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June 4, 2010

Ms. Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D. C. 20423

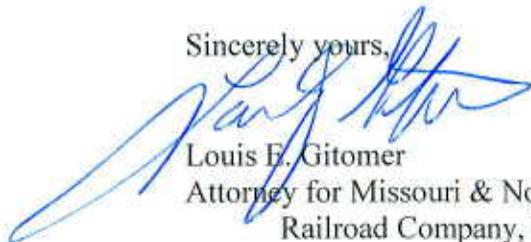
RE: Docket No. 42104, *Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc.*  
Finance Docket No. 32187, *Missouri & Northern Arkansas Railroad Company, Inc.—Lease, Acquisition and Operation Exemption—Missouri Pacific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

Dear Ms. Brown:

Enclosed for e-filing is the Response of the Missouri & Northern Arkansas Railroad Company, Inc. to the Opening Evidence and Argument filed by Entergy Arkansas, Inc. and Entergy Services, Inc. and Arkansas Electric Cooperative Corporation.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer  
Attorney for Missouri & Northern Arkansas  
Railroad Company, Inc.

Enclosure

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. 42104

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ENTERGY ARKANSAS, INC. AND ENTERGY SERVICES, INC.  
v.  
UNION PACIFIC RAILROAD COMPANY AND MISSOURI & NORTHERN ARKANSAS  
RAILROAD COMPANY, INC.

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Finance Docket No. 32187

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MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.  
–LEASE, ACQUISITION AND OPERATION EXEMPTION–  
MISSOURI PACIFIC RAILROAD COMPANY AND  
BURLINGTON NORTHERN RAILROAD COMPANY

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REPLY OF MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.  
TO ENTERGY ARKANSAS, INC. AND ENTERGY SERVICES, INC. AND ARKANSAS  
ELECTRIC COOPERATIVE CORPORATION

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ARKANSAS RAILROAD COMPANY, INC.

Dated: June 4, 2010

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. 42104

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ENERGY ARKANSAS, INC. AND ENTERGY SERVICES, INC.  
v.  
UNION PACIFIC RAILROAD COMPANY AND MISSOURI & NORTHERN ARKANSAS  
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MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.  
–LEASE, ACQUISITION AND OPERATION EXEMPTION–  
MISSOURI PACIFIC RAILROAD COMPANY AND  
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REPLY OF MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.  
TO ENTERGY ARKANSAS, INC. AND ENTERGY SERVICES, INC. AND ARKANSAS  
ELECTRIC COOPERATIVE CORPORATION

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Missouri & Northern Arkansas Railroad Company, Inc. (“M&NA”) replies to the Opening Evidence and Argument filed on April 7, 2010 by Entergy Arkansas, Inc. (“EAI”) and Entergy Services, Inc. (“ESI”), jointly referred to as Entergy, and Arkansas Electric Cooperative Corporation (“AECC”). M&NA respectfully requests the Surface Transportation Board (the “Board”) to take any and all action necessary to preserve the existing lease between the Union Pacific Railroad Company (“UP”) and M&NA, including, but not limited to, the denial of the relief sought by Entergy and AECC in this proceeding.

## BACKGROUND

### 1. M&NA's Operations.

Pursuant to authorization from the Interstate Commerce Commission (the "ICC"), M&NA acquired from UP and began operating in 1992 railroad lines located in the States of Missouri, Kansas, and Arkansas.

M&NA owns the rail lines located between: (1) milepost 415.0, at Bergman, AR, and milepost 313.0, at Guion, AR (102 miles); (2) milepost 334.39, at Iron Gate Street in Joplin, MO, and milepost 330.2, end of track near Tamko, including the Tamko Lead, the West Joplin Industrial Trackage, all tracks formerly owned by BNSF in the KCS rail yard in Joplin and BNSF's Joplin Yard; and (3) milepost 309.9 and milepost 315.3 in Carthage, MO (the "Owned Lines").

Pursuant to a Lease Agreement dated as of December 11, 1992 by and between Missouri Pacific Railroad Company ("MP"), the predecessor of UP, and M&NA (the "Lease"), M&NA leases from UP the rail lines between: (1) milepost 643.13, near Pleasant Hill, MO, and milepost 415.0, at Bergman, AR; (2) milepost 313.0 at Guion, AR and milepost 259.05 near Diaz Junction, AR; (3) milepost 527.94, near Carthage, MO, and milepost 544.66 near Joplin, MO; (4) milepost 0.07, near Webb city, and milepost 6.43, near Atlas, MO; (5) milepost 512.40, near Springfield, MO, and milepost 506.59, near Wallis, MO; and (6) milepost 340.50, near Griffith, KS, and milepost 262.60, near north Clinton, MO (the "Leased Lines").

M&NA has trackage rights over the UP rail lines located between: (1) Neff Yard at Kansas City, and milepost 643.3, at Pleasant Hill, MO; and (2) milepost 258.7, at Diaz Jct., and milepost 261.0, at Newport, Arkansas (the "Trackage Rights Lines").

The Owned Lines, Leased Lines, and the Trackage Rights Lines will jointly be referred to as the “Line.”

BNSF provides haulage service for the M&NA between Aurora and Springfield, MO. The Branson Scenic Railroad, Inc. and the White River Scenic Railroad operate passenger excursion trains over sections of the Line.

M&NA interchanges with UP at Kansas City, MO, and Newport, AR; BNSF at Lamar, Aurora, Joplin, and Springfield, MO; and KCS at Joplin, MO. Since there are existing interchanges with BNSF at Lamar, Aurora, Springfield, and Joplin, MO, a through route over those interchanges already exists between BNSF and M&NA. It is M&NA’s opinion that an interchange with BNSF at Lamar is the most efficient and least costly location for a through route. However, the existing track is insufficient to accommodate unit coal trains and would require substantial capital expenditures, as described in the Verified Statement of UP witness Hughes. M&NA has not budgeted for such capital programs, does not have the funds to budget for such programs, and has received no assurances from Entergy, the party benefiting from the capital expenditures, that Entergy would ever use the line, much less guarantee sufficient traffic so that M&NA could pay for the capital expenditures and earn a reasonable return on its expenditures, without requiring the benefit to Entergy to be cross-subsidized by M&NA’s other customers.

