BEFORE THE
SURFACE TRANSPORTATION BOARD

PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE SWITCHING RULES	)))))	STB Docket No. EP 711

OPENING SUBMISSION OF ENTERGY ARKANSAS, INC., KANSAS CITY POWER & LIGHT COMPANY, SEMINOLE ELECTRIC COOPERATIVE, INC., AND WISCONSIN ELECTRIC POWER COMPANY d/b/a WE ENERGIES

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Dated: March 1, 2013

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In response to the Surface Transportation Board's ("STB" or "Board") decision served in this proceeding on July 25, 2012 ("*July 2012 Decision*"), as modified by the Board's decision served October 25, 2012, Entergy Arkansas, Inc., Kansas City Power & Light Company, Seminole Electric Cooperative, Inc., and Wisconsin Electric Power Company (d/b/a We Energies) (collectively "Joint Coal Shippers") hereby make their Opening Submission.

The Board instituted this proceeding to obtain public comment and evidence concerning the potential impacts of the National Industrial Transportation League's ("NITL") proposal to adopt revised competitive switching rules under 49 U.S.C. § 11102(c). As detailed below, the Joint Coal Shippers respectfully submit that whatever action (if any) the Board ultimately determines to take in this regard, the Board should make clear that it intends no change in the standards and principles applicable to determinations of market dominance under 49 U.S.C. § 10707. Certain language in the

July 2012 Decision suggests that the Board might consider the mere availability of a competitive switching option – standing alone – to be determinative on the question of market dominance and the availability of maximum rate relief for a given movement. The Joint Coal Shippers respectfully submit that captive coal shippers would be adversely impacted if the Board were to rely on the existence of a novel and untested competitive switching remedy as a basis for limiting a shipper's ability to obtain origin-to-destination rate relief.

IDENTITY AND INTEREST

The Joint Coal Shippers each operate coal-fired electric generating facilities that are captive to a single rail carrier at destination. Those facilities are located within, or nearly within, 30 miles of a working interchange with another carrier. While the NITL proposal extends only to facilities located within a 30-mile radius of working interchanges, the Board's discussion of the 30-mile issue in its *July 2012 Decision* raises the possibility that the Board might expand the scope of the competitive switching proposal. *See id.*, slip op. at 2 ("We also encourage the comments to submit evidence to show what would happen if we modified NITL's proposal, such as: by changing the 30-mile distance limitation . . . ."). The Joint Coal Shippers thus have a legitimate interest in the outcome of this proceeding.

(1) <u>Entergy Arkansas, Inc. ("Entergy Arkansas")</u>. Entergy Arkansas is a wholly-owned subsidiary of Entergy Corporation, with its principal place of business located in Little Rock, Arkansas. Entergy Arkansas produces, distributes and sells

electric power at retail to approximately 600,000 residential, commercial, industrial and agricultural customers located in 63 counties in Arkansas, and engages in sales of power in wholesale markets as well.

Entergy Arkansas operates two large coal-fired power plants, the 1,659 megawatt ("MW") White Bluff Steam Electric Station and the 1,678 MW Independence Steam Electric Station. All of the coal burned at White Bluff and Independence is produced in the southern Powder River Basin of Wyoming ("PRB"), and is transported to White Bluff and Independence by rail. Entergy Arkansas' Independence plant is captive to the Union Pacific Railroad Company ("UP"). The nearest point of interchange with another carrier – *i.e.*, BNSF Railway Company ("BNSF") – is Hoxie, AR, which is 30.9 miles from Diaz Junction.

(2) Kansas City Power & Light Company ("KCPL"). KCPL is a full-service energy provider headquartered in Kansas City, Missouri. KCPL services more than 800,000 customers in 47 northwestern Missouri and eastern Kansas counties.

