

ENTERED
Office of Proceedings
March 31, 2015
Part of
Public Record

SLOVER & LOFTUS LLP

ATTORNEYS AT LAW
1224 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20036-3003

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
KATHERINE F. WARING

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:

kjd@sloverandloftus.com

OF COUNSEL
DONALD G. AVERY
CHRISTOPHER A. MILLS

March 31, 2015

VIA ELECTRONIC FILING

The Honorable Cynthia T. Brown
Chief, Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 35873, Norfolk Southern Railway
Company – Acquisition and Operation – Certain Rail Lines
Of The Delaware and Hudson Railway Company, Inc.

Dear Ms. Brown:

Enclosed for filing in the referenced proceeding on behalf of PPL
EnergyPlus, LLC (“PPL”) please find PPL’s Reply Comments.

Sincerely,



Kelvin J. Dowd
An Attorney for PPL EnergyPlus, LLC

KJD:lad
Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NORFOLK SOUTHERN RAILWAY)
COMPANY – ACQUISITION AND)
OPERATION – CERTAIN RAIL LINES)
OF THE DELAWARE AND HUDSON)
RAILWAY COMPANY, INC.)

Finance Docket No. 35873

REPLY COMMENTS OF PPL ENERGYPLUS, LLC

Joseph R. Waala
Senior Counsel
PPL Services Corporation
Two North Ninth Street
Allentown, PA 18101

Of Counsel:

SLOVER & LOFTUS LLP
1224 Seventeenth Street, NW
Washington, DC 20036

Kelvin J. Dowd
SLOVER & LOFTUS LLP
1224 Seventeenth Street, NW
Washington, DC 20036
202-347-7170

Dated: March 31, 2015

Attorneys for PPL EnergyPlus, LLC

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NORFOLK SOUTHERN RAILWAY)	
COMPANY – ACQUISITION AND)	
OPERATION – CERTAIN RAIL LINES)	Finance Docket No. 35873
OF THE DELAWARE AND HUDSON)	
RAILWAY COMPANY, INC.)	
)	

REPLY COMMENTS OF PPL ENERGYPLUS, LLC

PPL EnergyPlus, LLC (“PPL”), submits these Reply Comments in connection with the proposed acquisition and operation by Norfolk Southern Railway Company (“NS”) of a total of 282.55 miles of rail line and related facilities between Sunbury, PA and Schenectady, NY, that currently are owned and operated by Delaware and Hudson Railway, Inc. (“D&H”), a wholly-owned, indirect subsidiary of Canadian Pacific Railway Company (“CP”), and certain related transactions proposed between NS and D&H/CP.¹

In its Comments and Request for Conditions filed on January 21, 2015 (“PPL Comments”), PPL showed that as proposed by NS, the subject transactions would eliminate viable, potential competitive alternatives to NS for the transportation of coal to

¹ As in PPL’s Comments and Request for Conditions, filed on January 21, 2015, “D&H South Lines” shall refer to the property that is the subject of NS’ Application for acquisition and operation in this proceeding. As used herein, “Southern Tier Lines” refers to the NS line between Buffalo and Binghamton, NY, over which CP currently has haulage rights that NS and D&H propose to cancel as part of the subject transactions. *See* Application, p. 10, n.3.

PPL's Montour Generating Station near Sunbury. *See* PPL Comments at 7-10.

Consistent with applicable precedent in proceedings for Board approval of transactions subject to its jurisdiction under 49 U.S.C. §11323, and the provisions of 49 U.S.C. §11324(c), PPL established that any approval of NS' acquisition of the D&H South Lines should be conditioned on requirements that NS (1) enter into appropriate agreements with PPL and CSX Transportation, Inc. ("CSXT") for trackage or haulage rights on reasonable terms over the D&H South Lines for loaded and empty trains moving between points served by CSXT and the Montour Station; and (2) enter into a new or an extended trackage or haulage rights agreement with CP on reasonable terms, for the handling of loaded and empty trains moving via Buffalo, NY over the Southern Tier Lines between points served by CP and the Montour Station. PPL Comments at 10-14. *See also*, V.S. Baumann at 2-3; V.S. Crowley at 3-7.

