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SERVICE DATE – MARCH 15, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42104

ENTERGY ARKANSAS, INC. & ENTERGY SERVICES, INC.

v.

UNION PACIFIC RAILROAD COMPANY,
MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC., &
BNSF RAILWAY COMPANY

Docket No. FD 32187

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.
– LEASE, ACQUISITION AND OPERATION EXEMPTION –
MISSOURI PACIFIC RAILROAD COMPANY AND BURLINGTON NORTHERN
RAILROAD COMPANY

Digest:¹ A coal-fired electric utility plant owned by Entergy and Arkansas Electric Cooperative seeks a choice of rail carriers so that it may obtain alternative rates and service. The plant is served by a single small railroad: the Missouri & Northern Arkansas Railroad. MNA works with Union Pacific Railroad to deliver coal to the plant. UP hauls coal from mines in the southern Powder River Basin of Wyoming and hands the shipment to MNA for final delivery. While UP owns the track needed to serve the plant, it leased those facilities to MNA over 18 years ago. Under the terms of the lease, MNA must interchange its traffic on the leased property with UP or pay a large rental fee.

In addition to service from UP/MNA, the utility wants a joint BNSF Railway/MNA service option. So it seeks three forms of relief. First, it seeks joint BNSF/MNA service from the northern PRB coal mines served only by BNSF. Second, it seeks joint BNSF/MNA service from the southern PRB coal mines served by UP and BNSF. Third, it asks the Board to revoke its approval of the lease and rewrite the lease terms by replacing the current rental fee agreement with a more favorable one.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

With this decision, the Board finds that the plant has a statutory right to service by BNSF from the northern PRB mines, giving the plant a competitive BNSF/MNA transportation alternative (or a BNSF/UP alternative if UP exercises its right under the lease to displace MNA). But the agency denies the rest of the relief sought. The utility did not show that the service problems it experienced were the result of anticompetitive conduct by UP or MNA, and the Board finds that the proposed BNSF/MNA route is not better or more efficient than the existing route. The Board is unable to reach a majority decision on the utility's request that it revoke agency approval of the UP-MNA lease, and the lease authority therefore remains in effect.

Decided: March 14, 2011

BACKGROUND

Entergy Arkansas, Inc., and Entergy Services, Inc. (jointly Entergy) co-own Independence Steam Electric Station (ISES) with intervenor Arkansas Electric Cooperative Corporation (AECC). ISES, which is located in Newark, Arkansas, burns low-sulfur coal obtained from the southern Powder River Basin (PRB) region of Wyoming. The coal is transported from southern PRB mines that are served by a line that is jointly operated by Union Pacific Railroad Co. (UP) and BNSF Railway Company (BNSF). The southern PRB joint line connects with a northern PRB line that is operated only by BNSF. Since operations at ISES commenced in 1983, all PRB coal burned at the plant has been delivered by railroad.

ISES is directly served by Missouri & Northern Arkansas Railroad Co., Inc. (MNA). Coal destined for ISES is transported by UP from the PRB to Diaz Junction, Ark. At Diaz Junction, the loaded coal cars are handed off to MNA crews for delivery to ISES. From Diaz Junction, MNA completes the 8-mile trip to ISES, where the cars are handed off to Entergy employees for unloading. After the cars are unloaded, Entergy releases them back to MNA crews, and MNA delivers the empty cars to UP's Neff Yard in Kansas City, Mo., with UP handling the remainder of the empty car movement back to the PRB. While en route to Kansas City, MNA passes several points where it could interchange traffic with BNSF, which also serves the PRB.

MNA became a newly formed railroad by obtaining authorization from the Board's predecessor agency, the Interstate Commerce Commission (ICC), to lease, acquire, and operate the lines used to serve Entergy's plant, lines that were held by UP's predecessor in interest, the Missouri Pacific Railroad Company. See Mo. & N. Ark. R.R. – Lease, Acquis. and Operation Exemption – Mo. Pac. R.R., FD 32187 (ICC served Dec. 22, 1992) (MNA Exemption).² The

² The authorization also pertained to trackage rights over two Burlington Northern Railroad Company (now BNSF) lines in Missouri. Those trackage rights are not at issue in this proceeding.

sole opposition from interested parties at the time was on the issue of whether the ICC should have exercised its then-discretionary power to impose labor conditions on the transaction.³

Since 1992, ISES has been directly served by MNA, with coal interchanged from UP at Diaz Junction, Ark. Entergy and AECC seek to obtain an alternate BNSF/MNA route for PRB coal sent to ISES. However, MNA's lease with UP contains "interchange commitments"⁴ that could make it costly for MNA to interchange traffic with a carrier other than UP:

- Under the lease, MNA pays no rent for the over 300 miles of track it leases from UP so long as MNA interchanges over 95% of its traffic with UP; but if MNA interchanges less than 95%, sections 4.01 and 4.03 of the lease provide for a schedule of rent that increases with the total volume of traffic that MNA interchanges with railroads other than UP.⁵ The rentals are indexed to the Producer Price Index for Finished Goods (PPI). As of April 7, 2010, the maximum PPI-adjusted annual rental under the lease was \$117,000,000.⁶

- Under section 4.01 of the lease, the interchange percentage rental thresholds must be achieved "separately and simultaneously" for each of the two leased segments, which are separated by a segment that was purchased by MNA rather than leased.

- Sections 3.01 and 3.04 of the lease permit UP, at its sole discretion, to provide exclusive service directly to Entergy over the leased lines upon 7 days' notice to MNA and a payment to MNA of \$60,000 per year.

- Section 15.01 provides that either party may terminate the lease if Section 4 (the rental schedule) is found to be unlawful or unenforceable.

By complaint filed on February 19, 2008 (Docket No. NOR 42104), Entergy alleged that the lease between UP and MNA unlawfully prevented MNA from interchanging Entergy's traffic

³ See decisions served in the MNA Exemption proceeding on Dec. 15, 1992 (denying stay petition), and May 4, 1993 (denying revocation request).

⁴ See 49 C.F.R. § 1114.30(d) (describing "interchange commitments" as provisions in line sales and leases that "serve to induce a party to the agreement to interchange traffic with another party to the agreement, rather than with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means").

⁵ The base (unadjusted by PPI) MNA rent levels are: (1) 100-95% of traffic interchanged with UP - \$0; (2) 94-85% interchanged - \$10,000,000; (3) 84-75% interchanged - \$20,000,000; (4) 74-65% interchanged - \$20,000,000; (5) 64-55% interchanged - \$30,000,000; (6) 54-45% interchanged - \$40,000,000; (7) 44-35% interchanged - \$50,000,000; (8) 34-25% interchanged - \$60,000,000; (9) 24-15% interchanged - \$70,000,000; (10) 14-5% interchanged - \$80,000,000; and (11) 0-4% interchanged - \$90,000,000.

