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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. EP 705

COMPETITION IN THE RAILROAD INDUSTRY

WRITTEN SUBMISSION OF OMAHA PUBLIC POWER DISTRICT, THE AES CORPORATION, OKLAHOMA GAS & ELECTRIC COMPANY, AND COLORADO SPRINGS UTILITIES

Pursuant to the Decision issued in this proceeding on February 4, 2011, Omaha Public Power District ("OPPD"), The AES Corporation ("AES"), Oklahoma Gas & Electric Company ("OG&E"), and Colorado Springs Utilities ("CSU") (together "Utilities")[1] hereby provide this Written Submission, which responds to several aspects of the reply comments filed by the Class I railroad parties in this proceeding.[2] In their Initial Comments in this proceeding, the Utilities provided the Board with non-confidential factual information about the current lack of effective competition between railroads for the transportation of coal to their coal-fired electrical generating stations, and also suggested several policy alternatives for the Board's consideration. As

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1 Summary descriptions of the Utilities were included in their Initial Comments at pages 2-3.

2 AES, OG&E, and CSU do not wish to appear at the hearing scheduled for this proceeding on June 22, 2011. OPPD does wish to appear at the hearing and is submitting a separate notice of intent pursuant to the February 4 Decision. As indicated in that notice, OPPD's testimony in the proceeding will refer to the issues addressed in this Written Submission as well as the Utilities' Initial Comments.

discussed below, the specific factual information provided by OPPD, OG&E, and CSU that effective competition between Union Pacific Railroad Company ("UP") and the BNSF Railway ("BNSF") at their facilities that can be served by both railroads has ceased since 2003 was unrebutted by UP and BNSF. As for AES, UP and CSX Transportation Inc. ("CSX") briefly responded to its comments about the lack of effective competition at AES's Shady Point plant in Oklahoma and Somerset plant in New York, but significantly mischaracterized the underlying facts.

I.

The Specific Facts Submitted by OPPD, OG&E and CSU Demonstrating a Lack of Competition Were Unrebutted

The Utilities in their Initial Comments and numerous other commenters pointed out to the STB that the railroad industry has consolidated into two regional duopolies, an indisputable fact that has significantly altered the pricing behavior of UP, BNSF, CSX and Norfolk Southern Railway ("NS"). OPPD, OG&E, and CSU submitted non-confidential facts in their Initial Comments demonstrating how meaningful competition for their coal transportation needs ceased beginning around 2003, and how this lack of competition had adversely affected them. These facts are briefly summarized as follows:

OPPD – OPPD, which owns and operates the North Omaha Power Station and the Nebraska City Power Station in Omaha and Nebraska City, Nebraska, respectively, described how starting in the early 1990s OPPD devoted a considerable amount of resources to establish access to both UP and BNSF at these plants, which together currently consume around 7 million tons of Wyoming Powder River Basin ("PRB") coal annually. Initial Comments at 7. These efforts resulted in intense competition between the two railroads between 1995 and 2003, which in turn resulted in low transportation rates and contract terms that were favorable to OPPD and to whichever railroad won OPPD's business. *Id.* at 7-8. However, OPPD further described how, when a contract it entered into with UP in 2003 came up for renewal in 2008, UP proposed to increase the expiring contract rates by up to 110% and refused to renew many of the prior contract terms with OPPD. OPPD further described how BNSF made no meaningful effort to try to secure OPPD's coal volumes through a competitive contract proposal. The lack of competition eventually resulted in OPPD executing a new contract with UP that, combined with increased coal costs, increased OPPD's delivered fuel costs to these two facilities over $100 million per year over 2008 levels, which in turn caused OPPD to raise residential and industrial electricity prices.

