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BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED

Office of Proceeding
November 28, 2012
Part of Public
Record

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| M & G POLYMERS USA, LLC, |) | |
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| Complainant, |) | |
| |) | |
| v. |) | Docket No. NOR 42123 |
| |) | |
| CSX TRANSPORTATION, INC., |) | |
| |) | |
| Defendant. |) | |
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**MOTION OF ARKANSAS ELECTRIC COOPERATIVE CORPORATION
TO PARTICIPATE AS AMICUS CURIAE
AND
COMMENTS OF AMICUS ON REFINED METHODOLOGY**

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Corporation

Dated: November 28, 2012

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Motion To Participate

In accordance with the Board's Decision herein served October 25, 2012, p. 3 n. 10, Arkansas Electric Cooperative Corporation (AECC) respectfully moves for leave to participate in this proceeding as amicus curiae.

AECC is a membership-based generation and transmission cooperative that provides wholesale electric power to electric cooperatives, which in turn serve approximately 500,000 customers, or members, located in each of the 75 counties in Arkansas and in surrounding states. In order to serve its 17 member distribution cooperatives, AECC has entered into arrangements with other utilities within the state to share generation and transmission facilities. For example, AECC holds ownership

interests in the White Bluff plant at Redfield, AR and the Independence plant at Newark, AR, each of which typically uses in excess of 6 million tons of Powder River Basin (PRB) coal each year. In addition, AECC holds an ownership interest in the Flint Creek plant at Gentry, AR, which normally uses in excess of 2 million tons of PRB coal each year. Because of the large volume of coal consumed by these plants, and the need for long-distance rail transportation to move this coal, AECC has a direct interest in the effectiveness of remedies for unreasonable rates charged by rail carriers. The Board's decision in this docket might have a significant effect on the effectiveness of such remedies.

Accordingly, AECC moves for leave to participate as amicus curiae.

Comments On Refined Methodology

In its Decision served September 27, 2012, the Board described a refined quantitative methodology for determining whether CSX Transportation, Inc. (CSX) has market dominance with respect to the rates that are being challenged by M&G Polymers USA, LLC (M&G) in this proceeding. AECC takes no position on whether the described methodology should be applied in determining the reasonableness of the challenged rates in this case. AECC has no financial interest in that issue, and AECC does not have access to the classified information needed to make a reasoned evaluation of the applicability of the new methodology to this case. See Decision herein served October 25, 2012, at p. 3 n. 11.

AECC notes, however, that in the September 27 Decision the Board expressed concern that the determination of market dominance in cases involving

commodities that can “physically be transported via truck or rail” (p. 3), has caused delay in this proceeding, which could become “commonplace” in proceedings involving such commodities, which “will deter future litigants from bringing genuine rate disputes to the agency for resolution” (*id.*). In light of the Board’s expressed concern, AECC urges the Board to decide the dispute between M&G and CSX as expeditiously as possible, without allowing concerns about the future applicability of the refined methodology to cause further delay.

That said, AECC will now discuss briefly the broader question of the applicability of the refined methodology to future or pending rate cases other than this one, and in particular to cases involving the reasonableness of rates for coal transportation.

Although a determination of market dominance is part of the evaluation of rate challenges for coal as well as for other commodities, the Board developed its refined methodology specifically to deal with problems that arise in non-coal cases, such as this one, where there is at least an arguable possibility that truck or truck/rail alternatives might provide a competitive check on the serving railroad’s dominance of the market.

Over the last two decades, rate cases were brought almost exclusively by utilities challenging rates for the transportation of large coal volumes. Truck or truck/rail alternatives are rarely a feasible alternative to direct rail service in such cases. Thus, the typical pattern in past rate cases has been either that (1) defendant railroads concede market dominance or (2) the questions relating to market dominance were relatively straightforward and easy to resolve. For several years now, however, the Board has been striving to make its rate review process more broadly available to shippers other than large

utilities. These efforts are starting to bear fruit—as witnessed by our growing rate docket and the more frequent use of our simplified rate procedures. But many of these new cases— involving challenges to dozens, if not hundreds, of transportation rates—raise complex market dominance issues. Without some more objective means of resolving these issues quickly, the market dominance inquiry will soon dwarf the rate reasonableness inquiry.

