

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., and BNSF RAILWAY  
COMPANY, Defendants.

Docket No. 42104

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MISSOURI & NORTHERN ARKANSAS  
R.R. - LEASE, ACQUISITION AND  
OPERATION EXEMPTION - MISSOURI  
PACIFIC R.R. and BURLINGTON N. R.R.

Finance Docket No. 32187

**REBUTTAL EVIDENCE AND ARGUMENT**

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- MATERIAL UNDER SEAL DELETED -*

ENERGY ARKANSAS, INC. and  
ENERGY SERVICES, INC.

Cory R. Cahn  
639 Loyola Avenue, 26th Floor  
New Orleans, LA 70113

OF COUNSEL:

Slover & Loftus LLP  
1224 Seventeenth St., N.W.  
Washington, D.C. 20036  
(202) 347-7170

By: C. Michael Loftus  
Frank J. Pergolizzi  
Andrew B. Kolesar III  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036

Dated: July 9, 2010

Attorneys & Practitioners

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**REBUTTAL EVIDENCE AND ARGUMENT**

Entergy Arkansas, Inc. (“EAI”) and Entergy Services, Inc. (“ESI”) (collectively, “Entergy”) hereby submit this Rebuttal Evidence and Argument in accordance with the Board’s June 2009 Decision in this case and with the procedural schedule currently in effect. *See Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific R.R. and Missouri & Northern Arkansas R.R.*, STB Docket No. 42104, *et al.* (STB served June 26, 2009) (“June 2009 Decision”) (permitting Entergy to amend its complaint in order to seek the prescription of a through route); *see also Entergy*

*Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific R.R. and Missouri & Northern Arkansas R.R.*, STB Docket No. 42104, *et al.* (STB served December 15, 2009) at 1 (establishing procedural schedule).

Entergy filed its Opening Evidence and Argument in this most recent phase of the case on April 7, 2010. Defendants Union Pacific Railroad Company (“UP”), the Missouri & Northern Arkansas Railroad Company (“M&NA”), and BNSF Railway Company (“BNSF”) each made separate Reply filings on June 4, 2010.

Entergy’s Rebuttal Evidence and Argument consists of the following individual portions:

- (1) Entergy’s Argument of Counsel
- (2) the Rebuttal Verified Statement of Mr. Ryan Trushenski, Manager – Solid Fuel Supply, System Planning and Operations, Entergy Services, Inc.;
- (3) the Rebuttal Verified Statement of Mr. Daniel B. Gray, Administrator Coal Transportation, Entergy Services, Inc.;
- (4) the Rebuttal Verified Statement of Mr. Thomas D. Crowley, President of L.E. Peabody & Associates, Inc.;
- (5) the Rebuttal Verified Statement of Mr. Harvey Crouch, PE, President and CEO of Crouch Engineering, P.C.;  
and
- (6) the Rebuttal Verified Statement of Mr. Paul H. Reistrup, former President of Amtrak and the Monongahela Railway.

## SUMMARY

As the Board is aware, Entergy did not initially seek relief from the UP paper barrier under 49 U.S.C. § 10705, but instead, complained in February of 2008 that UP's continued enforcement of that provision constituted an unreasonable practice. That 2008 complaint itself followed a decade's worth of administrative proceedings in Ex Parte No. 575, *Review of Rail Access and Competition Issues*, in which shippers sought some guidance from the Board on the rules and standards that would apply to the evaluation of paper barrier interchange restrictions. Relying on the limited insight the Board provided in its October 30, 2007 Decision in Ex Parte No. 575,<sup>1</sup> Entergy filed a formal complaint and submitted extensive evidence regarding the unreasonableness of the UP paper barrier.

In its June 2009 Decision, however, the Board explained that the relief that Entergy sought in its Complaint is more appropriately pursued under Section 10705. *See* June 2009 Decision at 2. Entergy's Amended Complaint conformed to the Board's directive.

Entergy filed Opening Evidence and Argument on April 7, 2010 demonstrating that it was entitled to relief from the UP paper barrier under the standards set forth in the Board's June 2009 Decision (*i.e.*, Section 10705). In its June 4, 2010 Reply Evidence and Argument, UP improperly seeks to take strategic advantage of the

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<sup>1</sup> *Review of Rail Access and Competition Issues*, STB Ex Parte No. 575 (STB served Oct. 30, 2007).

unprecedented nature and unique procedural posture of this case by arguing that the relief that Entergy requests is not available under Section 10705. UP's objection in that regard amounts to a fundamental disagreement with the Board's determination that Entergy's request for relief was more appropriately presented under Section 10705 than under 49 U.S.C. § 10702. If UP did not agree with the logic of the Board's June 2009 Decision and the finding that a complaint under Section 10705 would provide a "straightforward path" whereby Entergy "could seek to establish that it is entitled to the type of relief it desires" (June 2009 Decision at 2), UP should have sought reconsideration of that Decision. UP declined to follow that approach, but instead, first raised its implicit criticism of the rationale underlying the Board's June 2009 Decision in its Reply Evidence and Argument.

Alternatively, to the extent UP is arguing that its dismissive view (namely, that relief under Section 10705 cannot provide a solution to the paper barrier problem that Entergy seeks to address) is consistent with the Board's own view when issuing the June 2009 Decision, then UP's argument amounts to a claim that the Board encouraged Entergy to pursue a litigation approach that provided no possible chance of obtaining the relief that it seeks. *See, e.g.*, UP Reply at 12 ("Entergy seeks relief that is not available under Section 10705"); *id.* at 11 ("Entergy cannot preclude UP from enforcing the lease's interchange and contingent rent provisions through a proceeding under section 10705."). Stated differently, UP's argument regarding the limits of possible relief under Section

10705 would suggest that the Board directed Entergy to seek a through route prescription as a means of remedying its paper barrier problem even though the Board knew that a through route prescription would have no impact on that paper barrier. Entergy does not find any support for UP's argument in this regard.

Under Section 10705, the Board has expansive power to prescribe through routes. In the first instance, the statute gives the Board the unlimited discretion to prescribe a through route. *Id.* (“The Board may . . . prescribe through routes . . . for a rail carrier providing transportation subject to the jurisdiction of the Board under this part.”). As described in greater detail below, the Congressional directive under Section 10705 regarding the prescription of through routes is compulsory in situations in which the Board considers the prescription of a through route to be desirable in the public interest. *Id.* (“The Board . . . shall when it considers it desirable in the public interest, prescribe through routes . . . .”) (emphasis added).

In its June 2009 Decision, the Board explained that Section 10705 was the appropriate vehicle for Entergy to use in challenging the interchange commitment set forth in the 1992 Lease Agreement between UP and M&NA. In so doing, the Board characterized the use of Section 10705 as a “straightforward path” for Entergy to “directly address and remedy the precise problem about which Entergy complains.” June 2009 Decision at 2. The Board also confirmed that “UP and MNA cannot contract away the statutory rights of a third party or neglect their own obligations under the statute.” *Id.*

at 7.<sup>2</sup> Moreover, the Board explained that the through route standards are “less rigorous” than those relating to terminal access or reciprocal switching cases (*id.* at 8), that through route prescription “merely entails the activation of interchange relationships that, while perhaps dormant, already physically exist” (*id.*), and that through route prescription “involves the consideration of fewer factors regarding issues such as the operational conflicts between multiple carriers operating on a single line.” *Id.*

As described in greater detail below, Entergy’s evidence demonstrates that the prescription of a through route involving BNSF and M&NA is desirable in the public interest.

## **ARGUMENT**

Entergy’s Argument includes three principal sections. First, Entergy discusses the most glaring misstatements, contradictions, and distortions set forth in UP’s Reply Evidence and Argument regarding the nature of this case. Second, Entergy identifies the proper legal standard to apply in this unprecedented context. Third, Entergy summarizes its witnesses’ responses to the UP, M&NA, and BNSF Reply filings and Entergy demonstrates that its request for relief is appropriate.

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<sup>2</sup> *Cf.* M&NA Reply, Verified Statement of John Giles at 27 (“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. UP's Misstatements, Contradictions, and Distortions Regarding the Nature and Facts of this Proceeding**

The highly unusual nature of this case is confirmed by the fact that the principal opposition to Entergy's request for relief has been submitted by a party that would not be a participant in the proposed through route to serve Entergy's Independence Steam Electric Station ("Independence" or "ISES"). The carriers who actually would be involved in such a through route – *i.e.*, BNSF and M&NA – have filed what amounts largely to token opposition to Entergy's Amended Complaint, and, in fact, each reiterates in its evidence that a BNSF-M&NA through route to ISES either already is available, or will be made available, in the future. *See* BNSF Reply at 3 ("By letter to Entergy dated March 4, 2010, BNSF has already agreed to cooperate with MNA to develop a commercially reasonable BNSF-MNA through route from southern Powder River Basin origins without the necessity for such an STB order.") (emphasis added); M&NA Reply at 5 ("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.") (emphasis added).<sup>3</sup>

Instead, it is UP that most actively opposes Entergy's request, and UP bases its opposition on a number of factors that should not be regarded as controlling, or even

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<sup>3</sup> In other portions of its filing, M&NA provides a vivid reminder of the constraints that M&NA faces as a result of UP's paper barrier restriction. Stated differently, M&NA's Reply Evidence largely reflects M&NA's concerns regarding retaliatory action from UP, as opposed to an aversion to increased business and revenue on its system.

relevant, in this unprecedented situation. Significantly, there is no basis under the statute for denying a request for a through route prescription simply because a third-party carrier that would not be involved in the proposed through route would prefer – for competitive reasons – that the through route not exist. Yet that is precisely the situation before the Board in the instant case; UP seeks to hold out its own corporate interests as a surrogate for the public interest under Section 10705.

Much of UP's opposition to Entergy's request for relief is based upon distortions of the legal standard and on efforts to confuse or misstate the underlying facts of this case. Entergy addresses each of UP's principal misstatements, contradictions, and distortions at the outset of this argument:

First, UP contends that the consequence of granting Entergy's request for a through route prescription would be to require BNSF or M&NA to incur substantial costs to upgrade their lines without any assurance of traffic from Entergy. *See, e.g.*, UP Reply at 4 (“[A] Board order prescribing a BNSF-M&NA through route would impose substantial costs on M&NA and BNSF.”).<sup>4</sup> This UP argument amounts to little more

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<sup>4</sup> *See also id.* at 32 (“Entergy asserts that the Board should err on the side of prescribing a through route because, if the ‘routing ultimately cannot be used for some reason . . . no party will be harmed.’ . . . However, Entergy ignores that M&NA and BNSF would be required to incur significant costs to construct new interchange facilities at Lamar or Aurora, and that those expenditures would be entirely wasted if Entergy ultimately chose not to use the prescribed through routes because they are less efficient or more expensive than the current route.”); *id.* at 70 (“Entergy is asking the Board to require that M&NA, and potentially BNSF, invest a substantial amount of money to construct new interchange facilities at Lamar or Aurora and additional facilities on M&NA's lines so the two railroads can provide service that Entergy may never use.”).

than an unfounded scare tactic. Entergy fully intends that neither BNSF nor M&NA should be required to incur costs (such as the costs of constructing interchange facilities at Lamar or Aurora) without an assurance of recovery of such costs. The most logical and appropriate way to afford such assurances would be under a rail transportation contract with BNSF and M&NA, but Entergy has been unable to progress negotiations for such a contract because of the paper barrier provisions of the UP-M&NA lease. So long as such terms are deemed to be in full force, M&NA has no interest in pursuing traffic that might cause UP to terminate its lease or invoke its direct service to Independence provision. Nor does BNSF have any interest in engaging in serious negotiations for a transportation service that it believes will never materialize due to the paper barrier provisions.

Whether under a contract or common carrier arrangement, however, Entergy recognizes that neither BNSF nor M&NA should be expected to construct interchange facilities to handle Entergy's traffic until terms are devised that will cover their costs. Consequently, in evaluating Entergy's Amended Complaint, the Board should not consider UP's unfounded allegation that BNSF or M&NA would or could be required to incur unrecoverable costs. *See, e.g., Winnebago Farmers Elevator Co. v. C. & N.W. Transp. Co.*, 354 I.C.C. 859, 876-77 (1978) (rejecting shipper's request to order rehabilitation of the subject line up to Class III standards where available traffic did not warrant restoration beyond Class I status); *id.* at 874 ("[T]here must be some balance

struck between the level of service which must be provided, the condition of the track, and the amount of revenue which will be derived.”<sup>5</sup>

Second, UP argues that Entergy cannot obtain Section 10705 relief because it “has not alleged that either [BNSF or M&NA] engaged in anticompetitive acts.” UP Reply at 3 n.2. UP characterizes this as a “critical” issue and a “threshold requirement” for obtaining a prescription. *Id.* UP’s argument is based upon an improperly narrow application of competitive access principles that is not appropriate given the facts of this case. As Entergy explained in its Opening Evidence and Argument, Entergy’s principal argument in this multi-phase litigation has been that UP’s continued enforcement of its paper barrier restriction is improper, contrary to sound public policy, and an unreasonable practice. It should come as no surprise to UP, to the Board, or to BNSF and M&NA themselves, that Entergy is not focused on anticompetitive acts by BNSF or M&NA. The

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<sup>5</sup> See also *Bolen-Brunson-Bell Lumber Co. v. CSX Transp., Inc.*, STB Finance Docket No. 34236, 2003 WL 21108185, at \*6 (STB served May 15, 2003) (“The costs for CSXT to make the necessary repairs so that it would be able to safely operate over the bridge would far exceed the annual profits that CSXT might expect from the anticipated traffic from the line.”); *Illinois Central Gulf R.R. – Abandonment between Herscher and Barnes in Kankakee, Ford, Livingston, and McLean Counties, IL*, 363 I.C.C. 690, 700-701 (1980) (“The evidence of [a] possible increase in traffic is not strong enough for the Commission to find that ICG could recoup a required rehabilitation expenditure of about \$2 million [to upgrade the line for 100-ton car operations] plus earn a reasonable profit from operations . . .”).

absence of such a focus, however, cannot legitimately operate as a bar to the relief that Entergy seeks in the current procedural setting.<sup>6</sup>

Third, UP argues that it was wrong for the Board to conclude in its June 2009 Decision that the BNSF-M&NA routing would be feasible because “BNSF and Missouri Pacific never interchanged coal moving to the Independence plant at either Lamar or Aurora . . . .” UP Reply at 49; *see* June 2009 Decision at 7. UP effectively is proposing a feasibility standard that would only allow a shipper to obtain a through route prescription if it could demonstrate that it already had received service via the very same through route that it asks the Board to prescribe. UP’s argument in this regard is nonsensical and would place an impossibly high burden on shippers.

Fourth, in a similar ‘cart-before-the-horse’ argument, UP contends that Entergy’s request for a through route prescription must be rejected because Entergy has not committed to the use of a BNSF-M&NA routing. *See* UP Reply at 70 (“Entergy’s failure to commit to using a BNSF-M&NA through route dooms its request for a through route prescription under the competitive access rules.”). Again, UP’s reading of the

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<sup>6</sup> Entergy respectfully submits that it also is not literally required to demonstrate that UP engaged in anticompetitive acts in order to obtain the prescription of a through route. UP is not a carrier that would be subject to such a through route prescription and, as described below, there are serious questions regarding the imposition of such a requirement on Entergy (given the “non-permissive” nature of Section 10705(a)(1) of the statute), particularly in a situation where a complainant’s request would not require a carrier to short-haul itself. It is therefore by no means clear that Entergy faces any formal obligation under Section 10705 (or otherwise) to demonstrate that UP engaged in anticompetitive acts. Entergy’s discussion of competitive issues in its evidence in this proceeding should not be regarded as a concession that such a requirement exists.

Board's competitive access rules would place an impossibly high burden on Entergy. It simply is not possible for Entergy to commit to the use of a through route before that route has even been prescribed and a rate or rates have been established, and there is no basis for accepting UP's argument that such a commitment is required. In fact, if a formal commitment between a shipper and the subject rail carriers were a necessary predicate for a route prescription, then it would never actually be necessary for the Board to prescribe through routes. UP's argument is even less pertinent in the circumstances of the present case where issues regarding the continued enforceability of UP's paper barrier remain unresolved.

Fifth, UP contends that the Board "has already rejected Entergy's unreasonable practice challenge." UP Reply at 14. While it is correct that the Board has directed Entergy to seek relief under Section 10705 rather than under Section 10702, the Board did not address the merits of Entergy's arguments regarding UP's continued enforcement of the paper barrier restrictions. To the contrary, the Board explicitly confirmed that it was not reaching any conclusion whatsoever in that regard. *See* June 2009 Decision at 11 ("Because we conclude that the conduct here is not appropriately challenged under section 10702, we do not reach the question of whether the terms of the UP/MNA contract are reasonable in isolation, nor do we opine on whether the Board would approve such terms if they were contained in a new interchange commitment presented to the Board today. Rather, we merely find that the proper course for shippers

that perceive themselves harmed by a refusal to interchange pursuant to an existing interchange commitment is to challenge the conduct itself and pursue relief specifically provided under section 10705.”) (emphasis added). Accordingly, UP’s implication that the Board rejected Entergy’s original Complaint on the merits is incorrect. The issues raised in that Complaint are very much at the heart of Entergy’s continuing efforts in this phase of the case.

Sixth, UP states that Section 10705 is very protective of the rights of carriers to “establish preferred routes.” UP Reply at 15 (citing *Central Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1067 (1996) (“*CP&L*”) (“Congress retained and strengthened the specific statutory provisions allowing carriers to select their routes and to protect their long-hauls.”)). UP’s argument is legally and factually inapposite in the current context, however. The proposed BNSF-M&NA through route would not deprive either one of those two carriers of its long-haul, and would not interfere with those carriers’ routing discretion. BNSF currently does not participate in the movement of coal to ISES, and has not objected to the selection of Lamar or Aurora as interchange points with M&NA. *See* BNSF Reply at 4 (“BNSF continues to stand ready to work with MNA and Entergy to develop a through route via Lamar on commercially reasonable terms.”). Moreover, while M&NA participates in the current movement to the plant, the proposed routing would substantially increase M&NA’s participation in the loaded portion of the movement and M&NA has endorsed the selection of Lamar as an

appropriate interchange point. *See* M&NA Reply at 5 (“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.”). Accordingly, UP’s citation of precedent regarding the rights of carriers to establish preferred routes is inapplicable.

Seventh, UP claims that its paper barrier agreement actually increased competition on the M&NA line by permitting the diversion of five percent of the M&NA traffic. *See* UP Reply at 28 (“Because M&NA has no obligation to pay rent unless it interchanges less than 95% of its through traffic with UP, M&NA can interchange up to 5% of its through traffic with UP’s competitors and still pay no rent. The lease thus created new competition for the 5% of the traffic that UP would have served exclusively if it had not leased its lines to M&NA.”). Despite this claim, UP nevertheless has steadfastly opposed Entergy’s request for a through route.<sup>7</sup> UP cannot have it both ways. The practical effect of UP’s opposition to Entergy’s through route request is to render its claim regarding the pro-competitive nature of the lease meaningless. If UP stands behind its assertion that the lease has improved competition, UP should withdraw its opposition to the through route prescription and, in so doing, remove this impediment to Entergy’s use of the BNSF-M&NA routing option.

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<sup>7</sup> UP contends that it “has not, in fact, prevented M&NA from establishing a through route with BNSF to serve the Independence plant.” UP Reply at 20 n.18. Entergy submits that UP’s voluminous Reply filing itself demonstrates the dubious nature of this UP contention.

Eighth, UP attempts to admonish the Board regarding its ruling that BNSF and M&NA would be obligated to participate in a through route for shipments of coal from the northern Powder River Basin (“NPRB”), suggesting that the Board “should take care in offering any views on such a hypothetical situation.” UP Reply at 18 n.16; *see also* June 2009 Decision at 8 (“Should Entergy choose instead to source coal from a northern PRB mine not served by UP . . . MNA would be obligated to interchange with BNSF upon request . . .”). UP also attempts to offer rationales that could be used to defeat such an Entergy effort to obtain a through route. There is nothing in the language of Section 10705, the Board’s regulations, or relevant precedent suggesting that the public interest is served by allowing a carrier in UP’s position to help develop excuses for frustrating a shipper’s effort to obtain rail service when the Board already has found participation in an NPRB through route to be obligatory. *Cf.* BNSF Reply at 4 (“BNSF agrees that, if Entergy seeks to move coal from northern Powder River Basin origins to Independence Station, the railroads must provide a commercially reasonable route for such movements.”).

## **II. The Proper Legal Standard in this Unprecedented Case**

In its June 2009 Decision, the Board explained that Entergy’s request for relief was more properly made under the standards of Section 10705. Consistent with that directive, Entergy demonstrated in its Opening Evidence and Argument that the simple “public interest” standard of Section 10705(a)(1) governed this case, rather than

the more detailed inquiry of Section 10705(a)(2) that applies where a requested through route prescription would “short-haul” a carrier. *See* Entergy Op. at 11-13.

**A. UP Wrongly Attempts to Impose Additional Evidentiary Requirements upon Entergy**

Although UP does not seriously dispute that Entergy has correctly stated the public interest standard set forth in the governing statute,<sup>8</sup> UP nevertheless contends that the Board’s analysis of this case should be burdened by all of the competing interests and additional evidentiary factors that were in play during the former ICC’s evaluation and development of rules to govern competitive access and terminal trackage rights cases. *Id.* (“[T]he Board is not writing on a blank slate when it is asked to determine whether a through route prescription would be in the public interest.”).

In particular, UP argues that the factual elements under the Board’s competitive access regulations – including the formal obligation to demonstrate 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” – constitute mandatory prerequisites to relief for Entergy. *See* UP Reply at 18-25 (relying extensively upon *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988) (“*Midtec*”). As explained in the following section of this Rebuttal, Entergy respectfully submits that UP’s argument reflects an improper reading of Title 49 and the precedent touching upon the Board’s competitive access regulations.

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<sup>8</sup> *See* UP Reply at 18 (“Section 10705 provides that the Board may prescribe a through route ‘when it considers it desirable in the public interest.’”).

**B. The Underlying Rationale of the *Midtec* Case**

UP's extensive reliance on *Midtec* is improper in this case. The D.C. Circuit's decision in *Midtec* supports the narrow proposition that, when developing regulations to govern its exercise of statutory authority to prescribe reciprocal switching arrangements and terminal trackage rights, the ICC was entitled to limit its exercise of discretion to those situations in which the complainant had shown that "the respondent railroad had committed or was likely to commit an act contrary to the competition policy of the Staggers Act or [was] otherwise anticompetitive . . . ." *Midtec*, 857 F.2d at 1499.<sup>9</sup> Stated differently, the court held that – although the statutory criteria at issue in the case permitted the ICC to order reciprocal switching if "practicable and in the public interest or . . . necessary to provide competitive service" – the agency could elect to further limit the exercise of its own power under the applicable statutory authorization.

Significantly, however, the D.C. Circuit based its decision authorizing the ICC's action on the explicitly permissive nature of the relevant statute, noting first that the reciprocal switching statute "merely authorizes and does not require" the Commission to prescribe such switching when the statutory criteria of 49 U.S.C. *former* § 11103(c)(1) are met:

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<sup>9</sup> These regulations, sometimes referred to as the "Competitive Access Rules" or "CARs," appear in 49 C.F.R. § 1144.2. See *Intermodal Rail Competition*, 1 I.C.C.2d 822 (1985), *aff'd sub nom. Baltimore Gas & Elec. v. United States*, 817 F.2d 108 (D.C. Cir. 1987).

As we have seen, the Commission did not expressly address Midtec's complaint under the criteria of section 11103(c)(1): "practicable and in the public interest or . . . necessary to provide competitive rail service." The petitioner and the intervenors supporting it argue, each in its own way, that the agency's failure to do so requires a remand. Midtec argues that, notwithstanding the permissive language of section 11103(c)(1) ("The Commission *may* require rail carriers to enter into reciprocal switching agreements"), the Commission is required to order reciprocal switching whenever it is either practicable and in the public interest or necessary to provide effective rail competition. If Midtec is correct in this, then it seems it need not demonstrate that the C&NW engaged in conduct that is contrary to the competition policy of the Staggers Act or that is otherwise anti-competitive, which, as we have seen, is a threshold requirement under the CARs.

*Midtec*, 857 F.2d at 1499 (emphasis in original).

Relying upon Seventh Circuit precedent for the proposition that "[t]he purpose of the Staggers Act was to encourage, under the appropriate circumstances, but not require, the Commission to approve railroad switching agreements," the D.C. Circuit ultimately rejected Midtec's argument and concluded that the permissive nature of Section 11103(c)(1) permitted the ICC to impose additional restrictions on its exercise of discretion. *Id.* (citing *Central States Ent. v. ICC*, 780 F.2d 664, 679 (7th Cir. 1985)); *id.* ("Our own review of the legislative history confirms [that] the Commission is under no mandatory duty to prescribe reciprocal switching where it believes that doing so would be unwise as a matter of policy."). In other words, since the reciprocal switching statute afforded permissive authority to the agency, it was not unreasonable for the ICC to

determine that it would not exercise the broadest possible “practicable in the public interest” authority contemplated by Section 11103(c)(1).

The court likewise explained that the statute governing Midtec’s accompanying request for terminal trackage rights (*i.e.*, 49 U.S.C. *former* § 11103(a)) also was phrased in permissive terms (“the Commission ‘may require’ terminal trackage rights where ‘practicable and in the public interest’”), and that this discretionary language therefore permitted the agency to impose additional competition-related constraints on its exercise of that discretion. *Id.* at 1502-1503 (“Under these circumstances, we cannot say it is unreasonable for the Commission to require Midtec and the Soo to demonstrate that terminal trackage rights are necessary to remedy or to prevent an act on the part of the C&NW that is contrary to the competition policy of the Staggers Act or that is otherwise anticompetitive.”).

That same rationale cannot apply to the consideration of through route requests under 49 U.S.C. § 10705(a)(1).

**C. The Scope of Agency Discretion Under Section 10705 is Fundamentally Different than Under the Terminal Trackage Rights and Reciprocal Switching Statutes**

Significantly, Section 10705 includes a fundamentally different standard regarding the extent of the agency’s discretion, and therefore is not subject to the same “permissive” interpretation that provided the foundation for the D.C. Circuit’s decision in *Midtec*. Specifically, Section 10705 states that the agency “shall” prescribe a through

route that it determines to be desirable in the public interest. 49 U.S.C. § 10705(a)(1) (“The Board may, and shall when it considers it desirable in the public interest, prescribe through routes . . . .”) (emphasis added). Consequently, the principal rationale supporting the D.C. Circuit’s conclusion that the ICC could elect to further restrict its own reciprocal switching and terminal trackage rights authority (by requiring a showing of actual or potential anticompetitive acts), cannot legitimately be relied upon by UP as a justification for encouraging the Board to refrain from prescribing through routes that would be desirable in the public interest. If the Board finds the prescription of a through route to be desirable in the public interest, Congress insists that the Board “shall” establish that through route.

Notably, a predecessor version of Section 10705 (*i.e.*, Section 15(3) of the Interstate Commerce Act) initially included only the permissive construction “may . . . establish” through routes, but Congress added the mandatory “shall” language to Section 15(3) in the Transportation Act of 1920, 41 Stat. 484. *See 3 Interstate Commerce Act Annotated*, p. 1905 (1930) (stating that the 1906 version of the Act provided that “[t]he commission may also . . . establish through routes” but that the term “also” was replaced in the 1920 Act by “and it shall whenever deemed by it to be necessary or desirable in the public interest”) (emphasis added).

Two facts are evident from a review of the circumstances surrounding this modification. First, the introduction of the obligatory “shall” term in Section 15(3)

coincided with a wide-ranging Congressional effort to ensure a more positive role for the agency in helping to foster a sound transportation system for the benefit of the shipping public. Second, the introduction of compulsory language to the text of Section 15(3) was made at the same time that Congress added the terminal trackage rights provision in former Section 3(5) of the Interstate Commerce Act, which from the outset of its existence, included only the permissive formulation that the agency “may” establish terminal trackage rights.

With regard to the general environment surrounding the development of the Transportation Act of 1920, one leading commentator (Professor Sharfman of the University of Michigan) observes in his treatise on the Interstate Commerce Commission that the 1920 Act was intended to strengthen the rail system to ensure adequate service to the public. *See* 1 I.L. Sharfman, *The Interstate Commerce Commission, A Study in Administrative Law and Procedure*, at 177-82 (The Commonwealth Fund 1931) (“*Sharfman*”). In particular, Professor Sharfman remarks that the adoption of the Transportation Act of 1920 marked the “beginning of a new approach in railroad regulation. . . . The basic contribution [of this Act, as] evidenced by the character of many of its provisions, lay in the statutory recognition of a positive public responsibility, in the exercise of the Commission’s regulating functions, toward the establishment and maintenance of an adequate transportation service.” *Sharfman* at 177 (emphasis added); *id.* at 178 (“The new measure imposed an affirmative duty on the Interstate Commerce

Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States”) (quoting *R.R. Comm. of Wisc. v. C., B., & Q. R.R.*, 257 U.S. 563, 585 (1922) (Taft, C.J.)) (emphasis added); *id.* (“[The Transportation Act of 1920] introduced into the federal legislation a new railroad policy. . . . Therefore, the effort of Congress had been directed mainly to the prevention of abuses . . . . The 1920 Act sought to ensure, also, adequate transportation service.”) (quoting *Akron, C. & Y. Ry. v. United States*, 261 U.S. 184, 189 (1923) (Brandeis, J.)).

With specific regard to the subject of through route prescription, Sharfman notes that “[w]hile the right to establish through routes and authority to adjust divisions of joint rates had been conferred upon the Commission as early as 1906, the Transportation Act [of 1920] sought to mold the exercise of these powers more directly in the interest of the public.” *Sharfman* at 217. According to Sharfman:

. . . the amended Sec. 15, par. (3), deals with the establishment of through routes and joint rates. [Pursuant to the 1920 modifications, the] Commission’s powers in these directions may be exercised on its own initiative as well as upon complaint, and it may establish minimum as well as maximum charges. Moreover, “whenever deemed by it to be necessary or desirable in the public interest,” it is made the duty of the Commission to establish through routes, joint rates, and “the divisions of such rates.”

*Id.* at 217 n.83 (emphasis added).

At the same time that Congress mandated the establishment of through routes found to be desirable in the public interest, Congress simultaneously added the

permissive authority of Section 3(4) to the Interstate Commerce Act, which empowered the Commission to grant terminal trackage rights:

Sec. 405 [of the 1920 Act], amending Sec. 3 of the Interstate Commerce Act, par. (4), provides for the use by one carrier of the terminal facilities of another carrier, and vests the Commission with authority in the premises. The Commission is empowered [but not obligated] to require such use if it finds it to be “in the public interest and practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business.”

*Sharfman* at 238 n.118. Consequently, it is evident that in making simultaneous modifications to the Interstate Commerce Act in these two respects – *i.e.*, introducing “obligatory” language to the agency’s pre-existing through route prescription discretion and creating a new, “permissive” authority to grant terminal trackage rights – Congress intended to draw a distinction between the scope of the Commission’s authority in administering these two provisions of the statute. Congress certainly could have left the through route authority as permissive when modifying the Interstate Commerce Act in 1920, but it chose not to do so.<sup>10</sup>

\* \* \*

By way of summary, UP’s reliance on the *Midtec* decision in opposing Entergy’s request for relief under Section 10705 is inappropriate. There are fundamental

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<sup>10</sup> It is noteworthy that despite the many instances in which it has revisited the Interstate Commerce Act throughout its history, Congress has consistently retained the obligatory “shall” language in Section 10705 (and its predecessor, Section 15(3)).

differences in the through route, terminal trackage rights, and reciprocal switching statutes that preclude reliance on *Midtec* as a basis for imposing extra-statutory constraints on the prescription of through routes. *See* 49 U.S.C. § 11102(a) (“The Board may require terminal facilities . . . to be used by another rail carrier . . . .”); 49 U.S.C. § 11102(c)(1) (“The Board may require rail carriers to enter into reciprocal switching agreements . . . .”); 49 U.S.C. § 10705(a)(1) (“The Board may, and shall when it considers it desirable in the public interest, prescribe through routes . . . .”).