KCPL's Iatan Generating Station consumes over 6 million tons of PRB coal annually. Iatan is captive to BNSF, and BNSF currently transports coal from the PRB to Iatan under contract. However, UP also serves the PRB mines, and potentially could transport KCPL's coal from the PRB to Kansas City, where it could interchange with BNSF for delivery to Iatan. BNSF's point of interchange with UP in Kansas City is located 34.2 miles from the Iatan Station.

(3) Seminole Electric Cooperative, Inc. ("SECI"). SECI is one of the largest non-profit generation and transmission cooperatives in the United States. SECI is

headquartered in Tampa, Florida. SECI and its Member distribution cooperatives serve nearly 900,000 metered residential and business consumers in 45 of Florida's 67 counties. The primary generating resource serving Seminole's Member systems is the Seminole Generating Station ("SGS"). This 1,300 MW, coal-fueled facility is located in Northeast Florida in Putnam County, about 50 miles south of Jacksonville. SGS is served exclusively by CSX Transportation, Inc. ("CSXT"). However, CSXT interchanges traffic with Norfolk Southern Railway Company ("NS") at Jacksonville, Florida, which is located 54.6 track miles from SGS.

(4) Wisconsin Electric Power Company d/b/a We Energies ("We Energies"). We Energies operates several coal-fired electric generating stations in Wisconsin, including the Oak Creek complex at Oak Creek, WI ("Oak Creek"). Oak Creek has a total electric generating capacity of 2,368 MW, and consists of four generating units that burn western coal produced at mines in the PRB, and two recently-constructed units, known as the Elm Road units, that burn eastern coal from Pittsburgh seam mines in southeastern Pennsylvania (these units can also burn PRB coal). The four older units burn approximately 3.0 million tons of PRB coal annually, and the Elm Road units can burn 2.5 to 3.0 million tons of eastern coal annually, depending on the delivered price of the coal.

Oak Creek is served exclusively by UP. PRB coal is transported to the plant in UP single-line service, and eastern coal is transported to the plant in joint NS-UP service. However, We Energies' Oak Creek complex is located less than 15 rail miles from a connection between UP and Canadian Pacific Railway Company ("CP") at

Milwaukee, WI. We Energies understands that UP and CP interchange rail traffic at Milwaukee, and that CP interchanges traffic with both BNSF (which also originates PRB coal) and NS in the Chicago area.

BACKGROUND

In its January 11, 2011 Notice initiating the Ex Parte No. 705 proceeding, the Board invited comments exploring the "current state of competition in the railroad industry and possibly policy alternatives to facilitate more competition, where appropriate." *Competition in the Railroad Industry*, EP 705, slip op. at 1 (STB served Jan. 11, 2011). The Board specifically identified competitive access as one of the subjects that it would consider. *Id*., slip op. at 5. Pursuant to 49 U.S.C. § 11102(c), the Board may require rail carriers to enter into pro-competitive reciprocal switching agreements where it finds such agreements "to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service."

In response to its Notice, the Board received comments from a number of parties seeking changes to the Board's competitive access regulations, including the Board-imposed requirement that a complainant make a showing of "competitive abuse" by the incumbent carrier, which is not contained in the actual language of Section 11102. Specifically, 49 C.F.R. Part 1144.2 requires shippers to demonstrate that the prescription or establishment of a competitive access remedy (terminal trackage rights or reciprocal switching) is "necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101 or is otherwise anticompetitive . . . ." Elsewhere, the Board has held that a finding of "competitive abuse" cannot be based on the level of the incumbent railroad's rates. *See Central Power & Light Co. v. Southern Pacific Transp. Co.*, 1 S.T.B. 1059, 1067 n.15 (1996).

On July 7, 2011, following the conclusion of the public hearing in EP 711, NITL submitted a petition for rulemaking ("Petition") seeking modification of the Board's standards regarding mandatory competitive switching. In its Petition, NITL requested that the Board require a Class I carrier to enter into a switching arrangement if four conditions are met: (1) the facility in question is served by a single carrier; (2) there is no effective inter- or intramodal competition for the subject movement; (3) there is or could easily be placed into operation a working interchange between the incumbent carrier and an alternative carrier within 30 miles; and (4) there is no showing that competitive switching would be infeasible or unsafe. *See* NITL Petition at 8.

