

SERVICE DATE - JULY 16, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33387

SOUTHERN ELECTRIC RAILROAD COMPANY--CONSTRUCTION AND OPERATION  
EXEMPTION--WEST JEFFERSON, AL

Decided: July 1, 1997

By petition filed April 24, 1997, Southern Electric Railroad Company (SERC) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 to construct a rail line approximately 4.5 miles in length beginning near milepost 821 on the Norfolk Southern (NS) main line, located near the intersection of U.S. Highway 78 and Jefferson County Road No. 45 near West Jefferson, Jefferson County, AL, and connecting with the industry track facilities of the James H. Miller, Jr. Steam Electric Generating Plant (Plant Miller) located near the south bank of the Locust Fork of the Black Warrior River, approximately 20 miles northwest of Birmingham, AL. To expedite the transaction, SERC requests that the Board conditionally grant the exemption, subject to our review of the anticipated environmental impacts of this proposal. We are granting the conditional exemption sought.

BACKGROUND

SERC is a Class III carrier that owns, but does not operate, approximately 12 miles of rail lines in Alabama and Georgia. SERC is a subsidiary of The Southern Company, a holding company that owns numerous utilities, including Alabama Power Company (APC). Plant Miller consists of 4 generating units owned by APC, except for 8.16% of units 1 and 2 owned by Alabama Electric Cooperative. Along with construction of the plant, Plant Miller constructed 4 miles of industry track, including a loop track around the plant for the loading and unloading of coal deliveries by rail. The industry track connects with a CSX Transportation, Inc. (CSXT) branch line and, prior to 1994, CSXT was the sole source of rail coal delivery.

With the passage of the Clean Air Act of 1990, according to SERC, Plant Miller was required to burn compliance coal to reduce emissions. SERC notes in this regard that Powder River Basin (PRB) coal is an efficient and competitive source of such compliance coal. Accordingly, in 1992, the ICC granted an exemption for SERC to build a 1.5-mile rail line into Plant Miller connecting with the main line of what is now The Burlington Northern and Santa Fe Railway Company (BNSF). Upon the line's completion in 1994, SERC granted BNSF trackage rights over the line pursuant to which the latter has been providing coal service to Plant Miller.

Concurrent with this proposed construction, SERC plans to convert units 1 and 2 to burn PRB coal, which it avers is cleaner and cheaper. When these two units join already-converted units 3 and 4, Plant Miller will burn approximately 12,000,000 tons of PRB coal annually, up from the current 3,000,000 tons. Due to this significant increase in demand for PRB coal, SERC states that Plant Miller will need a competitive alternative to BNSF, which it intends to secure by constructing the proposed rail line connecting the industrial track with NS.

According to SERC, it will take 1.5 to 2 years to complete all legal and contractual requirements necessary for the construction of this second rail line and to complete construction. Once this line is completed, SERC will grant trackage rights to NS to move unit coal trains over the SERC line to the connection with the Plant Miller industry tracks. NS will then deliver PRB coal to the plant pursuant to a joint arrangement with the Union Pacific Railroad Company and Southern Pacific Transportation Company (UP/SP). Because of the lengthy construction period, SERC

requests that we expedite consideration of its request<sup>1</sup> and grant the exemption conditioned upon completion of the environmental review process. To this end, SERC has requested and received from the Board's Section of Environmental Analysis (SEA): (1) approval to retain a third-party consultant to prepare environmental documentation; and (2) a waiver of the 6-month prefiling notice required by 49 CFR 1105.10(a). In addition, SERC has requested and received from SEA a waiver of 49 CFR 1105.6(a), which generally provides for preparation of an environmental impact statement for a rail line construction proposal. SEA has determined that, because the proposed construction and operation are unlikely to have significant environmental impact, preparation of an environmental assessment (EA) is appropriate.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10901, the construction and operation of a rail line requires prior Board approval. However, under 49 U.S.C. 10502, we must exempt the construction and operation from regulation if we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed construction and operation under 49 U.S.C. 10901 is not necessary to carry out the rail transportation policy. The requested exemption will promote that policy. The proposed construction and operation will give Plant Miller access to an additional rail carrier and, as a consequence, will increase competition. [49 U.S.C. 10101(1) and (4)]. Moreover, exempting the proposed construction and operation will reduce the need for Federal regulation, ensure the development of a sound transportation system, foster sound economic conditions, and reduce regulatory barriers to entry [49 U.S.C. 10101(2), (4), (5), and (7)]. Other aspects of the rail transportation policy will not be adversely affected.

Moreover, there is no reason to believe that any shipper or member of the public would be subject to an abuse of market power for which regulation might be necessary. To the contrary, the proposed rail line will provide Plant Miller, and possibly other shippers, with an additional rail transportation option and thus will shield them from potential market power abuses by a single carrier. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its obligation under 49 U.S.C. 11326 to protect the interests of adversely affected employees. However, section 11326 applies only to transactions under 49 U.S.C. 11323 and does not govern section 10901 transactions such as this where labor protection is not available. Consequently, no labor protective conditions will be imposed here.

We have decided to grant this exemption conditionally, subject to our review of the anticipated environmental impacts of the construction and operation of the proposed line. This request is consistent with our practice in numerous other construction exemption proceedings. *See Joppa and Eastern Railroad Co.--Construction Exemption--Joppa, IL*, Finance Docket No. 31656 (ICC served July 5, 1990). Once an EA is issued and comments are received, we will consider those issues and comments and issue a further decision. Granting the requested exemption at this time will not diminish our capacity to decide environmental matters when rendering a final decision. *See Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1259 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989).

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

---

<sup>1</sup> As part of its expedition request, SERC appears to indicate that construction of this line may commence as early as September 1997. We must point out, however, that no actual construction can begin until such time as the Board issues its unconditional approval.

*It is ordered:*

1. Under 49 U.S.C. 10502, we conditionally exempt the construction and operation of the proposed line from the prior approval requirements of 49 U.S.C. 10901, subject to our further consideration of the anticipated environmental impacts of the proposal.

2. On completion of the environmental review, we will issue a further decision addressing those matters and making the exemption effective at that time, if appropriate.

3. Notice will be published in the *Federal Register* on July 16, 1997.

4. Petitions to reopen must be filed by August 5, 1997.

5. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary