

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

IN THE MATTER OF:

ENTERGY ARKANSAS, INC., AND
ENTERGY SERVICES, INC.

v.

STB Docket
No. 42104

UNION PACIFIC RAILROAD COMPANY
and MISSOURI & NORTHERN
ARKANSAS RAILROAD COMPANY, INC.

Tuesday,
October 27, 2009

Surface Transportation Board
Suite 120

395 E Street, S.W.
Washington, D.C.

The above-entitled matter came on
for hearing, pursuant to notice, at 1:00 p.m.

BEFORE:

DANIEL R. ELLIOTT, III, Chairman
CHARLES D. NOTTINGHAM, Vice Chairman
FRANCIS P. MULVEY, Commissioner

Reporter: Chad Jackson

APPEARANCES:

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2 1:00 p.m.

3 CHAIRMAN ELLIOTT: Good afternoon,
4 everyone. Welcome. First of all, I'd like to
5 apologize for the delay, obviously, something
6 that we could not help. There's been numerous
7 times, as you're aware, where I kind of wish
8 that there was a fire alarm right before I got
9 up to argue, and unfortunately, that never
10 happened, and I guess we're going to go ahead
11 anyway today.

12 I'm going to read some procedural
13 things, because this is a little bit different
14 than what most of you are accustomed to.

15 Today, we will hear oral arguments
16 in two proceedings, currently pending here at
17 the Board.

18 In an effort to move things along,
19 the Board members will not be making opening
20 remarks this morning. But I wanted to cover
21 a few procedural matters before we begin.

22 We have asked each party to make a

1 short statement of their arguments. The
2 counsel should be prepared to answer questions
3 from the Board at any time during your
4 allotted time. I assure you that we have read
5 all of your pleadings, and there's no reason
6 to repeat every argument.

7 Just a general thing, because we
8 tried to run this like a Court of Appeals type
9 argument, as opposed to how we've held
10 hearings in the past, to give you a better
11 idea of the way we're trying to make them go.

12 Speakers, please note that the
13 timing lights are in front of you. You will
14 see a yellow light when you have one minute
15 remaining and a red light when your time is
16 expired. Please speak to the time you have
17 been allotted. When you see the red light,
18 please finish your thought and take a seat.

19 Additionally, and just a reminder
20 to everyone, please, turn off your cell
21 phones.

22 The first oral argument we will

1 hear is in STB Docket No. 42104, Entergy
2 Arkansas, Inc. and Entergy Services, Inc. v.
3 Union Pacific Railroad Company and Missouri &
4 Northern Arkansas Railroad Company, Inc.

5 Counsel for Missouri & Northern
6 Arkansas Railroad, you have been allotted 30
7 minutes. Please step up to the podium,
8 introduce yourself, indicate if you have
9 reserved any time for rebuttal and then begin.
10 Thank you.

11 MR. GITOMER: Good afternoon,
12 Chairman Elliott, Vice Chairman Nottingham,
13 Commissioner Mulvey. My name is Lou Gitomer,
14 counsel for the Missouri & Northern Arkansas
15 Railroad Company, Inc. With me today are
16 Scott Williams, the Vice President and General
17 Counsel and Thomas Gibson, the General Manager
18 of the M&NA Railroad. I reserve 10 minutes
19 for rebuttal.

20 The M&NA is Class III railroad,
21 revenues of about \$28 million last year,
22 operates 580 miles in Missouri, mainly

1 Missouri and Arkansas, and leases about 380 of
2 those miles from the Union Pacific. We move
3 to dismiss this proceeding on three grounds.

4 One, there is a necessary
5 defendant that has not been named in the
6 amended complaint, filed by Entergy
7 Corporation, or the Entergy entities.

8 In addition, there is a contract
9 between the Union Pacific and Entergy for the
10 movement of the vast majority, if not all, of
11 the coal that the Entergy independence plant
12 in Arkansas uses.

13 Finally, there is an existing
14 through route, even though it is for single
15 car movements and we feel that's appropriate
16 because the complaint does not specify that
17 Entergy is talking about unit trains. In
18 fact, it doesn't specify very much about the
19 movements that it's seeking to make. It's
20 talking about moving coal to independence,
21 over the Missouri & Northern Arkansas, using
22 a through-route.

1 The complaint does not identify
2 the other party to the through-route.

3 In our motion to make it more
4 definite, we asked them to identify the party
5 to the through-route and we also asked for
6 some information about the through-route,
7 including such points as the origin of the
8 movement and the point of interchange, neither
9 of which have been identified.

10 I'll be glad to answer your
11 questions at any point in time during this
12 presentation.

13 Although the Board gave Entergy a
14 roadmap for filing the amended complaint when
15 it denied the initial complaint in June of
16 this year, that did not give Entergy leave to
17 file an incomplete amended complaint with the
18 Board and that is the issue that M&NA is
19 raising today and has raised in our papers,
20 that again, BNSF was not identified as a
21 defendant, that there's a contract between UP
22 and Entergy and that there is a through-route

1 over which Entergy could move traffic through
2 to the independence plant between BNSF and
3 Missouri & Northern Arkansas, or any of the
4 other railroads that interchange with the
5 Missouri & Northern Arkansas.

6 The through-route has been sought
7 previously, informally by Entergy. They've
8 asked Missouri & Northern Arkansas to quote a
9 rate, to open a route and as provided by the
10 Board's rules, we've, in turn, asked them to
11 provide additional information.

12 That's the same thing that's going
13 on in this proceeding. However, they've asked
14 the Board to prescribe a through-route. In
15 turn, we filed a motion to dismiss and we're
16 definitely seeking more information. Again,
17 that information has not been provided.

18 It's very difficult to open a
19 route, to quote a rate, when you don't have
20 necessary information concerning the movement
21 that the shipper is seeking a rate for or a
22 route for.

1 This is the first procedure before
2 the Board under the rules of Section 1144.
3 Those rules require a comparative analysis
4 between the current move and the new through-
5 route that the moving party and the
6 complaining party is seeking.

7 Here, it's very difficult to make
8 a comparison. We know the factors involved in
9 the current route from the Powder River Basin,
10 over the Union Pacific, to the Missouri &
11 Northern Arkansas and then for final delivery
12 to the Entergy independence plant.

13 What do we know from the amended
14 complaint about the new through-route? We
15 know that the through-route will be over the
16 Missouri & Northern Arkansas. We don't know
17 the origin points. We don't know the railroad
18 that will provide the through movement with
19 Missouri & Northern Arkansas. We don't know
20 where the interchange should be.

21 Those are necessary elements,
22 improving the case, and they should be

1 necessary elements in the amended complaint.

2 COMMISSIONER MULVEY: Hasn't
3 Entergy indicated that it accepts that it
4 would probably be BNSF and BNSF would be the
5 connecting railroad and that it was willing to
6 attest that BNSF would be the connecting
7 railroad?