OG&E – OG&E recounted for the Board how rail competition between UP and BNSF and their predecessors for service to OG&E's Sooner Station has been systematically eliminated starting with the 1995 merger between the Burlington Northern Railroad Company and the Atchison, Topeka and Santa Fe Railway Company. *Id.* at 11-12. OG&E explained how, despite the Interstate Commerce Commission's imposition of a build-out and trackage rights condition on that merger for the purpose of preserving a pre-merger competitive rail option at this location because it would be captive to BNSF after the merger, this potential option did not prompt any competitive behavior between BNSF and UP during 2007-2008 contract negotiations. *Id.* at 12. Indeed, UP declined to provide a contract proposal in the absence of a physical connection to the plant. *Id.*

CSU – CSU summarized for the Board how in 2000 UP and BNSF competed for the right to haul PRB and Colorado Coal to its Drake and Nixon Plants, located in the vicinity of Colorado Springs, but how in 2009 BNSF demonstrated little interest in securing the 1,000,000 tons of annual PRB coal deliveries to the Nixon Plant, which both BNSF and UP serve, and how CSU eventually abandoned BNSF as an alternative for PRB coal transportation to Nixon beginning in 2010 due to BNSF's lack of interest. *Id.* at 14.

In their reply comments neither UP nor BNSF make any effort to rebut or explain the facts summarized by OPPD, OG&E or CSU. Instead of responding to these utilities or addressing in any depth that they have indeed competed for coal transportation market share since 2003, BNSF and UP for the most part only provide general, self serving pronouncements that they really do compete, hoping the Board will take these assertions at face value. *See*, UP Reply Comments at 9 ("Union Pacific is competing vigorously with BNSF for coal business, just as it has since . . . 1984"); *Id.* at 31 ("Competition remains strong."). While UP stated in its Reply Comments that it "will show specific examples" of "pervasive competition" since 2004, UP Reply Comments at 7, it could only muster four instances where it purportedly "actively competed" with BNSF for coal movements over the past seven years. *Id.*, Verified Statement of John J. Koralski ("Koraleski V.S.") at 24-25. One of the four examples is the AES Shady Point movement, which AES described in its Initial Comments as an example where in fact no effective competition between BNSF and UP occurred. Initial Comments at 9-10. UP's statements regarding this particular plant are addressed below. Tellingly, UP did not include the OPPD, OG&E, or CSU movements as specific examples of where it "actively competed with BNSF" to retain, or attempt to obtain, coal transportation market share.

BNSF's Reply Comments contain no examples where BNSF competed for coal movements. *See*, BNSF Reply at 12, Verified Statement of John P. Lanigan at 13 (where "with respect to UP . . . We win some and we lose some," although only a single intermodal example is provided), and *id.* ("[t]he assertions of some coal shippers that BNSF does not compete for their business and that after 2004 no coal business has shifted between BNSF and UP are categorically false," a statement made without any supporting proof offered to refute either assertion).

In addition to failing to refute the specific allegations of OPPD, CSU and OG&E, the railroads weakly argue that the claims of these utilities and AES, and other rail shippers that the consolidation of the rail industry has resulted in a diminishment of rail to rail competition is a figment of the imagination of just a few disgruntled shippers. CSX Reply Comments at 17-18; BNSF Reply Comments at 7; Koraleski V.S. at 8. The railroads would have the STB ignore the fact that the presence of regional rail duopolies and the associated competition concerns have long been the topic of considerable discussion by not only rail shippers, but the U.S. Department of Justice, the U.S. Department of Agriculture, the General Accountability Office, and numerous Members of Congress as well as other non-shipper entities. In addition, BNSF declares that any discussion about the level of competition in a duopoly rail market is entirely outside the scope this proceeding in any event, which BNSF has incorrectly stated is limited to only dealing with "access issues." BNSF Reply Comments at 7-8.[3]

[3] The Board's January 11, 2011 Notice clearly informed interested parties that the STB was interested in broadly exploring "the current state of competition in the rail industry and possible policy alternatives to facilitate more competition, where appropriate." January 11 Decision at 1.

II.

