

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 34421

-214778

HOLRAIL LLC – CONSTRUCTION AND OPERATION EXEMPTION – IN
ORANGEBURG AND DORCHESTER COUNTIES, SC

STB Finance Docket No. 34421 (Sub – No. 1)

-214780

HOLRAIL LLC – PETITION FOR CROSSING AUTHORITY UNDER 49 U.S.C.
10901(d)

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**JOINT STATEMENT OF AMEREN ENERGY FUELS AND SERVICES,
ARKANSAS ELECTRIC COOPERATIVE CORP., and DOMINION
RESOURCES IN SUPPORT OF PETITION FOR CROSSING AUTHORITY**

AmerenEnergy Fuels and Services, Arkansas Electric Cooperative Corp., and Dominion Resources (“Supporting Shippers”) hereby submit this Joint Statement in Support of the Petition for Crossing Authority and Supplemental Evidence in Support of Petition for Exemption (“Petition”) filed by Holrail LLC (“Holrail”) in the above captioned dockets on September 9, 2005. As set forth in the Petition, the unique circumstances surrounding Holrail’s rail build-out proposal require that the Board consider ordering CSX Transportation, Inc. (“CSXT”) to permit a rail line to be constructed by Holrail to cross CSXT’s existing right-of-way by running parallel to CSXT’s existing track, rather than physically crossing the existing track. While Supporting Shippers take no position on the merits of Holrail’s crossing request, or the evidence submitted therewith, they nevertheless express their approval of the use of 49

U.S.C. §10901(d) to permit a new line of rail to cross the right-of-way of an incumbent railroad by being constructed parallel to the incumbent's track within the existing railroad right-of-way. For the reasons expressed herein, requests for such crossings can and should be evaluated using the standards developed by the Board in applying §10901(d), and the application of §10901(d) in this manner under the appropriate circumstances makes a great deal of sense from a public policy standpoint.

I.

INTRODUCTION

Supporting Shippers own and operate coal-fired generating facilities dependent on rail service. All have one or more facilities that are physically connected to a single railroad. Under current law and policy, the only effective means of establishing dual rail access at such facilities is the construction of a new line of rail to a point of connection with another railroad capable of providing the same or comparable service as the incumbent. In some instances, the construction of and operations over a new line are subject to the jurisdiction of the Board and require an order from the Board directing the incumbent carrier to permit the new line to cross the incumbent's track in order to reach one or more alternative rail service providers.

The construction of new lines of rail on new rights-of-way that must be acquired and developed for this purpose is very costly, and the siting, construction, and operation of new lines of rail in newly established rail corridors can pose significant social and environmental hurdles in certain locations. While Holrail's Petition describes a situation where environmental issues are particularly acute and deserving of particular attention by

the Board, it is clear that environmental and social issues have become increasingly prevalent in rail build-out proposals generally.

As Holrail demonstrates in its Petition, and as Supporting Shippers reinforce below, proposing to construct a portion of a new rail line parallel to an existing track within an existing railroad right-of-way is consistent with established STB precedent. Supporting Shippers submit that such construction, where found to be appropriate, is also good public policy because it can reduce the social and environmental impacts of new railroad construction on communities and surrounding land. Requests such as the one presented by Holrail in this proceeding should be evaluated using the standards adopted by the Board in evaluating crossing petitions under 49 U.S.C. §10901(d). These standards enable the Board to permit a line of rail to cross the “property” of another railroad if (1) construction of the line does not unreasonably interfere with the operation of the crossed line; (2) operation of the new line does not materially interfere with the operation of the crossed line; and (3) the crossed carrier is appropriately compensated. 49 U.S.C. §10901(d)(1)(A) – (C).

Supporting Shippers’ Joint Statement is supported by the attached Verified Statement of Michael Nelson, an independent transportation systems analyst. Mr. Nelson supplies additional operational, technical, and policy reasons for interpreting §10901(d) to permit the construction of new lines of rail within existing railroad right-of-way.

II.