As relevant to this proceeding, M&NA leases the lines between Lamar, MO and Bergman, AR from UP, owns the line between Bergman, AR and Guion, AR, and leases the line between Guion, AR and Independence, AR. Were the Lease to be terminated, M&NA would only have the right to operate over the owned 102-mile line between Bergman and Guion.

M&NA operates the Owned Lines, the Leased Lines, and the Trackage Rights Lines as a unified system. The Owned Lines are about 108 miles of railroad, the Leased Lines are about 308 miles of railroad, and the Trackage Rights Lines are about 70 miles. If M&NA's right to lease the 308 miles and operate over 30 miles of trackage rights from UP were terminated for any reason, M&NA would cease being a viable railroad. If the Lease were terminated, the three segments owned by M&NA would become disconnected islands and M&NA would lose the majority of its traffic and revenue. UP, on the other hand, would receive return of an operating line with a 102 mile missing segment between Bergman and Guion.

Loss of the Lease and trackage rights franchise from the UP would have a devastating financial impact on M&NA and require M&NA to review all options as to the future of its remaining lines. Under the Lease, M&NA may interchange up to five percent of the traffic that it interchanges with UP with another carrier, without incurring an increase in rental payments to UP. Hence, under the Lease, there is additional competition for up to five percent of the traffic interchanged between UP and M&NA. Were the Lease terminated, this competitive option would end.

M&NA would lose the substantial capital expenditures it has made in the Line if the Lease were terminated. Moreover, there would be a substantial disruption of service to shippers that rely upon M&NA. M&NA would not have the system size or volume of work necessary to retain its workforce of 125. Pursuant to the Board's rules, M&NA would be required to seek discontinuance authority in order to terminate its operations under the Lease. M&NA would seriously consider abandonment of the Owned Lines. M&NA would likely incur the costs of

labor protection resulting from discontinuance of service over the Leased Lines and any abandonment.

M&NA has operated for over 17 years and has provided a valuable service to its customers as demonstrated by its handling of 101,993 carloads in 2009.

## **2. The Instant Proceeding.**

In *Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc.*, STB NOR 42104 (STB served June 26, 2009) (the “*Decision*”), the Board did not grant Entergy or AECC the relief they sought. Instead, the Board stated that it “clarifies the appropriate avenue for a shipper to seek relief from a carrier’s interchange commitment and gives the complainant an opportunity to show that a new through route should be prescribed under 49 U.S.C. 10705.” *Id.* at 1.

In response to the *Decision*, Entergy filed an Amended Complaint on July 27, 2009 (the “Amended Complaint”). On the same date, AECC filed a Joinder in and Supplement to Amended Complaint filed by Entergy (the “Joinder”).

In response to the Amended Complaint, on August 17, 2009 M&NA filed a Motion to Dismiss and a Motion to Make More Definite. After responses by Entergy and AECC and an oral argument before the Board on October 27, 2009, the Board denied the Motion to Dismiss and the Motion to Make More Definite. *Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc.*, STB NOR 42104 (STB served December 30, 2009). In denying the Motion to Dismiss, the Board explained “If Entergy subsequently determines that it desires relief that would require a Board order directed at BNSF, Entergy may seek leave to amend its complaint further to join

BNSF as a defendant.” *Id.* at 4. Although the Board denied the Motion to Make More Definite, it required that “If Entergy is to pursue its amended complaint, it must identify the through route(s) that it seeks to have prescribed, and this will require identification of the origin/destination point(s) and the point(s) of interchange. We will require Entergy to do this in its opening evidence and argument.” *Id.* at 5.

In response to this additional guidance from the Board, Entergy filed a Motion for Leave to file a Second Amended Complaint and a Second Amended Complaint on March 11, 2010. The Board granted the Motion for Leave in *Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc.*, STB NOR 42104 (STB served April 19, 2010). The Second Amended Complaint named the BNSF Railway Company (“BNSF”) as a defendant and specified either Lamar or Aurora, MO as the point of interchange and Entergy’s Independence Steam Electric Station (“ISES”) as the point of destination. However, Entergy did not identify the point of origin, instead relying on the generic description of the Powder River Basin, including the North Powder River Basin and the South Powder River Basin.

After the Board accepted the Second Amended Complaint, the parties filed answers on May 10, 2010. While the status of the Second Amended Complaint was being decided, Entergy and AECC filed their opening evidence and argument on April 7, 2010.

#### **THE RELIEF SOUGHT**

Entergy is seeking prescription “of a through route from southern PRB origins to ISES” and a finding that UP cannot include any traffic moved over the through route in its annual calculation of diverted traffic for the purpose of requiring additional rental payments from

M&NA. Entergy Opening at 27. Entergy also sought confirmation that “BNSF-M&NA are obligated to participate in a through route to ISES from northern PRB origins, subject to the same additional finding regarding the exclusion of such tonnage for rent calculation purposes under the UP/M&NA lease.” *Id.* at 27-28.

AECC sought the same relief as Entergy, AECC Opening at 12, and, in addition, if UP terminates the lease with M&NA, AECC seeks a ruling that BNSF has the right to serve ISES over the UP line from Hoxie to ISES via Diaz Junction. *Id.* at 13.

## ARGUMENT

### 1. Criteria.

In the *Decision* at 7, the Board stated that “further examination under section 10705 is warranted for a number of reasons.” The Board went on to state, at page 8:

In this next phase of the case, the parties should be guided by section 10705 and the discussions concerning alternative route prescriptions in CP&L. The Board has declined to “declare in advance” precisely what showing would justify the prescription of a through route because that question is necessarily fact-specific. See CP&L, 1 S.T.B. at 1069. Thus, the question of how to establish that a foreclosed route is “more efficient” under 10705 is a matter of first impression and we will consider all relevant factors. Those factors should include, but are not limited to, those listed in 49 CFR 1144.2(a)(1), such as the revenue associated with the traffic, the relative costs of moving traffic on the alternative routes, and the volume of traffic that could be expected to move over the alternative route.