In its *July 2012 Decision*, the Board initiated a proceeding to consider NITL's proposal. However, the Board first explained that it could not fully gauge the potential impact of the NITL proposal without additional information. *See July 2012 Decision*, slip op. at 2 (the Board does not know how many shippers would be able to take advantage of mandatory competitive switching and the Board does not have information regarding an appropriate access price). To that end, the Board's *July 2012 Decision* asks for information from interested parties relating to:

> (1) the impact [of the NITL proposal] on rates and service for shippers that would qualify under the competitive switching proposal; (2) the impact on rates and service for captive shippers that would not qualify under the proposal (because they are not located in a terminal area or within 30 miles of a

> working interchange); (3) the impact on the railroad industry, including its financial condition, and network efficiencies or inefficiencies (including the potential for increased traffic); and (4) an access pricing proposal.

July 2012 Decision, slip op. at 2. The Board also invited interested parties to submit "other appropriate information and recommendations" in response to the Decision. *Id.*, slip op. at 11.

Finally, and of particular concern to Joint Coal Shippers, the *July 2012 Decision* included references to the potential impact of the NITL proposal on determinations of market dominance and the continued availability of maximum rate relief on certain captive movements. Most notably in this regard, the Board stated on page 6 of its *July 2012 Decision* that "[u]nder this [NITL] proposal . . . there may be no market dominance, and hence the Board may not regulate the reasonableness of those rates." *See, e.g., id.*, slip op. at 6. As discussed below, it is the position of Joint Coal Shippers that should the Board ultimately adopt a new or modified competitive switching rule, it should make clear that the mere availability of the rule for a given traffic movement would raise no presumption regarding, or otherwise alter the standards for determining, whether the movement was subject to market dominance.

ARGUMENT

In its *July 2012 Decision*, the Board invited comments regarding, *inter alia*, "the impact on rates and service for shippers that would qualify under the competitive switching proposal." *July 2012 Decision*, slip op. at 2. The loss of the ability to pursue maximum rate relief would constitute a serious form of harm to shippers, and Joint Coal

Shippers submit that the availability of a supposedly "competitive" switching option should not be equated with the presence of "effective competition" for purposes of determining whether market dominance exists in a maximum rate proceeding. It would be highly improper for the Board to allow a switching rule that in fact fails to provide any meaningful market-based rate relief to a captive shipper to be construed to preclude such shipper from exercising its statutory right to seek regulatory rate relief on its existing origin-to-destination rail movement.

A. The Board's Market Dominance Standard

A shipper may challenge the level of a rail carrier's rate if it is shown that the carrier enjoys market dominance over the subject transportation. *See* 49 U.S.C. § 10701(d)(1) ("If the Board determines, under section 10707 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable."). Market dominance "means an absence of *effective* competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10707(a) (emphasis added).

Significantly, the mere existence of an alternative is not enough to establish a lack of market dominance; the alternative must constitute an *effective* constraint on the incumbent railroad's pricing power. *See, e.g., West Texas Utilities Co. v. Burlington N. R.R.*, 1 S.T.B. 638, 646 (1996) ("[W]e look not just at whether there is an alternative, but at whether it constitutes an effective competitive constraint so as to prevent an exercise of undue market power."); *Metropolitan Edison Co. v. Consolidated Rail Corp.*, 5 I.C.C.2d

385, 410 (1989) ("We look to see if there are any alternatives sufficiently competitive (alone or in combination) to bring market discipline to Conrail's pricing."). If a theoretically available alternative does not actually provide an effective constraint on the incumbent carrier's pricing, then that alternative does not preclude a finding of market dominance. Notably, Joint Coal Shippers are unaware of any instance in the history of maximum rate litigation before the STB or the Interstate Commerce Commission in which the agency found market dominance to be absent because of the possibility that the complaining shipper could have exercised leverage over the defendant carrier's rate by seeking – or threatening to seek – any of the various forms of competitive access relief that are available under Title 49.

