, what the
5 rates would be, what the service terms would
6 be, you know, that would be for another day.

7 That is initially for the
8 railroads, and if Entergy doesn't like the
9 result, they can go to the Board. Or if the
10 railroads don't agree on what the interchange
11 point is, that might be for the Board.

12 But it is a separate question, it
13 is a separate question. They would be
14 entitled to a through-route, what that route
15 is, what the rates are, is a separate
16 question.

17 VICE CHAIRMAN MULVEY: But you are
18 not suggesting that this particular case, as
19 it is being presented right now, is any sort
20 of a bottleneck case, as though the short-
21 hauling, be specific on this, because you are
22 already are leasing the route, the short-haul

1 part of it, to MNA.

2 So it is really the long haul part
3 of the route for UP, that would be at issue
4 here, as Entergy would shift from southern to
5 northern PRB mines, correct?

6 MR. ROSENTHAL: Well, I think it
7 depends, I just want to make sure that I
8 understand the question correctly. But it
9 depends on what type of relief we are talking
10 about here.

11 If we are talking about giving
12 Entergy what it wants, which is free use of
13 Union Pacific's lines, prohibiting Union
14 Pacific from charging rent to MNA, and
15 allowing an uncompensated BN/MNA route, I
16 think you have the effect of a short haul.

17 You would be taking away, from
18 Union Pacific, what its current route is,
19 which is essentially single line service from
20 the plant to the Powder River Basin, and
21 cutting it out entirely.

22 That is what Entergy wants to do,

1 and I think it is the functional equivalent to
2 a short haul. If the only question were,
3 could you prescribe a BN/MNA route, and deal
4 with other questions later, what is the rate,
5 what are the service terms, where are the
6 interchange points.

7 Then I think you would have a
8 question about what BN's route would be.
9 Maybe BN would want a different interchange
10 point, maybe it would think it could have a
11 longer haul.

12 That might be a case under Section
13 10705A2, a short haul case. If BM and MNA
14 don't object to the route, then I'm not sure
15 why you would have a case, but it would be
16 under Section A1.

17 VICE CHAIRMAN MULVEY: Or you can
18 take the route back from MNA if Entergy chose
19 to go with the northern Powder River Basin
20 coal, and then you could simply say, well you
21 want to carry it, that is in violation of our
22 contract.

1 We want to take the route back,
2 and then we will operate the route, and then
3 you will be interchanging with UP, with BNSF,
4 rather. Would that be the case?

5 If that were to happen you would
6 have that option.

7 MR. ROSENTHAL: If there were a
8 BNSF route from the Powder River Basin,
9 several things could happen. Again, BN could
10 strike a deal with MNA, and MNA could carry
11 the coal.

12 The interchange commitment, in the
13 lease, doesn't preclude a through-out. What
14 it says is that if MNA carries, or
15 interchanges more than a certain percentage of
16 coal, or any traffic on the line, with a
17 railroad other than Union Pacific, then it has
18 to pay rent.

19 It is not precluding MNA from
20 going out and working with BN, or working with
21 some other carrier to set a rate. It is just
22 that you either interchange traffic with Union

1 Pacific, or you pay rent for your use of Union
2 Pacific --

3 VICE CHAIRMAN MULVEY: Is that
4 rental rate comparable to the rates that UP
5 has with other short line railroads, where
6 there is not a, and I will use the word, paper
7 barrier in place?

8 MR. ROSENTHAL: I'm not sure there
9 would be a comparable situation, where Union
10 Pacific would be just renting out its line.

11 It is not really in the business
12 of renting out lines. I think the record
13 reflects, in this case, that the rent was set
14 in an effort to make sure that Union Pacific's
15 contribution, from the traffic on the line was
16 preserved.

17 Union Pacific didn't want to end
18 up in a worse position because it leased the
19 line. The point of the lease was to put Union
20 Pacific in a better position to serve the
21 shippers, and to continue to benefit from the
22 traffic on the line.

1 VICE CHAIRMAN MULVEY: Since
2 Staggers there have been several hundred short
3 line railroads created, and a goodly number of
4 those have been created by UP, and some of the
5 other surviving carriers, classified carriers.

6 And many of those contain
7 interchange commitments. But I must say that
8 many do not, especially since we began raising
9 this question about the public policy
10 implications of paper barriers.

11 We are getting almost all of them
12 coming to us now with a little line saying,
13 there is no interchange in this agreement.
14 Which, by the way, sort of runs counter to the
15 argument that was made by the short line
16 association, that no new short lines would be
17 created, unless these interchange commitments
18 existed.

19 Well, they are still being
20 created. So there is a universe out there,
21 and there are individual railroads that do and
22 do not have them.

1 And I was sort of wondering, is
2 there a difference in the prescribed rates
3 between what you actually charge where it
4 doesn't exist, and what you would charge, if
5 they were to violate the agreement?

6 MR. ROSENTHAL: Well, there are
7 different types of arrangements between Union
8 Pacific and short lines. In fact, there is a
9 different type of arrangement in this very
10 case.

11 MNA bought outright the middle
12 section of the line, the line between Bergman
13 and Liam. And there is no interchange
14 commitment with respect to the line.

15 MNA paid the fair value of the
16 line, it can interchange as much traffic from
17 shippers on that line, with any other
18 railroad, there is no barrier there, there is
19 no rent there, because it bought the line
20 outright.

21 The other portions of the line,
22 frankly, would have been too expensive for the

1 railroad to afford to buy it, because it had
2 these large coal plants.

3 At one end it had Entergy, and at
4 the other end it has Kansas City Power and
5 Light. So it is not that there would never be
6 any short line spinoffs, if you couldn't have
7 interchange commitments.

8 But you would probably find that
9 they would be very different. They would be
10 the smaller segment of the line, that the
11 short line can afford to buy outright, that it
12 can afford to buy without the interchange
13 commitment.

14 And, you know, you can talk about
15 what is going to happen going forward. And I
16 suspect that is what you are going to see.
17 You are not going to see the same types of
18 transactions.

19 Whether that is a good thing, or a
20 bad thing, the future will tell. But the
21 railroad system is where it is today, and it
22 has recovered to the position where it is

1 today, because there was a long time when
2 these type of interchange commitments were
3 allowed.

4 They were allowed before Union
5 Pacific entered into this agreement with MNA,
6 everybody knew what was going on, everybody
7 knew what the rules were.

8 Today it may be different, and the
9 short lines that are created in the future may
10 be different.

11 VICE CHAIRMAN MULVEY: Thank you.

12 COMMISSIONER NOTTINGHAM: Mr.
13 Rosenthal, are you arguing that, let's just
14 assume that in the lease between the UP and
15 the MNA there are incentive and disincentive
16 provisions of some type.

17 Sometimes people refer to those
18 disincentive provisions as penalty provisions.
19 Are you saying that UP can avail itself of a
20 penalty provision and get the benefit of that,
21 when all MNA seeks to do is honor its common
22 carrier obligation, its other statutory

1 obligations to receive traffic from the BNSF
2 that lawfully originates, for example, on the
3 northern Powder River Basin, where there is
4 only BNSF service?

5 MR. ROSENTHAL: Absolutely not.
6 There is not a penalty provision, in this
7 interchange commitment. And it is just wrong
8 to characterize it like that.

9 Union Pacific leased the line and
10 the agreement was you interchange the traffic
11 with Union Pacific, or you pay rent for use of
12 the line.

13 That doesn't strike me as
14 unreasonable. Union Pacific was not out there
15 trying to create competition with itself.
16 Union Pacific has no obligation to allow some
17 carrier free use of its property in
18 competition with Union Pacific.

19 So there is no penalty. You
20 interchange traffic, or you pay rent.

21 COMMISSIONER NOTTINGHAM: Or if UP
22 can avail itself of the termination provision,

1 right? And reassume direct ownership and
2 control over the MNA track?

3 MR. ROSENTHAL: That is true,
4 although it is interesting. There is a lot
5 being made of the fact that Union Pacific has
6 a right to go in and resume service to
7 Entergy.