The UP and CSX Responses to the Statements of AES Misconstrue the Facts and are Misleading

While the facts asserted by OPPD, CSU, and OG&E were unrebutted, UP and CSX responded to certain allegations made by AES. Specifically, UP's Mr. Koraleski responded to AES's claims that UP did not submit a competitive proposal to try and win the right to haul PRB and Illinois coal to AES's Shady Point plant by asserting AES

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Koraleski V.S. at 25. Mr. Koraleski also muses that "AES apparently used our offer to extract an even better deal from BNSF." *Id.* UP provides no other evidence in support of Mr. Korleski's statements and in fact AES did not do what he represents. At most, AES agreed to enter into negotiations with UP for a new transportation contract using UP's opening offer as a starting point. However, these negotiations were ultimately unsuccessful due to UP's refusal to improve its initial proposal over the proposal submitted by BNSF and KCS, who for their part had offered renewal rates that exceeded the expiring contract rate levels by nearly 100%, as well as other objectionable terms. Initial Comments at 9-10. Mr. Koraleski's speculation that AES ultimately rejected UP's proposal because it got "an even better deal from BNSF" is wrong and completely ignores AES's statement in the Initial Comments that "[a]s a direct result of the lack of rail competitive options, the prior contract was replaced with a new contract with BNSF and KCS that significantly increased the rail rates to this plant and imposed surcharges and other contractual provisions that make the current contract much less favorable to

AES Shady Point than the prior contract." *Id.* at 10. Had UP's proposal truly been "extremely competitive," Koraleski V.S. at 24, then UP would very likely be transporting coal to the AES Shady Point plant today.

In the Initial Comments, AES also informed the Board that the lack of competition in the rail industry and the lack of a sufficient regulatory backstop in the form of potential rate relief had resulted in extremely high rates and poor service to AES Eastern Energy's four coal-fired plants in New York, including the Somerset Plant. The Somerset Plant is captive to CSX for rail service, notwithstanding CSX's strained attempt to create a potential barge alternative that does not exist.[4] Initial Comments at 10. The lack of competition at this plant and CSX's poor service resulted in coal supplies at this and the other three plants (which are served by NS) reaching dangerously low levels in 2010. *Id.* at 10. CSX admits that its rail service to the Somerset plant was substandard, but blames winter weather in 2010. Rupert V.S. at 1-2. However, extremely poor service by CSX continues at the Somerset plant to this day. AES reiterates that the unreliable rail service to the Somerset and the other AES Eastern Energy plants is due to a lack of viable rail options due to the concentration of the railroad industry, and a lack of an effective regulatory backstop in the form of rate relief or access to other railroads, which lack of backstop CSX and NS have used to exploit their market power at these locations.

[4] In his Verified Statement included with CSX's Reply Evidence Mr. Henry Rupert, Assistant Vice President for Coal Marketing ("Rupert V.S."), makes the unsupported assertion that AES threatened to construct a barge un-loader and shift 100% of its tons away from rail. Rupert V.S. at 2-3. In addition to providing no evidence that such an alternative to rail deliveries of coal was even viable, Mr. Rupert provided no specific evidence that this alleged potential alternative had any effect whatsoever on CSX's pricing behavior, which AES represents it did not.

III.

Conclusion

The Class I railroads' failure to respond to the facts provided by OPPD, OG&E, CSU, combined with the railroads' failure – with a few unpersuasive exceptions - to provide examples of specific instances over the past seven years where they have actively competed for coal transportation business, affirms the statements of the Utilities in their Initial Comments that the consolidation of the railroad industry into two regional duopolies has resulted in a substantial reduction in rail-to-rail competition. Further, the responses of UP and CSX to allegations made by AES concerning the lack of rail competition at its Shady Point and Somerset plants and the impact on these plants of the lack of rail options combined with a limited regulatory backstop, misstate the actual facts and are misleading.

Despite the Class I railroads' collective attempt to minimize the fact that the rail industry has been consolidated into effectively two regional rail duopolies, and that this consolidation has had a profound reduction on rail competition nationwide, the record in this proceeding convincingly demonstrates that this is the case for many coal shippers, including coal shippers which have access to more than one railroad for service. The current concentrated rail market requires that the Board, after assembling a factual and legal record in this proceeding, commence a formal review of its rules and policies concerning rail-to-rail competition, and related rules such as rate reasonableness standards. Such rules and policies should be modified to encourage the resumption of meaningful rail-to-rail competition, while also meeting the Board's other statutory responsibility of ensuring a viable railroad industry in the United States.

Respectfully submitted

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