B. The Existence of New Competitive Access Regulations Should Not Change the Rules for Determining Market Dominance

As noted above, *the July 2012 Decision* includes several statements that could be read as suggesting that the Board would view the simple availability of relief under a new competitive switching rule as raising a bar to a finding of market dominance, and thus precluding maximum rate relief from origin to destination for the affected shipper.

For example, the Board states that "[u]nder this [NITL] proposal, because both Railroad 1 and Railroad 2 could quote rates from Origin to Destination, there may be no market dominance, and hence the Board may not regulate the reasonableness of those rates." *July 2012 Decision*, slip op. at 6. If the Board is suggesting that the ability of two carriers to quote rates – in and of itself – means that market dominance does not exist, the NITL proposal would be working a major, adverse change in established market dominance jurisprudence, which currently requires a showing not only that a feasible alternative exists, but that it actually is *effective* in constraining the incumbent's rates to reasonable levels. The mere possibility that two carriers can quote rates for the same traffic does not automatically compel the conclusion that they will compete effectively for the subject traffic, such that it can fairly be found that market dominance is not present.

Rather than regulating origin-to-destination rates, the Board indicates in the *July 2012 Decision* that its role "would be limited to regulating the 'access price' (i.e., the price Railroad 1 may charge to provide the shipper with access to the competitor service provided by Railroad 2)." *Id*. *See also id.*, slip op. at 6 ("An additional benefit of NITL's proposal is that it would reduce governmental intervention by limiting regulation to the access price and relying on demand and the marketplace to set rates and judge the service provided by the railroads."). The Board offers that "[u]nder *the assumption* that competition between Railroad 1 and Railroad 2 would ensure reasonable rates and service between Origin and Destination, we could focus our resources only on the access price for the first 30 miles of the movement under NITL's proposal." *Id*. (emphasis supplied). However, no such presumption can be universally drawn. Only through a careful analysis of the facts and circumstances of each individual case can a determination be made regarding the presence or absence of "effective competition." In any decision rendered in this proceeding, the Board should state clearly that this remains the rule.

C. Limitations on a Captive Shipper's Right to Pursue Origin-to-Destination Rate Relief Would Constitute A Significantly Adverse Impact

Particularly given the railroad industry's historic, unified opposition to expanded competitive access remedies, the Board must consider that "competition" between carriers via mandatory switching very well may be far from robust. Absent clear and unambiguous proof of such widespread and effective competition, however, any assumption that the availability of mandatory switching constitutes *de facto* competition would constitute a significant and unjustifiable harm to captive shippers. The availability of any new switching service remedy under the Board's regulations should be treated the same as any other alleged "alternative" in making market dominance determinations in challenges to the origin-to-destination rate of an incumbent carrier: to be the source of "effective competition," evidence specific to the movement in question must establish that it imposes a real and meaningful constraint on the incumbent's pricing.

To be sure, Joint Coal Shippers cannot exclude the possibility that certain carriers under certain circumstances may be willing to compete vigorously for the ability to provide service using mandatory competitive switching. However, there is no legal obligation on the part of an alternative carrier to offer contract rates to shippers using competitive switching, and even if a carrier was willing to provide a rate for service using mandatory competitive switching (or was required to quote some rate), there would remain the significant question whether the alternative service option and the associated rate would "effectively" constrain the incumbent carrier's rates. *See, e.g., Amstar Corp. v. Atchison T. & S.F. Ry.*, NOR 37478, 1987 WL 99931, at *2 (ICC decided Nov. 23,

