

EP 705

229905

**STATEMENT OF
ARKANSAS ELECTRIC COOPERATIVE CORPORATION
REGARDING COMPETITION IN THE RAILROAD INDUSTRY**

This Statement summarizes AECC's comments and evidence about the current state of competition in the railroad industry and AECC's recommendations regarding specific steps the Board should undertake to enhance competition to benefit not only rail customers, but also the public generally, and indeed even the railroads themselves.

AECC commends the Board's decision to hold this proceeding to examine competition in the freight rail industry. Competitive access to economical and efficient transportation systems is one of the things that contributed to the United States' historical rise to the leadership position we now hold in the world's marketplace.

INTRODUCTION

Competition, whether in the railroad industry or in any other part of the economy, is not a "zero sum game", where any gain by one party must mean a loss by another party. Competition can result in benefits for everyone. Competition encourages innovation, increased efficiency, enhanced service, and lowered costs. In contrast, excessive market power can cause what our expert witness, Michael Nelson, refers to as "resource misallocations", including various kinds of inefficiency and inadequate service. Many shippers and shipper organizations have described in their comments in this record the problems they have experienced with rail service.

AECC is not proposing a radical change in the Board's regulatory policies. We are certainly not proposing "re-regulation". No one who knows anything about the condition of the

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railroad industry in the 1970's, before the enactment of the Staggers Act, would want to go back to those Bad Old Days.

What AECC is proposing is for the Board to adjust the balance between two principal goals of the Staggers Act: Improved financial health of the railroads, on one hand, and competition, on the other. Like any other administrative agency, the Board has the power to change its regulations to reflect changed circumstances, and this is particularly so with respect to regulations to accommodate "the conflicting policies set out in" the Staggers Act ^{1/} Periodic adjustments to the regulations must be made in order to accommodate the conflicting policy goals of the Act under changing circumstances. The evidence developed in this proceeding shows that circumstances in the railroad industry have changed dramatically, and adjustments to the Board's policies are required to accomplish the purposes of the Staggers Act under current conditions.

AECC'S PROPOSALS

AECC proposes that the Board amend its competitive access rules by eliminating the requirement that the customer (or competing railroad) seeking competitive access must prove that the incumbent railroad has been guilty of "competitive abuse". This requirement does not appear anywhere in the statute; it was added by the ICC when that agency adopted its competitive access rules in 1985. The subsequent interpretations of this requirement by the ICC and the Board have caused the competitive access provisions of the statute to become completely ineffectual. The competitive access rules should put the burden of proof on the incumbent railroad to prove reasonable grounds why competitive access should be denied.

^{1/} Baltimore Gas & Electric Co. v. United States, 817 F.2d 108, 115 (D.C. Cir. 1987).

AECC also proposes that the Board rescind the Bottleneck Rule for unit train and trainload movements. "Bottleneck railroads" should be required, on request, to quote separately challengeable rates.

Further information about AECC's proposals appears in Appendix B.

DISCUSSION

AECC has tried to play, and believes that it has played, a constructive role in the process that has brought consideration of competitive access issues to this point. In Docket No. 42104, the Board specifically acknowledged, and followed, AECC's suggestion that the issues faced by the Independence powerplant, which AECC co-owns with Entergy, prospectively could be addressed through a situation-specific competitive access remedy. While we have substantial concerns with the Board's eventual decision in that case, the Board itself cited the instant proceeding as the forum in which it would consider the prospective need for changes in its stewardship and application of the competitive access remedies.

In this proceeding, we have approached the issues not on the basis of the "zero-sum game" of rate level changes portrayed by the railroads, but on the basis of core economic issues and evidence that define several guiding public interest considerations. The "resource misallocations" Mr. Nelson describes in his verified statements are particularly meaningful to us because we have borne the costs that can arise when rail market power leads to inadequate service, inefficient service, and other problems.

AECC is not advocating "open access" or "open routing", under which every solely-served rail customer would have the right to obtain competitive rail service on demand. "Open access" is a straw man that the railroads have put up in this proceeding to avoid

addressing the real issues. AECC is proposing to shift the burden of proof in competitive access cases from the applicant to the incumbent carrier, but the Board would continue to have the duty to decide whether a particular competitive access application would be in the public interest.

Thus, AAR mischaracterizes AECC's proposal by claiming that we would allow a competitive access application to be denied "only on limited feasibility grounds". AAR Reply Comments, at 41. AECC said no such thing. AECC's Initial Comments said that the incumbent carrier would have the opportunity "to show reasons why access should be denied." We did not impose limits on what the reasons might be. Our Initial Comments simply offered an example of how shifting the burden of proof could work; in a trackage rights or reciprocal switching case, "this might, for example, include a showing that the proposed access would interfere unduly with the incumbent's own operations." AECC Initial Comments, at 9 (emphasis added).

AECC did not think that it was our role to attempt to define, in our Initial Comments, the grounds on which big railroads might think it appropriate oppose a competitive access application. The schedule in this proceeding offered the railroads an opportunity to present their views on this matter in their reply comments. They chose not to do so, apparently because they prefer to take the position that no change in the existing rules should even be considered. That was their choice; they cannot blame AECC for it.

AAR is also wrong to claim that AECC's proposal would violate the statute by "usurp[ing] the railroads' route- and rate-setting prerogatives", and by "restructure[ing] the [railroad] industry to provide multi-carrier service wherever a shipper seeks alternative

service.” AAR Reply Comments, at 41-42. What AECC proposes is that the Board revise its competitive access rules to exercise more forcefully than it has done in the past powers that the statute expressly confers on the Board. Those powers include: To prescribe through routes “in the public interest” (and in doing so to shorthaul a carrier if “needed to provide adequate and more efficient or economic transportation”); to require access to terminal facilities if “practical and in the public interest”; and to order reciprocal switching if “practical and in the public interest” or if “necessary to provide competitive rail service”. It is absurd for the railroads to argue that it would be a violation of the statute for the Board to exercise powers conferred by the statute.

We urge the Board to adopt meaningful measures to curb the manifestations of rail market power that harm AECC (and other rail shippers) and the customers we serve. AECC hopes its participation in this proceeding assists the Board in finding constructive ways to enable the competitive access remedies to limit and remedy harmful consequences that can result from carrier market power, as contemplated under the statutes.

On the basis of the evidence developed in this proceeding, there are four fundamental issue areas to which AECC would like to draw the Board’s attention:

- (1) the “competitive abuse” standard in the Competitive Access Rules as implemented by the Board subsequent to Midtec and the ICCTA, including the nature and severity of conduct that warrants a competitive access remedy;**
- (2) changes in competition that resulted from the mega-mergers of the 1990’s, including but not limited to those resulting from 3-to-2 reductions in the numbers of carriers;**

(3) changes in cost structure associated with the mega-mergers and the

Bottleneck Rule; and,

(4) achievement of revenue sufficiency by the Class I railroad industry.

Evidence regarding each of these is summarized in Appendix C.

In considering these issues, it is important for the Board to distinguish between the rhetoric and the evidence. While the carriers advance a lot of rhetoric, they ultimately do not dispute most of AECC's evidentiary points (many of which are based on information provided by the carriers' own witnesses).

In that context, it is particularly egregious that the Association of American Railroads, the principal partisan on behalf of the big railroads in this proceeding (and in many others), has submitted reply testimony by Christensen Associates. The Board expended substantial public funds to obtain "independent" assessments by Christensen of many aspects of the state of competition in the rail industry, and highlighted those assessments in the notice initiating this proceeding. While AECC questioned aspects of Christensen's analysis in its opening evidence, 2/ the willingness of the study authors to serve as reply witnesses for AAR before they or AAR even knew what other parties would be saying about subjects related to the Christensen study 3/ reveals a predisposition that undermines confidence in the objectivity of their work for the Board. Notwithstanding this irregularity, AECC believes this proceeding has

2/ See Initial Comments of Arkansas Electric Cooperative Corporation ("AECC Initial Comments"), VS Nelson at 11-12.

3/ Messrs. Eakin and Meitzen state (at p. 2 of their Reply Verified Statement) that they were retained by AAR in March 2011 to critique the initial comments in this proceeding, which were not due until April 12 under the Board's schedule.

generated ample information – including that generated by Christensen on behalf of AAR – for the Board to proceed with the development and implementation of reasonable modifications of its competitive access procedures and the Bottleneck Rule.

In this proceeding, the big railroads have treated the very idea of changes in current competitive access rules as illegitimate and inappropriate. They claim that the present rules are indispensable to their financial health and indeed to the survival of American greatness. They regard it as unimaginable that they might have to compete with each other in markets where currently there is only one serving carrier.

These fears should be put aside. A modest increase in competition between big railroads, such as AECC is proposing, will not undermine the revenue sufficiency that the big railroads have achieved under the Staggers Act. In fact, the reduction in competition that occurred in the mid- 1990's as a result of the big rail mergers and the Bottleneck Rule evidently harmed, rather than helped, the big railroads' achievement of revenue sufficiency. As AECC's expert Mr. Nelson demonstrated using data from the study performed for the Board by Christensen Associates, the big railroads had all satisfied the core statutory requirement for revenue sufficiency (i.e., the ability to attract needed capital) by 1995, but the subsequent mergers and the Bottleneck Rule increased their fixed and marginal costs, thereby detracting from their competitive capabilities and financial performance. If competition among the big railroads had remained at the level of the early 1990's, the big railroads would have achieved their current level of revenue sufficiency even earlier than they have. The big railroads have adequate revenues now, and the improvements in efficiency, service, and innovation that

would be encouraged by an increase in competition will give them an opportunity to do even better in the future.

Competition is not a "zero sum game", where the only question is who gets a bigger slice of the pie. All market participants can benefit from healthy competition. Competitive pressure encourages efficiency, innovation, improved service, and lower costs. More competition will not only mean that AECC and other rail customers will get better and more efficient rail service – which it will, and which we will welcome – but it also means that the railroads providing that service will face market forces that drive them to be better, stronger, and more efficient. All of these impacts of competition are advantageous from a public interest perspective.

AECC respectfully urges the Board to adopt the changes in the Competitive Access Rules that we have proposed, and to eliminate the Bottleneck Rule.

APPENDIX A

JONATHAN OLIVER

BACKGROUND AND EXPERIENCE

Resume for Jonathan Oliver

Jonathan Oliver
Vice President – Engineering, Construction and Operations
Arkansas Electric Cooperative Corporation

I. Duties and Responsibilities

Oversight of the generation and transmission assets of AECC including directing procurement, transportation and delivery of fuels for power plants operated by AECC and monitoring of fuel supply and usage for power plants jointly owned by AECC. Other responsibilities include plant operations and maintenance, environmental compliance, regulatory compliance, generation development, transmission operations and maintenance, and transmission design. Activities of the Engineering, Construction and Operations division have significant impact on the electricity rates charged to our member cooperatives.

II. Education

1993 – Bachelor of Electrical Engineering, Georgia Institute of Technology
1995 – Master of Science in Electrical Engineering, University of Missouri – Rolla

III. Professional License or Accreditation

Professional Engineer in state of Arkansas, License 9544
Master Electrician in state of Arkansas, License M-6780
Project Management Professional, Registration No. 77922

Employment History

Over sixteen years electric utility experience with varying degrees of responsibility ranging from power plant construction to general administrative management.

APPENDIX B

**RECOMMENDATIONS OF
ARKANSAS ELECTRIC COOPERATIVE CORPORATION**

Based on the evidence developed in this proceeding, the specific adjustments to the Board's rules and policies that AECC proposes are as follows:

1. Eliminate the requirement of the current Competitive Access Rules that the applicant prove that the incumbent carrier has committed "competitive abuse" as that term has been defined by the Board. Establish a simplified procedure that places the burden of proof on the incumbent railroad, if the incumbent is a Class I railroad;
2. Provide that competitive access may be granted where it is shown that the incumbent railroad's common carrier rate exceeds the SAC level; 1/
3. Establish a presumption in favor of granting competitive access where the party seeking access undertakes to pay a proportional share of an existing facility's construction and operating costs (i.e., the "PRB Joint Line model"); 2/
4. Rescind the Bottleneck Rule for unit train and trainload movements and require that carriers, on request, quote separately challengeable rates; and,
5. Disengage the Board's current process for determining "revenue adequacy" and replace it with an acknowledgement that (a) the industry as a whole has

1/ The foundation for this proposal is described further at AECC Reply Comments, RVS Nelson at 8, n12.

2/ See AECC Initial Comments, VS Nelson at 20-21. NS appears to endorse the proposition that flows large enough to entice a new entrant to "pay to play" will tend to avoid the concerns articulated by the railroads regarding the introduction of new competition in smaller markets. See NS Reply Comments at 24, n19.

achieved the objective articulated in the statute; and, (b) variations in performance among individual firms can be ascribed to such factors as management effectiveness, and absent a showing of highly extraordinary circumstances do not justify increased differential pricing.

APPENDIX C

**SUMMARY OF
EVIDENCE ON KEY ISSUES**

"Competitive Abuse" Standard

- AECC Initial Comments, VS Nelson at 17-18, discussed the resource allocation and public interest foundation for differential pricing and for remedial action when the exercise of market power leads to tangible misallocations of resources, including inefficient and inadequate service. AAR concedes that "Congress intended access remedies to address conduct-based abuses of market power that cannot be addressed through regulation of unreasonable rates", 1/ and offers no disagreement with Nelson's testimony describing how service inefficiencies and inadequacies "can rapidly accrue costly deviations from the efficient allocation of economic resources." 2/
- AECC Reply Comments, RVS Nelson at 6-7, discusses the acknowledgement provided by AAR witness Willig of the central importance of efficient resource allocation in determining the public interest.
- None of the railroad evidence provides a basis on which the public interest problems stemming from resource misallocations can be disregarded. The same considerations that permit differential pricing basically require that such resource misallocations be effectively addressed.
- The railroads try to conjure up the threat that competitive access will degrade service, 3/but this is contradicted by the actual experience of the Canadian railroads

1/ Reply Comments of the Association of American Railroads ("AAR Reply Comments") at 28.

2/ AECC Initial Comments, VS Nelson at 17.

3/ See, for example, Reply Comments of CSX Transportation, Inc. ("CSX Reply Comments") at 12.

with competitive access (via interswitching). CN and CP concede that competitive access formed an effective basis for service competition. 4/ The Canadian experience validates the role of competitive access envisioned in the U. S. statutes for mitigating service inadequacies, and it refutes the scare-mongering of the big U. S. railroads. Indeed, the big railroads never explain why, even if competitive access were to perturb their traffic flows, they couldn't simply make use of the statutory freedoms they enjoy to emphasize solicitation of traffic to match their available capacity. Moreover, in the unlikely event that the carriers find themselves unable to prevent a failure of traffic movement, the Board holds abundant authority pursuant to Section 11123 to provide for appropriate emergency service. 5/

- The statutes provide no authorization for "differential service" or "differential efficiency" to result from a carrier's exercise of market power.
- Moreover, the Board's own rules call for the Board to remedy competitive problems with competitive access irrespective of the possibility that such access would reduce the revenues of a revenue-inadequate carrier (see Section 1144.2(b)(3)).
- Therefore, the Board should recognize differential service and/or efficiency as per se indicators of adverse exercises of market power to be curtailed with competitive access.

4/ Joint Reply Comments of Canadian National Railway Company and Canadian Pacific Railway Company at 2-3.

5/ As an obvious example, if Carrier A experienced congestion due to increased traffic volume obtained as a result of competitive access to customers of Carrier B, the Board could order that Carrier B's facilities formerly used to serve those customers be made available to Carrier A on an interim basis to provide Carrier A with time to adapt its operations.

- The railroads can avoid the widespread application of competitive access remedies simply by heeding their own advice to “do no harm”. They are permitted to engage in differential pricing within limits, but not to otherwise subject captive shippers to other conduct incompatible with a competitive marketplace.

Changes in Competition Associated with the Mega-Mergers

- AECC Initial Comments, VS Nelson at 15-16, discussed the losses of competition that occurred in the mega-mergers, including the demonstration by Christensen of the adverse impacts on shipper price/service options associated with a 3-to-2 reduction in the number of carriers serving a given area.
- AECC Reply Comments, RVS Nelson at 10, discusses this issue further, referencing corroboration supplied in the opening evidence of other shippers.
- The railroads rely on the stated expectations of the applicants and the Board regarding the competitive impacts of the mega-mergers, 6/ but do not address the Christensen

6/ See, for example, CSX Reply Comments at 20-21. CP and AAR go a step further, advancing a theory that appears to claim duopolies don't produce harm because they don't exist. Reply Comments of Canadian Pacific Railway Company at 20-22; AAR Reply Comments at 9-10. In discussions of duopolies and 3-to-2 reductions in the number of serving carriers, AECC has never claimed that no factor other than the duopolistic Class I carriers is ever relevant in any market. However, even if, for example, CP or CN handled PRB coal in movements to west coast ports, that would not alter the duopolistic environment that exists in the rail originations of PRB coal. The theoretical problems associated with duopolistic competition are well known, and as described above have been confirmed empirically by the Christensen Study.

finding. However, the railroad comments implicitly concede the existence of different types of competition lost in the mega-mergers. 7/

- UP attempts to pardon the loss of competition from SP on the basis of the "failing firm" characterization it has used before. 8/ While this characterization has always seemed questionable in light of such considerations as SP's ownership by billionaire Philip Anschutz, its successful network expansion and marketing initiatives, and the favorable settlement terms it achieved in the BN/ATSF merger, the proposition that SP was a failing firm was disproven by the Christensen Study, which found that SP was fully able to attract required capital prior to its acquisition by UP. 9/
- Messrs. Eakin and Meitzen did not even attempt to refute Nelson's interpretation of the Christensen study results regarding the adverse competitive impacts associated with 3-to-2 reductions (referenced above), implicitly corroborating Nelson's conclusion.
- Railroad arguments that the Board lacks authority to revise the conditions imposed on mergers when unanticipated competitive harms come to light 10/ are wishful thinking.

The statutes (e.g., 49 U.S.C. § 722) are clear on the Board's authority, which is

7/ For example, Reply Comments of Union Pacific Railroad Company ("UP Reply Comments") at 15 describes an element of shipper leverage that was lost without remediation in the larger mergers. Likewise, UP Reply Comments, RVS Koraleski at 24, describes competition between western bituminous and PRB coals that was not effectively protected by the Central Corridor conditions imposed in the UP/SP merger.

8/ UP Reply Comments, RVS Koraleski at 8-9.

9/ See AECC Initial Comments, VS Nelson at 8, n4.

10/ BNSF, for example, asserts there is no precedent for a "long reach back" into the mergers. Reply Comments of BNSF Railway Company ("BNSF Reply Comments") at 8-9. UP similarly asserts that it is "too late in the day". UP Reply Comments at 26.

acknowledged by CSX, 11/ and the merging parties were provided ample notice that the Board approved the mega-mergers under the expectation that they would cause no significant competitive harms.

Changes in Cost Structure Associated with the Mega-mergers and the Bottleneck Rule

- AECC Initial Comments, VS Nelson at 13-14, discusses the findings from the Christensen Study that plainly show adverse changes in carrier marginal costs and fixed costs associated with consummation of the mega-mergers.
- AECC Reply Comments, RVS Nelson at 4-6, discusses the dramatic slowdown in the rate of productivity improvement that was associated with the mega-mergers. Where the railroads once rushed to embrace such productivity improvements as 286k cars, they now complain about operational refinements like PTC, notwithstanding the productivity and capacity benefits PTC offers. 12/
- AECC Initial Comments, VS Nelson at 22, references Nelson's previous study of adverse impacts on operating efficiency, system reliability, and Infrastructure investments associated with the Bottleneck Rule, which also was cited as an authoritative source in the USDA/DOT study referenced by the Board.
- The railroads, including Messrs. Eakin and Meltzen, make no attempt to refute Mr. Nelson's Bottleneck Study or his interpretation of the Christensen Study results

11/ CSX Reply Comments at 22 n. 25.

12/ See, for example, Reply Comments of Norfolk Southern Railway Company ("NS Reply Comments") at 34; UP Reply Comments at 16.

regarding adverse marginal and fixed cost changes. 13/ Indeed, while AAR tries to deflect attention from this issue by claiming that “productivity growth began to decline in the early 2000s” ,14/ AAR’s own witnesses conclude that “railroad productivity grew by more than 6 percent per year between 1986 and 1996, but has slowed dramatically to a pace of about 2.3 percent per year since 1996” . 15/ Even a quick glance at the Board’s productivity data presented by Mr. Nelson confirms that the claim in the text of AAR’s reply comments is false and misleading, and that the productivity nosedive commenced at the time of the mega-mergers.

- Therefore, losses of competitive pressure from the mega-mergers and the Bottleneck Rule have introduced material inefficiencies that are detrimental to the cost structure of the railroads and contrary to the public interest.

13/ Messrs. Eakin and Meitzen do attempt (in AAR Reply Comments, RVS Eakin/Meitzen at 12, n32) to comment on Mr. Nelson’s reference to the length of haul portion of Christensen’s econometric results as it relates to the Bottleneck Rule, but this attempt appears to affirm, rather than undermine, Mr. Nelson’s reference. Basically, they agree that their model results show an adverse impact on costs associated with the length of haul handled by the merged mega-railroads, but then try to rely on the growth in average length of haul “in the early post-Staggers era” to infer that the opposite must somehow be true. These observations validate Mr. Nelson’s conclusion that the combination of the mega-mergers and the Bottleneck Rule introduced inefficiency by allowing a carrier’s long haul preference to be exercised over longer routes with decreased discipline imposed by competitive pressures. Messrs. Eakin and Meitzen also appear to have overlooked the fact that Mr. Nelson’s analysis pertained to unit train and trainload movements, for which the classification efficiencies that drove much of the early post-Staggers growth in length of haul are irrelevant, and for which the Board has already concluded that interchange costs are negligible.

14/ AAR Reply Comments at 8.

15/ AAR Reply Comments, RVS Eakin/Meitzen at 3.

Achievement of Revenue Sufficiency

- AECC Initial Comments, VS Nelson at 12, discusses the absence of any valid theory upon which the Board could rely to permit rail earnings above the level required to produce revenue sufficiency.
- AECC Initial Comments, VS Nelson at 8, specifically documented how the Christensen Study showed that the major railroads were fully able to supply needed capital by the mid-1990's, satisfying the core element of the applicable statute. 16/
- AECC Reply Comments, RVS Nelson at 7, discusses the concurring position of DOT/DOJ that rail revenues above the level required to produce revenue adequacy are improper.
- The railroads generally do not acknowledge any theoretical upper bound on the earnings they should be permitted, or any linkage between the achievement of revenue sufficiency and the public interest need for the Board to lessen restraints on competition. 17/
- Messrs. Eakin and Meitzen offer no reply to Nelson's interpretation of the Christensen Study results regarding capital sufficiency, but do reiterate an important Christensen finding – that increasing volumes and decreasing economies of density should be

16/ BNSF corroborates this, at least indirectly, when it observes that "(v)irtually every Class I railroad merger or acquisition that has taken place in the past two decades has involved an 'acquisition premium'...". BNSF Reply Comments at 16. The existence of an acquisition premium, all else equal, is indicative of a firm attracting and retaining capital in excess of that indicated by its book value.