8 MR. GITOMER: I don't recall the
9 word 'attest' in any of their papers. I
10 believe what they said is, they would amend
11 the complaint with leave of the Board. The
12 Board's rules indicate that you can amend your
13 complaint at any time with leave, and if they
14 truly wanted to amend the complaint, they
15 would have filed a motion with the Board, for
16 leave to amend and they would have amended it,
17 prior to this time.

18 This matter was filed back August
19 with our answer, 20 days after the amended
20 complaint was filed.

21 As far as, would they definitely
22 used BNSF, I don't think there is a commitment

1 in their papers, number one, to definitely use
2 BNSF as the connecting carrier. Number two,
3 there is no commitment anywhere, in any of
4 their papers, to make use of this route at
5 all.

6 This may be a -- just a
7 theoretical argument by Entergy, may be a
8 realistic argument by Entergy, but Missouri &
9 Northern Arkansas is very concerned that if it
10 is ordered by the Board to open a through-
11 route, it would incur substantial costs, in
12 order to prepare the route, to handle the
13 traffic generated by Entergy.

14 But again, we don't know what
15 traffic Entergy is talking about. We don't
16 know if we're talking about one unit train
17 over a one year period. We don't know if
18 we're talking about two unit trains per day.
19 We don't know if we're talking about trains
20 moving at 10 miles an hour. We don't know if
21 we're talking about trains moving at 45 miles.

22 As you well know, there's a

1 substantial difference between the costs
2 involved in preparing trains -- to move trains
3 withing those different criteria, and those
4 are just end points. Those don't include all
5 of the potential iterations within.

6 COMMISSIONER MULVEY: You said unit
7 trains, but did you quote a unit train rate or
8 did you quote a single car rate?

9 MR. GITOMER: There is a single car
10 rate quoted on the current through-route.

11 COMMISSIONER MULVEY: Obviously, it
12 would be unit train for movement of coal. But
13 you would not be moving single car loads, it
14 would be a unit train movement.

15 So, why didn't you quote a unit
16 train rate, rather than a single car rate, in
17 the tariff?

18 MR. GITOMER: As I explained
19 before, we have been discussing this matter
20 with Entergy over a number of years. A number
21 of times, Entergy has come to M&NA, requested
22 a rate quote.

1 In response, as provided by the
2 rule -- the Board's rules, M&NA has then gone
3 back to Entergy and asked Entergy, "Please
4 provide us with the following information."

5 Each time that we have requested
6 that information from Entergy, Entergy has not
7 provided that information. That is the same
8 situation that exists with this case.

9 As you know, Entergy began this
10 proceeding by sending a letter to Missouri &
11 Northern Arkansas, requesting a through-route
12 and a rate quote.

13 In response, Missouri & Northern
14 Arkansas, we sent a letter back saying,
15 "Please provide us the following information."
16 The response we received from Entergy did not
17 provide all of the information necessary for
18 the through-route and the rate quote.

19 VICE CHAIRMAN NOTTINGHAM: Mr.
20 Gitomer, could you describe this through-route
21 that you've referenced a few times? Would it
22 go along a specific alignment and where would

1 it -- what would be the beginning and ends
2 points?

3 MR. GITOMER: Vice Chairman
4 Nottingham, that's a very good question and I
5 have the exact same question for Entergy.

6 VICE CHAIRMAN NOTTINGHAM: But
7 you've offered a through-route, but you don't
8 know, it's just an open offer of whatever it
9 might evolve into?

10 MR. GITOMER: There is a tariff
11 through-route that exists today. However,
12 Entergy does want to move unit trains. They
13 want to move them from the Powder River Basin.
14 They have not identified whether they would
15 move from the Northern Powder River Basin or
16 the Southern Powder River Basin, or a specific
17 mine.

18 They have not identified the
19 railroad that the traffic would move over,
20 before it connects with the Missouri &
21 Northern Arkansas and they haven't identified
22 the interchange point between the Missouri &

1 Northern Arkansas and the second railroad.

2 VICE CHAIRMAN NOTTINGHAM: But you
3 must be pretty familiar with the -- M&NA's
4 system or map and what would be the potential
5 alternative through-routes that might exist?
6 I mean, it's not a giant railroad.

7 MR. GITOMER: Are there five
8 different interchanges today, just with the
9 BNSF. It doesn't include the case, yes. It
10 doesn't include the Union Pacific. There are
11 additional interchanges with them.

12 So, there would be five potential
13 interchanges. I believe that in this case,
14 because Entergy had the burden of proof that
15 they would be the ones to define what they
16 believe is the most efficient interchange.
17 They haven't done that. They haven't defined
18 any of the interchanges.

19 In fact, in response to a
20 discovery request from Entergy last week, M&NA
21 extended an invitation to inspect the M&NA
22 properties, to both Entergy and Arkansas

1 Electric.

2 We believe that instead of Entergy
3 -- excuse me, instead of M&NA going through
4 all of the potential iterations of the
5 interchanges, the different types of
6 operations that may occur, that the best
7 approach would be for Entergy and Arkansas
8 Electric to conduct its -- their inspection of
9 the Missouri & Northern Arkansas property.

10 Then they could determine what
11 they believe is the best interchange. They
12 could determine what they believe is necessary
13 to provide the service that they want, which
14 they have not identified yet, and then, they
15 could present a second amended complaint with
16 appropriate information that the parties could
17 respond to and the Board could probably more
18 expeditiously determine the case.

19 VICE CHAIRMAN NOTTINGHAM: Aren't
20 there any constraint on your -- based on the
21 condition of your track, your client's track?
22 Are there sections of track or parts of M&NA's

1 system, that could not accommodate a unit
2 train full of coal, and would that impact the
3 possible menu of through-routes?

4 MR. GITOMER: We believe that we
5 could probably accommodate a limited number of
6 unit trains, moving at 10 miles an hour.

7 The infrastructure would require
8 substantial investment. We have not conducted
9 a study to determine how much that investment
10 is.

11 The more trains that are running,
12 the more investment would be needed. We would
13 be talking -- not only talking about upgrading
14 the track to meet whatever the criteria are
15 that Entergy might establish, but also, adding
16 sidings, so that the train -- it's a single
17 line track.

18 You'd have to add sidings to avoid
19 meets, so that the track could continue to run
20 fluently.

21 VICE CHAIRMAN NOTTINGHAM: And how
22 would the railroad recover the costs of those

1 upgrades?

2 MR. GITOMER: That's an excellent
3 question and we don't know and --

4 VICE CHAIRMAN NOTTINGHAM: How does
5 your railroad usually recover such costs?

6 MR. GITOMER: Through the rates
7 charged to the shipper.

8 COMMISSIONER MULVEY: Hasn't
9 Entergy suggested that it would decide what
10 route was the appropriate one, after discovery
11 and they felt that if it's inappropriate to
12 dismiss the case now, before they do discovery
13 and that after discovery, they're willing to
14 identify the route and that that would be a
15 legitimate expectation on the part of Entergy?