8 And it may be a confidential
9 point, so I want to be very careful here. But
10 we discussed why that provision made its way
11 into the lease, and who insisted on it.

12 And it is worth going back into
13 the record and seeing who wanted Union Pacific
14 to be able to resume service to Entergy,
15 instead of MNA.

16 COMMISSIONER NOTTINGHAM: I don't
17 think, personally, I'm troubled by that
18 provision. Because what it says to me is
19 there is a going to be a rail carrier with a
20 legal obligation to serve, no matter what.

21 And if it is not the small, less
22 well capitalized carrier, it is going to be

1 the larger much more capitalized carrier, with
2 the same statutory obligation.

3 If UP stands in the shoe of the
4 MNA, and the BNSF calls and says we have a
5 service requirement to get northern Powder
6 River Basin coal, for example, down into the
7 Entergy plants, UP can't say no.

8 MR. ROSENTHAL: That is actually
9 right, Commissioner, that is absolutely right.

10 COMMISSIONER NOTTINGHAM: So
11 basically what you are saying is the Entergy
12 is, when it comes to accessing coal, from the
13 greater Powder River Basin, Entergy is not
14 captive, they actually have alternatives, but
15 for whatever reason, up until now, they have
16 opted not to avail themselves of all those
17 alternatives.

18 MR. ROSENTHAL: I just want to be
19 clear. Entergy, at its plant, has access to
20 one carrier. That is the situation before
21 Union Pacific leased its line, that is the
22 situation after Union Pacific leased its line.

1 Entergy does have access to other
2 sources of coal if they choose to contract
3 with northern Powder River Basin mines, and
4 BN. There will be a carrier that completes
5 the haul to the Entergy plant.

6 So it does have the sourcing
7 options that you are talking about.

8 VICE CHAIRMAN MULVEY: On that
9 issue, if UP were to take back the line, there
10 would be implications for UP as well. I mean,
11 when UP spun off the line, leased the line to
12 a class III operator, there are changes in
13 UP's employment, the labor, the unions it
14 deals with, etcetera.

15 So there is a benefit to UP when
16 it does this, because it does get out from
17 some of the contracts it has with labor.

18 I have a question here, though,
19 and you made an efficiency presentation about
20 what it is going to cost to upgrade these
21 tracks if, indeed, you were going to carry
22 more of this.

1 And during this you made some sort
2 of adjustments to reflect what you would
3 believe would be the cost characteristics of
4 the movement.

5 But aren't these precisely the
6 adjustments to IRCs that the Board prohibited
7 a couple of years ago, when we made six
8 changes to our large rate cases, we precluded
9 making these specific cost adjustments.

10 And aren't you, should the Board
11 allow you to do that now, when we have said we
12 are not going to allow this any more, in the
13 large rate cases, recognizing this is not a
14 large rate case.

15 MR. ROSENTHAL: And I think that
16 is a very important point, that this isn't a
17 large rate case. When the Board addressed
18 this, in ex parte 657 and 646, the concern
19 was that the variable costing portion of those
20 rate cases which, in theory, shouldn't matter
21 that much, they should really be stand-alone
22 cost cases, was consuming inordinate resources

1 in relation to the purpose they were serving.

2 Here, where you are talking about
3 10705, if we were really talking about what
4 the specific efficiency factors are, the
5 efficiency is a key issue.

6 And to just blindly ignore the
7 fact that Union Pacific uses a very different
8 route, on the reverse movement, than it uses
9 on a loaded movement, you are not doing what
10 the statute, and what your competitive access
11 rules, you know, explicitly require you to do.

12 Which is to make a careful
13 assessment of efficiency. So, yes, in the
14 stand-alone cost world, I wasn't a fan, but I
15 can understand the reason why you wouldn't
16 spend the resources to do that.

17 In this type of case efficiency
18 should matter. Anti-competitive conduct
19 should matter more, but efficiency should
20 matter. And so to say that you are limited to
21 system average IRCs just doesn't make sense in
22 this particular context.

1 VICE CHAIRMAN MULVEY: Thank you.

2 CHAIRMAN ELLIOTT: Thank you very
3 much, Mr. Rosenthal. If you would like to
4 close, that is fine.

5 MR. ROSENTHAL: I mean, I just
6 wanted to briefly say that, you know, you can
7 look at the evidence on efficiency. I don't
8 think we have to get to some of these more
9 complicated questions, because we are not --
10 there is not evidence of anti-competitive
11 conduct.

12 There is not evidence that the
13 routes are significantly inefficient, that
14 Entergy has been harmed by inattentiveness to
15 its service. There have been service
16 disruptions, not inattentiveness.

17 The simple fact is that Entergy's
18 and AAEC's complaints really don't have
19 anything to do with the lease, or the
20 interchange commitment. They all have to do
21 with the fact that the plant was built at a
22 location served by only one railroad.

1 And if they think the lease and
2 the interchange commitments were causing a
3 problem, the answer is to pursue relief, and
4 to try to get the Board to revoke the
5 exemption, and return the line to UP.

6 But they can't get the relief they
7 want under Section 10705. And they are really
8 not entitled to it, based on their showing of
9 efficiencies, and based on the lack of
10 competitive harm.

11 CHAIRMAN ELLIOTT: Thank you, Mr.
12 Rosenthal. Next we will have Mr. Steel, from
13 BNSF. I see that you have four minutes.

14 MR. STEEL: Thank you, good
15 morning Chairman Elliott, Vice Chairman
16 Mulvey, and Commissioner Nottingham.

17 My name is Adrian Steel, and I'm
18 pleased to be here today representing BNSF.
19 I will try to take less than my four minutes,
20 in the interest of time.

21 We believe that a Board Order
22 directed to BNSF, requiring it to participate

1 in a BNSF/MNA routing, is neither appropriate
2 nor necessary.

3 First it is not appropriate, in
4 our view, since no showing has been made that
5 we, we being BNSF, have engaged in any kind of
6 anticompetitive conduct, or are precluding a
7 more feasible route, or providing poor
8 service.

9 We are just not in that mix. So
10 we believe that that precludes a 10705 Order
11 against us.

12 Second, we have committed, in
13 writing, as you all have seen, on our March
14 4th letter to Mr. Tushinski, who is here
15 today, that we are willing to participate and
16 negotiate a routing on commercially reasonable
17 terms, meaning ability to recover our costs,
18 and a reasonable return.

19 And there is no reason to require
20 us to participate in a particular routing.
21 That said, we are willing to cooperate in that
22 regard.

1 If, in fact, we don't do that,
2 then t is the time for Entergy and the AECC,
3 to complain that we are not participating. So
4 it is really premature to order us.

5 We fully intend to live by our
6 obligations to quote a route and if the Board
7 does enter any kind of Order, requiring us to
8 do something, we believe it should make it
9 clear that we cannot be required to expend
10 funds, to upgrade the line at the interchange
11 at Lamar, which we have heard anywhere from 2,
12 to 4, to eight million dollars to upgrade,
13 there are different views among the parties.

14 Absent a commitment by Entergy to
15 use the route, so that we can recover our
16 costs. That was about what I intended to say,
17 but let me talk about the Northern Powder
18 River Basin coal for a second.

19 We endorse what Mr. Rosenthal
20 said, that if Entergy were to choose to take
21 coal from a mine in the Northern Powder River
22 Basin, we have an obligation to offer a

1 reasonable route for that coal.

2 It is not necessarily through
3 Lamar, it could Kansas City, it could be at
4 Diaz, because we have some trackage rights
5 that we could use on UP's lines, turning south
6 at Hoxie.

7 But we, again, would be compelled,
8 under the ICTA, to offer reasonable routing,
9 and reasonable rates. If Entergy didn't like
10 those, they could come to the Board at that
11 time, and express any concerns, and we could
12 have it out in discussions.

13 Hopefully we would be able to
14 negotiate something. So that is pretty much
15 what we have to say. I'm open to any
16 questions you all may have.

17 CHAIRMAN ELLIOTT: I had a
18 question about your remarks, with respect to
19 service. Service is the big issue here, that
20 Complainants raise.