⁶ Entergy Opening Evidence and Argument (filed Apr. 7, 2010), V.S. Crowley at 2.

with BNSF. Entergy's principal argument was that the interchange commitments constituted an unreasonable practice under 49 U.S.C. § 10702. Alternatively, Entergy argued that the interchange commitments should be removed by Board revocation of the exemption under 49 U.S.C. § 10502(d) or a finding that the interchange commitments created a pooling arrangement requiring prior agency approval under 49 U.S.C. § 11322. AECC supplemented Entergy's arguments by suggesting that a more efficient route – involving an MNA interchange with BNSF at Lamar, Mo. – was being foreclosed by the interchange commitments in violation of the carriers' interchange obligations.

In the decision served on June 26, 2009 (June 2009 Decision), the Board concluded that Entergy had focused on the wrong provisions of the statute, and recommended that the shipper instead pursue relief under 49 U.S.C. § 10705. The Board determined that § 10702 was an inappropriate provision for examining the propriety of an interchange commitment because there was a more specific statutory provision governing the alleged behavior and effects. The Board also concluded that the UP-MNA interchange commitments did not require pooling authority under § 11322 when the lease was executed and does not require such authority now. The Board deferred consideration of whether to revoke the exemption in whole or in part under § 10502(d), reasoning that, while Entergy would have an opportunity to obtain more focused relief under § 10705, relief by revocation alone might result only in the termination of MNA's lease (which could harm MNA, its employees, and other shippers on the line) without providing Entergy with the alternate route that it seeks for its traffic.

On July 27, 2009, Entergy filed an amended complaint asking the Board to (1) enter an order prescribing "a through route (or through routes)" involving a carrier other than UP, and (2) take such other actions as may be reasonable and necessary. In its amended complaint, Entergy did not propose and describe a specific (origin-to-destination) alternate through route. Rather, Entergy mentioned several possible candidate points for interchange with BNSF⁷ and asked the Board to select the point or points where interchange would be required. Entergy argued that the prescription of a through route would be in the public interest under § 10705(a)(1) and would enable Entergy to obtain more adequate, efficient, and economic service under § 10705(a)(2)(C). Entergy also requested that any route prescription be sufficiently broad to apply with equal force to UP if that carrier were to elect to terminate MNA's role in serving Entergy.

On October 27, 2009, the Board held an oral argument on a motion to dismiss filed by MNA, at which counsel for Entergy, AECC, and MNA appeared. By decision served on December 30, 2009 (December 2009 Decision), the Board disposed of various motions filed by MNA. In particular, the Board denied MNA's motion to dismiss the amended complaint at that time, subject to reconsideration at a later date, and granted MNA's request to require Entergy to make the complaint more definite – by requiring Entergy to identify the through route(s) that it seeks to prescribe in its opening statement. The Board also adopted a revised procedural schedule.

⁷ Entergy mentioned Aurora, Lamar, Joplin, Kansas City, or Springfield (via MNA trackage rights over BNSF between Aurora and Springfield), Mo., and Ft. Scott, Kan.

On March 11, 2010, before Entergy's opening statement in support of its amended complaint was due, Entergy filed a motion for leave to file a second amended complaint, tendering the second amended complaint that it was seeking to file. In its second amended complaint, Entergy requested the same relief for the same reasons but also: (1) joined BNSF as a defendant; and (2) asked the Board to select an interchange with BNSF at either Lamar or Aurora, Mo.

On April 7, 2010, Entergy filed its opening statement. In its statement, Entergy added to its request for relief by asking the Board to confirm that BNSF and MNA must participate in a through route involving northern PRB origins that are served by BNSF alone.⁸ Entergy also clarified its choice of an interchange point by stating that an interchange at Lamar would appear to be the more feasible choice of an interchange.⁹

On April 19, 2010, the Board granted Entergy's motion for leave to file the second amended complaint that it had tendered with its motion filed on March 11, 2010.

On May 10, 2010, UP, MNA, and BNSF filed answers requesting dismissal of Entergy's second amended complaint. Also on that date, AECC filed a statement joining in Entergy's complaint and supplementing it with a request that the Board prevent UP from invoking provisions in the lease that would prevent MNA from participating in a through route with BNSF in the event that the agency were to order MNA to interchange with that carrier, specifically by: (1) ordering UP not to invoke these provisions; or (2) granting BNSF terminal trackage rights to serve Entergy directly under 49 U.S.C. § 11102.

On June 4, 2010, reply statements in opposition to the relief sought by Entergy were filed by UP, MNA, and BNSF. Entergy and AECC filed rebuttal on July 9, 2010, and the Board held an oral argument on October 26, 2010.

DISCUSSION AND CONCLUSIONS

Entergy has requested that the Board clarify and confirm the obligations of MNA and BNSF regarding service from the northern PRB mines. Entergy has also asked the Board to enter an order prescribing a BNSF through route from the southern PRB mines with a MNA interchange at either Lamar or Aurora, Mo. The Board will clarify the obligations of MNA and BNSF regarding service from the northern PRB mines. The request for a through route will be denied, however, because the UP service problems on which that request is premised do not constitute competitive abuse and the proposed route is not more efficient or better than the current route. Although the Board has carefully considered the record, it is unable to reach a majority decision on Entergy's request that the Board revoke the exemption governing the UP-MNA lease. Accordingly, the relief Entergy requested cannot be granted and the lease authority therefore remains in effect. These determinations are discussed in greater detail below.

⁸ Entergy Opening Evidence and Argument (filed Apr. 7, 2010), Argument 5.

⁹ Id., Argument 23 n.14.

I. Northern PRB Origins

Entergy has asked the Board to confirm what it stated in the June 2009 Decision about obligations of MNA and BNSF to participate in through service for coal from northern PRB origins. We did make such a statement in the June 2009 Decision about the carriers' statutory obligations concerning northern PRB coal, and we reaffirm it, with additional discussion that clarifies how the statutory provisions governing northern PRB origins interact with each other.

