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**WFEC RAILROAD COMPANY—CONSTRUCTION AND OPERATION EXEMPTION—
CHOCTAW AND McCURTAIN COUNTIES, OK; WFEC RAILROAD COMPANY—
CONSTRUCTION AND OPERATION EXEMPTION—CHOCTAW AND McCURTAIN
COUNTIES, OK—PETITION FOR ISSUANCE OF AN ORDER PURSUANT TO 49 U.S.C.
10901(d)**

Finance Docket No. 32607

Finance Docket No. 32607 (Sub-No. 1) n2

n2 These proceedings are being treated in a single decision for administrative convenience. They have not been consolidated.

SURFACE TRANSPORTATION BOARD n1

n1 The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

*1996 STB LEXIS 56***SERVICE DATE:** February 23, 1996**February 22, 1996****PANEL:**

[*1]

DECISION

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

OPINION:

On February 27, 1995, a decision was served in Finance Docket No. 32607, conditionally granting **WFEC** Railroad Company (**WFEC**) an exemption under *49 U.S.C. 10505* from the prior approval requirements of *49 U.S.C. 10901* to construct and operate a 14-mile line of railroad in Choctaw and McCurtain Counties, OK. n3 The exemption was conditioned on (1) completion of the environmental review process and (2) a further decision addressing the environmental impacts of the proposal and making the exemption effective at that time, if appropriate, thereby allowing construction to begin.

n3 By decision served September 1, 1995, several petitions to reopen and revoke the construction exemption and a request to impose employee protective conditions on the transaction were denied. Petitions for review of the February 27, 1995 and September 1, 1995 decisions are pending in the D.C. Circuit in No. 95-1553, *Brotherhood of Locomotive Engineers v. ICC* and No. 95-1557, *Kiamichi Railroad v. ICC*. The court has pending before it a request that both review proceedings be held in abeyance pending the completion of the agency's environmental

review.

[*2]

The line to be constructed extends north from Western Farmers Electric Cooperative, Inc.'s (Western Farmers) n4 Hugo Station loop track near Fort Towson, OK, crossing a line of the Kiamichi Railroad Company (Kiamichi), and then east to connect with a line of the Texas, Oklahoma & Eastern Railroad (TOE) near Valliant, OK. On February 27, 1995, WFEC filed a petition in Finance Docket No. 32607 (Sub-No. 1), under 49 U.S.C. 10901(d), requesting authority to cross the right-of-way of the Kiamichi in connection with the proposed line construction. n5 WFEC seeks crossing authority while it negotiates with Kiamichi over compensation and operating terms.

n4 WFEC is a corporate subsidiary of Western Farmers.

n5 A proceeding was instituted and a modified procedure schedule adopted in a decision served May 5, 1995.

This decision imposes environmental conditions on the exemption in Finance Docket No. 32607, and grants the crossing petition while reserving jurisdiction over the parties' negotiations for compensation and other terms in the Sub-No. 1 proceeding.

BACKGROUND

Western Farmers is a rural electric cooperative that generates and delivers electric power to 19 member systems [*3] and an Air Force base. The member systems serve the electric power needs of approximately 464,000 residents in rural portions of Oklahoma. Western Farmers' generating capacity consists of a hydroelectric allocation and three generating stations, including the coal-fired Hugo Generating Station. Coal used at the Hugo Station originates on the Burlington Northern Railroad Company (BN) from the Powder River Basin (PRB) in Wyoming.

Currently, only one rail line, owned by the Kiamichi, serves the Hugo station. n6 WFEC's proposed construction would create an alternative to that service and give Western Farmers and other shippers access to an additional rail carrier. WFEC's preferred route would require that it build an overpass across the right-of-way of the Kiamichi line now serving the Hugo station. WFEC states that it seeks section 10901(d) crossing rights to protect it should Kiamichi or BN attempt to block the crossing of the new line.

n6 When the Hugo station was constructed, BN owned the rail line serving the station. In 1987, however, BN sold a portion of the line to Kiamichi. The Kiamichi segment runs about 100 miles between Madill, OK, and the Hugo Station (Kiamichi line). See Kiamichi Railroad Company, Inc.—Exemption Acquisition and Operation—Certain Lines of Burlington Northern Railroad Company, Finance Docket No. 30182 (ICC served July 22, 1987).