IDENTIFICATION OF SUPPORTING SHIPPERS

Ameren – With assets of more than \$17 billion, Ameren Corporation (NYSE: AEE) owns a diverse mix of electric generating plants strategically located in its Midwest

market with a combined capacity of more than 14,800 megawatts. AmerenEnergy Resources, as the nonregulated parent of AmerenEnergy Generating and AmerenEnergy Marketing companies, houses the non rate-regulated generating assets of Ameren Corporation, including AmerenEnergy Fuels and Services. AmerenEnergy Fuels and Services purchases more than 38 million tons of coal annually for use in eleven (11) Ameren coal-fired power plants. Ameren Corporation, through its operating companies, serves 2.3 million electric customers and 900,000 natural gas customers in a 64,000 square-mile area in Missouri and Illinois.

Arkansas Electric Cooperative Corporation - AECC is a membership-based generation and transmission cooperative which provides wholesale electric power to electric cooperatives, which in turn serve approximately 440,000 customers located in each of the seventy-five counties in Arkansas. In order to serve its member distribution cooperatives, AECC has entered into arrangements with other utilities within the state to share generation and transmission facilities. The coal-fired generation facilities in which AECC holds an ownership interest, consisting of the White Bluff plant at Redfield, the Independence plant at Newark, and the Flint Creek plant at Gentry, utilize in excess of 14 million tons annually of Powder River Basin (“PRB”) coal. AECC’s share of this PRB coal is approximately 5 million tons per year.

Dominion - With assets of more than \$44 billion, Dominion, headquartered in Richmond, Virginia, is one of the nation’s largest producers of energy. Dominion’s portfolio consists of more than 24,000 megawatts of electric power transmitted over more

than 6,000 miles of transmission lines, 6.4 trillion cubic feet of equivalent natural gas reserves, 7,900 miles of natural gas pipeline and the nation's largest natural gas storage system with more than 960 billion cubic feet of storage capacity. With respect to coal, Dominion consumes more than 22 million tons annually at its ten (10) largest coal-fired plants, with over 5 million tons of that coal originating in the PRB.

III.

STATEMENT ON GENERAL POLICY AND LEGAL FRAMEWORK

The backdrop for the establishment of rail competition through rail build-outs is the National Rail Transportation Policy ("RTP") originally set out in the Staggers Rail Act of 1980. 49 U.S.C. §10101. The number one element of the RTP is "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. §10101(1). Other elements of the RTP set out Congress' intent to "ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers" (§10101(4)); "to reduce regulatory barriers to entry into and exit from the industry" (§10101(7)); and "to operate transportation facilities and equipment without detriment to the public health and safety." §10101(8).

There are several provisions in the Board's governing statutes that the Board could rely upon to promote the foregoing RTP elements and foster rail-to-rail competition without requiring such competition to be established through new rail line construction. For example, under 49 U.S.C. §11102 the Board has authority to require an incumbent railroad to (1) permit another railroad to operate over the incumbent's track into a facility; and/or (2) agree to provide reciprocal switching services in and out of the facility

over its existing track. In the latter case, reciprocal switching can be ordered where “practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.” §11102(c)(1). Nevertheless, the rules at 49 C.F.R. Part 1144 implementing §11102 substantially limit the Board’s discretion to facilitate the establishment of dual rail access at a sole-served location through the use of the incumbent’s track and right-of-way via terminal trackage rights or reciprocal switching. See ICC Docket No. 39021, MidTec Paper Corp. v. Chicago and N.W. Transp. Co., 3 ICC 2d 171 (1986), aff’d, Midtec Paper Corp. v. U.S., 857 F.2d 1487 (D.C. Cir. 1988). Moreover, the Board has stated on at least one occasion that “section 11102, which requires carriers to share their own lines with their competitors, [is] a more intrusive remedy than a requirement that a railroad permit a competitor to cross its own line if the crossing can be accomplished without unduly interfering with the owning carrier’s operations.” Finance Docket No. 32630 (Sub No. 1), Omaha Public Power District – Petition under 49 U.S.C. 10901(d) at 5, note 9 (decision served August 1, 1996) (“OPPD”).