As the Board has suggested, the requirements for making the showing to obtain a through route prescription are less rigorous than those required to justify the “far more intrusive” remedies of terminal access or reciprocal switching. CP&L, 1 S.T.B. at 1068-70. Through route prescription merely entails the activation of interchange relationships that, while perhaps dormant, already physically exist. Thus, the question of whether there are “benefits, advantages, and projected efficiencies” that would make service over the proposed new through route “better” than the existing through route (see CP&L, 1 S.T.B. at 1069) involves the consideration of fewer factors regarding issues such as the operational conflicts between multiple carriers operating on a single line.

Our discussion of Entergy’s evidentiary burden in a section 10705 challenge presupposes that Entergy would continue to obtain coal from PRB mines served by UP. Should Entergy choose instead to source coal from a northern PRB mine not served by UP (e.g., Dry Fork, Rawhide, Eagle Butte, Buckskin), it would not need to bring a section 10705 case or establish that a particular route is more efficient in order to obtain an alternative route.

In addition to the factors enumerated in the *Decision*, 49 U.S.C. §10705(a)(1) provides:

“The Board may, and shall when it considers it desirable in the public interest, prescribe through routes and the conditions under which those routes must be operated, for a rail carrier providing transportation subject to the jurisdiction of the Board under this part.” In determining the public interest, the Board has traditionally relied on a balancing test. *See Major Rail Consolidation Procedures*, 5 S.T.B. 539, 550 (2001). M&NA contends that in determining whether the through route sought by Entergy is “desirable in the public interest” the Board must balance the interests not only of Entergy, but also of M&NA.

The Board has also advised the parties that the factors to be considered “should include, but are not limited to, those listed in 49 CFR 1144.2(a)(1).” *Decision* at 8. Section 1144.2(a)(1) provides:

- (a) *General.* A through route or a through rate shall be prescribed under 49 U.S.C. 10705, or a switching arrangement shall be established under 49 U.S.C. 11102, if the Board determines:
  - (1) That the prescription or establishment 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, and otherwise satisfies the criteria of 49 U.S.C. 10705 and 11102, as appropriate. In making its determination, the Board shall take into account all relevant factors, including:
    - (i) The revenues of the involved railroads on the affected traffic via the rail routes in question.
    - (ii) The efficiency of the rail routes in question, including the costs of operating via those routes.
    - (iii) The rates or compensation charged or sought to be charged by the railroad or railroads from which prescription or establishment is sought.

(iv) The revenues, following the prescription, of the involved railroads for the traffic in question via the affected route; the costs of the involved railroads for that traffic via that route; the ratios of those revenues to those costs; and all circumstances relevant to any difference in those ratios; provided that the mere loss of revenue to an affected carrier shall not be a basis for finding that a prescription or establishment is necessary to remedy or prevent an act contrary to the competitive standards of this section.

In adopting the Intramodal Rail Competition rules, the ICC stated that the test for the imposition of through routes “permits consideration of all public interest concerns. It also contains more specific criteria that serve to focus the proceeding.” *Intramodal Rail Competition*, 1 I.C.C.2d 822, 834 (1985). Under the regulations, the Board should only prescribe a through route if it is necessary to remedy or prevent an act contrary to the competition policies of 49 U.S.C. §10101 or is otherwise anticompetitive, and if the complaining shipper will use the through route. In making its decision, the Board looks at the revenues of the involved railroads, rates, costs, and the efficiencies of the current and the requested route in determining whether imposition of a through route is in the public interest.

Of particular import in this proceeding is the question of the “efficiency of the rail routes in question.” 49 CFR 1144.2(a)(1)(ii). M&NA concedes that in comparing two routes, one route can always be made more efficient if sufficient capital is invested in infrastructure. However, M&NA does not believe that theoretical efficiency should be the basis of determining the comparative efficiency of routes. Instead, M&NA contends that the Board should only take into account and compare the physical properties that exist, especially when one of the parties is a Class III railroad, like M&NA, that has limited resources available to make capital improvements for the theoretical advantage of one shipper that is unlikely to ever provide

sufficient traffic to pay for the capital costs. Entergy has yet to provide M&NA with long term commitments sufficient to compensate for the needed capital investments.

The Board has authority to require a connection between carriers, but where a connection already exists, the Board has not required an unwilling carrier to upgrade that connection. The ICC has, however, required a carrier to upgrade existing track for the benefit of a shipper where such upgrades were necessary to provide adequate service. But the Agency has refused to require upgrades beyond what it deemed necessary to provide adequate service. M&NA notes that Entergy has not alleged that M&NA is providing inadequate service.

The ICC has required a railroad to upgrade its existing track where it has first found that the service provided by the railroad was inadequate. *Winnebago Farmers Elevator Co. v. Chicago & N. W.*, 354 I.C.C. 859 (1978) (“*Winnebago*”). In *Winnebago*, after the ICC found that the service provided was inadequate it ordered the track upgraded to FRA class I levels which, it concluded would provide for adequate service. The ICC refused to require the railroad to upgrade its tracks beyond what the ICC deemed necessary to provide adequate service, despite the shipper’s request that the track be upgraded to allow for the use of heavier cars. In *Winnebago*, the shipper showed that the track as it existed was not in a condition to allow the carrier to provide adequate service.

Here, Entergy is seeking the prescription of a through route, which requires a showing that M&NA is abusing its market power. Specifically Entergy must show that M&NA is abusing its market power by providing inadequate service over its own lines or foreclosing more efficient service over another carrier’s lines. This requirement of inadequate service is different from the requirement in *Winnebago* where service was inadequate because of the physical limitations of

the track. If Entergy wants the connection between M&NA and BNSF upgraded, it must provide evidence that the service that could be provided through the M&NA BNSF connection is inadequate because of the physical limitations of the track.