[*4]

DISCUSSION AND CONCLUSIONS

Construction Exemption. An environmental assessment (EA) was served on August 18, 1995. The EA preliminarily concluded that, subject to the imposition of 20 recommended mitigation measures, the construction and operation of the proposed rail line would not significantly affect the quality of the human environment. Comments to the EA were originally due September 18, 1995; the due date was later extended until October 2, 1995.

Comments to the EA were filed by Kiamichi, WFEC, area landowners, and the Oklahoma Department of Wildlife Conservation. All four commenters raised a number of questions and concerns that required further analysis by the Section of Environmental Analysis (SEA). On November 29, 1995, SEA prepared a post environmental assessment (post EA), recommending that the 20 mitigation measures outlined in Chapter 7.0 of the EA be imposed, but SEA decided to modify the recommended water resources mitigation condition (number 4) requiring a Clean Water Act, section 404 permit from the U.S. Army Corps of Engineers, to reflect that only 5.82 acres of wetlands would be affected by the proposed project.

We have considered the EA and SEA's recommendations [*5] and will adopt the 20 mitigation measures, as modified by SEA in the post EA. These mitigation measures are set forth in the Appendix to this decision, and will be imposed as a condition to the exemption. As mitigated, the construction and operation of the proposed rail line will not significantly affect the quality of the human environment. Therefore, it is appropriate to make the construction and operation exemption effective at this time. n7

n7 The September 1, 1995 decision in Finance Docket No. 32607 suggested that the ICC would consider petitions to reopen conditional exemptions under 49 U.S.C. 10505(d). This was error. As the ICC explained in the decision served September 25, 1995, in Ozark Mountain Railroad—Construction Exemption, Finance Docket No. 32204, pending review in the D.C. Circuit in No. 95-1107, section 10505(d) applies to unconditional or final exemptions. The relevant question in a petition to reopen or revoke a conditional exemption is whether the decision to process the proceeding under section 10505 is consistent with applicable law and supported by evidence on the record.

For the reasons discussed above and in the earlier decisions, there has been no showing here that **WFEC** should be required to submit an application under 49 U.S.C. 10901 for authority to construct and operate the line.

[*6]

Track Crossing Petition. Section 10901(d)(1) provides, in pertinent part, that where a rail carrier has been issued a certificate of public convenience and necessity authorizing the construction of a railroad line (or a construction exemption under section 10505), no other rail carrier may block the construction by refusing to permit the carrier to cross its property if the construction does not unreasonably interfere with the operation of the crossed line, the operation does not materially interfere with the operation of the crossed line, and the owner of the crossing line compensates the owner of the crossed line. The legislative history indicates that the provision is intended to permit easier railroad entry. The purpose of the statute is to provide a way to overcome the ability of existing carriers to block the construction of new rail lines by refusing to allow potential competitors to cross their existing lines. See H.R. Rep. No. 1430, 96th Cong., 2d Sess. 115, reprinted in 1980 U.S. Code Cong. & Admn. News 4147. If the parties are unable to agree on the terms of operation or amount of payment, section 10901(d)(2) permits either party to submit the matters in dispute for an [*7] agency determination.

In its petition, **WFEC** describes the crossing and submits evidence and argument that the crossing will not materially or unreasonably interfere with Kiamichi's rail operations. According to **WFEC**, Kiamichi's train operations will be affected by the proposed bridge construction for, at most, two 12-hour periods during the time when the bridge support structure is being constructed above the Kiamichi line's right-of-way. To minimize the impact on this portion of the Kiamichi line (where only two trains move daily in each direction), **WFEC** states that it will coordinate the timing of these two 12-hour construction periods with Kiamichi's dispatcher and will employ industry-standard procedures. Once construction of the overhead bridge crossing is complete, **WFEC** asserts that there will be no impediments to Kiamichi's train operations because **WFEC's** train operations will take place via the new bridge.