In light of these long-standing statutory distinctions, and in light of the specific textual basis for the D.C. Circuit’s approval of the competitive access regulations in *Midtec*, the proper legal standard in the instant case is the simple public interest standard of Section 10705(a)(1).<sup>11</sup>

### **III. The Proposed Through Route is Desirable in the Public Interest**

Entergy demonstrated in its evidence in the unreasonable practice phase of this case, and again in its Opening Evidence in this Section 10705 phase of the case, that the continued enforcement of UP’s paper barrier restriction was contrary to the public interest. Specifically, Entergy showed that UP’s service has been inadequate for

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<sup>11</sup> It bears mention that in issuing the June 2009 Decision, the Board did not know the specific through route prescription that Entergy would seek, and therefore did not know if the short-haul provision of Section 10705(a)(2), and its inquiry into issues of efficiency, adequacy, etc., would be implicated. Since Entergy has sought the prescription of a through route that does not involve UP, those additional issues are not formally implicated in this case.

sustained periods during the life of the lease, and that UP's continued enforcement of the paper barrier restrictions consistently prevented Entergy from obtaining alternative service to ISES. Entergy has incurred substantially increased costs in the form of purchased power during periods of poor UP service as a result of that situation.

Notably, this case does not present a situation where a shipper simply would prefer that its destination monopolist allow another carrier to provide service to its plant. Instead, this is a case in which UP voluntarily elected to lease its line to another carrier in order to reduce its costs. {

}<sup>12</sup> yet UP still

seeks to restrict M&NA's ability to interchange with BNSF to provide service to ISES on an ongoing basis for the duration of the lease. As the Board noted in its October 30, 2007 decision in Ex Parte No. 575, paper barrier restrictions of an unlimited duration should be subject to a higher level of scrutiny by the agency. *See* Ex Parte No. 575 Decision at 15.

In the balance of this Argument, Entergy addresses the need for dependable service at ISES, the cost advantages associated with service over the BNSF-M&NA routing, the feasibility of service to ISES over the proposed routing via either a Lamar or

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<sup>12</sup> In fact, Entergy demonstrated in the initial phase of this proceeding that "the revenue stream resulting from the [UP-M&NA Lease/Sale Transaction] was expected to be more (and, in fact was more) than what UP would have received had it not divested the line . . . as a result, continued enforcement of the interchange limiting provisions would 'overcompensate' UP." Entergy's September 2, 2008 Rebuttal Evidence and Argument at 24.

Aurora, MO interchange, and the proper interpretation of the rate evidence that UP relies upon in its Reply.

**A. UP has Not Refuted Entergy's Demonstrations that it Depends Upon Reliable Service at ISES and that UP has Abused its Market Power**

In its Opening Evidence (and in the preceding phase of this case), Entergy recounted the difficulties that it had experienced in obtaining reliable rail transportation service from UP at ISES over the course of more than fifteen years. *See* Entergy Op. at 19-23 & Trushenski V.S. at 3-4, 8-9.<sup>13</sup> In addition, Entergy's Opening Evidence described the manner in which UP used its control over deliveries to ISES during periods of service inadequacy to enhance its own profitability. *See* Crowley V.S. at 6-7.<sup>14</sup>

As an initial matter, Entergy's witnesses chronicled the 1993-1995, 1997-1998, and 2005-2008 UP service crises and explained that these crises resulted in substantial under-deliveries of coal to ISES. Entergy's Mr. Mohl noted in his September 2, 2008 Rebuttal Verified Statement that UP had claimed force majeure under its contract with Entergy for approximately 42% of the 2005-2008 time period. Mohl 2008 Reb. V.S. at 4. When coal is not available at ISES, the "lost generation must be replaced with

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<sup>13</sup> *See also* Mohl July 11, 2008 V.S. ("Mohl 2008 V.S.") at 2-9; Mohl Sept. 2, 2008 Reb. V.S. ("Mohl 2008 Reb. V.S.") at 3-6; Gray July 11, 2008 V.S. ("Gray 2008 V.S.") at 5-11; Gray Sept. 2, 2008 Reb. V.S. ("Gray 2008 Reb. V.S.") at 1-8.

<sup>14</sup> In his testimony, Mr. Crowley explained that during its 2005-2006 service crisis, {

}

generation from higher-cost alternatives (*i.e.*, typically higher-cost gas, or purchased power).” Trushenski V.S. at 3. Significantly, however, UP’s paper barrier restrictions prevented Entergy from obtaining alternative coal transportation service to ISES during these times of poor performance. *Id.* at 4 (citing Gray 2008 V.S. at 5-11 and Mohl 2008 V.S. at 4-5).

In its Reply Evidence, UP alleges that its past service problems and its refusals to waive the paper barrier restrictions do not constitute anticompetitive acts or an abuse of market power. UP Reply at 33-47. UP also claims that Entergy has misstated the relevant facts regarding the UP service crises, and UP submits the Reply Verified Statement of Mr. F.M. “Rick” Gough in support of its claims. Effectively, UP’s responses amount to statements that: (i) UP did not single Entergy out for service any worse than that received by UP’s other customers (*id.* at 34); (ii) UP service to ISES was better than UP’s service to Entergy’s White Bluff plant (even though UP faces competition from BNSF at White Bluff) (*id.* at 35); and (iii) UP did not refuse to waive the paper barrier restrictions “when [UP] could not provide requested service to the Independence plant.” *Id.* at 36. {

} *Id.*

at 47.

None of UP's arguments in this regard has merit. First, the fact that UP provided poor service to many of its customers does not ameliorate the harm experienced by Entergy. If anything, the widespread nature of UP's service failure led to more pronounced harm to Entergy because of the impact of widespread shortfalls on purchased power prices. In any event, as Mr. Crowley explains in his Rebuttal Verified Statement, "[t]he nature of the service problem, the cause of the service problem, the breadth of its impact on transportation across the UP system and/or the total number of customers affected by it are immaterial." Crowley Reb. V.S. at 4. What is important is "UP's actual response (or lack of a response) to the service problem for a particular customer that indicates an abuse of market power." *Id.*

Likewise, UP's claim that its service to White Bluff was even worse than its service to ISES (notwithstanding the presence of a second destination carrier at White Bluff) does not provide any support for UP's argument that the proposed through route would not be desirable in the public interest. Again, as Mr. Crowley observes, "[c]omparative levels of service provided by UP during its service problems (either between different customers or between two plants of the same customer) do not provide any indication of whether or not UP caused harm to Entergy because of the fact that UP denied Entergy access to a transportation option for PRB coal delivery." *Id.*

UP's claim that it never refused a request to waive the paper barrier when it could not provide service also fails to provide any legitimate obstacle to the prescription

of the BNSF-M&NA through route. As Mr. Gray explains in his Rebuttal Verified Statement, UP's characterization of the past service crises does not provide a complete picture of the difficulties that Entergy faced. *See* Gray Reb. V.S. at 1-5. UP's service during the three time periods was substantially inadequate, yet UP was able to use its control over the ISES destination to prevent Entergy from obtaining alternative rail service to the plant. *See id.* at 2 ("In my 2008 Rebuttal Statement . . . I explained how UP used its market position to leverage Entergy into withdrawing the request for a waiver as a *condition* to UP's proposed plan to increase coal deliveries to Independence and White Bluff."). {

} Gray Reb. V.S. at 3; *see also*

Gray 2008 V.S. at 8-11.

UP's Reply Evidence also includes the claim by Mr. Gough that "Entergy demonstrated its honest view of UP service in 2007 when it chose to {

} and when, at the end of

2009, "Entergy informed UP {

} Gough R.V.S. at 5.

In his Rebuttal Verified Statement, Entergy witness Trushenski explains that Mr. Gough is mistaken in his characterization of {

} Specifically, Mr. Trushenski observes that "Entergy's

decisions with respect to the volumes it ships under the UP Contract were not a vote of confidence regarding UP service levels.” Trushenski Reb. V.S. at 2. Instead, Entergy’s decisions to utilize UP service “reflect the reality that {

} *Id.*

Significantly, however, Mr. Trushenski explains that “there is nothing inconsistent with Entergy availing itself of the favorable rates of the UP contract when *UP is willing to perform* its delivery obligations, while at the same time seeking the right to take advantage of alternative transportation arrangements that will protect its transportation requirements when *UP is not willing or able to provide reliable transportation.*” *Id.* Mr. Trushenski adds in this regard that “it also would not be inconsistent for Entergy to pay higher rates in order to maintain a BNSF/M&NA alternative to assure reliable service during such periods, particularly given that delivered coal costs tend to be less than other alternatives (*e.g.*, purchased power or natural gas) that we have been forced to rely upon in the past to make up for deficient coal transportation service in the absence of a transportation alternative.” *Id.*<sup>15</sup>

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<sup>15</sup> In a related matter, M&NA’s Reply Evidence includes a number of inaccurate characterizations regarding Entergy’s motivations in this case. *See, e.g.*, M&NA Reply at 17 (“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.”); *id.* (“[I]t is clear that Entergy does not want a rate to move traffic, but merely for the purpose of engaging in rate litigation with

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} First, UP claims that Mr. Crowley's testimony was based on the "false premise that, in the absence of the lease, Entergy would have used a BNSF-M&NA through route to transport PRB coal to the Independence plant." *Id.* at 42-43. Second, UP insists that if Mr. Crowley were correct {

} UP would have waived the lease's interchange provision and allowed BNSF-M&NA to provide alternative service to ISES {

} *Id.* at 43 & n.34.

In his Rebuttal Statement, Mr. Crowley responds to UP's claims.

Specifically, Mr. Crowley recounts that during the 2005-2006 time period, "BNSF's PRB operations were less affected by the 2005-2006 events (and therefore more able to provide PRB coal service to the Independence Plant)." Crowley Reb. V.S. at 5. In addition, Mr. Crowley explains that UP is wrong to suggest that {

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M&NA and BNSF."); Gibson R.V.S. at 30 ("[I]t is apparent that Entergy is not seeking a rate to use the M&NA service, but for some other purpose."). In his Rebuttal Verified Statement, Entergy's Mr. Trushenski addresses these claims, and explains that they each misstate the actual nature of Entergy's motivations. Trushenski Reb. V.S. at 6-9.

*Id.* at 8. Accordingly, UP's refusal to waive the paper barrier restrictions {  
}

**B. UP's Efforts to Distort the Comparisons of Costs and Rates between Service Over the Current and Proposed Routes are Unavailing**

Entergy's Opening Evidence included a demonstration that service via BNSF-M&NA via either a Lamar or Aurora interchange would be cost-effective relative to the more circuitous UP routing currently in effect. *See* Entergy Op. at 23-25 & Crowley V.S. at 8-13. Relying upon the Board's URCS costing system, Mr. Crowley showed that the cost of providing service to ISES from the PRB equals \$14.24 per ton via the BNSF/M&NA Lamar route and \$14.88 under the current UP-M&NA route. *See* Crowley Exhibit \_(TDC-6).

In the absence of rate quotes from BNSF and M&NA for ISES service, Mr. Crowley also developed estimated rates for the proposed BNSF-M&NA through route using BNSF's average 2009 rate per ton-mile for coal traffic. *See* Crowley V.S. at 11. That analysis demonstrated that the BNSF-M&NA movement would yield {  
} *Id.* at 11-12.

**1. UP is Wrong to Utilize Movement-Specific Cost Adjustments to URCS**

In its Reply Evidence, UP argues that Mr. Crowley's cost and rate calculations are improper. UP Reply at 56-68. With respect to the costs of service over the proposed route, UP argues that Mr. Crowley: (i) should have used actual empty miles

rather than following standard URCS procedures; (ii) should not have used western region costs for locomotives on the M&NA portion of the proposed movement since UP claims that BNSF likely would supply the locomotives for that movement; and (iii) should not have used system average URCS costs for private car rental since Entergy likely would provide railcars for the proposed through route. UP Reply at 57-58.

As Mr. Crowley explains in his Rebuttal Statement, however, UP is mistaken in each respect. *See* Crowley Reb. V.S. at 10-14. UP's arguments regarding the use of empty miles, locomotive costs, and car costs seek the use of movement-specific cost adjustments to the Board's URCS system. Those arguments reflect a fundamental and improper disagreement with the rationale supporting the Board's rejection of movement-specific cost adjustments in *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), at 47-61 (STB served Oct. 30, 2006), *aff'd sub nom. BNSF v. STB*, 526 F.3d 770 (D.C. Cir. 2008) ("*Major Issues*"). In *Major Issues*, the Board determined that it would exclude consideration of movement-specific adjustments to the URCS system in making jurisdictional threshold determinations in maximum rate reasonableness cases. *Id.*

The Board's justifications for rejecting future consideration of such proposed adjustments included the inordinate cost associated with URCS adjustments, the limited impact of such adjustments on the costing results, and the fact that piecemeal or incomplete adjustments to URCS are suspect. *Id.* at 48 ("[T]he analysis of proposals

for movement-specific adjustments is complex, expensive, and time consuming.”); *id.* at 50 (“Massive discovery is required. Detailed adjustments to the URCS program are needed and exhaustive analysis of the reliability of the evidence is performed, even if the final result, after all adjustments are made, would be a variable cost estimate that closely mirrored the unadjusted URCS calculations.”). The Board also noted the unfairness associated with the fact that the unavailability of certain information regarding cost adjustments risked biasing the cost calculation in the favor of railroads that do not maintain cost records that would permit shippers to make movement-specific cost adjustments in their favor. *Id.* at 52.<sup>16</sup>

While the Board’s decision pertained specifically to maximum rate reasonableness cases, it is evident that each of the considerations relied upon by the Board applies with even greater force in the context of the present proceeding. In particular, the Board’s concerns regarding the substantial expenditures of resources, the imbalanced access to required costing information, and the limited impact of any movement-specific adjustments on costing results carry even greater force in a case in

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<sup>16</sup> See also “Surface Transportation Report to Congress Regarding the Uniform Rail Costing System,” May 27, 2010, at 1 (“The challenge in any regulatory costing methodology is that there is no accounting process that can precisely attribute costs to particular movements. By necessity, the methodology must incorporate assumptions and generalizations about railroad operations, some of which may not reflect individual situations. . . . Though imperfect, URCS has served as the agency’s costing tool for more than two decades and has produced costs sufficiently reliable for the Board to make regulatory determinations.”).

which the objective is to determine whether a through route prescription is desirable in the public interest (as opposed to setting a specific maximum rate level).

Two of UP's three proposed adjustments to URCS (*i.e.*, the identification of empty miles and the modification of system-average car costs) are particularly inappropriate here because the Board specifically rejected arguments from UP in support of those same adjustments in its *Major Issues* decision. *See Major Issues* at 58-59 & nn.188 and 191 (referencing arguments that UP made in its Opening Evidence in *Major Issues* at 41-42 and 44). In its decision, the Board found that the use of movement-specific adjustments for these two items could bias the entire costing analysis in the favor of the railroads. *Id.*

The Board's reasoning with respect to mileage calculations in *Major Issues* is equally valid in the present case:

[C]arriers proposed that the Board allow parties to submit the actual number of total miles or empty miles. URCS calculates round-trip miles for train-load shipments by doubling loaded miles, but this presumes that the number of loaded miles, which are inputted by the user, is the same as empty miles. Carriers note that this is often not the case, as carriers may use a longer route for empty trains returning to the origin so as to increase efficiency, service to the shipper, and operational fluidity. Carriers argue that actual empty miles are easily ascertainable, readily agreed upon by the parties, and could be included in URCS Phase III.

While we recognize the carriers' desire to have the URCS calculation reflect more accurately the actual cost of moving the issue traffic, we find that such piecemeal adjustments would tend to bias the results in favor of the

railroads. As discussed above, selective replacement of system-average statistics – which tend to benefit the railroads – without allowing four counterbalancing adjustments that benefit shippers – which often require information not maintained in sufficient detail or at all by the railroads – may bias the entire analysis, rendering the modified URCS output unreliable.

*Id.* at 58 (emphasis added) (footnotes omitted).

Similarly, the Board’s basis for rejecting UP’s argument regarding car costs applies with equal force in the present context:

Carriers also argue that actual car rental costs should be allowed in variable cost calculations. When a party inputs private car ownership into URCS for a specific movement, URCS calculates a system-wide private car allowance and then allocates that allowance over all movements. The model does not know, however, whether a carrier has chosen to actually pay a private car allowance or simply to lower the rate for the movement to reflect private car ownership. While we recognize this limitation in URCS, we are concerned that allowance of actual car rental costs in URCS would be subject to manipulation by the carriers. Carriers determine whether to offer an allowance at all or whether to adjust rates to reflect a shipper’s car ownership. Thus, one method of accounting for private car ownership would be deemed a “cost” in URCS while the other would not. Only railroad discretion would determine how to account for this expense.

*Id.* at 58-59 (emphasis added) (footnotes omitted).

Notably, in *Major Issues*, the Board also addressed the fact that “in proposing to include additional inputs in URCS Phase III, or more generally, that we reexamine the entire URCS system, the carriers request a change to the URCS program.”

*Id.* at 59 (footnote omitted). The Board responded to those carrier requests, however, by

stating that such requests “should only be considered in a separate rulemaking proceeding, where specific proposal(s) would be subjected to public comment and, if adopted, uniform application. *Id.* UP has not followed that rulemaking approach.

**2. UP’s Mileage Assumptions are Improper**

In calculating costs for the current and proposed movements, Mr. Crowley determined the distance from the PRB to the ISES plant using an average of the distances to each of the PRB mines. *See Crowley V.S.* at 8. On Reply, UP claims that this approach was improper, and insists that Entergy should have used a weighted average of distances from the PRB mines from which Entergy actually purchased coal in 2009, rather than using a simple average of distances. *Plum/Newland R.V.S.* at 5 (“To develop mileage inputs for our URCS analysis that more accurately reflect actual operations to the Independence plant, we used the actual origins of Entergy’s PRB coal in 2009 to calculate a weighted average distance from the mines to the plant.”).

The use of 2009 coal origins for calculating an average distance from the PRB to the plant is unwarranted. As Entergy’s Mr. Gray explains in his rebuttal statement, {

} Mr. Crowley's use of a simple average of distances from the PRB to ISES therefore constitutes the best evidence of record.

**3. UP's "Other" Cost Adjustment Measures  
are Likewise Improper**

UP also asserts in its Reply evidence that the Board should look to cost measures other than URCS in order to evaluate the relative cost disparity between the current and proposed movements. *See* UP Reply at 59-60. Specifically, UP argues that the Board should consider the disparity in transit times that UP calculated using the RTC and TPS models, the disparity in fuel consumption on the two routes, and the disparity in total degrees of curvature on the two routes. *Id.* Again, UP's proposed approach is improper.

As Mr. Crowley explains in his Rebuttal Verified Statement, the Board previously has rejected the use of the TPS model to estimate fuel consumption. Crowley Reb. V.S. at 17 (citing *Wisc. Power and Light Co. v. Union Pacific R.R.*, 5 S.T.B. 955 (2001)). In addition, Mr. Crowley points out that there is no evidence that UP's TPS or RTC results correspond to actual fuel consumption by actual trains. *Id.* Moreover, Mr. Crowley demonstrates that the miles used by UP witnesses Plum and Newland to develop URCS variable costs are inconsistent with the miles that those same witnesses used for their TPS and RTC analyses. *Id.* at 18-19. Finally, Mr. Crowley shows that UP's RTC

and TPS simulations are flawed because they are based on an “unopposed” system without accounting for any delays that real-world traffic would encounter. *Id.* at 19-21.

In light of all of these flaws, there is no basis for accepting UP’s claims regarding the supposed efficiency advantages associated with the current UP routing to ISES. .

**4. UP’s Rate Comparison Arguments are Mistaken**

On Opening, Entergy showed that the proposed through route likely would { }. *See Crowley V.S.* at 11-12. On reply, UP argues that Entergy’s Opening demonstration regarding {

} UP Reply

at 65-68. UP’s arguments are unavailing.

UP’s chief argument is that BNSF’s March 4, 2010 letter regarding service to ISES {

} *Id.* at 66. {

} *See, e.g.*, March 4, 2010 Letter at 1 (“BNSF would not be willing to undertake the capital investments required for BNSF to provide interline service with M&NA via Lamar or Aurora unless a commercial arrangement was put in place that assured our recovery of those investments. Your letter gives no indication of how Entergy proposed that BNSF would recover those investments . . .”). BNSF prepared this letter, as the Board will recall, shortly after the Board’s December 15, 2009 Decision regarding the possible addition of BNSF as a defendant in the case. It is therefore reasonable to conclude that litigation concerns may have influenced BNSF’s preparation of its letter.<sup>17</sup>

**C. There are No Engineering Issues Regarding the M&NA Line that Constitute a Legitimate Impediment to the Requested Through Route Prescription**

In its Opening Evidence, Entergy presented the testimony of Mr. Harvey Crouch in support of the proposition that service over the proposed BNSF-M&NA through route would be feasible. *See* Entergy Op. at 25-27 & Crouch V.S. at 1-21. Mr. Crouch is particularly qualified to address this subject because he was the individual that RailAmerica retained in 2003 to prepare the current track charts for the M&NA system.

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<sup>17</sup> In its Reply, UP faults Entergy’s Opening Evidence for not including evidence about the impact of the through route on the revenues of UP and M&NA. *See* UP Reply at 68-69. Given the uncertainty surrounding the continued enforcement of the paper barrier and the difficulty associated with obtaining rate quotations from BNSF/M&NA, it is difficult to provide any definitive estimate of the impact of the through route prescription on the carriers’ revenues. Entergy respectfully submits that this difficulty should not operate as an impediment to prescription of the requested through route.

In addition, Mr. Crouch inspected the line for three days in November of 2009, as he explained in his opening testimony. Crouch V.S. at 3-4. Accordingly, Mr. Crouch has substantial familiarity with the line at issue in this case.

Based upon his analysis of the line, Mr. Crouch concluded that “the M&NA line between Lamar and Aurora, Missouri, and the Independence Station would be capable of handling loaded unit coal trains moving via a BNSF/M&NA through route interchanging at either Lamar or Aurora, Missouri, with minor modifications.” Crouch V.S. at 3; *id.* at 21 (“Based on the information available to me to date, it is my opinion that current track and bridge conditions, with minor modification, could accommodate the addition of 3 to 10 loaded unit coal trains per month in the near term on the M&NA line between Lamar, Missouri and the Independence Station in Arkansas.”). Mr. Crouch added that “[w]hile some additional bridgework may be appropriate to accommodate the higher volumes that become available [in the future], these additional modifications are relatively modest given the tonnages involved.” *Id.* at 21. Finally, Mr. Crouch found that interchange would be feasible at either Lamar or Aurora with minor construction of additional facilities and that there are “sufficient existing sidings that have the capacity to allow efficient passing of 3 to 10 trains per month.” *Id.*

In its Reply Evidence, UP challenged Mr. Crouch’s findings, arguing that Entergy had substantially underestimated the cost and difficulty associated with moving loaded coal trains over the M&NA line. *See* UP Reply at 49-56; Wheeler-Plum R.V.S.;

Hughes R.V.S. UP focuses substantial attention in its Reply Evidence on the proposed interchange points and on the purported need to add staging capacity on the M&NA line. *See* UP Reply at 49-56.

In his Rebuttal Verified Statement, Entergy's Mr. Crouch explains the defects in UP's Reply Evidence in substantial detail, and ultimately concludes that it remains his view that "it is feasible to operate loaded coal trains via a joint through route interchanging at Lamar or Aurora, Missouri, using BNSF and M&NA." Crouch Reb. V.S. at 1. As Mr. Crouch explains, "[t]he criticisms lodged by UP are largely overblown, misstate my initial verified statement, and ignore the reality that the BNSF/M&NA routing is capable of handling loaded unit coal trains at the initial volume levels that Entergy has identified with minimal capital outlays." *Id.*

With respect to the feasibility of the potential interchange locations, Mr. Crouch explains that UP's Mr. Hughes overlooked the fact that Entergy included costs for power switches in its Opening Evidence, that he failed to identify the length of interchange track that Entergy specified in its Opening Evidence, and that he miscalculated the land that would need to be acquired at Lamar. *Id.* at 25-26. Mr. Crouch also demonstrated – based on his inspection of the site – that UP's concerns about the impact of interchange operations on automobile traffic in Lamar were overstated. *Id.* at 27 (describing the limited use of the 21st Street grade crossing in Lamar).

In response to UP's criticisms regarding siding availability, Mr. Crouch also explained that "[t]here are numerous sidings available for staging trains or passing 2 unit coal trains between Lamar and the Independence Plant." *Id.* at 24; *see also id.* ("When meeting local or other shorter freight trains, the unit coal trains can hold the main line for the meet, and have the small local freight trains take the siding, thereby reducing the necessary siding lengths."). Ultimately, Mr. Crouch concluded that it continues to be his opinion that there are ample sidings for passing trains between Lamar and Independence, particularly at the initial volume levels that Entergy contemplates, and that additional sidings could be added, as necessary, when volume levels increase. *Id.*<sup>18</sup>

Finally, Entergy's Mr. Paul H. Reistrup submits a Rebuttal Verified Statement in which he addresses the M&NA's ability to handle loaded unit coal trains over its lines between Lamar, Missouri and ISES in conjunction with BNSF. Mr. Reistrup has fifty years of experience in railroad operations, and has served as the President of Amtrak and the President of the Monongahela Railway (an eastern coal-carrying railroad). Mr. Reistrup explains that, in his opinion, the UP witnesses "have

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<sup>18</sup> Mr. Crouch also points out that "in discovery, UP and M&NA failed to provide originals or copies of originals of any actual rail inspections, rail test car inspections, tie inspection records, geometry car test records, Sperry Rail Service rail test records, or other test results in response to Entergy's requests, yet UP's experts refer in their statements to defects listed in test reports, and actually summarize data from test reports in reply that were requested in discovery, but were not provided (refer to Hughes' workpaper "M&NA Track Evaluation Analysis.pdf")." Crouch Reb. V.S. at 2 n.1. Consequently, any reference in the Defendants' replies to track geometry or other test results should not be considered since the supporting information was not provided to Entergy.

greatly overstated the difficulty that would be encountered in running loaded unit coal trains on the M&NA portion of the requested through route with BNSF.” Reistrup Reb. V.S. at 2. Mr. Reistrup explains that the M&NA’s topography is not too severe for loaded unit coal trains, that UP’s own original routing decision confirms that the through route is not inefficient, and that the staging and siding capacity proposed by Mr. Crouch is sufficient to handle the anticipated Entergy traffic volumes. *Id.* at 3-12.

## CONCLUSION

For the foregoing reasons, Entergy requests that the Board prescribe the requested through route via BNSF-M&NA with an interchange at Lamar, Missouri, or alternatively, at Aurora, Missouri.

In addition, Entergy requests that the Board preclude UP from including tons moving under the prescribed through route in its calculation of annual diverted tons under Section IV of the UP/M&NA Lease.

Because UP could effectively negate the effect of the Board’s action and deprive Entergy of the ability to utilize the prescribed through route by exercising its option under Section 3.01/3.04 to provide exclusive service to Independence, or the option under Section 15(f) to terminate the Lease, the Board also should rule that any such action by UP would constitute an unreasonable practice under 49 U.S.C. § 10702, or, at a minimum, would be subject to challenge by Entergy and other interested parties as an unreasonable practice.

Finally, Entergy requests that the Board confirm 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.

Respectfully submitted,

ENTERGY ARKANSAS, INC. and  
ENTERGY SERVICES, INC.

Cory R. Cahn  
639 Loyola Avenue, 26th Floor  
New Orleans, LA 70113

OF COUNSEL:

Slover & Loftus LLP  
1224 Seventeenth St., N.W.  
Washington, D.C. 20036  
(202) 347-7170

By:

C. Michael Loftus   
Frank J. Pergolizzi  
Andrew B. Kolesar III  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036

Dated: July 9, 2010

Attorneys & Practitioners

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this 9th day of July, 2010, caused copies of the foregoing Rebuttal Evidence and Argument to be served upon the parties of record to this case as follows:

**By email and hand delivery (*Two Copies each of Under Seal and Public Versions*):**

Michael L. Rosenthal, Esq.  
Charles H.P. Vance, Esq.  
Covington & Burling LLP  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

**By email and overnight courier (*Two Copies each of Under Seal and Public Versions*):**

Louis E. Gitomer, Esq.  
Melanie Yasbin, Esq.  
The Adams Building, Suite 301  
600 Baltimore Avenue  
Towson, MD 21204-4022

**By email and hand delivery (*Two Copies each of Under Seal and Public Versions*):**

Adrian L. Steel, Jr., Esq.  
Mayer Brown LLP  
1999 K Street, N.W.  
Washington, D.C. 20006-1101

By email and hand delivery (*Two Copies each of Under Seal  
and Public Versions*):

Eric A. Von Salzen, Esq.  
Alex Menendez, Esq.  
McLeod, Watkinson & Miller  
One Massachusetts Ave., N.W.  
Washington, D.C. 20001-1401

  
Andrew B. Kolesar III



**REBUTTAL VERIFIED STATEMENT  
OF  
RYAN TRUSHENSKI**

My name is Ryan Trushenski. I submitted a Verified Statement on April 7, 2010 in support of Entergy Services Inc.'s ("ESI") and Entergy Arkansas, Inc.'s ("EAI") Second Amended Complaint in this proceeding. I have reviewed the public and/or redacted versions of the Reply submissions provided by the Union Pacific Railroad Company ("UP"), BNSF Railway Company ("BNSF"), and Missouri & Northern Arkansas Railroad Company, Inc. ("M&NA"), including the Verified Statements of F.M. "Rick" Gough (UP) and Tommy Gibson (M&NA). This Rebuttal Verified Statement will respond to various points that are contained in these submissions as they relate to Entergy's coal transportation strategy, deliveries, and reliability concerns.

**I. UP**

UP witness Gough has submitted testimony suggesting that the concerns that Entergy has presented about UP's future ability to provide reliable service are somehow contradicted by Entergy's decision in the aftermath of UP's latest service crisis in 2005-2006. Gough Reply V.S. at 5. In particular, Mr. Gough refers to Entergy's

{

} *Id.* He further notes that more recently, at the  
end of 2009, Entergy informed UP that it intended to {

} *Id.* Mr. Gough claims that Entergy made this decision despite the fact that {

} *Id.*

I can assure the Board that Entergy's decisions with respect to the volumes it ships under the UP Contract were not a vote of confidence regarding UP service levels. Rather, these decisions reflect the reality that {

}

Entergy has a duty to its electric customers to provide service in a cost-effective manner. Preserving the benefits of the UP legacy contract and fully utilizing the rights and privileges available under that contract is consistent with that duty. That said, there is nothing inconsistent with Entergy availing itself of the favorable rates of the UP contract when *UP is willing to perform* its delivery obligations, while at the same time seeking the right to take advantage of alternative transportation arrangements that will protect its transportation requirements when *UP is not willing or able to provide reliable transportation*. In fact, it also would not be inconsistent for Entergy to pay higher rates in order to maintain a BNSF/M&NA alternative to assure reliable service during such periods, particularly given that delivered coal costs tend to be less than other alternatives (*e.g.*, purchased power or natural gas) that we have been forced to rely upon in the past to make up for deficient coal transportation service in the absence of a transportation alternative.

As Entergy explained in earlier phases of this proceeding, Entergy experienced a three-year period (2005-2008) where UP was claiming force majeure under our rail transportation contract for 42% of the time. September 2, 2008 Mohl R.V.S. at 4; July 11, 2008 Mohl V.S. at 7-8. Put another way, for 42% of this time period UP was claiming that it was excused from performing its obligations under the UP/Entergy Contract. While Entergy could turn to BNSF for service at White Bluff during such times, there is currently no similar protection at Independence.

