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June 4, 2015

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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

ENTERED
Office of Proceedings
June 4, 2015
Part of
Public Record

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 Petition for Reconsideration.

Sincerely,



Kelvin J. Dowd
An Attorney for PPL EnergyPlus, LLC

KJD:lad
Enclosures

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June 4, 2015
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**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

PETITION FOR RECONSIDERATION

Pursuant to 49 C.F.R. Part 1115.3 and Decision No. 6 in the captioned proceeding,¹ PPL EnergyPlus, LLC (“PPL”)² hereby petitions for limited reconsideration of the Decision, on grounds of material error. Specifically, and consistent with analogous agency precedent, the pro-competitive condition granted by the Board in favor of PPL in Decision No. 6 should be revised to (1) direct that Applicant Norfolk Southern Railway Company (“NS”) grant the trackage rights described in the Decision by negotiated agreement with relevant parties, subject to Board intervention in the event that a voluntary agreement cannot be reached; and (2) direct that the trackage rights be granted to a rail carrier designated by PPL, following its construction of the connecting track discussed in the Decision. In support hereof, PPL shows as follows:

¹ Decision No. 6 was served on May 15, 2015.

² As has been publicly announced, PPL’s parent corporation has entered into a series of agreements leading to the creation of a new publicly traded company called Talen Energy Corporation. One result of these transactions is that PPL will be re-named Talen Energy Marketing, LLC (“Talen”). For all present and future legal purposes related to this proceeding and the condition granted herein, PPL and Talen should be considered one and the same entity.

INTRODUCTION

The evidence presented by PPL in this proceeding demonstrated that if NS' acquisition of the D&H South Lines was approved without condition, a potential competitive transportation option available to PPL for coal shipments to its Montour Generating Station would be foreclosed. *See* Decision No. 6, at 33-34. To remediate this adverse effect of the transaction, PPL advocated, *inter alia*, the following condition:

Negotiation of appropriate agreements among NS, 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....

Comments and Request for Conditions of PPL EnergyPlus, LLC, January 21, 2015 at 14.

As PPL explained, the requested condition would preserve PPL's pre-transaction option to access line-haul service provided by CSX Transportation, Inc. ("CSXT") for Montour coal traffic via the D&H South Lines. Since D&H service over the Lines already had atrophied and would cease altogether following NS' acquisition, direct access to CSXT through trackage or haulage rights represented the most efficient and effective remedial alternative. *Id.* at 10-12.

Over NS' opposition, the Board agreed with PPL that the loss of potential competition resulting from NS' proposed acquisition of the D&H South Lines was "real," and qualified for conditions relief under established precedent. *See* Decision No. 6 at 34-35. *See also, Union Pacific Corp. – Control and Merger – Southern Pac. Rail Corp.*,

1 S.T.B. 233, 390-393, 420, 469-479 (1996). However, the specific wording of the condition imposed was as follows:

[C]ontingent upon PPL actually constructing a connection to the D&H South Lines, *the Board will grant D&H trackage rights* over the D&H South Lines from that Point of PPL's connection with the D&H South Lines to Schenectady, N.Y.

Decision No. 6 at 35 (emphasis supplied).

PPL respectfully submits that the Board erred in crafting the foregoing condition, and that the impacts of the errors on PPL are material. For these reasons, reconsideration and revision of the condition are required.

ARGUMENT

Reconsideration of a Board decision pursuant to 49 C.F.R. Part 1115.3 is appropriate if a party makes a substantiated showing that the Board erred, and that the error had a material impact on the outcome of the subject proceeding. *See Canadian Nat'l Ry. – Control – EJ&E West Co.*, STB F.D. No. 35087 (Sub-No. 8), STB served November 8, 2012 at 1-2, 8. As shown below, PPL's Petition meets these criteria.

