

# COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW  
WASHINGTON DC 20004 2401  
TEL 202 662 6000  
FAX 202 662 6291  
WWW COV COM

WASHINGTON  
NEW YORK  
SAN FRANCISCO  
LONDON  
BRUSSELS

MICHAEL L ROSENTHAL  
TEL 202 662 5448  
FAX 202 778 5448  
MROSENTHAL@COV.COM

March 10, 2008



## BY HAND

Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423-00001

221794

Re Docket No 42104, *Entergy Arkansas, Inc and Entergy Services, Inc v Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc*  
Finance Docket No 32187, *Missouri & Northern Arkansas Railroad Company, Inc - Lease, Acquisition and Operation Exemption - Missouri Pacific Railroad Company and Burlington Northern Railroad Company*

221795

Dear Acting Secretary Quinlan

Enclosed for filing is an original and ten copies of Union Pacific's Answer to the Verified Complaint or in the Alternative Petition to Revoke in Part of Entergy Arkansas, Inc and Entergy Services, Inc

An additional paper copy of this filing is also enclosed Please return a date-stamped copy to our messenger

Thank you for your attention to this matter

Sincerely,

Michael L Rosenthal

ENTERED  
Office of Proceedings

MAR 10 2008

Part of  
Public Record

Enclosure

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

\_\_\_\_\_  
ENERGY ARKANSAS, INC. and  
ENERGY SERVICES, INC , Complainants,

v.

\_\_\_\_\_  
UNION PACIFIC RAILROAD COMPANY and  
MISSOURI & NORTHERN ARKANSAS  
RAILROAD COMPANY, INC , Defendants  
\_\_\_\_\_

\_\_\_\_\_  
MISSOURI & NORTHERN ARKANSAS R R –  
LEASE, ACQUISITION AND OPERATION  
EXEMPTION – MISSOURI PACIFIC R R  
and BURLINGTON NORTHERN R R.  
\_\_\_\_\_

Docket No. 42104



Finance Docket No 32187

**UNION PACIFIC'S ANSWER**

J MICHAEL HEMMER  
ROBERT T. OPAL  
GABRIEL S MEYER  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, Nebraska 68179  
Telephone (402) 544-3072  
Facsimile (402) 501-0129

LINDA J MORGAN  
MICHAEL L. ROSENTHAL  
Covington & Burling LLP  
1201 Pennsylvania Avenue, N W  
Washington, D C 20004  
Telephone: (202) 662-6000  
Facsimile (202) 662-6291

*Attorneys for Union Pacific Railroad Company*

March 10, 2008

ENTERED  
Office of Proceedings  
MAR 10 2008  
Part of  
Public Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

ENTERGY ARKANSAS, INC. and ENTERGY SERVICES, INC., Complainants,	)	
v.	)	Docket No. 42104
UNION PACIFIC RAILROAD COMPANY and MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC , Defendants	)	
MISSOURI & NORTHERN ARKANSAS R R – LEASE, ACQUISITION AND OPERATION EXEMPTION – MISSOURI PACIFIC R R and BURLINGTON NORTHERN R R	)	Finance Docket No. 32187

**UNION PACIFIC’S ANSWER**

Defendant Union Pacific Railroad Company (“UP”) hereby answers the “Verified Complaint or in the Alternative Petition to Revoke in Part” (the “Complaint”) filed by Entergy Arkansas, Inc (“EAI”) and Entergy Services, Inc (“ESI”) (collectively, “Entergy”) in this proceeding. Entergy is asking the Surface Transportation Board to rewrite a lease that was made and exempted in 1992 – more than 15 years ago – to eliminate UP’s right to compensation for the use of its lines to deliver coal to Entergy’s Independence Station. UP never would have agreed to such an arrangement and, had the Interstate Commerce Commission required terms like this in 1992, the lease transaction would have never occurred.

UP responds to the allegations in each separately numbered paragraph of the Complaint as follows

1 UP admits that EAI is a corporation organized under the laws of the State of Arkansas, with its principal place of business located at 425 West Capitol Avenue, Little Rock, Arkansas 72201 and that EAI distributes and sells electric power UP denies the remaining allegations of Paragraph 1 because it lacks knowledge or information sufficient to form a belief as to their truth

2 UP admits that ESI is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 639 Loyola Avenue, New Orleans, Louisiana 70113 UP denies the remaining allegations of Paragraph 2 because it lacks knowledge or information sufficient to form a belief as to their truth