21 And they give three different time
22 periods, or three different things occurred,

1 that caused UP to have service difficulties.

2 And if you could maybe tell us if
3 you believe BNSF wouldn't have faced similar
4 difficulties during those periods, or if they
5 would have been able to provide better
6 service, specifically with respect to the
7 derailments on the joint line, I think, are
8 one of the examples.

9 My thought would be that both of
10 the carriers would have difficulty making good
11 service during that time period. And I was
12 just wondering if you thought the same way.

13 And, also, your thoughts on the
14 other two periods that they raised.

15 MR. STEEL: I actually have
16 knowledge on the earlier two periods, the
17 service crisis, because BNSF was very active
18 in the service crisis, as you know.

19 CHAIRMAN ELLIOTT: Sure.

20 MR. STEEL: And, obviously, that
21 did not involve us. We were affected by it,
22 in the sense that UP's congestion caused our

1 trains to be slowed up.

2 And the Board, as you know, spent
3 a year, a year and a half, trying to sort that
4 out with everyone's help. And some people may
5 not view it as help, not when expressing their
6 positions during the time.

7 I really can't comment on the
8 2005-2006 period. I mean, just standing here,
9 because it is not an area that I was involved
10 in. So, I mean, I don't know if --

11 CHAIRMAN ELLIOTT: Are you saying
12 that BNSF would have provided better service
13 during the UP/SP period would have been able
14 to?

15 MR. STEEL: Well --

16 CHAIRMAN ELLIOTT: I mean, would
17 they have been affected by --

18 MR. STEEL: First I will say yes.
19 I think I will go with yes as a right answer.

20 CHAIRMAN ELLIOTT: I'm sure Mr.
21 Rose appreciates that.

22 MR. STEEL: We were -- my

1 hesitation is that we were affected by UP's
2 congestions. And so unless you know the
3 specific route that you are talking about, you
4 sort of don't know whether or not a route from
5 the Powder River Basin down to Arkansas would
6 have been a problem. I just don't know what
7 that was.

8 VICE CHAIRMAN MULVEY: You also
9 had your own washouts, bridges out, etcetera.
10 So things happened on your line as well, that
11 could affect the quality of service that
12 Entergy, or any other utility might receive at
13 any moment in time.

14 MR. STEEL: Right, standard type
15 things.

16 VICE CHAIRMAN MULVEY: Well, the
17 question really was, I think, was UP's
18 situation something that was more typical to
19 UP, or is it more ongoing, has it been more
20 systemic with UP than with the other large
21 glass spun railroads?

22 And you don't have to answer that,

1 but I think that is the basis of the --

2 MR. STEEL: Probably a question
3 that don't answer.

4 VICE CHAIRMAN MULVEY: Let me ask
5 you another question, though. Entergy has not
6 requested BNSF to quote a rate yet, has it?
7 You haven't refused to --

8 MR. STEEL: Where, northern or --

9 VICE CHAIRMAN MULVEY: Yes, any
10 rate from the Powder River Basin to the plant
11 at Independence. They have not come to you
12 and say would you quote us a rate, have they?

13 MR. STEEL: Entergy requested a
14 rate from us from the southern Powder River
15 Basin.

16 VICE CHAIRMAN MULVEY: On the
17 southern Powder River Basin.

18 MR. STEEL: And we wrote back, in
19 the March 4th letter, actually there was a
20 preceding letter as well --

21 VICE CHAIRMAN MULVEY: Right.

22 MR. STEEL: -- saying that we are

1 unable to give you a rate until we know which
2 route you are going to pick. And then they
3 picked the route.

4 And then until you tell us more
5 information about the interchange that is
6 expected, various operational materials that
7 we didn't know, and how are we going to
8 recover our costs that we have to expend.

9 VICE CHAIRMAN MULVEY: But you
10 allow the costs, couldn't you construct a rate
11 which took into account whatever costs, given
12 the volumes that are going to move,
13 eventually?

14 Or you could have some sort of
15 step and say, well if this is the volume, this
16 would be the cost, and this would be the rate.
17 If this is the volume, this would be the cost
18 and this would be the rate, and for the
19 various alternative routes.

20 I mean, you could have offered a
21 range of estimates as to what it would cost,
22 and then let Entergy make a decision.

1 Did, in fact, BNSF give a range of
2 what the rates would be under the various
3 loadings, and the various routes that could be
4 taken?

5 MR. STEEL: We did not, because we
6 asked them, in our March 4th letter, for
7 information. Instead of getting a response to
8 that, we got served with the second amended
9 complaint.

10 But we were prepared, and said we
11 were willing to do it. We did, in fact, give
12 them a quote from the southern Powder River
13 Basin to the White Bluff Station, when they
14 asked for that.

15 So we are, clearly, willing to
16 give them quotations. But in this case we
17 wanted some information, and they did not give
18 us the information.

19 So, I mean, we were, in our view,
20 unable to proceed to quote a rate. We are
21 willing to quote a rate, if we have the
22 information, we just didn't have it.

1 VICE CHAIRMAN MULVEY: The one
2 thing, it gets back to some theoretic issues.
3 And that is that there is always a concern
4 that the situation that UP has with respect to
5 Entergy, is one that BN might also have, with
6 respect to other plants, where in the absence
7 of an interchange agreement, somebody else
8 could come in and offer competitive service,
9 and force out the class III carrier, that you
10 have the agreement with.

11 Is there any, I know that it is a
12 very tough one to answer. But if, indeed,
13 that is the case, what could the Board do if
14 it was to begin to be concerned that the other
15 class I carriers aren't participating because
16 of fear of retribution, and that, therefore,
17 you have a tit for tat kind of, again,
18 theoretic solution.

19 MR. STEEL: It seems to me that if
20 the Board were to determine, let's do a third
21 party and take it out of particular railroads
22 right now, that the criteria for 10705 route

1 were met, whatever you decide those are,
2 efficiencies, service, that is met, you can
3 order the route, all right?

4 Then whatever there might be
5 impediments to that route becoming effective,
6 such as an interchange commitment provision,
7 or a rate issue, as you all said in your June
8 2009 Decision, you can deal with those when
9 the time comes.

10 So that is, sort of, how I think
11 we would view it, if you can order the narrow
12 relief, that you called it, to order the
13 route, so be it.

14 The alternate carrier would offer
15 a rate. If that rate incorporated the
16 interchange commitment penalties, well then
17 you would deal with that, at that time.

18 But that seems to be a way of
19 getting where you want to at least address the
20 issues. I think the 10705 relief is just
21 ordering the narrow relief of the route.

22 COMMISSIONER NOTTINGHAM: If I

1 could interject on that point? It is
2 important that the parties here today and,
3 also, potential future parties, and people who
4 are stakeholders and are, perhaps, viewing or
5 observing this proceeding, understand that if
6 a railroad is overly reluctant to provide a
7 tariff rate, when they are required to, or if
8 a railroad believes that a shipper is being
9 unreasonable in the type of request it is
10 making, a quick phone call to the Board's rail
11 consumer staff, can very often resolve that at
12 no cost, and very quickly.

13 And I just need to put a plug in
14 for that, because too often we get to the
15 stage, in these types of complex litigation,
16 it turns out that nobody has ever actually
17 availed themselves of that.

18 And it is just unfortunate
19 because, but that is what too often, frankly,
20 I do hear shippers in particular saying that
21 they just can't get a rate quote from a
22 railroad, and they always find that

1 outstanding.

2 Because if that ever happens,
3 contact the STB right away, and we will get to
4 the bottom of it.

5 MR. STEEL: Thank you,
6 Commissioner. We will pass it --

7 COMMISSIONER NOTTINGHAM: Same
8 goes to a railroad, if you believe a shipper
9 is being unreasonable in the type of request
10 that it is making --

11 MR. STEEL: I will make sure to
12 pass it on to BNSF and trust, that BNSF, if
13 given the information, is willing to quote
14 rates to compete for business, because we are
15 in business to carry traffic.