As a threshold matter, railroads are required by their common carrier obligation to establish rates and routes to move a shipper's traffic from origin to destination, 49 U.S.C. § 11101(a), and to interchange traffic if doing so is required to complete the transportation, 49 U.S.C. § 10742. Thus, if a utility seeks coal from an origin that is not served by the destination bottleneck carrier (i.e., the carrier with exclusive access to, or control of, the line to the shipper), either directly or under an existing through route, the bottleneck carrier cannot refuse to provide interline service to the destination generating station. Instead, under its common carrier and interchange obligations, the bottleneck carrier must accept this traffic from a new origin at a reasonable interchange point and establish a rate over the bottleneck segment to complete the transportation.¹⁰

Thus, should Entergy choose to source coal from a northern PRB mine not served by UP (e.g., Dry Fork, Rawhide, Eagle Butte, Buckskin), it would not need to bring a § 10705 case or establish that a particular route is more efficient in order to obtain service. In this situation, BNSF must provide service under § 11101. MNA or UP would be obliged to interchange with BNSF upon request.¹¹ Common carrier rates established by the rail carriers would be subject to the reasonableness standards of 49 U.S.C. § 10701(d).

Entergy therefore can obtain alternative transportation service to bring PRB coal to its ISES facility by requesting BNSF service from the northern PRB mines. The existence of a competitor should enable Entergy to obtain a quote from BNSF for service and react quickly to any service crises or inadequacies associated with a particular carrier by satisfying its coal needs from northern PRB mines.

Entergy has described its unsuccessful attempts to obtain service from the southern PRB mines via MNA and BNSF.¹² BNSF and MNA responded to Entergy's service requests with

¹⁰ Cent. Power & Light Co. v. S. Pac. Transp. Co., 1 S.T.B. 1059, 1063-64 (1996) (CP&L), aff'd MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999).

¹¹ 49 U.S.C. §§ 10703 and 10742. If UP were to displace MNA as the destination carrier by canceling the lease, the common carrier obligation to serve Entergy would be unaffected. Although the lease allows UP to resume direct service to ISES, UP would have the obligation under 49 U.S.C. § 11101(a) to provide "service on reasonable request" if MNA's role in providing that service were to end.

¹² Entergy Opening Evidence and Argument (filed Apr. 7, 2010), V.S. Trushenski 5-8.

requests for additional information regarding MNA interchange facilities and line upgrade costs.¹³ The carriers may not respond to Entergy’s reasonable requests for service from the northern PRB mines with questions regarding interchange facilities and upgrade costs. Rather, it is up to BNSF to work with MNA to obtain such information and quote a rate within the time frame set by the Board’s regulations.

II. Southern PRB Origins

To obtain relief under our competitive access rules, Entergy must first meet the statutory requirements. Under 49 U.S.C. § 10705(a)(1), the Board “may, and shall when it considers it desirable in the public interest, prescribe through routes, joint classifications, joint rates, the division of joint rates, and the conditions under which those routes must be operated” for rail carriers providing transportation under its jurisdiction. However, the Board “may require a rail carrier to include in a through route substantially less than the entire length of its railroad . . . only when” certain statutory criteria are met. See 49 U.S.C. § 10705(a)(2). In exercising our discretion, we are instructed to give reasonable preference to the rail carrier originating the traffic when prescribing a through route. Id.

The competitive access rules allow the Board to exercise its discretionary authority if the statutory requirements of § 10705 are met and the Board determines a prescription is necessary “to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. § 10101 or is otherwise anticompetitive.” 49 C.F.R. § 1144.2(a)(1); Intramodal Rail Competition, 1 I.C.C.2d 822 (1985), aff’d sub nom. Balt. Gas & Elec. v. United States, 817 F.2d 108 (D.C. Cir. 1987). The Board’s regulations state that a showing of anticompetitive conduct applies to all requests for § 10705 relief. 49 C.F.R. § 1144.2(a).

Some Board precedent suggests that a party may be able to obtain a through route prescription under an arguably more relaxed standard than set forth in our regulations. In CP&L, the Board suggested that a party could, under certain circumstances, obtain relief after establishing that the prescribed through route was “better” or “more efficient” in lieu of making an anticompetitive conduct showing.¹⁴ The Board determined that in such cases “shippers seeking ‘through route access’ may be able to establish underlying facts on comparative service

¹³ Id. at 5-6.

¹⁴ CP&L, 1 S.T.B. at 1069 (“We can foresee situations where contracts contain service terms providing benefits, advantages, and projected efficiencies that would make the proposed service over the non-bottleneck segment ‘better’ than that presently offered by the bottleneck carrier over the existing through route, and make the bottleneck carrier’s ‘foreclosure’ of that service over an additional through route conduct that would warrant prescriptive relief. Assuming the shipper presents sufficient facts in that regard, there is nothing in our competitive access regulations to preclude a competitive access remedy, and we are prepared to interpret the rules in a manner that will provide for relief in appropriate circumstances”).

inadequacies and/or efficiencies necessary to support such relief under the requirements of our [competitive access] rules.”¹⁵

Here, we conclude that Entergy has not met either the competitive access standard in our regulations or the more relaxed standard announced in CP&L.¹⁶ First, Entergy has not proven that the past service problems involving the southern PRB were the result of competitive abuse. Second, the evidence supplied by the parties establishes that the existing UP-MNA routing is more efficient (“better”) than the BNSF-MNA routing Entergy has requested. Finally, the current joint UP/MNA contract rate (with a revenue to variable cost (R/VC) ratio below 125%) does not suggest a monopolist railroad exploiting market power. We elaborate on each point below.

A. Competitive Abuse

Entergy argues that it has experienced anticompetitive impacts directly attributable to the relationship between UP and MNA. Entergy claims that it was adversely affected by what it describes as 3 major service crises involving PRB coal since the 1980s.¹⁷ Entergy specifies that it experienced the following coal shortfalls during those periods: more than 6 million tons during the (1) 1993-1995 and (2) 1997-1998 periods;¹⁸ and 3.32 million tons during the (3) 2005-2006 period.¹⁹ Entergy alleges that the impacts of the service problems during these periods were exacerbated by the lack of alternative routing to the southern PRB – a circumstance Entergy attributes to UP’s enforcement of its interchange commitment with MNA.²⁰

UP and MNA argue that Entergy’s evidence did not support its anticompetitive conduct allegations. UP responds that a BNSF/MNA through route would not have helped Entergy meet

¹⁵ Id. at 1070. The CP&L standard was also cited in the Board’s June 2009 decision in this proceeding.

¹⁶ In this decision, the Board need not clarify which standard applies as Entergy’s evidence is insufficient to meet either standard. See infra. The Board expects to reconcile these lines of precedent, and more fully explore the proper legal framework to govern future competitive access cases, in Competition in the Railroad Industry, Ex Parte 705.