As discussed further *infra*, the comments submitted by other interested parties – in particular the "GWI Subsidiaries" and CNJ Rail Corporation – corroborate PPL's showing that the proposed transactions *will* restrict competition unless they are properly conditioned. Moreover, while NS exploited the January 21, 2015 filing deadline for comments in opposition to its proposal by submitting a number of letters and statements summarily supporting it, none of those extra-curricular submissions, or comments by other parties, challenges or detracts from PPL's case for relief.²

² The procedural schedule adopted by the Board in this case prescribes simultaneous filings of reply comments by all parties, irrespective of their position on the merits. Thus, in preparing these Reply Comments, PPL has not had the opportunity to review and respond to any claims that NS might raise in opposition to PPL's request for

REPLY COMMENTS

PPL's Comments demonstrated that the transactions proposed by NS and CP/D&H would eliminate viable, competitive options currently available to PPL for rail transportation service to the Montour Station, anti-competitive impacts that were not considered by NS' witness Grimm. PPL Comments at 7-9; V.S. Crowley at 4-8. Specifically, PPL showed that it has a feasible "build-out" option from Montour to reach the D&H South Lines, and thereby access competitive alternatives to NS delivery service via CP and/or CSXT, utilizing routings from the north through the Albany/Schenectady interchanges, or from the west over the Southern Tier Lines (pursuant to the NS-CP haulage agreement). These alternatives are available to PPL for, *inter alia*, Northern Appalachia or Illinois Basin coal movements originating on CSXT, shipments of western origin coal interchanged to CSXT in the Chicago area for transportation to Montour via Buffalo, NY, and other traffic. PPL Comments at 4-5. The proposed combination of NS' acquisition of the D&H South Lines and the termination of CP's haulage rights over the Southern Tier Lines would foreclose both alternatives. *Id.* at 9.

Established Board precedent calls for the imposition of mandatory conditions to protect competition in circumstances like these. *Union Pacific Corp. – Control and Merger – Southern Pac. Rail Corp.*, 1 S.T.B. 233, 390-393, 420, 469-479 (1996); *Burlington Northern Inc. – Control and Merger – Santa Fe Pacific Corp.*,

conditions. PPL reserves the right to seek leave to supplement these Reply Comments if and as necessary to respond to any factual misstatements or distortions that might be included in NS' Reply Comments, or if NS attempts to introduce evidence related to the subject transactions' impact on current or prospective competition that could (and should) have been submitted with the Application.

10 I.C.C. 2d 661, 744-745, 781 (1995). *See also, Canadian National Railway – Control – Wisconsin Central Transp. Corp.*, STB Finance Docket No. 34000 (STB served September 7, 2010) at 10, n. 18, and 27. Consistent with that precedent, PPL proposed two (2) conditions to ameliorate the anti-competitive impacts of the proposed transactions: (1) a requirement that NS enter into one or more agreements with CSXT and PPL for unrestricted trackage or haulage rights over the D&H South Lines to permit the movement of trains from the Albany/Schenectady area to Montour; and (2) a requirement that NS enter into a new haulage agreement on reasonable terms with CP, to permit the movement of trains over the Southern Tier Lines between Buffalo and the Montour Station, with both conditions contingent only on PPL’s construction of a connecting track linking Montour to the D&H South Lines. *See CSX Corp. – Control and Operating Leases/Agreements – Conrail Inc.*, 3 S.T.B. 196, 319-320 (1998); *Union Pacific Corp.*, 1 S.T.B. at 469, 473.³

None of the other parties that submitted comments or statements on January 21, 2015 – including NS – offered any evidence or argument that contradicts either PPL’s entitlement to relief, or the reasonableness of the conditions sought to remediate the competitive harms that PPL described. To the contrary, the only parties to address issues related to those raised by PPL both essentially confirmed PPL’s showings regarding the