16 MR. GITOMER: What Entergy has
17 asked for in discovery, is for the Missouri &
18 Northern Arkansas to do all of the work for
19 them. They've asked us to identify -- to
20 respond to the five potential interchange
21 points. They've asked us to identify the
22 infrastructure upgrades that would be

1 necessary at each point and the costs for
2 those upgrades.

3 They haven't told us what kind of
4 service they want. They haven't told us how
5 many trains per day, per week, per month, per
6 year. They haven't told us what speed they're
7 looking for. They haven't told us what type
8 of efficiency comparison they're looking for,
9 in the context of this case, versus the
10 operations of the Union Pacific and Missouri
11 & Northern Arkansas movement today.

12 So, we could certainly answer it,
13 but it would be -- the answer would go from
14 zero to infinity.

15 I think it's better, since Entergy
16 knows exactly what it wants, for them to go
17 and inspect the property. They have their
18 consultants. They have their experts.
19 They've all been invited to go on this
20 inspection trip. They can then determine
21 which is the appropriate interchange point,
22 what the costs are, what infrastructure is

1 needed.

2 In addition, Missouri & Northern
3 Arkansas does not have access to the BNSF
4 lines, assuming BNSF is the party -- is the
5 partner in this interchange, in the through-
6 route.

7 Entergy, on the other hand, may or
8 may not, we don't know, because BNSF is not a
9 defendant party in this case.

10 So, Entergy can determine which
11 interchange is best on both sides of the
12 through-route, for both -- assuming -- again,
13 assuming it's BNSF, for BNSF and for Missouri
14 & Northern Arkansas.

15 It may well be that there is an
16 interchange point that is better for Missouri
17 & Northern Arkansas, and not for BNSF.

18 VICE CHAIRMAN NOTTINGHAM: Mr.
19 Gitomer, there is a tariff that's referenced
20 in the record, number 8006-C, that was issued
21 by M&NA. Are you familiar with the tariff?

22 MR. GITOMER: Somewhat, yes.

1 VICE CHAIRMAN NOTTINGHAM: Could
2 you help me learn when it came into existence?
3 Has this been a tariff that goes back many
4 years or is this something that just appeared
5 in the last few months or weeks?

6 MR. GITOMER: No, it's been in
7 existence for several years.

8 VICE CHAIRMAN NOTTINGHAM: And do
9 you have any knowledge about why -- has the
10 tariff every been used? Has it been -- have
11 customers availed themselves to the tariff?

12 MR. GITOMER: No, they have not.

13 CHAIRMAN ELLIOTT: If we grant the
14 motion to dismiss, based on the tariff, would
15 there be anything stopping you from pulling
16 back the tariff, withdrawing it?

17 MR. GITOMER: The tariff has been
18 in place for quite some time. There is no
19 reason for Missouri & Northern Arkansas to
20 withdraw the tariff.

21 In addition, one other point I
22 forgot to make is, we invited Missouri --

1 Entergy and Arkansas Electric for the
2 inspection trip. If the amended complaint
3 were dismissed, we would not withdraw that
4 request for the inspection. We don't want to
5 hide the ball.

6 We realize they have a case to
7 make. We want to give them a legitimate
8 opportunity to make their case and file the
9 proper pleadings. We would not withdraw that
10 request or that offer. They could come,
11 inspect the property, make their determination
12 on what the interchange is, what the
13 infrastructure improvements would be
14 necessary, to meet their service requirements.

15 They could determine -- or they
16 could at least make an offer of how they would
17 help Missouri & Northern Arkansas pay for that
18 infrastructure, which would solely be for the
19 benefit of Entergy.

20 COMMISSIONER MULVEY: Did you say
21 there was a quid pro quo for that invitation,
22 that if they did something, you would continue

1 to do this or that they would have to withdraw
2 the complaint? Was that it?

3 MR. GITOMER: No, what I was saying
4 is, if the Board were to dismiss the complaint
5 --

6 COMMISSIONER MULVEY: Okay.

7 MR. GITOMER: -- we would not
8 withdraw the invitation.

9 COMMISSIONER MULVEY: Okay, thank
10 you.

11 VICE CHAIRMAN NOTTINGHAM: Mr.
12 Gitomer, should we infer, based on the
13 existence of this tariff, that M&NA is
14 perfectly happy to do business with shippers,
15 such as Entergy and consistent with the tariff
16 and that there's nothing that would prohibit
17 you from honoring the tariff?

18 MR. GITOMER: That's correct.

19 VICE CHAIRMAN NOTTINGHAM: And are
20 you familiar with Section 10705? I'll cut to
21 the chase on it.

22 The essence of it, of interest in

1 this case, at least, to me, is the statement
2 in the statute that "the Board may, and shall
3 when it considers it desirable in the public
4 interest, prescribe through-routes," and then
5 I'll skip forward to sub-section (a)(2)(c),
6 "when the Board decides that the proposed
7 through route is needed to provide adequate,
8 and more efficient or economic,
9 transportation."

10 Do you have anything to say about
11 that provision of the statute today, to help
12 us understand it more clearly?

13 MR. GITOMER: The Interstate
14 Commerce Commission, back in the mid 1980's,
15 addressed this exact issue, when it adopted
16 the competitive access rules and this Board,
17 when it denied the original complaint filed by
18 Entergy, told Entergy that they could file an
19 amended complaint, under the competitive
20 access rules at 49 CFR 1144.

21 I don't know that -- I can't cite
22 chapter and verse of the rules for you, but

1 the rules put meat on the bones of Section
2 10705.

3 They require a comparative
4 analysis of the efficiencies between a current
5 route and a new through-route. They require
6 a competitive analysis, to see if the parties
7 involved in the competitive routes are --
8 excuse me, in the existing routes, are acting
9 in an anti-competitive way or contrary to the
10 route -- the competition factors in the rail
11 transportation policy, and that would put the
12 meat on the bones of Section 10705.

13 CHAIRMAN ELLIOTT: With respect to
14 10705, in your tariff argument, would that
15 tariff bar Entergy from seeking a more
16 efficient route, such as, say, Lamar?

17 MR. GITOMER: That's a good
18 question and I don't know if I have time left
19 to go through that. Let me think about that
20 and come back to that.

21 CHAIRMAN ELLIOTT: Ten minutes too.

22 MR. GITOMER: Yes, thank you.

1 VICE CHAIRMAN NOTTINGHAM: That
2 does raise a question. We'll give you the
3 opportunity to answer questions in more
4 detail, if necessary, and keep the record open
5 after the hearing today, if there are certain
6 questions that the parties are just not able
7 to answer, but are important to the Board?