In contrast to §11102, §10901 has been liberally construed to encourage and facilitate the establishment of dual rail access at facilities through the construction of new lines of rail that connect the facilities to alternative rail carriers. As summarized by the Board:

We agree ... that Congress intended to facilitate rail construction by amending section 10901 in the ICCTA by shifting the emphasis from whether a project is consistent with the public convenience and necessity to whether the project is inconsistent with the public convenience and necessity. Under the revised statute, proposed rail construction projects are to be given the benefit of the doubt. If they are not found to be inconsistent with the public interest, then they are to be approved. As the Board said in Class Exemption for the Construction of Connecting Track

Under 49 U.S.C. 10901, 1 STB 75, 79 (1996), ‘there is now a presumption that construction projects will be approved.’

See STB Finance Docket No. 33407, Dakota, Minnesota & Eastern Railroad Corporation Construction Into The Powder River Basin, served December 10, 1998. Thus, under present law and policy, new rail construction, or the ability to demonstrate such construction is feasible,¹ are the only realistic means by which a rail customer can establish dual rail access at a solely-served facility.

Often, the most efficient routing of a new track from a facility to a point of interchange with an alternative railroad requires the track to cross the right-of-way and/or track of the incumbent railroad. In cases where an incumbent refuses to voluntarily allow such a crossing, the Board has liberally applied its authority under §10901(d) to order such crossings over the carrier’s objections in order to advance the pro-competition policies of the RTP. See e.g., OPPD at 3-4, (“the legislative history of the statutory provision specifically applicable here indicates that the Congressional purpose in giving us authority over crossings was to facilitate railroad entry and promote intramodal competition by limiting the ability of incumbents to block new competition.”).² See also STB Finance Docket No. 34060 (Sub-No.1), Midwest Generation, LLC – Petition for Line Crossing Authority Under 49 U.S.C. 10901(d) (served March 21, 2002) at 9, note

¹ Under the Board’s authority to approve rail mergers, the Board is charged with mitigating the extent to which a merger would result in competitive harm, and with enhancing competition through rail mergers. See 49 CFR §1180.1(c)(1) and 1180(d). As such, the Board has conditioned its approval of rail mergers to require the merged carrier to provide trackage rights to alternative carriers in instances where a shipper demonstrated that it (1) possessed rail-to-rail competition prior to the merger that would be eliminated because the two competitors would become a single railroad; or (2) possessed a viable build-out option to one of the two merging railroads.

² Citing H.R. Rep. No. 1430, 96th Cong. , 2d Sess. 115-16 (1980), reproduced at 1980 U.S. Code Cong. & Ad. News 4147 (The Staggers Rail Act Conference Report).

18, listing “ample precedent for approval of construction exemptions and crossing petitions that increase competition.”

Importantly, in implementing the Congressional intent behind §10901(d), the Board has refused to limit the provision’s application to traditional “diamond” or “frog” crossing configurations, stating these typical configurations

[do] not mean that there is only one form that a crossing can take. Nor is there any requirement that a crossing can only involve a certain amount of track. Thus, the term “crossing” must be viewed pragmatically

STB Finance Docket No. 33740, The Burlington Northern and Santa Fe Railway Company – Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights, Decision Served May 13, 2003. (“Keokuk Junction”). In Keokuk Junction, the Board construed §10901(d) to apply to a crossing that entailed the use of a segment of the incumbent’s main line track. Keokuk Junction at 2. Specifically, the crossing “require[d] BNSF to enter KJRY track about one-half mile away via a new crossover over approximately one-quarter mile of KJRY trackage (a segment that includes seven switches and about 300 feet of KRJY main line).” Id.

Moreover, the ICC’s and Board’s consistent application of §10901(d) to encourage the establishment of rail competition is entirely consistent with the principle that all of an interstate railroad right-of-way should be used for railroad purposes. See, e.g. STB Finance Docket No. 34425, City of Lincoln – Petition for Declaratory Order, (served August 12, 2004); STB Finance Docket No. 34376, City of Creede, Co. – Petition for Declaratory Order, (served May 3, 2005). Specifically, in Lincoln and Creede, the Board denied attempts by state entities to diminish the existing right-of-way’s size and

ability to be used for interstate railroad operations. In contrast, petitions filed under §10901(d) necessarily entail additional rail operations subject to the Board's jurisdiction within existing railroad right-of-way. As such, the Board's inquiry under §10901(d)(1)(A)-(C) is, in part, a determination of how to maximize the use of existing railroad right-of-way for interstate railroad purposes. Accordingly, permitting a new line to cross the unused portion of an existing right-of-way by running parallel to the existing track is completely consistent with this aspect of §10901(d), provided the requirements of §10901(d)(1)(A)-(C) are met.