¹⁷ See Entergy Opening Evidence and Argument (filed Apr. 7, 2010), V.S. Trushenski; Entergy Rebuttal Evidence and Argument (filed July 9, 2010), V.S. Gray (Attachments 1 and 2). The Board notes that none of the defendants argued that Entergy’s reliance on service incidents occurring as much as 17 years ago was barred by the limitations set under 49 U.S.C. § 11705 (requiring a complaint to be filed with the Board within 2 years after the claim accrues). We will therefore treat this potential defense as waived.

¹⁸ Entergy Opening Evidence and Argument (filed Apr. 7, 2010), Attachment 1.

¹⁹ Id. at Attachment 2.

²⁰ Id. at 17-18.

its needs during these periods because the service problems equally affected BNSF and UP.²¹ UP argues that Entergy's evidence instead establishes that the service problems were caused by conditions unrelated to routing competition and that Entergy was only one of many affected customers.²² MNA argues that Entergy's evidence of UP service problems does not reflect on MNA's service history and that MNA "provided timely delivery of trains once received in interchange."²³

We conclude that Entergy's citations to the 1993 (flooding) and 2005 (joint line disruption) periods do not support its claims of competitive abuse. The southern PRB service problems arising during the 1993 and 2005 periods were not caused by UP's market power, or its relationship with MNA. UP shows that its rates for service to Entergy's plant declined substantially in real (inflation adjusted) terms from 1992-2008, even as its fuel and other costs increased, a development that is not consistent with Entergy's allegation of competitive abuse.²⁴

Moreover, Entergy's claims are contradicted by the fact that the 1993 and 2005 disruptions affected both UP and BNSF. The problems during those two periods were caused by a natural disaster and southern joint line disruptions that affected both carriers. Entergy has not shown that a BNSF alternative would have mitigated the harms Entergy suffered during these periods. In contrast, UP presents credible evidence that its service level during the 2005 period was comparable to BNSF's based on (1) a comparison of UP's cycle time data to BNSF's,²⁵ and (2) a comparison of actual volumes moved with the volumes that the mines were prepared to load in UP and BNSF trains.²⁶ As UP's service problems during the 1993 and 2005 periods were not specific to Entergy and also affected BNSF – the alternative carrier – the Board finds that the lack of alternative routing neither caused nor exacerbated Entergy's injuries. Thus the problems during the 1993 and 2005 periods do not support Entergy's claims of past or present competitive abuse.

Entergy's citation to the 1997 period (post-merger disruption) also lends no support to its claims. Entergy cannot show that UP's response to the service crisis during the 1997 period constituted competitive abuse as these problems coincided with UP's widespread and well

²¹ UP Reply Evidence and Argument (filed June 4, 2010) at 34.

²² Id. at 34-35. The 1993 period involved service problems following record flooding in the Midwest. The 1997 period involved service problems following the merger between UP and Southern Pacific Transportation Company. The 2005 period was due to issues affecting PRB joint line traffic. Id.

²³ MNA Reply (filed June 4, 2010) at 20.

²⁴ UP Reply Evidence and Argument (filed June 4, 2010), V.S. Gough, Attachment 1 (prior testimony) at 2-3.

²⁵ UP Reply Evidence and Argument (filed June 4, 2010) at 41-42.

²⁶ UP Reply Evidence and Argument (filed June 4, 2010), V.S. Gough, Attachment 1 (prior testimony) at 6.

documented general service meltdown that took place during that period. UP's response to this service crisis – acquiring additional cars and making the movement more efficient by rerouting the empty cars²⁷ – is not consistent with Entergy's allegation of competitive abuse. Although Entergy also alleges that UP refused to allow MNA and BNSF to establish a through route that would lessen the service problems,²⁸ we find that the record bearing on this allegation is inconclusive. As the 1997 period's service meltdown brought traffic to a standstill throughout the West, and indeed throughout many other parts of the nation, we have no basis for finding that service cutbacks to Entergy at that time provide a basis for ordering competitive access from 2012 going forward.

Entergy also argues that UP increased its profit by failing to serve Entergy during past service failures and favoring customers under more lucrative transportation contracts.²⁹ Entergy submits an exhibit to demonstrate that, when Entergy was forced to shift its supply from the Powder River Basin to Colorado origins due to the weather-related service problems that arose during the 2005 period, UP's profits rose because the Colorado coal moved at a higher R/VC ratio.³⁰ Citing a table comparing UP's allegedly low profits/ton for Entergy's traffic with higher profits/ton accruing to UP traffic for other customers, Entergy argues that if only 7% of the joint-line slots represented by the higher-profit destinations had been diverted to Entergy, the deficits at its plant could have been avoided.³¹

While Entergy has illustrated what would be expected whenever higher R/VC coal movements are substituted for lower R/VC coal movements (e.g., there will be a positive effect on the profits of any railroad), it has not established competitive abuse. The evidence does not establish that UP was allocating train slots to other customers in order to increase its profits during the 2005 period's service problems. The 2005 period problems were weather related and affected BNSF as well as UP. The substitution of Colorado coal reflected in Entergy's exhibit was proposed by Entergy.³² Finally, UP embargoed all new business during that service crisis and resumed service to Entergy without deficiency from 2007 onward,³³ actions that are not consistent with an abuse of monopoly power.

²⁷ Id., V.S. Gough, Attachment 1 (prior testimony) at 5.

²⁸ Entergy Rebuttal Evidence and Argument (filed July 9, 2010), V.S. Gray, Attachment 2 (prior rebuttal testimony) at 4-5; UP Reply Evidence and Argument (filed June 4, 2010), V.S. Gough, Attachment 1 (prior testimony) at 4.

²⁹ Entergy Opening Evidence and Argument (filed Apr. 7, 2010), V.S. Crowley; Entergy Rebuttal Evidence and Argument (filed July 9, 2010), V.S. Crowley at 8.

³⁰ Id., V.S. Crowley, Exh. TDC-4 at 12.

³¹ Id., V.S. Crowley, Exh. TDC-4 at 15.

³² Union Pacific Reply Evidence and Argument (filed June 7, 2020), V.S. Gough at 4 n.1.