Even in cases where service is limited by the physical limitations of the track, the Board balances the public need for service over the line at the level sought in the complaint and compares that need with the burden on the carrier and on interstate commerce of providing service at that level. In *Illinois Central Gulf R. Co.-Abandonment*, 363 I.C.C. 690 (1980), the ICC concluded that the shippers' desire to use heavier cars on the line was outweighed by the cost to reconstruct the line for such a purpose. The ICC found that the line would need to be virtually reconstructed using heavier rail to accommodate heavier cars and that there was no evidence of any possible increase in traffic that could offset the substantial rehabilitation and maintenance costs while providing a reasonable profit. Although the inability to use heavier cars would impose an economic burden on the public, that burden did not justify requiring the railroad to make such an investment in its infrastructure.

Even if the Board were to find that the interchange needed to be upgraded to provide service, M&NA is not required to maintain service levels for one shipper that will degrade service overall. See *Savannah Port Terminal Railroad, Inc.—Petition for Declaratory Order—Certain Rates and Practices as Applied to Capital Cargo, Inc.*, STB Docket No. 34920 (STB served May 30, 2008) (The Board found that railroad was not obligated to provide three switches per day to shipper even though the railroad had provided three switches when it could. When the terminal was busy the railroad used business practices to prioritize its resources.) and *De Bruce Grain Co., Inc. v. Union Pacific Railroad Company*, STB Docket No. 42023 (STB served Dec.

22, 1997) (The Board refused to grant an emergency service order because it would favor De Bruce's shipments over other shippers and would degrade service to those shippers.)

In *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 334 I.C.C. 25 (1968), the Erie Lackawanna Railroad Company ("EL") requested that ICC to impose conditions which would provide that whenever the Penn Central upgraded any of its system routes that competed with the EL, Penn Central would be require to upgrade the route used by EL. The ICC refused to impose such a condition because it would require Penn Central to make expenditures with no contribution from EL and to expend additional funds to remove low clearance obstacles on the line, all with no guarantee that the portion of the line beyond Penn Central's control would be used.

The Supreme Court has affirmed that it is wasteful and contrary to Congressional intent for the ICC to require a railroad to make expenditures for a line where those expenditures could not be recovered. *Purcell v United States*, 315 U.S. 381 (1942). The ICC had concluded that the cost of relocating and maintaining the line was not justified by the shippers need for service. The Purcell Court agreed, stating that "[w]hen materials and labor are devoted to the building of a line in an amount that cannot be justified in terms of the reasonably predictable revenues, there is ample ground to support a conclusion that the expenditures are wasteful..." *Id.* at 385.

The upgrading of facilities has not been required where the benefit of the improvement is outweighed by the cost to the carrier. See *Adequacy of Intercity Rail Passenger Service*, 348 I.C.C. 518, 572 (1976). With regard to Amtrak high speed rail service, the ICC concluded that the likelihood of such service coming to fruition was small compared to the cost that the freight railroads would incur to upgrade their tracks. Thus, the ICC indefinitely deferred imposing

regulations that would require railroads to upgrade their respective tracks to accommodate high speed rail service by Amtrak. In this proceeding, the Board could easily conclude that the likelihood of Entergy use of the through route was small, especially in light of Entergy's continued refusal to commit to using the through route.

Contrary to freight service, the Board has explicit statutory authority under 49 U.S.C. §24308(a) to require a freight railroad to upgrade its line in only the limited circumstance of facilitating passenger service. This authority, however, is only applicable to Amtrak passenger service. *See Application of the National Railroad Passenger Corp. Under 49 U.S.C. 24308(a)—Springfield Terminal Railway Company, Boston and Maine Corporation and Portland Terminal Company*, STB Finance Docket No. 33381 (STB served May 29, 1998). In that proceeding, Amtrak requested that the Board set the terms and compensation for its use of the line in question. The Board concluded that requiring the track to be upgraded to a level that could accommodate passenger service was one of the terms of the agreement and was included in the compensation to be paid the railroad. Unlike imposing an agreement on Amtrak under statutory provisions, the Board has no authority to require Entergy to ship traffic over a specific route regardless of the expenditures being made by M&NA. In a discontinuance proceeding where the shipper contended that a Class I railroad should expend around \$200,000 to repair a bridge, the Board concluded that “Rehabilitation and replacement of the Cypress Creek bridge would require an expenditure that cannot be justified by limited and speculative future profitability.” *CSX Transportation, Inc.—Discontinuance—at Memphis, in Shelby County, TN*, STB Docket No. AB-55 (Sub-No. 618) (STB served October 28, 2002) at 9. In the instant proceeding, Entergy is seeking a through route that would require M&NA, a Class III railroad, to make capital

expenditures of between \$2.45 million (Entergy's estimate) and \$96 million (UP's estimate, which Mr. Gibson, the General Manager of M&NA, believes to be more realistic than the Entergy estimate), while Entergy has not guaranteed to ship even one carload.

The Board provided general criteria for this proceeding in the *Decision*. M&NA urges the Board to conduct a balancing test when considering whether the prescription of a through route is desirable in the public interest. M&NA also urges the Board to consider the comparative efficiencies of the routes based on the assets that are on the ground today, instead of the efficiency that would arise through unlimited capital expenditures.

**2. Prescription of a through route is not desirable in the public interest.**

Entergy contends that prescription of a through route is desirable in the public interest because Entergy would be able to use an alternate route when UP incurs service disruptions and Entergy would receive competitive rates.

M&NA believes that UP is best able to respond to Entergy's claims that BNSF will be able to provide adequate service to Entergy when Entergy believes that UP is not providing adequate service.

With regard to the competitive rates, M&NA must point out to the Board that Entergy has entered a contract with UP, and that traffic to ISES has moved under contract for over two decades. M&NA is not a party to the contract between Entergy and UP. M&NA is compensated for the coal traffic it handles to ISES by UP on a per car rate, not based on the contract. The rates that Entergy is charged and the service that Entergy receives are governed by contract, not as part of UP's common carrier service. Even though part of that traffic under contract between Entergy and UP could be moved to ISES outside the contract, Entergy has not requested service

from M&NA in conjunction with another carrier. All M&NA has received from Entergy are letters requesting rate quotes, but not containing enough information to quote those rates. See Exhibits 2 and 10 to Mr. Trushenski's Verified Statement included in Entergy's Opening.

