BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

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Dated: May 30, 2013

TABLE OF CONTENTS

Page

I. Background 1

II. Joint Coal Shippers and Other Parties Agree That The Board Should Clarify That Any Modifications to its Competitive Switching Rules Should Not Affect its Market Dominance Principles Under 49 U.S.C. § 10707 2

A. The Board Should Not Assume That Access or Potential Access to a Second Carrier Through The Proposed Competitive Switching Rules Will Necessarily Result in The Incumbent Carrier's Loss of Market Dominance 3

B. Rail Shippers Will Be Substantially Harmed if The Board Curbs Their Access to Rate Reasonableness Relief Through The Proposed Mandatory Switching Regulations 6

C. The Railroads Have Not Advocated Modification of the Market Dominance Rules in Rate Reasonableness Proceedings 9

Conclusion 9

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

Joint Coal Shippers respectfully submit that the Board should make clear that any changes to the competitive switching regulations that it may adopt will not alter its market dominance standards and principles under 49 U.S.C. § 10707.

I. Background

Following the Board's 2011 hearings in *Competition in the Railroad Industry*, STB Docket No. EP 705, the National Industrial Transportation League ("NITL") submitted a proposal to modify the Board's mandatory competitive switching

standards. *See* Petition for Rulemaking of The National Industrial Transportation League, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Docket No. EP 711 (filed July 7, 2011) ("Petition"). The Board determined that it could not gauge the potential impact of NITL's Petition and therefore requested that interested parties supply it with "additional information" to help it "determine how to proceed" on the NITL initiative. *July 2012 Decision* at 2.

In its *July 2012 Decision*, the Board stated that under NITL's proposal, where mandatory switching enabled two railroads to quote rates for the same origin-to-destination service, "there may be no market dominance, and hence the Board may not regulate the reasonableness of those rates." *Id.* at 6. The Board seemed to view its function under the proposed rules as "limited to regulating the 'access price'" that "Railroad 1 may charge to provide the shipper with access to the competitor service provided by Railroad 2." *Id.* The Board explained that under "the assumption that competition between Railroad 1 and Railroad 2 would ensure reasonable rates and service between Origin and Destination," the Board could focus its resources "only on the access price for the first 30 miles of the movement under NITL's proposal." *Id.*

II. Joint Coal Shippers and Other Parties Agree That The Board Should Clarify That Any Modifications to its Competitive Switching Rules Should Not Affect its Market Dominance Principles Under 49 U.S.C. § 10707

In their Opening Submission, Joint Coal Shippers demonstrated that so-called "competitive" switching options would not automatically result in *effective* competition for purposes of market dominance determinations in rate reasonableness proceedings. *See* Joint Coal Shippers' Opening Submission ("Op.") at 9-10. Joint Coal

Shippers explained that there was no support in law or policy for the STB to construe a switching rule that granted access to a second carrier but failed to provide shippers with any actual, meaningful competitive rate benefits as precluding a shipper from exercising its statutory right to seek rail rate reasonableness relief at the Board for its existing origin-to-destination movement. *Id.* at 8. To that end, Joint Coal Shippers described the Board's market dominance standards, explained that the adoption of any new competitive switching options should not modify the market dominance rules, and demonstrated that limitations on captive shippers' rights to pursue origin-to-destination rate reasonableness relief would have a significant adverse impact on those shippers. *Id.* at 8-14.

Other non-railroad parties expressed concerns with the Board's statements on market dominance, which concerns largely were consistent with Joint Coal Shippers' views. The railroads likewise did not advocate that the new switching rules should be viewed as a substitute for a full market dominance analysis.

A. The Board Should Not Assume That Access or Potential Access to A Second Carrier Through The Proposed Competitive Switching Rules Will Necessarily Result in The Incumbent Carrier's Loss of Market Dominance

On Opening, Joint Coal Shippers described the Board's market dominance standards in rail rate reasonableness proceedings, and explained that any new mandatory switching rules that the Board may consider or adopt should not affect the Board's market dominance principles. *See* Joint Coal Shippers' Op. at 7-10. Rail shippers may challenge the reasonableness of a railroad rate if the railroad possesses market dominance, which § 10707(a) of title 49 defines as the "absence of *effective* competition

from other rail carriers or modes of transportation for the transportation to which a rate applies." (Emphasis added.)