³ PPL further explained that in accordance with 49 U.S.C. §11324(c), the requested conditions (1) would in fact ameliorate the harmful effects of the proposed transaction, (2) are feasible, (3) reflect a direct nexus between the proposed transactions and the threatened harm, (4) are narrowly tailored, and (5) will not place PPL in a better position than it occupies today vis-à-vis available competitive alternatives. PPL Comments at 13-14. *See Burlington Northern Inc.*, 10 I.C.C. 2d at 729-730.

loss of potential competition that is threatened by the subject transactions, and corroborated the legitimacy of PPL's remedial conditions.

The "GWI Subsidiaries," a group of Class II and III railroads⁴ controlled by Genesee & Wyoming Inc., focus their attention on the Southern Tier Lines, demonstrating – as PPL has shown – that regardless of whether Board approval of the planned termination of CP's haulage rights is statutorily required, the impacts of such termination on competition in the region still must be considered as part of the Board's evaluation of NS' acquisition of the D&H South Lines, as the two (2) transactions plainly are interrelated parts of the larger "deal" between NS and CP. *See* GWI Subsidiaries Comments at 5, 14-15.⁵ They go on to outline in detail the loss of commercially competitive routing alternatives currently available via the Southern Tier Lines that would result from the NS-CP plan, a clear indicator of adverse impacts that warrant ameliorative conditions. *Id.* at 7-9. *See Burlington Northern Inc.*, 10 I.C.C. 2d at 776-777. Also relevant is the fact that despite NS' assertions in the Application, there appears to be no rational economic justification for CP to desire termination of its haulage rights,

⁴ The GWI Subsidiaries are Buffalo & Pittsburgh Railroad, Inc., a Class II carrier, and two (2) Class III railroads: Rochester & Southern Railroad, Inc. and Wellsboro & Corning Railroad, LLC.

⁵ As the GWI Subsidiaries correctly point out, NS does not claim that termination of the haulage arrangement would *not* be anti-competitive. It merely argues that to the extent that there are anti-competitive effects, they are beyond the reach of the Board's jurisdiction in this case. *Id.* at 15. As PPL's Comments showed, however, that is a legally erroneous position. *See Delaware and Hudson Railway Company, Inc. – Discontinuance of Trackage Rights – in Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie and Genesee Counties, NY*, STB Docket AB-156 (Sub-No. 25X)(STB served January 19, 2005) at 11; *Conrail*, 3 S.T.B. at 282-283.

since it pays a fixed fee only on cars actually handled by NS on its behalf, and presumptively can cover the fee through its rates. GWI Subsidiaries Comments at 14-15.

The evidence submitted by the GWI Subsidiaries with respect to the Southern Tier Lines complements PPL's showing, and confirms the need for remedial conditions to address the loss of competitive alternatives for shippers and for carriers other than NS that otherwise would result from the subject transactions. Likewise, one of the conditions proposed by the GWI Subsidiaries – preservation of haulage rights over the Southern Tier Lines for traffic moving from CP at Buffalo or via the rail interchanges there to points served on the D&H South Lines⁶ – is squarely compatible with the conditions sought by PPL, and confirms that they meet the standards of effectiveness, feasibility, nexus and restraint prescribed by governing precedent. *Burlington Northern Inc.*, 10 I.C.C. 2d at 729-730; *Union Pacific – Control – Missouri Pacific, Western Pacific*, 366 I.C.C. 462, 562-565 (1982).

The comments and condition request submitted by CNJ Rail Corporation (“CNJ”) also reinforce PPL's case for relief in this proceeding. Like the GWI Subsidiaries, CNJ makes the case that termination of CP's rights over trackage connected to the D&H South Lines will substantially lessen competition,⁷ and argues accurately that if NS is before the Board seeking approval of one transaction (acquisition of the D&H South Lines) that assumes the successful consummation of other transactions (e.g.,

⁶ See GWI Subsidiaries Comments at 3, 16-17.