3. UP admits the allegations of Paragraph 3

4 UP admits the allegations of Paragraph 4.

5 UP admits that Missouri & Northern Arkansas Railroad Company, Inc (“M&NA”) has a business address of 514 N Ormer Street, Carthage, Missouri 64836, M&NA is a subsidiary of RailAmerica, Inc., and M&NA is a rail carrier subject to the jurisdiction of the Board under Title 49 of the U S Code UP denies the remaining allegations of Paragraph 5 because it lacks knowledge or information sufficient to form a belief as to their truth

6 UP admits the allegations of Paragraph 6

7 UP admits the allegations of Paragraph 7, except that UP denies that the exemption in Finance Docket No 32187 involved the acquisition of 492 27 miles of railroad lines UP avers by way of further response that the Verified Notice of Exemption stated that the transaction involved the acquisition of 491 27 miles of railroad lines

8. UP admits the allegations of Paragraph 8

9 UP admits the allegations of Paragraph 9 and admits that Exhibit No 1 appears to be an accurate copy of UP's lease agreement with M&NA (the "UP/M&NA Lease") as executed on December 11, 1992. except that it omits the exhibits to the UP/M&NA Lease UP further admits that the quotation in Paragraph 9 is an accurate quotation from the UP/M&NA Lease, but it avers by way of further response that the use of an isolated quotation is potentially misleading because other portions of the UP/M&NA Lease make clear that UP retained certain rights to operate over the leased premises UP also avers by way of further response to this Paragraph that the UP/M&NA Lease has been amended several times since December 11, 1992, and that the lease speaks for itself.

10 UP admits the allegations of Paragraph 10. UP avers by way of further response to this Paragraph that the UP/M&NA Lease speaks for itself

11 UP denies the allegation of Paragraph 11 that Section 4 01 of the UP/M&NA Lease establishes a "paper barrier " UP admits that the annual rent due under the lease is determined by reference to the percentage of traffic originating or terminating on the leased premises that is interchanged with UP, with certain exceptions UP further admits that the quotation in Paragraph 11 appears to be an accurate quotation from the UP/M&NA Lease dated December 11, 1992. UP avers by way of further response to this Paragraph that UP and M&NA amended sections 4 01 and 4.03 of the lease in 2005 to modify the interchange commitment and rent provisions for the year 2005 and that the UP/M&NA Lease speaks for itself

12 UP admits the allegations of Paragraph 12. UP avers by way of further response to this Paragraph that the UP/M&NA Lease speaks for itself

13 UP admits that the UP/M&NA Lease contains several provisions designed to insure that UP is appropriately compensated by MNA for MNA's use of UP's property UP

avers by way of further response that it provided exclusive service to the Independence Plant before entering into the UP/M&NA Lease and that it never would have entered into the lease without ensuring that it could preserve its existing stream of revenue from that traffic UP also avers by way of further response to this Paragraph that the UP/M&NA Lease speaks for itself. UP denies the remaining allegations of Paragraph 13.

14 UP admits that Sections 3.01 and 3.04 of the UP/M&NA Lease allow UP to acquire the exclusive right to serve the Independence Plant using trackage rights between Diaz Junction and Independence, Arkansas, after giving seven days' written notice to M&NA and that UP would pay M&NA \$60,000 per year for these rights if they are obtained UP further admits that the quotations in Paragraph 14 are accurate quotations from the lease UP avers by way of further response to this Paragraph that the UP/M&NA Lease speaks for itself. UP denies the remaining allegations of Paragraph 14, including the allegations in footnote 2

15. UP admits that Section 5.05 of the UP/M&NA Lease states that the parties shall execute agreements granting M&NA trackage rights over UP's lines between Pleasant Hill and Kansas City, Missouri, and between Diaz Junction and Newport, Arkansas, solely for the purpose of interchange with UP UP further admits that the quotation in Paragraph 15 is an accurate quotation from the UP/M&NA Lease UP avers by way of further response to this Paragraph that the UP/M&NA Lease speaks for itself. UP denies the remaining allegations of Paragraph 15

16 UP admits that Section 15.01 of the UP/M&NA Lease allows UP to terminate the lease if, among other possible reasons, a court or other body determines that all or any of the provisions of Section IV are unlawful or otherwise unenforceable UP further admits that the quotation in Paragraph 16 is an accurate quotation from the UP/M&NA Lease UP avers

by way of further response to this Paragraph that the UP/M&NA Lease speaks for itself UP denies the remaining allegations of Paragraph 16

17 UP admits that service to certain customers suffered as a result of widespread flooding in the Midwest in 1993 UP denies that it has a “stranglehold” on M&NA’s traffic and denies the remaining allegations of Paragraph 17 because it lacks knowledge or information sufficient to form a belief as to their truth