8 CHAIRMAN ELLIOTT: I certainly feel
9 it would be appropriate, if we felt there was
10 more need for further briefing, if that was
11 the case, yes.

12 VICE CHAIRMAN NOTTINGHAM: Okay,
13 thanks.

14 MR. GITOMER: Okay, I believe my
15 time is up. Thank you very much.

16 CHAIRMAN ELLIOTT: Thank you.
17 Thank you. Now, counsel for Entergy and AECC,
18 please step up to the podium and introduce
19 yourself for the record and begin.

20 MR. LOFTUS: Thank you, Chairman
21 Elliott, Vice Chairman Nottingham,
22 Commissioner Mulvey. My name is Michael

1 Loftus. I am appearing on behalf of Entergy
2 Corporation, Entergy Services, Inc.

3 I am accompanied at counsel table
4 by my partner, Frank Pergolizzi, and I'd also
5 like to note for the Board, that Mr. Ryan
6 Trushinsky, who is the head of the Solid Fuels
7 Department of Entergy Services, is here, as is
8 Corey Kahn, with Entergy's General Counsel
9 Office.

10 We have agreed to an allocation of
11 time with Mr. Von Salzen, who is counsel for
12 AECC.

13 I'd like to start by addressing
14 briefly, the standard of the motion to dismiss
15 before the Board, in general, that are
16 disfavor.

17 That is particularly true when the
18 case has not been through discovery and there
19 has been no opportunity to submit evidence.

20 In the North America Freight Car
21 Association case, which we provided a cite to,
22 among our additional authorities, there is a

1 statement that motions to dismiss, prior to
2 submission of evidence, are generally denied,
3 to ensure that participants have a full and
4 fair opportunity to meet their burden of
5 proof.

6 There is also precedent before
7 this Board, that where the matter involved is
8 one of first impression, that raises the bar,
9 if you will, for a motion to dismiss.

10 The indication from that
11 precedent, if you look at National Grain and
12 Feed Association versus Burlington Northern,
13 is that there has to be more leeway for a
14 complainant to make their case, in the absence
15 of clear standards.

16 We are in the midst of discovery.
17 We have requested, in discovery, much
18 information we need, in order to flush out our
19 case, to identify the route or routes that we
20 believe are the most efficient and would be
21 most appropriate for this traffic.

22 Turning to the arguments that have

1 been made by M&NA, first, as to BNSF being a
2 necessary party, as we have pointed out, they
3 are a party to one of the dockets that is
4 involved in this case.

5 Even if they were not, the Board
6 could make the comparative analysis under its
7 regs, 1144, that is called for.

8 We have discovery outstanding to
9 BNSF, seeking information that's pertinent to
10 such an analysis. We do not agree that
11 Entergy must satisfy the elements of that
12 comparative analysis.

13 We believe that under 10705(a)1,
14 which refers to the Board may and shall, when
15 desirable and in the public interest,
16 prescribe an analysis that we can qualify for
17 a prescription of a through-route, under that
18 standard, without necessarily getting to the
19 long haul/short haul focus, which is reflected
20 in the regs, for that comparative analysis.

21 Lastly, on the BNSF, as a
22 necessary party, if the Board concludes that

1 it is, if it would instruct us to that effect,
2 we will certainly add them as a party.

3 The second argument has to do with
4 the contracts that Entergy has outstanding
5 with the Union Pacific.

6 There are two such contracts. We
7 have explained in our amended complaint to the
8 Board, what each of those contracts allows
9 Entergy, and I should say in our reply, to the
10 motion to dismiss, the volumes that are not
11 committed to UP under those contracts and that
12 we are free to ship via another arrangement.

13 So, this is not a situation where
14 there is no traffic, that we are free to
15 tender, to BNSF, which is our assumption of
16 who the originating carry would be and M&NA
17 for movement to the independence plant.

18 COMMISSIONER MULVEY: We can't talk
19 about the amount of traffic. That's
20 confidential. But are the amounts of traffic
21 here at issue, sufficient to justify opening
22 up a line to the Burlington Northern and along

1 with the question I asked earlier, if the
2 volumes are relatively small, would therefore,
3 the single car rate be appropriate if the
4 volumes are not sufficient to require unit
5 trains?

6 MR. LOFTUS: Starting at the end,
7 the single car rate would not be appropriate
8 under any circumstance because as we have
9 advised M&NA, and I will submit for the
10 record, our response to M&NA, when they asked,
11 "Well, what kind of traffic is this going to
12 be and so on," we told them very clearly, it's
13 going to be a 135 car trains, shipper
14 provided, 286 equipment, aluminum equipment,
15 etcetera.

16 Now, where the uncertainty is, is
17 how much volume per year will we want to move
18 and so on.

19 As to your question about whether
20 the volumes that Entergy is free to move
21 between now and the expiration of the second
22 contract, is it sufficient to warrant

1 upgrading the line? I take it to be your
2 question.

3 First of all, we do not know as
4 yet, what may be necessary for upgrading that
5 line. We do not know whether, you know, with
6 slow orders and, you know, moving at certain
7 rates of speed, the line may be capable at
8 this time of handling unit trains at a slower
9 speed, for example. So, we need discovery to
10 figure that out.

11 This is a situation that cries out
12 for a contract, between M&NA and Entergy, but
13 what is preventing that contract is what we
14 tried to directly attack in the first stage of
15 this litigation, in which the Board would not
16 address on the terms we wanted.

17 I mean, the problem is, we cannot
18 go to M&NA and say, "Okay, what are you going
19 to have to do," and you know, this is how much
20 tonnage we could commit. This is the schedule
21 we would commit it on. This is how much we
22 might be able to help you with financing,

1 upgrades, you know, all that sort of thing.

2 We can't do that.

3 One of the problems, in terms of
4 the timing of this litigation, is that
5 although the Board says, in its June decision
6 in this case, that 10705 provides a clear
7 approach and remedy for the precise problem we
8 have, that's not entirely clear to us, because
9 in our view, we get the through-route we're
10 asking to be prescribed. What happens then?

11 Well, we then we ask for the
12 rates, you know, and then --

13 CHAIRMAN ELLIOTT: But wouldn't
14 that be appropriate for a rate case?

15 MR. LOFTUS: It would.

16 CHAIRMAN ELLIOTT: If you're
17 concerned about the rates.

18 MR. LOFTUS: Yes, I'm not
19 suggesting, but the problem we see is, when we
20 do that, M&NA is going to say, "All right, to
21 handle that, we're going to have to pay under
22 the terms of the lease, all these," I'll call

1 them penalty rentals, and they're going to
2 build that into their rates.