⁷ CNJ Comments at 5; V.S. Nelson at 2-3. See also, *Canadian Pacific Ltd. – Pur. & Trackage – D&H Ry. Co.*, 7 I.C.C. 2d 95, 118 (1990).

discontinuance of trackage rights), examination of the latter should not be left for a later date, by which time key issues could be rendered moot. CNJ Comments at 7. The same logic necessarily applies to NS' and CP's planned termination of haulage arrangements over the Southern Tier Lines. CNJ also demonstrates – as PPL did – that NS' witness Dr. Grimm's competitive impact analysis did not address *prospective* anti-competitive effects of the proposed transactions, because he tended to focus solely on current traffic moving between defined origin-destination pairs. CNJ Comments at 8-9; V.S. Nelson at 3-6. For CNJ, these effects are shown to impact source competition and alternatives for traffic that may arise in the future.⁸ For PPL, it is the loss of competitive options currently available upon the commitment of capital for new track construction. PPL Comments at 8-10; *Conrail*, 3 S.T.B. at 319-320.

While the specific condition sought by CNJ is focused on routes between the Newark, NJ area and Easton, PA (or Allentown-Bethlehem, depending on practical considerations),⁹ the evidence submitted by CNJ is entirely consistent with PPL's showing that pro-competitive dual carrier access over both the D&H South Lines and the Southern Tier Lines is feasible and directly responsive to the threats to potential competition posed by the subject transactions as presented. *See* V.S. Nelson at 6-7; PPL Comments at 13-14.

In sum, of all the parties to file comments and statements in response to the proposed transactions, the only two (2) to address issues related those raised by PPL

⁸ *See* V.S. Nelson at 4-5.

⁹ CNJ Comments at 17.

effectively confirm PPL's positions, both on the anti-competitive impacts of the transactions, and the appropriate remedial steps that the Board should take in response. The impacts are evident and material, and PPL's proposed ameliorative conditions are practical and would not reduce *any* of the public benefits that NS claims in support of the Application.

CONCLUSION

For the reasons set forth herein and in PPL's January 21, 2015 Comments, the Board should condition approval of NS' acquisition of the D&H South Lines on its (1) negotiation of appropriate agreements with CSXT and PPL for the granting of trackage or haulage rights over the Lines in favor of CSXT to PPL's Montour Station, should PPL construct a new connecting line between the Station and the D&H South Lines, subject to the Board's continued supervisory jurisdiction; and (2) its negotiation of appropriate agreements with CP and PPL for the granting of haulage rights over the NS lines between Buffalo and Binghamton, NY, and over the D&H South Lines to Montour, should PPL construct the new connecting line, again subject to the Board's continued supervisory jurisdiction. The Board also should grant such other and further relief to PPL as may be appropriate based on the full record of this proceeding.

Respectfully submitted,

PPL EnergyPlus, LLC

By: Joseph R. Waala
Senior Counsel
PPL Services Corporation
Two North Ninth Street
Allentown, PA 18101

Of Counsel:

SLOVER & LOFTUS LLP
1224 Seventeenth Street, NW
Washington, DC 20036

Kelvin J. Dowd 
SLOVER & LOFTUS LLP
1224 Seventeenth Street, NW
Washington, DC 20036
202-347-7170

Dated: March 31, 2015

Attorneys and Practitioners

CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of March, 2015, caused a copy of the foregoing Reply Comments to be served via United States Postal service upon all parties of record in this proceeding, as well as:

Secretary of Transportation
1200 New Jersey Avenue, S.E.
Washington, DC 20590

Attorney General of the United States
c/o Assistant Attorney General
Antitrust Division
Room 3109
Department of Justice
Washington, DC 20530

William A. Mullins
Baker & Miller PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037



Kelvin J. Dowd