Also, the fact that UP service improved in 2009 and 2010 does not mean that Entergy is no longer concerned that UP service breakdowns may occur in the future. As the evidence in this proceeding demonstrates, there have been recurring periods of severe UP service breakdowns: first, in 1993-1995; second in 1997-1998; and most recently in 2005-2008. While Entergy cannot predict when the next breakdown will occur, UP cannot state with certainty that there will not be a breakdown in the future.

Mr. Gough's statement that Entergy chose to rely entirely upon UP

{

(Gough Reply V.S. at 5), also warrants a response. This statement is not entirely correct.

The current transportation rates that Entergy enjoys under the UP contract {

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<sup>1</sup> ETSI Pipeline Project v. Burlington Northern, Inc., Civil Action No. B-84-979-CA (U.S.D.C., E.D. Tex.).

}

In light of this history, I do not believe it is accurate to state that UP has not

{

of its PRB coal shipments under the UP contract in periods when UP is able, and willing, to fulfill its contract obligations. During such times, UP has a rate advantage. When UP is not able, or willing, to fulfill its obligations, however, that advantage is mooted and the real constraint on diversion becomes whether the transportation alternative can compete with our replacement energy costs (*i.e.*, natural gas or purchased power). It is my

understanding that in each of the three significant periods of service disruptions (1993-1995, 1997-1998, and 2005-2008), it has always been the case that alternative rail transportation would have been a lesser-cost alternative to the replacement energy sources had UP not blocked Entergy's ability to seek assistance from the other carriers.

UP also is wrong to suggest that Entergy's decision {

} Again, Entergy's hope is that UP will honor its contract. It also bears noting that {

} in anticipation of UP service failures should not be misconstrued by the Board as meaningful evidence of any level of confidence in UP service.

## II. M&NA

M&NA suggests that Entergy only requested that M&NA quote a rate because we are interested in rate litigation before the STB. With all due respect to the Board, and contrary to what M&NA may think, Entergy has no interest in incurring millions of dollars of expense to litigate a rate. Instead, we have attempted to engage two seemingly "independent" railroads (M&NA and BNSF) in dialogue that we would have expected them to wholeheartedly embrace in a competitive marketplace. Instead, we have received nothing but stonewalling from these two railroads, who appear more concerned about potential retaliation from a "competitor," than in serving the shipping public.

I also am compelled to respond to MNA's counsel's suggestions that 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," and that Entergy "is using this proceeding to launch a collateral attack on the contract between Entergy and UP." M&NA has absolutely no basis for these factually deficient statements. As explained above, the UP contract has significant value to Entergy *when UP performs*. It is no secret that the rate levels reflected in this contract are favorable to Entergy, and that Entergy believes that it is the *attractiveness of the contract to Entergy* that has caused it to be disfavored during times of service constraint. That harms the public interest in two ways. This treatment increases the harm that Entergy's customers will experience when UP will not, or cannot, perform because it interferes with Entergy's and its customers ability to obtain the full value of the UP legacy contract; and it increases the harm to Entergy and its customers because as a shipper with a low delivered cost, when we are forced to replace low-cost coal-fired generation with higher-cost replacement energy the differential (*i.e.*, the damages) will be larger for Entergy than for those with a higher transportation cost. Entergy has brought this proceeding in the hopes that the Board will assure that an existing transportation alternative can be implemented so that it will be available to maintain reliable coal deliveries even when UP is unable, or unwilling, to perform so that public harm can be minimized during periods of inadequate UP performance.

Equally unfounded is the suggestion by M&NA that Entergy has not been forthcoming in its rate discussions with M&NA. Gibson Reply V.S. at 30. Mr. Gibson

suggests that Entergy did not provide “needed information,” and that specifically a letter I wrote to Mr. Gibson on April 27, 2010 somehow suggests that we “are not seeking a rate to use the M&NA service, but for some other purpose.” *Id.*

The suggestion that Entergy has not provided needed information mischaracterizes both the information that M&NA requested and the response that I provided on behalf of Entergy. First, the information sought was hardly “needed.” For example, to my knowledge, Entergy has never been asked by any railroad that we have ever dealt with to define the operations that the railroad would perform. Entergy does not own locomotives and traditionally has left it to the carriers to determine issues relating to power. Entergy suspects the same is true for all of M&NA’s shippers as well. It is hard to imagine a situation where it would be reasonable for the railroad to expect the shipper to provide the power for a movement or to tell the carriers how the shipper wants the power to be coordinated between the two railroads. Entergy is not a railroad and has no interest in dictating the manner of operations that M&NA and BNSF would use on the proposed through route.

Second, the suggestion that Entergy was not forthcoming with the requested information is contradicted by the very clear responses that we provided to M&NA. As my letter clearly reflects, Entergy *answered* the vast majority of the questions asked, leaving unanswered only the questions that never should have been asked (*i.e.*, questions that are railroad matters) and the questions that the Board so far has been unwilling to address (*i.e.*, questions that relate to whether, and how, the MNA lease penalty provisions will be applied).

M&NA's lawyers also erroneously refer to my April 27, 2010 letter as support for their criticism that Entergy "has asked M&NA to quote a proportional rate between an interchange point with BNSF (most likely Lamar and Aurora) and ISES for unit coal trains." M&NA Reply Argument at 17. This letter, however, makes clear that Entergy has most certainly not demanded a proportional rate. As stated in response to question 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." Thus, Entergy has clearly advised M&NA that Entergy would be willing to accept service under a joint rate quoted by BNSF and M&NA, subject to Entergy's right to challenge any common carrier rates and practices. This reservation, of course, is necessary because the Board has not addressed whether or not it would be an unreasonable practice for UP to impose the penalty provisions and/or take back the line.

### **III. BNSF**

BNSF's Reply filing suggests that it stands ready to cooperate with M&NA to "develop a commercially reasonable BNSF-MNA through route." BNSF Reply at 3. BNSF notes, however, that it has concerns about the economics of such a through route, and in particular needs "an assurance that Entergy will cover BNSF's costs." *Id.* BNSF further suggests that it cannot offer a rate to Entergy for its portion of the through route without knowing how these costs would be recovered. *Id.*

Entergy recognizes that – to the extent capital improvements are necessary to enable a feasible through route – it is reasonable for the participating railroads to recover their costs. Entergy, however, disagrees that it is up to the shipper to figure out those costs and how to assign them. Entergy has requested a rate from BNSF and M&NA. We are willing to, and have, disclosed the volume levels that are available near-term {

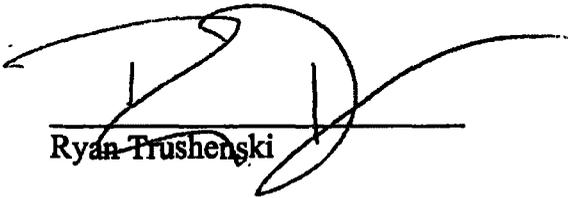
} Entergy assumed that M&NA working with BNSF would be able to identify the costs, if any, that would be incurred in upgrading the interchange and facilities needed to accommodate these volume levels. Entergy further assumed that BNSF and M&NA would have the ability to take these costs, combine them with their estimated costs of service, and develop a rate for the transportation service. As volume levels changed, if at all, Entergy expects that any related additional costs would be factored into future rate discussions. In addition, Entergy would be willing to discuss other arrangements, under a contract, for contributing to financing requirements, but BNSF's and M&NA's unwillingness to engage in any such discussions has prevented any progress of that nature.

Instead of a rational response along the above lines, Entergy has been met with responses from BNSF that suggest that it has no real interest in cooperating with M&NA on the establishment of a through route. Its actions, like M&NA's, have done

nothing to advance this effort and appear instead to be designed only to delay and disrupt Entergy's ability to obtain relief from the restrictions of the UP/M&NA Lease.

## VERIFICATION

I, Ryan Trushenski, verify under penalty of perjury that I have read the foregoing Rebuttal Verified Statement and know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.



Ryan Trushenski

Executed on: July 7, 2010



**REBUTTAL VERIFIED STATEMENT  
OF  
DANIEL B. GRAY**

My name is Daniel B. Gray. I am the same Daniel Gray that submitted a Verified Statement in this proceeding on April 7, 2010. I also submitted a July 11, 2008 Verified Statement (“2008 Statement”) and a September 2, 2008 Rebuttal Verified Statement (“2008 Rebuttal Statement”) in the earlier stages of this proceeding. I am submitting this Rebuttal Verified Statement in response to the Reply Verified Statement that Mr. F.M. “Rick” Gough submitted on behalf of Union Pacific Railroad Company (“UP”) on June 4, 2010.

In my earlier statements, and in particular my 2008 Rebuttal Verified Statement, I addressed many of the points that Mr. Gough is making in his most recent statement. Rather than repeat this testimony again, I am attaching a copy of my 2008 Statement as my Exhibit 1 and my 2008 Rebuttal Statement as my Exhibit 2. The purpose of this Rebuttal Verified Statement is to address the points that I have not already covered in my earlier testimony, and to identify the portions of my past testimony that are responsive to Mr. Gough’s latest Verified Statement.

I. UP’s Interference with M&NA Service and Performance Levels

At page two of his Reply Verified Statement, Mr. Gough states that his earlier testimony explains why Entergy was “wrong” in claiming that the UP/M&NA Lease was an impediment to coal deliveries in three periods in which Entergy experienced significant railroad service disruptions: the 1993-1995 service disruptions

that followed the Midwest flooding in 1993; the 1997-1998 service disruptions that followed the UP/SP merger; and the 2005-2006 service disruptions that followed UP's realization that the Joint Line was in a state of disrepair and needed substantial rehabilitative maintenance. Mr. Gough claims that his earlier testimony in August 2008 showed that none of these periods of disruption were "caused or exacerbated by the UP/M&NA Lease." He also claims that he refuted testimony that UP had denied Entergy requests that UP waive the lease's interchange and contingent rent provisions. Gough Reply V.S. at 2, citing August 2008 Gough V.S. at 3-8.

In my 2008 Rebuttal Statement, I responded to Mr. Gough's claims that the UP/MNA lease did not act as an impediment to Entergy's ability to obtain alternative transportation service during the various UP serviced meltdowns. I demonstrated that Mr. Gough had mischaracterized the events and deceptive methodology through which UP refused to waive the restrictions in the UP/M&NA Lease. Exhibit 2 at 2-3. I explained how UP used its market position to leverage Entergy into withdrawing the request for a waiver as a *condition to* UP's proposed plan to increase coal deliveries to Independence and White Bluff. *Id.* As I noted, this withdrawal was under duress. It did not take Entergy long to realize that UP would not live up to its promise and delivery levels quickly deteriorated once UP got us to withdraw the request. *Id.*

Significantly, I see that Mr. Gough has not disagreed with my earlier testimony. Instead, he simply says he has already addressed Entergy's testimony about the role of the lease. In fact, my 2008 Rebuttal testimony as to the 1993-1995 events has

never been rebutted. Accordingly, by only incorporating Mr. Gough's August 2008 UP verified statement, UP has never responded to my rebuttal on these points.

Similarly, Mr. Gough's reference to his August 2008 verified statement does not respond to my rebuttal testimony regarding the 1997-1998 service problems. Gough Reply V.S. at 2. I addressed Mr. Gough's testimony regarding 1997-1998 at pages 3-5 of my 2008 Rebuttal. Exhibit 2 at 3-5. Mr. Gough's Reply V.S. ignores the points that I made in response to his characterizations of the 1997-1998 facts. Again, Mr. Gough's incorporation of his August 2008 statement without addressing my rebuttal points to that statement leaves my responses on those points unrebutted.

Mr. Gough also is incorrect in his statement that his prior testimony showed that Entergy never asked UP to allow alternate BNSF-M&NA service to Independence in 2005-2006. Gough Reply V.S. at 3, citing Gough August 2008 V.S. Again, Mr. Gough claims his earlier testimony addressed the issue when, in fact, my 2008 Rebuttal has already explained why his testimony was inaccurate and/or misleading. For example, one of the points that I made in September 2008 was that neither M&NA nor UP offered any facts to rebut my comments concerning the discussions I had with M&NA personnel about whether UP would allow M&NA to assist during the 2005-2006 crisis. Exhibit 2 at 6. Neither Mr. Gough nor M&NA have rebutted my comments in their replies here.

I have also already explained the flaws in Mr. Gough's testimony that "UP's service to the Independence plant since the 2005-2006 period has been strong." Gough Reply V.S. at 5-6. Mr. Gough refers to statistics that are based on comparisons of UP's deliveries to information provided through the National Coal Transportation

Association (“NCTA”). As I explained in my earlier Rebuttal, UP’s performance obligation is defined by the coal transportation agreement, and not the non-binding NCTA nomination process. Exhibit 2 at 7-8. As I showed in that testimony, UP delivered only { } of our contract declarations in 2005 and only 92.7% in 2006, leaving Entergy short almost { } million tons. *Id.* That shortage was enough coal to run one unit of the Independence station for almost an { }

## II. BNSF’s Performance Levels

At page 3 of his Reply V.S., Mr. Gough suggests that BNSF’s service was also affected by the impairment of the Powder River Basin (“PRB”) Joint Line in 2005-2006 and that BNSF was not in a position to provide new service to Independence. He further notes that UP “encouraged” Entergy to shift tons to the BNSF for delivery to White Bluff, so that UP could divert train sets from White Bluff service to Independence service. He even suggests that UP was performing at a level higher than BNSF at the White Bluff plant, and at an even higher level at Independence.

Mr. Gough’s characterization of BNSF’s service levels during 2005-2006 is wrong for several reasons. First, he bases his conclusion on an analysis of NCTA percentage deliveries, rather than on a comparison of deliveries to the contract performance standards that govern. BNSF’ 2005 service levels, when properly considered based on contract performance standards and contract nominations, were comparable to UP’s. BNSF only claimed force majeure for a three week period and worked diligently with us to honor its contract commitments. UP, on the other hand,

sought to avoid its delivery obligation by claiming force majeure for nearly seven months.

As to Mr. Gough's suggestion that UP's supposed offer to allow BNSF to deliver more coal to White Bluff would allegedly freeing trains for Independence service, UP was simply looking to be relieved of its obligations under its coal transportation agreement with Entergy. It was our view, and remains our view, that UP's underlying service failures were not relieved by its claim of Force Majeure – a claim that we challenged in the Arkansas State Court litigation initiated by UP. As was often the case, UP's offer to “help” by allowing BNSF to move more tons was not without strings – it would have required us to release UP from its obligation to transport coal to White Bluff under our contract. As I noted in my September 2008 Rebuttal, release from the volume commitment in our contract simply would have freed UP to move more tons to its higher revenue coal shippers – shippers that we believed were already benefitting at our expense. Exhibit 2 at 7.

I have also been advised that UP has criticized Entergy's URCS calculations because Entergy's expert, Tom Crowley, determined the distance from the PRB coal mines based on an average distance. It is my understanding that Mr. Crowley used the average distance based on an assumption that Entergy will be purchasing coal for Independence from a variety of sources in future years. Crowley V.S. at 8. By contrast, UP apparently assumed that Entergy would continue to source all of its Independence coal from the PRB mines from which it obtained coal in 2009.

The assumption that Entergy will continue to purchase coal for ISES from the same PRB mines and in the same quantities in future years is not well-founded.

{

}

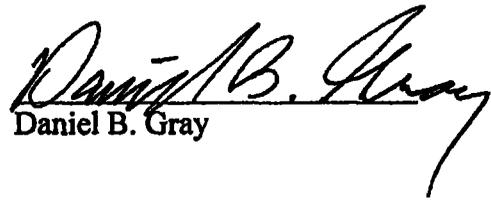
In 2011 Entergy plans to take approximately {

} Entergy does not have coal supply commitments that go beyond { } at this time, and will make any coal source determinations based on economic and quality considerations for these and all other presently uncommitted tonnages. Given the many sources that are available, there is no basis for UP's assumption the coal that Entergy could potentially ship to Independence

via the requested through route in the forthcoming years necessarily would originate at the same 2009 sources from which Entergy purchased coal (and in the same proportion).

## VERIFICATION

I, Daniel B. Gray, verify under penalty of perjury that I have read the foregoing Rebuttal Verified Statement and know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
Daniel B. Gray

Executed on: July 8, 2010



**VERIFIED STATEMENT  
OF  
DANIEL B. GRAY**

My name is Daniel B. Gray. I am currently Administrator Coal Transportation for Entergy Services, Inc. ("ESI"). My business address is 10055 Grogan's Mill Road, Parkwood II Building, Suite 300, The Woodlands, TX 77380.

I have been employed by an Entergy company since 1980, when I began my Entergy career with Gulf States Utilities Company (now Entergy Gulf States

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coal-fired generating plants, the White Bluff Steam Electric Station ("White Bluff") and the Independence Steam Electric Station ("Independence").

In my current position at ESI I am responsible for the day-to-day administration of Entergy's coal transportation arrangements for all of the coal fired generating stations which it operates. These duties include involvement in the procurement, negotiation and administration of the coal transportation

Gray Ex 1  
PUBLIC

contracts for the three coal-fired generating plants operated by Entergy. I have responsibility for scheduling deliveries, managing trainsets, and coordinating with the railroads, the generating plants and mines to make sure that our trainsets are operating as efficiently as possible. I am also involved in transportation planning activities.

In the course of my duties relating to the Independence Station I have reviewed and become familiar with the 1992 lease agreement between the Union Pacific Railroad Company (“UP”) and the Missouri & Northern Arkansas Railroad (“M&NA”) (*see* Counsel’s Exh. No. 1), elements of which Entergy is challenging through its Complaint in STB Docket No. 42104 and Petition for Revocation of Exemption in STB Finance Docket No. 32187. I am submitting this Verified Statement to provide factual details relating to how the terms of the UP/M&NA Lease have been a serious impediment to Entergy’s ability to obtain all of the coal deliveries that have been needed at the Independence Station since the lease became effective in 1992.

#### The M&NA/UP Lease Agreement

Since 1983, UP has delivered PRB coal to White Bluff and Independence pursuant a series of coal transportation agreements. Initially the coal was originated by UP and interchanged with the Missouri Pacific Railroad Company (“MP”) at Kansas City. MP then transported the coal via its Carthage Subdivision – which is included in the line currently operated by M&NA – for delivery to

Independence.<sup>1</sup> MP continued to move the coal over this routing from 1983 until 1989, when UP – which by then had acquired control of MP – proposed a reroute of the traffic over its own lines to North Little Rock and then over to Diaz, from which point UP would move over a short stretch of MP trackage to the Independence plant. Entergy agreed to the changed routing based on assurances that service would not be less efficient, along with some contract concessions that were designed to compensate Entergy for the increased mileage on its railcars.

In 1992, UP transferred virtually all of its Carthage Subdivision to M&NA. I have personally reviewed the agreements relating to this transaction in the course of performing my duties for ESI. In total, the line at issue was comprised of about 491 miles of track in Arkansas, Missouri and Kansas. In transferring this line to M&NA, UP sold a 102 mile stretch located in the middle of the Carthage Subdivision between Bergman, Arkansas and Guion, Arkansas, and entered into a long term lease agreement covering the east and west ends. The M&NA/UP lease agreement covers approximately 389 miles of track. On the east end, UP leased the track between Guion and Diaz Junction, Arkansas. On the west end, UP leased the track between Bergman, Arkansas and Pleasant Hill, Missouri, and some connecting branch lines.

After the sale/lease of the Carthage Subdivision to M&NA, UP asked Entergy to consent to the use of M&NA as a subcontractor for performing all

---

<sup>1</sup> Prior to the execution of the 1983 Agreement, Independence coal was transported pursuant to a tariff arrangement that involved Burlington Northern Railroad Company transporting the coal from PRB origins to Kansas City for interchange to MP, with MP then delivering the coal to Independence.

services for UP between Newport, Arkansas and the Independence plant. By agreement dated May 27, 1993, Entergy agreed to this request. *See Counsel's Exh. No. 6.* This agreement, however, was conditioned on Entergy's right, on seven days' notice to UP, to require UP to resume performance of these services in lieu of M&NA at Entergy's request.

From 1993 through 1998, the Independence coal continued to be routed through North Little Rock and Diaz for interchange to M&NA. During this period, the portion of the Carthage Subdivision west of Independence was not utilized for either empty or loaded coal trains. As explained below, in the Fall of 1997, M&NA moved some empty trains west from Independence to interchange with UP at Kansas City on a temporary basis. In 1998, the carriers adopted this routing for all Independence empties. Currently, M&NA interchanges loaded coal trains with UP at Diaz, Arkansas, delivering the loaded coal trains to Independence for unloading and returning the unloaded coal trains via its line to Kansas City for interchange with the UP.

M&NA maintains interchanges with other railroads, although as others explain and as my experience detailed below has confirmed, the lease contains restrictions that render these interchanges with other carriers ineffective for Entergy's purposes. In particular, there are provisions in the lease that require M&NA to pay UP a "rental" payment that is inversely related to the percentage of traffic it interchanges with carriers other than UP, i.e., the lower the percentage of total traffic that M&NA interchanges with UP, the higher the rent payment that

M&NA must pay to UP. This effectively restricts the amount of traffic that M&NA can economically interchange with carriers other than the UP. M&NA has physical interchanges with the BNSF Railway Company (“BNSF”) at Lamar, Aurora, and Springfield, Missouri, as well as Fort Scott, Kansas. M&NA also has physical interchange capability with BNSF and Kansas City Southern Railway Company (“KCS”) at Kansas City, and with KCS at Joplin, Missouri.

#### The 1993-1995 Service Crisis

I first became aware of the restrictive nature of the M&NA/UP Lease Agreement in connection with serious coal delivery shortfalls that Entergy experienced at its Arkansas coal plants in 1994-1995. UP initially blamed these problems on inventory rebuilding following severe flooding in the Midwest that occurred in the summer of 1993. However, it became apparent that other significant factors also contributed to the shortfall including sharp increases in UP coal traffic in 1994 and 1995, questions concerning adequate rail capacity to handle the increased volumes, and difficulties associated with the UP’s integration of the newly acquired Chicago & Northwestern Transportation Company. The combination of these events put Entergy’s coal deliveries at significant risk throughout 1994 and into 1995. For example, in 1994 alone, UP incurred deficit tonnages to Entergy { ██████████ } tons out of a total planned annual volume of 13 million tons.



was lost during this curtailment, Entergy had to resort to purchased power at substantially higher costs than would have been experienced had UP either delivered all the coal that Entergy needed or allowed BNSF/M&NA to deliver supplemental coal to replace the coals that UP was not delivering.

### The 1997-1998 Service Crisis

Regrettably, history repeated itself in 1997 and 1998. During the second quarter of 1997 Entergy began noticing that cycle times to Independence were increasing at an alarming rate. The service problems continued through the remainder of 1997 and 1998. Once again, Entergy experienced significant delivery shortfalls exceeding { [REDACTED] } tons.<sup>2</sup> Entergy again curtailed generation at its Arkansas plants in an effort to conserve coal, and was faced with the need to replace lost generation with either alternate coals or other replacement energy sources, such as purchased power, at substantially higher cost to its consumers.

I was involved in the efforts to obtain much-needed supplemental coal deliveries during the 1997-1998 UP service crisis. These efforts were detailed for the Board by Mr. Charles W. Jewell, Jr., then Director of Coal Supply for ESI, in a Verified Statement submitted on October 23, 1997 in Finance Docket No. 32760 and 32760 (Sub-No. 21) (Copy attached as Exhibit DBG-4). I reported to Mr. Jewell in 1997 and was aware of the events Mr. Jewell describes in his statement.

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<sup>2</sup> Entergy sued UP in Federal District Court in Nebraska for breach of contract relating to these delivery shortfalls. The District Court ruled that UP had breached the parties coal transportation agreement in creating deficit tons, and failing to make up those tons. See *Entergy Services, Inc. v. Union Pacific R.R.*, 35 F. Supp. 2d 746 (D. Neb. 1999). The case was ultimately settled by the parties in the summer of 2000.

In addition, I participated in the efforts to obtain UP's consent to allow supplemental deliveries via BNSF/M&NA.

As the service crisis dragged on into 1998, Entergy renewed its request to UP for permission to allow BNSF/M&NA to move supplemental coals to Independence. On April 7, 1998, Mr. Jewell asked UP to allow BNSF to use trackage rights that it had obtained in the UP/SP merger so that it could reach Diaz and then interchange trainsets to M&NA. See Exhibit DBG-5. Entergy noted that the continuing deficits were causing curtailments and that Entergy was incurring "very substantial additional costs for electricity generation from natural gas and for power purchases." *Id.* at 2. Even worse, Entergy noted that the delivery shortfalls had Entergy "in a very precarious position with regard to its ability to meet system demands for electricity this coming summer." *Id.* Despite these dire circumstances, { [REDACTED]

[REDACTED].<sup>3</sup> [REDACTED]  
[REDACTED]  
[REDACTED].

The 2005-2006 Service Crisis

While service levels were somewhat stable during 2000-2004, Entergy began to see service declines going into the first quarter of 2005. By the Second Quarter of 2005, the declines had once again reached the crisis point. As has been

---

<sup>3</sup> { [REDACTED] }.

much-publicized, UP claimed that the disruptions in the delivery chain were the result of a claimed *Force Majeure* event relating to deterioration of track conditions on the PRB Joint Line. UP made clear in public statements, as well as in its direct communications with Entergy, that it was not going to be able to deliver all of the coal that Entergy required under its Coal Transportation Agreement for Independence until rehabilitative maintenance was completed on the Joint Line. Instead, UP announced its intention to ration coal to its PRB shippers while it repaired its lines, and that each shipper would be receiving approximately 85% of its need.

In an effort to mitigate the harms that were being caused by the UP delivery shortfalls – shortfalls that we did not believe were the product of events beyond UP’s control – Entergy again looked at potential alternative sources of coal to replace the UP under-deliveries. Among the alternatives that we looked at was the possibility of moving foreign coals to Independence through the Illinois Central’s Rail Marine Terminal (“ICRMT”) at Convent, Louisiana. There were at least two potential routings available from ICRMT. One involved CN/UP/M&NA, and the other involved CN/KCS/M&NA. Given the significant service issues that UP was experiencing on its system, and that Entergy was using CN/KCS to transport foreign coal to another one of its plants, Entergy decided that it made sense to pursue the CN/KCS/M&NA option.

Discussions with M&NA continued between March and October. { [REDACTED]

[REDACTED] } Because of

the urgent need for supplemental coal, Entergy was forced to abandon discussions

with CN/KCS/M&NA and to deal with UP for the UP/CN/M&NA move.

Unfortunately, it was not until 2007 that we were finally able to move the tons.

Our experience in 2006 with M&NA confirmed, once again, that the absence of an independent M&NA left Entergy in a very precarious position with regard to its ability to meet system demands for electricity during summer peak burn periods. Because of UP's service difficulties, Entergy again – marking the third time since the UP/M&NA lease was executed – had to curtail generation at its Arkansas coal stations in order to conserve coal. For the period from the First Quarter of 2005 through the Fourth Quarter of 2006, UP created deficits of approximately { [REDACTED] } under our rail agreement. Once again, the absence of the ability to supplement coal deliveries, in part due to the UP/M&NA lease restriction, caused Entergy to incur substantial additional costs in order to replace the generation that could have been produced had UP delivered all the coal that Entergy required.<sup>4</sup>

### Conclusion

As the above experience reflects, the presence of the paper barrier in the UP/M&NA lease has been a very effective bar to M&NA's ability to interchange traffic with BNSF for delivery of supplemental coals to Independence Station during UP's various service crises. But for this restriction, Entergy could have

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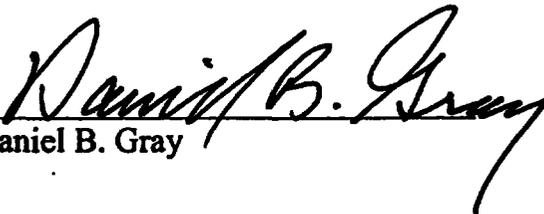
<sup>4</sup> UP and Entergy again found themselves in litigation – this time in State Court in Arkansas. See *Union Pacific R.R. v. Entergy*, No. CV2006-2711, In the Circuit Court of Pulaski County, Arkansas, Sixth Division. UP initially commenced the litigation and requested a declaratory ruling that its performance was excused because of a Force Majeure event. Entergy counterclaimed for breach of contract. The litigation was recently settled in April 2008.

avoided, or at least minimized, the need to curtail generation during each of these service crises, thereby greatly reducing the costs to its consumers.

VERIFICATION

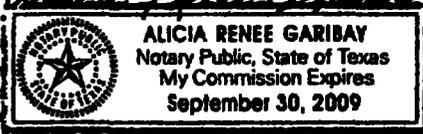
STATE OF TEXAS        }  
                                  }  
COUNTY OF HARRIS    }        ss:

**DANIEL B. GRAY**, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

  
Daniel B. Gray

Subscribed and sworn to before me this  
9 day of July 2008

My Commission expires September 30, 2009

COUNTY OF MONTGOMERY, Texas

**EXHIBIT DGB-1 TO DBG-3**

**REDACTED**

**EXHIBIT DGB-4**

BEFORE THE  
SURFACE TRANSPORTATION BOARD



UNION PACIFIC CORPORATION, UNION )  
PACIFIC RAILROAD COMPANY, AND )  
MISSOURI PACIFIC RAILROAD COMPANY )  
-- CONTROL AND MERGER -- SOUTHERN )  
PACIFIC RAIL CORPORATION, SOUTHERN )  
PACIFIC TRANSPORTATION COMPANY, )  
ST. LOUIS SOUTHWESTERN RAILWAY )  
COMPANY, SPCSL CORP., AND THE )  
DENVER AND RIO GRANDE WESTERN )  
RAILROAD COMPANY )

Finance Docket Nos. 172769  
and 32760 (Sub No. 21118)

PETITION OF ENTERGY SERVICES, INC.  
AND ENTERGY ARKANSAS, INC. FOR  
MODIFICATION OF DECISION NO. 44 OR, IN  
THE ALTERNATIVE, FOR ADDITIONAL CONDITION

PUBLIC, REDACTED VERSION

ENTERGY SERVICES, INC. and its  
affiliate ENTERGY ARKANSAS, INC.

By: O. H. Storey  
Deputy General Counsel  
Entergy Services, Inc.  
Mail Unit L-ENT-26D  
639 Loyola Avenue  
New Orleans, LA 70113

OF COUNSEL:

Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036

C. Michael Loftus  
Frank J. Pergolizzi  
Andrew B. Kolesar III  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036  
(202) 347-7170

Dated: October 23, 1997

Their Attorneys



Entergy Corporation is an investor-owned public utility holding company registered pursuant to the Public Utility Holding Company Act of 1935. The Entergy operating companies include Entergy Arkansas, Inc. ("Entergy Arkansas", formerly known as Arkansas Power & Light Company); Entergy Gulf States, Inc. (formerly Gulf States Utilities Company); Entergy Louisiana, Inc. (formerly Louisiana Power & Light Company); Entergy Mississippi, Inc. (formerly Mississippi Power & Light Company); and Entergy New Orleans, Inc. (formerly New Orleans Public Service, Inc.). ESI is a wholly-owned subsidiary of Entergy Corporation, and acts as agent for the above-named operating companies in acquiring fuel and related transportation for their coal-fired power plants. In this Verified Statement I will focus in particular on Energy Arkansas.<sup>1</sup>

The purpose of this testimony is to provide the Surface Transportation Board ("Board") with facts concerning the present critical situation faced by Entergy as a result of UP's continuing and very severe service problems in transporting coal to Entergy Arkansas' two large coal-fired plants in Arkansas, the White Bluff Steam Electric Station ("White Bluff") and the Independence Steam Electric Station ("Independence"). I will also demonstrate Entergy's need for modification of the White Bluff build-out preservation condition imposed by the Board in granting merger authority to Union Pacific Railroad Company

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<sup>1</sup> I will refer to ESI and Entergy Arkansas, Inc. collectively as "Entergy" in my testimony.