September 27 Decision at 3.

Because, as the Board said, in coal rate cases “[t]ruck or truck/rail alternatives are rarely a feasible alternative to direct rail service”, there is no need for a refined methodology to address such alternatives. The parties and the Board can focus on the dispositive question: Is the rate reasonable?

Furthermore, if the refined methodology were applied to coal rate cases, it would provide an opportunity for supracompetitive pricing by railroads and impermissible cross-subsidies. Such problems would arise because the RSAM percentage to be used in the refined methodology is a system-wide number, whereas the rate challenged in a coal rate case involves only a specific portion of the rail carrier’s network. Rail movements of PRB coal in particular are highly efficient, ^{1/} because they involve long-distance movements from a single origin to a single destination, in very long trains of very heavy cars generally moving in specific corridors possessing extraordinary traffic densities. Under these circumstances, a much lower markup would normally be necessary to cover the stand-alone costs of the assets used for a

^{1/} Many of these efficiencies are a direct result of investments by coal shippers, such as the purchase of fleets of high-capacity rail cars and the expansion of unloading facilities at numerous individual powerplants.

particular PRB coal movement than would be needed to satisfy a system-wide criterion, such as RSAM, for the same defendant carrier. Indeed, it has become a common occurrence in PRB rate cases for the parties to stipulate or for the Board to find that stand-alone costs do not even exceed the 180% R/VC jurisdictional threshold, let alone the defendant carrier's RSAM percentage. When this occurs, even rates set at the jurisdictional threshold are higher than they should be under SAC principles. Yet if the refined methodology were used in coal rate cases, that could result in a finding that a rail carrier did not possess market dominance over a coal movement because of the RSAM of its whole system, thereby preventing the Board from addressing or rectifying the plainly supracompetitive earnings between the jurisdictional threshold and RSAM percentages, and the cross-subsidy that would result from rates in that range.

Thus, the refined methodology is neither necessary nor appropriate in coal rate cases. Yet, if the Board leaves open the possibility that this new methodology may or must be applied in such cases, railroads could well use it to shield against legitimate challenges to rates that are supracompetitive according to CMP criteria, or at least seek a tactical advantage by lengthening proceedings on coal rate cases and increasing the litigation costs incurred by complainants.

Therefore, AECC submits that the Board should make clear that the refined methodology is not applicable to such coal movements.

Even with that exclusion, however, the Board may believe that its refined methodology would be useful not only in the circumstances presented by the M&G chemical movements in this case, but also in a broad range of non-coal cases where

there is a possibility of “[t]ruck or truck/rail alternatives . . . to direct rail service”. AECC suggests that if the Board wishes to consider application of the refined methodology beyond this particular case, the Board should do so through a formal rule-making proceeding, so that affected parties would have an adequate opportunity to present their views on that issue.

The limited opportunity that the Board has provided in this case for comments on the refined methodology does not satisfy the requirements of the Administrative Procedure Act for formal rule-making. See 5 USC § 553. Notice has not been published in the Federal Register, as would be required for a rule-making, and commenters in this case have been limited to the status of amici curiae. Before the Board decides whether and to what extent to make its refined methodology applicable to cases other than this one, the Board should afford interested parties the full opportunity to comment envisioned by the APA.

Therefore, AECC urges the Board to make clear that the refined methodology is not intended to apply to coal rate cases in which the market dominance of the rail carrier can be determined according to established standards and practices. AECC further urges that before the Board decides whether and to what extent the refined methodology may be applied to future cases, the Board should commence a formal rule-making proceeding in accordance with 5 USC § 553 to afford to all interested parties an adequate opportunity to present their views on that matter.

Respectfully submitted,



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Transportation Consultant

Dated: November 28, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November, 2012, I caused a copy of the foregoing to be served electronically on all parties of record on the service list in this action.



Eric Von Salzen