3 So, then we're going to challenge
4 the rates --

5 CHAIRMAN ELLIOTT: Would that be
6 considered the rate case?

7 MR. LOFTUS: Would it be?

8 CHAIRMAN ELLIOTT: Yes.

9 MR. LOFTUS: Well, under the stand-
10 alone cost case, or approach, you know, I
11 think the Board indicated this in its June
12 decision, it's not clear that those would be -
13 - I'm mean, you're going to be focusing on
14 what would it cost to build a stand-alone
15 railroad.

16 We would certainly argue that
17 these payments to UP have nothing to do with
18 that, and they're not a variable cost and they
19 shouldn't be considered. But that's -- you
20 know, I mean, who knows what kind of arguments
21 are going to be raised there.

22 But what's clear is, that we then

1 have to go through a rate case. So, we go
2 through the rate case. We get a prescribed
3 joint rate over the route.

4 Well, then, you've got provisions
5 in this lease that allow UP to do one of two
6 things. One, it can terminate the lease.
7 Two, it can say, "Well, we're exercising our
8 right, to provide direct service, to Entergy's
9 independence plant," and you know, M&NA,
10 you're no longer capable of doing it, you
11 know, under the terms of our agreement, and
12 so, where are we then?

13 So, we have great concerns about,
14 you know, where this is all leading, but you
15 know, the Board directed us down this path and
16 we're proceeding down this path, and we will
17 do our best, and in our amended complaint, we
18 have asked the Board to be mindful that it has
19 to fashion a remedy at the end, that's
20 sufficiently broad, to deal with these
21 potential occurrences.

22 CHAIRMAN ELLIOTT: So, your thought

1 is, the remedy of quoting, like we have in
2 this case, a tariff, wouldn't be adequate
3 because you'll need more to stop, I guess, UP
4 from exercising its right?

5 MR. LOFTUS: Well, we're very
6 fearful that we will go through the hoops and
7 at the end of the -- at the end of the line,
8 the UP will pull the plug, and say, "Okay,
9 game over. We're tired of this," and then
10 what?

11 So, that's something we would
12 welcome, all the guidance the Board can -- or
13 clarification, the Board can provide in a
14 decision on this or any other matter in this
15 case. But it's a great concern to us.

16 VICE CHAIRMAN NOTTINGHAM: Mr.
17 Loftus?

18 MR. LOFTUS: Yes, sir.

19 VICE CHAIRMAN NOTTINGHAM: Just
20 following up on that point.

21 You expressed concern that Union
22 Pacific might exercise its contractual

1 authority to -- under the conditions to
2 basically, cancel the lease with M&NA and then
3 you would presumably, return to, what could be
4 called a status quo ante or a situation the
5 existed in the past, where your client did
6 business, largely with the UP directly.

7 No offense to M&NA. We're glad
8 that they're on the national scene and the
9 short lines have played a phenomenally
10 important role in bringing competition and
11 service to thousands and thousands of rail
12 customers around the country.

13 But, you know, if that were to
14 happen and UP were to -- could directly serve
15 you again and you also had the ability to make
16 your case, that there is a more efficient
17 interchange point, putting you onto the BNSF,
18 wouldn't that solve your so-called captivity
19 concern?

20 But I'm hearing you reference a
21 broader concern, which one might describe as
22 wanting low cost rail transportation and

1 that's a different concern. There's access
2 to different -- to multiple rail lines is
3 something that I think our decision earlier
4 this year, gives you a roadmap to pursue.
5 Guaranteed low cost rail service, that may be
6 another matter.

7 What problem are you trying to
8 specifically solve for your client?

9 MR. LOFTUS: Well, Vice Chairman
10 Nottingham, the specific problem we're trying
11 to address is that in the lease that UP
12 executed with M&NA, there are, what we
13 believe, constitute in our words, a paper
14 barrier and in the Board's parlance, an
15 interchange commitment, which should be found
16 to be against public policy and unenforceable.

17 As we pointed out in our legal
18 arguments in the initial case, there are a lot
19 of analogous circumstances where Courts in
20 this country, hold various agreements void, as
21 against public policy.

22 Now, you know, the facts are, as

1 we have demonstrated them, in the earlier
2 phase of the case, that there have been
3 periods of awful service from UP, at least
4 three extended periods where Entergy was
5 severely damaged, by UP's failure to deliver
6 the coal that Entergy needed to burn.

7 It had to curtail operations at
8 its coal-fired power plants and its efforts to
9 obtain some sort of alternative transportation
10 were unsuccessful.

11 So, yes, Entergy wants to obtain
12 more economical transportation.

13 COMMISSIONER MULVEY: Isn't what
14 Vice Chairman Nottingham brings up be an
15 example of a bottle-neck situation, where UP
16 would not be compelled, as the law stands
17 right now and as Board precedent stands right
18 now, could not be compelled to interchange
19 with BNSF, if it served -- if it served
20 Entergy in all mine sources?

21 MR. LOFTUS: That, obviously, is
22 yes, a major concern as well.

1 Now, you know, we have asked, in
2 our amended complaint, that the Board, in this
3 case, if it were to through-route, specify
4 that if Entergy -- I mean, if UP terminates
5 the lease or asks for direct service, that the
6 Board make it clear that UP itself would be
7 provided -- required, that is, to interchange
8 with BNSF, for an alternative route.

9 COMMISSIONER MULVEY: But that
10 would basically be requiring UP to short line
11 itself, to short haul itself. So, it would
12 follow our bottle-neck decision, and,
13 therefore, be okay.

14 MR. LOFTUS: Yes, it would.

15 VICE CHAIRMAN NOTTINGHAM: Mr.
16 Loftus, didn't Congress directly address this
17 in Section 10705? There is a clear
18 description that the Board can decide and
19 require a through-route. You just need to
20 show that it would be more efficient or
21 economic.

22 If it's -- to me, it's as plain as

1 the printed word on the paper, I mean, that
2 Congress directly thought this through and
3 gave us clear statutory guidance and gave
4 shippers that guidance of basically, a way to
5 proceed here, and what -- do you have an
6 alternative view or definition or
7 interpretation of that section?

8 MR. LOFTUS: Vice Chairman
9 Nottingham, I'm not aware that Congress ever
10 really addressed the paper barrier
11 circumstances that exist in this case, or the
12 interchange commitment issue.

13 I'm not aware that that was a
14 focus of 10705, as enacted, and it's one of
15 the reasons we didn't proceed under 10705
16 originally, because we see it as a competitive
17 issue that -- on policy grounds, this agency
18 should rule unacceptable.

19 You know, you raised the point
20 about, you know, the Union Pacific and its
21 rights under the lease and so on.

22 You know, as we demonstrated

1 earlier, we think that they've already earned,
2 under this lease, what they had a right to
3 protect, through an interchange commitment
4 when entering into this lease, and that that's
5 the reason that the Board should look to find
6 that whatever legitimate role it had at the
7 outset, that role has been exhausted.