("UP") and Southern Pacific Transportation Company ("SP") in 1996. This condition, which I will refer to as the "White Bluff condition", is described in more detail on page 2 of Entergy's accompanying Petition for Modification in this proceeding.

I. BACKGROUND

Entergy Arkansas produces, distributes and sells electric power to approximately 600,000 residential, commercial and agricultural customers located in 63 counties in Arkansas, and also engages in the wholesale power market. Its White Bluff and Independence plants collectively consist of four units (two at each plant), with a combined capacity of approximately 3,337 megawatts. Each plant normally burns approximately 6.5 million tons of coal annually, or 13 million tons in total, all of which is produced in the southern Powder River Basin of Wyoming, and all of which is transported to the plants by rail (specifically, by UP). Entergy's present coal supply and transportation arrangements for the White Bluff and Independence plants are described at pp. 5-8 of the Verified Statement of Roy A. Giangrosso (who was then ESI's Director, Coal Supply) in Entergy's Comments in this proceeding served March 29, 1996.

Entergy's present rail transportation contract with UP, known as the "Interim Agreement", whose term runs through

requires that 100% of the coal

destined to White Bluff and Independence be transported by UP. Unfortunately, the level of service

provided by UP in transporting coal to these plants under the Interim Agreement is abysmal. As I will describe in more detail below, UP is completely failing to meet the service standards set forth in the Interim Agreement, with the result that Entergy is unable to receive all the coal these plants need to meet their generation requirements. Entergy has been forced to curtail burn (and thus generation) at these plants, and either purchase more expensive power from the grid or use more expensive gas generation.

In order to remedy the present situation, which is growing to near-critical proportions due to UP's continuing service crisis in the south-central part of the nation, Entergy must supplement UP's inadequate coal transportation service with transportation by other rail carriers, in particular the Burlington Northern and Santa Fe Railway Company ("BNSF") -- which also serves the PRB mines in Wyoming -- at White Bluff.<sup>2</sup> It is for this reason that Entergy is requesting the Board to modify the White Bluff condition previously imposed in approving the UP/SP merger to enable BNSF to serve the White Bluff plant immediately, without waiting for construction of the build-out.

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<sup>2</sup> BNSF service to White Bluff would enable UP to concentrate on providing service to Independence.

The build-out involves construction of a 21-mile line to a connection with the former SP Memphis-Houston line at Pine Bluff, AR. BNSF was granted trackage rights over this line as a condition to the UP/SP merger, and the White Bluff condition will enable BNSF to use these trackage rights to access the White Bluff plant after the build-out is completed. It will take approximately three years to construct the build-out, from engineering design to final completion, so completion will not occur until approximately the year 2001. In the interim, without the relief requested herein, Entergy must rely on UP to haul coal to its Arkansas power plants -- a totally unacceptable situation considering UP's failure to meet Entergy's coal delivery requirements.

## II. UP's CONTRACTUAL SERVICE COMMITMENTS

Entergy presently operates 18 trainsets, each consisting of 115 high-capacity aluminum cars acquired by Entergy in 1995, in PRB coal service to the White Bluff and Independence plants. The economics of acquiring and using this equipment are dependent on an assured level of rail service. Thus, Entergy's Interim Agreement with UP (which became effective in 1990) contains a service standard, under which UP has committed to transporting coal from the PRB mines to White Bluff

"Elapsed Transit Time" (excluding specified time for loading coal trains at the mines and unloading them at the plants) of        hours in the case of White Bluff and        hours in

the case of Independence. If UP fails to meet its Elapsed Transit Time , it then has a deficit, which it must make up . If UP incurs a deficit and fails to make it up it is obligated to pay Entergy liquidated damages

UP is also under an express contractual obligation to exercise good faith in avoiding the creation of deficits. It is Entergy's position that the make-up and liquidated damages provisions of the Interim Agreement are not intended to be used as substitutes for contract transit time requirements in the chronic, pervasive manner that UP has resorted to in recent years.<sup>3</sup>

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<sup>3</sup> Virtually identical service standards are also contained in Entergy's original rail transportation contracts with UP and its then-partner, the Chicago and North Western ("CNW"), and with Missouri Pacific, which were signed in 1983. These agreements are also described in Mr. Giangrosso's Verified Statement filed as part of Entergy's Comments of March 29, 1996.



no improvement in UP's cycle times

and the deficit is growing at an accelerated rate.

As a direct result of UP's dismal performance in transporting coal to the White Bluff and Independence plants, the inventory of coal stockpiled at the plants, which Entergy attempts to keep at a level equal to days' projected coal burn, has rapidly dwindled. At present, the inventory amounts to only days at White Bluff and days at Independence. The reduced inventories, with no prospect of improvement in UP's service, have resulted in Entergy Arkansas' curtailing burn (and thus the generation of electricity) at these plants. As a result, the Entergy system (which is economically dispatched) has had to purchase more expensive power from the grid and shift more generation to its expensive gas-fired plants. Given UP's virtual service meltdown south of Kansas City, which Entergy does not expect UP to be able to remedy in the foreseeable future, the situation is becoming critical for Entergy (and, I understand, for other utilities particularly in Texas).

### III. ENTERGY'S ATTEMPTS TO USE ALTERNATE RAIL SERVICE

Entergy has repeatedly informed UP of the vital importance of compliance with its service commitments under the Interim Agreement, and of the worsening situation in terms of inventory and reduced coal burn at the White Bluff and Independence plants. Entergy has had several meetings and conference calls with UP, to no avail. Finally, on September 23, 1997, I

wrote to UP's Senior Vice President in charge of coal marketing and transportation, Art Peters, and informed him that the situation had deteriorated to the point where Entergy believed UP had materially breached its contractual obligations under the Interim Agreement. A copy of my letter to Mr. Peters is attached hereto as Exhibit CWJ-1.

My September 23 letter also requested UP's permission to waive the 100%-volume requirement of the Interim Agreement, and sought UP's cooperation in making alternative transportation arrangements with other carriers, in particular BNSF. Finally, we requested definitive assurances from UP as to its ability to meet its contracted service standard in the future, and indicated that the matter had to be resolved by September 30, 1997.

Mr. Peters did not respond to my September 23 letter until late on October 3, 1997 (after the lawsuit discussed below had been filed). A copy of Mr. Peters' October 3 letter is attached hereto as Exhibit CWJ-2. To say the least, his response did not provide the kind of assurances Entergy had requested

Equally important, Mr. Peters' October 3 letter rejected Entergy's request that UP waive the volume requirements of the Interim Agreement and cooperate with Entergy in arranging alternative transportation service with other carriers to help Entergy through the present crisis.



Given UP's continuing service deterioration<sup>5</sup> and its refusal to respond in a meaningful way to our requests for cooperation in resolving the present crisis, on October 3, 1997, Entergy filed suit in the United States District Court for the Middle District of Louisiana alleging that UP has materially breached both the Interim Agreement and the underlying 1983 Agreements due to its continuing failure to meet the contractual service standards, and seeking both the right to terminate the agreements and damages. Entergy Services, Inc. and Entergy Arkansas, Inc. v. Union Pacific Railroad Company, Civil No. 97-967-B-M3 filed October 3, 1997. A copy of the complaint in this action is attached hereto as Exhibit CWJ-3.

The modified condition being sought here would remove an impediment to Entergy obtaining effective relief through the federal court action. With the modified condition, Entergy would be able to make alternative transportation arrangements with BNSF.

#### IV. CONCLUSION

UP's present service difficulties are a direct result of its haste and failure to plan adequately in implementing its merger with SP. Entergy urgently needs the Board's help in

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<sup>5</sup> As an example of how bad things are, on September 29, 1997 one of our trains was released after unloading at the White Bluff plant. UP then took the empty train to Durand, KS, where it arrived on September 30. The train was then parked on a siding and the locomotives removed. This train was finally returned to service on October 11, but other trains either are not moving or have been removed from service from time to time.

obtaining substitute rail service to make up for UP's merger-related inability to keep the White Bluff and Independence plants supplied with coal.

On behalf of Entergy, I respectfully urge the Board to modify the White Bluff build-out condition to enable BNSF to serve the White Bluff plant directly, using its existing trackage rights over the UP line that passes right by the plant, until Entergy is able to construct the build-out.



Entergy Services, Inc.  
Parkwood II Building, Suite 300  
10055 Grogans Mill Road  
The Woodlands, TX 77380  
Tel 281 297 3562

Charles W. Jewell, Jr.  
Director  
Coal Supply

September 23, 1997

VIA FACSIMILE AND  
CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Mr. Art Peters  
Senior Vice President  
& General Manager  
Union Pacific Railroad Company  
1416 Dodge Street, Room 500  
Omaha, NE 68179

RE: Breach of Railroad's Service Commitments

Dear Mr. Peters:

Entergy Arkansas, Inc. currently receives rail transportation services to its Arkansas coal plants from Union Pacific Railroad Company pursuant to Interim Rail Transportation Agreement ICC-WRPI-C-0065, dated October 1, 1991, which superseded certain provisions of Agreement ICC-UP-C-0505 and Agreement ICC-MP-C-0430. Upon termination of the interim agreement, the terms of Agreements ICC-UP-C-0505 and ICC-MP-C-0430 again are applicable, subject to amendment/renegotiation.

Entergy's coal plants in Arkansas have experienced significant shortages in coal deliveries from Union Pacific. As a result of these delivery shortages and Union Pacific's failure to meet the service standards set forth in the agreement, Entergy, among other things, has been forced to curtail its coal burns, seek alternate fuel sources and purchase electric power from other sources, all to the detriment of Entergy and its ratepayers.

Based on Union Pacific's actions and its inadequate responses to concerns expressed by Entergy representatives, Entergy believes that Union Pacific has breached its contractual obligations under the agreement. Specifically, Entergy believes that Union Pacific, among other things, has failed and refused to abide by the contractual obligations with respect to cycle times, minimum train lading weight and the good faith obligation to avoid creating deficit tonnages.

ENT0536

Mr. Art Peters  
Page 2  
9/23/97

While the agreement provides for deficit service payments, such payments do not provide an adequate remedy. Union Pacific's persistent and continuing failure to meet its cycle time commitments under the agreement, and its continued failure and refusal to make good faith efforts to avoid deficit tonnages as required by our agreement are unacceptable. Such failure and refusal are causing Entergy substantial and irreparable harm, and constitute a material breach of the agreement. Among other things, and without waiving any other alternatives available to it, given the current near-emergency situation with respect to the coal inventory at the White Bluff and Independence plants, Entergy will explore immediately options (1) with respect to the movement of coal to the Independence plant via Burlington Northern Santa Fe and Missouri & Northern Arkansas Railroads; (2) for the barge delivery of coal to the White Bluff plant, and (3) for the movement of coal via BNSF to Pine Bluff, Arkansas, and thence via Union Pacific to the White Bluff Plant.

Entergy expects that Union Pacific will cooperate with it in every respect in its efforts to make alternative transportation arrangements with alternate providers. You are requested to provide information with respect to any restrictions that may exist with respect to the M&NA's delivery of coal to White Bluff in connection with BNSF, and to waive such restrictions. You are also requested to provide Entergy with a rate for the movement of trainloads of coal in Entergy cars between a point of interchange with BNSF at Pine Bluff, Arkansas, and the White Bluff plant, that can be used in combination with a BNSF rate from the Powder River Basin mines to Pine Bluff.

Additionally, Entergy demands adequate assurances from the Union Pacific as to its ability to meet its cycle time commitments under the agreement from this date forward, and as to its ability to transport all deficit tonnage that has accrued and that will accrue so as to become completely current and remain current. In order to receive adequate assurances with respect to these issues, it will be necessary for Union Pacific to provide documentation sufficient to enable Entergy to perform a due diligence review of Union Pacific's operations with a view toward satisfying itself with reasonable certainty as to Union Pacific's ability to perform in accordance with any such assurances. Entergy expects that Union Pacific will cooperate in making information available for this purpose.

Mr. Art Peters  
Page 3  
9/23/97

While Entergy will be pursuing these alternatives, it in no way considers these to be the only remedies available to it. Under the circumstances, Entergy intends to evaluate all of its remedies. We plan to resolve this matter no later than September 30, 1997. Please contact me immediately so that we may discuss this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'CWJ', followed by a long horizontal flourish.

jb

cc: James F. Kenney

bcc: Ms. Kelly Cupero  
Mr. Chris Mills, Slover & Loftus  
Mr. Bud Storey

**EXHIBIT CWJ-2**

**REDACTED**

COPY  
ORIGINAL FILED  
USDC MD/LA

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA

97 OCT -3 PM 4:16

RICARDO T. MARTIN  
CLERK

ENERGY SERVICES, INC. AND \*  
ENERGY ARKANSAS, INC., \*  
 \*  
PLAINTIFFS, \*  
 \*  
VERSUS \*  
 \*  
UNION PACIFIC RAILROAD COMPANY, \*  
 \*  
DEFENDANTS. \*  
 \*  
\* \* \* \* \*

CV NO. 97-967-B-M3

C O M P L A I N T

Plaintiffs, Entergy Services Inc. ("ESI") and Entergy Arkansas, Inc. ("Entergy Arkansas") (collectively referred to herein as "Entergy"), complain of defendant Union Pacific Railroad Company ("UP") as follows:

Jurisdiction and Venue

1.

This is a civil action in which the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states. This Court has jurisdiction of the parties and the subject matter pursuant to 28 U.S.C. § 1332.

2.

Venue is properly in this Court pursuant to 28 U.S.C. §1391(a), because UP resides in this judicial district; UP owns, controls and operates railroad lines and other facilities

approximately 13.0 million tons annually at both plants. 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.

8.

Since August of 1984, Entergy Arkansas' PRB coal has been transported to its White Bluff and Independence plants pursuant to long-term rail transportation agreements. The first of these agreements was entered by and between Entergy Arkansas, UP, and two UP predecessor companies, Western Railroad Properties, Incorporated ("WRPI") and Chicago and North Western Transportation Company ("CNW"), on July 22, 1983, and provided for the transportation of coal originating in the PRB and destined for Entergy Arkansas' White Bluff and Independence plants (the "UP Agreement"). A related agreement was executed the same day by and between Entergy Arkansas and another UP predecessor company, Missouri Pacific Railroad Company ("MP") (the "MP Agreement"). (The UP Agreement and the MP Agreement are collectively referred to herein as the "1983 Agreements"). The 1983 Agreements became effective upon their approval by the Interstate Commerce Commission ("ICC") pursuant to 49 U.S.C. § 10713, and are identified as Contract Numbers ICC-UP-C-505 and ICC-MP-C-0403.

9.

The UP Agreement provided for the transportation of coal between the PRB mines and Kansas City, Missouri/Kansas; the MP Agreement provided for the transportation of the same coal from

Kansas City, Missouri/Kansas to the White Bluff and Independence plants. Use of both agreements was necessary to provide for the continuous rail carriage of coal from the PRB to the White Bluff and Independence plants.

10.

On October 1, 1991, Entergy Arkansas, UP, WRPI, CNW and MP entered an Interim Rail Transportation Agreement ("Interim Agreement"), ICC-WRPI-C-0065, which was also approved by the ICC. The Interim Agreement is currently in effect. A recent amendment to the Interim Agreement provides that the parties will negotiate market-based rates for the movement of PRB coal to White Bluff and Independence by rail starting in the year 2000.

11.

Both the 1983 Agreements and Interim Agreement set forth the rates, services and other terms and conditions governing transportation of coal by UP between PRB mine origins in Wyoming and the White Bluff and Independence plants. The agreements contain confidential provisions that prohibit disclosure of certain information regarding these agreements, and Entergy has therefore framed in general terms portions of this pleading relating to the agreements.

12.

The 1983 Agreements represented the first agreements entered by UP and WRPI/CNW for the transportation of PRB coal. The first movements under these agreements occurred in August of 1984, when WRPI first instituted service to the PRB mines from which Entergy

Arkansas purchased (and purchases) coal for use in generating electricity at the White Bluff and Independence plants.

13.

Pursuant to the terms of the 1983 Agreements and the Interim Agreement, Entergy Arkansas is obligated to ship, and UP is obligated to transport, a certain minimum volume of coal each year.

14.

Both the 1983 Agreements and the Interim Agreement include a number of provisions that describe UP's commitments concerning the service to be provided in connection with the contract movements to White Bluff and Independence, including but not limited to the following:

- (a) UP has a duty to transport all coal tendered by Entergy Arkansas within a defined average elapsed transit time.
- (b) If UP fails to meet the transit time standard, and as a result, fails to transport the required volume of coal during a defined time period, UP must transport (in its own railcars) the shortfall to Entergy Arkansas within a certain time thereafter. If UP fails to do so, UP must pay a prescribed amount of liquidated damages to Entergy Arkansas.
- (c) UP is expressly obligated to exercise good faith efforts to avoid creating any deficit tonnages.

15.

Among other things, the purpose of the contract provisions described in paragraph 14. herein, is to optimize the productivity

of Entergy Arkansas' railcar fleet and to assure an adequate and continuous supply of coal to maintain electric generation at Entergy Arkansas' White Bluff and Independence plants. As the parties expressly stated in the 1983 Agreements, it was their "desire that the contractual arrangement promote maximum equipment utilization and transportation efficiency and provide all parties with economic incentives."

16.

In reliance on the service standards and other contractual provisions described in paragraphs 14 and 15 herein (collectively referred to herein as "the service standards"), in 1995 Entergy Arkansas replaced its fleet of steel railcars used for the transportation of coal from the PRB to the White Bluff and Independence plants with a fleet of higher-capacity aluminum railcars, and made certain modifications to the coal unloading facilities at both plants, at a total capital cost in excess of \$100 million.

The Controversy

17.

In spite of the stated intent to promote maximum equipment utilization and transportation efficiency, and the obligation to make a good faith effort to avoid creating deficit tonnages, UP has consistently ignored its contractual service commitments to Entergy Arkansas, and has breached, and continues to breach, the service standards by:

- (a) Continually failing to meet the transit time standard.

(b) Continually failing to comprise trains of the required length.

18.

Entergy has repeatedly informed UP of the vital importance of compliance with the service standards, and the consequent impact of UP's failure to meet these standards on Entergy Arkansas' ability to plan and provide electric utility service to its customers.

19.

Despite Entergy's efforts, UP has refused to either correct the service deficiencies, or provide adequate assurances that it would (or could) take the necessary steps to assure its ability to comply with its contractual service commitments to the end that Entergy is confronted with an escalating deficit in its coal supply which has forced curtailment of power production and reduced reserves to a critical level.

20.

Entergy Arkansas has fully complied with all of its obligations and responsibilities under its contracts with UP.

21.

Under the terms of the 1983 Agreements and the Interim Agreement, Entergy is not free to seek alternative transportation of coal for the White Bluff and Independence plants. Unless Entergy is freed from this restriction, Entergy is precluded from taking action to ensure the reliability of its system, and as a consequence, both Entergy and its customers may suffer irreparable harm.

COUNT I

BREACH OF CONTRACT

22.

Entergy hereby realleges and incorporates by reference ¶¶ 1-21 of this Complaint.

23.

In entering the 1983 Agreements and the Interim Agreement, Entergy Arkansas reasonably expected that UP would substantially perform its contractual promises relating to the service standards, and particularly the stated intent to promote maximum equipment utilization and transportation efficiency and the express commitment to exercise good faith efforts to avoid the creation of deficit tonnages.

24.

Rather than promote maximum equipment utilization and transportation efficiency and exercise good faith, UP has instead persistently failed to meet its duty to comply with the service standards.

25.

UP's persistent failure to meet the service standards has caused, and is continuing to cause, substantial hardship to Entergy and has substantially impaired, and will continue to impair, the ability of Entergy Arkansas to serve its ratepayers.

26.

In entering the 1983 Agreements and the Interim Agreement, Entergy Arkansas relied on UP's agreement to provide service in

accordance with the service standards and did not expect that UP would persistently fail to comply with the service standards.

27.

Entergy also reasonably relied on UP's commitment in the Interim Agreement to exercise good faith to avoid creating deficit tonnages, and reasonably did not expect that UP would engage in a practice of creating and cumulating (rolling over) deficit tonnages in lieu of meeting the contractual elapsed transit time standard.

28.

As a direct and proximate result of UP's failure to meet the service standards, Entergy and Entergy Arkansas have been deprived of maximum equipment utilization and transportation efficiencies in entering the 1983 Agreements and the Interim Agreement.

29.

The liquidated damages remedy contained in the 1983 Agreements and the Interim Agreement was not intended to apply to chronic, pervasive failures to meet the railroad service standards, such as have occurred.

30.

By persistently failing to meet the service standards, UP has materially breached and repudiated the 1983 Agreements and the Interim Agreement.

31.

Entergy has provided UP with an opportunity to cure the above-described breach and UP has exhibited an inability, or unwillingness, to correct the same.

32.

As a direct and proximate result of this breach, Entergy has incurred damages relating to, inter alia, the cost of replacement power, the loss of sales and revenues associated with curtailing production from the plants in question, and other costs and expenses associated with the UP's failure to provide adequate rail transportation service, in an amount in excess of \$1 million.

**COUNT II**

**BREACH OF COVENANT OF GOOD FAITH**

33.

Entergy hereby realleges and incorporates by reference ¶¶ 1-32 of this Complaint.

34.

In entering the 1983 Agreements and the Interim Agreement, the parties stated their desire to promote maximum equipment utilization and transportation efficiency and UP expressly committed to exercise good faith to avoid the creation of deficit tonnages.

35.

Under its contractual commitments to Entergy, UP has both an implied and express duty to cooperate with Entergy in order to accomplish the stated objectives set forth in paragraph 34 herein.

36.

UP has refused to comply with the service standards, which were intended to ensure maximum equipment utilization and transportation efficiency, and has been unable, or unwilling, to correct past deficiencies in service.

37.

UP has engaged in a practice of creating and cumulating (rolling over) deficit tonnages, rather than fulfilling its contractual commitment to act in good faith to avoid the creation of such deficit tonnages.

38.

While UP has neglected to comply with its contractual service standards and refused to correct such deficiencies, UP's service to other PRB coal shippers has, in UP's words, "consistently exceeded [UP's] own performance goals and contractual performance commitments...in recent months." Though service to Entergy has continued to deteriorate, UP's "performance levels" for other customers "have reached all-time records." See Applicants' Report on Merger Condition Implementation, Surface Transportation Board Docket No. 32760 (Sub-No. 21), Union Pacific Corporation, Union Pacific Company and Missouri Pacific Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and the Denver and Rio Grande Western Railroad Company [OVERSIGHT] at 42 (filed July 1, 1997).

39.

In ignoring and/or refusing to comply with its duty to satisfy the express service standards and stated intent set forth in its contractual commitments to Entergy, while at the same time choosing to provide "record level" service to other PRB coal shippers, UP has breached the covenant of good faith and fair dealing, and has otherwise failed to act in compliance with standards of commercial reasonableness.

40.

As a direct and proximate result of UP's breach of the duty of good faith and fair dealing, Entergy has incurred damages relating to, inter alia, the cost of replacement power, the loss of sales and revenues associated with curtailing production from the plants in question, and other costs and expenses associated with the UP's failure to provide adequate rail transportation service, in an amount in excess of \$1 million; but such monetary damages may be inadequate to fully compensate Entergy for the losses and harm which may be experienced by Entergy and its customers.

**PRAYER FOR RELIEF**

**WHEREFORE**, Entergy prays for the following relief:

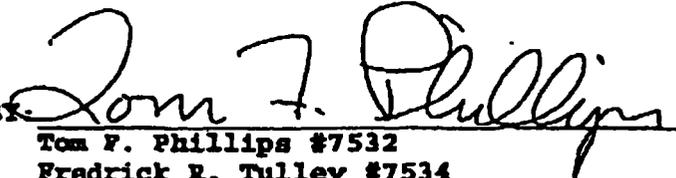
(a) that on the basis of Counts I and II, the Court enter a judgment (i) declaring that UP has materially breached the 1983 Agreements and the Interim Agreement, that because of the material breach those agreements are unenforceable by UP, and that Entergy is excused from performance under those agreements; and (ii)

ordering UP to pay damages relating to the failure to meet the service standards set forth in those agreements;

(b) that the Court, alternatively, order UP to pay all direct, consequential and incidental damages incurred by Entergy as a result of UP's material breach of the 1983 Agreements and the Interim Agreement; and

(c) that the Court award such other and further relief as it deems just and proper.

**TAYLOR, PORTER, BROOKS & PHILLIPS, L.L.P.**

  
BY: Tom F. Phillips

Tom F. Phillips #7532  
Fredrick R. Tulley #7534  
Deborah E. Lamb #18991  
John P. Murrill #23878  
P. O. Box 2471  
Baton Rouge, Louisiana 70821  
504-387-3221

**WILLIAMS & ANDERSON**

J. Leon Holmes, Ark. Bar #82078  
James E. Hathaway III, Ark. Bar #86085  
Steven W. Quattlebaum, Ark. Bar #84127  
Twenty-Second Floor  
111 Center Street  
Little Rock, AR 72201  
501-372-0800

**SLOVER & LOFTUS**

C. Michael Loftus, D.C. Bar #225730  
Christopher A. Mills, D.C. Bar #449325  
Frank J. Pergolizzi, D.C. Bar #405174  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036  
202-347-7170

**Attorneys for Entergy Arkansas, Inc. and  
Entergy Services, Inc.**



**EXHIBIT DGB-5 TO DBG-7**

**REDACTED**



**REBUTTAL VERIFIED STATEMENT  
OF  
DANIEL B. GRAY**

My name is Daniel B. Gray. I am the same Daniel Gray that submitted a Verified Statement in this proceeding on July 11, 2008. I am submitting this Rebuttal Verified Statement in response to the Verified Statement that Mr. Frederick M. Gough submitted on behalf of Union Pacific Railroad Company (“UP”) on August 11, 2008.

Mr. Gough refers to “three situations over the past fifteen years.” The “three situations” that we raised were not short-term events. The first two of these events (the 1993-1995 event and the 1997-1998 event) resulted in Entergy being shorted more than {██████████} tons. That is enough coal to run the one of the Arkansas coal plants for {██████████}. The more recent event that was described in part by my opening Verified Statement, and in part by Mr. Mohl’s opening Verified Statement, covered a three-year period from April 2005 through April 2008. During this period, Entergy was shorted nearly {██████████} tons, which would be enough to run one of our Arkansas plants for {██████████}. These “three situations” are not trivial events – they affected performance in *nine of the fifteen* years between 1993 and 2008, and have had a major impact on our operations and the way we do business.

**1993-1995**

In addressing my comments on the 1993 to 1995 service disruptions, Mr. Gough stated that I was wrong in suggesting that the UP/M&NA Lease caused or contributed to the service problems. Gough V.S. at 3. I don’t know what Mr. Gough is referring to when he makes this claim, and he does not refer to a specific point in my Verified Statement. Regardless, Entergy never said that the UP/M&NA Lease *caused* the service

problems that we experienced in 1993-1995. However, the paper barrier constraints in the Lease most certainly did impair Entergy's ability to obtain alternate coal supplies to cover for the UP delivery shortfalls.

Mr. Gough altogether mischaracterizes the events and deceptive methodology through which UP refused to waive the restrictions to the UP/M&NA Lease. Gough V.S. at 3-4. Mr. Gough says that "Entergy is wrong when it claims that UP refused to waive the UP-M&NA Lease's interchange commitment to permit delivery of additional coal to Independence using a Burlington Northern/M&NA routing." UP never outrightly refused Entergy's request in so many words. Instead, a careful reading of UP's letter of May 24, 1994 (referenced by Mr. Gough as his exhibit FMG-1) reveals that UP induced Entergy to withdraw its request for the waiver *as a condition to* UP's "propos[ed] plan for increasing its coal deliveries to Entergy's Independence and White Bluff plants" (Gough Rebuttal, third paragraph under "The 1993-1995 Midwest Flooding and Aftermath").

In the first paragraph of that letter, UP stated the "Railroads are prepared to..." take certain actions which Mr. Gough refers to as the proposed plan. This clearly indicates that no commitment had yet been made. In the next-to-last paragraph of the same letter, UP stated that "Based on the Railroads' commitment to this program, it is our understanding that Entergy is withdrawing its request for . . . [the waiver]." Finally, in the final paragraph of the same letter UP requested Entergy's written confirmation of that understanding. Entergy withdrew its request under duress with the mistaken belief that UP's proposed actions would, in fact, increase UP's coal deliveries to Entergy as represented by UP. Although Entergy was briefly "pleased with the railroad's efforts," as

Mr. Gough notes, this reaction was very short-lived. As history shows, UP's deficits continued to build *at an increasing rate* for the remainder of 1994, and continued through 1995.

It is true that Entergy "withdrew" the request for a waiver of the M&NA restriction in connection with UP's assurances to Entergy that it would take steps to supplement deliveries to the Arkansas plants. The fact that we withdrew the request based on those assurances, however, did not change the fact that UP was unwilling to grant our request for a waiver. In this regard, I note that neither UP nor M&NA refuted my testimony that an M&NA representative told me that M&NA would not be able to participate in an M&NA/BNSF movement because of the lease. Gray V.S. at 6. In sum, the withdrawal of the request did not change the fact that UP would not agree to waive the lease restrictions.

I also would like to reemphasize that, while Entergy was *initially* encouraged upon receiving these assurances from UP in May 1994, any satisfaction soon dissipated when UP's service continued to deteriorate through the remainder of 1994. There was also no point in renewing the request at that time, as UP had made very clear to Entergy that it was not going to waive the M&NA restriction under any circumstance.

### **1997-1998**

In my opening Verified Statement I explained the circumstances surrounding Entergy's attempts to obtain supplemental coal deliveries via the M&NA during the 1997-1998 UP service meltdown. Gray V.S. at 7-8. I referred specifically to correspondence between UP and Entergy, as well as to Entergy submissions to the Board. Mr. Gough's reply Verified Statement responded to that testimony with two points: (1) a

claim that our requests for M&NA access related to the White Bluff plant; and (2) a claim that Entergy “benefited” from the UP/M&NA relationship because UP ultimately rerouted empty Independence trains via the M&NA during the crisis. Both of these claims merit clarification.

First, Mr. Gough is wrong that our request for M&NA related only to White Bluff. My opening Verified Statement included Entergy’s 1997 petition for emergency relief that was filed in connection with Finance Docket Nos. 32760 and 32760 (Sub-No. 21). Gray V.S. at Exhibit DBG-4. As reflected in the correspondence attached as exhibits to that pleading, Entergy requested that UP “provide information with respect to any restrictions that may exist with respect to the M&NA’s delivery of coal to White Bluff in connection with BNSF, and to waive such restrictions.” *Id.* at Exhibit CWJ-1, page 2. This reference to “White Bluff” was an obvious typographical error, as the context of the rest of the letter, including the immediate sentence, plainly confirms. M&NA did not and could not serve the White Bluff plant, and as such, it would have been immediately evident to UP that our request for information about restrictions on M&NA’s ability to deliver coal to Entergy actually sought information regarding the Independence plant. In addition, the next sentence in Mr. Jewell’s letter states that UP was “also” requested to provide Entergy with a rate for the movement of coal to White Bluff. Again, this additional request for a rate for the White Bluff plant confirms that our immediately preceding inquiry regarding M&NA related to the Independence plant. UP’s suggestion to the contrary in its Reply Evidence ignores this unmistakable fact. In any event, I was personally involved in discussions relating to this option with UP and

can confirm that UP never agreed to waive the M&NA restrictions to allow such a movement to Independence.