The mere presence of an alternative form of transportation is insufficient to preclude a finding of market dominance: the alternative actually must be shown to effectively constrain the railroad's rates. "Even where an alternative mode or modes of transportation exists, a complainant can establish market dominance by demonstrating that the alternate modes of transportation are not effectively constraining the carrier's ability to increase the rates of the issue traffic." *E.I. Dupont De Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. NOR 42101, slip op at 2 (STB served June 30, 2008) (citing *Market Dominance Determinations*, 365 I.C.C. 118, 129 (1981) ("Effective competition for a firm providing a good or service means that there must be pressures on that firm to perform up to standards and at reasonableness prices, or lose desirable business.")).

As Joint Coal Shippers discussed on Opening, the Board should not assume that access or potential access to an alternate carrier – through mandatory switching or otherwise – automatically will result in the elimination of the incumbent carrier's market dominance. Joint Coal Shippers' Op. at 10. Such assumptions are unfounded, as the existence of market dominance can be ascertained only through a careful analysis of the individual facts and circumstances relevant to the transportation service subject to the challenged rate. *Id.*

Other parties participating in this proceeding expressed similar sentiments. For example, the U.S. Department of Agriculture ("USDA") noted that the Board could

find an absence of effective competition even if a shipper is connected to more than one rail carrier. *See* USDA Op. at 7. It stated: "The Board can rule that the market dominance test is met when a shipper can demonstrate the absence of effective transportation competition, even if the rail shipper is physically connected to two railroad systems or has competitive access to another railroad." *Id.* The Alliance for Rail Competition, et al., ("ARC") also expressed concern, stating that the Board should not assume that *potential* competition for competitive access purposes is the same as *effective* competition for market dominance purposes. ARC Op. at 8. It noted:

> ARC, et al., are among the shipper groups that have warned the Board not to assume that potential competitive access will be practicable for all shippers, and not to assume that potential competition equals effective competition within the meaning of the statute. Unfortunately, the Board appears to make the mistake of confusing possible access with effective competition….

Id.

The National Grain and Feed Association, et al. ("NGFA") explained that the Board could consult the Ex Parte 705 record for evidence demonstrating why it should not be presumed that access to alternate carriers will result in competition:

> [T]he Board need look no further than the recent extensive record in EP 705 for a reminder that it should not *conclusively presume* that access to an alternative Class I railroad via mandatory switching will result in effective competition between the Class I railroad conducting switching and the alternative Class I railroad in all cases, or that any competition that occurs "would ensure reasonable rates and serve." To the contrary, the record in EP 705 is replete with evidence and argument from the NGFA and many other rail shippers and shipper interests informing the Board that in today's concentrated railroad "marketplace" the longstanding,

> fundamental assumption upon which the Staggers Rail Act of 1980 was premised – that competition would suffice to "regulate" rail rates – is no longer supportable. Rather, the consolidation of the Class I railroads into essentially four rail carriers who control more than 90% of the rail revenues collected in the United States every year has resulted in a dramatic reduction in competition, even where shippers have access to more than on railroad.

NGFA Op. at 15-16 (footnotes omitted). Finally, NITL itself explained that the Board should not automatically assume that a shipper that has pursued competitive switching before the Board no longer is subject to market dominance:

> Because there is no assurance that railroads will actually compete under the CSP, if a shipper chooses to pursue competitive switching, the STB should not automatically assume a lack of market dominance if the shipper later files a rate case. Rather, an analysis of the facts, including the switching rate established, would need to be reviewed to determine if the competition created by switching is "effective."

NITL Op. at 15-16.

B. Rail Shippers Will Be Substantially Harmed if The Board Curbs Their Access to Rate Reasonableness Relief Through The Proposed Mandatory Switching Regulations

On Opening, Joint Coal Shippers demonstrated that any limitations on captive shippers' rights to pursue origin-to-destination rate relief would have a significant adverse impact on those shippers. Joint Coal Shippers' Op. at 11-14. Particularly in light of the highly concentrated state of the railroad industry, it would be unrealistic to assume that if the Board were to adopt a mandatory switching rule, competition between the railroads automatically would become robust. Accordingly, the availability of any new

switching remedy simply should be viewed as any other potential alternative in making a market dominance determination in a rate reasonableness proceeding. *Id.* at 11.