Finally, Supporting Shippers add that the burden should be on the incumbent railroad to demonstrate any claim that it needs the entire right-of-way for its interstate operations. More specifically, in Creede the Board stated that "the burden is on the party seeking to take property away from the national transportation system to show that the entire ROW is not and will not be needed for rail purposes," Creede at 6. In cases involving petitions seeking orders under §10901(d) that would result in additional rail operations in existing right-of-way parallel to the existing track, the burden should be squarely on the incumbent railroad to demonstrate that the entire right-of-way at issue should be reserved exclusively for the incumbent's use.

IV.

SUMMARY OF KEY ISSUES FACING SHIPPERS SEEKING TO CONSTRUCT RAIL BUILD-OUTS

Holrail's Petition, which describes a situation where the environmental issues surrounding the proposal are particularly acute, highlights the fact that any rail customer considering a rail build-out is faced with numerous cost, engineering, social, and

environmental hurdles.³ As summarized below and discussed in more detail in the accompanying Verified Statement of Michael Nelson, these costs and hurdles arguably run counter to other aspects of the RTP, and could be alleviated to the extent that portions of a new line of rail could be constructed within the existing right-of-way of the railroad serving the facility where circumstances dictate and the requirements of §10901(d) are met.

The hurdles faced by proponents of rail construction vary in significance depending on the location of the facility, the surrounding environment, and other factors.

A non-inclusive list of such factors includes the following:

- To the extent that residential development, commercial development, highway construction, etc. have occurred in the area around a given facility, viable opportunities for build-outs outside of existing railroad rights-of-way may have been compromised or eliminated (Nelson V.S. at 18);
- From an engineering perspective, terrain and other topographic features may lead to a preferred alignment, but those same features may have caused the current serving carrier's line to be placed in approximately the same location (Id. at 19);
- In many areas, economic development has, over time, decreased the supply of open land available for new rail construction. Such development increases the resource costs associated with construction based on new alignments (and as a result may have increased the relative efficiency of utilizing existing rail right-of-way corridors that have excess space) (Id. at 18, 22-23); and

³ Potentially, some of the hurdles faced by rail shippers seeking to establish dual rail access through rail build-outs could be lowered or even eliminated if the Board revised its rules implementing 49 U.S.C. §11102 to make it less difficult for rail-to-rail competition to be established through the common use of rail spurs and terminal facilities serving a particular facility. Such common use would obviously mitigate some or all of the environmental and social issues that arise with establishing a new rail corridor. However, joint use of the incumbent's track is not necessarily the optimal or desirable scenario in every case.

- With increased development, “NIMBY” opposition to projects that require new ROW tends to become more intense. Environmental awareness and concerns have become more pronounced over time, and may now impede or rule out specific candidate alignments. In environmentally sensitive areas there are strong public policy reasons to minimize environmental harm by using existing ROW (Id. at 18).

V.

POTENTIAL BENEFITS OF USING SURPLUS EXISTING RAILROAD RIGHT-OF-WAY FOR NEW CONSTRUCTION

Permitting the crossing of another carrier’s right-of-way by using portions of that right-of-way clearly can promote the goals of the RTP, in some instances even more so than construction outside of that right-of-way. With safeguards against operational interference, a project that uses an existing carrier’s surplus right-of-way satisfies the Board’s “public convenience and necessity” standards at least as well as an equivalent project constructed on new right-of-way.

A. Social, Environmental and Public Safety Benefits

Because train movements would remain within existing railroad right-of-way, such build-out construction could minimize environmental disruption (habitat damage; noise, pollution and vibration exposure, etc.) and remediation requirements in comparison with greenfield alignments. Nelson V.S. at 23. Moreover, use of the existing right-of-way could also minimize adverse community impacts of construction and operation, such as blockages at road crossings. Construction of new lines of rail within existing railroad right-of-way is also consistent with a policy followed by some public utility commissions that requires the facilities and equipment of public utilities to be located together in one right-of-way corridor.