18 UP admits that Entergy sought UP’s agreement to waive the restrictions on interchange in the UP/M&NA Lease when UP experienced service problems in 1997-1998 UP denies the remaining allegations of Paragraph 18. UP avers by way of further response that UP told Entergy in 1997 that it was prepared to allow BNSF to handle Entergy trains via interchange with M&NA on a temporary, detour basis

19 UP admits the allegations contained in the first two sentences of Paragraph 19 and admits that Exhibit No 2 appears to be an accurate copy of UP’s confidential rail transportation contract with Entergy UP denies that the UP/M&NA Lease contains “paper barriers” and denies the remaining allegations of Paragraph 19 because it lacks knowledge or information sufficient to form a belief as to their truth. UP avers by way of further response to this Paragraph that Entergy currently has reliable transportation service and competitive pricing to its Independence Plant and White Bluff Station.

20. UP admits that Entergy receives service for PRB coal deliveries to the Independence Plant via a routing that involves UP’s moving loaded coal trains from the PRB through North Little Rock to Diaz Junction, Arkansas, then via M&NA from Diaz Junction approximately 8 miles to the plant, and that M&NA delivers empty coal trains from the plant

back to UP at either Diaz Junction or Kansas City, Missouri UP further admits that Exhibit No 3 appears to be a map of the MNA. UP denies the remaining allegations of Paragraph 20

21 UP admits the allegations in the first sentence of Paragraph 21 UP further admits that the handing of loaded coal trains over certain M&NA lines not currently used to handle loaded coal trains may require upgrading the lines UP denies that the M&NA Lease contains “paper barrier restrictions” and that M&NA could use its trackage rights between Pleasant Hill and Kansas City, Missouri, to interchange traffic with BNSF in Kansas City UP denies the remaining allegations of Paragraph 21 because it lacks knowledge or information sufficient to form a belief as to their truth

22 UP admits that Fort Scott, Kansas, is an interchange point referenced in the UP/M&NA Lease. UP denies the remaining allegations of Paragraph 22 because it lacks knowledge or information sufficient to form a belief as to their truth

23 UP admits that the Board served a decision on October 30, 2007, in STB Ex Parte No 575 and that the decision speaks for itself UP denies the remaining allegations of Paragraph 23.

24 UP admits that the Board’s served a decision on October 30, 2007, in STB Ex Parte No 575 and that the decision speaks for itself UP denies the remaining allegations of Paragraph 24

25 UP denies the allegations of Paragraph 25 UP avers by way of further response to this Paragraph that the M&NA Lease has a term of 20 years and, subject to UP’s possible reacquisition of the leased premises pursuant to the lease, is renewable at M&NA’s election

26 UP denies the allegations of Paragraph 26 because it lacks knowledge or information sufficient to form a belief as to their truth UP avers by way of further response that assessing the truth of the allegations would require a special study that UP has not performed

27 UP admits that it has experienced service problems on several occasions during the term of the UP/M&NA Lease, including problems from Midwest floods in 1993, problems following UP's merger with Southern Pacific Transportation Company in 1997-1998, and problems relating to conditions that UP and BNSF experienced on their jointly owned line in Wyoming beginning in 2005 UP denies the remaining allegations of Paragraph 27

28 UP repeats its responses to the allegations of Paragraphs 1 through 27

29 UP admits that the rent provisions in Section IV of the UP/M&NA Lease are designed to insure that UP is appropriately compensated by MNA for MNA's use of UP's property UP avers by way of further response that the rent provisions reflect the fact that UP provided exclusive service to the Independence Plant before entering into the lease and never would have entered into the lease if it could not ensure that it could preserve its existing stream of revenue from that traffic. UP also avers by way of further response to this Paragraph that the UP/M&NA Lease speaks for itself UP denies the remaining allegations of Paragraph 29

30 UP denies the allegations of Paragraph 30

31 UP denies the allegations of Paragraph 31

32. UP denies the allegations of Paragraph 32

33 UP denies the allegations of Paragraph 33.

34 Paragraph 34 states a legal conclusion to which no response is required, to the extent that a response is deemed to be required, UP denies the allegations of this Paragraph

35 UP repeats its responses to the allegations of Paragraphs 1 through 34

36. UP denies the allegations of Paragraph 36 UP avers by way of further response to this Paragraph that Sections III, V, and XV of the UP/M&NA Lease contain certain provisions that reflect the fact that UP provided exclusive service to the Independence Plant before entering into the lease and never would have entered into the lease if it could not ensure that it could preserve the existing stream of revenue from that traffic UP also avers by way of further response to Paragraph 36 that the UP/M&NA Lease speaks for itself