A number of parties to these proceedings similarly demonstrated that Board limitations on shipper access to rate reasonableness relief would harm shippers and the public. For example, the USDA noted that it would be a perverse result for a shipper to gain access to competitive switching only to lose the market dominance test, in light of the extensive evidence demonstrating that railroads do not compete seriously:

> [T]he availability of competitive switching should not affect a railroad's market dominance for rate appeals because there is substantial testimony that the Class I railroads do not compete. For a shipper to gain access to competitive switching only to lose the market dominance test when making a rate appeal would be a perverse result.

USDA Op. at 7 (footnote omitted). ARC also cautioned that some carriers may decline to compete, even if the Board adopts the mandatory switching proposal, and that involved shippers will need recourse to the Board in such an event:

> Continued recourse to the agency will also be needed by shippers who receive competitive switching holding out the hope of competitive benefits, but who are deprived of those benefits due to the unwillingness of railroads to respond adequately to competitive pressures.
>
> It is a dangerous fallacy to assume that actual competitors, let alone potential competitors or monopoly railroads in theoretically "contestable" markets, will always or normally respond to competition by charging reasonable rates and striving for high service quality. For this reason, Congress was correct to define market dominance not as the absence of competition but as the absence of <u>effective</u> competition. 49 USC § 10707(a).

ARC Op. at 2.

NGFA expressed similar reservations with the Board's stance on the effect of the switching proposal on market dominance determinations in rate cases. It explained:

> [I]t would be unrealistic and imprudent for the Board to presume that the establishment for a rail transportation alternative via mandatory switching would typically result in reasonable rates and service terms established by competition between the two Class I railroads involved. For this reason, the Interested Agricultural Parties maintain as a threshold matter that adoption of *any* conclusive presumptions that the incumbent railroad has market dominance over the transportation covered by the *switch movement* at issue should have no bearing on whether market dominance exists over the *origin-to-destination transportation* provided by either railroad. To take the contrary view would wrongly ignore the structure of the current railroad industry and evidence presented to the Board in EP 705.

NGFA Op. at 17-18 (footnote omitted). Olin Corporation was even more direct in its comments, pointing out that if the Board adopts a mandatory switching rule but precludes shippers from challenging the reasonableness of the rates resulting from the switching, a reduction in rail-to-rail competition would result:

> If shippers are unable to challenge the reasonableness of rates resulting from mandated switching, a reduction in rail-to-rail competition and weakening of the existing statutory competition policies would result, and shippers would in each instance be forced to reconsider pursuing relief under the Proposed Rules for fear of waiving their ability to obtain protection from subsequent market abuse through a rate case.

Olin Corp. Op. at 7.

Finally, and significantly, the NITL clarified that in developing its mandatory switching proposal, it "did not intend to limit or foreclose captive shippers'

options to address railroad market power"; rather its proposal was "intended to operate as a supplement to, and not a replacement for, the existing remedies available to shippers." NITL Op. at 16.

C. The Railroads Have Not Advocated Modification of the Market Dominance Rules in Rate Reasonableness Proceedings

None of the railroad parties participating in this proceeding advocated changing the rules and standards for market dominance determinations in rate reasonableness proceedings, should the Board adopt a mandatory switching rule. The only real mention of any interplay between the two came in a footnote to the opening submission of Norfolk Southern Railway ("NS") that took issue with the Board's hypothetical on page 6 of the *July 2012 Decision*, claiming that "the shipper would not have the option to pursue rate relief if Railroad 2 were a competitive alternative." NS Op. at 21 n.42. However, even here the railroad's point is not in conflict with the Joint Coal Shippers, as the Board's market dominance standards still would require a shipper to demonstrate that Railroad 2 was not *effectively* competing with Railroad 1 in determining whether the incumbent railroad was market dominant.

CONCLUSION

For the reasons set forth herein and in Joint Coal Shippers' Opening Submission, and in light of the importance of protecting captive shippers' rights to meaningful maximum rate relief, Joint Coal Shippers respectfully request that the Board clarify that any mandatory switching rules that it may adopt will not alter the established

standards and principles relevant to market dominance determinations under 49 U.S.C. § 10707, and will not give rise to any presumptions or predispositions in that regard.

Respectfully submitted

By: /s/ Kelvin J. Dowd

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Dated: May 30, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2013, I have caused copies of the foregoing Reply Submission to be served via first class mail, postage prepaid, upon the parties of record to this case.

/s/ Frank J. Pergolizzi
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