B. Operational Efficiencies

In some cases, parallel construction within an existing right-of-way may minimize resource costs for railroads to supply the capacity needed to satisfy marketplace demands. For example, earthwork and other related construction costs can be expected to be lower for parallel vs. greenfield construction. Id. at 22. Other operational efficiencies can also occur to the extent that the alternative carrier can offer single-line service to markets not served by the incumbent carrier, or possess a route with a favorable profile that permits it to move the subject traffic at lower cost. Id. at 22-23. Finally, new construction within the existing right-of-way creates opportunities for directional operation that may add throughput capacity to the interstate rail network above and beyond that associated with the new line viewed in isolation. Id. at 23. Accordingly, build-out construction within an existing right-of-way can promote the public interest by facilitating use of routings that enhance efficiency and broaden market access.

C. Requests for Crossings that Entail Parallel Track Construction Should be Evaluated Under the Rules Implementing §10901(d)

Construction of new rail line within existing railroad right-of-way that runs parallel to the existing track can and should continue to be evaluated under the standards developed under §10901(d). Under this section, “no other rail carrier may block any construction or extension ... by refusing to permit the carrier to cross its property” provided that certain conditions are met. These conditions ensure, among other things, that the new line and its construction do not unduly burden operations on the incumbent line. Notably, these conditions include no limitations on the amount of the other rail carrier’s property that may be traversed, or on the alignment of the new line. In short, under the plain language of the statute, the establishment of competition and operational

efficiency takes precedence over the property rights of the incumbent carrier, as long as the operations of the incumbent carrier are not unduly burdened and the carrier is adequately compensated for the use of its property.

Supporting Shippers note that parallel construction within an existing right-of-way does not inherently create the same type of direct safety risk and need for operational coordination as construction that actually crosses the existing track. Nelson V.S. at 19-20. Rather, whether the construction and operation of a newly constructed line in an existing right-of-way unreasonably or materially interferes, respectively, with the operations of the existing line will depend in large part on the proximity of the two lines and their respective operating parameters. Id. at 20. The Board has already demonstrated in Keokuk Junction that, even where the crossing track actually uses part of the existing track within the right-of-way such crossings will be allowed if they do not impermissibly interfere with the existing carrier's operations.

Finally, requests to cross an existing right-of-way that entail parallel construction will invariably be met with claims that the incumbent railroad's future plans for the right-of-way require that the entire right-of-way be reserved solely for the incumbent railroads' exclusive use. However, there is no reason why the Board cannot also examine this question within the parameters of §10901(d) and the Board should place the burden on incumbent carriers to clearly demonstrate the viability of claims for future use. Even in cases where such a demonstration is made, the Board could condition its approval of the proposed parallel construction by requiring the newly constructed line to be available to both railroads consistent with the incumbent's expansion plans, thereby making the most efficient use of railroad right-of-way that is part of the national transportation system.

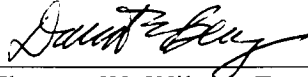
This would be comparable in some respects to the original establishment of ownership of the Powder River Basin Joint Line. Id. at 21.

VI.

CONCLUSION

For all the reasons discussed above Supporting Shippers express their concurrence with the interpretation of §10901(d) being advanced by the Petitioner in this proceeding from both the legal and public policy standpoints. Crossings of railroad right-of-way that entail construction of a new rail line parallel to existing track promote the RTP, and can make sense from a public policy and rail operations standpoint. Such proposals should be evaluated under the existing standards developed under §10901(d), which permit a carrier to cross the property of another carrier over its objection if the construction and operation of the new line will not unduly interfere with the operations over the existing line and the incumbent is adequately compensated.

Respectfully submitted,



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September 29, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September 2005, I have served a copy of the foregoing Joint Statement of AmerenEnergy Fuels and Services, Arkansas Electric Cooperative Corp., and Dominion Resources in Support of Petition for Crossing Authority (including the attached Verified Statement) by hand delivery upon counsel for the parties at the following addresses:

A handwritten signature in cursive script, reading "David E. Benz", is written over a horizontal line.

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**VERIFIED STATEMENT
OF
MICHAEL A. NELSON**

1. Qualifications

My name is Michael A. Nelson. I am an independent transportation systems analyst with over 25 years of experience advising clients on rail transportation issues. My office is in Dalton, Massachusetts. Prior to February 1984, I was a Senior Research Associate at Charles River Associates, an economic consulting firm in Boston, Massachusetts.