M&NA contends that this proceeding has arisen because Entergy is unhappy with certain contract provisions, but is not willing to let the contract terminate and challenge UP's actual rates and common carrier service. Instead, Entergy is using this proceeding to launch a collateral attack on the contract between Entergy and UP since "A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part." 49 U.S.C. §10709(c)(1). Such an abuse of the Board's processes is not desirable in the public interest.

Entergy has asked M&NA to quote a proportional rate between an interchange point with BNSF (most likely Lamar or Aurora) and ISES for unit coal trains. As can be seen in the April 27, 2010 letter from Mr. Trushenski to Mr. Gibson (see Gibson, Exhibit 1), it is clear that Entergy does not want a rate to move traffic, but merely for the purpose of engaging in rate litigation with M&NA and BNSF. First, it is within the discretion of M&NA to quote either a proportional rate or a joint rate, it is not up to the shipper to dictate the type of rate. *Central Power & Light Co. v. Southern Pacific et al.*, 1 S.T.B. 1059, 1064 (1996) citing *United States v. Illinois C.R.R.*, 263 U.S. 515, 522 (1924). Second, M&NA contends that it is not in the public interest for the Board to require a short line railroad to quote a rate solely for the purpose of a shipper being able to engage that short line in expensive rate litigation. In this proceeding, the shipper has alternate transportation that it is using pursuant to a voluntary transportation contract.

As described in Mr. Giles' verified statement, imposition of a through route or any action by the Board affecting the Lease between UP and M&NA will most likely lead to the termination of the Lease by UP. Overnight, M&NA will be deprived of over 80 percent of its railroad leaving three disconnected segments. Although there may be some scenario where M&NA would continue as a functioning railroad, the most likely scenario is that M&NA will cease to exist as a railroad. M&NA's competitive handling of over 100,000 carloads per year would cease. There are about 125 employees of M&NA who could face unemployment, and M&NA would most likely incur labor protection costs. M&NA would also lose all of the investment made in the Line.

The effective destruction of M&NA as the result of a Board decision would be devastating for the short line industry. Credit could become problematic for existing and future short line railroads. Entrepreneurs may have second thoughts about entering the short line business. Current investors would consider whether an investment made that could be wiped out by government fiat was wise. Certainly it is not in the public interest for the Board to severely damage the short line industry in order to satisfy one shipper that is dissatisfied with its contract.

Not only would M&NA suffer, but so could the shippers who rely on M&NA's competitive service. Imposing a through route is not in the public interest because it would in fact lessen competition on the Line. Even though M&NA is limited in the amount of traffic it can interchange with carriers other than UP, there is still five percent of its traffic that is competitive. Moreover, UP has granted M&NA waivers from the interchange limits in the past and M&NA is confident that UP will grant similar waivers in the future.

**3. M&NA has not acted contrary to the competition policies of 49 U.S.C. §10101 or otherwise anticompetitive manner.**

Neither Entergy nor AECC have provided any evidence that M&NA's behavior is anticompetitive. In acquiring the Line, M&NA stepped into the shoes of UP. Other than Entergy's claims in this proceeding, M&NA has not been accused of acting in an anticompetitive manner and has not been adjudicated to acting in an anticompetitive way. The Board has concluded that the replacement of one carrier with another carrier is not anticompetitive. See *Massachusetts Coastal Railroad, LLC—Acquisition—CSX Transportation, Inc.*, STB Finance Docket No. 35314 (STB served March 29, 2010) at 6.

M&NA does interchange traffic with railroads other than UP. M&NA has not had an opportunity to interchange coal traffic with BNSF at Lamar because BNSF has not quoted a rate and Entergy has never provided M&NA (or BNSF) sufficient information to quote a rate other than the single car rate in M&NA Tariff 8006-C. Indeed, it now is clear that the rate requests from Mr. Trushenski, and Mr. Mohl before him, were not for the purpose of moving traffic, but only for the purpose of this litigation.

Entergy claims that UP's actions are anticompetitive and therefore Entergy is entitled to relief involving M&NA. But, as Entergy admits, it does not seek relief from the purported wrong doer, but from two parties who Entergy has not provided any evidence to demonstrate acted in an anticompetitive manner.

M&NA urges the Board not to grant Entergy relief against a party that has not been shown to have acted in an anticompetitive manner.

**4. M&NA has provided Entergy adequate service.**

M&NA contends that in order for the Board to impose a through route on M&NA, the question is not whether UP's service has been inadequate but whether M&NA's service has been inadequate. The answer to that question is no. Entergy has provided no evidence that M&NA's service has been anything less than adequate and reasonable. M&NA has consistently provided timely delivery of trains once received in interchange.

**5. An M&NA BNSF route is not as efficient as the current UP M&NA route.**

As previously discussed, M&NA contends that the Board must consider efficiency by comparing the existing routes in service today. Even Entergy admits that M&NA's route requires some capital expenditures. Mr. Gibson has reviewed UP's and Entergy's proposed operations and capital estimates and has concluded that the UP's proposals are more realistic and represent the expenditures that would need to be made to provide the level of service that Entergy seeks.

M&NA adopts UP's position with regard to the efficiencies of the alternate routes.

**6. M&NA is not a bottleneck carrier.**

M&NA serves ISES directly today in conjunction with UP. In the Lease, UP has reserved the right to directly serve Entergy at ISES by giving seven days notice to M&NA. Hence within seven days, there can be two railroads serving ISES. With service available to ISES from the north via M&NA and the south on UP, M&NA cannot be considered a bottleneck carrier. Entergy has not met its burden of showing that it is in the public interest to impose a

through route on M&NA , a third party carrier, to address the alleged anticompetitive behavior of UP.

Since M&NA is not a bottleneck carrier, *Central Power & Light Co. v. Southern Pacific et al.*, 1 S.T.B. 1059 (1996) does not apply to this situation.

## **7. Summary.**

In balancing the harm to M&NA, its employees, its shippers, and the short line industry against the ephemeral benefits to Entergy of the prescription of a through route involving BNSF and M&NA to serve Entergy's ISES facility at the same time that ISES is served by UP under contract, M&NA contends that the balance favors a finding by the Board that the prescription of a through route is not desirable in the public interest.