Second, Mr. Gough's suggestion that Entergy "benefited" from the UP/M&NA relationship is, at best, a generous characterization of the facts. It is true that UP eventually was able to route empty trains from Independence over the M&NA to Kansas City. What is not true is that this act eliminated the need for BNSF/M&NA service. It is also incorrect to suggest that the re-route provided substantial benefits during the height of UP's meltdown. Our experience reflected the opposite. In the first re-route effort in the late fall of 1997, Entergy noticed that the re-route actually *increased* cycle times. UP was effectively using the M&NA lines as a parking lot and parking Entergy's trains on the M&NA in order to limit congestion at its Kansas City terminal. As a result, UP was able to report to the Board that its car inventory in Kansas City was declining (implying service was improving), while in reality our cars were stuck on the M&NA and our overall cycle time performance and deliveries were declining. Entergy agrees with Mr. Gough that eventually the use of the M&NA re-route was beneficial. However, the benefits of this reroute did not favorably impact cycle times until later in 1998.

UP's actions in 1997-1998 further underscore the problem with the UP/M&NA Lease. In a time of severe constraint, UP once again made very clear that Entergy *could not* pursue any alternative that could provide substantial benefits unless UP controlled the movement. Mr. Gough fails to explain to the Board that even with the steps that UP was taking to try to minimize its contract breaches, it still fell short of its delivery obligation by more than { ██████████ } in 1997-1998. Had it allowed us to use M&NA/BNSF to supplement deliveries, there is no doubt we could have mitigated some of these deficits.

## **2005-2006**

Neither M&NA nor UP has offered any facts to rebut my comments concerning discussions that I had with M&NA personnel about whether UP would allow M&NA to assist during UP's latest service crisis. Gray V.S. at 9-11. Mr. Gough, who was not involved in any of those discussions, does not offer any proof that my recitation of the dealings with M&NA is inaccurate. Instead, Mr. Gough simply notes that we did not ask UP for a waiver. We believed it would be premature to approach UP on this matter until we learned from M&NA whether the move would be feasible from a practical standpoint and the extent, if any, to which the paper barrier would impede the move. Mr. Gough's statement does not contradict in any way my statements about what M&NA told Entergy about UP's unwillingness to waive the lease restrictions.

M&NA's counsel, who were also not involved in my discussions with M&NA personnel, suggest that Entergy did not provide necessary information that would allow M&NA to provide a quotation. As I detailed in my opening Verified Statement, we repeatedly informed M&NA that the types of operational questions they were asking needed to be referred to KCS because Entergy simply did not have and could not produce this information. V.S. Gray at 10. I believed then, and believe now, that repeatedly directing these inquiries to Entergy was designed to stall and discourage our efforts to obtain service from M&NA. *Id.*

Mr. Gough also attempts to defend UP's unwillingness to waive the M&NA lease restrictions by noting that UP offered to waive the volume limitation under the Coal Transportation Agreement to allow BNSF to deliver more coal to White Bluff based on UP's force majeure claim. We disputed the legitimacy of the PRB force

majeure claim. We repeatedly asked UP to provide support for its claim, especially as to reasons for the alleged track failures on the Joint Line. Entergy never received an adequate response. Given that it was our view that the delivery obligation was not suspended, we did not want UP to be relieved of that obligation. We wanted what we bargained for in signing our contract – performance. Absent UP’s willingness to perform under the terms of the Agreement, Entergy needed to have access to all alternative transportation options, not just the ones that would benefit UP.<sup>1</sup>

I also strongly disagree with Mr. Gough’s statements concerning how cooperative UP was in connection with the efforts to bring in foreign coal to Independence in 2006. Mr. Gough suggests that the request for UP’s cooperation on foreign coal was unrelated to the service problems because Entergy had made a corporate decision to diversify its fuel supply. This testimony ignores the very real fact that Entergy’s decision to diversify was forced on it by UP’s performance failures under the PRB Coal Transportation Agreement.

I also disagree with Mr. Gough’s suggestion that UP’s performance was strong in 2005-2006. His calculations of UP’s performance in 2005-2006 are fraught with errors. His numbers ignore contractual provisions and substitute numbers from sources that are not relevant. He gives UP credit for disputed force majeure claims, including 196 days to catch up on track maintenance in the PRB, that have the effect of understating UP’s performance failures.

As I detailed above, UP did not deliver anywhere near the percentages they claim when their performance is measured against the only relevant measuring stick – the

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<sup>1</sup> UP could have benefited by being relieved from the volume obligation because it could have then used any available capacity to move higher revenue traffic for others, without being in violation of the Entergy Agreement. Entergy did not believe it was in our best interests to provide this disincentive to perform.

contract. When compared to that standard the facts are that UP fell short of its delivery obligation by {██████████} tons in 2005, and {██████████} tons in 2006. That translates to delivery of only {██████████} of our declarations in 2005 and only {██████████} of our declarations in 2006. It should be noted that the 2006 numbers reflect improved performance in the latter part of the year. The 2007 and 2008 numbers averaged in the {██████████} range when compared against contract declarations.





**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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<b>ENTERGY ARKANSAS, INC. and</b>	)	
<b>ENTERGY SERVICES, INC., Complainants</b>	)	
<b>v.</b>	)	<b>Docket No. 42104</b>
	)	
<b>UNION PACIFIC RAILROAD</b>	)	
<b>COMPANY and MISSOURI &amp;</b>	)	
<b>NORTHERN ARKANSAS RAILROAD</b>	)	
<b>COMPANY, INC., and BNSF RAILWAY</b>	)	
<b>COMPANY, Defendants</b>	)	

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	)	
	)	
<b>MISSOURI &amp; NORTHERN ARKANSAS</b>	)	
<b>R.R. – LEASE, ACQUISITION AND</b>	)	
<b>OPERATION EXEMPTION – MISSOURI</b>	)	<b>Finance Docket No. 32187</b>
<b>PACIFIC R.R. and BURLINGTON</b>	)	
<b>NORTHERN R.R.</b>	)	

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Rebuttal  
Verified Statement

Of

Thomas D. Crowley  
President  
L.E. Peabody & Associates, Inc.

On behalf of

**Entergy Arkansas, Inc. and Entergy Services, Inc.**

*Redacted, Public Version*

Date: July 9, 2010

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**LIST OF EXHIBITS**

<b><u>EXHIBIT NO.</u></b> <sup>1</sup>	<b><u>EXHIBIT DESCRIPTION</u></b>
(1)	(2)
(TDC-8)	BNSF Coal Map – Powder River Basin
(TDC-9)	RTC Train Simulation Scenarios
(TDC-10)	Comparison of Total Cost from PRB to Newark, AR via BNSF and UP Routes Net of Upgrade Costs

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<sup>1</sup> Exhibit\_(TDC-1) through Exhibit\_(TDC-7) appear in Crowley Opening Verified Statement of April 7, 2010.

## I. INTRODUCTION

My name is Thomas D. Crowley. I am the same Thomas D. Crowley that submitted an opening verified statement (“OVS”) in this proceeding on April 7, 2010. A copy of my credentials is included as Exhibit\_(TDC-1) to my OVS.

I have been asked by Counsel for Entergy Arkansas, Inc. (“EAI”) and Entergy Services, Inc. (“ESA”) (collectively referred to as “Entergy”) to respond to the verified statement of Union Pacific Railroad Company (“UP”) witness F. M. “Rick” Gough and to the joint verified statement of Robert Plum and Deborah Newland (“Plum/Newland”), filed in this proceeding on June 4, 2010.

As explained in my OVS, on June 26, 2009 the Board issued a Decision in this proceeding which provided Entergy the opportunity to amend its Complaint in order to seek a prescription of a through route under 49 U.S.C. § 10705.<sup>2</sup> Consistent with this Decision (and the STB’s subsequent Decision in this proceeding dated December 30, 2009), on March 11, 2010, Entergy filed its Second Amended Complaint in this proceeding.

Among other items, the December 30, 2009 STB Decision required Entergy to identify the through route(s) in its opening evidence<sup>3</sup> that it seeks to have prescribed. With the benefit of discovery and an inspection of alternative routes, Entergy identified its proposed route(s) in its March 11, 2010 Second Amended Complaint as The BNSF Railway (“BNSF”)/Missouri & Northern Arkansas Railroad (“M&NA”) through routes from the Powder River Basin (“PRB”) to Independence with an interchange between BNSF and M&NA at either Lamar, MO or

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<sup>2</sup> See *Entergy Arkansas, Inc. and Entergy Services, Inc. v Union Pacific R.R. and Missouri & Northern Arkansas R.R.*, STB Docket No. 42104, et al, served June 26, 2009, at 15.

<sup>3</sup> See *Entergy Arkansas, Inc. and Entergy Services, Inc. v Union Pacific R.R. and Missouri & Northern Arkansas R.R.*, STB Docket No. 42104, et al, served December 30, 2009 at 5.

Aurora, MO. Exhibit\_(TDC-3) to my OVS contains two schematics showing both the existing UP/M&NA route and the preferred BNSF/M&NA routes.

In my OVS, I demonstrated that the BNSF/M&NA routes from the PRB to Entergy's Independence Station would provide Entergy an alternative routing that would greatly improve Entergy's ability to ensure the reliability of its vital coal transportation requirements from the PRB. These BNSF/M&NA routes would shield Entergy{

} . In addition, I demonstrated that the BNSF/M&NA routes are less circuitous and more efficient than the UP/M&NA route from the PRB to Independence. I showed that the alternative routes would permit Entergy to obtain more economic service to Independence than is currently possible in the absence of such a prescription.

My Rebuttal testimony is discussed further below under the following topical headings:

- II. The BNSF/M&NA Through Routes Would Foster Adequate and Reliable Transportation and Counter Abuse of Market Power
- III. The BNSF/M&NA Through Routes Are More Efficient than the UP/M&NA Through Route
- IV. Comparison of BNSF and UP Rates for Moving Coal to Independence
- V. Conclusions

## **II. THE BNSF/M&NA THROUGH ROUTES WOULD FOSTER ADEQUATE AND RELIABLE TRANSPORTATION AND COUNTER ABUSE OF MARKET POWER**

In my OVS, I stated that UP's abuse of market power would not have been as effective had M&NA and BNSF had the ability to deliver coal to Entergy without fear of the penalty provisions contained in the UP/M&NA Lease Agreement.

In its Reply evidence, UP responds to Entergy's claims of inadequate and unreliable service and abuse of market power by claiming that "Entergy has its facts wrong" and that "even if Entergy had described the facts accurately, they would not establish a right to relief under section 10705." <sup>4</sup> UP concludes that it has not engaged in anticompetitive acts or abused its market power by providing inadequate service to the Independence Plant. In responding to the specific criticisms contained in my OVS, UP claims: (1) that past service problems do not constitute anticompetitive acts or abuse of market power; and (2) it did not refuse to waive the UP/M&NA's interchange and contingent rent provisions in 2005-2006.

My responses to UP's statements are addressed in the remainder of this section of my Rebuttal Verified Statement.

### **A. UP'S RESPONSES TO THE SERVICE PROBLEMS RESULTED IN INADEQUATE AND UNRELIABLE TRANSPORTATION SERVICE**

UP admits in its Reply evidence that, during all of the periods it experienced service problems for PRB coal transportation, Entergy suffered delivery shortfalls at the Independence Plant<sup>5</sup>. UP's states, however, that all of its PRB coal customers received poor service as a result

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<sup>4</sup> See UP Reply at page 33

<sup>5</sup> See UP Reply at page 35.

of the service problems and that UP in no way singled out Entergy. According to UP, because all customers suffered from poor service UP's actions cannot be considered anticompetitive. UP's statements completely miss the point. The nature of the service problem, the cause of the service problem, the breadth of its impact on transportation across the UP system and/or the total number of customers affected by it are immaterial. What is important is UP's actual response (or lack of a response) to the service problem for a particular customer that indicates an abuse of market power. As I noted in my OVS,{

}

UP also claims that "competitive conditions had no correlation to UP's performance during periods of service difficulties."<sup>7</sup> In support, {

}.<sup>9</sup>

Comparative levels of service provided by UP during its service problems (either between different customers or between two plants of the same customer) do not provide any indication of whether or not UP caused harm to Entergy because of the fact that UP denied Entergy access to a transportation option for PRB coal delivery.

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<sup>6</sup> See Rebuttal Verified Statement of Entergy witness Gray, at 2.

<sup>7</sup> See UP Reply at 35.

<sup>8</sup> See UP Reply at 42. The cycle time data for UP shipments to White Bluff and Independence are extracted from Exhibit 4 to my OVS and the BNSF cycle time data is from Entergy's response to UP discovery requests.

<sup>9</sup> UP also claims that it provided { }. See UP Reply at page 35.

UP's claim that it "took steps during each period to improve service to the Independence plant" ring hollow. UP did not take the most important step and permit the delivery of PRB coal via a BNSF/MN&A routing.

**B. UP'S RESPONSES TO THE  
SERVICE PROBLEMS  
DEMONSTRATE AN  
ABUSE OF MARKET POWER**

UP also takes exception to Entergy's statement that UP abused its market power because it did not waive the interchange and contingent rent provisions of the UP/M&NA lease during the UP service problems in 2005-2006 to allow the BNSF/M&NA route to be used for the delivery of PRB coal to Independence Plant. Specifically, UP states: (1) that Entergy did not ask for a waiver; and (2) that BNSF's rail system was impaired by the same service problems faced by UP on the PRB Joint Line in 2005-2006 time period and, as such, BNSF was in no position to provide the service that Entergy wanted for Independence.

UP asserts that absent a waiver request by Entergy, there can be no proof of market power abuse and maintains that the facts demonstrate that Entergy never asked UP to utilize the BNSF/M&NA routing and/or for a waiver of certain provisions of the Lease. UP is wrong in this regard and fails to disclose important facts. As discussed by Entergy witness Gray, {

}<sup>10</sup>.

UP also claims that BNSF was in no position to provide the service that Entergy wanted for Independence Plant in the 2005-2006 time period. This is inaccurate. First, BNSF's PRB operations were less affected by the 2005-2006 events (and therefore more able to provide PRB coal service to the Independence Plant). This fact is obvious from the fact that BNSF lifted its

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<sup>10</sup> See Rebuttal Verified Statement of Entergy witness Gray at 2.

Force Majeure claim over five (5) months before the UP lifted its claimed Force Majeure and over twenty-one (21) months before the UP lifted its embargo<sup>11</sup> on new service from PRB coal origins.

UP also compares “actual cycle time” data of UP and BNSF in order to attempt to demonstrate that, during the period between 2Q05 through 4Q06: (1) UP was performing at a higher level than BNSF at the White Bluff Plant; and (2) that UP was providing { } service to the Independence Plant than BNSF was providing to the White Bluff Plant. Neither of these conclusions are supported by the summary “cycle time” data relied upon by UP.

As an initial matter, according to underlying data sources,<sup>12</sup> the times shown in UP’s comparison table are transit times and not cycle times. As such, these times are not a complete indication of the service provided by either railroad as the transit times exclude loading and unloading time. Next, the sources of the BNSF “actual” hours and the UP “actual” hours appear to be time calculations {

}.  
The data summarized by UP indicates that{

} This difference does not support UP’s conclusion that BNSF was not able to provide BNSF/M&NA service for PRB shipments of coal to Independence.

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<sup>11</sup> UP’s self-declared embargo stated that UP would accept only traffic moving under current active contracts or common carrier items. BNSF did not impose any embargo on PRB coal shipments.

<sup>12</sup> See footnote 2, supra.

UP's conclusion regarding BNSF's ability to provide service to Independence Plant does not comport with reality. The service crisis was caused by events that affected the Southern PRB Joint Line and restricted access to and from the PRB from the south. UP ignores the fact that these events did not impact UP and BNSF's PRB operations equally. Specifically, because BNSF can enter and exit the PRB from two directions it was able to continue normal operations for coal shipments from BNSF-only served mines and the impacts of emergency maintenance activities on the Joint Line had less impact on BNSF shipments from BNSF/UP served mines, due to BNSF's northern PRB coal routes.<sup>13</sup>

UP also claims that I have erroneously attempted to "re-purpose" testimony I offered in prior litigation by asserting that certain UP actions during the 2005-2006 service crisis were connected to UP's enforcement of the Lease.<sup>14</sup> UP mischaracterizes my testimony and again claims that there can be no connection between actions UP took during the 2005-2006 service crisis and the Lease because Entergy never asked UP to permit the utilization of the BNSF/M&NA route or a waiver of certain terms of the Lease. As a result, UP claims that "the facts show that the UP/M&NA Lease had nothing to do with the unavailability of a BNSF-M&NA through route to the Independence plant."<sup>15</sup> I referenced earlier the Rebuttal Verified Statement of Entergy's Mr. Gray, which responds to UP's erroneous claims on this point. As the facts demonstrate in my OVS, a BNSF/M&NA through route would have enhanced the adequacy and reliability of coal transportation service from the PRB to the Independence Plant and would have been an effective check of UP's abuse of market power during the 2005-2006 service crisis.

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<sup>13</sup> Exhibit\_(TDC-8) shows BNSF is able to enter and exit the PRB at both Donkey Creek and Bridger Jct., while UP can access the PRB only through Shawnee Jct. Exhibit\_(TDC-1) through Exhibit\_(TDC-7) appear in my OVS.

<sup>14</sup> See UP Reply at page 42.

<sup>15</sup> *Id* at 44.

Finally, UP asserts that it would have been better off by waiving the Lease Agreement's interchange and contingent rent provisions, allowing BNSF and M&NA to provide the alternative service to Independence and devoting its resources to its more profitable customers.<sup>16</sup>

This claim is not correct. In fact, UP would be better off denying BNSF and M&NA access to Independence, {

}.}

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<sup>16</sup> See Reply at 43, note 34.

**III. THE BNSF/M&NA THROUGH ROUTES ARE MORE EFFICIENT THAN THE UP/M&NA THROUGH ROUTE**

In my OVS, I demonstrated that the BNSF/M&NA through routes are “more efficient and economic” than the existing UP/M&NA route based on four reasons. First, the BNSF/M&NA routes are shorter than the UP/M&NA route. Second, the combined BNSF/M&NA cost of providing service is less than the UP/M&NA cost of providing service. Third, the railroad cost of moving PRB coal to the Independence station using either of the BNSF/M&NA routes is less than via the UP/M&NA route over the next 10 years. Fourth, BNSF’s average rate for coal (measured on a mills per ton-mile basis) applied to the BNSF/M&NA route miles {

}

UP takes exception with each of these conclusions and posits that the existing UP/M&NA route is more efficient than either of the BNSF/M&NA routes. UP reaches this conclusion based on its calculation of variable costs for each of the routes and based on its calculation of several operating measures including transit time, fuel consumption and aggregate degrees of curvature along the alternative routes.

UP’s analysis and its conclusions are incorrect for two significant reasons. First, UP’s cost methods are inconsistent with the Board’s approach to developing costs for regulatory purposes. Second, UP’s reliance on its Train Performance Simulator (“TPS”) and the commercially available Rail Traffic Controller (“RTC”) simulation model to show operational efficiencies are so rudimentary and incomplete as to produce totally meaningless results.

**A. UP'S COST DEVELOPMENT  
IS INCONSISTENT WITH THE  
BOARD'S APPROACH**

UP contends that UP's and M&NA's cost of moving Entergy's coal trains over the existing UP/M&NA route is lower than BNSF's and M&NA's cost on either of the alternative routes. To calculate the carriers' cost of providing service, UP relies on the Board's Uniform Railroad Costing System ("URCS") Phase III cost program and 2008 URCS unit cost for UP and BNSF and the 2008 URCS western region unit costs for the M&NA. UP uses the same URCS cost model and unit costs that I used to calculate the carriers' cost of service in my OVS. However, UP has made a significant change to the URCS method used in its Reply evidence compared to that used in my OVS in order to produce its desired result.

As explained in my OVS, the Board's decision in *Major Issues*<sup>17</sup> states: "The Board uses the Uniform Rail Costing System (URCS) to determine a carrier's variable costs." URCS is a "general purpose costing system for all regulatory costing purposes," designed to measure system-wide average variable costs.<sup>18</sup> The Board determined in *Major Issues* to use the URCS Phase III cost program and allow adjustments *only* for the nine movement-specific factors inputted into Phase III of URCS.<sup>19</sup> In its Reply, UP added several additional input parameters in order to calculate lower URCS costs for the UP/M&NA route. These additional inputs include adjustments for: (1) empty miles; (2) private car mileage payments; and (3) use of run-through locomotives on the M&NA portion of each of the alternative routes.

The Board in *Major Issues* specifically prohibited any adjustments to URCS costing for regulatory purposes beyond the nine input parameters. Moreover, the Board specifically

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<sup>17</sup> Ex Parte No. 657 (Sub-No. 1), *Major Issues in Rail Rate Cases*, served October 30, 2006, *Major Issues*.

<sup>18</sup> See *Major Issues* at p. 47.

<sup>19</sup> These movement specific factors include: (1) the railroad; (2) loaded miles; (3) shipment type (local, originated, delivered, bridge); (4) number of freight cars; (5) tons per car; (6) commodity; (7) type of movement (single, unit, multiple); (8) car ownership; and (9) type of car.

*excluded* adjustments for empty miles and for private car allowances, i.e., two of the three adjustments to URCS cost that UP has employed in its Reply evidence. In Major Issues the Board provided the reasoning behind its rejection of these two specific adjustments. Addressing the use of actual empty miles, the Board states:

[C]arriers propose that the Board allow parties to submit the actual number of total miles or empty miles. URCS calculates round-trip miles for train-load shipments by doubling loaded miles, but this presumes that the number of loaded miles, which are inputted by the user, is the same as empty miles. Carriers note that this is not often the case, as carriers may use a longer route for empty trains returning to the origin so as to increase efficiency, service to the shipper, and operational fluidity. Carriers argue that actual empty miles are easily ascertainable, readily agreed upon by the parties, and could be included in URCS Phase III.

While we recognize the carriers' desire to have the URCS calculation reflect more accurately the actual cost of moving the issue traffic, we find that such piecemeal adjustments would tend to bias the results in favor of the railroads. As discussed above, selective replacement of system-average statistics – without allowing for counterbalancing adjustments that benefit shippers – which often require information not maintained in sufficient detail or at all by the railroads – may bias the entire analysis, rendering the modified URCS output unreliable. Shippers note this potential for unfairness and bias in their reply.

Major Issues at 58.

Further, addressing its rejection of using actual private car allowances, the Board states:

Carriers also argue that the actual car rental costs should be allowed in variable cost calculations. When a party inputs private car ownership into URCS for a specific movement, URCS calculates a system-wide private car allowance and then allocates that allowance over all movements. The model does not know, however, whether a carrier has chosen to actually pay a private car allowance or simply to lower the rate for the movement to reflect private car ownership. While we recognize this limitation in URCS, we are concerned that allowance of actual car rental costs in URCS would be subject to manipulation by the carriers.

Id.

Addressing adjustment of more than the nine parameters, the Board states:

“[A]s a matter of econometric theory, piecemeal or incomplete adjustments to URCS are suspect. There are hundreds of individual expense categories that URCS uses to estimate the variable cost of a movement and the parties do not seek to adjust all of them. Indeed, many of the expense categories could not be changed, because movement-specific information is not available. Yet selective replacement of system-average cost with movement-specific costs may bias the entire analysis, rendering modified URCS output unreliable.

*Id* at 52.

Thus, it is clear that UP’s adjustments to URCS are outside of what the Board has determined appropriate for determination of variable costs for regulatory purposes. As clearly recognized by the Board, numerous additional adjustments can be made to URCS inputs and to individual unit costs as well. These additional adjustments may further confirm that the BNSF/M&NA alternative routes cost less than the existing UP/M&NA route, thereby showing the BNSF/M&NA routes to be more efficient even with UP’s unacceptable adjustments.

To demonstrate that further movement specific adjustments can also lower a railroad’s average variable costs developed by the URCS Phase III process, I have quantified two examples of such adjustments, i.e., actual crew wages and actual number of locomotives as they relate to the issue movements. Each is discussed below.

I calculated crew wages for each route using current UTU wage rates and BNSF and UP constructive allowances and crew assignments for these routes based on my knowledge of UP and BNSF operations. In addition, it has been reported that BNSF uses two locomotives on loaded coal trains moving over the line between Alliance, NE and Kansas City.<sup>20</sup> Based on this information, I calculated the average locomotive units for the BNSF portion of the Lamar and Aurora routes to equal { } locomotives and{ } locomotives, respectively.<sup>21</sup> I then used this crew wage and locomotive information as additional detailed input parameters in UP’s

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<sup>20</sup> See Entergy Rebuttal e-workpaper “Locomotives on BNSF coal trains.pdf”.

<sup>21</sup> See Entergy Rebuttal e-workpaper “Entergy Miles Revised.xlsx” tab “BNSF Locomotive”.

calculation of URCS variable costs. As shown in Table 1 below, revising UP’s calculation of variable costs to include these additional adjustments results in the BNSF/M&NA alternative routes having lower variable costs than the current UP/M&NA route.

<u>Route</u> (1)	<u>Carrier</u> (2)	<u>UP Reply</u> (3)	<u>Revised UP</u> (4)
1. UP/M&NA	UP	\$13.20	\$12.68
	M&NA	<u>\$0.88</u>	<u>\$0.83</u>
	Total	\$14.08	\$13.51
2. BNSF/M&NA – Lamar	BNSF	\$12.66	\$11.49
	M&NA	<u>\$1.53</u>	<u>\$1.44</u>
	Total	\$14.19	\$12.93
3. BNSF/M&NA - Aurora	BNSF	\$13.18	\$12.00
	M&NA	<u>\$1.30</u>	<u>\$1.24</u>
	Total	\$14.48	\$13.23

Source: Entergy rebuttal e-workpaper “Entergy-Independence Costing Results-Actual locos and wages.xlsx.”

As demonstrated in Table 1 above, by adding two additional adjustments to UP’s modified URCS calculations changes the results and conclusions. UP’s selective adjustment of system average cost has resulted in a bias in its analysis, rendering it unreliable. In Rebuttal, I continue to rely on the Board’s method of calculating URCS variable cost using only the nine input parameters specified in *Major Issues*.

**B. UP’S CLAIM OF ERRORS  
IN ENTERGY’S URCS  
CALCULATIONS ARE UNFOUNDED**

UP claims the URCS calculations in my OVS are incorrect primarily due to the use of only “loaded” miles rather than total miles or actual empty miles in my calculations. As

discussed in the previous section, the use of loaded miles as an input parameter is required by the Board for development of variable costs for regulatory purposes. Therefore, I continue to use only loaded miles as an input parameter in my URCS variable cost calculations for each of the alternative routes.

UP also claims that my mileage calculations are in error for two additional reasons. First, UP claims my use of the average miles from all mines jointly served by BNSF and UP to the Independence station is incorrect. Instead UP develops average miles from PRB mine origins to Independence by including only those mines supplying coal in 2009 and weighting the miles based on the tons shipped from each mine in 2009. In doing so, UP incorrectly assumes that Entergy will procure coal from the same mines and same tonnages for all years in the future, even if BNSF/M&NA alternative routes are used to meet the Independence Station's supply needs. This UP assumption is not supportable. {

}<sup>22</sup> {

} In Rebuttal, I continue to rely on the average distance from all jointly served PRB mines to Independence used in my OVS.

Finally, UP claims that my calculation of miles is somehow inaccurate as it relies on a "computer program to calculate miles, and the computer program uses approximate locations for origins, destination and interchanges, and does not account for actual track configurations at junctions and interchanges."<sup>23</sup> UP is correct that I relied on a computer program to calculate

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<sup>22</sup> See Rebuttal Verified Statement of Entergy witness Gray at 6.

<sup>23</sup> See Plum/Newland at 5.

loaded miles for use in my URCS calculation in my OVS. However, this program “PCMILER Version 16” is widely used in the industry to determine miles for cost calculations, including use by UP and the Board. UP’s claim is a “red herring” as the differences in the loaded miles between my calculations and those of UP resulting from my use of PCMILER rather than UP and BNSF and M&NA’s track charts and timetables is minimal.

In order to reduce the differences between the parties’ evidence, I have accepted UP’s determination of loaded miles from the PRB to Independence using UP, BNSF and M&NA track charts and timetables and incorporated this information with my determination of the average distance. As stated above I continue to rely on a simple average distance from all mines in the PRB that are jointly served by UP and BNSF.

Table 2 below compares the loaded miles for each route alternative that I use to calculate URCS variable costs in Rebuttal and those included in UP’s Reply. The difference between these miles is due to my use of the simple average miles from all jointly served mines in the PRB and UP’s use of weighted miles based on tons shipped to Independence in 2009.

<b><u>Route</u></b> (1)	<b><u>UP Reply</u></b> (2)	<b><u>Entergy Rebuttal</u></b> (3)	<b><u>Difference</u></b> (4)
1. UP/M&NA	{ }	{ }	16.7
2. BNSF/M&NA- Lamar	{ }	{ }	6.2
3. BNSF/M&NA – Aurora	{ }	{ }	6.1

Source: Entergy Rebuttal e-workpaper “Entergy Miles Revised.xlsx”.

Accepting UP’s source documents for calculating miles and recalculating the carriers’ cost for each alternative route demonstrates that the URCS cost of providing service to the

Independence Station from PRB mines is still less via the BNSF/M&NA routes than via the existing UP/M&NA route. Table 3 below compares my variable cost calculations (relying on the Board's use of nine specified parameters) with those included in UP's Reply evidence. The difference demonstrates that when variable costs are calculated in accordance with the Board's accepted URCS methodology, the carriers' cost of providing service via the BNSF/M&NA alternatives is lower than that of the current UP/ M&NA route and therefore the BNSF/M&NA routes are economically more efficient.

<b><u>Route</u></b> <b>(1)</b>	<b><u>Carrier</u></b> <b>(2)</b>	<b><u>UP Reply</u></b> <b>(3)</b>	<b><u>Entergy Rebuttal</u></b> <b>(4)</b>
1. UP/M&NA	UP	\$13.20	\$14.03
	M&NA	<u>\$0.88</u>	<u>\$0.58</u>
	Total	\$14.08	\$14.61
2. BNSF/M&NA – Lamar	BNSF	\$12.66	\$10.70
	M&NA	<u>\$1.53</u>	<u>\$3.47</u>
	Total	\$14.19	\$14.16
3. BNSF/M&NA - Aurora	BNSF	\$13.18	\$11.66
	M&NA	<u>\$1.30</u>	<u>\$2.82</u>
	Total	\$14.48	\$14.47

Source: Entergy Rebuttal e-workpaper "Entergy Variable Costs Rebuttal.xlsx".

The variable cost per ton via the BNSF/M&NA Lamar route equals \$14.16 per ton and the variable cost per ton for the BNSF/M&NA route via Aurora equals \$14.47, both of which are lower than the \$14.61 cost per ton via the UP/M&NA route.

**C. UP'S TPS AND RTC  
ANALYSES ARE  
FATALLY FLAWED**

Plum/Newland state that they examined several other measures that reflect the relative efficiency and cost-effectiveness of the alternative routes under consideration in this proceeding. They state: "Specifically, we used the RTC model, which the Board uses in its stand-alone cost rate cases, to model the routes at issue and generate measures of transit time, fuel consumption, and track curvature."<sup>24</sup> Based on UP's RTC analysis, UP concludes that the current UP/M&NA route is more efficient than either of the BNSF/M&NA routes because it produces lower transit time, lower fuel consumption and because in aggregate, it has lower degrees of curvature than either of the BNSF/M&NA routes.<sup>25</sup>

The Plum/Newland analysis is fatally flawed and unreliable for numerous reasons. First, the Board has indicated that use of the TPS model to estimate fuel consumption is not appropriate. In *WPL*,<sup>26</sup> the Board states:

We also cannot accept UP's evidence on this expense. UP would have us rely on fuel consumption rates generated by its "Train Performance Simulator" (TPS), a computerized simulation model. However, as *WPL* points out, there is no evidence that the results of UP's TPS model correlate with measured fuel consumption of any actual trains.

*5 S.T.B. 1003.*

Similarly, in this proceeding, there is no evidence that the results of UP's TPS correlate to actual fuel consumption by any actual trains. This same conclusion would apply to UP's RTC simulation which has relied on the same input information for both track and train data.

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<sup>24</sup> See Plum/Newland at 7.