17/ BNSF, for example, asserts that financial performance issues are "far afield from the access issues framed by the STB in this proceeding". BNSF Reply Comments at 8. NS similarly claims revenue adequacy is not at issue. NS Reply Comments at 39-40. See also AAR Reply Comments at 13.

reducing the level of differential pricing required to produce adequate revenues. 18/

This repudiates various railroad arguments regarding the benign nature of their recent pricing. 19/

- **Further evidence submitted by AAR witnesses Hamada and Gokhale corroborates Mr. Nelson's conclusions, based largely on the Christensen Study, that (1) the rail industry had achieved revenue sufficiency by the mid-1990's; (2) the mega-mergers and the Bottleneck Rule harmed the railroads' cost structure and financial performance; (3) the railroads have been revenue sufficient at least since 2006; and (4) the railroads since that time have been accruing contribution above the level needed to sustain revenue sufficiency via an increased exercise of market power.**

First, Hamada/Gokhale Exhibit VI permits a comparison of the return on assets generated by the railroads vs. electric utilities, an industry with capital intensity comparable to that of railroads, but generally subject to regulation that prevents excessive earnings. The exhibit shows that the railroad returns were above those of the utilities from 1995-1997 (but only by a small margin in 1997). The railroad returns then fell below those of the utilities as the mega-mergers took effect, and remained below those of the utilities through 2005. In 2006, the railroad returns again rose above those of the utilities; since that time the margin between the two has (with the exception of

18/ See, for example, AAR Reply Comments, RVS Eakin/Meltzen at 6: "a lesser markup over marginal cost is needed to achieve sufficient revenues"; and at 10: "A key finding of our revenue sufficiency analysis is that the needed markup has declined in recent years, but the actual markup observed has not declined by as much."

19/ See, for example, UP Reply Comments at 11-12.

the recessionary impact of 2009) been increasing in magnitude.

Second, Hamada/Gokhale argue in point 16 on page 5 of their RVS that railroads require high returns because they are risky investments, as reflected by the fact that their measured “betas” in a CAPM analysis are greater than 1. It was not that long ago, in the Board’s reviews of its cost of capital methodology, that internationally-recognized finance expert Stewart Myers appeared on behalf of AAR and told the Board that railroad betas were below 1. During that same process, AECC provided the Board with a detailed explanation of how CAPM will misstate as increased risk an increase in returns stemming from an increase in the exercise of market power. 20/ The disparity between the beta (risk) findings of Myers and Hamada/Gokhale are indicative of the increased exercise of rail market power during the intervening period.

- Several railroad parties argue that the Board should simply permit rail earnings above the level of revenue sufficiency on the grounds that railroads reduce highway congestion, fuel use, air pollution, etc. 21/ AECC has already described how this argument is nullified by the plain language of the statute. 22/ In addition, NS is to be commended for its honest acknowledgement that Congress, not the Board, needs to weigh and balance such considerations. 23/

20/ Described further in AECC Initial Comments, VS Nelson at 13.

21/ See, for example, AAR Reply Comments at 52; UP Reply Comments at 2.

22/ AECC Reply Comments at 8, n.11.

23/ NS Reply Comments at 8-9.

- Having argued on opening that no changes in competitive access should be considered, AAR advances a “back-door” strategy in reply that attempts – without providing opportunity for comment by other parties - to promote access pricing that would preserve the contribution achieved by a “bottleneck” carrier irrespective of the circumstances of the movement. 24/ AAR never explains why the primary claimed benefit of this approach – i.e., that it favors an efficient operator on the competitive portion of the movement - wouldn’t arise under virtually any other pricing scheme as well. AAR also never explains why the pre-existing level of contribution is sacrosanct if (1) a central purpose of competitive access is to introduce market forces to counteract harms that resulted from the pre-existing level of market power; and (2) guaranteeing the incumbent that it won’t lose contribution removes the strong incentive the incumbent otherwise would face to avoid engaging in the conduct that would trigger competitive access relief in the first place.

24/ See AAR Reply Comments, RVS Eakin/Meitzen at 13-15.