M&NA has not participated in anticompetitive activities and has not acted contrary to the competitive policies of 49 U.S.C. §10101. Entergy has not alleged that M&NA provides inadequate service and M&NA has no reason to believe that its service to ISES is less than adequate.

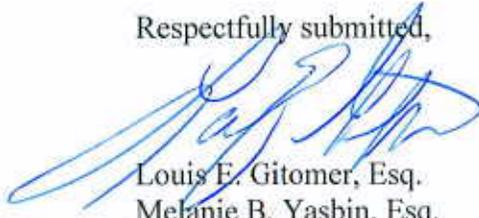
In determining whether the proposed BNSF M&NA through route would be more efficient than the existing UP M&NA through route, M&NA urges the Board to compare the existing physical facilities of both routes. Comparing an actual route and a theoretical route is not a legitimate comparison. Prescribing a through route based on a theoretical facility and then requiring M&NA to incur those expenditures when it is doubtful that Entergy would use the facility enough to cover the costs would violate the *Purcell* principal of prohibiting the Board from mandating wasteful expenditures.

Finally, M&NA is not a bottleneck carrier, so the bottleneck relief developed by the Board does not apply to this proceeding.

### CONCLUSION

M&NA respectfully requests the Board not to prescribe the trough route sought by Entergy and AECC and to dismiss the Complaint, the Amended Complaint and the Second Amended Complaint with prejudice.

Respectfully submitted,



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Attorneys for: MISSOURI & NORTHERN  
ARKANSAS RAILROAD COMPANY, INC.

Dated: June 4, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the foregoing document to be served upon counsel for Entergy Arkansas, Inc., Entergy Services, Inc., Union Pacific Railroad Company, Arkansas Electric Cooperative Corporation, and BNSF Railway Company electronically.



Louis E. Gitomer  
June 4, 2010

## VERIFIED STATEMENT OF JOHN GILES

My name is John E. Giles and I am President and Chief Executive Officer of RailAmerica, Inc. (“RailAmerica”), the parent of the Missouri & Northern Arkansas (“M&NA”). Among other responsibilities, I must consider how the RailAmerica railroad subsidiaries fit within the future plans of RailAmerica.

In recent years, we have worked very hard to turn M&NA in the direction of greater customer focus and service, higher involvement and engagement in safety with M&NA employees, operational effectiveness and excellence, and it is now a valuable asset of RailAmerica. This current litigation with Entergy Arkansas, Inc. and Entergy Services, Inc., jointly referred to as Entergy, and Arkansas Electric Cooperative Corporation (“AECC”) has been disturbing because of the potential negative effects on our relationship with Union Pacific Railroad Company (“UP) and the potential ruinous options for the M&NA.

Under a Lease Agreement dated as of December 11, 1992 between Missouri Pacific Railroad Company (“MP”) (UP’s predecessor) and M&NA (the “Lease”), M&NA leases about 308 miles of rail line in Missouri and Arkansas. Section 15.01(e)(ii) of the Lease gives UP the right to terminate the Lease if the Surface Transportation Board (the “Board”) imposes conditions that UP finds unacceptable. It is my impression from meetings and discussions with UP, that if the Surface Transportation Board prescribes a through route between M&NA and BNSF Railway Company (“BNSF”) to serve Entergy’s Independence Steam Electric Station (“ISES”) I would expect UP to seriously consider terminating the Lease. Termination of the Lease would reduce the 517-mile unified M&NA system to about a 138-mile fragmented system. Although it is difficult to predict the future of M&NA if the Lease and accompanying trackage

rights were terminated, it is doubtful that M&NA would be able to continue to operate as a viable common carrier.

In order to carry out the Lease termination, M&NA would be required to seek authority from the Board to discontinue service over those lines. M&NA would also study whether it was prudent at the same time to abandon the remainder of the system. M&NA would expect to lose the cost of the capital improvements made to the leased lines, which we estimate to be about \$15 million over the last four years alone. M&NA would expect its agreement for UP to provide matching capital funding up to Five Million dollars per year to terminate. And finally, M&NA would expect a substantial reduction in its work force of 125.

If the Lease is terminated, the local shippers would lose a competitive transportation option. Shippers like Entergy would become captive to UP. Under the Lease agreement, M&NA may shift up to five percent of the traffic it interchanges with UP to interchange with another carrier, without incurring any rental payments to UP. Thus, there are additional rail competitive options available to “on-line” shippers today for up to five percent of the traffic interchanged between UP and M&NA.

Since the Staggers Act, the number of short lines has grown and so has the amount of traffic that is handled by such carriers. Today, according to the American Short Line Railroad Association, 1 in 4 cars originates or terminates on a short line railroad. The short line railroads are an integral part of the United States rail system. The Board recognizes that short lines can often operate lines at lower costs than the larger carriers from whom they acquired or leased their lines. Because short lines are local to their shippers, they provide a high degree of attention to

the unique and specialized needs of the shippers they serve. By providing better service than larger railroads, short lines have been able to attract new traffic to these lines.

Numerous short line railroads throughout the country were created as the result of “arms length” contracts that contained interchange commitments and termination provisions. RailAmerica and its subsidiaries abide by their contracts. Were the Board to prescribe a through route at the request of Entergy, it would be my responsibility to have all of the purchase and lease acquisition agreements of the RailAmerica subsidiary railroads reviewed to see if they were also susceptible to similar disruptive results, and to determine which of the railroads were at risk. And I can assure the Board that every short line railroad in the country would conduct the same reviews and take appropriate steps to reduce or eliminate unacceptable risk.

M&NA has operated its system for over 19 years and has established strong relationships with local shippers. At the time M&NA began operating over the Line there were 66 shippers, there are now 79 shippers plus eight storage customers on the Line. There would be a substantial disruption of service to the shippers, their employees, and the employees of M&NA that rely on M&NA if UP terminates the Lease. In 2009 M&NA handled 101,993 carloads. Of those carloads, 3,709 were local movements. Without M&NA to provide local service, shippers will have to rely on UP.