<sup>25</sup> It should be noted that the analysis presented in the Plum/Newland Reply evidence is not based on the RTC model at all, but instead is based on UP's Train Performance Simulator ("TPS"). UP recognized this error when Entergy requested workpapers supporting the RTC analysis, and then submitted its June 21, 2010 errata and filed the results of a similar analysis using the RTC model. The results of both of these analyses are addressed in this section.

<sup>26</sup> *5 S.T.B. 955.*

The Board also rejected UP's TPS simulation in *WPL* because the data used in the simulation does not match that used elsewhere in UP's evidence in that proceeding. The Board stated:

In addition, UP's model relies on cycle times for the Black Thunder and Antelope mines of 177.0 hours and 144.8 hours, respectively – figures which are inconsistent with the cycle times used by UP to develop locomotive ownership cost. Moreover, the total fuel consumption per trip shown in UP's reply workpapers (UP Reply W.P. Kent/Fisher KKA 0000431) does not correspond to the simulation results reflected in its rebuttal workpapers (UP Reb. Kent/Fisher KKA 0000740). These inconsistencies make reliance on UP's TPS model problematic.

*Id.*

The same holds true with regard to UP's reply evidence in this proceeding. Review of the miles used by Plum/Newland to develop URCS variable cost for each of the alternative routes and the miles used in the TPS and RTC models for each of the alternative routes in this proceeding shows that different miles are used for these analyses. Table 4 below compares the miles used in UP's URCS variable cost development and those used in UP's TPS and RTC simulations.

<b><u>Alternative Route</u></b> (1)	<b><u>Variable Cost</u></b> (2)	<b><u>TPS &amp; RTC</u></b> (3)	<b><u>Difference</u></b> (4)
1. UP/M&NA	{ }	{ }	43.8
2. BNSF/M&NA – Lamar	{ }	{ }	26.6
3. BNSF/M&NA - Aurora	{ }	{ }	17.7

Source: Entergy Rebuttal e-workpaper "Analysis of UP Errata.xlsx".

As shown in the Table 4 above, UP's TPS and RTC analyses use different miles than UP used in its variable cost analyses. Clearly, the results of the TPS and RTC simulations would differ if UP had used the same miles it used in its variable cost development.

Additionally, the UP TPS and RTC simulations are fatally flawed because they are based on an "unopposed" system. UP defines its TPS and RTC analysis as "ideal" or "unopposed" transit times as "assuming a train could operate at the maximum possible speed given available locomotive power and resistance conditions (e.g., grades, curves, car types, trailing tons), and without accounting for delays associated with train meets, train passes, maintenance, construction, weather, crew availability, or mechanical delays."<sup>27</sup> Plum/Newland then offer the following critique of their analyses: "Thus, the results of calculating 'unopposed' transit times are instructive when performing comparisons of alternative routes, but they can significantly understate *real-world* results."<sup>28</sup>

UP agrees that the results of its "unopposed" TPS and RTC analyses do not represent real world results. This lack of real world representation is obvious as UP's analyses do not consider the actual track configuration for any of the routes, i.e. UP's models include only a single line track with no sidings, passing tracks or yards. Further, its simulations include only one train moving in one direction, even over the same route, where separate simulations are performed for loaded and empty trains. UP's analysis provides no consideration to the actual trains moving over these alternative routes or any real world circumstances such as those listed by Plum/Newland in the previous paragraph.

For example, the UP/M&NA route includes UP's mainline between O'Fallons and Gibbon, Nebraska. This line has greater traffic density than any line on UP's system and is one

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<sup>27</sup> See Plum/Newland at 8.

<sup>28</sup> Plum/Newland at 8, footnote 10. (emphasis supplied)

of the most heavily traveled rail lines in the world, yet UP's simulation ignores the delays in transit times and increased fuel cost of delays related to this segment in its simulation. The results of UP's simulations provide no reliable or probative information upon which to determine the relative efficiency of the alternative routes.

To demonstrate the impact additional traffic might have on UP's simulation analysis, I ran four alternative train scenarios over a portion of the UP/M&NA route.<sup>29</sup> Specifically, I isolated the portion of the UP/M&NA route which extends a distance {

} The first scenario (Scenario 1) included one empty train from the Independence Station to Nacco Junction and one loaded train (linked to the empty train) from Nacco Jet to Independence. The second scenario (Scenario 2) adds one loaded coal train running from the PRB to Independence to the Scenario 1 RTC analysis. The third scenario (Scenario 3) adds an empty coal train moving north and west against the loaded coal trains and an intermodal train moving west toward O'Fallons to the Scenario 2 RTC analysis. The last scenario (Scenario 4) adds one more intermodal train moving west toward O'Fallons to the Scenario 3 analysis. For each scenario, transit times were collected for the Scenario 1 Independence loaded and empty coal trains to observe the impact on transit time for these trains. The results are shown in Table 5 below.

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<sup>29</sup> The scenarios and procedures are fully described in Exhibit\_(TDC-9), attached to this Rebuttal Verified Statement.

<b><u>Scenario</u></b> <b>(1)</b>	<b><u>Description</u></b> <b>(2)</b>	<b><u>Impact On</u></b> <b><u>Transit Time</u></b> <b>(3)</b>	<b><u>% Increase</u></b> <b><u>Over Scenario 1</u></b> <b>(4)</b>
1. Scenario 1	One Independence loaded and one empty coal train (2 trains)	{ } hours	xxx
2. Scenario 2	Scenario 1, plus one loaded coal train (3 trains)	{ } hours	7.4%
3. Scenario 3	Scenario 2, plus one empty coal train and one intermodal train (5 trains)	{ } hours	24.5%
4. Scenario 4	Scenario 3, plus one additional intermodal train (6 trains)	{ } hours	32.6%

Source: Entergy Rebuttal e-workpaper "Scenario Comparison.xlsx".

As is evident from the transit times in the Table 5 above, as traffic is added to each scenario, the transit time for the Independence loaded and empty trains increase, thus density and track configuration have a direct impact on transit time. These simple additions to Plum/Newland's RTC analyses result in increased transit times for the modeled Independence train of up to 33%. UP's analysis, which does not replicate the actual track configuration, train activity or operations over the alternative routes yields a meaningless measure of the relative efficiency of the routes.

**IV. COMPARISON OF BNSF AND UP RATES  
FOR MOVING COAL TO INDEPENDENCE**

In my OVS, I compared UP's current rate to BNSF's average 2009 rate per ton-mile applied to the two BNSF/M&NA routes in order to estimate a BNSF market-place rate for moving Entergy's coal to Independence. UP challenged my assumptions and calculations for three reasons, each of which are discussed below.

**A. BNSF ALLEGED  
RATE OFFER  
TO ENTERGY**

UP's first challenge to my rate comparison is based on BNSF's March 4, 2010 response (Exhibit RT-9, Trushenski OVS) to a letter from Entergy requesting BNSF's rate requirements for a through route with M&NA to Independence. BNSF actually sent two letters responding to Entergy requests for rate quotes. In the first such letter, {

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In its March 4, 2010 letter, after Entergy had identified Lamar, Missouri and Aurora, Missouri as its preferred locations for a BNSF/M&NA interchange, BNSF again declined to provide a rate quote, again claiming that it lacked necessary information. For example, it stated;

“Specifically, we would need to understand the following key operational parameters to determine our revenue requirement: (i) the

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<sup>30</sup> Exhibit RT-6, Trushenski OVS, at 1.

anticipated physical interchange location (i.e., whether physical interchange would occur on BNSF or MN&A track); (ii) any operation limitations present on the contemplated routes (i.e., the number of railcars per unit train that can be accommodated by the M&NA in interchange or limitations on the MN&A frequency or schedule of service); and (iii) locomotive power arrangements that would be required ( i.e., whether run-through power would be provided or MN&A would provide their own locomotives, MN&A's requirements in terms of horsepower and configuration, and whether MN&A would anticipate performing the required inspections and/or fueling). As you can imagine, such information is needed to enable BNSF to evaluate train cycles and other service parameters in determining BNSF's revenue requirement, and we will be unable to respond to your request for revenue requirements absent such information."<sup>31</sup>

Based upon my extensive experience with railroad rate negotiations, the information BNSF refers to is information that, in the normal course, would be obtained by a railroad through discussions with the other carrier involved in the joint haul, i.e., in this case, the M&NA. Entergy does not have such information, and a rail shipper will not normally be expected to provide such information.

UP suggests that other comments in BNSF's March letter (which also appeared in its November letter), afford a better basis for estimating a BNSF rate than the BNSF average I relied upon. I disagree. It is clear from BNSF's conduct in response to Entergy's efforts to obtain a rate quote and its filings in this proceeding that Entergy faces major impediments in exploring the possibility of transporting coal to Independence via BNSF as long as the paper barriers contained in the UP-M&NA lease are in effect. BNSF's refusal to provide a rate and its other comments { } give no meaningful indication of the rate level BNSF might actually be willing to establish for hauling PRB coal to Independence if it and M&NA were able to negotiate rates and terms without the prospect of those efforts

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<sup>31</sup> Exhibit RT-9 Trushenski OVS at 1-2.

being rendered meaningless by the paper barrier provisions of the lease. In fact, the same is true of M&NA with regard to its responses to Entergy.

For the reasons I explained in my OVS, under these circumstances, the BNSF's average coal rate provides an objective measure, not influenced by litigation, of the type of rate that might be established through meaningful negotiation.

**B. BNSF AVERAGE RATE PER TON-MILE**

UP's second argument is that my comparison of BNSF's average rate per ton-mile for coal applied to the BNSF/M&NA routes with UP's current contract rate is in error, because the BNSF average rates per ton-mile are at 2009 rate levels and the current UP rate is at 2010 levels. UP corrects my error by comparing my BNSF/M&NA rates to UP's 2009 rate. Specifically, UP adjusts my BNSF/M&NA rates to reflect UP's calculation of route miles to yield BNSF/M&NA rates to Independence via Lamar and Aurora that equal \$15.95 and \$16.31, respectively. UP then compares these rates to its 2009 rate for moving coal to Independence of { } and concludes that { }.

UP's reply includes an additional apples to oranges comparison. The BNSF average rate per ton-mile included in my OVS is based on BNSF annual coal revenues {

}

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<sup>32</sup> The BNSF/M&NA loaded miles and resultant rates shown in Table 6 have been revised to reflect the adjustments to the route miles discussed *supra*.

**Table 6**  
**Comparison of Rates Per Ton-Miles To**  
**Independence Via BNSF/M&NA And UP/M&NA Routes**

<u>Item</u> (1)	<u>BNSF/M&amp;NA</u> <u>Via Lamar</u> (2)	<u>BNSF/M&amp;NA</u> <u>Via Aurora</u> (3)	<u>UP/M&amp;NA</u> (4)
1. Loaded Miles	1,238.1	1,265.6	---
2. BNSF 2009 Average Coal Rate Per Ton-Mile	12.95	12.95	---
3. BNSF/M&NA Rate Per Ton 1/	\$16.03	\$16.39	{ }
4. BNSF Average Fuel Surcharge	\$2.12	\$2.16	\$0.00
5. BNSF/M&NA Rate per Ton excl fuel surcharge (Line 3 – Line 4)	\$13.92	\$14.23	{ }
6. BNSF/M&NA rate as percent for UP/M&NA rate 2/	{ }	{ }	100.0%

1/ Line 1 x Line 2 ÷ 1,000.  
2/ Line 5, Column (2) or Column (3) or Column (4) ÷ Line 5, Column (4).

As stated in my OVS, given that the average BNSF rate per ton-mile is comprised of coal moves that are both captive to BNSF and for which BNSF faces competition, one would expect that the rate BNSF would actually charge on Entergy's tons moving to Independence which could also move via UP, would be lower than BNSF's average rate per ton for moving coal.

**C. RECOVERY OF  
THE CAPITAL  
COST OF UPGRADE**

UP's final challenge to my rate comparison is that it fails to account for how the BNSF/M&NA rates would be affected by the cost of capital associated with constructing interchange facilities required to implement the BNSF/M&NA route alternatives. In my OVS, I demonstrated that over a ten year period Entergy is contractually obligated to move { } million of the { } million tons via UP and could move the remaining { } million via a BNSF/M&NA route.

I also showed that moving the { } million tons of Entergy's PRB coal requirements which are not contractually obligated to move via UP, via a BNSF/M&NA route to Independence, would result in a reduction in the carriers' cost of providing service equal to \$33.6 million during the 2011 through 2020 period if the Lamar interchange is used, and \$18.9 million if the Aurora interchange is used. Based on the revisions to the carriers' cost discussed earlier, the reduction in the cost of providing service equals \$23.7 million and \$7.5 million for the Lamar and Aurora routes, respectively.<sup>33</sup>

To address UP's challenge that I have not accounted for the capital cost associated with the interchange facilities required to implement the BNSF/M&NA alternative routes, I have revised my calculations of the reduction in the carriers' costs of providing service to reflect the capital cost of these interchanges. The revised calculations show that the carriers' cost of providing service via a BNSF/M&NA route to Independence would be reduced by \$21.7 million during the 2001 through 2020 period if the Lamar interchange is used and by \$5.0 million if the Aurora interchange is used. The calculation of the reduction in the railroads' cost of providing service for moving these tons is shown in Exhibit\_(TDC-10).

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<sup>33</sup> See Entergy Rebuttal e-workpaper "Entergy Variable Costs-Rebuttal.xlsx" tab "Total Excl construction."

## V. CONCLUSIONS

In my OVS, I concluded that UP abused its market power by not permitting coal to be moved to Independence via the BNSF/M&NA routes during UP's 2005-2006 service crisis and during earlier periods of service disruption. UP's Reply evidence does not alter my conclusion. UP's response to Entergy's request to permit utilization of the BNSF/M&NA alternative routes for serving Independence during the 2005-2006 service crisis demonstrates its abuse of market power for moving Entergy's coal. UP's claim that BNSF was impaired by the same service problems as UP, and therefore BNSF was also not in a position to provide service to Independence is incorrect. The fact is that BNSF did not experience the same service difficulties as UP as demonstrated by the fact that BNSF lifted its force majeure 5 months prior to UP lifting its force majeure and 21 months prior to UP ending its embargo on shipments not moving under existing contracts or common carrier items.

I also concluded in my OVS that the BNSF/M&NA routes for serving Independence are more efficient than the current UP/M&NA route. UP's Reply arguments to the contrary are incorrect. UP states that the UP/M&NA route is more efficient based on its calculation of the carrier's variable cost of service, however, its cost methodology is inconsistent with the cost methodology approved by the Board. Using the Board's approved method demonstrates that the cost of providing service is lower via the BNSF/M&NA routes by as much as \$0.45 per ton.

UP also claims that the current UP/M&NA route has lower transit times and is more fuel efficient based upon its analyses using a TPS simulation and a RTC simulation. UP's analyses produce meaningless results as their "unopposed" analyses do not consider actual traffic using the lines at issue.

As shown in my OVS, a BNSF/M&NA rate for moving coal to Independence based on the average rate per ton-mile that BNSF charges both captive and competitive traffic is lower than the current UP/M&NA rate.

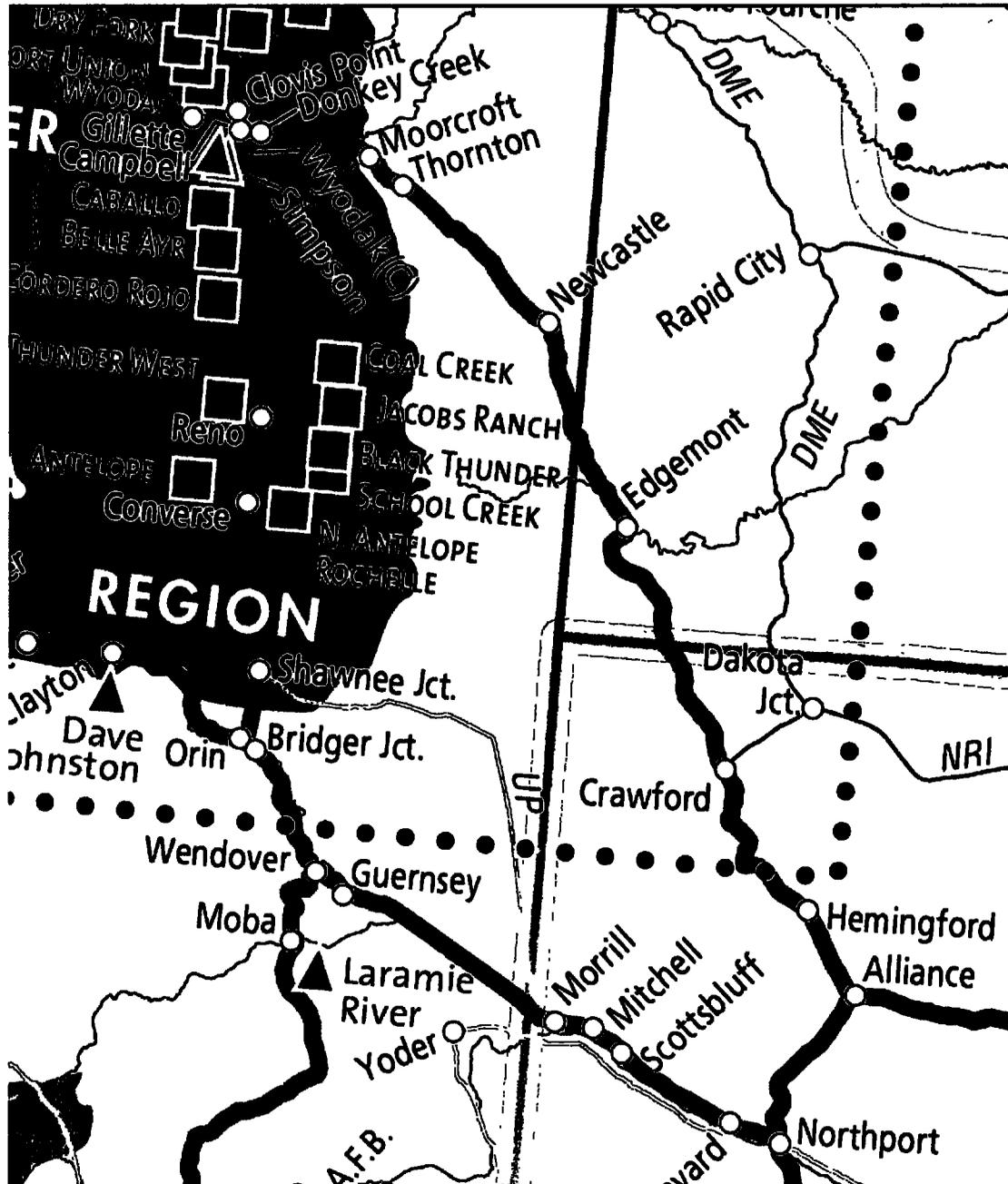
Finally, using the BNSF/M&NA route to move tons not contractually obligated to UP between 2011 and 2020 would result in a reduction in the carriers' costs (net of the capital cost for the required interchange facilities) equal to \$21.7 million and \$5.0 million via the Lamar and Aurora interchanges, respectively.

In short, UP has abused its market power by preventing Energy access to more efficient and less costly routes to Independence and the proposed BNSF/M&NA through route with an interchange at either Lamar, MO or Aurora, MO would be more efficient and economical than the UP/M&NA route.





## BNSF Coal Map - Powder River Basin Area





**Exhibit TDC-9 Redacted**



**Exhibit TDC-10 Redacted**



**REBUTTAL VERIFIED STATEMENT  
OF  
HARVEY A. CROUCH, P.E.**

My name is Harvey A. Crouch. I am the same Harvey A. Crouch that submitted a Verified Statement in this proceeding on April 7, 2010 in support of Entergy Arkansas, Inc. and Entergy Services, Inc.'s (collectively "Entergy") efforts to obtain a through route using the BNSF Railway, Inc. ("BNSF") and Missouri & Northern Arkansas Railroad Company, Inc. ("M&NA"). A statement of my background and qualifications was included with that Verified Statement at Exhibit No. HAC-1.

**I. PURPOSE OF STATEMENT**

I have been asked by Counsel for Entergy to respond to three Reply Verified Statements filed on behalf of the Union Pacific Railroad Company ("UP"); namely: (i) the statement filed by David J. Hughes ("Hughes R.V.S."); (ii) the joint statement filed by David R. Wheeler and Robert J. Plum ("Wheeler/Plum R.V.S."); and (iii) the joint statement filed by Mr. Plum and Deborah G. Newland ("Plum/Newland R.V.S."), as those statements relate to the engineering issues addressed in my initial verified statement.

**II. SUMMARY OF FINDINGS**

For the reasons detailed in my opening statement and below, it remains my view that it is feasible to operate loaded coal trains via a joint through route interchanging at Lamar or Aurora, Missouri, using BNSF and M&NA. The criticisms lodged by UP are largely overblown, misstate my initial verified statement, and ignore the reality that the BNSF/M&NA routing is capable of handling loaded unit coal trains at the initial volume levels that Entergy has identified with minimal capital outlays. I am particularly confident that the M&NA line between Lamar

and Aurora, Missouri, and the Independence Station would be capable of handling loaded unit coal trains at the initial projected traffic levels, and that future increased tonnage levels could be handled despite the increased maintenance costs that may be dictated by the heavier annual tonnage. These conclusions are based on Crouch Engineering's review of: the documents and interrogatory responses provided in discovery in this proceeding by M&NA and BNSF; information available to us through public sources, including map resources (Google Earth Maps, USGS Topographic Maps, Aerial Photos from Google Earth and Bing); performance of a three day hy-rail inspection of the line in November, 2009 to make observations regarding current infrastructure conditions; conversation with the City of Lamar City Manager; review of real-world bid prices and UP "shotgun" estimates; review of the UP and M&NA replies; my extensive knowledge and experience with the terrain and topography of the M&NA line as a result of my role as the person who was retained by M&NA's parent company RailAmerica to develop the track charts for M&NA; and other related information.

UP's principal arguments on reply relate to the interchange of traffic at Lamar or Aurora, Missouri, and to the purported need for additional staging and side tracks along the route of movement. As I describe below, UP's objections do not warrant any modification to my conclusion that service over the requested through route – at the { } annual tonnage levels – would be feasible with only minor upgrades to the line. While additional work on the line would be necessary to permit the transportation of annual tonnages on the order of 6.5 million tons (as I described in my opening verified statement), that additional work does not constitute a serious impediment to the use of the line even at such increased volume levels.<sup>1</sup>

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<sup>1</sup> Significantly, in discovery, UP and M&NA failed to provide originals or copies of originals of any actual rail inspections, rail test car inspections, tie inspection records, geometry car test records, Sperry Rail Service rail test records, or other test results in response to Entergy's

### **III. REBUTTAL FINDINGS**

In the following sections of this rebuttal, I address the criticisms that UP witnesses made in response to my opening statement. This rebuttal is organized to follow the general structure of my opening:

- A. Gross Car Weight
- B. Locomotive Type and Axle Configuration
- C. Length and Number of Trains
- D. Track Geometry – Grade and Curvature
- E. Track Structure – Track Components
- F. Bridge Structures – Design Load Rating
- G. Capacity to Handle Additional Traffic
- H. Operations Considerations – Passing Sidings
- I. Feasibility of Potential Interchange Locations

Prior to reviewing the specific details of UP's reply, it is important to note that there is a common defect that runs throughout UP's critiques of my conclusions. In particular, UP's witnesses appear to draw no distinction between the impact of running 3, 10, or 33 additional trains per month on the M&NA line. Those witnesses simply assume that as soon as *any* loaded coal cars are added, M&NA will need to immediately spend massive capital dollars to upgrade the line to accommodate the highest level of traffic potentially available.

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requests, yet UP's experts refer in their statements to defects listed in test reports, and actually summarize data from test reports in reply that were requested in discovery, but were not provided (refer to Hughes' workpaper "M&NA Track Evaluation Analysis.pdf").

Notwithstanding these criticisms, I continue to be of the opinion that the need for significant capital outlays is unnecessary for purposes of the initial traffic levels.

In my experience, annual gross tonnage drives maintenance needs and costs. The railroad's fixed costs remain constant, while variable costs increase with traffic. One can expect increased tonnage to lead to accelerated testing cycles, tie change out, gaging, surfacing and lining, bridge repairs, and rail change out; however, these factors do not influence the feasibility of running on existing track and bridges, instead, they only impact future maintenance costs. Moreover, as volumes increase, revenues increase as well. Accordingly, any concern about increasing maintenance costs should be, and can be, addressed through the rates and have nothing to do with the current feasibility to move currently available volumes.

For the purpose of determining the feasibility of running loaded unit coal trains along the M&NA route, the focus should be on the capability of the route to handle the { } annual net tons and the { } annual net tons that will be available in the initial years of the through route. At the initial proposed traffic levels, the existing track and bridge structures are capable of handling loaded unit coal trains with modest capital expenditures.

**A. Gross Car Weight**

As noted in my opening evidence, M&NA currently hauls 286,000 lb. ("286k") cars and 286k unit grain trains on the proposed route. Crouch V.S. at 5. According to M&NA's Maintenance-of-Way employee, Mr. Kess Creech, the M&NA {  
} *Id.*

In his Reply Verified Statement, UP's witness Mr. Hughes attempts to refute this evidence but he is mistaken. In particular, while he acknowledges that the M&NA moved 286k traffic on portions of the subject line in 2009, Mr. Hughes wrongly suggests that there was {

} moving between Bergman and Independence in 2009. Hughes R.V.S. at 11-12.

The fact that {

} See Rebuttal e-workpaper “Reports of Interchange Cars.pdf” at page 290 of 712.

M&NA handled { } as

well. See January 3, 2008 carload data provided in the “Daily Interchange Report of Cars Received” showing that {

} See Rebuttal e-workpaper “Reports of Interchange Cars.pdf” at page 10 of 950.

UP makes much of its claim that the addition of “dramatic volumes” of heavy axle load (*i.e.*, 286k) traffic on the Bergman/Independence segment will have a “*potential*” impact that “cannot be overstated.” Hughes R.V.S. at 12. UP, however, offers nothing more than a statement of opinion in this regard that does not address the current feasibility of the line for loaded coal train operations, nor is any supporting data provided for the claim that significant capital is needed immediately. *Id.* Instead, all of the various “likely” maintenance needs put forth by Mr. Hughes are speculative, undocumented, and unsupported guesses, and should not be considered in the evaluation of the line as being feasible for the proposed operation of 286k loaded unit coal trains over the line. Neither the UP, M&NA, nor Mr. Hughes provides any original test data, track data, historical data, reports, price support data, or any other information to support his “likely” future maintenance costs.

It should be noted that the gross car weights used in my analysis are 286,000 LB per car, and that the net weight per car of coal is 118.2 TN. Mr. Hughes, however, incorrectly uses 110 TN as the net weight of coal per 286k car, which introduces error into Mr. Hughes' calculations and analyses (refer to "M&NA Workbook.xlsx," tab "Density," provided in Mr. Hughes' workpapers by UP). Using a net coal weight of 110 TN/Car instead of 118.2 TN/Car is in error, and causes an increase in the annual gross tonnage over the line since the same weight of coal would be shipped, but higher gross tonnage results from the calculations, based on the fact that more car weight and locomotives would be needed to haul the same amount of coal with a higher tare weight car. Mr. Hughes' analysis therefore overstates the annual gross tonnage that would result from the additional unit coal train traffic on the proposed route.

**B. Locomotive Type and Axle Configuration**

UP assumes the same locomotive type and configuration that I used in my opening evidence (*i.e.*, 3 @ six axle locomotives in a distributed power configuration). *See* Crouch V.S. at 5-6; Wheeler/Plum R.V.S. at 3.

**C. Length and Number of Trains**

Both parties likewise agree as to the length of trains (*i.e.*, 135 cars). *See* Crouch V.S. at 5-6; Gough R.V.S. at 7, and Wheeler/Plum R.V.S. at 3.

Regarding the number of additional trains that would move over the line if the Board were to grant Entergy's request for relief, it is understood that the same number of empty unit coal train movements will continue to run northbound on the existing M&NA route, up to the interchange point, though some will be moving in UP/M&NA service and some in BNSF/M&NA service. However, Mr. Hughes' tonnage calculations improperly include the gross train weight of additional empty unit coal trains in his calculations even though the existing

empty unit coal train traffic already is included in the base traffic total (refer to Hughes workpaper “M&NA Workbook.xlsx,” tab “Density”), effectively doubling the empty annual MGT for new loaded unit coal trains. This error is then compounded in Mr. Hughes’ Table 1, at 10, which is intended to show the annual increase in tonnage on M&NA line segments. By double-counting the empties, Mr. Hughes overstates the impacts of the proposed through route on overall traffic levels.<sup>2</sup>

One additional point regarding train length merits discussion. UP, of course, previously moved all of its Independence traffic over what is now the M&NA line even though UP could have moved that traffic via North Little Rock, Arkansas. In an effort to overcome the contradiction between UP’s past choice in running loaded coal trains to Independence over the M&NA route, as opposed to the more circuitous route through North Little Rock, UP suggests the proposed route is particularly unfavorable (Hughes R.V.S. at 5) for running loaded unit coal trains today because today’s trains are longer than the loaded trains that UP used to run over the M&NA Carthage subdivision. In my opinion, Mr. Hughes is mistaken. Train length has little additional affect on operations, particularly given all of the advancements in locomotive power, and the relatively light grades and curvature as compared to eastern coal hauling railroads. The current coal trains on the M&NA all use distributed power (“DP”). DP allows for a better distribution of the load throughout the train and limits the amount of rolling resistance of the train. DP provides for better control of slack, run-in, and braking, and therefore allows railroads to run longer trains, and run them more efficiently. Thus, UP’s assumption that running longer

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<sup>2</sup> Mr. Hughes also overstates the existing traffic density on the M&NA line, using the highest density in one line segment to represent the entire line, rather than taking a mileage based average (refer to Hughes workpaper “M&NA Workbook.xlsx,” tab “Density”).

trains today is less efficient than running the slightly shorter trains that ran previously without DP, is not accurate and is not supported by any pertinent technical analysis.

**D. Track Geometry – Grade and Curvature**

In my opening statement, I explained that “the curvature I have observed on the M&NA lines is conducive to the movement of loaded unit coal trains.” Crouch V.S. at 9. In their reply statement, UP witnesses Plum and Newland use a summation of the central angle of every curve on the route to support their claim that the route is unsuitable for unit coal operations. Plum/Newland R.V.S. at 11, Table 3. Total central angle curvature is not a valid railway engineering standard for the evaluation of route feasibility.<sup>3</sup> Summing the central angles is a simplistic approach that does not consider maximum degree of curvature, frequency or location of high degree curves, grades, or the length of curves. Moreover, UP did not provide any data source or calculations to support its comparison, and UP likewise did not provide any scientific engineering support for the supposed relationship of total central angle curvature to efficiency.

The number of curves on a given section of railroad main line track simply is not an indication of the feasibility of the line for unit coal train operations. If the line had grades of 3% and many curves over 10-12 degrees, then feasibility would come into question; however, this is not the case with the M&NA’s relatively light grades and curvature, as compared with the lines of eastern railroads such as Norfolk Southern and CSX that have significant coal operations in more severe terrain. Eastern coal routes have many curves, many of which are over 6 degrees.

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<sup>3</sup> In this regard, I note that neither Mr. Plum nor Ms. Newland appears to be a professional engineer, or has any engineering training. Rather, they appear to have simply made the calculations of curvature and offered opinions on the impacts of the curvature on “efficiency” without the benefit of any actual technical analysis of the track conditions.

The proposed M&NA route has very few curves at or over { } degrees of curvature (approximately { } of all curves on the line, and the great majority of those curves are between { } degrees). (Refer to rebuttal curve data spreadsheet “Entergy Rebuttal Curve Data.xlsx”). Most curves on the proposed M&NA route are in the { } degree range, which many railroads treat similar to tangent track in terms of design parameters and maintenance.