1. The Trackage Rights Directive to NS Should be Self-Executing

When the Board imposes pro-competitive trackage rights as conditions on approvals of transactions covered by 49 U.S.C. §§11323-11325, the standard form of the condition is a directive to the applicant carrier(s) to grant trackage rights to a third party railroad or railroads, based on negotiated terms and conditions. *Burlington N. Inc. – Control and Merger – Santa Fe Pac. Corp.*, 10 I.C.C. 2d 661, 676 (1995). *See also, CSX Corp. – Control and Operating Leases/Agreements – Conrail, Inc.*, 3 S.T.B. 196, 221-

224 (1998). The typical condition requires that if the carriers cannot agree on the terms to govern the exercise of trackage rights, then (and only then) the Board will conduct a proceeding to resolve disputed issues. *Conrail*, 3 S.T.B. at 283; *Burlington N. Inc.*, 10 I.C.C. 2d at 745. Significantly, the directive to negotiate ameliorative trackage rights includes within its scope shippers that only could access the benefit in the future, upon the construction of new, connecting rail infrastructure. *Union Pac. Corp. – Control and Merger – S. Pac. Rail Corp.*, Aug. 12, 1996 slip op. at 144-146. In those circumstances, which include this case, once the “build-in/build-out” shipper invests the necessary capital, its entitlement to competitive rail service is self-executing; a return trip to the Board would be needed only if negotiations over trackage terms and conditions reached impasse. *Burlington N. Inc.*, 10 I.C.C. 2d at 745.

In contrast to the standard conditions procedure described above, Decision No. 6 states that “contingent upon PPL actually constructing a connection to the D&H South Lines, *the Board will grant*” trackage rights to preserve PPL’s competitive options. Decision No. 6 at 35 (emphasis added). The implication of this language is that upon construction of the new track connecting the Montour Station to the D&H South Lines, PPL will have to return to the Board for some form of order compelling NS to permit another carrier to operate over the Lines in order to serve Montour. This relief is inconsistent with the precedents cited *supra*, which imposed the obligation to grant pro-competitive rights on the applicant carrier(s) when the decision approving the transaction(s) at issue was served, regardless of when in the future they might be exercised.

PPL submits that the impact of this error is material. Regardless of the magnitude of the burden of presentation or persuasion that PPL might have to bear in order to secure a future Board order, the fact that it may have to submit to a procedure before finally securing relief – and presumably respond again to any opposition that might be advanced by NS or any other party – would set PPL apart from previous beneficiaries of trackage rights conditions imposed under 49 U.S.C. §11324(c) in an adverse fashion. PPL would be forced to expend time and resources as a threshold condition of relief that its identically-situated predecessors only faced as a last resort.

Consistent with established precedent, the Board should revise the condition imposed in Ordering Paragraph 9 of Decision No. 6 to provide that contingent on PPL's construction of the connecting tracks, NS will grant trackage rights to a second carrier³ to provide competitive service, on terms negotiated in the first instance by PPL, NS and the second carrier. The Board would retain jurisdiction to prescribe such terms if – and only if – the parties are not able to reach agreement within a defined time period. Consistent with the trackage rights conditions imposed in *Conrail*, PPL proposes that the time period be set at 60 days following PPL's notice to NS of the date that the connecting track will be completed. *See* 3 S.T.B. at 283.

³ As discussed *infra*, PPL should be granted the right to designate the rail carrier that would receive trackage rights.

2. PPL Should Have the Right to Designate the Carrier to Receive Trackage Rights

The second point of error with regard to the PPL condition was the Board's apparently exclusive designation of D&H as the carrier to which trackage rights would be awarded.

As the Board acknowledged in Decision No. 6, PPL's prospective build-out to the D&H South Lines is part of a "long-term expansion strategy" that will extend well into the future. *See* Decision No. 6 at 33. Once construction of the connecting line is completed, PPL's need for service to Montour from a carrier other than NS will continue indefinitely. However, there are no assurances that *D&H service* through Schenectady or elsewhere will be available. As NS' own Application in this docket showed, D&H has reduced service generally in the Northeast in recent years, and additional service discontinuances and/or transfers of franchises to NS are planned in connection with NS' takeover of the D&H South Lines. *See* Decision No. 6 at 14-15 and notes 44 and 45.

The Board itself emphasized D&H's decline as a competitive presence:

D&H is a financially struggling operator seeking to exit the market served by the D&H South Lines. NSR is a much larger operator that is better situated to own and operate these lines. Over 80% of the current traffic on the D&H South Lines is NSR traffic, and this transaction would better align ownership of the Lines with their usage. NSR has the funds and incentive to purchase and invest in the D&H South Lines, and to potentially make improvements on the Lines. It is in the public interest to facilitate transactions that transfer control of a line to a carrier with a greater ability and incentive to ensure adequate investment in and growth of traffic on the line. ... By allowing NSR to purchase and invest in the D&H South Lines, this transaction

will allow NSR to provide more reliable service for shippers and to conduct safer and more efficient operations over the Lines than either D&H as struggling owner or NSR as an operator without ownership rights could provide.