Finally, it is questionable in my mind that Entergy should be allowed to successfully argue that the public interest is served by:

(A) Engaging M&NA, a medium-small short-line railroad, in this ongoing and costly litigation along with the attendant distractions from operating the railroad, not to

mention the economic hardship of being stuck in the middle of ongoing litigation between two giant corporations.

- (B) Clearly placing the future of M&NA in proximate jeopardy of extinction, especially after 19 successful years of nurturing and building the M&NA into a sustainable going concern.
- (C) Clearly placing the jobs of 125 current M&NA employees at risk and creating continued anxiety for the employees and their families, in addition to suppliers and other vendors that rely on M&NA for their own livelihood.
- (D) Risking the ongoing commercial viability of other on-line shippers that have come to count on the specialized service and attention that the M&NA and other responsible and similar short-lines throughout the country have become known and respected for.
- (E) Creating a potentially toxic ingredient into the healthy and mutually respectful relationship between UP and M&NA.

Both UP and M&NA entered into the Lease in 1992 that created the M&NA with eyes wide open. The “paper barrier” was a condition that was understood at the time and judged to be acceptable by all parties. We at M&NA stand by that contractual arrangement.

I do not believe that it is in the public interest for the Board to order M&NA to take an action that will result in the inability of M&NA to continue to provide service as a viable common carrier. I urge the Board to deny Entergy’s request to prescribe a through route with BNSF to serve ISES.

**VERIFICATION**

I, John Giles, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on June 4, 2010.

  
John Giles

## **VERIFIED STATEMENT OF TOMMY GIBSON**

My Name is Tommy Gibson and I am the General Manager of the Missouri & Northern Arkansas Railroad (“M&NA”). I am responsible for the day-to-day operations of M&NA and am very familiar with the physical plant and operations of the M&NA. As such, I am in a unique position to determine if proposed capital expenditures will bring the M&NA up to a level to meet the proposed service requirements.

M&NA’s Line is a light density line and is maintained as such. M&NA and Union Pacific Railroad Company (“UP”) have entered into a three year track improvement plan designed to maintain the Line to handle the current traffic, which does not presently include running southbound unit coal trains. M&NA would have to make significant capital expenditures to accommodate Entergy traffic from the north in conjunction with the traffic that M&NA already carries. In addition to the capital expenditures, M&NA’s maintenance costs would increase because it would have to maintain the Line to standards appropriate for running heavy unit trains. Running heavy unit trains over the Line will cause it to deteriorate more quickly, requiring maintenance more frequently.

Based on what I have seen of the Plum-Wheeler and the Hughes Verified Statement provided by UP and the Crowley and Crouch Verified Statements submitted by Entergy, I believe that UP is correct in the level and costs of capital improvements that would be necessary to bring the M&NA up to a level where it would be able to accommodate Entergy traffic handled through an interchange with the BNSF Railway Company at Lamar, MO. Based on my experience as General Manager of the M&NA I support UP’s conclusions that the existing interchange between M&NA and BNSF at both Lamar and Aurora need to be upgraded and that

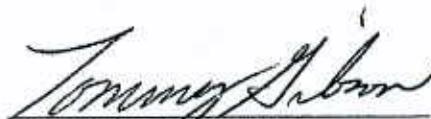
Entergy's proposed connection falls short because it would block crossings, interrupt current traffic movement, and cause increased labor costs. I also agree that the M&NA would need to add capacity. It would be necessary to add additional sidings to deal with both the staging of empty and loaded Entergy trains at interchange and at the Independence Plant. At least one additional siding between a BNSF interchange and the Independence Plant would also be necessary to ensure capacity on the Line to handle current shippers and Entergy traffic.

I have also been engaged in correspondence with Entergy concerning the quote of a rate to move unit coal train traffic through an interchange with BNSF. As the Board can see from the correspondence provided by Mr. Trushenski in Entergy's opening, M&NA has been attempting to obtain sufficient information from Entergy to quote a rate based on capital expenditures and operations, but Entergy has not been forthcoming with the needed information. In the latest letter from Mr. Trushenski, attached as Exhibit A, it is apparent that Entergy is not seeking a rate to use the M&NA service, but for some other purpose.

**VERIFICATION**

I, Tommy Gibson, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on June 3, 2010.

  
Tommy Gibson

## EXHIBIT A



**Entergy Services, Inc.**  
10055 Grogans Mill Road  
Suite 300  
The Woodlands, TX 77380  
Tel. 281-297-3532  
Fax 281-297-3832

April 27, 2010

Mr. Tommy Gibson  
General Manager  
Missouri & Northern Arkansas Railroad, Inc.  
514 Orner Street  
Carthage, MO 64836

Re: Independence Steam Electric Station

Dear Mr. Gibson:

We are in receipt of your April 22, 2010 letter in which the Missouri & Northern Arkansas Railroad Company ("M&NA"), rather than responding to the questions raised by Entergy in its February 11, 2010 and March 12, 2010 letters, suggests it needs additional information before it can begin discussions with BNSF Railway Company ("BNSF"). Entergy can only conclude from your response that M&NA is not seriously interested in progressing discussions concerning a through route and will only cooperate with Entergy if ordered to do so by the Board.

Entergy continues to believe that M&NA has much to gain from cooperating with Entergy towards what should be a common goal of increasing M&NA's role in the movement of coal traffic to Entergy's Independence Station. As Entergy has made clear to the Board, there have been several instances in the past where service to Independence via UP has been constrained and where assistance from M&NA/BNSF would have been in the public interest. A through route is needed for that reason, as well as to potentially deliver tonnages that are not presently committed under the existing UP/Entergy coal transportation agreement. Long-term, there are even greater opportunities for M&NA to expand its role in our business at Independence. Entergy can only assume that concerns about penalties and other retribution from UP under the UP/M&NA Lease Agreement are preventing M&NA from giving meaningful consideration to what otherwise ought to present a great opportunity for your railroad.