37 UP denies the allegations of Paragraph 37

38 UP denies the allegations of Paragraph 38

39 UP denies the allegations of Paragraph 39

40 UP denies the allegations of Paragraph 40

41. UP denies the allegations of Paragraph 41

42. UP denies the allegations of Paragraph 42

43 Paragraph 43 states a legal conclusion to which no response is required, to the extent that a response is deemed to be required, UP denies the allegations of this Paragraph

44 UP repeats its responses to the allegations of Paragraphs 1 through 43

45 Paragraph 45 states a legal conclusion to which no response is required, to the extent that a response is deemed to be required, UP denies the allegations of this Paragraph

46 Paragraph 46 states a legal conclusion to which no response is required; to the extent that a response is deemed to be required, UP denies the allegations of this Paragraph

47. UP denies the allegations of Paragraph 47

48 UP denies the allegations of Paragraph 48

49 UP repeats its responses to the allegations of Paragraphs 1 through 27

50 Paragraph 50 states a legal conclusion to which no response is required; to the extent that a response is deemed to be required, UP denies the allegations of this Paragraph

51. Paragraph 51 states a legal conclusion to which no response is required, to the extent that a response is deemed to be required, UP denies the allegations of this Paragraph

52 Paragraph 52 states a legal conclusion to which no response is required, to the extent that a response is deemed to be required, UP denies the allegations of this Paragraph

53 UP denies the allegations of Paragraph 53

54. UP admits that the parties to the UP/M&NA Lease neither sought nor obtained approval for the lease under Section 11322 of Title 49 of the U S Code or former Section 11324

55 Paragraph 55 states a legal conclusion to which no response is required; to the extent that a response is deemed to be required, UP denies the allegations of this Paragraph

56. UP denies the allegations of Paragraph 56.

### **DEFENSES**

1 The Complaint fails to state a claim for an unreasonable practice in violation of 49 U.S.C. § 10702

2 The Complaint fails to establish a basis for revoking the exemption in Finance Docket No 32187 pursuant to 49 U.S.C § 10502(d)

3. The Complaint fails to state a claim for unlawful pooling or division of transportation or revenues in violation of 49 U.S.C. § 11322.

4 Entergy's challenge to the UP/M&NA Lease as an unreasonable practice is barred by the statute of limitations

5 Entergy's challenge to the UP/M&NA Lease as unlawful pooling or division of transportation revenues is barred by the statute of limitations

6. Entergy admittedly has been on notice of the terms of the UP/M&NA Lease about which it complains since at least 1994 and is thus precluded from bringing an unreasonable practice challenge to the lease by the doctrine of laches

7 Entergy admittedly has been on notice of the terms of the UP/M&NA Lease about which it complains since at least 1994 and is thus precluded from petitioning to revoke the exemption in Finance Docket No. 32187 by the doctrine of laches

8 Entergy admittedly has been on notice of the terms of the UP/M&NA Lease about which it complains since at least 1994 and is thus precluded from challenging the UP/M&NA Lease as unlawful pooling or division of transportation or revenues by the doctrine of laches

9. The Board lacks jurisdiction to rule that the consummated transaction exempted from regulation in Finance Docket No 32187 constitutes an unreasonable practice under 49 U S C § 10702

10 The Board lacks jurisdiction to rule that the consummated transaction exempted from regulation in Finance Docket No 32187 constitutes pooling or a division of transportation or earnings that requires approval under 49 U S C § 11322

11. The Board lacks jurisdiction to preclude the enforcement of individual contractual terms of the UP/M&NA Lease

12. The remedies sought by Entergy would result in an unconstitutional taking of UP's property

WHEREFORE, UP requests that the Complaint be dismissed with prejudice and that the Petition to Revoke be denied, that no relief of any kind be awarded to Entergy, that UP be awarded its costs, and that the Board grant UP such other and further relief as may be appropriate

Respectfully submitted,



J MICHAEL HEMMER  
ROBERT T. OPAL  
GABRIEL S. MEYER  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, Nebraska 68179  
Telephone. (402) 544-3072  
Facsimile (402) 501-0129

---

LINDA J MORGAN  
MICHAEL L ROSENTHAL  
Covington & Burling LLP  
1201 Pennsylvania Avenue, N W  
Washington, D C 20004  
Telephone (202) 662-6000  
Facsimile (202) 662-6291

*Attorneys for Union Pacific Railroad Company*

March 10, 2008

CERTIFICATE OF SERVICE

I, Michael L Rosenthal, certify that on this 10th day of March, 2008, I caused a copy of Union Pacific's Answer to be served electronically and by first class mail postage prepaid on counsel for Entergy Arkansas, Inc and Entergy Services, Inc , and counsel for Missouri & Northern Arkansas Railroad Company, Inc



---

Michael L. Rosenthal