16 So we will fulfill our obligations
17 at all times.

18 COMMISSIONER NOTTINGHAM: Thank
19 you.

20 CHAIRMAN ELLIOTT: Thank you, Mr.
21 Steel. Now Mr. Gitomer for Missouri and
22 Northern Arkansas Railroad. And I see that

1 you have 13 minutes.

2 MR. GITOMER: Good morning. My
3 name is Lou Gitomer, I'm representing Missouri
4 and Northern Arkansas Railroad, the only class
5 III railroad involved in this proceeding, this
6 morning.

7 There are four points that I would
8 like to make. First is that if the relief is
9 granted, there must be something done to
10 preserve the lease for the Missouri and
11 Northern Arkansas.

12 Without the lease, the Missouri and
13 Northern Arkansas Railroad will most likely
14 cease to exist, causing harm to the shippers
15 on the line, the employees of the Missouri and
16 Northern Arkansas Railroad, not to mention
17 further harm to other short lines and,
18 probably, the reduction in investment, in
19 short lines in the future.

20 Secondly, the record is completely
21 deficient on the parts of Entergy and Arkansas
22 Electric, as far as meeting their burdens

1 under both section 10705 of the statute, and
2 section 1144 of the regulations.

3 They have not proven that the
4 public interest warrants granting the relief
5 that they seek.

6 Third, a great deal of the record,
7 in this proceeding, has been constructed based
8 on theories, and hypotheticals, of what will
9 be more efficient railroad, including
10 substantial costs that will be borne by the
11 Missouri and Northern Arkansas, whether those
12 costs are at the low end of around six million
13 dollars proposed by Entergy, or above 60
14 million dollars, as the Union Pacific
15 proposes.

16 The Board should consider none of
17 those. The Board should look at the situation
18 that, as Commissioner Nottingham said, look at
19 the reality on the ground, today.

20 Compare the route that is there,
21 today, over Missouri and Northern Arkansas and
22 the potential interchange with Burlingon

1 Northern, compared to what up and Missouri and
2 Northern Arkansas provide today.

3 Finally, you've asked for a
4 discussion of the statutory provisions that
5 relate to prescribing a through-route. There
6 are a number in the statute.

7 But the only one that applies to
8 this proceeding is section 10705. The
9 alternate service of 11123 does not apply
10 here. Entergy is seeking permanent relief,
11 not temporary relief.

12 The relief available under the
13 merger procedures is not available here, you
14 don't have a merger. I don't think we are
15 going to go back and reopen the Union Pacific,
16 Missouri Pacific, Western Pacific merger.

17 CHAIRMAN ELLIOTT: Mr. Gitomer, I
18 have a quick question, it just struck me. And
19 in this instance we have talked about quoting
20 a rate, BNSF from the Northern Powder River
21 Basin, and conceivably that could occur
22 without this proceeding or not, that Entergy

1 could ask them to quote the rate, and come
2 down.

3 And, in fact, BNSF seems to say
4 that they would be glad to do that. Have you
5 talked, you know, to UP about what would
6 happen to MNA, at that point, if without even
7 our influence, something like that did occur?

8 MR. GITOMER: There have been
9 discussions with Union Pacific, and the senior
10 management. Missouri and Northern Arkansas
11 believes that if the interchange commitment,
12 the additional rental payments in the lease,
13 were modified by the Board, that the Union
14 Pacific would terminate the lease.

15 VICE CHAIRMAN MULVEY: If that
16 were to happen, you suggest that MNA could no
17 longer exist as a company. But doesn't MNA
18 serve other shippers and don't you have other
19 revenues from other shippers, besides the
20 Entergy revenues?

21 MR. GITOMER: If the lease were
22 terminated MNA would go from a railroad of

1 over 500 miles to one of a little bit over 100
2 miles.

3 It would lose one of its largest
4 shippers, Entergy, over the line. It would be
5 left with, probably, about 3,000 car loads a
6 year over about a 100 mile, maybe 3,000 car
7 loads, over the 100 and some mile segment in
8 the middle of a line that it owns.

9 Which really does not originate,
10 or terminate very much traffic. So could MNA
11 survive? It is possible, it depends how Union
12 Pacific will continue to route the Entergy
13 traffic, what arrangements MNA could make,
14 whether additional traffic would be generated
15 on that line.

16 But the overall feeling is that
17 MNA would not be the railroad it is today. It
18 certainly would not have the employees it has
19 today, and it would not be able to serve all
20 of the shippers it has today.

21 In addition it wouldn't provide
22 the five percent competition to Union Pacific

1 that it provides today.

2 VICE CHAIRMAN MULVEY: But a part
3 of your route that is being talked about, as
4 the alternative route, you would -- and a
5 route that you have today, you still own part
6 of that track, right?

7 MR. GITOMER: Yes.

8 VICE CHAIRMAN MULVEY: And I
9 wouldn't say it is a bottleneck, but certainly
10 you would have a certain amount of negotiating
11 power for the charges that you would require
12 that either BN or UP would have to pay you, to
13 use that part of your track, right?

14 MR. GITOMER: That is assuming
15 that UP would want to use that track.

16 VICE CHAIRMAN MULVEY: And they
17 have an alternative of going around you, and
18 going out the other way?

19 MR. GITOMER: Right, and that is
20 how Union Pacific delivers the traffic to the
21 Entergy plant today.

22 VICE CHAIRMAN MULVEY: Okay, thank

1 you.

2 CHAIRMAN ELLIOTT: Could I go back
3 to -- just to clarify my point, what you are
4 saying is that if the Board orders that there
5 be a through-route do you think that UP would
6 cancel it in that situation?

7 But let's say, hypothetically the
8 Board says no. And then BNSF comes along, the
9 next week, and quotes this great rate to
10 Entergy, and Entergy starts running their
11 traffic down through the Northern Powder River
12 Basin.

13 Do you think -- so with no Board
14 influence, whatsoever, would you think that UP
15 would cancel the contract, then, or cancel the
16 lease with MNA?

17 MR. GITOMER: Let's step back and
18 look at what is involved in this proceeding,
19 realizing that you are talking about a
20 hypothetical.

21 CHAIRMAN ELLIOTT: Sure.

22 MR. GITOMER: About a year ago we

1 were here, arguing over two motions that MNA
2 filed, to dismiss the proceeding, and to make
3 the complaint more definite.

4 And one of the items we raised was
5 the description of the origins which were to
6 be brought before the Board, and the Board
7 denied the request that the record be made
8 more definite.

9 Because the origins that were
10 discussed were, you know, Powder River Basin.
11 And as we know, from today, the Powder River
12 Basin is the South Powder River Basin, and the
13 North Powder River Basin.

14 As we also know, in this
15 proceeding, Entergy filed a second amended
16 complaint, in which it named BNSF as a
17 specific Defendant, and it named Lamar and
18 Aurora as specific interchange points.

19 It did not mention the Northern
20 Powder River Basin as a potential origin
21 point. So I think we are talking hypothetical
22 here, and that that relief is not available in

1 this proceeding.

2 With that preface, if Entergy were
3 to come to Missouri or Northern Arkansas, and
4 provide the information needed to quote a rate
5 over Missouri Northern Arkansas, Missouri
6 Northern Arkansas would quote an appropriate
7 rate.

8 COMMISSIONER NOTTINGHAM: Mr.
9 Gitomer, just to follow-up on that point.
10 Let's say that Entergy works out an
11 arrangement with BNSF for the delivery of
12 Northern Powder River Basin coal, for which
13 BNSF is the sole transportation provider at
14 the source, at the Northern Powder River
15 Basin.

16 And they reach an agreement on
17 that, and then BNSF contacts your client and
18 says, we have to come through, we have
19 determined that routing it over your tracks is
20 the best way to go, let's work out a
21 reasonable arrangement here.

22 Your client is not entitled at

1 that point to say, no BNSF we can't work with
2 you, because we have sort of contracted away
3 our service obligations in a contract with the
4 UP.

5 So help me understand, in other
6 words, MNA wouldn't be just, of its own free
7 will, choosing to market itself to do business
8 with another carrier, other than UP, it would
9 be required to, you know, based on no fault of
10 MNA, and how could some type of, whether you
11 call it rent, or penalty provision, obviously
12 all the railroads involved need to be
13 compensated reasonably.

