

STB FINANCE DOCKET NO. 33782

ENTERGY ARKANSAS AND ENTERGY RAIL
— CONSTRUCTION AND OPERATION EXEMPTION —
WHITE BLUFF TO PINE BLUFF, AR

Decided April 25, 2000

Board conditionally approves build-out by Entergy Rail.

BY THE BOARD:

By petition filed July 30, 1999, Entergy Arkansas, Inc. (EAI, formerly Arkansas Power & Light Company), and Entergy Rail¹ seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for Entergy Rail to construct and operate a rail line approximately 8.6 miles in length between EAI's White Bluff, AR electric generating plant and a line of railroad near Pine Bluff, AR, formerly owned by the Southern Pacific Transportation Company (SP). According to Entergy, its right to receive rail service from a second railroad, specifically The Burlington Northern and Santa Fe Railway Company (BNSF), if it were to build out from White Bluff to SP's rail line near Pine Bluff, was ensured by the Board in the decision approving the acquisition of SP by, and merger into, Union Pacific Corporation and its subsidiary Union Pacific Railroad Company (UP).² Entergy requests that we conditionally grant the exemption, subject to the completion of our environmental review of the proposal and the issuance of a further decision addressing the environmental matters and providing an effective date for the exemption, if appropriate, thereby allowing construction to begin. In a decision served October 28, 1999, we instituted a proceeding to consider the merits of this construction exemption.

¹ Unless referred to separately, EAI and Entergy Rail will be referred to collectively as Entergy.

² In 1996, the Board approved the acquisition of SP by Union Pacific Corporation. See, *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996) (*Decision No. 44*).

BACKGROUND

EAI and its affiliate Entergy Service, Inc., had filed on September 20, 1999, in Finance Docket No. 32760, a petition for enforcement of the build-out condition in the Chemical Manufacturers Association (CMA) agreement, as modified and imposed by the Board in *Decision No. 44*. Although the two proceedings were not consolidated, we found that Entergy's construction exemption request and enforcement petition were related and raised issues that required the Board's further consideration. By decision in *Union Pacific/Southern Pacific Merger*, 4 S.T.B. 560 (2000) (*Decision No. 88*), we held that the expanded CMA condition imposed in *Decision No. 44, supra*, preserves Entergy's pre-merger build-out option to SP, and requires that BNSF be granted overhead trackage rights over UP's Little Rock-Pine Bluff line. In view of our enforcement decision, we are going forward with consideration of Entergy's construction exemption petition here.

EAI is an electric utility that distributes electric power to approximately 600,000 customers in Arkansas. It indicates that its two coal-burning generating plants — the Independence Station near Newark, AR, and, as pertinent here, its White Bluff plant located near Redfield, AR — are capable of receiving and burning a total of 13 million tons of coal (6.5 million tons each) per year from the Powder River Basin in Wyoming. EAI states that, in the past several years while using UP rail service, it has experienced service and performance problems resulting in delivery shortfalls of several million tons of coal to its plants. Because both of its plants are solely served by UP, EAI states that it needs to obtain alternative rail service at White Bluff to avoid future delivery problems.

Entergy proposes to construct an 8.6-mile line linking its White Bluff plant to an SP "island" located at the southern boundary of the Pine Bluff Arsenal.³ This island is connected at SP MP 273 to an existing 3.4-mile track segment located on the grounds of the Arsenal and at SP MP 272.81 with the so-called Arsenal Lead to Pine Bluff, AR. As part of the build-out, Entergy also proposes to rehabilitate the existing 3.4-mile Arsenal track segment⁴ and construct a new crossover⁵ at SP MP 272.81, linking the SP island to UP's Little Rock-Pine Bluff

³ The Pine Bluff Arsenal (Arsenal), situated north of the city of Pine Bluff, AR, is owned by the United States Government.

⁴ Accordingly, Entergy's build-out and rail operation will extend over approximately 12 miles of rail line, although the project will involve only 8.6 miles of new track construction.

