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SERVICE DATE - AUGUST 23, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33862

PUBLIC SERVICE COMPANY OF COLORADO--CONSTRUCTION EXEMPTION--  
PUEBLO COUNTY, CO

Decided: August 16, 2000

By petition filed on April 14, 2000, the Public Service Company of Colorado (PSCo) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 to construct a line of railroad, approximately 1,500 feet in length,<sup>1</sup> to serve its Comanche Power Station (Comanche station) in Pueblo County, CO. PSCo states that the proposed line will connect with a line of the Union Pacific Railroad Company (UP) and will cross track of The Burlington Northern and Santa Fe Railway Company (BNSF).<sup>2</sup> PSCo seeks an alternative to its rail transportation contract with BNSF that expires at the end of the year. PSCo requests expedited handling of its petition because the availability of two-carrier rail service at its Comanche station could affect its efforts to negotiate a new rail transportation arrangement. We will grant a conditional exemption from the requirements of 49 U.S.C. 10901 for construction of the line<sup>3</sup> and will issue a final decision after completion of the environmental review process making the exemption authority effective at that time, if appropriate.

MOTION TO DISMISS

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<sup>1</sup> In its petition, PSCo estimated the length of the line to be approximately 600 feet, but after further investigation into the operational and engineering aspects of the new track, it revised the estimate to approximately 1,500 feet.

<sup>2</sup> On May 19, 2000, PSCo filed a related petition in STB Finance Docket No. 33862 (Sub-No. 1), Public Service Company of Colorado--Petition For Crossing Authority Pursuant to 49 U.S.C. 10901(d), seeking authority under 49 U.S.C. 10901(d) to cross the BNSF track. In its petition, PSCo states that its efforts to obtain BNSF's permission to cross its track have been unsuccessful. On June 8, 2000, BNSF filed a motion to dismiss the crossing petition, and on June 27, 2000, PSCo replied. A decision on the crossing petition must await a final decision allowing construction to proceed. See 49 U.S.C. 10901(d)(1); Big Stone-Grant Industrial Development and Transportation, L.L.C.--Construction Exemption--Ortonville, MN and Big Stone City, SD, Finance Docket No. 32645, slip op. at 1 n.1 (ICC served Sept. 26, 1995).

<sup>3</sup> In its construction exemption petition, PSCo did not include a request for authorization to operate. Before commencing operations on the line, it must seek and obtain operating authority from the Board under 49 U.S.C. 10901 or 49 U.S.C. 10502.

On May 4, 2000, BNSF filed a motion to dismiss the petition for exemption, arguing that the line that PSCo proposes to construct would be a spur or industrial track that, under 49 U.S.C. 10906, is exempt from 49 U.S.C. 10901. BNSF also alleges that we do not have jurisdiction over the proposed crossing of BNSF's track in STB Finance Docket No. 33862 (Sub-No. 1) because PSCo is not a rail carrier and our jurisdiction under 49 U.S.C. 10901(d) is limited to a rail carrier's proposed crossing of a rail line.<sup>4</sup>

In challenging our jurisdiction to consider the proposed build-out by PSCo, BNSF acknowledges the line of decisions relied on by PSCo, authorizing similar construction proposals by shippers, but argues that these decisions have no precedential effect because they were never challenged on jurisdictional grounds. Instead, BNSF relies on one case where jurisdiction was challenged and found to be lacking. See K&K Warehouse--Exemption From 49 U.S.C. 11104 and 10901(d), Finance Docket No. 30858 (ICC served Apr. 23, 1987) (K&K Warehouse).

However, K&K Warehouse is inapposite. In that case, the shipper proposed to connect track identified by the parties as "industrial spur" to a rail line operated jointly by two carriers. Only one of those carriers served K&K's facility, and the shipper sought Interstate Commerce Commission (ICC) exemption authority to construct a switch and connecting track to provide access for the second carrier. Slip op. at 1, 5 n.6. In dicta, the ICC found the track to be an exempt spur because the construction would not substantially alter the competitive situation as there was no evidence that K&K's traffic would significantly affect either carrier's revenues.<sup>5</sup> Id. at 5 n.6. However, the ICC did not view that finding as determinative of the crossing issue. Id. at 5. Rather, the ICC based its decision on the fact that K&K would not be assuming any of the responsibilities of a carrier. Id. at 5 and n.7. It was for that reason that the ICC ruled that the crossing remedy in section 10901(d) was unavailable in that case. Id. at 5.

In marked contrast to K&K Warehouse, PSCo's proposed construction would substantially alter the competitive situation for the transportation of coal from the Powder River Basin to the Comanche station. Thus, this case plainly involves construction of a line of railroad

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<sup>4</sup> BNSF makes this same argument in its separately filed motion to dismiss the crossing petition in the Sub-No. 1 docket. See supra note 2. Inasmuch as BNSF has raised the issue here, we will dispose of this issue now.