14 But to put a railroad out of
15 business because they are honoring its
16 obligations, help me understand how that would
17 play out.

18 MR. GITOMER: If MNA received
19 sufficient information to quote a rate, where
20 BNSF was operating out of the Northern Powder
21 River Basin, MNA would quote an appropriate
22 remunerative rate, to itself, be included in

1 the rate that BNSF was proposing to Entergy.

2 COMMISSIONER NOTTINGHAM: And if
3 UP had some problem with that, and threatened
4 to do something negative to your client, your
5 client would have rights before this Board,
6 wouldn't it, amongst other rights?

7 If that action was tantamount to
8 interfering with your clients' ability to meet
9 its obligations.

10 MR. GITOMER: Under the contract
11 Missouri Northern Arkansas is required to pay
12 Union Pacific additional rental, if it
13 interchanges different percentages with
14 carriers other than Union Pacific.

15 VICE CHAIRMAN MULVEY: Does the
16 contract override the common carrier
17 obligation? Can you contract away the common
18 carrier obligation?

19 MR. GITOMER: I haven't said that
20 we would contract away the common carrier
21 obligation. I said that we would quote an
22 appropriate rate.

1 COMMISSIONER NOTTINGHAM: And
2 would the rent, that you just referenced,
3 would you anticipate that that rent would be
4 so high so as to put your client, ultimately,
5 out of business?

6 MR. GITOMER: It depends on what
7 the rate is that we quote, it depends on the
8 volume of traffic. It depends whether
9 Missouri Northern Arkansas, and Union Pacific,
10 saw fit to negotiate a modification to the
11 contract.

12 There are a lot of variables
13 involved, and we have not reached the point of
14 being able to decide those variables. Again,
15 we are talking about a hypothetical here.

16 CHAIRMAN ELLIOTT: And that rate
17 that you are referring to, that you would
18 quote, would that include some allotment for
19 the rental payments?

20 MR. GITOMER: I don't know, that
21 decision hasn't been made by the marketing
22 people at Missouri Northern Arkansas yet.

1 They haven't been asked that question, so we
2 can't answer it.

3 But it would be an appropriate
4 rate for Missouri Northern Arkansas to be
5 compensated for the service it provides, and
6 to pay the rent that it would have to pay to
7 Union Pacific, I'm sure.

8 VICE CHAIRMAN MULVEY: It would
9 also include the cost of any upgrades
10 necessary to accommodate the increased flow of
11 traffic that would also be to the rate.

12 So if you had to make investments,
13 in the yards, and traffic, and --

14 MR. GITOMER: I'm not sure that we
15 would want to do that in a common carrier
16 rate. Remember, Missouri Northern Arkansas is
17 a class III railroad. Revenues may be around
18 25 million dollars a year.

19 And we are being asked to make
20 investments of, at a minimum, six million,
21 maybe up to sixty million dollars. And we
22 want to rely on a shipper to continue to ship

1 over us for a period long enough for us to
2 recover those costs.

3 VICE CHAIRMAN MULVEY: You would
4 need some guarantees of traffic, as well as a
5 time frame, and all of that, right?

6 MR. GITOMER: We would probably
7 need more than a guarantee of traffic, we
8 would probably need a substantial upfront
9 payment to cover those costs.

10 Again, we are just talking about
11 estimates made by Entergy, and Union Pacific,
12 in litigation. When we get out in the ground,
13 and really have to make those improvements,
14 that is the cost that we are going to be
15 looking for.

16 We are not looking for
17 hypotheticals here, we are looking for
18 something to actually preserve the railroad.

19 VICE CHAIRMAN MULVEY: Thank you.

20 COMMISSIONER NOTTINGHAM: Mr.
21 Gitomer, if I understand correctly, under the
22 hypothetical about coal coming from the

1 Northern Powder River Basin, your client would
2 have an obligation to provide that service,
3 and of course would need to charge a
4 reasonable rate that covers your cost plus a
5 reasonable return.

6 If that actually plays out to be,
7 to look unreasonable to the ultimate receiver,
8 the shipper, Entergy in this case, an avenue
9 for relief there, of course, would be a rate
10 case proceeding.

11 And I would assume, in a rate
12 proceeding a defense to alleged unreasonable
13 rate would not be it is unreasonable because
14 of a contract that two railroads entered into
15 to escalate costs.

16 You would have to actually get it
17 and look at all of the elements of rate
18 reasonableness.

19 MR. GITOMER: There may be other
20 defenses in that type of a case. There may be
21 intramodal competition, because remember,
22 Union Pacific can exercise trackage rights on

1 10 days' notice, to directly serve the Entergy
2 facility at Independence.

3 So you might have two railroads
4 serving that facility, in which case the Board
5 would be divested of jurisdiction over a rate
6 complaint.

7 COMMISSIONER NOTTINGHAM: That
8 raises the issue I touched on earlier, of
9 whether we have a situation of real captivity
10 here or not. It is an interesting point.

11 MR. GITOMER: I think if you came
12 to the point where you have a BNSF Missouri
13 Northern Arkansas route serving Entergy, and
14 you also have a Union Pacific route serving
15 Entergy, you probably have a very clear case
16 of intramodal competition.

17 COMMISSIONER NOTTINGHAM: Thank
18 you.

19 CHAIRMAN ELLIOTT: Thank you, Mr.
20 Gitomer, I appreciate it.

21 MR. GITOMER: Thank you.

22 CHAIRMAN ELLIOTT: Now we will

1 hear, again, from Mr. Loftus. It appears that
2 you have -- we are very kind, we know you ran
3 over the last time. I will allow you the full
4 eight minutes.

5 MR. LOFTUS: Thank you very much,
6 Mr. Chairman, I appreciate that.

7 I would like to go back to a few
8 points that were touched upon with opposing
9 counsel. There was the talk about the --
10 there were several questions about the
11 Northern Powder River Basin coal.

12 And how that would work. And I
13 think that, as a result of the questioning,
14 and the responses, it is clear that MNA, in
15 quoting a rate for that, either separately or
16 jointly with BNSF, would want, as counsel put
17 it, a remunerative rate, which covered their
18 operating costs, which covered the penalty
19 rentals under the lease agreement to Union
20 Pacific.

21 Which this Board recognized, in
22 its earlier decision, would be a prohibitive

1 cost for that route. If you go back and look
2 at the Board's June decision, based upon what
3 you had seen, you said that those rentals
4 would constitute a prohibitive cost for that
5 alternative.

6 The -- I wanted to say, in
7 response to Vice Chairman Mulvey's question
8 about the mines, and the contracts, I don't
9 believe that there is specific detail, in the
10 record, about that.

11 But you know that, you know, these
12 types of contracts are cyclical, that they run
13 for a certain period, they expire, new
14 contracts are entered into, and so on.

15 But it is certainly a factor, when
16 you are talking about shifting large volumes
17 of coal, from the southern Powder River Basin,
18 to the northern Powder River Basin, that you
19 would have to do that in concert with the
20 expiration of contracts, and so on.

21 COMMISSIONER NOTTINGHAM: Mr.
22 Loftus, if I could just interject there?

1 Isn't it a fairly common contract feature, I
2 won't get into specific contracts that may or
3 may not be before us now, but to have the
4 shipper retain some right to begin taking some
5 coal from different sources?

6 In other words, your client could
7 probably start receiving coal from other
8 sources now. I won't get into any contract
9 issues.

10 And then when the time comes for a
11 new contract negotiating they can expand upon
12 that?

13 MR. LOFTUS: Well, I think what
14 you may be referring to is, it is frequently
15 utility practice to have some of their coal
16 requirements committed under long term
17 contracts.

18 And some of them sort of reserve
19 for short term, or spot purchases. And if
20 that is what you are referring to, yes, I
21 would say that is likely the case.

22 COMMISSIONER NOTTINGHAM: Thanks.

1 CHAIRMAN ELLIOTT: Mr. Loftus, I
2 noted that the Counsel for the railroads, BNSF
3 and MNA both stated that they would be willing
4 to quote rates, they weren't saying exactly
5 which route would be used, I would assume the
6 most efficient one.

7 But if those statements, which we
8 take very seriously are, in fact, correct how
9 would you respond to your request for a
10 through-rate? It seems like they kind of have
11 offered up on a platter here.

12 MR. LOFTUS: Well, we have
13 understood, as the Board indicated in the June
14 '09 Decision, that Entergy is entitled to a
15 through rate, in a through route, to move
16 Northern Powder River Basin coal to the
17 Independence station.

18 And, you know, I think you heard
19 from BNSF, they might want to do that with UP,
20 they might want to try and interchange off
21 trackage rights, and so on.

22 I don't know how all that would

1 shake out, whether it would wind up being BNSF
2 and MNA, or BNSF and UP, or what have you.

3 But as I said, earlier, in this
4 proceeding we are here because we need this
5 Board's help with the paper barrier provisions
6 of this lease.

7 We can't get that by going to BN
8 and MNA, because if we do that, they give us
9 a joint rate, MNA is going to build in the
10 rental payments that it is going to have to
11 make to UP, if it moves that traffic.

12 They are going to put that in
13 their rate, they have to. I mean, as a
14 matter of dollars and cents they have to, so
15 they will.

16 And what is that going to do? It
17 is going to drive that rate up to a level this
18 Board has already found is prohibitive.

19 So you basically cost that
20 alternative out of the picture. The lease
21 that you are looking at, in this record, is an
22 exercise in brinksmanship.

1 They pushed it as close to the
2 line as they could. And then they said, in
3 section 15F, oh by the way, if anybody says we
4 can't enforce these penalty rental provisions,
5 we, UP, get to terminate the lease.

6 And so they tried to protect their
7 brinksmanship in the event they got called on
8 it. Well, you know, as a matter of public
9 policy that sort of thing ought to be void as
10 against public policy.

11 CHAIRMAN ELLIOTT: We are about to
12 the end, and then let's say they do go that
13 end, they issue, into the rate, the lease
14 payments. And then you come in and challenge
15 them, and hypothetically the Board says, the
16 rate is too high.

17 MNA, in the end goes out of
18 business, and UP takes over because the
19 contract doesn't work any more. Would UP,
20 then, be required to serve you through that
21 route?

22 MR. LOFTUS: Well, the problem I

1 have with this scenario you have just
2 described, is the point that MNA counsel made
3 about market dominance as an issue in that
4 sort of a rate case challenge.

5 So what you have is a situation
6 where the penalty rental provision forces a
7 commercially impracticable, unaffordable cost
8 prohibitive option out.

9 And so --

10 CHAIRMAN ELLIOTT: I see what you
11 are saying.

12 VICE CHAIRMAN MULVEY: You would
13 get to a position where there was no market
14 dominance because, quote unquote, two
15 carriers. And then, if UP exercised its rights
16 to take back the railroad, take it back to one
17 carrier again.

18 But at that point, your only
19 option would be to bring a rate case if,
20 indeed, the rate was over 180 percent of
21 variable cost, correct?

22 I have another question along the

1 same -- well, not quite along the same lines.
2 But this gets to the whole way, which is the
3 approach of these cases.

4 In your rebuttal you argue that
5 neither section 10705, nor the Board's
6 competitive access rules, under 1144, should
7 be interpreted to require Entergy to show that
8 UP has committed some type of anticompetitive
9 abuse.

10 That should not be one of our
11 considerations. But don't the competitive
12 access rules, which require some sort of
13 anticompetitive showing, don't those broadly
14 apply under all cases, under section 1705?

15 MR. LOFTUS: By the terms they do.
16 I think that the Board has indicated that it
17 is going to -- and I have a quotation here to
18 that effect, but I don't have it in front of
19 me.

20 That it is going to look at a
21 broad range of factors in terms of this
22 anticompetitive effects, then. And I think

1 that in the language I quoted, when I first
2 stood up, the Board has said, both in
3 bottleneck 1, and in its June '09 Decision, if
4 you show us a failure to perform service, if
5 you show us a foreclosure of a more efficient
6 alternative, you are entitled to relief.

7 It doesn't say you have to show us
8 that, and then you must show us some
9 anticompetitive conduct. It does not say
10 that.

11 And I think, as a practical
12 matter, the Board has interpreted its own
13 regs, as not requiring that sort of detailed
14 showing on that element.

15 VICE CHAIRMAN MULVEY: So you are
16 saying, then, when you have a situation as you
17 claim we have here, that the public interest
18 standard should be the primary standard in
19 resolving this case, regardless of whether or
20 not there are any violations of the
21 competitive access rules?

22 MR. LOFTUS: Absolutely. May I

1 make one last point?

2 CHAIRMAN ELLIOTT: Sure, please
3 close.

4 MR. LOFTUS: It goes to the
5 questions raised about whether BNSF was in a
6 better position to serve in 2005-2006, than UP
7 was. There is something in the record, that
8 I think is instructive on that.

9 You had these derailments that
10 occurred. Both carriers declared force
11 majeure. BNSF ended its force majeure after
12 a couple of months.

13 UP ran that force majeure,
14 maintained that it continued to be in effect,
15 relieving it of its contract obligations for
16 many, many months.

17 In fact, we have in the record,
18 for 40 percent of the period, from 2005
19 through 2008, UP said it had force majeure
20 protection, relieving it of its contract
21 obligations.

22 So BN two months, UP many months

1 as a result of the same circumstance.

2 COMMISSIONER NOTTINGHAM: Mr.
3 Loftus, before you leave us, could I ask you
4 to explore, maybe in a little more detail,
5 your argument about, if I heard you correctly,
6 you are basically saying to the Board that we
7 should void this lease arrangement between the
8 UP and the MNA, because for a number of
9 reasons, including the fact that there is this
10 termination clause.

11 I guess I'm just having trouble
12 with that because, in all types of contractual
13 arrangements, it is very often quite
14 reasonable, and efficient, to make it really
15 easy for either party to get out of the
16 arrangement, no questions asked.

17 And what is the problem? In other
18 words, if that were to play out, and the
19 situation reverts to the status quo ante, the
20 way it was earlier in time, and your client is
21 doing business solely with the UP, and there
22 is no longer an MNA railroad, what is so --

1 where is the harm to your client? I guess
2 that is what I'm saying.

3 MR. LOFTUS: Well, the Board has,
4 before it, a lease that we believe is
5 anticompetitive, whatever legitimate purpose
6 it had, to protect UP's position, at the time
7 it entered into the lease, we have submitted
8 evidence that the financial interests to be
9 protected, as of the time the lease was
10 entered, has been protected.

11 As the course has run, as the
12 lease has run now some 18 years, they have
13 essentially been made whole, in evidentiary
14 presentation we made, in the first phase of
15 this proceeding, as to what they legitimately
16 could have protected through that interchange
17 commitment.

18 So it has done its job and now it
19 is simply serving to foreclose other options.
20 What we are asking the Board to do, is to
21 order a through route.

22 And in addition to that to say

1 that traffic, moving over that through route,
2 will not be counted for purposes of the rental
3 provision of the UP/MNA lease.

4 We want you to render that
5 ineffective, with regard to traffic moving
6 under the through route. And then we ask that
7 you preclude UP from terminating the lease,
8 under that separate provision of the lease.

9 And, you know, it is -- the
10 provisions we are asking you to render
11 ineffective, are orders we believe are
12 appropriate to protect the integrity of the
13 through route you author, and to deprive, of
14 effect, contractual provisions that are
15 against public policy.

16 And we have already argued, and
17 would continue to insist, an unreasonable
18 practice.

19 COMMISSIONER NOTTINGHAM: So where
20 is the harm to your client if the UP reverts
21 to being the complete owner and operator of
22 that line?

1 Your client is still served, in
2 this case by a major class I, you still have
3 all your rights and remedies. Just help me
4 understand the harm.