I have directed or participated in numerous consulting assignments and research projects in the general field of transportation. My work typically involves developing and applying methodologies based on operations research, microeconomics, statistics and/or econometrics to solve specialized analytical problems.

Of particular relevance to this statement, I have assisted coal users in the assessment of transportation options at over 30 major coal-fired electric generating stations. Many of these assessments have included consideration of build-outs, including alternative possible designs and the effectiveness of those build-outs in providing or strengthening intramodal competition. I have provided testimony in several proceedings before this Board regarding competitive issues in coal transportation, including Finance Docket No. 33407 (DME construction case), Ex Parte 582 - Sub-No. 1 (merger rules), Finance Docket Nos. 34177 and 34178 (DME/IMRL/ICE transactions), and two times in Finance Docket No. 32760 - Sub-No. 21 (UP/SP merger oversight). In addition, I have performed competitive and/or statistical analyses in several rail merger and acquisition

cases, and have advised a number of shippers, railroads (U.S., Canadian, and Mexican) and governmental bodies on various other railroad issues. This work has provided me with perspective on the issues raised in Holrail's construction and crossing petitions in this case.

Outside of my rail experience, I have provided extensive testimony regarding methods for analyzing the cost structure of the U.S. Postal Service in five dockets before the Postal Rate Commission. In addition, I have assisted in the preparation of numerous other verified statements presented before various regulatory and legal bodies, and authored many technical reports and articles in transportation journals.

I received my bachelor's degree from the Massachusetts Institute of Technology in 1977. In 1978, I received two master's degrees from MIT, one in Civil Engineering (Transportation Systems) and one from the Alfred P. Sloan School of Management, with concentrations in economics, operations research, transportation systems analysis and public sector management.

2. Subjects Covered in This Statement

I have been asked by Supporting Shippers to comment on technical, operational, and public interest considerations associated with Holrail's crossing petition, and its potential significance for coal-fired electric generating facilities. This statement focuses primarily on the portion of Holrail's petition that relates to construction within the right-of-way of an existing rail carrier (in this case, CSXT). It first describes general issues that frequently arise in the design of possible build-outs at coal-fired facilities. Appropriate protections for the operations of the existing carrier are discussed, and

specific public benefits that should be considered by the Board in this matter are then presented.

3. General Build-out Issues

Construction of a new rail line to serve an individual coal-fired electric generating plant inherently presents many challenges. Construction costs are formidable, and can easily reach into the tens of millions of dollars for all but the shortest build-outs made under the most favorable conditions. At the same time, it is rare for an individual facility to account for more than a few million tons of rail traffic annually, so build-out costs tend to be high on a “per ton” basis, especially in comparison with the analogous costs for railroad mainlines.⁴

New construction frequently faces one or more specific challenges that limit feasible alignment options. For example:

- To the extent that residential development, commercial development, highway construction, etc. have occurred in the area around a given facility, viable opportunities for build-outs outside existing railroad rights-of-way may have been compromised or eliminated;
- With increased development, “NIMBY” opposition to projects that require the acquisition and development of new railroad right-of-way has become more intense;

⁴ As a result, the serving carrier typically has a capability to retain the traffic and still earn a significant contribution (*i.e.*, revenue in excess of variable cost) through negotiations prior to build-out construction. If the serving carrier fails to retain the traffic, it may signify that the serving carrier’s route is inferior to the route created by the new construction.

- From an engineering perspective, the terrain and other topographic features that led to the location of the incumbent carrier's line may cause the preferred alignment for a new line to be in roughly the same location; and
- Environmental awareness and concerns have become more pronounced over time, and may now impede or rule out specific candidate alignments.

As a result of such factors, all else equal, building parallel to an existing line may in some cases be the most desirable and efficient approach for constructing a new line of railroad connecting a sole-served facility to an alternative rail carrier.

This is, of course, not true in all instances. For example, following the existing line may not provide an efficient connection with the desired alternate rail carrier. Likewise, changes over time in such factors as the shipper's volume, car sizes, train lengths, etc. may detract from the desirability of the original alignment and its profile. In short, there are considerations that may work against parallel construction in many cases.