In their replies, UP’s experts imply that the entire line is full of curves of { } degrees and higher. In fact, the locations on the M&NA line with higher degree of curvature are small sections within the entire route length, and most of the higher degree curves are between { } degrees, which are considered mild in terms of handling coal on eastern railroads. As stated in opening evidence, NS and CSX handle many loaded unit coal trains over track with curvature in excess of 6, 8 and even 10 degree and higher curves. *See Crouch V.S. at 9.*

UP’s simple approach of summing the central angles of all curves as a measure of efficiency or feasibility likewise is inconsistent with its own operating decision to use this route for the movement of all of Entergy’s empty unit coal trains from Independence. If the route is not efficient or suitable due to curvature, then empty unit coal trains should not run on the line, and UP should have never run loaded unit coal trains on the line in the 1980’s. In contrast to the UP argument for inefficiency, it is evident that UP and M&NA run unit coal trains northbound on the line because it is feasible, and because it provides a more efficient route for their operation.

**E. Track Structure - Track Components**

In my opening statement, I commented that during my hy-rail inspection of the M&NA line in November of 2009, “[I] observed the track components to be in very good condition.” *Crouch V.S. at 10.* In their reply statements, UP’s experts erroneously state that I

did not consider all of the factors relating to track structure in my inspection of the M&NA main line track and claim that I failed to acknowledge the actual conditions of the M&NA lines. See Hughes R.V.S. at 3, 14 and 15 & n.19.

Contrary to UP's claim, I did inspect and evaluate ties, rail, ballast section, etc., and I considered CWR, grades and curvature, as well as the size and condition of each track component. I also spent many hours in conversation with the M&NA Track Superintendent, Mr. Kess Creech, who {

} A more

detailed discussion of tunnels and vegetation control is also included in this section.

I address specific conditions of track components below with respect to current conditions.

1. **Rail**

As stated in opening evidence, the rail on the proposed route is 112 RE and 133 UP continuous welded rail (CWR). Crouch V.S. at 10. This rail is suitable for loaded unit coal train operation.<sup>4</sup> Currently, UP routes empty unit coal trains northbound on the M&NA because of the efficiency of the route. Loaded coal trains can operate southbound with the existing rail. This increased tonnage will require the M&NA to reevaluate its testing cycles, but does not affect feasibility of running loaded unit coal trains southbound.

In his reply statement, Mr. Hughes questions the condition of the rail based on its age. Hughes R.V.S. at 16-20. In making his criticism, however, Mr. Hughes ignores the fact

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<sup>4</sup> In fact, based on my knowledge and experience, 112 LB rail sections or similar weight rail sections are in use for unit coal hauling lines on the CSX and NS. I see no reason why 112 LB rail could not be used for loaded coal trains on the M&NA. The fact that the M&NA rail is CWR and not jointed makes the existing rail even more suitable for unit train operation, and reduces long term maintenance.

that the anticipated life of rail is almost entirely dependent upon the gross tonnage hauled over the rail. Age may be a factor in rail wear, but tonnage is the greatest factor. Age, in and of itself, is not controlling.

RailAmerica has an aggressive rail testing program with frequency of testing based on annual gross tonnage over their lines, and the M&NA's contractual obligation with UP requires them to keep the track maintained at the same level as when they took over the line. RailAmerica's rail testing program, in my opinion, is one of the best rail flaw detection programs used in the short line industry. Furthermore, the M&NA is required to repair defects found during inspections and during testing programs. On all RailAmerica railroads, defective rails are replaced as found during or immediately following the testing programs, conforming to FRA rules.

## **2. Crossties**

In our independent inspections and evaluations of crosstie conditions in November, 2009, AECC's Mr. Heavin and I each found that the crosstie condition on the M&NA line was good, and adequate for the class of track (refer to opening workpaper "Entergy Defective Tie Data.xls"). The average number of defects in all sample locations was 24.3/100. See Entergy Op. e-workpaper "Defective Tie Counts.xls." This is considered good tie condition for the current FRA classes of track. I did not find any locations where existing tie conditions did not meet minimum safety standards required by the Federal Railroad Administration Rules.

Significantly, even with the proposed added coal traffic, the M&NA line will still be considered relatively light in density, and the existing tie conditions will support the operation of unit coal trains. My observations are based on decades of experience in inspecting and

grading crossties, tie marking, and preparing plans for timber and surfacing rehabilitation projects on Class 1 and short line railroads.

UP's Mr. Hughes addresses the subject of ties on pages 20-24 of his reply statement. Mr. Hughes' main focus is the concern that adding the largest possible volume of 6.5 million ton per year will increase maintenance costs, as if that is a determination of route feasibility. Whether future theoretical volume levels will require increased maintenance costs is a separate issue from the feasibility of the current route to move coal at the desired tonnage levels. As annual tonnage increases on a line, tie life will decrease accordingly, and maintenance costs will go up over time. However, the cost of the additional maintenance is offset by the increase in revenue to the railroad from the additional traffic.

Mr. Hughes does not state that unit coal trains cannot operate over the track based on existing tie conditions. Rather, Mr. Hughes provides a bar graph of "Required vs. Actual Tie Replacement Between Lamar and Independence." Hughes R.V.S. at 22, Chart 1. The bar graph apparently is intended to show a state of deferred maintenance on the M&NA; however, the calculations used by Mr. Hughes are incorrect for a number of reasons.<sup>5</sup> In particular, Mr. Hughes fails to include the ties planned for the 2010 and 2011 calendar years in his calculations and graphical presentation, even though he recognizes the planned tie installations in his footnote No. 32. Hughes R.V.S. at 23 n.32. If Mr. Hughes had included those ties planned for replacement, then he could not have demonstrated a state of deferred maintenance.

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<sup>5</sup> Mr. Hughes makes reference to a report prepared by Neel Schaffer and Crouch Engineering for the Tennessee DOT that refers to tie life. Hughes R.V.S. at 22 n.30. Mr. Hughes extracted data and quotes from the report that were accurate for that study; however, the purpose of the study was to develop a study basis, for which the intended goal was a fair and impartial distribution of state allocated rehabilitation funds, and not the feasibility of using a certain route for a certain type of traffic. His use of that data should be tempered by other conditions, such as level of traffic over time, and the extension of useful tie life as a function of reduced traffic.

Mr. Hughes also makes a mistake in his assumption that there are 3,250 ties per mile on the line. Using 3,250 ties per mile would equate to a tie spacing of 19.5" center to center. This is a 286k modern standard, but 19.5" is not the existing tie spacing on the M&NA. At best, the ties may be on a 20" tie spacing, which equates to 3,160 ties per mile, but the tie spacing is most likely between 21" and 24" on average. Because of this mistake, all of Mr. Hughes' calculations are in error. Mr. Hughes also fails to consider that annual tonnage is a factor in determining tie life. At much lower annual tonnages, tie life is extended for many years. Not taking annual tonnage into consideration adds more error to Hughes' calculations.

Mr. Hughes also fails to provide any current tie data, inspection reports, or calculations from the UP or M&NA regarding existing tie conditions. Since the M&NA and UP are well into their 3-year combined, joint rehabilitation project, one would think they had evaluated the number of ties needed for their timber and surfacing project; however, no data, other than the number of ties to be installed, was provided.

### **3. Ballast and Roadbed**

As observed in my 2009 inspection, the existing ballast section is adequate for operation of the line at the existing FRA class of track. Ballast in most locations is clean and free draining, and the shoulder width at the ends of ties is adequate for restraining lateral movement of the track. *See Crouch V.S. at 11.* Mr. Hughes suggests that additional maintenance expenditures will be necessary (*see Hughes R.V.S. at 25-29*) but he does not provide any data or conclusions that explain at what tonnage levels the expenditures become necessary. In my opinion, such expenditures are maintenance-related and relate to rate issues, rather than feasibility to operate loaded unit coal trains at the initial volume levels. Mr. Hughes

has not explained or justified treatment of these costs as capital expenditures that would be required prior to the commencement of the through route.

#### **4. Tunnels**

Mr. Hughes concluded that it is “likely” that 5% of tunnels will need major repair work. Hughes R.V.S. at 33-35. This conclusion, however, was not based on any empirical evidence or engineering study of actual tonnage conditions. Mr. Hughes did not state that the condition of the tunnels would prevent the operation of loaded unit coal trains. Instead, Mr. Hughes suggests unspecified capital investments and maintenance costs are “likely.” These conclusions are not consistent with my observations and experience for several reasons.

I inspected the tunnels on the M&NA line during my hy-rail inspection trip in November, 2009. The M&NA currently operates empty unit coal trains through all of the tunnels on the proposed M&NA route. There are no known clearance issues, or loading issues that would prevent running empty or loaded trains through the M&NA tunnels.

From an operational and engineering perspective, there is no limiting factor involved with respect to tunnels in determining whether the tunnels are able to handle 286k loaded unit coal trains. The load from a train is transferred from the wheels into the rail, tie plates, ties, ballast, and then into the rock subgrade in each tunnel. Contrary to Mr. Hughes’ statement at 34, the arch of the tunnel is not affected by the influence lines of the wheel loading in any manner. Mr. Hughes’ evaluation and comments do not reflect the simple fact that train loads go down into the track and subgrade beneath the track, and not up into the air, or out to the side, and then into the tunnel arches above.

As in most tunnels in the eastern US, there is ground water seepage into the tunnels, which drains out of the tunnels via lateral ditches. This is natural, and is always

expected. The tunnel floors are sloped to drain away from the track, and the track is sloped on a grade sufficient to move the water out of the tunnels. All of the tunnels I observed during my inspection in 2009 were performing properly, and no deficiencies were noted that would prevent the operation of 286k loaded unit coal trains. Moreover, the track structure in all of the tunnels was in a good state of condition. The rock walls of the tunnels appeared to be stable, the rock competent, and there was no evidence of recent or eminent collapse. My experience is based on my education, tunnel inspection experience on the NS and many short line railroads, and rehabilitation plans I have prepared for tunnel rehabilitation projects in the eastern US.

Over time, there will be regular track maintenance required; however, there were no conditions observed in the tunnels that would affect the operation of loaded unit coal trains. All tunnels are just as capable of handling loaded unit coal trains as they are the empties. Also, annual gross tonnage is not a factor in determining future tunnel maintenance costs because loaded trains do not impact the structural integrity of tunnels, as explained above.

##### **5. Vegetation Control**

Mr. Hughes assumes that 25% of the line needs some kind of ditching and that approximately { } will be needed for cutting back brush and restoring drainage. Hughes R.V.S. at 35-36. Mr. Hughes “likely” capital and maintenance costs are based solely on his speculation, and he offers no supporting reports, evidence, data, or calculations. He offers no basis for concluding that loaded unit coal trains will affect ditch capacity. Also, as with many of his back of the envelope maintenance cost estimates, he offers no explanation of his tonnage assumptions. He merely refers to the level of maintenance needed to accommodate “main-line operations involving significant numbers of loaded trains.” Thus, it is difficult to understand whether he is saying that his proposed level of maintenance is needed immediately – even if

there are only 3 trains per month – or if he is basing the maintenance levels on the assumption that the maximum 33 trains per month will be moving over the lines immediately. These assumptions should have been addressed and are essential to understanding the maintenance needs of the railroad.

I agree that vegetation control is very important in track maintenance. The M&NA has a program in place to perform weed spraying on its main line and other track on an annual basis. During my inspection in 2009, there was minimal vegetation in the roadbed section, indicating that their vegetation control program is working. With respect to brush cutting, no information was provided in discovery or opening evidence that would indicate the railroad's schedule for brush cutting along the main line. RailAmerica does contract for brush cutting on an as-needed basis. However, there were no conditions noted that would prevent the operation of empty or loaded unit coal trains. For that matter, brush cutting schedules would be dictated by the operation of any trains. There are no special considerations for “loaded” or “empty” trains when it comes to vegetation control.

Mr. Hughes comments that railroad roadbeds need sun light and not shade in order to stay stable and dry. Hughes R.V.S. at 35-36. All railway maintenance personnel know that drainage is a very important factor in track maintenance. However, proper ditches and ditch maintenance is the most important factor in track drainage, not sunlight. The ballast drains the immediate track structure, and the lateral ditches drain the track roadbed. There were very few locations I observed during the hy-rail inspection where ditches were not properly functioning. The track line and surface also were observed to be in very good condition, with a very full and adequate ballast section. Observing a few areas requiring spot maintenance is typical on any

railroad. These spot areas are handled in regular maintenance and any related costs would be addressed in the rate base.

**F. Bridge Structures**

On reply, neither UP nor its experts provided individual bridge design load ratings or estimates of necessary individual bridge capital costs based on any specific evaluations, calculations, or individual cost estimates. UP also did not provide individual bridge inspection reports or proposed work plans for individual bridges in discovery or reply.

Given this lack of bridge data provided by UP and M&NA, we based our evaluation of bridges on calculated bridge design load ratings developed from the verified Osmose bridge reports for individual bridges, and from observations made in the field during the inspections in November, 2009. Crouch used unit prices from the M&NA - Osmose repair work recently completed on the M&NA. I continue to be of the opinion that these unit prices are the most realistic unit costs for bridge repair based on materials, location and similar scope of work.<sup>6</sup>

Design load rating assumes that the individual bridge members will not deteriorate faster than normally expected over the life of the bridge. Life of the bridge is dependent on the materials used in construction. A railroad can run trains over structures with design load ratings lower than the proposed car weights; however, the rate of deterioration for individual bridge members will be accelerated. Bridges not rated for 286k can be upgraded, or, the maintenance program accelerated to maintain the bridges that fall in this category.

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<sup>6</sup> During the Bridge Inspections, {

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Mr. Hughes based his evaluation on “likely” repairs needed for bridges based on the type of bridge, and lumped all bridges together, rather than looking at the individual repairs needed at each individual location.<sup>7</sup> Mr. Hughes’ broad based “likely” blanket assessments used costs that were unsupported. No source of information was provided for the UP cost estimates.

UP relied on Mr. Hughes in support of its criticism “that Entergy’s and AECC’s experts appear not to have considered carefully the costs of maintaining bridges under the increased loads that would result from routing loaded coal unit trains as proposed by Entergy.” UP Reply Argument at 63. On the contrary, we have carefully considered the existing capacity of the M&NA bridges along the proposed route, and are aware of the cost of maintaining bridges under the proposed increased loads. The impact of trains running at timetable speed was used in the calculation of design load ratings. The question of whether the route is feasible for hauling loaded unit coal trains is the purpose and focus of our evaluation.

As with other cost items, our analysis assumes that additional maintenance expenditures relating to higher tonnage levels in later years are maintenance issues that would be addressed through the rate base after the route has been established, and are not capital costs required to bring the design load rating of bridges up to 286k for initial establishment of the through route for initial volume levels. The bridges on the M&NA have the capacity for, and are currently able to carry, loaded unit coal trains, just as they are able to carry loaded unit 286k grain trains and other 286k traffic currently using the route. I recommended upgrading the timber bridges to a design load rating of 286k in opening, and provided an approach to estimating the costs, based on Osmose Bridge Inspection reports, my load ratings, and recent

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<sup>7</sup> He appears to assume that the bridge repairs are needed regardless of whether the tonnage levels are at the initial 3-10 trains per month, or the potentially available 33 trains per month.

M&NA unit prices for similar work (refer to opening workpapers and “9109 UP-MNA09Bridgework.xls” provided in opening). Mr. Hughes, on the other hand, offers generalized views on the level of bridge repairs “needed” based on the age of bridges and his apparent view that the bridges have to be upgraded immediately to handle future tonnage levels that may, or may not, ever be shipped over the route. Mr. Hughes did not base his opinion on an actual inspection of the bridges, on review of bridge inspection reports, or on his own independent analysis. He offers no conclusions regarding the level of bridge repairs that would be needed to move initial tonnage levels of 3 to 10 trains per month. For example, UP notes: “He [Mr. Hughes] observes that there are many bridges on M&NA between Lamar and Independence plant, { } UP Reply at 64; Hughes R.V.S. at 30-31. Mr. Hughes explains that M&NA’s bridge maintenance approach has been to repair bridges { } and that while such an approach may have been adequate for the traffic currently moving on those lines, it would not be an appropriate approach given the volume of loaded coal trains contemplated by Entergy.

Mr. Hughes also states that “bridges tend to have long useful lives so long as they are systematically maintained and repaired, thereby ensuring the integrity of structural subsystems such as bents, stringer packs, and decks.” Hughes R.V.S. at 31. The condition of the bridge, its members, and components are what are used to determine the load rating of a bridge. Mr. Hughes nevertheless states that the { } approach will not be adequate as a maintenance plan going forward with increased traffic. However, it is common Railroad industry practice to replace only the bridge components that are necessary for sustaining the

capacity of the bridge, and the safe operation of the Railroad, rather than replace an entire structure when only a few single piles, caps, bracing, or ties are deemed unsatisfactory.<sup>8</sup>

Based on the Osmose Inspection Reports, our findings in the field inspection, and the repairs being made, completed, and scheduled by Osmose, it is my opinion that RailAmerica is doing a good job of maintaining their bridges, and that they currently run 286k cars over their bridges without incident. The railroad should continue to inspect the bridges annually, and make repairs as needed each year, based on their inspections. I strongly disagree with Mr. Hughes that bridges should be replaced in their entirety, even though conditions do not warrant the replacement of the entire bridge.

I also disagree with Mr. Hughes conclusion that repairing and replacing bridges on the M&NA lines would cost almost { } million between Lamar and Independence plant, and almost { } million between Aurora and the plant. Hughes R.V.S. at 33. Mr. Hughes' estimates to repair and replace bridges on the M&NA lines are based on a short segment between Diaz Junction and the Independence plant. His estimates are not based on the evaluation of each individual bridge, but are based on a blanket or "shotgun" approach which assumes every bridge is defective. Mr. Hughes' costs and quantities are unsupported, and are applied to every bridge on every segment of the proposed route regardless of condition, based solely on the type of bridge.

Mr. Hughes' "shotgun" approach is very unrealistic and the repairs presented by him are not representative of the condition of the bridges on the M&NA. He states "such repairs would need to be completed in the very near future" (Hughes R.V.S. at 33), but provides no

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<sup>8</sup> Based on my experience performing bridge inspections and evaluations for RailAmerica, this is the philosophy that RailAmerica employs.

inspection evidence, quantities for individual bridges, load rating data, inspection data, or cost data to support his position. Mr. Hughes concedes that the bridges do rate for 286k cars, which are currently in common use on the M&NA route. The “UP Reply workpaper “M&NA Workbook.xls,” tab “Bridges” contains the costs that were proposed by Mr. Hughes. These costs are referenced from source data from a file titled “MNA Bridge Work Cost.xls,” which again has not been provided in discovery or reply. The underlying costs are unsupported and thus cannot be verified. My Hughes’ “shotgun” approach grossly overstates the bridge work that is necessary to accommodate the initial volumes of traffic that would be implicated if the request for the BNSF/M&NA through route is granted.

I also have not ignored the potential additional traffic that could be run over the M&NA bridges. The purpose of our study was to determine the feasibility of running loaded 286k unit coal trains over the proposed M&NA route. The M&NA has been regularly accommodating rail traffic that consists of loaded and unloaded 286k cars. Mr. Hughes states that “the M&NA lines . . . have been handling traffic that is very different from the loaded unit coal train operations contemplated by Entergy . . .” and that “an entirely new set of requirements will be placed on them, necessitating an entirely new and different cost structure.” Hughes R.V.S. at 36. However, the M&NA has been handling traffic at timetable speed that is indeed very similar to unit coal train operations. As I have noted throughout, the M&NA has been carrying 286k cars for many years, and has been inspecting and repairing bridges annually. Mr. Hughes states that “an entirely new set of requirements will be placed on them,” yet he has not identified a single limiting factor or M&NA bridge that he believes is not capable of carrying the proposed traffic anywhere in his verified statement. Instead, he uses blanket cost projections

based solely on the type of structure, with unsupported cost data, and does not consider each structure independently.

I also disagree with UP's characterization of our inspection of the M&NA bridges as "cursory." UP attempts to support this misdirected criticism with the false statement that "Mr. Crouch concedes that his evaluation likely understates the full breadth of bridge repairs necessary to allow for the significant movement of unit coal trains over the line in question." Hughes R.V.S. at 30. As stated in my opening, the bridges carry 286k cars now, and are capable of carrying the proposed loaded unit coal traffic. That said, I have acknowledged that it is recommended to bring the timber trestles up 286k as outlined in my opening evidence.

In fact, during its hy-rail inspection of the line, Crouch made random inspections to verify the accuracy of the Osmose bridge reports provided by the M&NA in discovery. (Please note that UP did not provide any bridge inspection reports, plans, load ratings, or other pertinent bridge data in discovery or reply). The purpose of the Crouch inspections was to determine whether the Osmose data were reliable and whether the measurements and data were verifiable. In its random inspections, Crouch found that the observations made by Osmose inspectors and listed in the Osmose reports matched the conditions in the field observed by Crouch with almost no exceptions. Crouch also observed all concrete and steel structures to be in good condition. Steel structures had little to no corrosion.

As presented in opening evidence, Crouch load rated 54 timber bridges, which represent roughly 44% of all M&NA timber bridges on the proposed route.<sup>9</sup> The calculations were based on data from the Osmose reports, many of which were the same ones checked in the

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<sup>9</sup> Timber deck tie defects were minimal, and were pointed out to the Railroad's Kess Creech during our inspection. At one location, a crushed timber cap was identified by Crouch, and the information was provided to the railroad at the time of inspection.

field and verified. Crouch extrapolated the work necessary to achieve a 286k design load rating on the bridges to include 100% of the bridges on the M&NA. The timber bridges not rated, were not rated because the Osmose reports did not contain complete data with respect to member size of certain bridge components. Crouch assumed that the same magnitude of repairs would be required on the remaining timber bridges, and so extrapolated that cost to the remaining timber bridges in opening.

In his reply, Mr. Hughes emphasizes that { } years old. While Mr. Hughes relies upon the { } year number, he does not explain the significance. Mr. Hughes then states that bridges tend to have long useful lives if properly maintained. He does not identify, analyze or estimate the actual useful life of any particular bridge, or bridges. Instead, he very simply assumes that massive bridge repairs and replacements are necessary even before volume reaches the potential 33 trains per month that is potentially available at the end of the UP/Entergy contract period.

Mr. Hughes ignores the reality that the M&NA conducts annual inspections, and repairs bridges annually as needed. Hughes then asserts that bridges have to be replaced based on age, rather than condition, which is not a railroad standard practice. In our field inspections, we found that bridge defects were being repaired as needed, bridge deck ties scheduled for replacement as needed, and that the steel and concrete bridges were in very good condition, with no apparent work needed at the time of our inspection.

**G. Capacity to Handle Additional Traffic**

In my opening evidence, I provided a spreadsheet showing the capacities of sidings along the proposed route. The calculated capacities were based on the train configurations agreed upon by all parties, and the siding lengths listed in the UP timetable

provided in discovery. There are numerous sidings available for staging trains or passing 2 unit coal trains between Lamar and the Independence Plant. (These sidings are listed in electronic workpaper “MNA Sidings Lengths.xlsx”). When meeting local or other shorter freight trains, the unit coal trains can hold the main line for the meet, and have the small local freight trains take the siding, thereby reducing the necessary siding lengths.

Given that the unit coal trains have distributed power, the siding at Lamar could be used to stage empty coal trains prior to interchanging with the BNSF. The siding at Pearl can also be used to stage empty trains waiting for loaded trains, or waiting to interchange at Lamar.

The UP currently has to stage trains at Newton, AR, approximately 11 miles from the interchange with the M&NA at Diaz Junction, so the UP argument that trains have to be staged immediately at the interchange point is not a valid argument, and does not reflect current interchange and operating scenarios.

It continues to be my opinion that there are ample other sidings for passing trains between Lamar and Independence. This is particularly true at the initial volume levels. While I also believe there are available siding locations to accommodate even the highest volume levels contemplated, such additional sidings are not necessary to have in place to establish a through route for the initial volumes and could always be added and built into the rate base if the volumes materialize.

**H. Operational Considerations - Passing Sidings**

The factors pertaining to passing sidings are discussed in Section G. above.

**I. Feasibility of Potential Interchange Locations**

Both parties agree that a new interchange track would be necessary either at Lamar, MO or Aurora, MO, with Lamar appearing to be the preference of all parties. On reply,

UP experts made incorrect assumptions that were not based in fact, or misstated facts that they used to drastically increased the length of the proposed Interchanges at Lamar, MO, and Aurora, MO. UP also ignored several items provided for in the evaluations, designs and cost estimates presented by Crouch in opening evidence. The proposed increases in length and double-counting of costs already included in the Crouch estimates, resulted in the much higher interchange costs proposed by UP.

For example, UP's experts stated that the cost of a power switch and related signal work need to be added to the cost at Lamar (and Aurora). Hughes R.V.S. at 39. UP's experts overlooked the fact that these costs were included in opening evidence and were based on the costs typically charged by eastern Class I railroads (*e.g.*, NS and CSX). These costs were included in the original cost estimate for Lamar, Items 13 and 14, and in the original cost estimate for Aurora, Items 14 and 15 (Please refer to opening evidence e-workpaper "Interchange Preliminary Cost.xls"). A power switch was assumed for the BNSF high traffic mainline at each interchange location in order to get trains off of, or onto, the BNSF main line segments quickly. A spring switch was provided for in the estimates allowing for trains to move onto the M&NA main line at each interchange location without having to stop to manually throw the switch back to the main line alignment. A remote control switch could be added for about the same cost as a spring switch, and could be operated from the cab of the locomotives. A power switch is not required on the M&NA side for two reasons. The M&NA does not currently use power switches on its line, and, Lamar would be a crew change location; therefore, trains would be stopping for crew change anyway.

Another area of disagreement relates to the length of the interchange tracks. As provided in opening evidence, the interchange tracks, which are connection tracks between the

BNSF and M&NA, provide for holding a loaded or empty unit coal train with 135 cars, and 3 locomotives, in the clear of each mainline. UP confirmed this proposed train configuration in reply. Crouch calculated the length of track to construct is 7,928 TF at both Lamar and Aurora, which is the length of track from end of long ties of the BNSF No. 15 power switch, to the end of long ties on the No. 15 spring switch or remote control switch on the M&NA. Mr. Hughes states that he did not know how much track was proposed to be built (*see* Hughes R.V.S. at 38 n.63), but the length was listed in my opening on each individual cost estimate provided in opening evidence (Please refer to opening evidence e-workpaper “Interchange Preliminary Cost.xls”).

Mr. Hughes is also mistaken in his calculation of the land that needs to be acquired at Lamar. At Lamar, the only right-of-way to be acquired is close to the actual crossing of the BNSF and M&NA main lines, in the 7 degree 30 minute curve. All other work would be on BNSF or M&NA existing right-of-way. It is unclear how UP experts arrived at their estimate of 5.8 AC (Hughes R.V.S. at 39), since no cross-section, explanation or calculations were provided. Instead UP’s “shotgun” estimate for Lamar appears to an additional 25' of new right-of-way width over 10,046 FT (Refer to Mr. Hughes’ workpaper “Lamar Interchange Costs 1.pdf”). A blanket 25' additional right-of-way width is unnecessary and unreasonable as shown by the cross-sections developed by Crouch in the proposed plans submitted in opening. The proposed track is only 7,928' between the proposed turnouts, not 10,046' as listed by UP. The topography is very, very flat at Lamar. The proposed connection track can be constructed within the existing right-of-way at Lamar, except as noted above. We continue to be of the opinion that the proposed additional right-of-way as provided for in our opening evidence is correct and that UP’s “shotgun” estimate is overstated and based on false assumptions.

UP also overstates the potential issues relating to the blocking of the 21<sup>st</sup> Street crossing at Lamar. In reply, UP experts added over 4,000 TF of additional track construction at Lamar in order to keep the 21st Street crossing “unblocked.” According to the City of Lamar’s website, Lamar is “a city of just over 4,000 farmers, merchants, and families who embrace the small town way of life . . .” <http://cityoflamar.org/welcomp.php>. During my site visit at Lamar I observed that there was very little traffic in vicinity of the interchange. In a conversation with Lynn Calton, City Manager of Lamar, MO, Mr. Calton stated that the 21st Street grade crossing is rarely used; that there are other ingress and egress access points to Gulf St.; and, that there would be no issues with the railroad leaving a train on the line for crew changes or waiting for access to either main line for extended lengths of time. *See* Rebuttal e-workpaper “Entergy Conv with Lamar Administrator 6-9-2010.pdf.” This was my basis for design, assuming that the crossing could be blocked for extended periods if necessary. Mr. Calton suggested that a warning sign could be posted at the intersection of Gulf St. and 21st St. warning local drivers of potential delays.

UP’s experts replied that the estimates presented in opening were understated, and presented their own “shotgun estimates,”<sup>10</sup> contained in Mr. Hughes’ work papers (*i.e.*, Lamar Interchange Costs 1.pdf; Lamar Interchange Costs 2.pdf; Aurora Interchange Costs 1.pdf; Aurora Interchange Costs 2.pdf) that were not based on detailed engineering or site investigation, but purely on assumptions.

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<sup>10</sup> As stated by UP experts on the bottom of each of the “shotgun estimates”: “This is a “Shotgun” estimate, intended to provide a ballpark cost to determine whether a proposed project warrants further study. This estimate is not to be used for budget authority. This estimate is based on a conceptual design, without detailed engineering or site investigation. Quantities and cost are estimated using readily available information and experience with similar projects. Site conditions and changes in project scope and design may result in significant cost variance.”

In contrast, I performed a high level, detailed cost estimate that included making a site visit, investigation of local site conditions, research of property use, and preparation of a preliminary design based on topographic maps and surveyed contour lines. Crouch Engineering has applied this detailed approach to preliminary design and estimating to many eastern US projects for Norfolk Southern, numerous short line and regional railroads, RailAmerica projects including a new freight yard in Darlington County, SC and connection/interchange track at Bucyrus, OH (plans complete), and coal and other customer preliminary engineering projects. Our estimating of costs typically matches the first or second low bid price when projects are bid through a competitive bid process.

My unit costs were based on recent real world contractor bid prices for similar work under similar conditions. I used unit prices based on real world contractor bids since the M&NA uses contractors to perform all major capital projects. In contrast, UP experts do not state who developed their plans, what information was used for developing the plans, how the quantities for each item were calculated, nor did they provide the source of their “shotgun estimate” unit prices. UP experts failed to provide any supporting evidence for estimated unit prices, plan quantities, who developed the plans and quantities, or who developed the “shotgun” costs, or on what they were based. Based on my experience at Southern Railway, Norfolk Southern, and subsequent experience planning and designing hundreds of capital track design projects, the prices we used are reasonable for the site conditions and proposed design. Following is a comparison of the pricing and quantities that I used compared to UP’s estimates in reply. The following notes apply to Lamar, for the proposed interchange track, and most of the comments also apply to the “shotgun” estimates for Lamar - interchange with an additional

storage track; the interchange at Aurora, MO; and, the interchange at Aurora with an additional storage track.