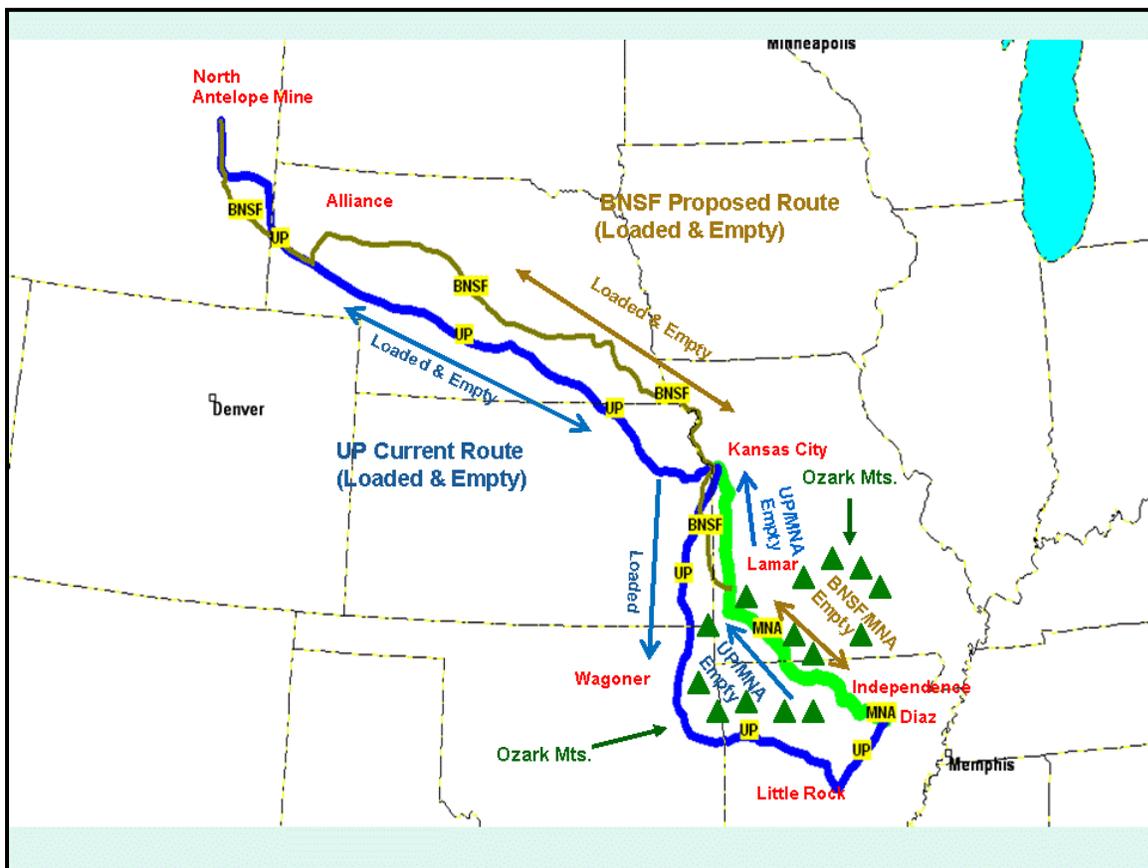
³³ Id., V.S. Gough at 4-6.

The Board recognizes the significance of the UP service disruptions experienced by Entergy in the past and the importance of Entergy receiving good service in the future. But those isolated service disruptions, which affected the shipping public generally, do not establish a showing of anticompetitive conduct on UP's part with respect to Entergy.

B. Comparative Route Efficiency

We turn next to the crux of this case. The vast majority of the evidence is directed at the question of whether UP/MNA has engaged in anticompetitive conduct by foreclosing the use of a "better" alternative BNSF/MNA route. What constitutes a "better" route is an issue of first impression. Based on the facts of this case, we find that the current route used by UP/MNA is the best route to serve Entergy's coal needs and that the alternative route sought by Entergy is inferior. We start our analysis with a general description of the three key routes that serve or could be used to serve Entergy, as shown below.

**Map of
Current & Alternative Transportation Routes**



First, there is the Current UP/MNA Route. As previously noted, the Current UP/MNA Route moves the coal-bearing cars to ISES via Diaz Junction, Ark., a route that leaves Kansas City, Mo. then curves back through Kansas and Oklahoma before reaching ISES in Arkansas.

Empty cars are not sent back along that route. The empty cars (which are much lighter than loaded coal cars) are sent straight back via a more direct route from ISES to Kansas City. As such, the Current UP/MNA Route allows the carriers to send the heavy coal-laden cars over a high density route while avoiding the “significantly more challenging topography” of the lower-density MNA lines.³⁴ The Current UP/MNA Route round trip from North Antelope mine is 2,479 miles.

Second, there is a more direct UP/MNA route in which UP hands off to MNA at Kansas City. The Direct UP/MNA Route is the shortest and most direct route between the coal mines and the utility plant, with a round trip from the North Antelope mine of 2,330 miles.³⁵ But the terrain is not ideal for heavily loaded coal trains. The Direct UP/MNA Route would require the loaded coal trains to travel over the mountainous region between Lamar and ISES, with difficult curves that increase rolling resistance, power requirements, fuel consumption, and rolling stock wear.

Finally, there is the third route that Entergy alleges is “better” than the current UP/MNA route. The alternative BNSF/MNA Route parallels the existing UP route out of the PRB region. But rather than avoid the Ozark Mountains, the BNSF/MNA Route must traverse them. As such, the BNSF/MNA Route would be 8 miles (or 0.32%) shorter than the Current UP/MNA Route from North Antelope mine (that supplies 76% of the coal), but 141 miles (or 6%) longer than the Direct UP/MNA Route. And it would take the loaded coal trains over precisely the same challenging topography UP and MNA avoid with the current route.

Table 1 below reveals some of the key features of the various alternative routes for coal trains from the PRB. The table focuses on the three largest coal mines used by Entergy: North Antelope (providing 76% of the coal); Cordero (13.2%); and Caballo (7.9%).³⁶ Regardless of the particular mine origin, the basic features are the same. The shortest, least cost route is clearly the Direct UP/MNA Route. According to the Uniform Rail Costing System (URCS), our general purpose costing model, the Direct UP/MNA Route is between 9% and 11% less expensive than either of the alternatives.³⁷ And the variable costs of transporting the coal over the Current

³⁴ Union Pacific Reply Evidence and Argument (filed June 7, 2020), V.S. Hughes at 5. The UP witness noted that the more direct MNA routing had “at least double the curvature” of the more circuitous route. Id.

³⁵ All miles cited in this decision come from UP Reply Workpapers, Plum-Newland Exhibits and Workpapers; Workpapers–Highly Confidential; Entergy Miles.XLXS, Tab Summary.

³⁶ See Note 38, *supra*.

³⁷ The parties dispute how to calculate the variable costs according to our URCS methodology. There were four areas of disagreement, involving: (1) mileage of empty movements; (2) plant-to-mine distances; (3) use of actual locomotive costs; and (4) treatment of private rental car costs. Entergy claims that none of these adjustments should be made because, as movement-specific adjustments, they should be prohibited. UP, in contrast, argues that given

(continued . . .)