Under these circumstances, Entergy is somewhat skeptical regarding the potential value of continuing discussions with M&NA outside the STB litigation. However, given the importance of the issues to Entergy and its customers, we offer the following responses to your recent questions in hopes that M&NA will use that information to commence discussions with BNSF:

- 1. What are the type and number of locomotives per train, including the number of axles per locomotive?** M&NA has been participating in the operation of Entergy coal trains on M&NA tracks for many years. The type and number of locomotives per train has never been determined by Entergy. As has been the practice for the past 17+ years, we assume that the type and number of locomotives will be decided by the two railroads involved in the movement (M&NA and BNSF in this instance), rather than Entergy.
- 2. Who will provide the locomotive power?** All of the coal trains presently operated on M&NA's track are powered by the operating railroads. Entergy has never provided locomotive power, and it is difficult to understand why M&NA would ask Entergy, rather than BNSF, this question. Again, this is not a matter that Entergy will decide. We expect that M&NA and BNSF will determine who will provide the locomotive power.
- 3. Will locomotive power be provided on a run through basis?** Whether power is provided on a run through basis is not a matter that Entergy will decide. As you are well aware, Entergy does not own locomotives, will not be providing the locomotives, and has no involvement in the railroads' determination of whether the locomotive power will be provided on a run through basis.
- 4. Who will provide fuel for the locomotives and where will fuel be provided?** See Entergy's response to question 1, above. Once again, we find it hard to believe that M&NA needs a response from Entergy on this question. Rest assured, Entergy will not be fueling locomotives or making the operational determination as to where the locomotives should be fueled. Rather, we expect that M&NA (like every other railroad participating in a through route movement) would address this operational issue with the other carrier participating in the through route.
- 5. What will be the average tare weight per car?** The average tare weight per car will range between approximately 42,000 and 44,000 lbs, similar to the tare weights of cars currently in service on the M&NA/UP route to Independence.
- 6. What type of rail cars will be used?** Entergy will use the same type of rail cars that are currently in service on the M&NA/UP route to Independence.
- 7. What is the average loaded weight per train?** The average loaded weight per train will be approximately 19,800 tons gross (based on 135 railcars per train and 3 locomotives).
- 8. How many coal trains does Entergy seek to move per week, per month and per year over the potential BNSF-M&NA route through 2015?** The number of coal trains that Entergy seeks to move for the period from January 1, 2011 through June 30, 2015 is approximately as follows:

1/1/2011 through 6/30/2012 – 2-3 trains/week; 10 trains/month; 120 trains/year  
7/1/2012 through 6/30/2015 – <1 train/week; 2-3 trains/month; 31 trains/year

**9. Are the volume estimates in your February 11, 2010 letter guarantees of minimum volumes?** The volumes referenced in Entergy's February 11, 2010 letter are not guarantees of minimum volumes. Entergy has identified the amount of coal that is available for transport outside the terms of our contracts with UP. We are willing to discuss volume commitments up to those levels, provided the rates and service terms are competitive.

**10. Is it possible that the quantity of trains moved will change after June 2015?** Yes. As we have previously explained to M&NA, as much as 6.5 million tons per year could be available for shipment via a BNSF/M&NA through route beginning July 1, 2015. Entergy estimates that the number of trains needed to move 6.5 million trains per year would be approximately 1 train/day; 33 trains/month; or 396 trains/year.

**11. How long, in days and hours, does Entergy expect a round trip from origin to destination and back to origin to take?** Approximately 7-8 days (or 168-192 hours) based on current UP-MNA performance. Round trip cycle times for a BNSF-MNA route should be jointly determined between BNSF and MNA based on their unique operating characteristics.

**12. What does Entergy expect the railroad crew to do once the loaded train is delivered to the Independence Station?** As in the current operation, M&NA crews will be expected to spot the train for unloading in the indexer in the same manner that they currently perform that function in conjunction with the UP movement. Crews would not normally be expected to remain on trains during unloading if local crew support is available to respond to occasional operating needs such as sticking brakes, misaligned cars, etc.

**13. How long does Entergy expect to take to unload the train after delivery and then release it to M&NA to begin the return trip to origin?** Entergy expects that the time needed to unload trains would be approximately eight (8) hours, with the time commencing when the train is placed in the indexer, and ending when the train is released to M&NA.

**14. Will Entergy object to a mileage based fuel surcharge?** Entergy does not object to the concept of a mileage based fuel surcharge, but will need to evaluate any such proposed fuel surcharge on its terms and in connection with overall rate and service issues.

**15. What type of arrangements is Entergy willing to agree to in order to ensure that M&NA is reimbursed for any capital costs required to handle the traffic on the terms sought by Entergy?** Entergy believes that M&NA can handle the volumes that will be available as of January 1, 2011 without significant capital costs other than at the interchange point. Entergy is willing to discuss alternative methods of addressing these costs, if other mutually satisfactory terms are not worked out in a rail transportation contract.

**16. Is Entergy willing to enter a long term contract?** Yes, provided, however, that M&NA/BNSF provide reasonable rates and terms of service.

**17. Is Entergy willing to enter a take-or-pay contract or pay liquidated damages in the event that volume commitments are not met?** Entergy will not enter a take-or-pay contract,

but will consider a contract that includes a liquidated damages provision for volume shortfalls that are not caused by M&NA/BNSF, or otherwise excused.

**18. Is Entergy willing to accept service provided under a joint rate quoted by BNSF and M&NA, as is the right of the carriers?** Yes, subject to Entergy's right to challenge any related common carrier rates and practices.

**19. Will Entergy dismiss the pending complaint before the Surface Transportation Board upon the quotation of a rate from BNSF-M&NA to compete with the contract rate provided by Union Pacific Railroad Company?** Entergy is prepared to dismiss its Second Amended Complaint, in whole or in part, without prejudice and subject to its right to challenge any common carrier rates and practices that may be related to any M&NA/BNSF joint rate quotation.

Entergy doubts that the above responses will assist M&NA in further understanding the through route service that Entergy has requested. However, now that we have provided you with the above responses, we hope that M&NA will provide the requested revenue requirements and other information in our earlier letters.

Sincerely,

A handwritten signature in black ink, appearing to read 'RT', with a long horizontal flourish extending to the right.

Ryan Trushenski  
Manager, Solid Fuel Supply  
Entergy Services, Inc.