We will grant the crossing request because **WFEC's** construction of the proposed crossing and operation of the crossing will not unreasonably or materially interfere with the operation of the crossed line. n8

n8 In its reply to the crossing petition, Kiamichi states that it is opposed to the issuance of a crossing order, relying on the same arguments it used to oppose the underlying construction and operation. The International Brotherhood of Locomotive Engineers—American Train Dispatchers Department also filed a letter in opposition, incorporating the arguments it previously filed in opposing the underlying construction and operation. These arguments have already been disposed of in the previous decisions issued in this case and will not be further addressed here.

[*8]

Kiamichi requests that the following conditions be imposed on any grant of crossing authority: (A) that **WFEC** indemnify and hold Kiamichi harmless from any injuries or liabilities to any persons or property resulting from the construction of the overpass and its subsequent use; (B) that **WFEC** provide its construction schedule for the overpass to Kiamichi at least 60 days in advance of any work; and (C) that **WFEC** and its agents and contractors perform the construction in a manner that minimizes interference with Kiamichi's operations, and that they consult with Kiamichi in advance for that purpose.

WFEC responds that it has no objections to Kiamichi's requested conditions B and C. However, **WFEC** argues that Kiamichi's proposed condition A, which essentially asks **WFEC** to act as Kiamichi's insurer, is an extraordinary request. **WFEC** argues that any tort liabilities resulting from the construction or use of the proposed overpass can and should be resolved under applicable tort law. **WFEC** requests, therefore, that Kiamichi's condition A be denied.

We will impose conditions B and C, to which both parties agree.

Because the parties already have agreed to negotiate operating and compensation [*9] terms at a later date, however,

there is no reason to consider Kiamichi's proposed condition A at this time. See *Louisville & Jefferson Co & CSX Const. & Oper. Jeff. KY, 4 I.C.C.2d 749, 755 (1988)*; Gateway Western Railway Company—Construction Exemption—St. Clair County, IL, Finance Docket No. 32158 (ICC served May 11, 1993), at 9. Rather, we direct the parties to negotiate the tort liability issue along with the compensation and any other remaining terms for the crossing within 45 days. **WFEC** should advise us on the outcome of the negotiations within 10 days of that time.

WFEC has asked for expedited action in order to complete construction by the end of the year. Accordingly, the construction exemption and the grant of this crossing request will be effective on 10 days from the service date of this decision. However, because the parties have not yet negotiated the compensation for the crossing and other remaining terms, we reserve jurisdiction over the crossing proceeding so as to facilitate the parties' reaching an appropriate crossing agreement.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy [*10] resources.

It is ordered:

1. Under 49 U.S.C. 10505, we exempt **WFEC's** construction and operation of the proposed rail line from the prior approval requirements of 49 U.S.C. 10901, subject to the condition that **WFEC** comply with the mitigation measures set forth in the Appendix.
2. The construction and operation exemption is effective 10 days from the service date of this decision.
3. **WFEC's** track crossing request under 49 U.S.C. 10901(d) is granted. In addition, Kiamichi's proposed conditions B and C are imposed.
4. Within 45 days of service of this decision, **WFEC** and Kiamichi shall negotiate the compensation and any remaining terms for the crossing (including the tort liability issue), and **WFEC** shall advise the Board of the outcome of their negotiations within 10 days from the time they have done so.
5. The Board reserves jurisdiction over the crossing proceeding so as to facilitate the parties' reaching a crossing agreement.
6. Petitions to reopen either of these proceedings or to revoke the construction exemption must be filed by March 14, 1996.

APPENDIX: APPENDIX

MITIGATING MEASURES IMPOSED:

Land Use/Economic Development

1. Petitioner shall limit construction activities [*11] and vegetative clearing to the railroad right-of-way and construction laydown yards. Marketable timber shall be sold and other timber shall be offered to local residents to reduce material to be burned or landfilled.
2. To minimize impacts to prime farmland due to construction, Petitioner shall consult with the District Soil Scientists of the U.S. Department of Agriculture, Natural Resource Conservation Service, for Choctaw and McCurtain Counties for their recommendations to reduce impacts to these soils.
3. Petitioner shall ensure that all woody vegetation and construction debris is removed and disposed of in a proper and legal manner consistent with state and local disposal procedures.