UP/MNA Route and the proposed BNSF/MNA Route, while slightly favoring Entergy's case, are very similar.

Table 1
Characteristics of Alternative Routes

Mine Origin (percent used)		UP/MNA		BNSF/MNA
		Direct	Current	
North Antelope (76%)	Distance (round trip)	2,330	2,479	2,471
	Variable Cost (per ton)	\$12.80	\$14.45	\$14.49
Cordero (13.2%)	Distance (round trip)	2,402	2,550	2,483
	Variable Cost (per ton)	\$13.16	\$14.81	\$14.56
Caballo (7.9%)	Distance (round trip)	2,410	2,559	2,475
	Variable Cost (per ton)	\$13.20	\$14.86	\$14.51

In addition to challenging terrain, the Direct BNSF/MNA Route over the Ozark Mountains would require significant capital upgrades to be able to haul loaded coal trains to the Entergy plant. The parties all agree that significant upgrades are needed but disagree on the cost of those upgrades.

Weighing the totality of evidence before us, we find that the proposed BNSF/MNA Route has not been shown to be a superior route to serve Entergy. We base this finding on the combination of several facts. First, the BNSF/MNA Route is only marginally shorter than the Current UP/MNA Route. The BNSF/MNA Route is 0.32% shorter than the current UP/MNA route from North Antelope, 2.63% shorter than the route from Cordero (which provides a small amount of coal for Entergy), and 3.28% shorter than the route from Caballo (which provides an even smaller amount). Second, as shown above, the variable costs of transporting the coal over

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the heightened importance of showing the "efficiency" of the routes in question, movement-specific adjustments should be permitted.

Table 1 reflects our restatement of the variable costs submitted by the parties. We accept UP's calculation of mileage of empty movements and the plant-to-mine distances as more accurate than the calculations made by Entergy. Significantly, these adjustments are within the scope of the kinds of movement-specific operating characteristics of a movement (i.e., mileage of the movement) we permit in rate reasonableness cases. We do not, however, accept UP's locomotive and private rental car adjustments. These are precisely the kind of selective movement-specific adjustments to URCS that undermine the reliability of the costing model. Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 50-51 (STB served Oct. 30, 2006) (noting that piecemeal movement-specific adjustments were expensive and were not leading to a more accurate result than using the system-average figures). Just as we prohibit such piecemeal adjustments to URCS in rate cases, so too shall we prohibit such adjustments to URCS in § 10705 complaints. Workpapers showing our restatement of the variable costs are available to the parties upon request.

the Current UP/MNA Route and the proposed BNSF/MNA Route, while slightly favoring Entergy's case, are very similar (the BNSF/MNA Route is 0.27% more costly from North Antelope, 1.7% less costly from Cordero, and 2.36% less costly from Caballo). Those very small differences are not sufficient to justify a prescription here when balanced with the third and fourth factors discussed below.

Third, UP and MNA could already route the traffic over the even shorter Direct UP/MNA Route, at a variable cost significantly below the variable cost of the proposed BNSF/MNA Route. But doing so would require the shipments to traverse the difficult terrain between Lamar and the Independence plant with heavy loaded coal trains. By comparing the URCS variable costs of the Direct UP/MNA Route (\$12.80 per ton from North Antelope) against the variable costs of the Current UP/MNA Route (\$14.45 per ton from North Antelope), we can estimate that the value of avoiding that terrain exceeded \$11 million dollars at a 1Q 2010 level. This figure reflects the reduction in variable costs UP and MNA would experience if they served Entergy over the Direct UP/MNA Route. Fourth, there is no dispute that the terrain of the alternative BNSF/MNA route is inferior to that of the current route, which (for example) has less severe curvature that would permit greater train speeds, reduce the number of locomotives needed, improve fuel consumption, reduce the wear and tear on the track and rolling stock, and takes advantage of a higher density line.

As the proposed route has not been shown to be a better route to serve Entergy, we find no evidence that UP and MNA have exploited their market power by seeking to foreclose a "better" BNSF/MNA route. The alternative is only a fraction shorter than the current route. But it would require significant upgrades and would traverse more challenging terrain, which explains why UP and MNA themselves do not use a far shorter direct UP/MNA route. Sometimes the shortest route is the best route. But other times, it is best to avoid an obstacle rather than try to climb over it.

C. Rate Projection Comparisons

Entergy submitted evidence³⁸ to prove that it would enjoy a better transportation rate from a prescribed BNSF/MNA route.³⁹ First, it created a predicted BNSF/MNA rate. This predicted rate was drawn from BNSF's average rate per ton-mile for moving coal, but excluding all fuel surcharge revenue. Entergy then compared this predicted BNSF/MNA rate against the actual 2009 UP/MNA rate. In the end, Entergy maintained that the predicted BNSF/MNA rate would be roughly 10% lower than the 2009 UP/MNA rate.

³⁸ All of the rate evidence is highly confidential and filed under seal. The parties are well aware of the precise figures at issue, so we will refrain from disclosing any precise figures and instead will speak in general terms.

³⁹ 49 C.F.R. § 1144.2 describes an inclusive set of factors that the Board will consider should it find them relevant to a pending competitive access matter. Those factors include: (1) revenues on the routes at issue; (2) relative route efficiencies; (3) rates on the prescribed route; and (4) revenues following the prescription.

UP contested this analysis. First, UP corrected the mileage (as we have similarly done for the variable cost analysis described earlier) and included the fuel surcharge revenue. With these two revisions, UP estimated that the predicted BNSF/MNA rate would be marginally higher than the rate UP and MNA already offer Entergy. Moreover, UP argued that Entergy's entire approach was flawed. Instead of using the BNSF average coal rate per ton mile, UP argued that a better surrogate of the rate Entergy might get is the rate BNSF charged to serve the nearby White Bluff plant.⁴⁰ Using that surrogate, UP has estimated that the BNSF/MNA rate would be roughly double the current UP/MNA rate.

We find that the rate evidence submitted by Entergy does not warrant competitive access relief. First, the proper inquiry is not whether the requesting shipper might receive a better rate under an alternative prescribed rate. We can presume that in most cases where a captive shipper seeks a competitive access remedy, it does so under the good faith belief that such relief will provide it with better rates. But as we stated in CP&L, "the competitive access rules were promulgated not to provide shippers with an alternative form of rate relief, but to offer a competitive remedy where a bottleneck carrier has exploited its market power"⁴¹ Thus, the proper inquiry is whether we have before us a monopolist, indifferent to the needs of its shipper, who is exploiting its market power by charging abusive rates (or providing poor service).