The locations where the Board's treatment of Holrail's preferred approach will be most important are the locations where alignments based on new right-of-way are inferior or infeasible due to economic, engineering or other considerations. This would include locations where development, natural features, environmental considerations, etc. leave the existing carrier's right-of-way as the preferred, if not the only, viable alignment.

4. Operational Issues

In comparison with a more conventional at-grade physical crossing of an incumbent line, parallel construction within the existing right-of-way does not inherently

create the same type of direct safety risk and need for operational coordination. This is because parallel construction (with proper engineering) avoids the possibility of collisions between trains on the new line and the existing line. To the extent that operational interference arises from a parallel alignment, it generally stems from (a) operating limitations caused by the proximity of a parallel line, and/or (b) foreclosure of alternative potential uses of the right-of-way.

As a practical matter, it is neither possible nor necessary to anticipate and codify in advance all of the potential interactions between an existing line and a parallel new line constructed in close proximity. As it does in other situations, the Board can address operational interference issues at a specific location based on the individual circumstances using (1) the established standards of §10901(d); (2) the existing carrier's operating practices at the subject location and suitably comparable locations on its system; and (3) accepted railroad industry practices.

In each case, the Board can give proper consideration to forms of operational interference that are affected by the distance between the existing and new tracks. For example, operating speeds on the original line might be affected by maintenance activity on the new line if the two lines are extremely close to each other. Alternatively, if the existing line is a branch line that primarily serves the subject plant, there may be little or no operational interference even if the new line is placed close to the existing line (*e.g.*, at the 15' on-center standard minimum track separation).

The Board can also give proper consideration to such factors as the incumbent carrier's plans for future use of presently unused right-of-way, the need for access roads of specified width(s) and the degree to which such uses would be unduly constrained by

the presence of a new line. Of course, the existing carrier will typically have a strong incentive to make aggressive claims regarding needed ROW width in order to block new competition. Such claims should therefore be scrutinized closely by the Board.

It is particularly important to note that an asserted need for future capacity expansion by the existing carrier does not provide a valid foundation for preventing construction by a new carrier. Even if the existing carrier has a legitimate future need of this type, the Board could condition its approval of the new construction and crossing by requiring the new carrier to grant the incumbent partial operating/ownership rights, subject to suitable operational and financial protections for the new carrier.

This would be comparable in some respects to the original establishment of ownership of the Powder River Basin Joint Line. In that situation, the Interstate Commerce Commission (a) encouraged two competitors interested in the construction of parallel new lines to formulate a coordinated plan for a joint facility; (b) permitted one of the competitors to build and operate over the joint line prior to the receipt of the second carrier's capital contribution to the project; and, (c) preserved the right of the second competitor to "buy into" the project on the basis of its own financial circumstances.⁵ If anything, an existing carrier's future need for added capacity favors the approval of new

⁵ In the early 1970's Burlington Northern (BN) and Chicago & North Western (C&NW) applied separately to the Interstate Commerce Commission for authority to construct new and largely parallel rail lines to serve the Powder River Basin. The applications were consolidated, and, as described in the Commission's Initial Decision (dated September 29, 1980) in Finance Docket No. 28934, *et al.*, the applicants were "...strongly urged to reach an agreement providing for joint construction and operation over a single right-of-way. The basic philosophy behind the Commission's reasons was to avoid duplicating construction of essentially parallel lines serving the same territory (which would have resulted in wasteful overall expenditures, especially in view of related environmental and financial considerations)... (t)he Commission found that the public convenience and necessity require joint service..." The applicants negotiated a joint agreement, and BN constructed the line. After C&NW defaulted on the terms of the joint agreement, the Commission upheld C&NW's right to participate in the new line whether or not it met the terms of its private agreement.

line construction within the existing right-of-way. Such construction can provide new capacity sooner and at reduced capital and operating costs to the existing carrier in comparison to what the existing carrier could/would achieve on its own.