8 Now, it's an impediment to
9 competitive service, that should no longer be
10 permitted.

11 VICE CHAIRMAN NOTTINGHAM: Mr.
12 Loftus, I respect that you would like to make
13 this exclusively a paper barrier case, but
14 what if -- in a hypothetical, what if the
15 Union Pacific and M&NA agreed to cancel
16 whatever interchange agreement they have or
17 paper barrier or possibly, UP decided to
18 return to the status quo ante and serve your
19 client directly and stop doing business with
20 M&NA?

21 How would that change your
22 situation? Don't you have another problem

1 that needs to be solved, if you pleadings and
2 also heard, through various testimony and
3 Congress and other public forums from your
4 client, that they have a captivity problem
5 that they need to address?

6 MR. LOFTUS: Absolutely.

7 VICE CHAIRMAN NOTTINGHAM: So, the
8 absence or existence of a paper barrier,
9 doesn't necessarily cause or solve your
10 client's problem? It's access or a lack of
11 access to another line of railroad, which the
12 statute provides a very clear roadmap for,
13 once you make a showing of enhanced
14 efficiency.

15 MR. LOFTUS: There is the physical
16 capacity, as operations are now performed, for
17 BNSF and M&NA, to deliver coal to this plant.

18 So, Entergy, yes, it wants to
19 break its captivity for two reasons. One, it
20 wants better rates. Two, it wants reliable
21 service, and it would like to do that by using
22 the rail operations that are in place and in

1 operation.

2 VICE CHAIRMAN NOTTINGHAM: Do you
3 have anything to say about 10705's
4 applicability to a situation such as this? Do
5 you feel it's applicable? Not applicable?
6 Inadvertently written with something else in
7 mind or -- because I'm just having trouble
8 getting beyond the point that it seems to be
9 directly on point, to the type of situation
10 you have, assuming that you could make the
11 case, that you could interchange to a more
12 efficient route.

13 We have an interest, as a Board, a
14 policy interest and a larger interest, of
15 making sure that we have an efficient rail
16 transportation system.

17 Nobody wants to see trains routing
18 all around the country, in an inefficient
19 manner. We've got, you know, energy policy
20 implications to that, transportation
21 congestion, jobs. So, I mean, what
22 interpretation do you have for 10705?

1 MR. LOFTUS: Well, we accept that
2 10705 applies and we are proceeding, under our
3 amended complaint, to satisfy the terms of
4 10705, and to obtain an order from the Board,
5 prescribing a through-route.

6 As I've described earlier, we are
7 very concerned, having completed that
8 successfully, which we hope to do, that there
9 are other problems looming down the road, and
10 you know, if there is not some way to address
11 those problems, before this agency, you know,
12 it's a legitimate question about how much
13 sense it makes to go through 10705.

14 Now, we have, after the Board
15 directed us in this direction, we went, we
16 sent a letter, we, Entergy, to M&NA, and said,
17 "You know, are you willing to establish a
18 through-route," because if you are, then we
19 don't have to go through this, and there have
20 been further exchanges of correspondence, and
21 you know, it's possible that as this proceeds,
22 you know, there will be an agreement to a

1 through-route, that may short cut this
2 process.

3 CHAIRMAN ELLIOTT: Do you believe
4 that mediation might be helpful in this case?

5 MR. LOFTUS: I have no reason to
6 believe so.

7 CHAIRMAN ELLIOTT: Okay.

8 MR. LOFTUS: I think if the parties
9 were to feel that there was some point in
10 that, we would certainly join in approaching
11 the Board, for assistance in that regard, but
12 --

13 CHAIRMAN ELLIOTT: I guess my next
14 question, with respect to -- because now, we
15 have to make a decision.

16 With respect to efficiency, you
17 noted various examples of inefficient service
18 from what you have at the present time, such
19 as during flooding.

20 Now, would this alternative route
21 that you picture, envision, I guess with BNSF,
22 would that have avoided something like the

1 flooding?

2 MR. LOFTUS: You have selected one
3 of the three episodes that we point to.

4 CHAIRMAN ELLIOTT: Right.

5 MR. LOFTUS: The other two were the
6 service crisis, after the UP/SP --

7 CHAIRMAN ELLIOTT: UP/SP, sure.

8 MR. LOFTUS: -- and the other was
9 the 2005 problem.

10 I cannot tell you what the
11 situation was on the ground in 1994, and
12 whether BNSF and M&NA would have been better
13 able to deliver the coal than UP was. I'm
14 sorry, I just don't know.

15 In the other two situations, we
16 believe the answer is yes. BNSF could have
17 provided assistance to Entergy, as it did to
18 other shippers, where BN or UP were capable of
19 originating the coal.

20 I see my yellow light is on, so --

21 CHAIRMAN ELLIOTT: One last
22 question. Do you think it's likely that we'll

1 have another such UP/SP type meltdown?

2 MR. LOFTUS: I consider it entirely
3 possible.

4 CHAIRMAN ELLIOTT: Okay.

5 MR. LOFTUS: We're currently
6 enjoynig the benefits of a major downturn and
7 economic activity in this country.

8 When the economy comes booming
9 back and the rail system is stressed, it seems
10 to be possible.

11 COMMISSIONER MULVEY: One last
12 question also. I know they said that you were
13 invited to go on a tour, to look at the
14 interchange points and what some of the needs
15 for upgrading track -- have you decided not to
16 take them up on their offer. Is that true?
17 Can you explain why?

18 MR. LOFTUS: I think you must have
19 mis-heard. I didn't hear Mr. Gitomer say we
20 decided not to take them up.

21 In fact, we requested the
22 opportunity to inspect. They agreed. They

1 are cooperating with us, to make arrangements
2 and we intend to proceed to do that.

3 I heard for the first time, that
4 they're not going to answer our
5 interrogatories and other discovery requests,
6 and I won't address that now, because I just
7 heard it.

8 COMMISSIONER MULVEY: But you will
9 be able then, to determine what routes you
10 want to identify and the like. Would it be
11 part of the discovery process then?

12 MR. LOFTUS: That's the objective.

13 VICE CHAIRMAN NOTTINGHAM: Mr.
14 Chairman, can I just ask one last question?

15 CHAIRMAN ELLIOTT: Certainly.

16 VICE CHAIRMAN NOTTINGHAM: Thank
17 you. Mr. Loftus, you mentioned earlier that
18 this is a situation that cries out for a
19 contract, and you might be right. Contracts
20 are important tools that can do great things.

21 But my understanding is that
22 railroads are not required to enter into

1 contracts and so, if M&NA or UP decides to
2 operate under tariff, it's going to be a way -
3 - you have to move forward -- and there is a
4 tariff I wanted to ask about.

5 We just heard from Mr. Gitomer,
6 there is an existing tariff, numbered 8006-C.
7 Has your client availed itself of that tariff,
8 and if not, why not?