- **Engineering** – I agree with the order of magnitude of the engineering costs presented by UP as a percentage of total project cost, but disagree with the total engineering cost presented by UP in reply. UP’s total project cost is many times higher than Crouch’s total cost, and the UP pricing and quantities are not supported by any evidence submitted by UP in reply. UP’s engineering costs are roughly 2.5 times higher than Crouch’s estimate. Crouch has completed the planning, survey, design, and bid phase for over 30 NS capacity projects within the past 5 years at a fee that is at or below 5% of construction cost. In the rebuttal cost estimate, Crouch has conservatively used an engineering fee that is 10% of the construction cost, and covers the cost of planning, topographic survey with roadway worker protection, top of rail and centerline survey, deed research, a drainage study, location of utilities, design of the proposed connection, development of plans, cross-sections, and specifications based on M&NA and BNSF standards, bidding documents, the bid phase, and construction project management and construction observation. The cost of flagging is included in the grading related costs since it is incidental to working along active railroad main line tracks.
- **Right-of-Way** -- Right-of-way quantities were calculated by Crouch based on a feasible track design and plans that incorporate existing BNSF and M&NA rights-of-way. Based on the proposed track layout and cross-sections, the only additional right-of-way needed is near the at-grade crossing of the BNSF and M&NA main line tracks. UP used a random number that appears to represent a uniform additional 25' right-of-way along more than 10,000 feet of track. Based on our design, no additional right-of-way is necessary for the proposed construction running parallel with the BNSF and M&NA main lines. Furthermore, the 10,000 TF of length is an exaggerated number based on UP’s false assumption that the 21st grade crossing cannot be blocked. UP’s proposed additional right-of-way area is exaggerated, and not supported by any design, plans, explanation, or other supporting evidence. Crouch’s area calculations are based on actual existing right-of-way widths, plans, cross-sections, and track length. In my experience, Railroads do not purchase any more land than is needed for construction and maintenance.
- **Track Construction Costs** -- Crouch presented very conservative estimated track construction costs in opening evidence. These costs were based on private projects bid in a competitive bid process to qualified track contractors. Crouch used a cost per track foot of construction of \$160/TF. Taking out the cost of turnouts, UP used a cost per track foot in its reply of { } (refer to Hughes’ reply workpaper “Lamar Interchange Costs 1.pdf”). Crouch has used the UP total track construction cost of { } in its modifications to the cost estimates in Rebuttal (please refer to e-workpaper “Lamar Interchange Rebuttal

Cost Estimate.pdf"). UP's total costs were based on constructing an additional 4,000 TF of track based on the false assumption that the 21st St. grade crossing cannot be blocked for extended periods. UP's total costs for track construction are overstated based on the fact that UP overstated the necessary track length at Lamar. Crouch listed prices in opening evidence estimates for all materials and work related to a No. 15 right hand power switch on the BNSF main line (including signal costs), which was higher than UP's proposed costs. Crouch also listed costs for a No. 15 left hand spring switch on the M&NA main line. Crouch did not use a power switch in the design for the M&NA side since the M&NA does not currently use power switches, and a spring switch provides for a train to leave the connection heading out onto the M&NA without having to stop to throw the switch, at track speed.

- **Mobilization** - Crouch conservatively used a separate cost of mobilization as a percentage of construction cost of approximately 1.5% for mobilization on all work. The rate of 1.5% of construction cost is typical in many Board matters. UP listed separate mobilization costs totaling roughly { } but included the cost of mobilization in the cost to construct track, and the cost to perform grading.
- **Site Work** – Hughes' proposed site work (grading related) costs were not based on site conditions or a detailed plan. Instead, he took a "shotgun" approach to the estimating process. Moreover, Hughes' costs are exaggerated due to the fact that he proposes to construct over 4,000 additional track feet of track based on the false assumption that the 21st St. crossing cannot be blocked. Crouch disputes UP's wild estimation of 400,000 CY of grading on a site that is very, very flat. Using UP's estimate of 400,000 CY of embankment, and assuming that the new roadbed starts about 6-7' from the existing centerlines of track, tracks at 15' c-c, and a 12' roadbed shoulder, the height of the proposed fill would be approximately 42' (feet) in height, or close to 40' higher than the existing main line tracks. This totally unrealistic 400,000 CY quantity does not even include extra excavation and backfill assumed by UP. This error reflects UP's lack of understanding of the local site conditions, and UP experts provide no basis for their estimated unit costs. Crouch used Contractor unit pricing from recently bid projects of similar scope and size.
- **Fencing** -- UP included the cost of fencing; however, no fencing is in place currently. Based on site conditions, and current land use, fencing is not necessary at this location.
- **Sub-ballast** -- Crouch agrees with UP's estimate of sub-ballast quantities; however, the use of { } as the unit price for sub-ballast is unheard of. In bids for this type of construction, unit prices typically range from \$9/TN to \$18/TN, delivered and placed/compacted. Crouch used a very conservative unit cost of \$16/TN. The local quarry (Nelson Brothers) in Jasper (about 10 miles from Lamar) sells sub-ballast material for \$6.05 per ton, which supports my

estimated cost. The unit price is based on a recent telephone conversation between Jay Harris, PE of Crouch Engineering and Nelson Brothers.

- **Backfill** -- Crouch disagrees with UP's estimate that 6" stone backfill will be required. UP has not based their estimate on existing site conditions, as stated in their estimates.
- **Clearing and Grubbing** -- Crouch asserts that the { } clearing and grubbing costs provided by UP are high based on the open area on most of the project, light growth, and other site conditions. UP's estimates were not based on existing site conditions, as stated in their estimates. Crouch conservatively used a cost of \$3,800/AC, as per recent bids for difficult clearing and grubbing, even though much of the site is open, with grass, or light vegetation.
- **Seeding** -- UP uses a lower cost per AC for seeding with mulch; however, Crouch used a slightly higher cost based on recent bid prices.
- UP lists { } in road crossing approach work, for 2 crossings, which is unnecessary. There is only one grade crossing in the design, and the crossing work is included in the crossing cost provided by Crouch in opening evidence.
- **Utility Adjustments** -- UP lists the cost of utility adjustments at { } Having investigated the site, there are no utilities that require relocation. Therefore, UP's shotgun estimated cost of { } for unnecessary utility relocations has no basis.
- **Traffic Control** -- The traffic control costs listed by UP are already included in Crouch's estimate. UP's costs are exaggerated based on the fact that there is virtually no traffic over the 21st St. crossing. The cost of placing barricades would be less than \$500, which is included in Crouch's track foot cost for crossing work.
- **Gulf St. Crossing** -- Crouch included the cost of rebuilding the Gulf St. crossing, ahead of the proposed turnout since the track ahead of the turnout will have to be surfaced and lined. UP did not include this cost in their estimate. Also, UP experts state that the proposed No. 15 turnout on the BNSF cannot be installed east of Gulf Street due to track alignment; however, Crouch has used the existing alignment, checked it, and determined that our design is feasible, with the right hand turnout located in tangent track, with slight lining/alignment of the main line track, introducing no reverse curves or other objectionable conditions. Please refer to the track plan provided in opening evidence (e-workpaper "Interchange Lamar Plan.pdf").
- **Wetland mitigation** - UP provided a wild estimate of { } in wetland mitigation costs at Lamar, but provided no supporting evidence that any wetlands

exist, or if wetlands are adjacent, the area affected that would be impacted by the proposed construction. UP states that their estimate is not based on local site conditions. Also, UP provided no basis for the cost of mitigation in its shotgun lump sum estimate. The National Wetland Inventory map indicates wetlands in the area, but not in the proposed construction area (Source - Google Earth - Please refer to the Rebuttal e-workpaper "Wetland Exhibit.pdf").

- **Permitting** -- UP lists the cost of permitting, totaling { } as a separate item. Crouch included the cost of permitting, which has to be performed on all construction projects, in its fee. Therefore, the duplicate cost of permitting listed by UP should be rejected.
- **Drainage** -- UP lists drainage costs as a lump sum value of { } This estimate is very high compared to the Crouch estimate of { }, which is based on an actual grading design for smaller culverts within the project site. The UP drainage costs are overstated and not supported by any analysis or data.
- **New Bridges** -- The UP estimate lists lump sum new bridge costs of { } With a total bridge length of 126 TF (50 TF at MP 548.1 and 76 TF at MP 548.3), this works out to over { } For this location, the UP estimated cost is absurd. The cost of { } is more representative of the cost to build a major bridge structure, such as a drawbridge, over a major waterway. There is no engineering basis to use such a high cost for this site, and the fact that UP used such an unreasonable cost is further evidence that their "shotgun" estimate should be rejected. The UP costs are not supported by any hydraulic analysis, bridge plans, design plans, or any other evidence indicating what is required for this site. A more reasonable, yet very conservative cost for bridge work at Lamar is \$4,966/TF. Please note in the following discussion of hydrology and hydraulics, that Crouch uses culverts, and not bridges, to handle the drainage at the two existing bridge locations.
- **Drainage (Hydrologic and Hydraulic Analysis)** -- Crouch admits that it did not include the cost to construct the drainage structures for the proposed interchange track at Lamar at MP 548.1 and 548.3, as suggested by Mr. Hughes at page 39 of his reply statement. We agree that these costs should have been included and are including them in the revised construction cost estimate for Lamar, MO in this rebuttal. Crouch conducted a hydrologic and hydraulic evaluation of the 2 bridges within the proposed project site (Please refer to the hydrologic and hydraulic analysis in e-workpaper "Drainage Report MP 548.pdf"), and determined that the existing main line bridges can be removed and replaced with corrugated metal pipe culverts meeting AREMA guidelines, extending under the proposed connection track, at a total cost of approximately \$188,000 for both bridge locations (please refer to the revised cost estimate for Lamar, MO in rebuttal e-workpaper "Lamar Interchange Rebuttal Cost.pdf"). RailAmerica, the M&NA, and many other railroads use bridge replacement with culverts whenever possible due to the reduced maintenance costs over time. Culverts like the ones

used today were not available at the time the original railroads were constructed. Crouch asserts that the bridges can be replaced based on our Hydrologic and Hydraulic analysis, and that the total cost for both bridges of \$188,000 is reasonable, and that the UP estimated cost of { } is thus grossly overstated. Crouch also prepared an alternate design for new bridges in lieu of culverts (see attached e-workpapers "Bridge Cost at 548.1 Lamar Interchange.pdf" and "Bridge Cost at 548.3 Lamar Interchange.pdf"). The cost to construct new bridges for the proposed interchange track is approximately \$620,800; however, the culvert option accomplishes the same hydraulic purposes at a much lower capital cost, with little to no ongoing maintenance costs.

- **Contingency Costs** -- UP lists contingency costs of { } (Hughes workpaper "Lamar Interchange Costs 1.pdf"), which are unreasonable based on this site. Crouch used a contingency amount of \$203,000, which is roughly 10% of construction costs for grading and track work. Using a contingency amount of 10% has proven to be very reasonable and conservative in our experience with similar projects on NS and other shortline projects. UP's very high contingency costs are unnecessary, and unsupported.
- **Equipment Rental** -- The UP estimate lists equipment rental to assist with the installation of the turnouts. The Crouch cost to furnish and install turnouts included equipment in the cost. The estimated cost of equipment is roughly the same. However, UP's additional cost for equipment is redundant, and should not be included.
- **Signal work** - Crouch included the cost of signal work related to the installation of the proposed No. 15 power switch in the estimate provided by Crouch in Opening Evidence. No signal work is required for the 21st St. grade crossing. UP included an excessive dollar amount for their proposed grade crossing protection, which is not warranted. The US FHA standard warrant for signals is based on a minimum of 3,000 potential incidents per day (number of trains x number of Average Daily Traffic [ADT] = Number of potential incidents). At the proposed interchange at Lamar, MO, crossing 21st St., the city manager estimated that the crossing is used 5-10 times per day. Even with 3 unit coal trains per day, the number of incidents would be 15 - 30 incidents. This traffic level does not come close to the level of train traffic that would warrant signals at 21st St. Cross-bucks will be sufficient at this location. The second grade crossing suggested by UP does not exist in the design submitted by Crouch in opening, and is not necessary since the extra 4,000 TF of track suggested by UP is unnecessary. The { } signal cost used by UP is unnecessary and overstated. Further, the signal costs related to the installation of the No. 15 turnout on the BNSF were included by Crouch in opening evidence, as stated above.

**VERIFICATION**

I, Harvey A. Crouch, P.E., verify under penalty of perjury that I have read the foregoing Rebuttal Verified Statement and know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
Harvey A. Crouch

Executed on: July <sup>th</sup> 7, 2010



**VERIFIED STATEMENT  
OF  
PAUL H. REISTRUP**

***Docket No. 42104 and  
Finance Docket. No. 32187***

I. Background and Qualifications

My name is Paul H. Reistrup. I am a consultant on rail operations and engineering matters. My address is 8614 Brook Road, McLean, VA 22102.

I have 50 years of experience in railroad operations (including rail car management), engineering, marketing and management. I have occupied engineering, operating and executive positions with CSX Transportation, Inc. ("CSXT") and its predecessors, including Assistant Division Engineer, Trainmaster, General Yardmaster and Superintendent of Car Utilization and Distribution in the late 1950's and 1960's. I have served in several senior executive positions at the Illinois Central Railroad, including Vice President-Passenger Service, Vice President-Intermodal Service, and Senior Vice President-Traffic. I have also served as President of two railroads: Amtrak and the Monongahela Railway (an eastern coal-carrying railroad). In addition, I have consulted for a number of years on rail operations and management matters, including service with R.L. Banks & Associates, Inc., and as Vice President of the rail division of the international engineering firm Parsons Brinckerhoff.<sup>1</sup>

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<sup>1</sup> A complete copy of my curriculum vitae is included as Attachment No. 1.

## II. Purpose of Statement

I have been asked to appear in this proceeding on behalf of Entergy Services, Inc. and Entergy Arkansas, Inc. (collectively “Entergy”) to address certain statements made by the Union Pacific Railroad Company (“UP”) about the Missouri & Northern Arkansas Railroad Company’s (“M&NA”) ability to handle loaded unit coal trains over its lines between Lamar, Missouri and Independence, Arkansas in connection with a through route movement with the BNSF Railway Company (“BNSF”). I am familiar with the M&NA’s portion of the route from my prior involvement in litigation between UP and Entergy, as well as from my involvement in the *Kansas City Power & Light* maximum reasonable rate proceeding at the Board.<sup>2</sup>

As explained below, it is my opinion that the UP witnesses have greatly overstated the difficulty that would be encountered in running loaded unit coal trains on the M&NA portion of the requested through route with BNSF. This route was at one time considered a more efficient routing choice by the Missouri Pacific Railroad than the current routing via North Little Rock, Arkansas, and could be an efficient route today with modest improvements and properly planned operations. Despite what UP’s experts have concluded, the challenges that the terrain and topography on this route present pale in comparison to the challenges that eastern railroads have faced, and that I have been

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<sup>2</sup> *Kansas City Power & Light Co. v. Union Pacific Railroad Co.*, STB Docket No. 42095. I was retained by KCPL to provide expert testimony in connection with the stand-alone cost portion of this case. However, UP waived the stand-alone cost test, and my testimony was, therefore, not needed.

directly involved in overseeing, in moving loaded unit coal trains through mountainous terrain.

The UP witnesses have also presented an unrealistic approach to the way that a viable shortline would respond to the opportunity presented by the requested through route. While focusing on the “can’t do,” they have presented a view that is inconsistent with my experiences in the real world – where a shortline like M&NA would make every effort to accommodate the shipper’s request and would find ways to get its tracks ready for the movements and to recover its costs through a properly conceived rate.

III. **M&NA’s Topography is Not Too “Severe”  
for Efficient Operation of “High”  
Volumes of Loaded Unit Coal Trains**

A fundamental theme that the UP witnesses advance in their reply evidence is that the terrain and topography of the M&NA portion of the proposed BNSF/M&NA through route is inefficient for the movement of “high volumes of loaded unit coal trains” because of the difficulties of running loaded unit coal trains through such territory. Hughes R.V.S. at 5. I understand that Entergy witness Harvey A. Crouch has provided testimony about the grades and curvature of the M&NA lines and has noted that it is less severe than is encountered on eastern coal routes operated by CSXT and Norfolk Southern Railway Company (“NS”). Crouch V.S. at 8-10. I also see that UP witness

David J. Hughes acknowledges, as he must, that the conditions faced by the M&NA “may not be considered extreme conditions when compared to the topography faced by some lines – such as those traversing the Rockies or the Appalachians.” Hughes R.V.S. at 6. Mr. Hughes, however, suggests that the M&NA’s conditions are nevertheless so severe that “any efficient railroad would seek to avoid them (particularly when transporting long, heavy trains) if given the opportunity.” *Id.*

Mr. Hughes’ suggestion that an efficient shortline railroad would avoid a potentially lucrative move because of topography like the M&NA encounters on its route reflects a naiveté about coal operations generally, and about the operations of shortline railroads in particular. While Mr. Hughes has a long career in railroad operations, his coal experience is extremely limited. By contrast, I have had extensive experience with and management responsibility for coal operations, including significant responsibility for the management and planning of coal operations for eastern railroads facing much more severe conditions than are evident on the M&NA line.

Before turning to examples, I would take issue with Mr. Hughes’ suggestion that the volumes of loaded unit coal trains that are involved here can properly be categorized as “high”, “significant” or “substantial” volumes of traffic as he suggests throughout his reply report. My understanding is that for the initial years of through route use contemplated by Entergy, the number of loaded unit coal trains that potentially would be added to M&NA’s lines is between 3 and 10 trains per month. Ultimately,

there is a possibility that the number of loaded coal trains could increase to 33 trains per month. I strongly disagree that 3-10 loaded trains a month would be considered to be a high, significant or substantial volume of coal. Moving this volume of loaded coal trains through M&NA's terrain is an entirely manageable task at these levels. In fact, even at 33 trains a month, I would not consider the volume high, substantial or significant enough to warrant Mr. Hughes' conclusion that the challenges outweigh the opportunities that the movement of the traffic might present to the shortline.

A bit of perspective about the "difficult" terrain of the M&NA is necessary. As Mr. Crouch has already pointed out, most of the grades on the M&NA do not exceed { } and the most difficult stretch, which is also less than 0.5 miles, reaches a maximum grade of { }. By way of comparison, the ruling grade up Logan Hill in the Powder River Basin, one of the busiest stretches of railroad anywhere in the United States, is 1%. See e-workpaper "Track Data.pdf." Yet, despite these difficulties, over 50 loaded trains a day regularly traverse the territory. In the East, grades exceeding 1.5% are not uncommon, and unit coal trains regularly moves over those lines.

For example, during my tenure as Assistant Division Engineer with the B&O, I was responsible for coal train operations on the Cumberland West End Subdivision, which ran from Cumberland, MD to Grafton, PA.<sup>3</sup> This line included grades of 2.6% on an uncompensated grade (*i.e.*, a grade that is not reduced to

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<sup>3</sup> Today, the Cumberland West End Subdivision is known on the CSXT system as the Mountain Subdivision.

compensate for curvature). *Id.* Loaded coal trains moving from Grafton to Cumberland had to traverse a “roller coaster” of grades starting with a significant climb up the Newberg grade and then head downhill towards Rowlesburg where the train’s airbrakes had to be set to 90 psi to control the train. After passing through Rowlesburg, a train would then have to negotiate the Cranberry grade (which reached grades as steep as 2.84%). *Id.* In addition, the curvature in this territory regularly exceeded 10 degrees. Yet, the Cumberland West End Subdivision was regularly used for coal train service. Indeed, the Subdivision has been in operation for over 100 years.

Similarly, when I was Trainmaster of the Pittsburgh Division of the B&O, I managed operations that included unit coal train operations that exceeded 1.5% grades and curves in excess of 14 degrees. For example, at a spot just west of the Allegheny River and approaching the bottom of Bakerstown Hill, there was a 14 degree curve combined with a steep grade that made for challenging operations when a train could not get “a run for the hill.” *Id.* Despite this, the operations team did not shy away from handling the traffic, we just paid very careful attention to the qualifications of the crew, the supervision, and the safety rules.

More recently, I observed the operations of NS in the MGA coal region on a field trip in 2009. On one segment of railroad near Consol’s Loveridge Mine, which moves between 3 and 4 million tons of coal annually, I observed eight 12 degree curves on a roughly 12 mile segment, including a few that were reverse curves.

Likewise, on the Manor Branch, which serves the Bailey Mine that produces more than 20 million tons of coal per year, the loaded trains face grades of 0.5% against the loads, but the downhill grades exceed 1.39% – practically a “runaway” grade for loaded unit coal trains. *Id.* At one point, Detroit Edison was even moving a two-mile long, unit coal train with 315,000 lb cars over this territory. *Id.* I regularly road the Detroit Edison train.

In sum, while the above examples are not models of the ideal conditions for operating loaded coal trains, they are illustrative of what railroads can do when they have an economic incentive to handle traffic.

#### IV. The Proposed Through Route is Not Inefficient

I also disagree with Mr. Hughes’ suggestion that anyone with significant railroad engineering and operating experience would choose the current UP routing to Independence over the proposed through route on the BNSF/M&NA. Hughes R.V.S. at 5. Indeed, the Missouri Pacific Railroad engineers and operating officers made the opposite decision when they began service to Independence in the early 1980’s. When this service began as a tariff move, the routing was via the BNSF to Kansas City, and then MP from Kansas City over its Carthage subdivision to the Independence plant. This routing was chosen by MP even though the current UP routing that Mr. Hughes suggests is so obviously superior was available to MP. MP owned all of the lines that UP owns

today, including the line between North Little Rock, Arkansas and Diaz Jct, Arkansas, that is used to move loaded coal trains to the east end of the M&NA routing for delivery to Independence.

In addition, I disagree with Mr. Hughes to the extent that his conclusion regarding the efficiency of the routing is based on his erroneous assumption that the railroad should make this decision not based on the available traffic, but on future traffic levels. In particular, I disagree that a competent manager of rail engineering and operations would be reluctant to use the M&NA line to transport the minimal volumes that are available to M&NA prior to the expiration of the UP/Entergy contracts identified in this proceeding. As noted above, these initial volumes are between 3 and 10 trains per month. When dealing with such a small volume of traffic the questions concerning efficiency of the routing can be very different than when dealing with “significant” volumes of loaded coal trains. Again, I do not think even 33 trains a month qualifies as significant, but surely 3-10 trains a month is not significant. The suggestion that “anyone with significant railroad engineering and operating experience” would avoid moving small volumes of loaded trains on a line with M&NA’s topography is, in my experience, incorrect.

Moreover, any basis for concluding that the current UP routing to Independence is so obviously superior to a BNSF/M&NA routing is contradicted by UP’s decision in the aftermath of its UP/SP service meltdown to reroute empty trains

northbound via the M&NA to Kansas City. It is my understanding that at the time this decision was implemented the parties were concerned about capacity constraints and congestion that UP was experiencing over its route from Kansas City southbound on the lines used to serve Entergy, including the Van Buren and North Little Rock subdivisions. These UP lines historically have experienced many of the same problems that Mr. Hughes cites as challenges faced by M&NA, such as susceptibility to damage from floods. If the efficiencies of moving loads via the current UP routing so clearly outweigh use of the M&NA routing, one would expect that UP would not expose the empty trains to those inefficiencies. The reality is that the issue of efficiency is far more complicated than UP suggests and there are/were many factors that resulted in the first routing change (i.e., the movement of loaded and empty trains to the UP through Diaz Jct. routing) and the more recent change (i.e., returning the empties to the original routing northbound over the M&NA).

V. Mr. Crouch's Staging/Siding Capacity is Sufficient

I have reviewed Mr. Crouch's initial verified statement as it relates to staging and siding capacity for the proposed through route. I understand that Mr. Crouch has concluded that the initial volumes (3 to 10 trains per month) could be accommodated without the need for additional sidings or staging tracks being constructed beyond what he has proposed at the interchange locations at Lamar and Aurora, Missouri. Crouch

V.S. at 17-18. I understand that UP's principal differences with Crouch on siding/staging capacity relate to the disagreement about whether additional tracks are necessary at the interchanges because of concerns over blocked crossings. Wheeler/Plum R.V.S. at 9-16.

Based on my review of the testimony, and consideration of the operational issues that a shortline such as M&NA would face if it were to add the initial volume levels of 3 to 10 trains per month to its limited existing traffic base, I am of the opinion that the sidings and staging tracks identified by Crouch are sufficient.<sup>4</sup> UP's witnesses suggest that additional staging capacity is necessary in close proximity to the Independence Station. UP acknowledges that its current staging capacity is located 11.5 miles from the Independence Station. Wheeler/Plum at 10. UP, of course, has made this decision even though it is currently moving the highest possible volume that will be potentially available on the requested BNSF/M&NA through route. That a busy railroad like the UP believes having staging capacity this far from the plant is adequate is significant.

Surprisingly, while not having staging capacity in close proximity to the Independence Station itself, UP nevertheless advocates that M&NA would need additional staging capacity closer to the plant, even though loaded coal trains on the M&NA would compete with far less traffic than the same loaded coal trains currently

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<sup>4</sup> In this regard, I note that Wheeler/Plum do not appear to be suggesting that any additional siding/staging capacity is needed to accommodate the introduction of 3 loaded coal trains per month, but instead are only addressing volume at the 10 train per month and 33 train per month levels.

have to compete with on UP's route. I do not agree with this suggestion. Rather, I believe that Mr. Crouch's assumptions that a shortline like M&NA could manage its operations around the coal trains and stage and stage the trains as necessary to accommodate the movement of local traffic is a reasonable assumption. Certainly the operation of only 3 to 10 trains per month would provide limited meets and passes that could be managed with existing siding capacity. Further, UP seems to assume that the only trains that would ever take to the sidings would be the coal trains. This assumption understates available capacity because it ignores the reality that shorter non-coal trains could be moved to sidings to allow coal trains through, even where the sidings might not be capable of accommodating a loaded coal train.

I also do not agree that the additional track that the UP witnesses require at the interchanges is necessary. It is my understanding that the crossing that would be blocked at Lamar is a rarely used crossing that is not the only point of access. Given that we are only dealing with 3 to 10 trains per month, and that there is no basis to assume that the BNSF/M&NA will not manage their interchange in a manner that minimizes the need to hold trains at interchange, the likelihood that trains will actually block the intersection is minimal. That said, I understand that Mr. Crouch has discussed this potential issue with Lamar city officials and that he has been informed that blocking the crossing will not be problematic. Thus, rather than needing to construct an additional 4,000 feet of track, as UP suggests, BNSF/M&NA can solve this problem with a warning

sign advising drivers that there may be possible delays and suggesting they use alternative crossings.

In sum, UP's approach to the siding/staging capacity issue is another illustration of their "can't do" approach to operations that is inconsistent with the manner in which real-world railroads handle capacity issues like the ones that are reasonably anticipated for the M&NA if the 3-10 loaded trains per month are actually added. Simply put, good operating management and staff should be able to easily handle 3-10 trains a month without the "extra" siding/staging capacity suggested in the UP reply filings.

**VERIFICATION**

I, Paul H. Reistrup, verify under penalty of perjury that I have read the foregoing Rebuttal Verified Statement and know the contents thereof; and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

  
Paul H. Reistrup

Executed on: July 7, 2010

## **Attachment No. 1**

**PAUL H. REISTRUP  
CONSULTANT**

**Biographical Profile**

**Date of Employment by CSX (or predecessor): July 1, 1997**

**Place of Birth: Sioux City, Iowa**

**Education: B.S., Engineering, United States Military Academy,  
West Point, NY 1954**

**Chronology of Employment:**

- 1959 to 1961 Assistant Division Engineer, Baltimore and Ohio Railroad**  
Infrastructure maintenance including track, bridges, signals and buildings on a mountain territory and later on high speed Division between New Castle, PA and Pine Jet (Chicao) IL.
- 1961 General Yardmaster, B & O Railroad**  
In charge of 1000 car classification yard at Fairport Harbor, Ohio, serving coal transshipment to Lake boats, grain processors and chemical customers. Supervised around the clock yardmasters and switch engines.
- 1961 to 1963 Trainmaster, B&O Railroad**  
Pittsburgh, PA headquarters for territory between Cumberland, MD and New Castle, PA plus line to Wheeling, WV. Supervised train crews of coal, merchandise, intermodal and passenger (including commuter) trains over generally mountain territory.
- 1963 Superintendent of Car Utilization and Distribution**  
In charge of system distribution of some 60,000 freight cars consistent with ICC regulations. Responsibility included passenger train movement orders and related assignment of coach, sleeper, diner, RPO, mail and express cars.
- 1964 to 1966 Director of Passenger Service, B&O/C&O Railroad**  
Selected to head restructured passenger department to include pricing/marketing, operations, mail, express and dining services. Became joint C&O Railway after control when responsibility expanded to include dining and cabin (sleeping room) service on three cross lake car ferry routes.

- 1966 to 1967**      **Assistant to Vice-President – Executive Department, B&O/C&O Railroad**  
Selected by Railroad President to be groomed for key positions in Coal Department. During process traveled to all C&O/B&O mine loading locations that produced more than 1000 tons per day, numbering more than 100 operations in total.
- 1967 to 1968**      **Vice-President – Passenger Services, Illinois Central Railroad**  
Elected to form integrated operations, marketing, pricing, mail and express, dining and commuter department. Task was to reduce intercity trains by one half and implement improvement program on electrified Chicago commuter operation to include funding and replacement of 40 year old equipment on 215 trains. Goal achieved in 18 months to meet commitment.
- 1969 to 1970**      **Vice-President – Intermodal Service, Illinois Central Railroad**  
Formed new department to develop emerging intermodal business of truck trailers and containers on flatcars. Initiated very commercially successful dedicated intermodal trains on passenger train schedules and led construction of four new intermodal terminals (exchanges) known as “IMX”.
- 1970 to 1975**      **Senior Vice-President – Traffic, Illinois Central Gulf Railroad**  
Responsible for all freight revenue, sales, marketing, pricing, coal traffic and Industrial Development. Continued to be in charge of intermodal as that department was consolidated. Elected to ICRR Board of Directors.
- 1975 to 1978**      **President and CEO, Amtrak**  
Elected in Jan. 1975 to become Amtrak’s second President and CEO. The operation then can best be described as horrible. Made it safe, led huge acquisition of equipment, selected locomotives that stayed on the track and against formidable opposition achieved acquisition of the most important element – The Northeast Corridor. Shared Penn Station and New York City with Long Island RR and began enduring relationship with Commuter Agencies, including MBTA, Metro North, what became Jersey Transit, SEPTA and MARC. Presided over all related labor union related transitions.
- 1978 to 1988**      **Vice-President R.L. Bank & Associates**  
Number Two in the Firm during the period of fuel “panic” and resulting switch from oil to coal power plants. Resurgence of commuter rail (VRE) and light rail (Baltimore resounding success) involved my role as “Project Manager”.
- 1988 to 1992**      **President, Monongahela Railway Company**  
Subsequent to a six year marketing role as acting Chief Traffic Officer under contract with RLBA was elected as President and CEO of

CSX/CR/PLE owned heavy haul coal railroad. Tonnage tripled during 10 year role as chief coal marketing officer. Two new mines opened subsequent to convincing coal operators output could (and was) flow effective. Role ended as President of a Conrail subsidiary.

- 1992 to 1994**      **General Manager, Railroad Development Corporation**  
Led Argentina through safe transition from government railroad to commercial enterprise of some 5000 miles. Startup was fully automated to U.S. safety standards since remaining employees had tenure for life.
- 1994 to 1997**      **Vice-President, Parsons Brinckerhoff**  
Initially engaged to lead PB's international rail effort because of the successful Argentina endeavor. Trained senior management (Chairman, VC, General Managers) of new Cairo, Egypt subway as experienced railway managers to lead subway constructed to BART (San Francisco) and Washington, DC Metro Rail automated standards. Resulting transition was safe.
- 1997 to 2002**      **Vice-President – Passenger Integration, CSX Transportation, Wash., DC**  
Was requested to rejoin CSX "family" to support Conrail integration of passenger with freight. Critical focus was NEC and the multitude of commuter rail interfaces plus Amtrak as CSX was the largest operator by number of trains and train miles.
- 2003**              **Consultant, CSX**  
From retirement from CSX to 31 Aug. 2003 served CSX to introduce chosen successors to all passenger entity key players. Smooth transition was the goal.
- 2003 to present**      **President, Paul H. Reistrup & Associates**  
Consultant on an hourly case fee basis. No retainer cash fee.

**Business, Civic and Professional Affiliations:**

**Transportation Research Board**

**Appointed Member Emeritus – 2001**

**Chair-Committee AR030, Railroad Operating Technologies (AREMA)**

**American Railway Engineering and Maintenance Association (AREMA)**

**Association of Railway Superintendents**

**Board Member – J.W. Barriger III Library**

**Lexington Group (Railroad History)**

**Association for Transportation Law, Logistics and Policy**