As both NSR and D&H point out, this transaction would also strengthen competition in the Northeast by replacing a smaller carrier operating at a loss with a larger carrier that is better equipped to operate the D&H South Lines.[] NSR is one of the strongest carriers in the Northeast, along with CSXT. On the other hand, D&H's role in the northeast transportation market has been reduced by intermodal competition from motor carriers and by competition between NSR and CSXT since the Conrail split in 1998 and 1999.

Id. at 21 (citation and footnote omitted). The PPL condition will be of no value if D&H has further retrenched operations in the Albany-Schenectady area – or ceased to exist as an independent carrier altogether – when the time comes to activate the trackage rights ordered by the Board.

In contrast, CSXT is a large and strong competitor of NS' with a positive and expansionist future, including in the Northeast.⁴ Additionally, CSXT would be the railroad originating the Eastern coal (or receiving Western coal in interchange at Chicago) destined for Montour that would compete with NS-origin coal and is the basis for the Board's condition. Decision No. 6 at 33-34; *PPL Comments* at 5-6 and V.S. Baumann, p. 2-3. The superiority of CSXT as a competitor for NS and the greater

⁴ See, e.g., <http://www.csx.com/index.cfm/media/press-releases/capacity-project-announced-on-premier-river-line>.

efficiency associated with a routing via Albany-Schenectady that does not require interchange with a second carrier were reasons why PPL promoted CSXT as the better trackage rights tenant for purposes of PPL's proposed condition. *PPL Comments* at 11.⁵

The Board's predecessor's ruling in *Burlington N. Inc.* is squarely on point on this issue. Referencing a utility's request for a trackage rights condition to preserve a build-out option in that case, the ICC held:

To preserve the competitive status quo, we have crafted a condition that will permit OG&E to maintain its existing build-out option. After the merger, there will be three class I railroads not affiliated with applicants (UP, SP, and KCS) operating near Sooner Station. We will require applicants to grant trackage rights to one of the three over the BN line to a convenient point of interchange (perhaps Morrison) to which OG&E would retain the ability to build out. *We will allow OG&E (not applicants) to choose the carrier that is to receive the trackage rights.* We will further allow the interested parties (BN, OG&E, and the carrier chosen by OG&E) an opportunity to reach a negotiated settlement respecting the details of the condition we are imposing.... If the parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such condition, and we will establish the terms.

10 I.C.C. 2d at 745 (emphasis supplied). The same relief should have been granted to PPL here. The Board erred in designating D&H as the carrier to implement the pro-competitive PPL condition, particularly when there is such evident doubt as to its

⁵ As PPL also showed, the 3.7 million tons of coal that move to Montour annually provide a volume level that easily would support direct CSXT operations over the D&H South Lines via trackage rights. *PPL Comments* at 11 and n. 17. This evidence was not challenged.

capability to do so effectively, or even at all. Moreover, the error plainly is material, as the unavailability of a healthy D&H to exercise trackage rights effectively nullifies a condition that the Board already has determined is needed to protect PPL from anti-competitive effects of the subject transaction. The Board should correct the error by revising the condition to allow PPL to designate the carrier that would receive trackage rights from NS⁶ to serve Montour.

CONCLUSION

For the reasons set forth herein, the Board should grant PPL's request for reconsideration of Decision No. 6, and revise the condition granted in favor of PPL at page 35 and in Ordering Paragraph 9 of the Decision in the manner described in this Petition.

⁶ The substitution of CSXT for D&H in this circumstance would have no meaningful operational impact on NS. But for the PPL condition, D&H would not be conducting operations over the D&H South Lines following consummation of the subject transaction; the condition would re-introduce a second carrier serving a single shipper over the Lines, whether that carrier was CSXT, D&H, or a hypothetical new railroad existing at the time.

Respectfully submitted,

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Dated: June 4, 2015

Attorneys and Practitioners

CERTIFICATE OF SERVICE

I hereby certify that I have this 4th day of June, 2015, caused a copy of the foregoing Petition for Reconsideration to be served via United States Postal service upon all parties of record in this proceeding, as well as:

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