Second, the evidence establishes that the current contract rate is not excessive or abusive, and does not illustrate a monopolist railroad exploiting market power. While there is no need to discuss the exact confidential rate levels being charged to Entergy, we will reveal, for the benefit of the public and future litigants, that the R/VC level of the current UP/MNA rate is below 125% of variable cost. Such a rate cannot be attributed to an abusive exercise of market power. Entergy responded that this low rate was the product of hard bargaining on its part and the resolution of legal disputes between the parties. The fact that a shipper has had to bargain hard to obtain what it seeks is no reason for the Board to intervene. It is only when hard bargaining results in an abuse of market power and an insistence on terms that are unreasonable should we interfere. That is not the case here.

Finally, even if the comparison analysis proposed by Entergy were relevant, we find that the best evidence of record is that proffered by UP. The rate that BNSF and MNA might charge is speculative, and thus can be afforded little weight. But we find the White Bluff proxy rate more likely, especially since BNSF itself suggested to Entergy that service to ISES would be more expensive to provide than White Bluff service due to upgrades and comparative inefficiencies.⁴² The White Bluff proxy rate is the best evidence of record because it is the

⁴⁰ BNSF has the right to serve Entergy's White Bluff plant using trackage rights over UP's line. UP's Reply Evidence and Argument (filed June 4, 2010), V.S. Plum-Newland, Exhibit Plum/Newland-3.

⁴¹ 1 S.T.B. at 1068 (citations omitted).

⁴² Entergy Opening Evidence and Argument (filed Apr. 7, 2010), V.S. Trushenski at Ex. RT-6 ("[W]e suspect such a joint route to the Independence Plant would be significantly more

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closest reflection of a BNSF market-generated rate for a comparably situated shipper that is transporting PRB coal to a nearby utility plant served competitively by BNSF and UP. This evidence predicts that Entergy would not obtain a better rate from a joint BNSF/MNA route, over a less efficient routing traversing the more mountainous terrain, than the current joint UP/MNA rate.

Accordingly, we will not order the defendant carriers to establish an alternative BNSF/MNA through route from the jointly served southern PRB mines.

III. Exemption Revocation

Because the MNA lease was effected through an exemption proceeding, Entergy requested in its February 2008 complaint, inter alia, that the Board “revoke the exemption [noticed in the MNA Exemption proceedings⁴³] to the extent that it permits UP to enforce the paper barrier provisions of the lease restricting the interchange of Entergy’s traffic.”⁴⁴ In the June 2009 Decision, the Board decided to defer consideration of whether to revoke authorization of the UP-MNA lease.⁴⁵ The Board concluded that it would revisit the revocation claims if it denied Entergy’s route prescription request. Since the Board has decided not to grant Entergy the relief it requested under § 10705, we will now turn to the deferred request.

Under 49 U.S.C. § 10502(d), the Board may revoke an exemption, to whatever extent we specify, when we determine that regulation is needed to carry out the Rail Transportation Policy (RTP) set forth in 49 U.S.C. § 10101. Generally, the Board will revoke an exemption only after a petitioner has demonstrated conduct that frustrates the RTP, and the Board has determined that the reinstated regulatory provisions could ameliorate the alleged harms.⁴⁶

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costly given the need for capital upgrades and likely less efficient than single-line BNSF unit train coal service to White Bluff Station”).

⁴³ See supra Background.

⁴⁴ February 2008 Complaint at 2.

⁴⁵ June 2009 Decision at 12-13. The Board deferred consideration of this issue for several reasons: (1) while § 10705 relief could be narrowly tailored, revocation was likely to be broader in both scope and effect; (2) revocation could result in termination of the lease between UP and MNA, which would harm the short line carrier, its employees, and shippers on the short line; and (3) if Entergy obtained relief under § 10705, then the revocation request would likely have been rendered moot. Id. at 13.

⁴⁶ Rail Gen. Exemption Auth.—Miscellaneous Agric. Commodities—Petition of G. & T. Terminal Pkg. Co. to Revoke Conrail Exemption, 8 I.C.C.2d 674, 676-77 (1992), aff’d in pertinent part sub nom. Mr. Sprout, Inc. v. United States, 8 F.3d 118 (2d Cir. 1993); see also Minn. Commercial Ry.—Trackage Rights Exemption—Burlington N. R.R., 8 I.C.C.2d 31, 35-36 (1991) (the Board’s revocation analysis “focuses on the sections of the RTP related to the underlying statutory section from which an exemption is sought”).

Entergy submits several arguments in support of its alternative request that the Board either partially or wholly revoke the exemption governing the UP-MNA lease. Entergy asserts that revocation is appropriate because: (1) the lease continues in effect for 80 years and therefore should receive a higher level of scrutiny; (2) Entergy could use MNA to mitigate damage from UP service failures in the absence of the “unreasonable” interchange restrictions (e.g., the allegedly excessive compensation due under the lease depending on the number of non-UP-MNA interchanges); (3) UP service was inadequate at certain times; (4) the interchange restrictions have necessitated an Entergy effort to construct a “duplicative,” allegedly RTP-inconsistent rail line connecting the ISES facility to BNSF; and (5) the requested relief would be in the public interest.⁴⁷

UP and MNA raise several objections to the Entergy revocation relief request. UP argues that: (1) Entergy has conceded that leases with interchange commitments produce benefits consistent “with the social interest in efficient production”; (2) Entergy made no showing to support its claim that UP either has earned or could earn more from the lease than it expected to earn by operating the line itself; (3) whatever benefits UP has realized from the lease are cost savings and efficiencies from the spin-off of the line; (4) since Entergy would be dealing exclusively with a single carrier regardless of whether the lease existed, the lease itself did not limit Entergy’s service options; and (5) Entergy has not attempted to prove that the lease resulted in higher rates.⁴⁸ MNA observes that Entergy’s argument regarding the “duplicative” rail line’s inconsistency with the RTP is contradicted by the standard assurance that all applicants must make in their case that their proposed line construction would be consistent with the RTP.⁴⁹

We have carefully considered the record but are unable to reach a majority decision on the revocation request. Accordingly, the requested relief cannot be granted, and the UP-MNA lease authority remains in effect.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Entergy’s request for the Board to clarify BNSF’s service obligations from the northern PRB mines is granted.
2. Entergy’s request for a 49 U.S.C. § 10705 through route involving BNSF and MNA from the southern PRB is denied.

⁴⁷ See Entergy Opening Evidence and Argument (Redacted, Public Version) (filed Jul. 11, 2008) at 9, 28-30, 53-55.