Water Resources/Erosion Control

4. Petitioner shall obtain a Clean Water Act, section 404 permit from the U.S. Army Corps of Engineers project for impacts to 5.82 acres of wetlands before beginning construction in any of the delineated wetlands.

5. To minimize sedimentation into streams crossed by the proposed rail line, Petitioner shall utilize Best Management Practices, such as silt screens to minimize soil erosion during construction, and shall disturb the smallest area [*12] possible around streams and stream branches. Petitioner shall revegetate disturbed areas immediately following construction.

6. Petitioner shall complete, in continuous segments, the placement of embankment and permanent drainage structures in wetland areas. This should minimize the time in which disturbed soils in these areas are left exposed while being revegetated with grasses and/or other vegetation to control erosion. Also, Petitioner shall apply seeding and temporary erosion control measures to protect the area until permanent vegetative cover is established. Heavy equipment shall be kept out of streambeds to the extent possible.

7. Petitioner shall ensure that any herbicides used in right-of-way maintenance are approved by the Environmental Protection Agency for aquatic vegetation and are applied by licensed individuals who shall limit application to the extent necessary for rail operations. Petitioner shall ensure that herbicides shall not be applied within approximately 150 feet of streams and wetlands to minimize the amounts potentially entering waterways.

8. During construction, Petitioner shall implement an erosion and sedimentation control plan to minimize erosion. [*13]

9. Petitioner shall obtain a National Pollutant Discharge Elimination System (NPDES) permit, a 401 Water Quality Certification, and a Storm Water Discharge Permit from the Oklahoma Department of Environmental Quality before beginning construction activities.

Biological Resources

10. To minimize impacts on wildlife after construction is completed, Petitioner shall reseed the right-of-way outside the subgrade slope with grasses and other appropriate vegetation recommended by the Natural Resource Conservation Service and the Oklahoma Department of Wildlife Conservation.

Air Quality

11. To minimize fugitive dust emissions created during construction, Petitioner shall use such control methods as water spraying of construction areas and tarp covers for haul vehicles.

12. Petitioner shall comply with all applicable Federal, state, and local regulations and recommendations regarding open burning and control of fugitive dust. Petitioner shall notify local forestry service personnel at least 4 hours before any burning and obtain verbal or written permission from them prior to burning activities. Petitioner shall take reasonable measures to maximize combustion [*14] and minimize smoke.

Noise

13. Petitioner shall maintain construction and maintenance vehicles in good working order with properly functioning mufflers to control emissions and noise.

Safety/Transportation

14. Petitioner shall ensure during construction that (a) one lane of traffic remain open on U.S. Highway 70 as much as possible, or that a reasonable detour is provided for this and all other roadways crossed; and (b) the construction work at road crossing is done, whenever possible, during off peak hours.

15. Petitioner shall submit its grade crossing safety plans to the Oklahoma Department of Transportation,

the Oklahoma State Corporation Commission, the Choctaw County Commission, and the McCurtain County Commission for their approval of the location and type of signaling required at these crossings.

16. Petitioner shall maintain the rail line and warning devices according to Federal Railroad Administration track safety standards (49 CFR Part 213).

17. Petitioner shall provide and maintain protective fencing along the right-of-way adjacent to all pastureland.

18. Petitioner shall coordinate relocation of any area utilities with the owners [*15] of those utilities.

Cultural Resources

19. Prior to construction, Petitioner shall ensure that a qualified archaeologist conducts a survey for archaeological and historic resources located within the proposed right-of-way, laydown yards and borrow and spoil areas in those areas not previously surveyed. If resources are discovered, Petitioner shall implement mitigation in coordination with the Oklahoma Archaeological Survey and Oklahoma Historical Society. Petitioner shall submit a letter stating that no extant structures would be affected or removed for project construction.

Hazardous Materials

20. Petitioner shall observe all applicable Federal, state, and local regulations regarding handling and disposal of any waste materials, including hazardous waste, encountered or generated during construction of the proposed rail line. Should any spill occur, Petitioner shall ensure it is cleaned up according to all applicable Federal, state, and local regulations.