⁵ With respect to the proposed crossover, we directed UP and BNSF to submit to arbitration, under section 13 of the CMA agreement and/or section 15 of the so-called BNSF/UP merger agreement, any unresolved dispute over the construction of the crossover. *See, Decision No. 88, id.,*

(continued...)

line. Entergy submitted a letter in support of its proposal from the commander of the Arsenal, indicating that the build-out is expected to save the U.S. Government between \$100,000 and \$150,000 annually in maintenance and repair costs to the Arsenal track, which Entergy has agreed to maintain.

In its reply filed August 31, 1999, UP opposes Entergy's exemption request. UP maintains that Entergy has no right to obtain alternative rail service from BNSF because the proposed build-out was not sanctioned by the Board. UP contends that the Board in *Decision No. 44*, preserved for Entergy a specific 21-mile build-out from its White Bluff plant to a different SP line between Pine Bluff and West Memphis, AR. UP states that, under the terms of the CMA agreement, as modified and imposed as a condition by the Board in *Decision No. 44*, Entergy's right to receive service from BNSF in conjunction with any other build-out, such as the one at issue here, turns on whether SP could have provided service via the proposed build-out prior to the merger. UP maintains that the proposed build-out fails this test and that the Board should deny Entergy's petition because the construction of a rail line that could not be used would violate the rail transportation policy. These are essentially the same arguments raised by UP in Entergy's enforcement proceeding, which we have reviewed and resolved in favor of Entergy. See, *Decision No. 88, supra*. Accordingly, we will not further consider them here.

DISCUSSION AND CONCLUSIONS

The construction of and operation over the new railroad line are subject to Board approval under 49 U.S.C. 10901. Under 49 U.S.C. 10502, we must grant an exemption if we find that: (1) application, in whole or in part, of the pertinent provision of the rail laws administered by the Board is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Based on the information provided, we conclude that detailed scrutiny of this transaction under section 10901 is not necessary to carry out the rail transportation policy. Entergy's proposed build-out will promote that policy. The proposed construction of new trackage and the upgrading of existing tracks will give EAI access to competitive rail service via BNSF. As a consequence, the construction and operation will increase competition [49 U.S.C. 10101(1) and (4)]. Exempting the proposed construction and operation will reduce the

⁵(...continued)
at 566-567.

need for Federal regulation, ensure the development of a sound transportation system, foster sound economic conditions, and reduce regulatory barriers to entry [49 U.S.C. 10101(2), (4), (5), and (7)]. Unless determined otherwise following the environmental analysis or in a decision on an application under 49 U.S.C. 10901(d)(1), other aspects of the rail transportation policy will not be adversely affected.

Regulation of the transaction is not necessary to protect shippers from the abuse of market power. The proposed transaction will provide EAI with an additional rail transportation option and thus will enable EAI to realize the benefits of increased railroad competition. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

Entergy Rail has consulted with the Board's Section of Environmental Analysis (SEA) regarding the environmental review process. Pursuant to our rules at 49 CFR 1105, Entergy Rail has retained an independent third-party consultant to assist SEA in completing the environmental review process. Once a final environmental assessment or final environmental impact statement is issued, we will issue a further decision based on the environmental documents and the comments. Granting the requested conditional exemption will not diminish our capacity to consider environmental matters when we issue a final decision addressing the environmental issues and making the exemption effective at that time, if appropriate, thereby allowing construction to begin. *See, Illinois Commerce Com'n v. ICC*, 848 F.2d 1246, 1259 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989); and *Missouri Min., Inc. v. ICC*, 33 F.3d 980 (8th Cir. 1994). No construction may begin until our final decision has been issued and has become effective.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we conditionally exempt Entergy Rail's construction and operation of the above-described line from the prior approval requirements of 49 U.S.C. 10901, subject to our further consideration of the anticipated environmental impacts of the proposal.
2. On completion of the environmental review, we will issue a further decision addressing those matters and making the exemption effective at that time, if appropriate, thereby allowing construction to begin.
3. Notice will be published in the *Federal Register* on May 4, 2000.
4. Petitions to reopen must be filed by May 24, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.