⁴⁸ See UP Reply Evidence and Argument (Redacted, Public Version) (filed Aug. 11, 2008) at 2, 15-17.

⁴⁹ See MNA Response to Opening Evidence and Argument (filed Aug. 11, 2008) at 13.

3. Entergy's alternative request for partial or complete revocation of the exemption governing the interchange commitments in the UP-MNA lease fails as the Board was unable to reach a majority.

4. This decision is effective on the decision date of service.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey. Chairman Elliott did not participate in Part III. Vice Chairman Nottingham commented with a separate expression and Commissioner Mulvey commented with a separate expression.

VICE CHAIRMAN NOTTINGHAM, commenting:

The denial of Entergy's exemption revocation request arises as a result of the recusal of one Board member and a disagreement between the two remaining voting members regarding the appropriate response to Entergy's request. I concur in the result here, as I would deny Entergy's request to revoke the exemption governing the UP/MNA lease.

We may revoke an exemption if the record shows that regulation is needed to carry out the RTP as set forth in 49 U.S.C. § 10101. We generally revoke only after a petitioner has demonstrated conduct that frustrates the RTP, and we determine that the reinstated regulatory provisions could ameliorate the alleged harms. Yet in this case, Entergy offered no real evidence of any carrier misconduct, whether in the form of poor service or abusive rates, that could support revocation.

The UP service interruptions Entergy has described – most of which affected large geographic areas many years ago and were not specific to Entergy – do not constitute proof of carrier misconduct that would frustrate the RTP. Further, as the Board has established with respect to service from the northern PRB mines, Entergy has the ability to obtain its coal from sources not served by UP. And Entergy has introduced no evidence of excessive rates or other circumstances that could support a claim that UP or MNA was abusing market power gained by the lease interchange commitment. To the contrary, the record before us reveals that Entergy's rate for the UP/MNA service is less than 125% of variable cost—well below the 180% R/VC statutory threshold and a rate level that most rail customers would be delighted to obtain. Entergy has thus failed to support its claim that the assertion of regulatory authority over the lease is needed to carry out the RTP or curtail conduct that frustrates the RTP. Because Entergy has not met its burden, I would vote to deny Entergy's alternative exemption revocation request.

There are other reasons why, in my view, an exemption revocation would be a poor resolution of this dispute. During oral argument, Entergy and AECC both expressed grave concerns that UP might end up displacing MNA. It seems everyone agrees that MNA is doing a great job and offering excellent service to all its shippers. Yet exemption revocation is precisely the outcome most likely to cause cancellation of the lease and displacement of MNA as the

destination carrier for ISES. Although the parties argued that the Board could narrowly tailor revocation to limit its breadth, such an approach would put the Board in the untenable position of re-writing the lease terms negotiated by the carriers to produce a lease to which UP would never have agreed. Removing our approval would be the end of the lease and, so it seems, MNA. But this would also disrupt the harmonious commercial relationships between MNA and all the other shippers located on this line, none of whom are complaining of the service provided by MNA, or otherwise seeking the termination of this lease. Ending the lease could also put MNA employees on the street in difficult economic times. In my view, the Board should not, in these circumstances, lightly choose the “nuclear” option of revoking our approval for an existing lease absent sound evidence that the agreement is frustrating the Congressional policies set forth in the RTP and that the concerns cannot be addressed with a less draconian solution. With access to the northern PRB mines, Entergy has at its disposal a far more narrowly tailored and effective means of acquiring competition and adequate service than an exemption revocation.

Nor would I require the railroads to submit themselves to periodic review of this lease. In my view, there is insufficient basis in this record to require MNA and all its shippers to operate under such a perpetual cloud of uncertainty.

In sum, I do not believe that Entergy has demonstrated conduct that frustrates the RTP. For this reason, I believe Entergy’s request for partial or complete revocation of the exemption governing the UP/MNA lease should be denied.

COMMISSIONER MULVEY, commenting:

Although I agree with the outcome of the Board’s decision on Entergy’s section 10705 claim in Docket 42104, I write separately to explain why I would have partially revoked the exemption in Finance Docket 32187, the ICC proceeding that authorized the lease at issue.

In 1992, MNA, then a newly formed entity seeking to become a rail carrier, sought authorization for the lease. The ICC authorized the transaction via an exemption from the requirements of 49 U.S.C. 10901. At the time, the rail industry was still in the process of recovering from the long period of financial difficulty that preceded the Staggers Rail Act of 1980. The only comments opposing the lease came from railroad employee representatives, who sought to have the ICC impose employee protective conditions on the transaction (a then-discretionary power the Board now lacks for section 10901 transactions).

Under 49 U.S.C. 10502(d), the Board may revoke an exemption, either in whole or in part, when it determines that regulation is necessary to carry out the Rail Transportation Policy of 49 U.S.C. 10101. These policies include ensuring effective competition and avoiding undue concentrations of market power in the rail industry. 49 U.S.C. 10101(5), (12).

From my perspective, there are two features of the lease that cause concern. First, section 4 contains an interchange commitment that, through economic penalties, strongly discourages MNA from interchanging with carriers other than UP. Should MNA interchange its traffic with another carrier, MNA's annual rent could increase dramatically from \$0 to a maximum of \$117,000,000 (as adjusted by the PPI). Second, section 2 provides that the lease term is 20 years, with three 20-year renewal options. This could effectively keep the lease in place for some 80 years.

I believe that the combination of these two provisions warrants a partial revocation of the exemption to the extent necessary to require MNA and UP to seek Board authorization in the form of a petition for exemption or application each time they wish to renew the lease. Such a partial revocation would give the Board an opportunity to review the existing competitive situation at each renewal to determine whether the lease should be continued in its present form in light of its current impact on shippers. Moreover, requiring the rail carriers here to seek Board approval and bear the burden of establishing that a new exemption or approval is consistent with the governing statutory provisions would be better than requiring the shipper to initiate a new revocation action in the future.

The partial revocation that I would have the Board order is different from the request that Entergy proposed, which would have had the Board revoke the exemption to disapprove the interchange commitment as well as disapprove UP's contractual rights to begin serving ISES directly or to terminate the lease should the Board invalidate the interchange commitment. But the Board is empowered to revoke an exemption and order relief that is different from that sought by the petitioner, as it deems appropriate. 49 U.S.C. 10502(d) ("The Board may revoke an exemption, *to the extent it specifies . . .* ") (emphasis added).

The Board took significant first steps in reviewing its approach to interchange commitments in EP 575, Review of Rail Access and Competition Issues. I would have the Board continue those steps in this proceeding to ensure that a lease that has the potential for competitive harm never ripens into abuse of affected shippers.