5 MR. LOFTUS: Well, first of all
6 Entergy is not seeking the demise of the MNA,
7 you know, that is something that Entergy has
8 no interest in bringing about.

9 Entergy full well expects, if we
10 got what we are asking for, in this case, what
11 would happen? Entergy would go, it would
12 negotiate a contract with BNSF, and MNA, to
13 provide them the types of assurances they need
14 about volumes that would move over the lines,
15 about financing of upgrading that is needed on
16 the line, or might be needed as additional
17 volumes come on line.

18 And would have an effective
19 alternative route. That would not be possible
20 under the scenario you described, where we are
21 simply back with the UP, as a sole carrier.

22 But that is, you know, this is a

1 situation UP is the one who decided to go out
2 and lease that line to get the benefits
3 available by doing that, namely, you know,
4 union considerations and so on.

5 And they did, and they have had
6 those benefits all these years. Now, they
7 can't complain that, you know, you continue to
8 observe the existence of this route over the
9 MNA, we don't believe, legitimately.

10 VICE CHAIRMAN MULVEY: Some have
11 argued that the interchange you have given us,
12 per se, are not really the problem here.

13 But as you seem to suggest, the
14 problem really is the fact that these
15 agreements go on in perpetuity. That there is
16 some calculation that could be made to asses
17 what the value of that agreement, what the
18 benefits to UP would be, over some period of
19 time by having all the traffic guaranteed to
20 it.

21 And at that point you could
22 calculate how that compensates for the

1 difference in the value that UP is charging
2 MNA and the value that it would have received
3 if it continued to carry the traffic, or the
4 value of the traffic being delivered to it.

5 And so would you suggest that if
6 the in perpetuity part of the interchange
7 agreements that is most problematic, as
8 opposed to the agreement themselves, have this
9 benefit to the class III carriers, that they
10 are able to acquire trackage rights, and
11 traffic, that they would otherwise not be able
12 to afford?

13 MR. LOFTUS: I would certainly
14 agree with you that, that is a major element
15 of the problem. And it is not just in
16 perpetuity. As you know, under this lease, it
17 is 20 years I believe, but then can be --

18 VICE CHAIRMAN MULVEY: It can be
19 renewed.

20 MR. LOFTUS: Right, multiple
21 times. And, yes, I would agree with you.

22 VICE CHAIRMAN MULVEY: Thank you.

1 CHAIRMAN ELLIOTT: Thank you very
2 much. And Mr. Von Salzen, it looks like you
3 are batting clean up. I have three minutes.

4 MR. VON SALZEN: Thank you very
5 much. Let me just add to what Mr. Loftus has
6 just said on the question of harm, what is the
7 harm.

8 The question is not compare the
9 situation if UP exercises its purported power
10 to terminate this lease, with the situation
11 that existed 20 years ago, before the lease.

12 The question is this, if this
13 Board prescribes a through route, a BNSF/MNA
14 through route, as we are requesting, that
15 means that the Independence Plant now has two
16 routes.

17 That is the situation that this
18 Board would have created. If UP then
19 exercises its purported power to terminate the
20 lease, we are back to one route.

21 There is the competitive harm. UP
22 would have exercised the power under, the

1 purported power, under that lease, to
2 eliminate a competitive option that this Board
3 would have created, if you agree with the
4 evidence that we have presented.

5 Let me just, secondly, point out,
6 this is just fact. We talk about the amount
7 of rent, what we call the penalty rent, under
8 this lease.

9 Let's remember how that was set,
10 and why it was set. It was set to equal the
11 gross income that UP would have received from
12 operating that line.

13 Not net income, not contribution,
14 gross income. And it was intended, as a
15 penalty in the sense it is intended not to be
16 something that UP would ever collect.

17 It is intended to prevent MNA from
18 cooperating with a competitor to compete
19 against UP. That is UP's own -- that is UP's
20 own purpose in doing that.

21 Now, so it is not a question of
22 somebody asking for the right to use UP's

1 property without compensating them.

2 What we are asking you to do is to
3 have the right to work with MNA, which has the
4 right to use that property. We are asking
5 this Board to override a penalty provision
6 that is intended to prevent you from
7 exercising your authority under section 1005,
8 to create an effective through route.

9 VICE CHAIRMAN MULVEY: One of the
10 problems is that the Board's policies, ever
11 since Staggers, the problem that the railroads
12 faced, a long time ago, was this policy of
13 enforced competition.

14 And we had far, far too many
15 railroads, far too many route miles, etcetera.
16 And this needed to be rationalized, and
17 railroads be given an opportunity to earn
18 their cost of capital.

19 And that, of course, would mean
20 that there had to be some precluding of some
21 of the competitive actions, some of what is
22 placed on competition.

1 The Board has had this bottleneck
2 decisions and, in fact, the early decisions on
3 paper barriers, saying railroads, you do have
4 the right to do this, because they needed it
5 in order to earn, say supernormal profits on
6 certain traffic, while other competitive
7 traffic sometimes can be carried at just about
8 variable cost.

9 Well, what about that? This is
10 something that is necessary for the class I
11 railroads to do, to have these kind of
12 restrictions if they are, indeed, going to be
13 able to exploit lease rates, keep the rates
14 high, and have some control of their future,
15 in some markets where they face intermodal,
16 intramodal competition in others.

17 MR. VON SALZEN: You have, you the
18 Board, have tried to balance the purported
19 need for the railroads to be able to exercise
20 a certain amount of market power versus the
21 objective of the Staggers Act to replace the
22 heavy hand of regulation with the presence of

1 competition.

2 Your competitive access rules
3 provide for competitive remedies under limited
4 circumstances. And we believe that in this
5 case our evidence satisfies the requirements
6 of those rules.

7 VICE CHAIRMAN MULVEY: But those
8 rules do require a showing of harm, don't
9 they?

10 MR. VON SALZEN: And we have shown
11 the harm in the specific terms that you
12 identified in the December 2009 Opinion, that
13 -- and let me just quote this language,
14 because it is important.

15 The Board may exercise its
16 authority under Section 10705, to order a
17 carrier to open another route, if a party
18 demonstrates that the bottleneck railroad has
19 exploited its market power by, one, providing
20 inadequate service over its lines, or
21 foreclosing more efficient service over
22 another carrier's lines.

1 Either one of those is
2 satisfactory. And I know that we have talked
3 a lot about both of those criteria. I believe
4 that the evidence is overwhelming that we have
5 satisfied the showing on both of those
6 requirements.

7 Obviously I'm not going to be able
8 to, I'm already out of time, but I'm trying to
9 answer your question.

10 We have complied with the
11 requirements of the competitive access rules
12 in our evidence. Just as Mr. Loftus
13 mentioned, it is true that under the statute
14 that we are dealing with here, unlike the
15 statutes that deal with reciprocal switching,
16 and terminal trackage rights, the language of
17 this statute is mandatory.

18 That if you find that the proposed
19 through route is desirable, in the public
20 interest, you shall order the through route.
21 There is a substantial legal question as to
22 whether, under the through route provisions,

1 your competitive access rules even should be
2 applied.

3 But we have treated them as
4 applying, and we have satisfied them. We have
5 shown that UP has abused its market power by
6 routing this traffic a circuitous route.

7 We have also shown that -- not
8 that BNSF is a better railroad, and wears a
9 white hat compared to UP. As far as railroad
10 customers are concerned, they all wear black
11 hats.

12 But they all act in their self-
13 interest. The difference is not that BNSF has
14 fewer service problems than UP, although in
15 some instances that happens to be true.

16 It is that UP doesn't have any
17 competition with this service and, therefore,
18 it lacks an incentive to solve the service
19 problems, when they arise, as rapidly as
20 possible.

21 And that evidence stands unrefuted
22 in this route.

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VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN ELLIOTT: Thank you, Mr. Van Salzen, and thank you everyone for your excellent presentations, and thank you for the staff for getting us ready for this hearing, and we will take this matter under advisement and the hearing of the Board is now adjourned. Thank you.

(Whereupon, at 11:34 a.m., the above-entitled matter was concluded.)

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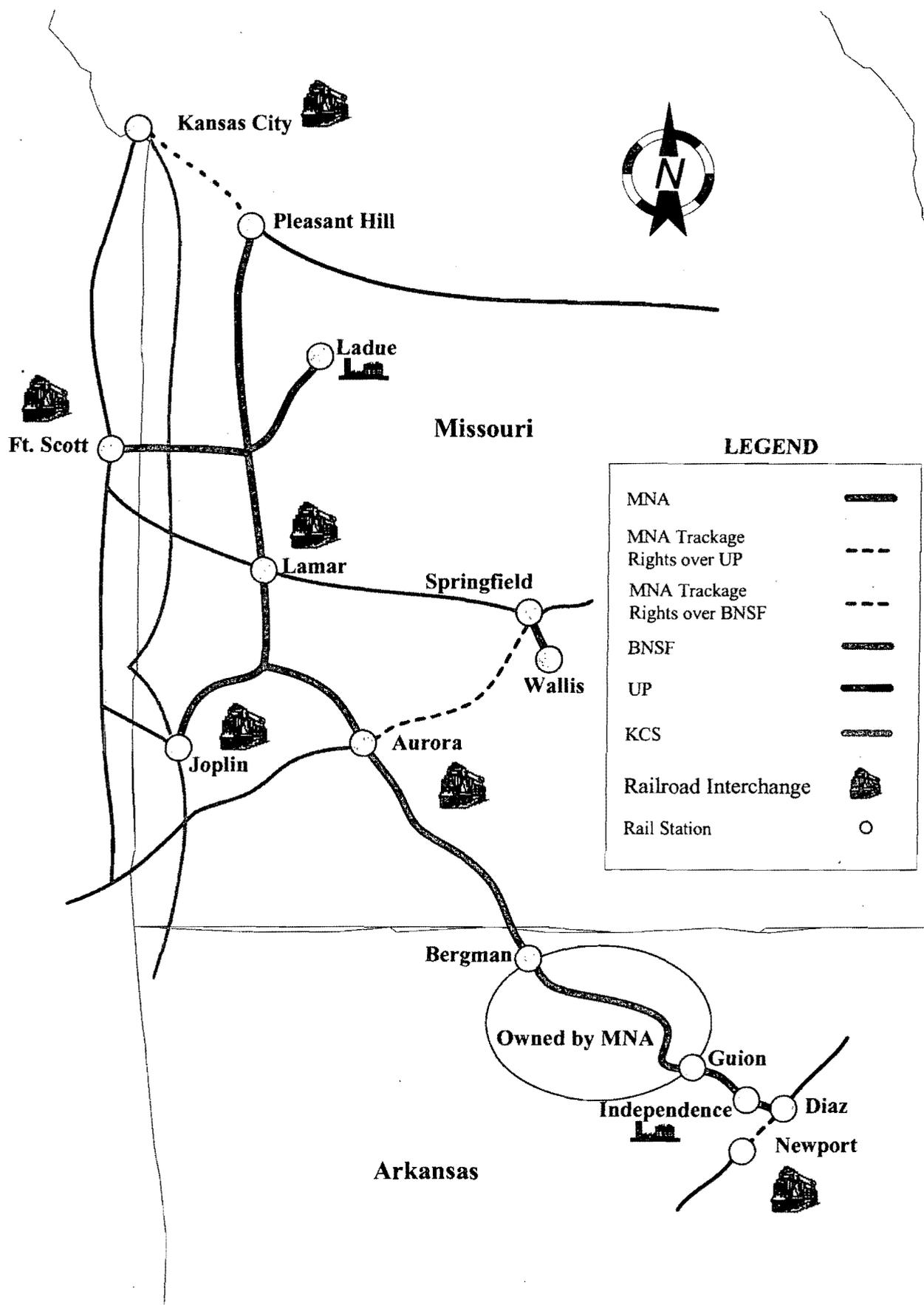
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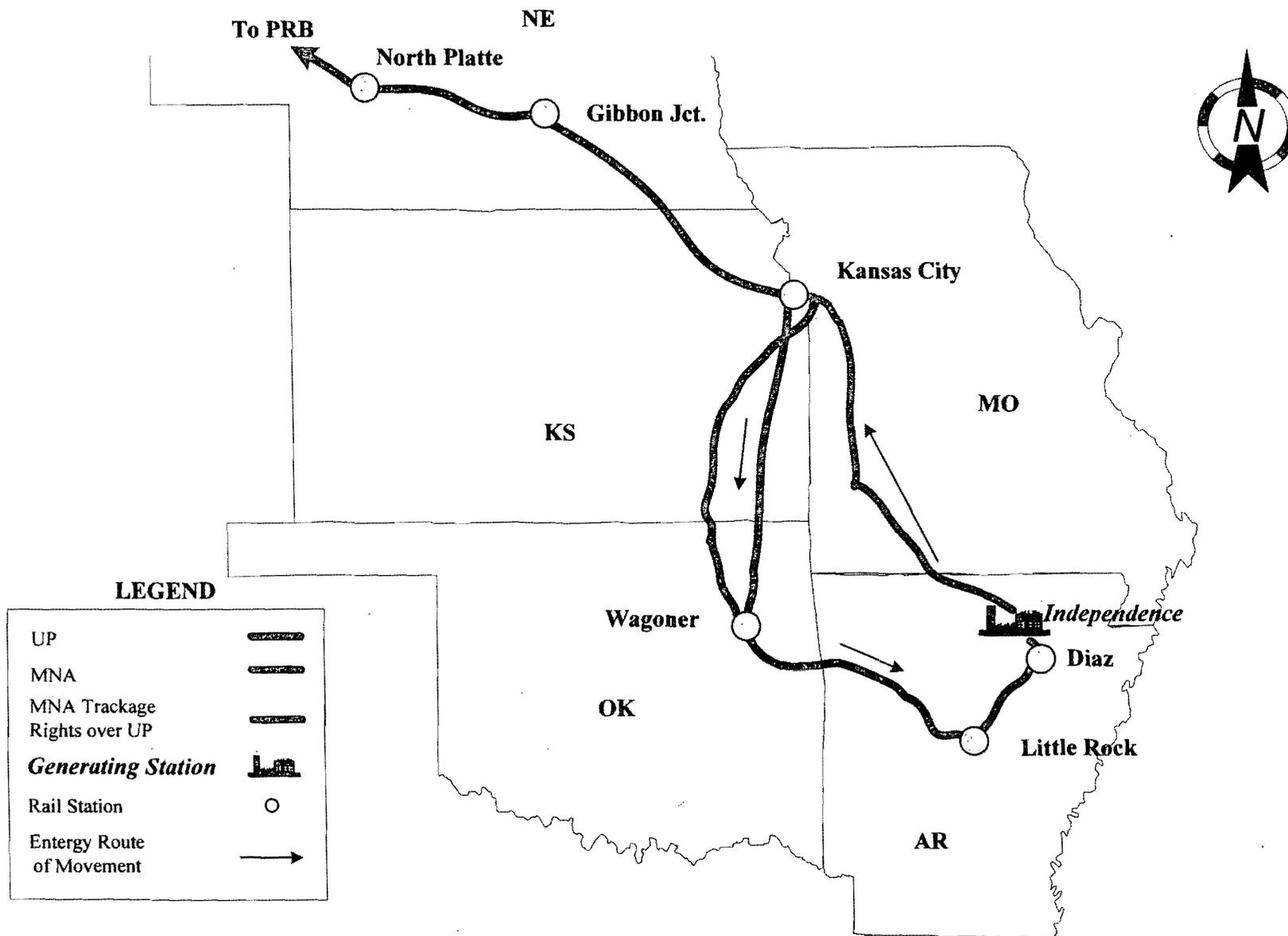
Schematic of M&NA



LEGEND

MNA	
MNA Trackage Rights over UP	
MNA Trackage Rights over BNSF	
BNSF	
UP	
KCS	
Railroad Interchange	
Rail Station	

Schematic Of UP's Route From PRB To Entergy's Independence Generating Station



Schematic Of BNSF's Route From PRB To Entergy's Independence Generating Station