5. Other Public Interest Considerations

In addition to the issues discussed above, there are several public interest considerations that would support the Board in permitting, with appropriate operational protections, parallel construction by a new carrier within an existing right-of-way. These include the following:

- In some cases, parallel construction within an existing right-of-way may minimize resource costs for railroads to supply the capacity needed to satisfy marketplace demands. For example, because of the way existing rights-of-way typically were selected for their advantageous topography and other engineering characteristics, earthwork and other related construction costs are frequently lower for parallel vs. greenfield construction. As is the case in rail mergers (where cost savings constitute public benefits), the Board should view resource cost savings associated with parallel construction within an existing right-of-way as a public benefit.
- Similarly, all else being equal, a build-out is most likely to be undertaken if it establishes a route via a railroad that has a lower cost structure or other advantages in comparison with the current serving carrier. For example, the non-serving carrier

may offer single-line service to markets not served by the incumbent carrier,⁶ or may possess a route with a favorable profile that permits it to move the subject traffic at lower cost. Build-out construction within an existing right-of-way should not be unduly impeded, since it promotes the public interest by facilitating use of routings that enhance efficiency and broaden market access.

- Because train movements remain within the existing right-of-way, build-out construction of this type may minimize environmental disruption (habitat damage; noise, pollution and vibration exposure, etc.) and remediation requirements in comparison with greenfield alignments.
- Because new right-of-way is not created, use of the existing right-of-way tends to minimize adverse community impacts, such as blockages at road crossings. Indeed, to the community, the capacity added by this type of new construction is largely transparent.
- New construction within the existing right-of-way creates physical opportunities for directional operation that may add throughput capacity to the interstate rail network above and beyond that associated with the new line viewed in isolation.

⁶ See, for example, STB Finance Docket Nos. 34060 (build-out from CN/IC-served plant to reach UP) and 34435 (build-out from NS-served plant to reach UP and BNSF), both of which involve new construction to establish single-line movements for PRB coal that cannot be provided by the existing carrier.

6. Summary and Conclusions

In many ways, the treatment of the new carrier's rights in this case goes to the heart of the Rail Transportation Policy, which rests on the premise that marketplace competition is more effective than regulation in promoting a healthy rail industry. The Board and its predecessor have uniformly backed new construction as a means for introducing (or strengthening) intramodal competition for many rail customers, as well as broader areas of industry concentration,⁷ and even entire geographic regions of the United States.⁸

The need to ensure that new construction faces no unreasonable impediments is a cornerstone of the Rail Transportation Policy and of the Board's past treatments of new construction proposals. The approval, with appropriate operational protections, of parallel construction by a new carrier within existing rights-of-way is entirely consistent with this policy. It facilitates entry by new carriers and marketplace competition without placing undue operational burdens on existing carriers. It promotes the public interest in several respects, and is consistent with applicable standards.

Conversely, the precedent that would be established by a denial of the requested construction authority would weaken marketplace competition, and forego the associated public benefits. It would enable incumbent carriers to wield surplus, unused right-of-way as a barrier to entry by new competitors, obstructing the competitive process upon which the current regulatory framework is premised.

⁷ See, for example, STB Finance Docket No. 34070 (San Jacinto rail/Bayport loop).

⁸ See, for example, STB Finance Docket Nos. 33407 (DME) and 30186 (Tongue River Railroad).

VERIFICATION OF MICHAEL A. NELSON

Michael A. Nelson, being duly sworn, deposes and says that he has prepared the Verified Statement ascribed to him and attached to the Joint Statement of the Supporting Shippers in Support of Petition for Crossing Authority in STB Dockets 34421 and 34421 (Sub-No. 1). He certifies under penalty of perjury that this Verified Statement is true and correct to the best of his information, knowledge, and belief.



Michael A. Nelson

ACKNOWLEDGMENT CERTIFICATE

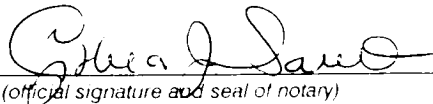
On this 26th day of September, 2005, before me, the undersigned notary public, personally appeared Michael A Nelson,
(name of document signer)
proved to me through satisfactory evidence of identification, which were personal knowledge
to be the person whose name is signed on the preceding or attached document and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose.

(as partner for _____, a corporation)

(as _____ for _____, a corporation)

(as attorney in fact for _____, the principal)

(as _____ for _____, (a) (the) _____)


(official signature and seal of notary)

My Commission Expires 12/2/09