1987) (competition is effective only "if it constrains rates to reasonable levels, so that regulatory scrutiny of them is unnecessary") ("*Amstar Corp*"); *see also M&G Polymers USA, LLC v. CSX Transp., Inc.*, NOR 42123, slip op. at 11 (STB served Sept. 27, 2012) ("*M&G Polymers*") ("[I]n rate cases the Board looks to see if there are any alternatives sufficiently competitive . . . to bring market discipline to the carrier's pricing – *i.e.*, whether there is effective competition *adequate to restrain rates at or below a maximum reasonable level*.") (emphasis added). Indeed, inasmuch as there has been no discussion thus far over the basis for evaluating the access price for mandatory switching service, it certainly is conceivable that destination monopolists could capture all of the monopoly rents associated with their existing movements through the imposition of excessive access fees. *See*, *e.g.*, *Arizona Pub. Serv. Co. v. Atchison, T. & S.F. Ry.*, 2 S.T.B. 367, 378 n.30 (1997) ("'At some point the availability of an alternative such as the horse and buggy or even people carrying oil in buckets theoretically prevents railroads from raising their rates beyond an outer bound. But the mere existence of some alternative does not in and of itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure.'") (quoting *Arizona Public Service Co. v. United States*, 742 F.2d 644, 650-51 (D.C. Cir. 1984)).[1]

[1] Of course, if the proposed switching service option did lead to competitive rate offers from two different carriers serving a given shipper, that shipper would not incur the burden and expense of litigating a maximum rate case against its incumbent carrier. *Cf. Market Dominance Determinations – Product and Geographic Competition*, 5 S.T.B. 492, 498 (2001) (observing that "a competitive rate is unlikely to be challenged, and, even if challenged, is unlikely to be disturbed); *see also id.* n.16.

Joint Coal Shippers can envision a number of different scenarios in which the availability of a mandatory switching option would fail to provide effective competition for the existing origin-to-destination service. For example:

(1) The incumbent's existing rail service may have a substantial distance advantage over the "switching service" alternative, such that the incumbent would be able to price its services up to the level of the less efficient switching alternative, regardless of whether that price would exceed the maximum reasonable rate that the Board would prescribe for the existing origin-to-destination service.

(2) The alternative carrier may decline to quote any rate for switching service, fearing retaliation in a parallel circumstance in which it is the incumbent. The rail industry's opposition to competitive access remedies, and the absence of any real record of railroads offering contracts in support of "bottleneck" rate relief to attract traffic away from the incumbent carrier's long-haul service, show this to be a credible concern.

(3) The access price ultimately charged for the switching service may be so high that it even renders uneconomic alternative service provided via a shorter and less circuitous routing. Again, this scenario would leave the shipper without any recourse against the incumbent carrier in the event that it prices its service above a maximum reasonable level.

(4) Given the fact that different rail carriers serve different coal origins (particularly in the east), a regulatory switching service alternative may enable a utility to acquire coal produced only from different basins than it currently utilizes. It is possible that coal from origins served by an alternative carrier may be more expensive than coal

originated by a given incumbent, thus allowing the incumbent to price its services up to the level at which it will meet the delivered cost of the higher-priced coal.

Joint Coal Shippers acknowledge that the Board has yet to make determinations as to any of the myriad issues raised by the NITL proposal. In light of the importance of protecting captive shippers' rights to meaningful maximum rate relief, however, the Board should state unequivocally at the outset that the adoption of any new or modified mandatory switching remedy will not alter the established rules and principles relevant to determinations of market dominance, and certainly, not give rise to any presumptions or predispositions in that regard.

Respectfully submitted,

By: /s/ Kelvin J. Dowd

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Dated: March 1, 2013

CERTIFICATE OF SERVICE

I hereby certify that this 1st day of March, 2013, I have caused a copy of the foregoing Opening Submission to be served via first-class mail, postage prepaid, upon the parties of record to this case.

/s/ Frank J. Pergolizzi
Frank J. Pergolizzi