9 MR. LOFTUS: The answer is no, it
10 has not. It's my understanding as well, that
11 railroads are not obligated to enter into
12 contracts and the reason Entergy has not
13 availed itself of that tariff is that it
14 provides for movement in single cars.

15 I haven't run the numbers, but my
16 guess is, it would be more expensive than the
17 current service and we don't have any
18 arrangements with BNSF, in place or in the
19 works, to do that.

20 I will tell you though, that I do
21 believe it cries out for a contract, because
22 in my experience, that's the best way to deal

1 with a situation such as this, where they may
2 need capital for upgrading and we have an
3 interest in making that happen, and so on.

4 The best way to do that is working
5 out terms in a contract.

6 VICE CHAIRMAN NOTTINGHAM: No
7 further questions, Mr. Chairman.

8 MR. VON SALZEN: Good afternoon,
9 Mr. Chairman, Mr. Vice Chairman, Commissioner.
10 I'm Eric Von Salzen, counsel for Arkansas
11 Electric Cooperative Corporation.

12 AECC endorses the arguments that
13 are made by Entergy. I'm not going to repeat
14 them, but what I want to do is remind you of
15 something that Mr. Gitomer said earlier in his
16 argument, which is that the Board, in its June
17 26th decision, provided a roadmap for this
18 proceeding and as is very often the case, Mr.
19 Gitomer is fairly correct and I'd like to
20 outline that roadmap as I see it.

21 On page seven of your decision,
22 you said this, and you described the claims

1 that Entergy and AECC were making as follows:

2 "Entergy has essentially alleged
3 an abuse in market power. Entergy served
4 solely by M&NA, UP today and Entergy alleges
5 that UP, in conjunction with M&NA, has
6 exploited that market power to foreclose
7 competition."

8 On page six, you said, "Public
9 documents suggests that the terms of the
10 contract," that is, the existing contract, the
11 rail transportation polled to the independence
12 station, "would permit Entergy to pursue rail
13 service from a carrier other than UP, for coal
14 movements for several years."

15 With those two thoughts in mind,
16 you said, "Section 10705 provides a means to
17 directly address and remedy the precise
18 problem about which Entergy complains."

19 That's the Board's ruling. The
20 Board was aware of the issues that M&NA has
21 raised in its motion to dismiss and the Board
22 ruled that this is the appropriate way to

1 address this particular problem.

2 So, in addition to all the reasons
3 why in an ordinary case before you, you would
4 not dismiss a case before you had heard any
5 evidence.

6 In this particular case, where you
7 have crafted or identified a way of addressing
8 a problem that has been presented to you, it
9 is surely inappropriate to dismiss this matter
10 before the parties have had an opportunity to
11 conduct discovery and come before you with a
12 record, on which you can decide what the
13 appropriate remedy would be.

14 As Mr. Loftus said, if you decide
15 that you want to have the BNSF as a party to
16 these proceedings, obviously, Entergy has
17 said, make them a party and AECC thinks that
18 would be -- you know, we'd go along with it.

19 We think it would waste the
20 resources of the Board to get, at this stage
21 anyway, an extraneous party into a matter,
22 which right now, involves problems that have

1 been created by the inter-relationship between
2 the parties who are here, UP and M&NA.

3 Thank you. I have nothing further
4 and I'd be happy to answer any questions.

5 VICE CHAIRMAN NOTTINGHAM: Well,
6 you raise a good point. I would just add that
7 would you agree -- let me ask this, that the
8 parties need to help build the record here.

9 The Board, I mean, we can provide
10 a roadmap, but we can't litigate the case for
11 you and you've got to bring the appropriate
12 parties to us at the appropriate time, to help
13 develop the record, and this applies to all
14 the parties.

15 But it's -- we -- as one
16 Commissioner, I would just say, I will be
17 looking with anticipation, at whether all the
18 parties that should be fully engaging on this
19 and working towards an actual resolution to
20 this case, are helping to do that.

21 I worry sometimes, with the stop
22 and start nature of this and that not everyone

1 is leaning forward enough to help us get to a
2 resolution in a reasonable time and at a
3 reasonable cost.

4 MR. VON SALZEN: I think certainly,
5 Entergy and AECC are interested in moving
6 forward as expeditiously as possible, to
7 develop a record.

8 I think the response of M&NA in
9 the form of the high rail inspection trip is
10 certainly a productive start. We just have to
11 see whether we run into any road blocks along
12 the way and of course, if we do, then the
13 Board will learn about it.

14 But I am trusting that we will be
15 able to present full and adequate evidentiary
16 record for your decision. Thank you for your
17 time.

18 CHAIRMAN ELLIOTT: Mr. Gitomer, I
19 believe you have 10 minutes for rebuttal.

20 MR. GITOMER: Thank you, Mr.
21 Chairman. In answer to Vice Chairman
22 Nottingham's question earlier, about whether

1 M&NA's existing through-route prohibits the
2 establishment of an additional through-route,
3 I believe that if Entergy were to bring an
4 appropriate case, under Section 1144, that a
5 through-route could be prescribed by the
6 Board.

7 Again, that's my off the top
8 thinking, having been given about a half hour
9 and no additional research. That's my thought
10 on that issue.

11 One item that Missouri & Northern
12 Arkansas whole-heartedly agrees with Entergy
13 about is that Missouri & Northern Arkansas
14 does not want to see the lease terminated.

15 Were the lease to be terminated,
16 Missouri & Northern Arkansas mostly likely
17 would cease to exist. The line may go back to
18 Union Pacific and the Union Pacific would do
19 with it as the Union Pacific deems best, and
20 we're not going to speculate on that.

21 But the short line would cease to
22 exist. The employees would cease to be

1 employed by the short line. The shippers that
2 receive some competitive service from the
3 short line would no longer receive that
4 service.

5 As Mr. Loftus did say, this is a
6 matter of first impression before the Board
7 and we believe it's very important for the
8 Board to get it right, as far as setting up
9 the procedures that the parties should follow,
10 in a matter of first impression, especially if
11 they're going to be a number of proceedings
12 follow it.

13 That's why we think it's very
14 important for all of the defendants to be
15 named in the amended complaint, which they
16 were not.

17 Mr. Loftus also stated that the
18 complainants need discovery in order to
19 provide facts to the Board. They don't need
20 discovery, to say that BNSF is a co-defendant,
21 not just a party, but a defendant, and I beg
22 to differ with Mr. Von Salzen, very strongly,

1 when he says that BNSF is an extraneous party
2 and it would lead to delay by including them
3 in the amended complaint.

4 As you well know, through-routes
5 involve more than one railroad. You can't
6 prescribe a through-route over just Missouri
7 & Northern Arkansas.