<sup>5</sup> We question the soundness of the ICC's reliance in K&K Warehouse on the effect on the carrier's overall revenues. See Texas & Pac. Ry. v. Gulf, Colorado & Santa Fe Ry., 270 U.S. 266, 278 (1926) (T&P) ("where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier," the proposed trackage constitutes an extension within the meaning of 49 U.S.C. 10901 "although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks.").

and not an exempt spur. See Detroit/Wayne County Port Auth. v. ICC, 59 F.3d 1314, 1317 (D.C. Cir. 1995); Brotherhood of Locomotive Engineers v. United States, 101 F.3d 718, 728 (D.C. Cir. 1996), citing T&P, 270 U.S. at 278. Because the track at issue here would be a line of railroad and because PSCo, unlike K&K, will be assuming the responsibilities of a carrier,<sup>6</sup> we have jurisdiction over both the construction exemption petition and the crossing request.

## BACKGROUND

PSCo, an operating company of New Century Energies, provides electricity and natural gas to approximately 70% of the State of Colorado. PSCo owns and operates 15 generating stations within its service area. It has approximately 1.4 million customers that use electricity. PSCo also engages in electric power sales in the wholesale electric power market. Seven of its 15 plants produce electricity by burning approximately 8 million tons of coal annually. PSCo purchases the coal from mines in Colorado and the Powder River Basin in Wyoming.

The Comanche station is a coal-fired generating plant that burns approximately 2.8 million tons of coal and receives 230 unit trains of coal each year.<sup>7</sup> The Comanche station is served exclusively by BNSF from a spur extending from BNSF's railroad line. The BNSF line consists of two segments of track that come together near the Comanche station spur. One track segment runs south from a point known as Southern Junction to Walsenberg, CO, and the other runs southwest from Pueblo, CO, to Walsenberg. UP's lines are west of, and parallel to, BNSF's Southern Junction-Walsenberg line.

The UP and BNSF tracks involved in this project are "directional running" (each track carries traffic one way only) double tracks that are operated by UP and BNSF pursuant to agreements between the two carriers. Under these agreements, both UP and BNSF trains use UP's track to run south to Walsenberg from the Southern Junction. Northbound trains of UP and BNSF use the BNSF track to move from Walsenberg to the vicinity of the Southern Junction. Consistent with this arrangement, the new rail line to be constructed by PSCo would run south-southeast from a point of connection with UP and would cross the BNSF line at grade, and extend to a point of connection on the existing Comanche spur, permitting loaded coal trains to travel southbound to the Comanche station using the UP track. A connection would also be constructed to the BNSF track from a point on the Comanche spur to permit UP to exercise its

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<sup>6</sup> PSCo states that it fully intends to be responsible for the maintenance and upkeep of the new line and will fulfill the obligation to provide service by arranging for UP to serve PSCo and other shippers who might request service, such as the C&W rail maintenance facility or other shippers who might locate along the line in the future.

<sup>7</sup> That is approximately 5 unit trains per week, with each unit train consisting of 120 rail cars.

rights to take northbound empty trains on BNSF's track to the point of connection with UP's track north of the Southern Junction.

Once the track is in place, PSCo expects that traffic over the line will vary, depending on the results of the competitive bidding process. PSCo notes that the line could carry 100% of the coal traffic into the Comanche station. While PSCo initially will be the only shipper served by the line, PSCo states that other shippers would be permitted to use the rail line in the future should a demand arise.

### DISCUSSION AND CONCLUSIONS

The construction of railroad lines requires prior Board approval under 49 U.S.C. 10901. However, under 49 U.S.C. 10502, we must exempt a transaction or service from regulation when 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 necessary to protect shippers from the abuse of market power.

Based on the information before us, we conclude that detailed scrutiny of the proposed construction 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 will establish competitive rail access to the Comanche station, and will, therefore, allow competition and the demand for services to establish reasonable rates for transportation by rail [49 U.S.C. 10101(1)]. Exempting the proposed construction will reduce the need for Federal regulation, ensure the development of a sound transportation system with effective competition among rail carriers, foster sound economic conditions, and reduce regulatory barriers to entry [49 U.S.C. 10101(2), (4), (5), and (7)]. Nothing on the record indicates that other aspects of the rail transportation policy will be adversely affected.

Regulation of the transaction is not necessary to protect shippers from an abuse of market power. Rather, the proposed transaction will enhance competition by providing PSCo, and possibly other shippers, with an additional rail transportation option. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

PSCo has consulted with our Section of Environmental Analysis (SEA) regarding the environmental review process. Pursuant to our rules at 49 CFR part 1105, PSCo has retained an independent third-party consultant to assist SEA in completing the environmental review of this project. After a final environmental assessment or environmental impact statement is issued, we will issue a further decision addressing the environmental issues and making the exemption effective at that time, if appropriate, thereby allowing construction to begin. See Missouri Mining, Inc. v. ICC, 33 F.3d 980 (8th Cir. 1994); Illinois Commerce Com'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.

It is ordered:

1. BNSF's motion to dismiss the construction exemption is denied.

2. Under 49 U.S.C. 10502, we conditionally exempt PSCo's construction of the above-described line from the prior approval requirements of 49 U.S.C. 10901, subject to our consideration of the anticipated environmental impacts of the proposal, and on completion of the environmental review process, issuance of a further decision making the exemption effective at that time, if appropriate.

4. Notice will be published in the Federal Register on August 23, 2000.

5. Petitions to reopen must be filed by September 12, 2000.

6. This decision is effective 30 days from date of service of this decision.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams  
Secretary