8 If you're going to prescribe a
9 through-route, you need a partner, and
10 apparently, the partner that's been chosen by
11 MG and Arkansas Electric is the BNSF.

12 I believe there are grave
13 questions, whether you can prescribe a
14 through-route over a railroad that is not a
15 party defendant to the complaint.

16 VICE CHAIRMAN NOTTINGHAM: Mr.
17 Gitomer, if -- do you agree that if the Board
18 delves in the public interest, we could, on
19 our own motion, make the BNSF a party, in
20 order to more fully develop the record in this
21 -- in what might be an important case, and you
22 know, just eliminate the drama and suspense,

1 just move forward?

2 MR. GITOMER: Certainly, these are
3 the Board's procedural rules. The Board can
4 adapt its procedural rules, as it sees fits,
5 whether it be on its own motion or not.

6 However, I caution that under the
7 procedural rules, a defendant to a complaint
8 is entitled to answer the complaint.

9 So, that, I believe BNSF, were
10 they made defendant, would be entitled to
11 respond to the complaint.

12 COMMISSIONER MULVEY: You mentioned
13 the possibility if UP was to terminate the
14 contract with M&NA and M&NA will cease to
15 exist and that UP then, once again, began
16 providing service directly to Entergy.

17 What would be the implications of
18 UP doing that? Wouldn't there be costs
19 associated with running that service again,
20 that UP, after all, was a Class I carrier and
21 would come under the -- some of the
22 regulations, especially labor regulations,

1 that M&NA does not have to comport with?

2 MR. GITOMER: I did not speculate
3 on what UP would do if they terminated the
4 lease and M&NA ceased to exist.

5 If we're going to speculate,
6 certainly, UP could take the operation over
7 again. UP could short line the line. UP
8 could abandon the line. There are obviously
9 other possibilities there, as to what UP could
10 do.

11 Were UP to take over the line
12 again, I believe UP would continue to be
13 subject to the same regulation that it's
14 subject to today, and in deed, I believe under
15 the lease, that Union Pacific has the residual
16 common carrier obligation to operate those
17 lines, were the Missouri & Northern Arkansas
18 to discontinue to serve over those lines.

19 VICE CHAIRMAN NOTTINGHAM: Mr.
20 Gitomer, if -- and it's a hypothetical, but
21 you raise it. If the UP were to abandon this
22 line, under some future scenario, wouldn't

1 parties have an opportunity to buy the line,
2 in the course of proceeding?

3 So, for example, a large,
4 successful energy company, for example, and
5 therefore, exercise a little self-help?

6 MR. GITOMER: Certainly, under the
7 Board's rules and the statute, any party can
8 acquire a line that's been authorized for
9 abandonment by paying the net liquidation
10 value for that line, yes.

11 COMMISSIONER MULVEY: Somebody
12 could make an OFA, and we would then look at
13 the NLV to see what they should be paying for
14 the line, correct? The offer of financial --

15 MR. GITOMER: Yes, unless the line
16 had a going concern value and I believe the
17 Board's precedent is that it -- you know, in
18 abandonment cases, there is no going concern
19 value, and therefore, the Board looks at the
20 net liquidation value and the question, I
21 think then, would become an economic question
22 for the utility company, to determine whether

1 it was willing to pay the net liquidation for
2 the line, whatever that may be.

3 VICE CHAIRMAN NOTTINGHAM: Mr.
4 Gitomer, it might help, there's been some
5 reference in the record, to the landscape
6 we're talking about here, that your client's
7 railroad operates on.

8 This is not, my understanding --
9 this is not all the wide open flat, dry
10 prairies. This is pretty severe terrain and -
11 - we've had other cases recently, Coos Bay,
12 you know, one in Oregon. We're familiar with
13 tough terrain.

14 But could you just try to give a
15 little context for -- some of us are not
16 native Arkansas.

17 MR. GITOMER: There are a number of
18 tunnels and bridges along the line. The line
19 runs along the river in a number of places,
20 and we believe that to handle any substantial
21 number of unit coal trains, the line would
22 require substantial infrastructure upgrading.

1 It's not easy terrain to operate
2 and it's not straight and flat.

3 VICE CHAIRMAN NOTTINGHAM: And I
4 appreciate your reference to an offer to -- to
5 Entergy, to go on a tour line, an inspection.

6 Would your client be willing to
7 discuss jointly hiring an independent
8 engineering firm, along with the other parties
9 here, to get an independent assessment of the
10 conditions of those lines?

11 That -- one might anticipate that
12 that of itself, after you have a pleasant trip
13 and inspection, we will be hearing about two
14 versions of what, in fact, the track condition
15 is and we'll have to choose amongst the two
16 versions.

17 It might be helpful to have an
18 independent engineering firm.

19 MR. GITOMER: I think we'd
20 certainly be willing to talk to the other
21 parties about it. Whether we could arrive at
22 an agreement, I'm not sure.

1 VICE CHAIRMAN NOTTINGHAM: I just
2 would commend that to your consideration and
3 the other parties, as well, to move forward
4 here. It just might save us -- everyone time
5 and money.

6 I mean, I envision dual
7 engineering reports, hundreds of thousands of
8 them, millions of dollars each and it's -- you
9 know, it's all pretty avoided.

10 You get a reputable engineering
11 firm. They're going to call it as they see it
12 and not argue about it, if you can work out
13 that agreement.

14 MR. GITOMER: If we can, fine, if
15 we can find an engineering firm that's not
16 tied to one of the parties.

17 VICE CHAIRMAN NOTTINGHAM: Fair
18 enough.

19 MR. GITOMER: Again, let me
20 emphasis that the point of agreement between
21 Missouri & Norther Arkansas and Entergy is
22 that Missouri & Northern Arkansas wants to

1 keep the lease in place, continue operating
2 over the line, providing service to its
3 customers, including Entergy, which it serves
4 today.

5 One further point that has been
6 made in this proceeding and in the prior
7 proceeding are the service problems, which
8 Entergy has suffered, because of the Union
9 Pacific.

10 I must point out that none of
11 these service problems have been caused by
12 Missouri & Northern Arkansas.

13 Missouri & Northern Arkansas is
14 not a party causing service problems, although
15 we are the party over which the new through-
16 route is being sought.

17 I urge the Board to dismiss the
18 amended complaint, allow the inspection to go
19 forward and then allow Entergy to file its
20 second amended complaint, seeking specific
21 relief and specifically naming the parties to
22 the relief, which they seek. Thank you for

1 your time.

2 CHAIRMAN ELLIOTT: Thank you much,
3 counsel, for your excellent presentations. We
4 will take the matter under advisement.

5 We will now hear oral argument in
6 STB Finance Docket No. 34914, DesertXpress
7 Enterprises, Petition for Declaratory Order.

8 (Whereupon, the above-entitled
9 matter went off the record at approximately
10 2:10 p.m.)

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